

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE
SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS
OF THE
COMMITTEE ON THE JUDICIARY
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STUDIES 14-16

- 14. Fair Use of Copyrighted Works
- 15. Photoduplication of Copyrighted Material by Libraries
- 16. Limitations on Performing Rights



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FOREWORD

This committee print is the fifth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statutes enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies relating to certain limitations on the scope of copyright: No. 14, "Fair Use of Copyrighted Works," by Alan Latman, formerly Special Adviser to the Copyright Office; No. 15, "Photoduplication of Copyrighted Material by Libraries," by Borge Varmer, Attorney-Adviser of the Copyright Office; and No. 16, "Limitations on Performing Rights," by Borge Varmer.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
*Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.*

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

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STUDIES IN EARLIER COMMITTEE PRINTS

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7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries.
10. False Use of Copyright Notice.

Fourth print:

11. Divisibility of Copyrights.
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STUDY NO. 16
LIMITATIONS ON PERFORMING RIGHTS
BY BORGE VARMER
October 1958

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LIMITATIONS ON PERFORMING RIGHTS

The "performing rights" to be considered in this study include not only the right to "perform" dramatic or musical works, but also the corresponding rights to "deliver" nondramatic literary works and to "exhibit" motion pictures. All of these are commonly spoken of as the "performing rights." The right to perform literary or musical works (dramatic and nondramatic) is dealt with in Part A of this study. The right to exhibit motion pictures, since it has developed differently and involves somewhat different aspects, is dealt with separately in Part B. The same separation is made in the Analysis of Basic Issues in sections I and II of Part C.

Excluded from this study is the special problem of the exemption in section 1(c) of the present copyright statute for the rendition of music by coin-operated machines (the so-called "jukebox exemption"). That exemption has been the subject of special consideration by Congress over the past several years, most recently in the Senate during the 85th Congress. See S. 1870, 85th Congress; hearings before subcommittee of the Senate Committee on the Judiciary, April 23-25, 1958, on S. 1870; and Senate Report No. 2414, 85th Congress.

A. PERFORMING RIGHTS IN LITERARY AND MUSICAL WORKS

I. LEGISLATIVE HISTORY OF THE PUBLIC PERFORMING RIGHTS AND THE "FOR PROFIT" LIMITATION IN THE PRESENT COPYRIGHT LAW

The author's public performing rights¹ were first included in statutory copyright in respect to dramatic works by the act of August 18, 1856.² In the act of January 6, 1897³ the public performing rights were extended to musical works. Neither the 1856 nor the 1897 act contained any specific limitations on the new rights, except that they related only to "public" performances.

The 1909 act⁴ further extended the public performing rights to works prepared for oral delivery. At the same time, the act imposed the "for profit" limitation on the performing rights in works prepared for oral delivery and musical works but not on the performing rights in dramatic works.

Finally, by the act of July 17, 1952,⁵ the author's public performing rights were extended to nondramatic literary works, subject to the "for profit" limitation.

While the public performing rights thus date back to 1856, the history of the "for profit" limitation begins with the copyright reform

¹ For the purpose of this paper, the words "performing rights" and "performance" are used in relation to all types of presentations, deliveries and performances, etc., and they include the presentation of live and recorded performances as well as performances given by means of broadcasting and telecasting and by means of radio and television receivers.

² 11 STAT. 138 (1856).

³ 29 STAT. 481 (1897).

⁴ 35 STAT. 1075 (1909).

⁵ 66 STAT. 752 (1952).

of 1909. The first of the general revision bills⁶ introduced in connection with the 1909 reform imposed the "for profit" limitation only on the performing rights in lectures, sermons, addresses, and similar works prepared for oral delivery. The provision can be traced back to a memorandum draft bill⁷ prepared at a very early stage of the drafting of the 1909 project. But the source material does not explain why what "for profit" limitation initially was imposed only on the performing rights in this specific class of works.

However, during the hearings before the House and Senate Committees on Patents in June 1906,⁸ the "for profit" limitation was discussed in connection with section 1(f) which provided for public performing rights in music, with no limitation.

Section 1(f) was criticized from various sides by people who feared that the provision would unduly restrict the free enjoyment of music and thus interfere with legitimate public interests. Some felt that copyright should not extend to performing rights,⁹ while others, who did not consider such rights as outside the proper scope of copyright, argued that they should be limited to certain performances of vital interest to the author.¹⁰ To compromise the various views suggested, Mr. Arthur Steuart, a representative of the American Bar Association, proposed to limit the author's public performing rights in musical works to public performances for profit.¹¹ He gave the following reasons for his proposal:

So far as the introduction of the word "profit" is concerned, in the first line of that section, there has been a very great protest on the part of many people against the drastic nature of this bill, proposing to punish the public performance of copyrighted music. Now, that is the present law. The present law is just as drastic as the present bill in the prohibition of the use of copyrighted music. I have conferred with many of the music publishers, and I find that none of them have any objection to the introduction of the words "for profit" * * * so that the introduction of the words "for profit" in that clause will, I think, relieve the clause of all of the objections which have been made against it by those who think it is too drastic a restraint upon the free enjoyment of music.¹²

While the "for profit" limitation was extended to musical works, the same was not true of dramatic works. The final report on the bill¹³ gave the following explanation for the different treatment accorded to dramatic works:

There has been a good deal of discussion regarding subsection (d) of Section 1. This section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale. He does not usually publish his work in the ordinary acceptance of the term, and hence in such cases never receives any royalty on copies sold. * * * If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph as to amply secure him in these rights.¹⁴

⁶ S. 6330, 59th Cong., 1st Sess. (1906).

⁷ U.S. COPYRIGHT OFFICE BULL. No. 10 (1905).

⁸ *Hearings Before the House and Senate Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. (June 1906).

⁹ *Id.* at 173, 174.

¹⁰ *Id.* at 200, 201.

¹¹ *Hearings Before the House and Senate Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess., at 161 (Dec. 1906).

¹² *Id.* at 162.

¹³ H.R. REPORT No. 2222, 60th Cong., 2d Sess. (1909).

¹⁴ *Id.* at 4.

Stephen P. Ladas in his work on international copyright adds another argument. He says:

The law considers that persons attending a performance of a dramatic work will not ordinarily attend a second performance of the same work and therefore an unauthorized performance, though gratuitous, will cause the author a monetary loss, by depriving him of a potential audience.¹⁵

Since 1909, the only change in the copyright law of interest in connection with public performing rights and the "for profit" limitation was brought about by the act of July 17, 1952.¹⁶ This act extended, among other things, the author's public performing rights to nondramatic literary works.

The first bill¹⁷ introduced for this purpose placed the performing rights in nondramatic literary works in section 1(d) concerning dramatic works, thereby giving these new rights the same wide scope as dramatic performing rights. The Copyright Office suggested that the new rights be subjected to the "for profit" limitation. The views of the Office were expressed in a letter of April 26, 1951 from Mr. Arthur Fisher, then Acting Register of Copyrights, to Congressman Bryson. The letter which was offered for the record during the hearings on the bill,¹⁸ contained the following statement:

H.R. 3589 in its present form extends the coverage of subsection (d) to literary works not enumerated in subsection (c), and thus, if enacted, would grant to such works all public performance rights even if not for profit. This might have the result that a teacher reading excerpts from a copyrighted textbook in a schoolroom, a minister reading from a literary work in a church, a scientist at a convention, or a speaker at a civic meeting would be held to have infringed the copyright. It may be questioned whether such a result would be in the public interest.

With respect to performing rights in literary works other than dramas, this office is therefore of the opinion that the limitation "for profit" should be added.¹⁹

The "for profit" limitation was discussed at great length during the hearings, both in its general application and its specific application in relation to nondramatic literary works.

Mr. John Schulman, representing the Author's League of America, criticized the "for profit" limitation in the following terms:

I think that if this exclusive right related to public performances that would be sufficient safeguard and we would not have to have the limitation of a public performance at a profit. Sometimes it is difficult to determine whether a huge performance, which actually is for some money-making purpose, is a performance for profit or not, but, nevertheless, it is a public performance which cuts into the author's utilization of this work.

Now, there is no suggestion that it relates to private performances, for instance, in the schools or any place of that sort. Those would be private performances over which no control could be exercised, and that is why I feel that the public is amply protected when the right relates to public performances. * * *²⁰

Mr. Herman Finkelstein, representing ASCAP, suggested that the doctrine of fair use would protect the public interest sufficiently.²¹

¹⁵ 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY, 783 (1938).

¹⁶ 66 STAT. 752 (1952).

¹⁷ H.R. 3589, 82d Cong., 1st Sess. (1951).

¹⁸ *Hearings Before Subcommittee No. 3 of the Judiciary Committee, House of Representatives, 82d Cong., 1st Sess. (1951).*

¹⁹ *Id.* at 14.

²⁰ *Id.* at 12.

²¹ *Id.* at 26, 27.

Mr. Arthur E. Farmer, counsel to the American Book Publishers Council, Inc., also felt that the "for profit" limitation should be omitted. He said:

Now, why not include "for profit"? Well, I should say that you should not include "for profit" for three outstanding reasons.

One, there is no more reason for putting a "for profit" provision with respect to literary works other than dramatic works than there has been for 40 years with respect to dramatic works. It has worked beautifully. There has not been a flood of lawsuits.

Second, any reasonable use, noncompetitive, is simply "fair use" and would not give rise to a cause of action.

Third, and affirmatively, if you put in "for profit" you will repeat the unwitting mistake of the 1909 Act, that is, not taking into account the technological advancement. That is what I have mentioned about broadcasting and television stations operating not for profit. I am not talking about a sustaining program or a station which operated for profit. That would come in even if you did not have "for profit" in it, but you are getting a gradual increase of the non-profit stations. You are going to have that, and the Army has shown that you are going to have and increase in your recordings rather than your printed word as textual material.²²

The argument for omitting the "for profit" limitation was criticized from various sides. At the close of the hearings the Committee on Copyright of the Association of the Bar of the City of New York submitted a statement for the record. The statement contained the following recommendation:

The committee on copyright recommends very strongly that the protection accorded to the performance of copyrighted nondramatic literary works should be limited to public performance for profit.

The omission from the bill of the words "for profit" affects adversely only church services, school commencements, Fourth of July ceremonies in public squares, and the like. It will not be possible for a minister to read an inspirational copyrighted poem at a funeral service, for a child to recite such a poem at a school commencement, or for a speaker to recite such a poem at a public ceremony, without a license. Obviously, it may not be practicable for the churches, schools, and public assemblies to make licensing arrangements * * *²³

The committee report²⁴ summarized the argument for the "for profit" limitation in words almost identical to those used by the Copyright Office in its letter of April 26, 1951.²⁵

Generally, the argument for the "for profit" limitation has centered around the public interest in certain civic, educational, and religious activities. The desire of Congress to protect these activities is indicated also by section 104 of the copyright law, which provides:

That nothing in this title shall be so construed as to prevent the performance of religious or secular works such as oratorios, cantatas, masses, or octavo choruses by public schools, church choirs, or vocal societies, rented, borrowed, or obtained from some public library, public school, church choir, or vocal society, provided the performance is given for charitable or educational purposes and not for profit.

It is not clear why this provision was included in the 1909 act. Inasmuch as it also contains the "for profit" limitation, it would seem that the particular activities mentioned therein are already protected by the general "for profit" limitation in section 1. At most, the provision is evidence to the effect that the activities mentioned therein are those which Congress found most deserving of an exemption from the author's performing rights.

²² *Id.* at 36, 37.

²³ *Id.* at 42, 43.

²⁴ H. R. REP. NO. 1160, 82d Cong., 1st Sess. 1 (1951).

²⁵ *Id.* at 2. See also hearings, *supra*, note 19, at 14 (1951).

II. COURT DECISIONS INTERPRETING "PUBLIC PERFORMANCE" AND THE "FOR PROFIT" LIMITATION

In only a few cases have the courts been presented with the question of what constitutes a "public" performance. These cases will be noted in passing. The more difficult and significant question has been the scope of the "for profit" limitation. Although the words "for profit" as such may seem clear and well defined, the complications of modern economic conditions render them ambiguous in certain situations, and it has taken a number of court decisions to give them a more precise meaning. Specifically, the courts have had to deal with practical situations where the profit element in a public performance was more or less indirect.

The first important case to deal with such a situation was *John Church Co. v. Hillard Hotel Co.* (221 Fed. 229 (2d Cir. 1915)).²⁶ The litigation involved a musical composition which had been performed in the dining room of a hotel belonging to the defendant. The case turned upon the meaning of the words "for profit" and the court held that the performances in question were not for profit inasmuch as no admission fee or other direct fee had been charged to the patrons hearing the performances.

It was argued for the plaintiff that the performance of music in the hotel restaurant was a means of attracting paying customers and hence was for profit although no direct fee was charged for the music, but this contention was overruled by the court.

The *Hillard* case was followed shortly by *Herbert v. Shanley Co.* (222 Fed. 344 (S.D.N.Y. 1915)), involving somewhat similar facts. The song "Sweethearts" from Victor Herbert's comic opera of the same name had been performed in the defendant's restaurant. Victor Herbert and three other persons who wrote the lyrics to Herbert's music sued for copyright infringement, contending that the performance in question infringed the copyright in the dramatico-musical work. Apparently the plaintiffs did not contend that the performance was for profit but rather relied upon the rule that dramatico-musical works cannot be performed publicly without permission even though the performance is not for profit.

The case was decided against the authors, the decision being based partly on the fact that a separate copyright had been secured in the song "Sweethearts" and partly on the holding in the *Hillard* case that public performance of a work in a restaurant is not a performance for profit.

On appeal, the circuit court upheld in substance the decision of the court below. The opinion of the circuit court (229 F. 340 (C.C.A.N.Y. 1916)) concluded:

That the copyright of the song "Sweethearts" as a separate musical composition, even if valid, is not infringed by its being rendered in a public restaurant where no admission fee is charged, although the performer is privately paid for rendering it by the proprietor of the resort.

Both the *Hillard* and the *Shanley* cases were appealed to the Supreme Court (242 U.S. 591, (1916)). Deciding the two cases to-

²⁶ Discussed in 81 CENT. L.J. 3.

gether, the Supreme Court reversed the decisions below. Justice Holmes, who delivered the opinion for a unanimous Court, concluded:

If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking the rival noises, give a luxurious pleasure not to be had from eating a silent meal. If music did not pay, it would be given up. If it pays, it pays out of the public's pocket. Whether it pays or not, the purpose of employing it is profit, and that is enough.

The "for profit" limitation was again at issue in *Harms v. Cohen* (279 Fed. 276 (D.C. Pa. 1922)), dealing with the public performance of music in a motion picture theater. The case goes back to the era of the silent motion pictures when music was played as a live accompaniment to the silent actions of the screen. The defendant contended that no charge was made for the privilege of listening to the playing of music, and that the music was purely incidental, and not a part of the motion picture exhibited by him in the conduct of his motion picture business. But the court, following the Supreme Court ruling in the *Shanley* case, overruled these contentions, holding that the performances in question were for profit.

The same result was reached in *M. Witmark & Son v. Pastime Amusement Co.* (298 F. 470 (E.D.S.C. 1924)).²⁷ The litigation involved a song, also by Victor Herbert, entitled "Kiss me Again" which had been played by an organist in a film theater. Later, in *Irving Berlin, Inc. v. Daigle, Same v. Russo* (31 F. 2d 832 (5th Cir. 1929)), the playing of records of copyrighted songs in a film theater was held to infringe the right of public performance for profit.

As already indicated, the above cases are all from the silent film era. The situation is somewhat different in regard to sound films.

In *Famous Music Corp. v. Metz* (28 F. Supp. 767 (W.D. La. 1939)), an analogy was drawn with the above-mentioned *Irving Berlin* case. It was held that the playing of the sound track of a film was an infringement of the performing rights. However, it should be noted that the ruling was based upon the fact that the film producer had not been authorized to use the music in his film. In other words, there was infringement "at the source," and the decision did not state what rule should be applied to a sound track recorded with due permission from the authors.

This problem has been settled in regard to ASCAP and ASCAP members by the ASCAP Domestic Consent Decree, Civil Action No. 13-95, amended final judgment, entered March 14, 1950. According to section IV, subsection (E), ASCAP is enjoined and restrained from—

Granting to, enforcing against, collecting any moneys from, or negotiating with any motion picture theater exhibitor concerning any motion picture performance rights;

²⁷ Discussed in 10 ST. LOUIS L. REV. 69.

and according to section XII, subsection (B), the members of ASCAP are prohibited from—

granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this judgment.

The BMI Consent Decree, Civil Action No. 459, modified consent decree, entered May 14, 1941, does not contain any similar provisions. However, that is probably due to the fact that BMI does not acquire any film recording rights from its members. In any case, there is little reason to believe that BMI or other performing rights societies would be able to follow another course than that outlined for ASCAP. The same probably applies to individual authors who are not members of any of the societies. In any event, there seem to be no instances of infringement suits against film exhibitors for showing films containing copyrighted music recorded on the sound tracks with the permission of the respective authors. Hence, film music can usually be considered as "cleared at the source."²⁸

The above-stated practice, however, does not seem to alter the fact established during the silent film era that performances rendered in connection with the commercial exhibition of silent films are public performances for profit, a fact that is relevant for example in regard to the playing of phonograph records before or after the showing of a film.

As the problem of public performance for profit had come up in regard to hotels, restaurants, dancehalls, film theaters and other public places, it was inevitable that it should arise also in connection with the growing broadcasting industry.

In *M. Whitmark & Sons v. L. Bamberger & Co.* (291 F. 776 (D.N.J. 1923))²⁹ the defendant had broadcast over its radio station a copyrighted song entitled "Mother Machree." The only point at issue was whether or not the performance thus rendered was "for profit."

The defendant, a large department store in Newark, N.J., operated the radio station, WOR, from which vocal and instrumental concerts and other entertainment and information were broadcast. From time to time the station would also broadcast the following slogan: "L. Bamberger & Co., One of America's Great Stores, Newark, N.J.". Relying on the decisions in *Herbert v. Shanley Co.* and *Harms v. Cohen*, the Court concluded that the radio station was operated for profit and consequently that the playing of the copyrighted song was for profit.

The following year the District Court of Ohio decided the case of *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 298 F. 628 (S.D. Ohio 1924).³⁰ The facts of this case were almost identical with those of the *Bamberger* case. The defendant, a manufacturer of radios and radio parts, operated a radio station as a part of its business. During one of its broadcasts the copyrighted song "Dreamy Melody" was played. This time, however, the profit element was not the main issue. The defense mainly relied on the contention that the broadcast in question was not a "public performance." The District Court accepted this view, but the decision

²⁸ Cf. ROTHENBERG, COPYRIGHT AND PUBLIC PERFORMANCE OF MUSIC, 33 (1954)

²⁹ 25 COLUM. L. REV. 90.

³⁰ 34 YALE L.J. 109, 10 ST. LOUIS L.REV. 69 and 13 GEO. L. J. 426.

in favor of the defendants was reversed by the Circuit Court of Appeals, 5 F. 2d 411 (C.C.A. 6th 1925). Judge Mack stated in his opinion:

A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an enclosure, or gathered together in some open stadium or park or other public place. Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home. Radio broadcasting is intended to, and in fact does, reach a much larger number of the public at the moment of the rendition than any other medium of performance. The artist is consciously addressing a great, though unseen and widely scattered audience, and is therefore participating in a public performance.

Ruling also on the applicability of the "for profit" limitation, Judge Mack stated:

That, under the Copyright Act, a public performance may be for profit, though no admission fee is exacted or no profit actually made, is settled by *Herbert v. Shanley*, 242 U.S. 591. It suffices, as there held, that the purpose of the performance be for profit, and not eleemosynary.

Thus, the rule established by the *Bamberger* case, that commercial broadcasting is public performance for profit, was followed.

Other important problems came up in connection with the growing broadcasting industry, namely whether or not the broadcasting of a public performance constitutes a new public performance; and similarly, whether or not the playing of radio in public places, whether by means of standard radio receivers or more elaborate receiving installations such as those frequently found in large hotels, constitutes a new public performance aside from the broadcast.

The cases involving instances of "multiple performances" do not deal directly with the question of whether a performance is "public" or with the "for profit" limitation. However, they represent an important chapter in the development of the author's performing right, and contribute to a full understanding of the scope of that right. Unfortunately, the problem of "multiple performance" was somewhat obscured by the fact that the early litigations involved instances in which the initial performances were unauthorized.

The first case to come up was *Jerome H. Remick & Co. v. General Electric Co.*, 16 F. 2d 829 (S.D.N.Y. 1926).³¹ A copyrighted song had been played by an orchestra at a hotel, and "picked up" by the defendant broadcaster. The court held that the broadcasting of the restaurant music was not a separate performance, but that the broadcast of an unauthorized public performance made the broadcaster a contributory infringer.

Another case, *Buck v. Debaum*, 40 F. 2d 734 (S.D. Calif. 1929),³² concerned a situation involving an authorized initial performance. The defendant, a restaurant owner, had turned on a radio in his restaurant. The station he tuned in brought a musical program which included the copyrighted song "Indian Love Call." The plaintiff, who was president of ASCAP and sued on behalf of his organization, contended that the said acts infringed the author's right of public performance for profit although the broadcast of the song had been duly licensed by ASCAP. The court held that the acts of the defendant did not constitute a new performance and consequently that there was no infringement of the said right.

³¹ 11 MINN. L. REV. 556.

³² 10 B.U.L. REV. 536 and 9 TEXAS L. REV. 87.

The opinion cited another case decided a few months previously, namely *Buck v. Duncan, Same v. Jewell-LaSalle Realty Co.*, 32 F. 2d 366 (W.D. Mo. 1929). In doing so, it distinguished the latter which, like the above mentioned *Remick* case, involved an initial performance not authorized by the copyright owners.

The facts were as follows: The Jewell-LaSalle Realty Co. owned and operated a hotel which had a master radio receiving set by means of which it furnished musical entertainment to the hotel guests through speakers installed both in the various public rooms and in the 200 private rooms. Duncan was a broadcaster who, in one of his programs received in the said hotel, had played copyrighted songs without permission.

The issue of importance in this connection was whether or not the "picking up" of the broadcast constituted a new performance. The court held that it did not.

On appeal of the *Jewell-LaSalle* case, 51 F. 2d 730 (8th Cir. 1931), the Circuit Court of Appeals, before deciding the case, certified the following question to the Supreme Court:

Do the acts of a hotel proprietor, in making available to his guests, through the instrumentality of a radio receiving set and loud speakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station, constitute a performance of such composition within the meaning of 17 U.S.C.A., sec. 1(e)?

The Supreme Court, 283 U.S., 191 (1931),³³ in an opinion delivered by Justice Brandeis held that the said acts did constitute a performance of the music, thus establishing the theory of "multiple performance."

Although the Supreme Court clearly established that the "picking up" of a radio broadcast is a separate performance, it did not decide whether or not such performance infringes the authors' performing rights in cases where the broadcasts are authorized by the authors.

Justice Brandeis stated in a footnote to the opinion:

If the copyrighted composition had been broadcast by Duncan with plaintiff's consent, a license for its commercial reception and distribution by the hotel company might possibly have been implied. Compare *Buck v. Debaum* (D.C.) 40 F. (2) 734. But Duncan was not licensed; and the position of the hotel company is not unlike that of one who publicly performs for profit by the use of an unlicensed phonograph record.

Having thus received the answer of the Supreme Court, the Circuit Court of Appeals, 51 F. 2d 726 (8th Cir. 1931), decided the main issue. Judge Booth who delivered the opinion concluded as follows:

It having been thus determined that the specific acts of the hotel proprietor constituted a performance, we are of the opinion that the record discloses that the performance was a public one and was for profit.

In view of Justice Brandeis' footnote and in order to avoid any risk to member authors, the performing rights societies wrote a limitation into their licenses to broadcasters precluding the latter from granting to others by sublicense, express or implied, the right to perform their music publicly for profit. *Society of European Stage Authors and Composers v. New York Hotel Statler Co.*, 19 F. Supp. 1 (S.D.N.Y. 1937),³⁴ involved a license containing such a limitation. Judge

³³ Annotated in numerous Law Reviews.

³⁴ 22 MINN. L. REV. 437.

Woolsen who delivered the opinion in this case stated in a *dictum* that the limitation was a "redundancy."

Because privity is lacking between the broadcaster and the receiver, it would probably be much more difficult to establish a "clearing at the source" in broadcasting than in the case of film exhibition.³⁵ But a situation similar to that involving film producers and exhibitors exists between the major networks and their affiliated stations, and between the operators of wired music services and their subscribers. In broadcaster's language, the statement that the "music was cleared at the source" means that the license given to a network or to the operator of a wired music service covers also the affiliated stations or the subscribers. The ASCAP and BMI consent decrees mentioned above both make such "clearance at the source" mandatory for broadcasting; see ASCAP Consent Decree, section V, subsection (A), and BMI Consent Decree, section II, subsection (4).

A more recent case, directly involving the "for profit" limitation is that of *Associated Music Publishers v. Debs Memorial Radio Fund*, 141 F. 2d 852 (2d Cir. 1944), in which plaintiff alleged that the defendant's broadcast of a copyrighted musical composition entitled "Petite Suite Espagnole" was an infringement of its performing rights. The case is important because of the following facts: the broadcasting organization was a nonprofit organization; only part of its operating expenses was covered by income from commercially sponsored programs; only part of the radio time, one-third on the average, was set aside for such programs; expenses not covered by the income from commercial broadcasts were covered by substantial private donations; and the remainder of the radio time, about two-thirds, was dedicated to unsponsored, so-called sustaining, programs. The alleged infringement had taken place during one of the sustaining programs, and the defendant argued that the broadcast was not for profit.

However, the Circuit Court of Appeals held otherwise. Judge Augustus Hand who delivered the opinion stated in part as follows:

It seems clear that an important radio station which allots one-third of its time to paying advertisers and thus supports a musical program in which a substantial part of a copyrighted musical work is rendered is engaged in a performance for profit, as to which the copyright owner has an exclusive monopoly.

The fees for advertising are obtained in order to aid the broadcasting station to pay its expenses and repay the advances to it by the Forward Association. The "sustaining" programs are similarly broadcast in order to maintain and further build up the listening audience and thus furnish the field from which the paying advertisers may reap a profit. It can make no difference that the ultimate purposes of the corporate defendant were charitable or educational. Both in the advertising and sustaining programs Debs was engaged in an enterprise which resulted in profit to the advertisers and to an increment to its own treasury whereby it might repay its indebtedness to Forward Association and avoid an annual deficit * * *. It is unimportant whether a profit went to Debs or to its employees or to the advertisers. The performance was for profit and the owner had the statutory right to preclude each and all of them from reaping where they had not sown.

In addition to holding, in line with the *Shanley* and *American Automobile Accessories* decisions, that a public performance which is not in itself a direct source of revenue is still "for profit" where it contributes indirectly to the commercial value of other revenue-producing activities, the decision in the *Debs* case seems to hold that a

³⁵ Cf. *supra* pp. 86, 87 concerning clearing at the source in the case of film exhibition.

public performance given by a nonprofit organization whose primary purposes, as stated by the court are "charitable and educational" is nevertheless "for profit" where the performance is, though indirectly, the source of revenue from which the organization defrays its expenses. Query, whether this implies that a public performance given solely for eleemosynary purposes is "for profit" whenever any revenue is to be used to defray expenses.

Concluding the examination of the court cases dealing with the "for profit" limitation, it is interesting to note that the general trend in the development from the *Hillard* case of 1915 to the *Debs* case of 1944 represents a consistent expansion of the "public" and "for profit" concepts in their practical application to various activities.

All the cases examined have involved the performance of musical works. No decisions have been found concerning works of the categories described in section 1(c) of the copyright law. This is natural inasmuch as musical works so far have been the quantitatively most important group of works to be publicly performed. However, the rules established for musical works undoubtedly apply also to oral and nondramatic literary works, a fact that may prove significant in the future.

III. SIMILAR LIMITATIONS IN FOREIGN COPYRIGHT LAWS AND INTERNATIONAL CONVENTIONS

(a) *Foreign Laws*

In all foreign copyright laws which grant exclusive performing rights to the author, such rights are limited to public performances. A few countries do not further restrict the author's performing rights, while others have statutory limitations similar in effect to the "for profit" limitation in the U.S. law.³⁶

The former group includes Argentina, Belgium, the Netherlands, and Switzerland.

As a matter of principle, France also maintains that the author's performing rights may be exercised in regard to all public performances. However, by an agreement between the French Government and the Société des Auteurs, Compositeurs et Editeurs de Musique, the Society has authorized the public performance of musical works in its repertory by musical societies giving gratuitous public performances and by schools in which students and teachers give such performances, on the payment to the Society of a royalty of 1 franc per year.³⁷ In this way France has met a practical situation while purporting to maintain its fundamental principles.

The group of countries which have enacted limitations on the author's public performing rights similar in effect to the "for profit" limitation in the U.S. law includes Austria, Bulgaria, Canada, Denmark, Germany, Greece, Italy, Norway, Poland, Spain, Sweden, U.S.S.R. and the United Kingdom. The relevant provisions of the laws of a representative selection of these countries will be summarized in order to arrive at a sound basis for comparison between the U.S. and foreign laws in this respect.

³⁶ By "similar" limitations are meant limitations which involve neither permission from the author nor royalties to him. However, provisions establishing various types of legal or compulsory licenses will also be mentioned.

³⁷ I LADAS, *op. cit. supra*, note 16, at 403, 404.

public performance given by a nonprofit organization whose primary purposes, as stated by the court are "charitable and educational" is nevertheless "for profit" where the performance is, though indirectly, the source of revenue from which the organization defrays its expenses. Query, whether this implies that a public performance given solely for eleemosynary purposes is "for profit" whenever any revenue is to be used to defray expenses.

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³⁷ 1 LADAS, *op. cit. supra*, note 16, at 403, 404.

Austria

The copyright law of Austria, law of April 9, 1936, as amended, lists a number of exceptions to the author's exclusive rights. The exceptions are contained in chapter VII entitled "Limitation on Rights of Exploitation." A number of the provisions permit the free use of small items and brief passages of works in various ways including public performance; and in many respects this right goes further than the American doctrine of fair use. Other provisions specify exceptions in regard to public performances. The following exceptions are listed:

(1) Published literary works may be used, to the extent justified by the purpose, in radio broadcasts designated as school broadcasts when use of the work in the schools has been declared permissible by the Board of Education (sec. 45(2)).

(2) Public delivery of published literary works is permitted when the members of the audience pay no admission or other fee and the delivery is not for profit, or when the receipts are destined exclusively for charitable purposes (sec. 50(1)). The provision applies only when the participants receive no compensation (sec. 50(2)).

(3) Public performance of published musical works is permitted when given by means of hand organs, music boxes and similar instruments not reproducing the work in the form of a personal performance (sec. 53(1)); when the work is performed at an ecclesiastical or civil ceremony or at a military event and the members of the audience are admitted without charge (sec. 53(2)); when the members of the audience pay no admission or other charge and the performance is not for any commercial purpose, or when the receipts are destined exclusively for charitable purposes (sec. 53(3)); and when the performance is given in certain places by nonprofessional musicians who comprise a band certified by the competent State government as serving the development of folklore and who do not participate for profit, and where such performance consists mainly of folk music and other music in the public domain (sec. 53(4)).

Canada

The Canadian copyright law, act of June 4, 1921, as amended, contains a number of specific exemptions. Thus, section 17 (2), (f) and (g), provides:

(2) The following acts do not constitute an infringement of copyright: * * *

(f) the reading or recitation in public by one person of any reasonable extract from any published work;

(g) the performance without motive of gain of any musical work at any agricultural, agricultural-industrial exhibition or fair which receives a grant from or is held under Dominion, provincial or municipal authority, by the directors thereof.

Section 17(3) provides:

(3) No church, college, or school and no religious, charitable, or fraternal organization shall be held liable to pay any compensation to the owner of any musical work or to any person claiming through him by reason of the public performance of any musical work in furtherance of a religious, educational, or charitable object.

In the "Report on Copyright" recently issued by the Royal Commission on Patents, Copyright, Trade Marks, and Industrial Designs

(Ottawa, 1957), the Commission made the following recommendation for section 17(2)(f);

We think also that the reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work, if accompanied by a sufficient acknowledgment should not constitute an infringement of the copyright in the work. In other words, we recommend the enactment of a provision to the effect of Section 17(2)(f) of our Copyright Act with the addition of the requirement of acknowledgment (Report, p. 56)

Concerning section 17(2)(g) the Commission stated:

We recommend that it be amended so as to apply to all agricultural and agricultural-industrial exhibitions and fairs which receive grants from the Government of Canada, a province, or a municipality, and that the exemption apply to every musical work performed at the fair except works which are performed in a place fees for admission to which are charged other than the fee payable for admission to the fair itself, and works which are performed for the purpose of advertising or attracting customers to places fees for admission to which are charged other than the fee payable for admission to the fair itself. This will have the effect of leaving musical works performed by concession holders and the like (and by the fair authorities themselves if a separate admission fee is charged) subject to performing right fees but exempting the rest (Report, p. 61).

Regarding section 17(3) the Commission observed:

Section 17(3) is unsatisfactory in certain respects. It does not provide that the public performance of musical works by a religious, charitable or fraternal organization (if it is in furtherance of a religious, educational or charitable object) is not an infringement. It merely provides that no compensation is to be paid. It therefore, leaves these organizations liable to injunction proceedings. Moreover the benefit of the exception does not extend to the performers but only to the organizations. We recommend that subsection (3) of Section 17 be replaced by a provision to the effect that the public performance of any musical work in furtherance of a religious, educational or charitable object, which is authorized by a church, college, school or religious, charitable or fraternal organization, shall not be an infringement (Report, p. 64).

An additional limitation of the author's public performing rights is found in section 50(7) of the Canadian act. Section 50(7) provides:

(7) In respect of public performances by means of any radio receiving set or gramophone in any place other than a theatre that is ordinarily and regularly used for entertainments to which an admission charge is made, no fees, charges or royalties shall be collectable from the owner or user of the radio receiving set or gramophone * * *.

As for public performances by means of radio or television receiving sets, the Commission recommended that they continue to be exempted from any obligation to pay royalties. The Commission stated:

The broadcast may at any moment it is broadcast, freely and without infringement of anyone's copyright be caused to be seen or heard in public at the receiving end and with or without profit (Report., p. 29).

As for public performances by means of gramophones, the Commission recommended that, with certain exceptions, they should continue to be exempted (Report., p. 113). As exceptions, the Commission felt (1) that in principle jukeboxes should not be exempted (but it was a question for Parliament to consider whether jukeboxes should remain exempted as long as they were exempted in the United States), and (2) that since wired music systems paid performance fees, contrivances (such as amplifying loud speaker systems) which competed with wired music systems should not be exempted (Report., pp. 112, 113).

Germany

The German copyright law of June 19, 1901, as amended, is still applicable in the German Federal Republic. The law provides a number of specific exceptions to the author's public performing rights. One exception is contained in section 11 which in regard to the performing rights provides as follows:

Copyright in a dramatic or musical work shall also include the exclusive right publicly to perform a work.

The author of a written work or an address shall have the exclusive right to deliver the work in public as long as it has not been published.

Thus, the exception for oral and nondramatic literary works is rather complete. When such works have been published, the author has no performing rights in them at all, except, of course, in dramatized versions of them.

The exceptions to the author's performing rights in musical works are listed in section 27 which reads:

The consent of the person entitled shall not be required for the public performance of published musical works if such performance has no commercial purpose and the audience is admitted free of charge. Otherwise, such performances shall be permitted without the consent of the person entitled thereto:

1. Where they take place during folk festivals, with the exception of music festivals;
2. Where the receipts are intended exclusively for charitable purposes and the performers do not receive any payment for their services;
3. Where they are given by associations and only members and persons belonging to the household of members are admitted as audience.

These provisions shall not apply to the stage performance of an opera, or of any other musical work which includes a text.

The provisions concerning performing rights in the new German draft law on copyright³⁸ are somewhat different from those now in force. According to section 46 of the draft, a published work may be publicly performed in the following cases:

- (1) When the performance takes place during folk festivals, with the exception of music festivals;
- (2) When the performance takes place during ecclesiastical or national ceremonies to which the public are admitted free of charge;
- (3) When the performance exclusively serves the education of youth;
- (4) When the net income is intended exclusively for charitable purposes and the performers do not receive any special payment from the promoter for their services;
- (5) When the performance has no commercial purpose for the promoter thereof and the performers do not receive any special remuneration from the promoter for their services, provided the audience is admitted free of charge. In the meaning of this provision a performance given at a staff or employees celebration shall not be considered as serving any commercial purposes.

According to section 46 the above exceptions (1-5) shall not apply to dramatic performances of a work.

³⁸ Published with other drafts in the general field of copyright in: REFERENTENENTWURFE ZUR URHEBERRECHTSREFORM (1954).

Sweden

The copyright law of Sweden, Law No. 381 of May 10, 1919, as amended, provides a number of minutely defined exceptions to author's performing rights. These are as follows:

(1) A published writing may be recited publicly otherwise than by reading, and it may be presented publicly by reading if read by a person who is not a professional performer or, if he is a professional performer, if he is not paid for his performance or his performance is given for the purpose of public education and arranged by a state-subsidized public educational organization (sec. 10(2)).

(2) A published musical work may be performed publicly, if either the audience is admitted free of charge and the performance is not for the purpose of private gain, or if the proceeds of the performance are devoted to charity and the performer does not receive any compensation (sec. 10(3)).

(3) A work may be broadcast for the purpose of religious edification or elementary instruction. Moreover, the public performance of a work may be broadcast, if the audience at the performance has been admitted free of charge and the performance does not serve the purpose of private gain. Finally, a work may be broadcast if the broadcast is in the category of newscasts (sec. 10(4)).

The exceptions in the Swedish law, especially those relating to broadcasting, limit the author's performing rights much more than the corresponding "for profit" limitation in the U.S. law.

United Kingdom

The new British copyright law of November 5, 1956, provides an exception to the author's public performing rights in section 6(5), which provides:

(5) The reading or recitation in public by one person of any reasonable extract from a published literary or dramatic work, if accompanied by a sufficient acknowledgment, shall not constitute an infringement of the copyright in the work:

Provided that this subsection shall not apply to anything done for the purposes of broadcasting.

This provision, which is more in the nature of a fair use exception, resembles section 17(2)(f) of the Canadian law. The other exceptions contained in the Canadian law, however, are not found in the British law.³⁹

(b) International Conventions

Some, but not all, of the international copyright conventions expressly provide for the author's exclusive performing rights.

The Berne Convention.—The Berne Convention of 1886 undertook to secure the performing rights, and all the revisions thereof contain similar provisions.⁴⁰

The Berne Convention as revised in Brussels in 1948 contains various provisions for the protection of the author's performing rights.

³⁹ 1 LADAS, *op. cit. supra*, note 16, at 403, lists Great Britain as one of the countries with no limitations on the author's public performing rights.

⁴⁰ *Id.* at 394-401 contains a brief and clear account of the development of the performing rights in the various versions of the Berne Convention up till 1948.

Article 11 deals with the author's rights in regard to live performances of dramatic, dramatico-musical, and musical works. Article 11 *ter* adds (nondramatic) literary works to this enumeration. Article 11 *bis* deals mainly with broadcasting rights but also with the right to use receiving sets, etc., for the purpose of public performance. Finally, Article 13 deals with recording rights and the right to use records for the purpose of public performance.

The exclusive performing rights thus formulated are not counteracted by any express limitations thereon. However, that does not mean that the Berne Convention purports to prevent the enactment of limited restrictions of the performing rights. This is clear from the comments of the Berne Office in the preparatory work of the Brussels Conference. It is stated therein that "it would be chimerical to attach such a meaning" to Article 11. This sentence is followed by the following observation:

The great majority of Union Countries enumerate certain cases in which the performance of protected works is free. Consequently, the exclusive right of the author is restricted in certain circumstances. The following are examples of performances declared to be free by a number of laws: musical performances for cultural purposes, concerts given by military bands, concerts given for charity or organized for various types of civic festivities. It would not be possible in the Convention to list all the exceptions; they are too varied. Many of them are based upon ancient local traditions with which the interested countries are disinclined to interfere. Hence, it is not to be expected that these exceptions will disappear in the future.⁴¹

The Washington Convention.—Like the Berne Convention, the Washington Convention of 1946 has provided for the author's performing rights without expressly mentioning that certain limitations may be imposed upon these rights. However, there is no doubt that certain limitations are to be found in the laws of adhering countries.

The Universal Copyright Convention.—The Universal Copyright Convention does not expressly mention the performing rights.

In summary, the above examination of foreign copyright laws reveals a great variety of rules whereby the author's performing rights have been restricted to a smaller or larger extent. In all countries, however, the restrictions are in the nature of exceptions. Basically, the public performing rights are considered as being within the author's exclusive domain, but subject to restrictions to a limited extent. These restrictions most commonly relate to noncommercial performances of music and nondramatic literary works for educational, charitable, or other civic purposes.

IV. LEGISLATIVE PROPOSALS FOR REVISION OF THE PRESENT LAW

Several of the bills introduced in Congress between 1924 and 1940 for general revision of the copyright law proposed to change the law with respect to the "for profit" limitation on public performing rights, particularly for music.

The Perkins bill, 1925

The Perkins bill,⁴² introduced in January 1925, was the first general revision bill to propose such a change. The bill omitted the "for

⁴¹ DOCUMENTS DE LA CONFERENCE DE BRUXELLES, 5-26 Juin 1948, 255 (1951).

⁴² H.R. 11258, 68th Cong., 2d Sess. (1925); see also S. 4355, 68th Cong., 2d Sess. (1925).

profit" limitation, and provided instead the following limitation in section 12(1):

That nothing in this act shall be construed to prohibit the performance of copyright musical works by churches or public schools, provided the performance is given for charitable or educational or religious purposes, unless a fee is charged for admission to the place where the music is so used.

During the hearings on the bill⁴³ the elimination of the "for profit" limitation and the substitution of a new limitation was discussed at some length by Mr. E. C. Mills, representing ASCAP, and Congressman Reid.⁴⁴ Mr. Mills expressed satisfaction with the Perkins provision which he considered more fair to the authors than the "for profit" limitation of the present law.

The Vestal bills, 1926-31

The Vestal bills, introduced in Congress from 1926 through 1931, constituted the next major revision project which dealt with this question. The first of these bills,⁴⁵ introduced in March 1926, contained no limitations on the author's public performing rights. Several objections were made to this during the hearings on the bill.⁴⁶

Mr. Solberg, then Register of Copyrights, suggested that the omission was not intended by the drafters of the bill. He said:

The enumeration of the special rights granted in the lettered paragraphs of the Vestal bill, Section 1, is substantially identical in both bills, but in the Vestal bill the clause in the Perkins bill (Section 12) is omitted, perhaps through inadvertence, * * *⁴⁷

While the above testimony indicates that Mr. Solberg favored a reinstatement of the form of the limitation provided in the Perkins bill, a brief filed during the hearings by Mr. Alfred L. Smith, representing the Music Industries Chamber of Commerce, advocated reinstatement of the "for profit" limitation.⁴⁸

In spite of these requests, the next Vestal bill,⁴⁹ introduced in January 1928, also failed to impose any limitations on public performing rights. The same is true of the third bill,⁵⁰ introduced by Congressman Vestal in December 1929. No action is recorded on the 1928 bill, but hearings were held on the 1929 bill.⁵¹ During these hearings, the request for a limitation similar to the Perkins provision was renewed.⁵²

In May 1930 Congressman Vestal introduced a general revision bill⁵³ containing limitations on the author's public performing rights which appear to be somewhat more extensive than those proposed during the hearings on the previous Vestal bills.

Section 1(d) imposed the "for profit" limitation on performing rights in musical works, and furthermore provided:

That nothing in this Act shall be construed to prohibit the performance of copyright musical works by churches, schools, and/or fraternal organizations, provided the performance is given for charitable or educational or religious purposes, unless a fee is charged for admission to the place where the music is so used.

⁴³ *Hearings Before House Committee on Patents on H.R. 11258*, 68th Cong., 2d Sess. (1925).

⁴⁴ *Id.* at 126-131.

⁴⁵ H.R. 10434, 69th Cong., 1st Sess. (1926).

⁴⁶ *Hearings Before House Committee on Patents on H.R. 10454*, 69th Cong., 1st Sess. (1926).

⁴⁷ *Id.* at 232.

⁴⁸ *Id.* at 340.

⁴⁹ H.R. 8912, 70th Cong., 1st Sess. (1928).

⁵⁰ H.R. 6990, 71st Cong., 2d Sess. (1929).

⁵¹ *Hearings Before House Committee on Patents on H.R. 6990*, 71st Cong., 2d Sess. (1930).

⁵² *Id.* at 138 and 250.

⁵³ H.R. 12549, 71st Cong., 2d Sess. (1930).

Although the exemptions so specified would have been covered in most cases by the "for profit" limitation, that would not be true in all cases. For example, fraternal organizations were here mentioned for the first time among the exempted groups.

The bill was reported out of the House Committee on Patents three times in May and June 1930,⁵⁴ but none of the reports submitted mentioned the limitations on public performing rights. The bill was debated on the floor of the House of Representatives on June 28, 1930,⁵⁵ and further amendments to the provisions on performing rights were adopted. The "for profit" limitation was extended to the author's broadcasting rights provided in section 1(g),⁵⁶ and the following provision was added:

Provided, That the provisions of this Act shall not apply to the reception of such work by the use of a radio-receiving set or other receiving apparatus unless a specific admission or service fee is charged therefor by the owner or operator of such radio-receiving set or other receiving apparatus.⁵⁷

The same provision was added to section 1(h) concerning dramatic and dramatico-musical works.⁵⁸

This new limitation constituted a drastic cut in the author's public performing rights under the existing law. It would have reversed the result of the Supreme Court decision in the *Jewell-LaSalle* case mentioned above.

The various provisions limiting the author's public performing rights were apparently the result of a compromise between the opposing sides. The House passed the bill with amendments on January 13, 1931,⁵⁹ and sent it to the Senate.⁶⁰ The Senate Committee on Patents held hearings on the bill,⁶¹ but these hearings did not bring out anything new regarding limitations on the performing rights. Amendments further limiting the performing rights were accepted during debates on the Senate floor. One amendment included agricultural fairs among the organizations listed in section 1(d),⁶² and another exempted not only coin-operated machines but all mechanical reproduction devices from the author's public performing rights.⁶³ The latter exemption was considered a necessary correlate to the exemption in favor of radio receiving sets. Another amendment permitting free use of phonograph records for broadcasting did not win approval.⁶⁴ The Senate adjourned before reaching a vote on the bill.

The Vestal bill probably came closer to enactment than any of the other general revision bills. Although the Vestal bills as passed by the House would have restricted the author's performing rights more than the present law, the various organizations representing the authors supported it in the Senate because of other features they apparently considered more important. The bill was introduced again in December 1931 in both the House⁶⁵ and the Senate,⁶⁶ but no action was taken by either.

⁵⁴ H.R. REP. No. 1689, 1906 and 2016, 71st Cong., 2d Sess. (1930).

⁵⁵ 495 CONG. REC., 11996-12018, (1930).

⁵⁶ *Id.* at 12009.

⁵⁷ *Id.* at 12012.

⁵⁸ *Id.* at 12015.

⁵⁹ 499 CONG. REC., 2081 (1931).

⁶⁰ H.R. 12549, 71st Cong., 3d Sess. (1931).

⁶¹ *Hearings Before the Senate Committee on Patents on H.R. 12549*, 71st Cong., 3d Sess. (1931).

⁶² 504 CONG. REC., 6481 (1931).

⁶³ *Id.* at 6484.

⁶⁴ *Ibid.*

⁶⁵ H.R. 139, 72d Cong., 1st Sess. (1931).

⁶⁶ S. 176, 72d Cong., 1st Sess. (1931).

The Dill bill, 1932

Shortly after, in March 1932, Senator Dill introduced another general revision bill.⁶⁷ The Dill bill was based on the 1909 act but contained substantial changes. Section 1(c) concerning performing rights imposed the "for profit" limitation on performing rights in music, and further provided:

That nothing in this Act shall be construed to prohibit the performance of any copyright work for public entertainment and not for profit, nor the performance of any work for charitable or educational or religious purposes by churches, schools, and/or fraternal organizations, whether for profit or not: *Provided further*, That the use of a machine, instrument, or instruments serving to reproduce mechanically and/or electrically such work or works, except where such reproduction is by radio or wireless broadcast, shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs: *Provided further*, That the provisions of this Act shall not apply to the reception of any work by the use of a radio-receiving set or other receiving apparatus unless a specific admission or operating fee is charged therefor by the owner or operator of such radio-receiving set or other receiving apparatus.

The exemptions contained in this provision were much more extensive than those resulting from the "for profit" limitation of the present law, and also more extensive than any alternative proposed in previous bills. The provision brought all works, including dramatic and dramatico-musical works, under the "for profit" limitation and exempted charitable, educational and religious performances given by churches, schools or fraternal organizations, whether for profit or not. Moreover, the provision exempted all performances rendered by radio receiving sets, phonographs, and similar instruments except in cases where an admission or operating fee is charged. The bill was referred to the Committee on patents, but no hearings were held and no further action taken.

The Sirovich bills, 1932

The next general revision project was sponsored by Congressman Sirovich, who, as chairman of the House Committee on Patents, held extensive hearings⁶⁸ before he introduced any bills. During these hearings, which were held in February and March 1932, the subject of the author's musical performing rights was discussed at length, but because of the nature of the hearings it was discussed in general terms, and nothing new was said about the proper scope of the performing rights.

The bills introduced by Congressman Sirovich in March, May, and June 1932 all contained a section providing rather extensive exemptions to the author's public performing rights. In the first Sirovich bill⁶⁹ the exemptions were listed in section 11 which read as follows:

None of the remedies given to the copyright owner by this Act shall be deemed to apply to--

- (a) any performance or delivery of a copyright work which is neither public nor for profit;
- (b) the public performance of a copyright musical composition not for profit;
- (c) the performance of a copyright musical work by a recognized charitable, religious, fraternal, or educational organization for charitable, religious, or educational purposes;

⁶⁷ S. 3985, 72d Cong., 1st Sess. (1932).

⁶⁸ *Hearings Before the House Committee on Patents on General Revision of the Copyright Law*, 72d Cong., 1st Sess. (1932).

⁶⁹ H.R. 10364, 72d Cong., 1st Sess. (1932).

(d) the reception of any copyright work by the use of a radio receiving set or other receiving, reproducing, or distributing apparatus, except where admission fees, cover charges, operating charges, or similar charges are made;

(e) the performance (except by broadcasting) of any copyright work by means of a disk, record, perforated roll, or film manufactured by or with the consent of the copyright owner or anyone claiming under him, or of a copyrighted sound disk, sound film record, perforated roll or film, except where admission fees, cover charges, operating charges, or similar charges are made; or

(f) the fair use of quotation from copyright matter provided credit is given to the copyright owner.

This section contained most of the exemptions provided in the last Vestal bill and the subsequent Dill bill. The exemption in favor of agricultural fairs adopted by the Senate during its debates on the last Vestal bill was not included. However, during hearings held on the first Sirovich bill, this exemption was proposed again.⁷⁰

The proposal was accepted in modified form, and section 11(c) of the second Sirovich bill⁷¹ provided:

the performance of a copyright musical work by a recognized charitable, religious, fraternal, agricultural, or educational organization for charitable, religious, or educational purposes;

During the continued hearings, Mr. Nathan Burkan, counsel for ASCAP, criticized section 11 as being too extensive. He especially criticized the limitations on dramatic performances.⁷²

The Patents Committee reacted favorably to some of this criticism. Thus, the third Sirovich bill⁷³ removed dramatic and dramatico-musical works from the operation of the proposed exemptions. Section 12(a) of this bill, which corresponds to section 11(a) of the previous bills, reads as follows:

the performance, delivery, or other presentation of a copyright work which is neither public nor for profit; but this subsection shall not apply to the performance or presentation of a dramatic or dramatico-musical work or any exhibition of a motion picture.

Inasmuch as dramatic performing rights, the so-called grand rights, have never been subjected to any limitations, it may be assumed that a limitation of these rights was not deliberately intended. The Committee on Patents held hearings on this bill,⁷⁴ but limitations on the public performing rights were not discussed.

The fourth general revision bill introduced by Congressman Sirovich⁷⁵ offered no changes in the list of exemptions, but the exemptions previously adopted in favor of agricultural and fraternal organizations were discussed during the hearings on the bill. Mr. Burkan believed that the provision as adopted would not protect the authors against possible "racketeering" by promoters or others who derive profit from the affairs given by such organizations.⁷⁶

As a result of this and previous testimony by Mr. Burkan, an addition proposed by him was made to section 12(c) of the fifth Sirovich bill.⁷⁷ The new subsection read:

the performance of a copyright musical work by a recognized charitable, religious, fraternal, agricultural, or educational organization where the entire proceeds

⁷⁰ *Hearings Before House Committee on Patents on H.R. 10740*, 72d Cong., 1st Sess. 33 (1932).

⁷¹ H. R. 10740, 72d Cong., 1st Sess. (1932).

⁷² *Hearings, supra* note 70 at 189 (1932).

⁷³ H. R. 10976, 72d Cong., 1st Sess. (1932).

⁷⁴ *Hearings Before House Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. (1932).

⁷⁵ H. R. 11948, 72d Cong., 1st Sess. (1932).

⁷⁶ *Hearings Before House Committee on Patents on H.R. 11948*, 72d Cong., 1st Sess. 99 (1932).

⁷⁷ H. R. 12094, 72d Cong., 1st Sess. (1932).

thereof, after deducting the reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or educational purposes;

After very brief hearings⁷⁸ the bill was reported by the Committee on Patents.⁷⁹ Shortly after, on May 24, 1932, it was debated in the House of Representatives.⁸⁰ Various Representatives were of the opinion that the bill had received too little attention, and after a vote it was sent back to the Committee.

Congressman Sirovich introduced a sixth general revision bill⁸¹ in June 1932. The provision for exemptions in this bill was identical with the one of the previous bill. No action was taken on it beyond referring it to the Committee on Patents.

The Duffy, Daly, and Sirovich bills, 1935-37

Further general revision bills were introduced in 1935 and 1936 by Senator Duffy and Congressmen Daly and Sirovich.

The Duffy bill,⁸² introduced in May 1935, imposed in section 1 the "for profit" limitation on all performances with the exception of performances of dramatic and dramatico-musical works, including motion pictures, and except performances by means of broadcasting. Moreover, section 17 of the bill, amending section 25 of the act, provided the following exemptions:

(1) The performance of a copyrighted musical work by a recognized charitable, religious, or educational organization where the entire proceeds thereof, after deducting the reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or educational purposes;

(2) The auditory reception of any copyrighted work by the use of a radio receiving set, wired radio, or other receiving, reproducing, or distributing apparatus, or the performance, other than by broadcasting, of any copyrighted work by a coin-operated machine or machine mechanically or electrically operated or by means of a disk, record, perforated roll, or film, manufactured by or with the consent of the copyright owner or anyone claiming under him, except where admission fees, other than for the ordinary occupation by a guest of a hotel or lodging-house room, are charged to the place of operation or, in the case of restaurants, cover charges distinct from the charges for food, or other minimum charges, are made;

The Duffy bill was passed by the Senate on July 31, 1935, and sent to the House of Representatives but Congress adjourned before any action was taken. The bill was reintroduced in the following Congress and brought up in hearings before the House Committee on Patents, see below.

The Daly bill,⁸³ introduced in January 1936, contained limitations on the author's public performing rights which did not deviate essentially from the "for profit" limitation of the present law as interpreted by the courts.

The Sirovich bill,⁸⁴ introduced in February 1936, contained an interesting innovation inasmuch as it extended the performing rights in dramatic and dramatico-musical works (as well as in motion pictures) to all performances without the qualification that they be "public." Moreover, the Sirovich bill imposed the "for profit" limitation only on performances of musical works.

⁷⁸ *Hearings Before House Committee on Patents on H.R. 12094*, 72d Cong., 1st Sess. (1932).

⁷⁹ H. R. Report No. 1361, 72d Cong., 1st Sess. (1932).

⁸⁰ 515 CONG. REC. 11059-11072, 72d Cong., 1st Sess. (1932).

⁸¹ H. R. 12425, 72d Cong., 1st Sess. (1932).

⁸² S. 3047, 74th Cong., 1st Sess. (1935).

⁸³ H. R. 10632, 74th Cong., 2d Sess. (1936).

⁸⁴ H. R. 11420, 74th Cong., 2d Sess. (1936).

Extensive hearings were held in February, March, and April 1936 on the three bills last mentioned.⁸⁵ As in the case of previous committee hearings, the performing rights were discussed at great length. Much of the argument was repetitious, but a few new points were brought out.

It was argued, as previously, that under the "for profit" limitation, any barbershop, tavern or small restaurant could be forced to pay royalties for playing a radio on their premises. To this, Gene Buck, president of ASCAP, had the following to say:

This society does not charge a hotel in this country for the operation of a broadcasting set either in a public room or a private room, any place in these United States, unless the rooms of that hotel are especially wired and downstairs in the office or in some part of that hotel the proprietor exercises a master control.⁸⁶

In Mr. Buck's opinion the exemption favoring radio receiving sets contained in the Duffy bill was not necessary in order to protect barbershops and small hotels, etc., using only ordinary radio receivers, and would unduly restrict the author's performing rights in instances of large-scale receiving systems.

The Duffy provision was defended by Mr. Wallace McClure of the State Department who was a member of the interdepartmental group which had drafted the bill. Mr. McClure feared that the rulings of the *Shanley* and *LaSalle* cases also would affect operators working on a smaller scale than the operators in these cases.⁸⁷

The Sirovich provision on dramatic works (for performing rights not restricted to "public" performance) was criticized as being too extensive.⁸⁸ For example, Congressman Church feared that it would unduly interfere with the private sphere.⁸⁹

While some thought that the exemptions in the Sirovich bill were insufficient, others criticized the Duffy bill as being too restrictive.⁹⁰

After the hearings on these three bills there was no further action. The Duffy and Daly bills were reintroduced in 1937,⁹¹ but no action was taken.

The Thomas (Shotwell) bill, 1940

The Thomas bill,⁹² introduced in the Senate in January 1940, represents the last serious attempt at general revision of the copyright law. The bill was drafted by the Shotwell committee after extensive conferences on the revision project.

Section 1 of the bill imposed the "for profit" limitation on the author's public performing rights in all works except dramatic and dramatico-musical works, including motion pictures. In addition, section 12(a) exempted:

The performance of a copyrighted musical composition, with or without words, by a recognized bona fide charitable, religious, or educational organization; *Provided*, That the entire proceeds thereof, after deducting the actual reasonable

⁸⁵ *Hearings Before the House Committee on Patents on S. 3047, H.R. 10632 and H.R. 11480, 74th Cong., 2d Sess. (1936).*

⁸⁶ *Id.* at 17.

⁸⁷ *Id.* at 267.

⁸⁸ *Id.* at 449 and 462.

⁸⁹ *Id.* at 462.

⁹⁰ *Id.* at 558.

⁹¹ The Duffy bill was reintroduced as S. 7, 75th Cong., 1st Sess. (1937). The Daly bill was reintroduced, slightly modified, as H.R. 5275, 75th Cong., 1st Sess. (1937). The Guffey bill, S. 2240, 75th Cong., 1st Sess. (1937), is identical with H.R. 5275.

⁹² S. 3043, 76th Cong., 3d Sess. (1940).

cost of presenting the same, are devoted exclusively to charitable, religious, or educational purposes: *And provided further*, That, no part of the proceeds of such performance shall be for the private gain of any promoter or similar participant in the enterprise.

There were several references in the conference documents⁹³ concerning the scope of the author's public performing rights. A comparative study of the drafted proposals of the various interested groups, prepared by Mr. Edward Sargoy, contains the following observations:

Section 1(c). Delivery in Public for Profit.—All groups suggest the retention of this right with the qualification of "in public for profit". The Book Publishers, ASCAP and Radio extend it, however, to all copyrighted works, whereas the Authors retain the present limitation on this right for lectures, sermons, addresses, and like productions.

Section 1(d). Dramatic Performing Rights.—All groups substantially follow the present law which provides not only a public performing right for dramatic and dramatico-musical works, but also a mechanical instrumentality right. The latter gives the copyright owner of the drama or dramatico-musical composition the exclusive right to control the making, vending and performances or exhibitions of his dramatic manuscript by means of mechanical instrumentalities capable of preserving a particular performance and giving subsequent multiple identical reproductions thereof. This applies, of course, to instrumentalities capable of giving visual performances, such as motion picture films, as well as instrumentalities capable of acoustic performances, or both in synchronization.

Section 1(e) Musical Performing and Mechanical Rights.—All the groups retain in substance the present right publicly to perform for profit in respect of copyrighted music as well as the right to control the making, vending and performing of mechanical instrumentalities capable of reproducing the music. However they have eliminated the present compulsory license feature in respect of the mechanical rights.⁹⁴

During one of the committee meetings an interesting discussion on the subject of classical music took place, interesting because most of the argument concerning the "for profit" limitation has centered around popular music. Some members of the Shotwell Committee felt that the composers of serious music should enjoy the same rights as authors of dramatic and dramatico-musical works. The problem was discussed at some length,⁹⁵ and a special provision removing certain works of classical music such as oratorios, concertos, and symphonies from the "for profit" limitation was included in the tentative draft. This provision, however, was later eliminated, probably because of the difficulties arising in connection with a proper distinction between the two classes of musical works involved.

The various attempts heretofore to make a general revision of the copyright law ended with the Thomas (Shotwell) bill on which no action was taken.

Very recently, in January and February 1957, two bills⁹⁶ were introduced in Congress which provided that reception of radio or television programs or the playing of phonograph records in hotels shall not constitute a public performance for profit. No action was taken on these bills. In substance they are somewhat similar to provisions in some of the general revision bills referred to above.

⁹³ The records of the conferences have not been published, but have been collected and are available in the Copyright Office (STUDY OF COPYRIGHT, 4 Volumes).

⁹⁴ *Id.* Vol. 1 at 225.

⁹⁵ *Id.* Vol. 3 at 62-63.

⁹⁶ H.R. 673 and H.R. 4572, 85th Cong., 1st Sess. (1957).

B. EXHIBITION RIGHTS IN MOTION PICTURES

I. DEVELOPMENT UNDER THE COPYRIGHT STATUTE

In the Copyright act of 1909 no mention was made of motion pictures as a specific class of copyrightable works. The Townsend Amendment of 1912⁹⁷ added two new classes of works to those enumerated in section 5: Class L, "Motion picture photoplays", and Class M, "Motion pictures other than photoplays".⁹⁸

Section 1 of the act of 1909 specified (as does sec. 1 of 17 U.S.C. today) the exclusive rights of copyright owners, but neither the Townsend amendment nor any subsequent amendment inserted any reference to motion pictures in section 1, so that the statute now contains no provision as to the rights of copyright owners in motion pictures specifically.

Subsection (a) of the present section 1, specifying the right to "print, reprint, publish, copy, and vend the copyright work," relates by its terms to all classes of copyrighted works and therefore embraces motion pictures. The other subsections of section 1, however, enumerate the particular categories of works to which the rights therein specified pertain. Thus, performing rights are specified as pertaining to nondramatic literary works (sec. 1(c)), dramas (sec. 1(d)), and musical compositions (sec. 1(e)). There is no express provision in the statute for the right to exhibit a motion picture.

Even before the Townsend Amendment of 1912, and in fact before the act of 1909, motion pictures had been considered copyrightable and had regularly been registered in the Copyright Office as photographs.⁹⁹ Copyright in a motion picture (as a photograph) had been held in the courts to be infringed by unauthorized copying, in *Edison v. Lubin*¹⁰⁰ in 1903 and in *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*¹⁰¹ in 1905.

Mention should also be made of another case decided under the law in effect prior to the act of 1909. In *Kalem Co. v. Harper & Bros.*¹⁰² the plaintiff was the copyright owner of the novel "Ben Hur." The defendant made an unauthorized motion picture of the novel and sold films which were publicly exhibited in theaters. The Supreme Court, in an opinion by Justice Holmes, held that the exhibition of the motion picture infringed the right of the copyright owner to dramatize the novel,¹⁰³ and that the defendant maker of the films was a contributory infringer by furnishing the films for exhibition.¹⁰⁴ It should be noted that this case did not deal with the right of a copyright owner of a motion picture to exhibit it. This question was considered in later court decisions to which we now turn.

⁹⁷ Act of Aug. 24, 1912, 37 Stat. 488, c. 356.

⁹⁸ The Townsend Amendment also amended § 11 of the 1909 Act (now § 12 of 17 U.S.C.) to provide for the deposit to be made for registration of unpublished motion pictures, and amended § 25(b) of the 1909 Act (now § 101(b) of 17 U.S.C.) to add special provisions regarding damages for infringement of other works by means of motion pictures.

⁹⁹ Photographs had been made copyrightable as early as 1865 (13 Stat. 540, c. 126) and were mentioned as a class of copyrightable works in all subsequent revisions of the statute including the Act of 1909, § 5(j).

¹⁰⁰ 122 Fed. 240 (2d Cir. 1903), *app. dismissed* 195 U.S. 624 (1904).

¹⁰¹ 137 Fed. 262 (C.C.N.J. 1905).

¹⁰² 222 U.S. 55 (1911).

¹⁰³ This right—to dramatize a nondramatic work—is now provided for in § 1(b) of 17 U.S.C.

¹⁰⁴ The Circuit Court of Appeals, 169 Fed. 61 (1909), had said that the making of the motion picture was not of itself an infringement of the novel since the motion picture did not reproduce the book, here drawing an analogy to the making of perforated music rolls which had been held in *White-Smith Co. v. Apollo Co.*, 209 U.S. 1 (1908) not to infringe the right to make copies of copyright music. The Supreme Court opinion, though it did not discuss this point, based its decision, as did the Circuit Court, on the exhibition of the motion picture as an infringing dramatization of the novel.

II. COURT DECISIONS REGARDING EXHIBITION RIGHTS¹⁰⁵

The courts, since 1931, have largely, if not completely, filled the gap in section 1 of the statute with respect to exhibition rights for copyrighted motion pictures. Typical of the judicial process in general, this was done on the basis of the actual facts before the court in a series of decisions. The first reported opinion, *Vitagraph v. Grobaski* (46 F. 2d 813 (W.D. Mich. 1931)), simply overruled motions to dismiss, for legal insufficiency, complaints brought by the copyright owners of motion pictures against a licensee for infringement of the copyright in giving unlicensed exhibitions. The court merely stated that no reasons had been urged and none occurred to the court for applying so narrow a construction to the copyright statute as to conclude that it did not apply to exhibitors of motion pictures.

The first opinion to give extended consideration to this question was that in *Tiffany Productions v. Dewing* (50 F. 2d 911 (D. Md. 1931)). The copyright owners of motion picture photoplays brought a suit for infringement against a licensee who had shown the photoplays at a theater other than the one for which their exhibition had been licensed. The plaintiffs argued that these copyrighted photoplays were a species of dramatic works and had been publicly performed at the unlicensed theater so as to infringe the right granted under section 1(d) to publicly perform a drama. They also suggested an alternative broader ground, to wit, that the unauthorized exhibitions upon the screen were an unauthorized copying of the motion pictures under section 1(a). Judge Coleman held the unauthorized public exhibitions to be infringement of the copyrights in the photoplays under section 1(d). By way of dictum, he observed that the decision in *White-Smith v. Apollo*¹⁰⁶ (holding that the making of pianola music rolls was not an infringing copying of copyrighted sheet music) would appear to preclude exhibition of the motion picture from being deemed an infringing copying of the film.

At about the same time, a contrary opinion was handed down by U.S. District Judge Morton in the first of the three *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.* cases (50 F. 2d 908 (D. Mass. 1931)). This court dismissed, for legal insufficiency, a copyright infringement complaint brought against a licensee who had disregarded license limitations by exhibiting the copyrighted photoplay in the theater licensed on an additional unauthorized day. The court held that, motion pictures being commercially unknown in 1909, Congress never intended, in granting the public performing right to dramatic works under section 1(d), to accord any protection other than to those kinds of dramatic works capable of being performed on a stage by living actors in the presence of an audience. On appeal, this decision was reversed in 59 F. 2d 70 (1st Cir. 1932). However, the Court of Appeals seems to have obtained the impression that this was another *Kalem Co. v. Harper & Bros.* situation,¹⁰⁷ and that the copyrights sought to be protected in this case against the unauthorized exhibitions of these films were copyrights in the literary or dramatic materials on which the motion pictures were based. Finding no

¹⁰⁵ The author is grateful to Mr. Edward A. Sargoy for the information supplied by him regarding the cases herein reviewed in which he participated, and for his advice on other points as noted.

¹⁰⁶ See note 104, *supra*.

¹⁰⁷ See note 102, *supra* and text thereto.

allegations concerning such copyrights in the restored pleading, the court accordingly directed the plaintiffs to amend their complaints so as to show the copyrighted literary or dramatic works upon which the motion pictures were based. Plaintiffs amended their complaints so as to clarify the situation, by alleging that the copyrights involved were originally secured in the photoplay film prints themselves, and were not based on copyrighted literary or dramatic materials. Defendants thereupon moved to dismiss the amended complaints.

The third opinion in this case (3 F. Supp. 66 (D.C. Mass. 1931)), which gives considerably more clarity to the situation, sustained the amended complaints, and discussed in detail the various applicable theories. Judge McLellan found liability on the theory that the photoplays embodied in the film prints were dramatic works and their public performance was therefore protected under section 1(d). He added alternatively (citing the *Kalem Co.* case) that if they were deemed to be nondramatic rather than dramatic works, their exhibition upon the screen would constitute a dramatization of a nondramatic work under section 1(b). Judge McLellan also discussed at length the "copying" theory under section 1(a), quoting from the plaintiff's arguments in such regard, and indicated that he did not necessarily go along with Judge Coleman's dictum in the *Tiffany* case that *White-Smith v. Apollo* precluded the theory that the projection of the film upon the screen could be an infringing copying under section 1(a).

Inasmuch as the courts in the *Tiffany* and *Bijou Theatre* cases held for the plaintiffs on the ground that the public exhibition of a photoplay was a public performance of a drama within section 1(d), it was not necessary for the courts in these cases to consider the argument that the projection of a film on the screen was copying within section 1(a). In dicta, Judge Coleman in the *Tiffany* case rejected this argument, drawing an analogy to *White-Smith v. Apollo*, and Judge McLellan in the third *Bijou Theatre* decision questioned that analogy.¹⁰⁸

Several years later, the theory that the projection of a film is copying within section 1(a) was considered in connection with a motion picture that was not a photoplay, by the Second Circuit Court of Appeals in *Patterson v. Century Productions et al.*¹⁰⁹ In this case,

¹⁰⁸ Mr. Edward A. Sargoy, who was counsel for the plaintiff copyright owners in these cases and other like cases, as well as in the *Patterson v. Century Productions* case later discussed, has pointed out some interesting aspects of the above cases: "By agreement of counsel for both sides and the court in the first *Metro-Goldwyn-Mayer v. Bijou* case, when the motion to dismiss the original complaints was made, it was arranged that the briefs submitted by both sides in the *Tiffany* cases (50 F. 2d 911), in Maryland, be submitted to the Massachusetts court who then reached an opposite result thereon (50 F. 2d 908). The *White-Smith v. Apollo* dictum was first raised by Judge Coleman in his opinion, and there was no opportunity to argue it, since judgment was rendered for the copyright owners, and the defendants paid the judgment. An opportunity effectively to indicate that *White-Smith v. Apollo* (with its holding that an auditory test of identity was insufficient to establish infringing copying, and that the infringing copy must have visual identification with the copyrighted work claimed to have been infringed), was not applicable, arose in the argument before Judge McLellan in the third *Metro-Goldwyn-Mayer v. Bijou* case. There it was claimed that an enlarged visual copy of each image on the copyrighted film was projected upon the screen and met the visual test called for by the *White-Smith* case. The purpose in urging the broader ground in these cases, since judgment could simply have been obtained under §1(d), the pictures being copyrighted photoplay films which had been publicly exhibited, was two-fold. In the first place, this theory would be inadequate for exhibition rights for the greater volume of copyrighted motion pictures registered under Class M as non-photoplays; and secondly, both as to copyrighted photoplays and non-photoplays, the industry strongly felt that they must not be limited in their rights to control licensing to exhibitions given publicly."

¹⁰⁹ 93 F. 2d 489 (2d Cir. 1937), cert. denied 303 U.S. 655 (1938). Mr. Sargoy advises: "There were cases in Illinois and West Virginia where the Federal Court overruled motions by exhibitor defendants to dismiss for legal insufficiency under the copyright statute, infringement actions brought against them for unauthorized exhibitions of copyrighted newsreels. Unfortunately, the orders overruling the motions to dismiss such complaints were unaccompanied by any opinion. In the reported opinions of *Pathe Exchanges, Inc. v. International Alliance*, 3 F. Supp. 63 (S.D.N.Y. 1933), and in the lower court opinion in *Patterson v. Century Production, et al.*, 19 F. Supp. 30 (S.D.N.Y. 1937), the courts in their judgments sustained infringement causes of action against exhibitors for unauthorized exhibition of the copyrighted non-photoplay films, but discussed other points in their opinions."

the plaintiff, copyright owner of a documentary film (registered under Class M as a motion picture other than a photoplay), brought an infringement action against the producer and printer of another film in which they incorporated some 1,000 to 1,500 feet taken from the plaintiff's film, and also against a theater operator who had exhibited the infringing film. The producer and printer defendants were held to have infringed by making copies of the plaintiff's film in violation of section 1(a) when they made a negative and several positives of the footage taken from the plaintiff's film. As to the defendant theater operator (charged only with having exhibited the infringing film at a theater) the court held that by showing the film, he also violated section 1(a) by making infringing copies when he projected the film on the screen, even though the copies of the images so projected upon the screen were temporary. The Court of Appeals said that this case was not analogous to that of *White-Smith v. Apollo* where a pianola roll was held not to be an infringing copy of sheet music. Citing favorably Judge McLellan's dictum in the third *Bijou Theatre* decision, the Court of Appeals pointed out that while a pianola roll did not reproduce the written music itself, the projection of the film on the screen did reproduce the copyrighted motion picture.¹¹⁰

The question of exhibition as copying has never apparently been raised again since the *Patterson* case.¹¹¹

While the *Patterson* case involved a public exhibition of a non-dramatic motion picture, the copying theory would seem to apply to any exhibition, public or private, of any motion picture by its projection. This suggests the question of whether the exhibition right for motion pictures should extend to private as well as public exhibitions.

It might be pointed out in this connection that the courts have given a broad scope to the term "public performance" in other contexts. For example, the broadcasting of music has repeatedly been held to be a public performance even though the audience consists of many individuals who hear the performance separately in the privacy of their home.¹¹² However, in the unreported case of *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt and Maryland Yacht Club*,¹¹³ Judge Coleman, who had previously decided *Tiffany Productions v. Dewing*, held that the unlicensed exhibition of copyrighted motion picture photoplays at a yacht club, though given before a substantial audience of people, was not a public performance of the photoplays within the meaning of the applicable section 1(d), since only members of the club and their guests could secure admission to the performance. The test of a public performance as laid down by him was whether the performance was open to members of the general public on the same terms as available to those before whom the performance was actually given. This decision seems questionable but no other case in the United States dealing with a similar situation has been found. Decisions in foreign countries which appear to be to the contrary will be noted below.

¹¹⁰ The question of exhibition as copying under § 1(a) was a major issue raised in the application to the United States Supreme Court for a writ of certiorari in the *Patterson* case. *Certiorari was denied*, 303 U.S. 655 (1938).

¹¹¹ Mr. Sargoy advises: "The motion picture industry has relied upon the application of § 1(a) under the *Patterson* case, not only to cover exhibition rights for all copyrighted motion pictures whether registered as photoplays or non-photoplays, but as not being called upon to limit its licensing rights under copyright to performances given publicly as in the case of copyrighted dramatic works under § 1(d)."

¹¹² See *Jerome H. Remick & Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925) and the other cases discussed *supra*, at pages 87-91.

¹¹³ (D.Md. (1932)); oral opinion set forth in Copyright Office Bulletin No. 21, at 203.

III. EXHIBITION RIGHTS IN FOREIGN COPYRIGHT LAWS AND INTERNATIONAL CONVENTIONS

Under the "copying" theory adopted in the *Patterson* case, the exhibition right in motion pictures would seem to extend to all exhibitions, whether public or not, except perhaps to such private exhibitions as might be exempted under the doctrine of fair use. In contrast, all foreign copyright laws dealing with the matter expressly appear to limit the exhibition right to public exhibitions.

Thus, in Austria, the author's exclusive right includes the right to "publicly perform" a work of cinematography (sec. 18(1) of law of April 9, 1936). In Canada, the author has the exclusive right to "publicly present a cinematographic production of an original character" (sec. 3(1)(e) of the act of June 4, 1921). In France, the author's exhibition right is defined as the right of "public projection" (art. 27 of law No. 57-296 of March 11, 1957). In Germany, the author has the exclusive right to "exhibit" cinematographic works "in public" (sec. 15(a) of the act of January 9, 1907, as amended). In Sweden, the author's copyright includes the right to "publicly perform" by means of cinematography (sec. 3 of law No. 381 of May 30, 1919). In the United Kingdom, the exhibition right is defined as the right of "causing the film, insofar as it consists of visual images, to be seen in public, or, insofar as it consists of sounds, to be heard in public" (sec. 13(5) of the Copyright Act of 1956).¹¹⁴

While the Universal Copyright Convention (1952) makes no mention of performing or exhibition rights, the Berne (Brussels) Convention (1948) provides that the author's exclusive right in cinematographic adaptations or reproductions shall include the right to authorize the "public presentation and performance" of such adaptations or reproductions (art. 14). The Washington Convention (1946) is not entirely clear on the point: "Cinematographic works" are named in article 3 among the kinds of works protected. Article 2(b) provides for all works the right to "represent, recite, exhibit, or perform it publicly"; while article 2(c) provides for all works the right to "reproduce, adapt, or present it by means of cinematography." Perhaps this latter provision is to be understood as relating to the use of other works in a motion picture. In the copyright laws of a number of the countries which have ratified the Washington Convention the right of exhibition in motion pictures appears to be limited to public exhibitions.

In comparing the effect of the "copying" theory adopted in the *Patterson* case with the law governing in other countries, consideration should be given to whether the concept of public performance or exhibition has the same scope in the United States as in other countries. It would seem that the *Maryland Yacht Club* case was decided on the basis of a much narrower conception of the term "public" than that applied in other countries.

For example, in Austria, the Supreme Court has ruled that musical performances organized by a dancing school for its students, both in connection with instruction and other activities, were public performances within the meaning of the Austrian copyright law and the

¹¹⁴ All foreign copyright laws examined appear to limit the exhibition right in motion pictures to public exhibitions. On the other hand, the limitation to "public" exhibitions appears to be the only limitation imposed.

Berne Convention (decision of March 4, 1953; 3 Ob 9/53). In reaching its decision, the court referred to a case decided by the Supreme Court of Denmark, in which the playing of radio and records in a factory was held to be "public performance" within the meaning of the Danish copyright laws. One of the tests applied by the Danish court was whether the members of the audience, in this case the factory workers, were united by a "real, intimate bond." The same test was applied by the Austrian court to the dancing school performances. The latter court made it clear that it was of the opinion that the concept of "public performance" should be uniform in the Berne countries, and its reliance on a decision from another Berne country was an attempt to reach a common formula.¹¹⁵

In the United Kingdom, in the case of *Harms & Chappel v. Martan's Club Ltd.* ((1927) 1 Ch. 526), the court held that the performance of music in a social club for the entertainment of its members, who paid membership fees, and their guests was a public performance. Similarly, in *Jennings v. Stephens* ((1936) 1 Ch. 469), a performance of a play given exclusively for the members of a women's club, of which any woman residing in the locality could become a member on payment of a small fee, was held a public performance.

The aforementioned cases obviously gave a broader scope to the term "public performance" than the *Maryland Yacht Club* case. It is true that Judge Coleman thought the case before him was to be distinguished from the *Harms & Chappel* case. However, in view of the fact that the motion picture exhibition in *Maryland Yacht Club*, like the musical performances in *Harms & Chappel*, was given for a substantial audience consisting of paying club members and their guests, the distinction seems dubious. It is, of course, impossible to say whether Judge Coleman's relatively narrow concept would be upheld if the question were again presented to the courts in the United States. The same question might be posed with respect to performances of literary or musical works.

IV. LEGISLATIVE PROPOSALS FOR REVISION OF THE PRESENT LAW

All of the general revision bills introduced between 1924 and 1940 contained provisions basically similar to those in the existing law for the right to perform dramatic works publicly (as well as the right to copy any work and the right to dramatize nondramatic works). We shall refer here especially to those bills which mentioned the right to exhibit motion pictures specifically.

The Perkins bill of 1925¹¹⁶ was the first of the general revision bills which expressly referred to the exhibition of motion pictures. The bill proposed to secure the exclusive right "to reproduce said work [any copyrighted work] in the form of a motion picture and to exhibit the same" (sec. 12(c)). But query whether this pertained only to the use of other works in a motion picture. There was no other provision for the right to exhibit motion pictures specifically.

The Vestal bill as passed by the House of Representatives in 1931¹¹⁷

¹¹⁵ In a subsequent case, a lower Danish court held that musical performances given by a youth club for its members were public performances. (NIR 1953, page 137) Similarly, performances for members of a musical association were considered public (NIR 1955, page 46).

¹¹⁶ H. R. 11258, 68th Cong., 2d Sess. (1925).

¹¹⁷ H. R. 12549, 71st Cong., 3d Sess. (1931).

made no express provision for the right to exhibit motion pictures. However, in section 1, it first provided, for all works generally, that—copyright includes the exclusive right—To copy, print, reprint, publish, produce, reproduce, perform, render or *exhibit* the copyright work in any form by any means * * *. [Emphasis added.]

But perhaps this general listing of rights was not meant to be unqualified. Section 1 went on to provide that copyright “shall further include” rights specifically enumerated, some of which were qualified, including public performance of dramatic works, but with no express mention of exhibition of motion pictures.

The Sirovich bills of 1932¹¹⁸ provided specifically for an exclusive exhibition right in motion pictures. While the first two bills introduced exempted exhibitions which were neither public nor for profit, subsequent bills did not impose these limitations and provided for the exhibition right without qualification (sec. 12).

The Duffy bill of 1935¹¹⁹ and the Daly bill of 1936¹²⁰ both specified the exclusive right “to exhibit the copyrighted work publicly if it be a motion picture” while the Sirovich bill of 1936,¹²¹ like previous bills introduced by Congressman Sirovich, granted the right to exhibit motion pictures without limiting the right to public exhibitions. (See sec. 1(d) of each of the bills.)

During the hearings held on these three bills,¹²² the Duffy and Daly provisions were opposed by representatives of the motion picture industry. Thus, Mr. Gabriel L. Hess, appearing in behalf of the National Distributors of Copyrighted Motion Pictures, stated:

The first problem is [that] the unfair competition to licensed theatre users from pirated uses at semipublic establishments will be made possible by the proposed unreasonable limitation of the exclusive exhibit[ion] right to only “public” exhibitions by Section 1(d) of the Duffy and Daly bills.¹²³

The distinction made in the copyright law between motion picture photoplays and motion pictures other than photoplays was also criticized in a memorandum submitted by Mr. Hess, as follows:

This distinction is confusing, illogical, and unnecessary. One type of motion picture may be more dramatic than the other type of motion picture and at the same time be an actual recordation of true events as distinguished from a staged or fictional motion picture known as a photoplay. Both have this in common, namely, that primarily the only thing of value is exhibition rights which are licensed by the trade in precisely the same manner. Under the customs of the trade and in principle there is no difference whatsoever between a motion picture which is called “photoplay” and a motion picture which is called “nonphotoplay”.¹²⁴

The Duffy bill made no distinction between photoplays and other motion pictures while the Daly and Sirovich bills made such distinction for classification and deposit purposes.

The Thomas (Shotwell) bill of 1940¹²⁵ provided for the exclusive right “to exhibit or perform the work if it be a motion picture” (sec. 4(e)). As in the later Sirovich bills, the exhibition right was not limited to public exhibitions. The Thomas bill made no distinction between photoplays and other motion pictures.

¹¹⁸ H. R. 10364, H. R. 10740, H. R. 10976, H. R. 11948, H. R. 12094, and H. R. 12425, 72d Cong., 1st Sess. (1932).

¹¹⁹ S. 3047, 74th Cong., 1st Sess. (1935).

¹²⁰ H. R. 10632, 74th Cong., 2d Sess. (1936).

¹²¹ H. R. 11420, 74th Cong., 2d Sess. (1936).

¹²² *Hearings on Revision of Copyright Laws*, 74th Cong., 2d Sess. (1936).

¹²³ *Id.* at 1027.

¹²⁴ *Id.* at 1346.

¹²⁵ S. 3043, 76th Cong., 3d Sess. (1940).

The problem of the scope of the exhibition right in motion pictures had come up before the Shotwell Committee in its proceedings which led up to the drafting of the Thomas bill. While ASCAP and the book publishers proposed a public exhibition right for copyrighted motion pictures, the motion picture industry opposed any limitation to "public" exhibitions. In a memorandum comparing the proposals drafted by the various interested groups, Mr. Edward A. Sargoy stated:

The motion picture industry has consistently maintained that the exhibition right for copyrighted motion pictures is not in the same category as a dramatic performing right, particularly in respect of any such limitation as "public." The pirating user of a copyrighted stage play takes only the directions in the form of the plot and dialogue, but makes his own production, requiring living actors for each infringing performance. No two performances are ever exactly identical, and nonpublic performance is not a serious injury. The unauthorized exhibition of a copyrighted motion picture is a species of "copying" the identical work of the owner (*Patterson v. Century Productions, Inc.*, 93 F. 2d 489 (2d Cir. 1937), *cert. den.* 303 U.S. 655 (1938)). The pirating user appropriates not merely plot and dialogue, but the best and only production containing the services of artists and actors otherwise unavailable, and can give unlimited identical performances in any place for any gathering, which compete with and destroy the value of the work for the copyright owner and his legitimate exhibition licensees.¹²⁶

The view of the motion picture industry was followed in the Thomas bill, drafted by the Shotwell Committee. As already mentioned, the bill provided specifically for the exhibition right in motion pictures without limiting it to public exhibitions.

C. ANALYSIS OF BASIC ISSUES

I. PERFORMING RIGHTS IN LITERARY AND MUSICAL WORKS

The background material presented in Part A above indicates that there has been no serious contention regarding the propriety of limiting the performing rights in literary and musical works to public performances.¹²⁷ The issues that have been brought into question relate to the "for profit" and other similar limitations on the right of public performance. Since these limitations have been applied to non-dramatic literary and musical works, but not generally to dramatic works, these two categories will be considered separately.

(a) *Nondramatic works.*—The review in Part A above of the development of the present law, proposed revisions, and foreign laws suggests four alternatives which might be considered in connection with the question of limiting public performing rights in nondramatic literary and musical works: (1) the "for profit" limitation could be maintained in its present form; (2) a provision listing specific exemptions could be substituted for the present "for profit" limitation; (3) a provision listing specific exemptions could be added to the "for profit" limitation; or (4) the "for profit" limitation could be abolished without substituting for it other limitations. Each of these four alternatives has been proposed in one or more of the past bills for general revision of the U.S. law and is found in the law of some foreign countries.

(1) There are numerous arguments for preserving the "for profit" limitation in its present form. It has often been emphasized that the

¹²⁶ See note 94, *supra*.

¹²⁷ The Sirovich bill of 1936 would have extended the performing right in dramatic works to all performances, but this was strongly criticized and not defended at the Hearings (see notes 84, 88, 89, *supra* and the text thereto).

author's right to royalties from public performances of nondramatic works should only extend to the commercial exploitation of his works, and that a further extension of his rights to noncommercial uses would unduly interfere with the public interest in fostering the cultural life of the nation. Moreover, the "for profit" limitation has been in effect for almost 50 years, during which period the courts have interpreted "for profit" as including all methods of public performance related directly or indirectly to commercial exploitation. Inquiries made by the Shotwell Committee in 1938 and 1939 brought out the fact that most of the interested groups then favored a retention of this limitation.¹²⁸ It is noteworthy, though, that most of the general revision bills, including the Shotwell bill, contained specific exemptions in addition to the "for profit" limitation; see below under (3).

(2) One of the general revision bills, the Perkins bill of 1925, substituted for the "for profit" limitation a provision listing specific exemptions from the author's public performing rights. The bill provided:

That nothing in this Act shall be construed to prohibit the performance of copyright musical works by churches or public schools, provided the performance is given for charitable or educational or religious purposes, unless a fee is charged for admission to the place where the music is so used.

A number of foreign copyright laws¹²⁹ have the same approach, although the list of exempt activities usually is much more detailed and extensive than the one proposed in the Perkins bill.

The advantage of this approach is that it would clarify the scope of the exemptions from the public performing right by specifying in rather precise detail the performances for which the public interest is deemed to warrant an exemption. On the other hand, as shown in previous revision efforts, an attempt at comprehensive specification raises controversial questions of inclusion or exclusion. Moreover, such specification would lose the advantage afforded by the general "for profit" limitation of being flexible and adaptable to changing conditions in the future.

If a proposal following this pattern were to be drafted, it should be borne in mind that Congress throughout the years has focused its attention on musical performances by charitable, educational, and religious organizations for charitable, educational, or religious purposes. These are the performances, with some variations, which were exempted by the Perkins bill and specifically exempted in all the other bills which added a list of exemptions to the "for profit" limitation. Although the latter provisions were supplementary to the "for profit" limitation, they were drafted so that they could stand alone, and thus may serve as models for a provision intended to be substituted for the "for profit" limitation.

The aforementioned proposals have limited exempt performances in two respects. Only certain organizations were exempted, and only certain performances by such organizations.

The organizations exempted have in some of the revision bills been limited to churches and schools. In other bills they have been described as charitable, educational, and religious organizations. In still other bills agricultural and/or fraternal organizations have been

¹²⁸ See p. 103, *supra*.

¹²⁹ E.g., Austria (p. 92, *supra*), Canada (pp. 92, 93, *supra*), Germany (p. 94, *supra*), Sweden (p. 95, *supra*), and United Kingdom (p. 95, *supra*).

added; and objections voiced at the hearings were directed principally at the inclusion of these two kinds of organizations.

The performances exempted have in all cases been musical performances for charitable, educational, and religious purposes. During the hearings the fear was expressed that profitmaking performances might be given under the guise of charity or other exempt purposes. In order to prevent abuse, some of the bills further qualified the exempt performances. For example, the Perkins bill exempted such performances only where no admission fee was charged. Other bills, for example the Duffy bill, exempted performances only if the proceeds after deduction of reasonable expenses were devoted exclusively to charitable, educational, or religious purposes. Section 12(a) of the Thomas (Shotwell) bill is another example of a provision containing the latter qualification. It exempted:

The performance of a copyrighted musical composition, with or without words, by a recognized bona fide charitable, religious, or educational organization: *Provided*, That the entire proceeds thereof, after deducting the actual reasonable cost of presenting the same, are devoted exclusively to charitable, religious, or educational purposes: *And provided further*, That no part of the proceeds of such performance shall be for the private gain of any promoter or similar participant in the enterprise.

A number of the European copyright laws provide that musical performances for the aforementioned or similar purposes are only exempted if participating performers are not paid for their participation.¹³⁰

(3) As already indicated, a number of the general revision bills contained both the "for profit" limitation, applicable to all nondramatic works, and specific exemptions applicable to musical works.¹³¹

The specific exemptions made the application of the "for profit" limitation more definite in the specified situations. Their practical effect varied: the specific exemptions tended in some cases to extend and in other cases to narrow the scope of the "for profit" limitation. For example, the Vestal bill, in its later versions, exempted musical performances by fraternal organizations for charitable, educational, or religious purposes; this addition might have enlarged the exemptions under the "for profit" limitation insofar as such performances might sometimes involve a profit element. The condition found in this and other bills, "unless a fee is charged for admission," might have enlarged the scope of free performances in some respects (where a profit element is involved but no admission fee is charged), and narrowed it in others (where an admission fee is charged to raise funds for charitable or educational purposes). The condition of an admission fee, where appropriate, has the advantage of establishing an easily recognizable line of demarcation. The condition in the Thomas (Shotwell) and a few other bills, that the proceeds of a performance after certain deductions must be devoted exclusively to charitable, educational, or religious purposes, might be found to be inherent in the "for profit" limitation. Such a condition might have the merit of clarifying a doubtful point, but it would probably be more difficult to administer than the "admission fee" condition.

¹³⁰ E. g., Austria (p. 92, *supra*), Germany (p. 94, *supra*), and Sweden (p. 95, *supra*).

¹³¹ The bills referred to are: the Vestal bill (note 53, *supra*), the Dill bill (note 67, *supra*), the first Sirovich bill (note 69, *supra*), the Duffy bill (note 82, *supra*), and the Thomas bill (note 92, *supra*).

Mention might be made here of the proviso in section 104 of the present law which exempts performances of certain musical works—by public schools, church choirs, or vocal societies, * * * provided the performance is given for charitable or educational purposes and not for profit.

This seems to add nothing to the general “for profit” limitation inasmuch as it exempts the performances listed only if they are “not for profit.” Section 104 could well be eliminated.

Two other exemptions from the public performing right for music, unrelated to the “for profit” limitation, were proposed in a few of the previous general revision bills.¹³² In broad terms, it was proposed to exempt musical performances (though public and for profit) given by (1) the reception of a broadcast, or by (2) the playing (other than by broadcasting) of a recording, except in either case where admission fees or other charges are made. These exemptions were apparently intended to apply to performances given by means of broadcast receiving sets or by means of records in such places as hotels, taverns, restaurants, etc. Two special bills recently introduced in 1957 proposed to exempt performances given by such means in hotels.¹³³

The proponents of such exemptions have argued that such performances should be “cleared at the source” (by the broadcasters or record producers); that the small hotel, restaurant, etc., should not be required to pay performing license fees for such performances; and that with respect to the reception of broadcasts, the receiver has no control over the choice of the works performed. In opposition it has been argued that such performances are given for purposes of commercial gain and those who make commercial use of music should compensate the authors for the use of their property; and it has been said that in practice the small hotel, restaurant, etc., is not called upon to obtain a performing license.

(4) It might be argued that the author’s public performing rights should not be limited by any exemptions. That is the rule in some foreign countries, notably in France.¹³⁴ Moreover, that was the rule when the performing rights in music were first introduced into the copyright law, and has always been the rule for dramatic works.

Whether or not the “for profit” limitation should be eliminated without any substitute limitation depends upon whether the public interest in fostering the cultural life of the nation in situations where music or literary works are used noncommercially, or the author’s right to control the use of his works, is paramount.

It could be argued that although there is a distinct and recognizable public interest in the enjoyment of the works of authors, that interest should in no case deprive the author of a potential source of income. From the author’s point of view, it could also be said that he should have the right to determine which activities he desires to support by permitting the free use of his works.

In weighing the arguments for and against unlimited public performing rights, it should be remembered that the words “public performance” constitute a limitation and might be construed so as to protect the public against extreme cases of interference by the authors. If all other limitations were eliminated, the courts might tend to con-

¹³² The last Vestal bill (note 53, *supra*) as amended on the floor of the House (note 57, *supra*) and on the floor of the Senate (note 63, *supra*); the first Sirovich bill (note 69, *supra*); and the Duffy bill (note 82, *supra*).

¹³³ See note 96, *supra*.

¹³⁴ See page 91, *supra*.

strue the term "public performance" narrowly, or might apply the doctrine of "fair use," so as to exclude from the author's control non-organized, nonprofessional performances which do not in any way compete with the author's economic interests. But there would still be many nonprofit performances that are undoubtedly "public performances."

Only one of the legislative proposals, namely the Vestal bill as first introduced,¹³⁶ contained no limitation on the author's public performing rights. This met with violent opposition and both the "for profit" limitation and other exemptions were adopted in later versions.

During the hearings in 1952 on the bill resulting in the amendment of section 1(c) of the present law extending performing rights to nondramatic literary works, a representative of the authors argued that the rule governing dramatic works has caused almost no difficulties in the past, and that the same rule could be applied to other works without any invasion into legitimate public interests.¹³⁶ Congress, after hearing arguments pro and con, chose to maintain the "for profit" limitation.

(b) *Dramatic works.*—The oldest of the performing rights, the right to perform a dramatic work in public, has never been subjected to the "for profit" or other limitations. One of the reasons frequently given for treating dramatic performances differently from performances of nondramatic works is that people who attend a performance of a dramatic work will be less likely to attend a second performance of the same work. Consequently, a free performance will cause the author a serious monetary loss by depriving him of a potential audience. Another reason given is that the dramatic author depends more exclusively upon his public performing rights than other authors who derive substantial parts of their income from publishing, recording, and other rights.¹³⁷

The writer is unaware of any contention that the public performing rights in dramatic works should be limited by the "for profit" or other limitations. The charitable, educational, religious, and other groups that have sought the free use of music have never urged that dramatic works should be freely available for nonprofit performance

II. EXHIBITION RIGHTS IN MOTION PICTURES

The law regarding performing rights in motion pictures (commonly referred to as "exhibition" rights) has developed differently from performing rights in literary and musical works, and presents somewhat different issues.

There being no specific provision in the statute for exhibition rights in motion pictures, the courts have had to adapt general statutory provisions, designed for other kinds of works, to accord protection to copyright owners of motion pictures against their unauthorized exhibition. The courts found no difficulty in applying to public exhibitions of dramatic motion pictures (photoplays) the statutory right in section 1(d) to perform dramatic works publicly, as was done in the *Tiffany*¹³⁸ and third *Bijou Theatre*¹³⁹ decisions. In the third

¹³⁶ See note 45, *supra*.

¹³⁷ See argument pp. 83, 84, *supra*.

¹³⁸ See text to notes 14 and 15, *supra*.

¹³⁹ *Tiffany Productions v. Dewing*, 50 F. 2d 911 (D. Md. 1931).

¹⁴⁰ *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theatre Co.*, 3 F. Supp. 66 (D.C. Mass. 1931).

Bijou Theatre decision the court also suggested that if a motion picture was deemed to be a nondramatic rather than a dramatic work, its unauthorized exhibition (which was public in that case) would violate the statutory right in section 1(b) to dramatize a nondramatic work. Finally, in the *Patterson* case¹⁴⁰ the Second Circuit Court of Appeals, dealing with an unauthorized public exhibition of a nondramatic motion picture (being unable to apply the statutory right to perform a dramatic work publicly under section 1(d), and apparently overlooking or ignoring the suggestion of the court in the third *Bijou Theatre* decision that exhibition of a nondramatic motion picture is a dramatization under section 1(b)), adopted the theory advanced by the plaintiff copyright owners that the exhibition violated the statutory right in section 1(a) to "copy" a copyrighted work.

This theory of the *Patterson* case—that the temporary reproduction of a work by projecting it on a screen is "copying"—would seem to be a considerable stretch of the traditional concept of the copyright owner's exclusive right to "copy" under section 1(a). If the *Patterson* case, which dealt in fact with the public exhibition, is followed to its logical conclusion, any exhibition of a copyrighted motion picture, whether public or private, would be an infringement if not authorized by the copyright owner. The same result for nondramatic motion pictures might also follow from the theory advanced in the third *Bijou Theatre* decision that exhibition is a dramatization of the motion picture under section 1(b); but to accord more extensive exhibition rights to nondramatic motion pictures than to dramatic motion pictures would seem to be an unreasonable result.

In all of the foregoing decisions the exhibition involved was in fact a public exhibition. Only one decision has been found dealing with an exhibition that the court deemed to be private—the unreported *Maryland Yacht Club* case¹⁴¹ which was decided before the *Patterson* decision by the same judge who, in the *Tiffany* case, had rejected the "copying" theory. In the *Maryland Yacht Club* case, involving a photoplay, the judge considered that the right of exhibition was limited to public exhibitions (as a species of public performance of a dramatic work under section 1(d)) and was therefore not infringed by a private exhibition.

The *Maryland Yacht Club* case is also the only one found in the United States dealing with the specific question of whether an exhibition given at a club for its members and their guests is public or private. The holding that such an exhibition is private seems questionable, and there are several decisions in foreign countries which hold the contrary in what appear to be similar situations involving musical performances at a dancing school, in a factory, and at a social club.¹⁴² Whether the courts in the United States would now repudiate the *Maryland Yacht Club* case is a matter of conjecture. If the *Patterson* case is followed, the question would not be likely to arise with respect to motion picture exhibitions, but might arise in regard to the performance of musical or literary works.

Also conjectural to some extent is what the courts would now do if presented with a case of a purely private exhibition, as in a private

¹⁴⁰ *Patterson v. Century Productions*, 93 F. 2d 489 (2d Cir. 1937), cert. denied 303 U.S. 655 (1938).

¹⁴¹ *Metro-Goldwyn-Mayer Dist. Corp. v. Wyatt and Maryland Yacht Club* (D. Md. 1932); unreported opinion set forth in Copyright Office Bulletin No. 21, at 203.

¹⁴² See p. 108, *supra*.

home or in a library for an individual scholar. While even such an exhibition would seem to be "copying" under section 1(a) if the theory of the *Patterson* decision is carried to its logical conclusion, a court might hesitate to find an infringement in that situation. It is conceivable that a court might resort to the doctrine of "fair use" to hold such a purely private exhibition not an infringement.

It may be desirable in a general revision of the law, as was done in a number of the previous general revision bills, to make specific provision for the right to exhibit motion pictures. If that is done, consideration will need to be given to the question of whether this right should extend to all exhibitions or only to public exhibitions.

It might be observed first that insofar as exhibition rights are concerned, no reason is apparent for making any distinction between photoplays and other motion pictures. For both alike, their chief commercial value lies in their exhibition; and the methods of distribution, licensing, and exhibition are the same. Both are also alike in regard to the premise that people having seen the motion picture at one exhibition are not likely to pay to see it again. In all of the previous general revision bills which provided for exhibition rights in motion pictures, the rights pertained to all motion pictures without distinction between photoplays and others.

As to whether the exhibition right should be limited to public exhibitions, such a limitation was imposed in several of the earlier general revision bills,¹⁴³ but two of the later bills,¹⁴⁴ provided for an unqualified right of exhibition. Foreign laws generally limit the right to "public" exhibitions and that term has been given broad scope by the foreign courts.¹⁴⁵ Representatives of the motion picture industry have argued strongly for an unlimited exhibition right. Specifically, they have argued that such a right is necessary to assure control of the copyright owner over the exhibition of films in clubs, factories, camps, schools, and other such "semipublic" places to which the general public is not invited, and perhaps even in private homes.¹⁴⁶ They have pointed out that it is easy for anyone in possession of a film (who leased it for specified exhibitions) to give unauthorized exhibitions of the motion picture in such places, and that those attending such exhibitions are not likely to pay to see the motion picture again.

Because of the special nature of motion pictures, they might require broader protection than stage plays. Any performance of a stage play requires a good deal of preparation in assembling the cast, scenery, and costumes, in rehearsals, etc., and nonpublic (usually nonprofessional) performances are generally too crude or too fragmentary to compete with a theatrical performance. But a motion picture is a completed product that can readily be exhibited by anyone having the film and projection equipment, and is the same at every exhibition.

¹⁴³ The 1932 Strovich bills (note 118, *supra*), the Duffy bill (note 119, *supra*), and the Daly bill (note 120, *supra*).

¹⁴⁴ The 1936 Strovich bill (note 121, *supra*) and the Thomas bill (note 125, *supra*).

¹⁴⁵ See Part B III, *supra*.

¹⁴⁶ Mr. Sargoy advises: "It is extremely rare for motion picture prints to be sold to the public like books, newspapers, sheet music and other copyrighted works. A motion picture is valueless unless it can be exhibited. Distributors ordinarily license the exhibition right for a specified day or days at a designated place for an agreed upon license fee, and temporarily loan a positive print to the licensee, to be returned immediately after the licensed exhibition. The motion picture industry serves not only the 17,000 or so theatres which exhibit 35 mm. prints commercially to the public, but a much greater number of non-theatrical outlets with 16 mm. prints. There are not only hundreds of thousands of homes which have projection equipment, and license 16 mm. prints from time to time from distributors in this field, but there are hundreds of thousands of private or semiprivate establishments such as schools, colleges, clubs, children's camps, factories, and other places to which the general public would be denied access, which are potential exhibition licensees."

As heretofore urged by the motion picture industry, one possible solution to this problem is to provide for an unqualified right of exhibition in motion pictures.

Another approach might be to limit the right to public exhibition with a broad definition of what constitutes public exhibition. There would seem to be good reasons for giving the copyright owner control over the exhibition of motion pictures before a substantial audience at such "semipublic" places as clubs, factories, schools, camps, etc. Whether the copyright owner should have control over strictly private exhibitions, as in private homes or for an individual scholar in a library, may be more questionable. There is some number of 8 and 16 millimeter film prints (largely of motion pictures not produced for theatrical or other public showing) which are being sold for home use, and this practice is likely to increase as home projectors become more common. If it were made clear that exhibitions before a substantial audience in a place other than a private home are to be deemed public exhibitions, a provision giving the copyright owner control over public exhibitions might suffice to serve the needs of the motion picture industry without placing a questionable restraint on strictly private exhibitions.

A word might be added as to the application to motion picture exhibitions of the "for profit" limitation imposed by the present law (sec. 1 (c) and (e)) on public performing rights in nondramatic literary and musical works. No "for profit" limitation is imposed on the public performing right (sec. 1(d)) in dramatic works (stage plays) because the principal commercial value of plays lies in their public performance and the audience at one public performance will be less likely to attend another. These latter considerations would apply also to the exhibition of motion pictures. In fact, they are even stronger in the case of motion pictures, since performances of stage plays (by different producers with different casts, settings, etc.) are not the same, but a motion picture is always the same at every exhibition.

The first Sirovich bill of 1932¹⁴⁷ suggests the possibility of utilizing the "for profit" concept in a different manner, by granting the exhibition right to all exhibitions which are either public or for profit. Thus, the exhibition right would extend to all public exhibitions, whether or not for profit, and also to any exhibitions deemed not "public" that involved profit. As indicated in Part A of this study, "for profit" has been given broad scope by the courts, and it seems likely that motion picture exhibitions at such "semipublic" places as clubs, camps, factories, etc., would usually involve some element of profit seeking on the part of the exhibitor. In foreign countries the fact that a performance is given for profit has been held to indicate its "public" character.¹⁴⁸ Extending the exhibition right to any non-public exhibition for profit might be another approach to giving motion picture copyright owners control over "semipublic" exhibitions without extending their control to strictly private exhibitions, if such a dividing line is deemed desirable.

¹⁴⁷ Note 118, *supra*.

¹⁴⁸ See, for example, the United Kingdom case of *Harms & Chappel v. Martan's Club Ltd.*, 136 L. T. Rep. 362 (1927) 1 Ch. 52 (C.A.).

D. SUMMARY OF BASIC ISSUES

I. NONDRAMATIC LITERARY AND MUSICAL WORKS

(a) Which of the following four alternatives would be preferable in regard to the public performing rights in nondramatic literary and musical works?

(1) Should the "for profit" limitation be maintained in its present form?

(2) Should a provision listing specific exemptions be substituted for the present "for profit" limitation?

(3) Should the "for profit" limitation be combined with a provision listing specific exemptions?

(4) Should the "for profit" limitation be abolished without substituting for it any other limitations?

(b) If alternative (2) or (3) above is preferable, what exemptions should be specified?

(1) Should the kind of organization giving the performance be a criterion for exemption? If so, what kinds of organizations should be specified (*e.g.*, charitable, educational, religious, others)?

(2) Should the purpose of the performance be a criterion for exemption? If so, what purposes should be specified (*e.g.*, charitable, educational, religious, others)?

(3) Should the conditions under which the performance is given be a criterion for exemption? If so, what conditions should be specified (*e.g.*, that no admission fee is charged; or that all the proceeds, or the net proceeds after expenses, be devoted exclusively to an exempt purpose; or other conditions)?

(4) Should the means of giving the performance (*e.g.*, by reception of a broadcast, or by the playing of a recording) be a criterion for exemption? If so, under what conditions?

II. DRAMATIC LITERARY AND MUSICAL WORKS

Should any such limitations be imposed on the public performing rights in dramatic works?

III. MOTION PICTURES

(a) Should special provisions be made for exhibition rights in motion pictures? If so:

(b) Should such rights be extended to—

(1) All exhibitions without qualification?

(2) Public exhibitions only? If so, should "public exhibitions" be specially defined, and how?

(3) Public exhibitions, and also any nonpublic exhibitions for profit?

(c) Should such rights be subject to any other limitations?

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
LIMITATIONS ON PERFORMING RIGHTS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT
OFFICE ON LIMITATIONS ON PERFORMING RIGHTS

By Harry G. Henn

APRIL 7, 1958.

* * * * *
With respect to the summary of basic issues (Study, p. [119]), I am in favor of the following:

1. Maintaining the "for profit" limitation in its present form;
2. Not imposing any such limitation on the public performing rights in dramatic works;
3. Not imposing any such limitation on public exhibition rights in dramatic or nondramatic motion pictures, on the theory that the present law precludes unauthorized exhibition, by analogy to unauthorized copying without any "for profit" limitation or, for that matter, any "public" limitation.

Sincerely yours,

HARRY G. HENN.

By John Schulman

APRIL 8, 1958.

The analysis made by Mr. Varmer of the above subject is very useful, and needs only a brief comment.

Were we considering an ideal copyright statute, there might be some utility in discussing an abandonment of the term "for profit" in limiting performing rights in some works and in attempting to substitute specific exemptions parallel to those which have been enacted in foreign statutes. Since we are trying to attain some feasible and workable revision of the statute, no such attempt should be made.

In the area of performance rights the courts, in my judgment, have construed the present statute in a fashion which makes a valid adjustment between the public interest and private rights. That delicate balance should not be disturbed.

The concept of the kind of performance which constitutes a "public performance for profit" has been canalized by the courts with great care. It is no longer a vague term in our jurisprudence, but one which has a reasonably precise meaning. Any change in the statutory language would impair doctrines now firmly established in our law, and would create the necessity of resorting to new litigation to determine the extent to which the boundaries have been changed.

Reliance upon limited and foreseeable exceptions does not allow for the flexibility necessary to enable a statute to keep pace with the changing world in which it must operate. Take, for example, the jukebox exemption in the present law. Whatever may have been its usefulness in 1909, its validity is admittedly now outmoded although the operators assert a vested interest in the exemption.

The history of copyright revision is that the laws have been changed about once in each half century. No one can presently prognosticate what changes will take place in the channels of communication in the next 50 years, and any rigid statutory provision might well be outmoded before the ink on the statute is dry.

The basis for distinguishing between the exclusive rights accorded to dramatic works and motion pictures, and the more limited rights in relation to the performance of songs and rendition of literary material is well appreciated in the entertainment field. We often speak of the difference between the "grand right" and the "small right" and know pretty well what is meant by each of these terms, even though they have no legal precedent and are not found in legal literature. Perhaps a better understanding would follow from the general adoption of simple colloquial terms instead of stilted statutory phrases.

As a matter of policy, although not necessary by standards of absolute theory, I suggest that the formulae of the present statute be followed in respect of the right of performance.

Sincerely,

JOHN SCHULMAN.

By Walter J. Derenberg

APRIL 15, 1958.

I have examined with much interest the study by Borge Varmer on the profit limitation on performing rights.

I would be in favor of leaving the existing "for profit" limitation intact, both with regard to musical and nondramatic works. I share the point of view expressed in the letter from the Register of Copyrights of April 26, 1951, to which the Varmer study refers in the text at page [83] and in footnote [19], that it would not be in the public interest to make the use of nondramatic works by schools, ministers, scientists, etc. subject to licensing. The report of the Association of the Bar of the City of New York, quoted at page [84] of the study, in favor of the retention of the "for profit" limitation with regard to nondramatic works reflects, in my opinion, a correct point of view and I would not be in favor of amending section 1(c) of the Act of 1909 by eliminating the "for profit" limitation therefrom.

I further am of the opinion that by and large, the present "for profit" limitation has been interpreted by our courts in such a way as to offer a fair and reasonably reliable yardstick in determining the question under what circumstances and conditions musical or nondramatic performances are rendered "for profit." In view of the rapid changes in technology, it would seem unwise to add a specific list of exemptions.

I also believe that the present statutory system which does not provide for a "for profit" limitation in connection with the rendition or performance of dramatic works is justifiable and should be retained. As pointed out in Mr. Varmer's study, there are valid economic reasons for treating such works differently from nondramatic or musical works in that dramatic performances will not often enjoy more than one attendance by the same audience so that free performances of such works may result in a much greater financial sacrifice on the part of an author than would result from occasional free performances of music or nondramatic works.

I also agree with Mr. Varmer, page [114], that the present section 104 would seem to be superfluous and should be eliminated.

Sincerely yours,

WALTER J. DERENBERG.

By Melville B. Nimmer

JULY 8, 1958.

I have examined the study entitled "The 'For Profit' Limitation on Performing Rights," by Borge Varmer. I have the following comments:

As to Nondramatic Works, it seems to me that a distinction should be made between nondramatic literary works and musical works. With respect to musical works, I think the present "for profit" limitation should be retained without any additional or alternative listing of specific exemptions. The judicial construction, which has been given over the years to the phrase "for profit" in connection with musical performances, has, it seems to me, proven both workable and sound. To add any arbitrary specific exemptions would only invite difficulties in application, which have not heretofore been encountered.

However, as to performances of nondramatic literary works, it seems to me the "for profit" limitation is inappropriate, just as it is inappropriate in connection with dramatic works. Persons attending a nonprofit public reading of a nondramatic work would be just as unlikely to attend a subsequent performance for profit, as would be persons attending a nonprofit performance of a dramatic work. In each case the creator suffers a serious monetary loss by virtue of the nonprofit public performance.

Because of the views taken above that no distinction should be made between nondramatic and dramatic works for purposes of public performance, it follows that likewise no distinction should be made between dramatic and nondramatic motion pictures. However, I would have some hesitancy about expressly providing in a new copyright act that the author's rights include performances in motion pictures, as distinguished from his more general performing rights. From this it might be construed that the more general performing rights apply only to live or "in person" performances, so that performances by television, radio, phonograph record, and other media may not be protected unless also expressly provided for. It is therefore probably better to include language in the general performance clauses indicating that performances are protected, regardless of the media through which they emanate.

Sincerely yours,

MELVILLE B. NIMMER.

By Edward A. Sargoy

DECEMBER 1, 1958.

I have read with great interest Borge Varmer's study on "The for Profit Limitation on Performing Rights."

The paper is a very well-done historical and comparative review, with an analytic discussion of the issues involved with respect to performing rights for nondramatic works, and an history of the bills proposed since 1909 which have touched upon the "for profit" limitation on such performing rights. Since this study proposed to raise the issue of whether the so-called exhibition right for copyrighted motion pictures should be qualified by a requirement of "publicly," or "for profit," or both, it includes a discussion, at my suggestion, of the judicial development of an exhibition right under the Act of 1909 for copyrighted motion picture "photoplays," as well as for copyrighted motion pictures "other than photoplays." Such judicial engineering was necessary since our present statute never mentioned motion pictures when enacted in 1909, and still does not do so in the exclusive rights conferred by Section 1, despite the 1912 Townsend Amendment which brought photoplays and nonphotoplays into Section 5, as classes L and M, respectively, and into the civil remedies Section 101 (then known as Sec. 25).

I have no especially extended comment to make concerning the questions raised in the summary of basic issues in respect of either "nondramatic works" or "dramatic works."

I am quite troubled, however, by the issue posed by the Varmer study of whether, in a new law, the exclusive right to exhibit a copyrighted motion picture should be limited to those exhibitions only given "publicly" or "in public," or "for profit."

Before going into further detailed discussion of the motion picture exhibition right, I would like to indicate very briefly my views concerning the issues raised in respect of "nondramatic" and "dramatic works" in the above study.

I. NONDRAMATIC AND DRAMATIC WORKS

Nondramatic Works.—As to the four choices in subdivision (a) of No. 1, I would be inclined to the view expressed in (3) that the "for profit" limitation should be retained in combination with a provision listing specific exemptions. As to the various choices under subdivision (3) of 1(a) for nondramatic works, I prefer a combination of all three, along the lines of the provision in Section 12(a) of the so-called Shotwell Committee bill, as introduced by Senator Thomas (S. 3043, 76th Cong., 3d Sess.). This called for exemption from remedies for a public performance for profit of a copyrighted musical composition, if: the performance was by a recognized bona fide charitable, religious or educational organization; the entire proceeds, after deducting the actual reasonable cost of presenting the same, were to be devoted exclusively to charitable, religious, or educational purposes; and, further that no part of the proceeds of such performance shall be for the private gain of any promoter or similar participant in the enterprise.

Dramatic Works.—As to these, I do not see the necessity for imposing any limitation of "for profit" on the public performing rights in dramatic works. I might even be sympathetic to some modification of the requirement for "public" performance if there is any indication that this requirement may have become unduly onerous on the author or owner of the play under modern conditions.

II. MOTION PICTURES

Borge Varmer clearly points out that there is no logical reason for continuing to distinguish, as does the Act of 1909, by its Townsend Amendment of 1912 between those copyrighted motion picture positive film prints which are registered under class L as "photoplays," and those documentaries, travelogs, scientific, educational and news subjects, for example, which are registered under class M as "motion pictures other than photoplays." Their exhibition rights are marketed "to the public" in precisely the same way, under precisely identical license contracts, both kinds of pictures often being covered by the same clauses in one license agreement. The drafters of proposed general revisions over the last 30 years or so have generally recognized this fact by omitting the continuation of this unnecessary distinction, and by simply referring to "motion pictures, with or without sound."

In various proposed general revisions of the copyright law over the last 30 years or so, the motion picture exhibition right was ordinarily thrown into the same clause with the right publicly to perform a dramatic work. No particular thought had been given, I am sure, by the drafters of such proposed legislation

other than, I suppose, that since the old law lacked any "rights" provision for motion pictures, and since motion picture exhibitions often resemble stage play performances, logical symmetry and economy of language would appropriately put motion pictures into the same category as dramatic works, as to which the provision has usually been that of an exclusive right "to perform or represent the work publicly if it be dramatic."

After the motion picture industry had an opportunity to call to Congressman Sirovich's attention the fact that there were important practical distinctions in the marketing of motion pictures and stage plays to the public in respect of their dissemination by so-called performances or exhibitions "in public," Congressman Sirovich in his 1936 general revision bills separately provided for copyrighted motion pictures by way of a simple exhibition right, which was not qualified by any provision that the exhibition be given "publicly" or "for profit." However, Congressman Duly and Senator Duffy in their 1936 general revision bills were apparently not aware of this distinction, and casually tossed the motion picture exhibition right to the same box as that for dramatic works. In fact, Senator Duly created the further qualification of an "admission charge" for these as well as "performances" of any other works. There were extensive hearings in 1936 at which the motion picture industry indicated its very vigorous objection, to which I shall later refer. In the deliberations before the Shotwell Committee in 1938 and 1939, the industry had an opportunity again to present its views, and the Thomas bill, introduced on January 8, 1940 (S. 3043, 76th Cong., 3d Sess.) also put the right in a separate category and simply provided: "to exhibit or perform the work, if it be a motion picture with or without sound." I am unaware of any objection whatever by any one ever presented to these motion picture industry views.

I had thought that the doctrine of my *Patterson v. Century Productions* case (2d Cir. 1937) 93 F. 2d 489, *certiorari denied* (1938) 303 U.S. 655, had resolved this question by placing the exclusive right of exhibition, for photoplay as well as for nonphotoplay copyrighted film, under section 1(a), as involving the exclusive right "to copy."

Certainly, I have never heard a suggestion during the last 20 years that this opinion by Judges Chase, Learned Hand and Augustus Hand, was unsound. The motion picture industry has assumed, without question so far as I know, that, being under Section 1(a), the exhibition right is no more qualified by a requirement that the exhibition be "publicly given" than that the exclusive right "to print, reprint, publish, and vend," as well as "to copy" other kinds of work, must be done "in public" to be infringing, or that the rights of dramatization, translation, adaptation, other versions, novelizations, etc., under Section 1(b) must likewise be done "in public." I have never heard this position even questioned.

However, I do appreciate that in an objective general study such as this, it is appropriate to raise theoretical issues such as, for example, whether the exclusive motion picture exhibition right should be limited to exhibitions given "in public" or "for profit" or both. Since it is raised, I feel that some discussion at length is required to indicate facts which would not ordinarily occur to those who have not been faced from day to day with the special and practical problems of the distribution of motion picture exhibitions to the public in the United States (whether given in public, semipublic, or private places), as distinguished from a right to give such exhibitions only in public. A copyrighted motion picture print differs from other copyrighted works in that it cannot normally be read by visually examining or inspecting the print. Visual comprehension of the copyrighted material, as far as the average member of the general public is concerned, is possible only by making an enlarged visual duplication of each of the images on the film print by projecting the same on a reflecting screen in timed sequence. The expensive prints are comparatively rarely sold, and are usually only rented or loaned to the exhibitor to enable the exhibitor to exercise the exhibition license granted under the copyright.

Borge Varner's study has discussed the progressive judicial development of an exclusive motion picture right during the years 1930-38 in my *Tiffany Productions v. Dewing*, *Metro Goldwyn-Mayer v. Bijou Theatre Co.*, and *Patterson v. Century Productions* cases. In the *Tiffany* case (50 F. 2d 911, D. Md. 1931), Judge Coleman put the exclusive exhibition right for "photoplays" into the same category, Section 1(d), as the right to publicly perform a dramatic work. By dictum, relying by way of analogy to the pianola roll case (*White-Smith v. Apollo*, 209 U.S. 1 (1908)), he rejected the copying theory under Section 1(a). In the third of the decisions in the *Metro-Goldwyn-Mayer v. Bijou* case, that by Judge McLellan in

3 F. Supp. 66 (1933), it was held that liability for unauthorized exhibition of a copyrighted "photoplay" in a theatre could also be rested on Section 1(d), but Judge McLellan also indicated that he did not necessarily agree with Judge Coleman's dictum concerning the analogy of the pianola roll case, and indicated that liability could also well be put under the copying theory of Section 1(a). In addition, he also raised the possible theory that, if compelled to consider the film a nondramatic copyright work, the projection of the film upon the screen may have invaded the right to dramatize in pantomime given by Section 1(b), upon an analogy to *Kalem Co. v. Harper Bros.*, 222 U.S. 55 (1911). In the *Patterson* case, 93 F. 489 (2d Cir. 1937) *certiorari denied* 303 U.S. 655 (1938), the court clearly held, citing Judge McLellan's opinion in the *Metro-Goldwyn-Mayer* case to such effect, that the pianola roll case (*White-Smith v. Apollo*) analogy of Judge Coleman was not controlling and that unauthorized exhibition of a copyrighted "non-photoplay" film print violated the right to copy, under Section 1(a), even though the enlarged visual duplicate images projected upon the screen had an ephemeral existence. They were still, said the court, copies while they lasted.

I strongly disagree with the suggestion that the *Patterson* case may be setting forth an artificial doctrine. Accustomed as we are to concepts developed in an earlier day, it is a matter of first impression only to think that an infringing copy must be tangible. Tangibility is required only in respect of "copyrightability" since the work must be a writing to be copyrightable. Where the question is one of "infringement," there is no necessary requirement of tangibility. Witness the performing, rendition and delivery rights, for example. Under modern projection devices, infringing copies can be created with no tangibility whatever, which meet every test of visual identification, and can in fact be visually displayed as permanently as the infringer desires. In Grand Central Station, for example, tremendous enlargements of colored photographs, for advertising purposes, are displayed for weeks at a time by projection upon enormous translucent screens. Such projected images could just as easily be those of copyrighted photographs, advertisements, cartoons, etc., without license under the copyright. Animated cartoon figures are flashed upon enormous advertising signs in Times Square in the form of blinking electric light bulbs, which could possibly utilize for this purpose, without license, copyrighted cartoons. Such images are obviously intangible and ephemeral. The test of an infringing copy is the simply visual one of whether its duplication looks like the original, and it is immaterial whether the duplication be enlarged, printed on paper or engraved on copper plate or whether it be projected upon a reflecting surface such as a screen or in blinking electric lights. An initial observation by those confused by this situation has often been: "How can you deposit such copies?" The answer, of course, is that to perfect copyright under our present law, one of course has to deposit copies. But where the question is infringement, rather than copyrightability, no one has to deposit any infringing copies, and thus no tangibility is required for such copies.

Borge Varmer also discusses my *Metro-Goldwyn-Mayer v. Maryland Yacht Club* case (an oral opinion, D.C. Md. 1932, 21 Copyright Office Bulletin 203), where Judge Coleman applied his dictum of the *Tiffany* case to the effect that the copying theory under 1(a) could not be accepted in the light of *White-Smith v. Apollo*. He held that the only exhibition right for a photoplay was under Section 1(d), and that since members of the public generally could not secure admission to the authorized exhibitions given in the Maryland Yacht Club to large audiences composed exclusively of members and guests of members of the club (even though programs were sold), such exhibitions were not given "publicly" and thus were not infringing. Borge Varmer is inclined to question the validity of Judge Coleman's holding that such exhibitions in the yacht club were not given "publicly," referring to certain rulings in Great Britain holding that music was publicly performed in restaurants attached to so-called clubs (although Judge Coleman distinguished these British rulings). Nevertheless there is a certain logic to the distinction made by Judge Coleman to the effect that, the exhibition being open only to members of the club and guests of members, it was tantamount in effect, though on a larger scale, to a private performance in a home admissible only to the residents of the household and their invited guests; that the test of a performance being given "publicly" or "in public" is whether the members of the public generally, upon observing the standard admission requirements, can secure admission without discrimination. However, the problem goes much further because in my opinion there should be a right of copyright control over exhibitions which are not only semipublic but even private, including exhibitions in homes.

I do not think that there is any more necessity for imposing a qualification as to the exercise of the exclusive right to exhibit a copyrighted motion picture, by way

of a requirement that the same be "publicly" or "in public" or "for profit," than there is for imposing any such requirements upon the exclusive right to print, reprint, publish, copy, vend, translate, dramatize, adapt, complete, arrange, or make other versions, as now specified in subsections 1(a) and 1(b).

I think you will appreciate what such a limitation, as provided by Judge Coleman in the *Maryland Yacht Club* case, would mean to the motion-picture industry, if it were to be made law by general revision of the copyright statute. Borge Varmer's paper points to a distinction between the dramatic and the nondramatic performing right in the sense that repeated listening to performances of a musical composition may be acceptable to the public, but witnessing the performance of a dramatic work once will tend to deplete the audience since those who have once seen the play performed might not be inclined to witness a second performance, particularly if a charge were involved. This may be a valid observation, although I am inclined to doubt, if the teenage children of the members of the Maryland Yacht Club were to perform on the club stage the musical play "South Pacific", whether any members of the club and their guests would be lost to a performance of "South Pacific" in a Baltimore theatre by the original New York company or a good road show, merely because the members and guests had already seen the show. If the above observation of Borge Varmer is valid with respect to stage plays it is infinitely more valid with respect to motion pictures. In the latter case, with an expense at times of millions of dollars, a production and cast is assembled, whose best and only performance is frozen into the negative from which several hundred positive prints are made and duly copyrighted. Whether the motion picture "South Pacific" is seen at the Criterion Theatre in New York, in a drive-in in Horse's Neck, Wyo., a downtown theatre in Baltimore, or by way of a bicycled showing at the Maryland Yacht Club, it is the identical production and performance in every instance. One may well question whether the members of the club, already having seen the movie, would be willing to pay the admission fees charged at the Criterion Theatre on a visit to New York, or at a downtown Baltimore theatre, to see the same picture exhibited.

The stage play performing pirate takes the intellectual creation, but has to assemble his own cast, scenery, director, etc., rehearse the actors, and put on a show which may vary from performance to performance. The motion-picture exhibition pirate takes not only the intellectual creation, but the best and only production as well, which he can reproduce identically, at a few pennies worth of electricity, direct from the film which he transports under his arm from place to place.

We met many instances of this type of bicycling in the 1930's (when unauthorized exhibition was rife and the industry was unaware of copyright protection for unauthorized exhibition), where some exhibitor, to whom the print had been sent for certain licensed exhibitions at his own theatre, would take the picture to another town 40 or 50 miles away to show it before some school, church, fraternal lodge, boat club, riding academy, summer hotel or camp, or other restricted group, before it even came to the local theatre in that town. Our first knowledge would come when the distributor would receive a terrific blast from the local exhibitor to whom first run rights had been given, and who felt that he had lost a very substantial block of his potential future patronage for the picture.

From the foregoing, I think it should be appreciated that (1) not only must the copyright statute provide an exclusive exhibition right for those many many thousands of documentary nonphotoplay films copyrighted under class M over so many years, and whose basic public market, particularly in 16 mm. size, for exhibition rights, is in private homes, factories, schools, etc., to which the general public is not admitted, but (2) the copyrighted photoplay in 35 mm. as well as in 16 mm. or any other size, must not be restricted in the control of the all-important exhibition right under copyright to those exhibitions only which are publicly given.

The question is not of importance merely to the major producers and distributors of motion pictures in the United States which I have represented in matters of unauthorized exhibitions of their copyrighted motion pictures. It goes far beyond their interests. These major producers and distributors release only about 200 to 300 feature motion pictures a year, and possibly not as many short subjects. There are, however, over 2,000 motion picture copyrights which are registered in the Copyright Office annually, *by far the greater number of which are documentary registrations under class M*. There are hundreds of thousands of 16 mm. nontheatrical outlets in the United States, in schools, churches, factories, camps, clubs, etc., as well as hundreds of thousands of homes which have the equipment to show sound motion pictures. There are far more distributors in

the 16 mm. field that cater to these nontheatrical outlets than the comparatively few distributors serving the motion picture theatrical field. It is these smaller operations serving primarily these innumerable nontheatrical outlets where the showings for the most part may not meet the test of public exhibition, that especially require protection of an exclusive right to exhibit the copyrighted motion picture photoplay or nonphotoplay, privately as well as publicly.

In my comments upon other Copyright Office Revision Studies, I have already discussed at some length where the question was pertinent, the necessity for adequate protection against "nonlicensed" performing or exhibition uses, under the copyright statute, where such utilizations are normally licensed for a few pennies or a few dollars per licensed use. The smaller the normal license fee, the greater is the need for statutory protection to deter the potentiality of non-licensed uses. Contractual remedies where the unauthorized use incidentally also happens to be a breach of contract, are generally impracticable and tantamount in effect to a compulsory licensing system since the usual measure of damages for breach of the contract will be the usual (and probably nominal) license fee, if and when one of many such unauthorized uses is exposed and acted upon. Effective remedies available in other countries such as legalized boycotts of the offender by trade associations, or heavy court costs, in addition to the nominal damages, awarded to compensate for the expenses of counsel and litigation, or the consistent treatment of such violations as criminal violations, are not available in the United States. It is the copyright statute that here provides an effective remedy which serves, for the most part, to deter the innumerable possible violations, and to insure normal licensing of small uses. If the copyright statute is unavailable, and the user is a stranger, there is not even the ineffectual availability of a contract remedy.

When extensive hearings were being held in 1936 by the House Patents Committee, under its chairman, Representative Sirovich, of the 74th Congress, on the Sirovich bill (H.R. 11420), the Duffy bill (S. 3047) and the Daly bill (H.R. 10632), the latter two bills (Duffy and Daly) in their section 1(d), provided that the exclusive right was for "public exhibitions" of copyrighted motion pictures. The above Duffy bill which had passed the Senate after a cursory hearing before a committee under Senator Duffy, provided in addition (under sec. 25(g)(2)), for a denial of copyright remedies against infringers generally in the absence of admission charges to the place of infringement.

The above Sirovich bill, on the other hand, did not provide any such limitation of motion picture exhibition rights to "public" exhibitions. This matter had been called to the attention of Congressman Sirovich when hearings had been held in 1932 before the House Patents Committee on a series of general revision bills introduced by him. An extensive written statement was submitted by my predecessor in the above representation, the late Gabriel L. Hess, in which I collaborated with him as of counsel, in behalf of motion picture distributors, as owners of rights under copyright in motion pictures, entitled "Statement of Gabriel L. Hess in Behalf of Motion Picture Distributors, Concerning Amendments to the Present Copyright Law Proposing: (1) Unreasonable Limitations of Public Exhibition Upon Present Exhibition Rights; (2) Unjustifiable Exemption of Motion Picture Infringers From Liability if Admission is not Charged to Place of Infringement; and (3) The Dangerous Elimination of Present Stated Minimum Statutory Damages." (Revision of Copyright Laws, Hearings before the House Patents Committee, 74th Cong., 2d Sess., Feb. 25 to Apr. 15, 1936, at 1297-1341). The problem of the "public exhibition" right, and the additional requirement for admission charges under the Duffy bill, were discussed in detail at pages 1297-1306. Being too long for an appendix to this letter, I direct your attention to such 1936 Hess statement (pp. 1300-1306), dealing with that part of its discussion concerning the "public exhibition" right and the "admission charge" question, because its thorough discussion is as persuasively illuminating of conditions today as it was almost 23 years ago.

In an accompanying 1936 supplementary "Memorandum of Amendments Suggested in Behalf of Distributors of Copyrighted Motion Pictures" in respect of these three bills (printed at pp. 1341-1347 of the above Hess statement), a condensed "Note" more briefly summarizes the views presented in detail in the expanded main statement. These views, in more colloquial language, so well state the situation that I am taking the liberty of quoting the note. It should be appreciated, of course, that the illustrations used were pertinent to 1936, but the force of their principle is just as pertinent today. While the problems cited of the stage play and the motion picture differ in degree, if the owner of a copyrighted stage play is being faced with injury or loss of licensing revenues to which genuinely

entitled, by this limitation to "public performance" under section 1(d), I would be inclined to reexamine such requirement for stage plays with a view to its relaxation.

The note in the 1936 printed hearings, supplementing the Hess statement, to which I refer, is:

"NOTE. It is utterly unreasonable to give infringing users immunity, and to deny the copyright owner of a motion picture the right to protect his licensed theatrical uses from unfair competition, by a copyright provision that the owner cannot require the licensing of, or prevent unauthorized exhibitions, in semipublic places such as lodge rooms, barns, boat clubs, riding academies, factories, summer resort hotels, and camps, regardless of the size of the audience, which the courts hold not to be "public" because the invitation list is restricted and the general public is not admitted, even though admission charges, program charges, subscription fees, dues, assessments, and other direct and indirect charges may be made for services or commodities.

"When a motion-picture production is completed, a complete dramatic entertainment, taking months and sometimes years to produce at a cost perhaps of a million dollars or more, with casts of thousands and stars of the stage and screen of the first magnitude (such as Chaplin's "Modern Times," "Mutiny on the Bounty," "Midsummer Night's Dream," "Anthony Adverse") is frozen permanently into a few pounds of celluloid film, and unlike a stage play which must be freshly performed by the living actors at each repeated performance, this complete motion-picture play can be performed and reperformed any place, any time, anywhere, by anyone, at a cost of \$2 or \$3, if any, for an operator of the projection machine, and a few pennies for electric current.

"Since the entertainment is always identical, always the best producer has to offer, whether given in the Radio City Music Hall in New York or in the Shriner's Auditorium in Medicine Springs, Wyo., the potential patronage of the particular audience is exhausted forever, as far as the local licensing theater owner is concerned. The problem is vastly different in degree from that of stage plays performed and reperformed by living actors, where, because of the great expense for professional casting, rehearsals, sets, and the continuous presence of living performers for each performance, an infringing "road" or "stock" show must appeal to public acceptance. An amateur night semipublic local performance of the stage play, "The Petrified Forest," in the local lodge room of the Order of Moose in Thief River Falls, Minn., will not injure the owner of the stage play, but a motion-picture performance in the same place before the same audience of this play with its featured star Leslie Howard (who was also the star of the Broadway stage-play production) would most certainly injure the local theater owner who licenses this picture for his theater.

"Can the same infringer possibly be imagined as putting on the spectacular motion-picture productions above named as stage plays with living actors and recouping his investment from nonpublic performances, whereas with a can of film containing these very plays he can give five shows a day, if sufficiently industrious, any place in the United States to which he can cart a portable projection machine and a screen. Furthermore, his entire investment, if any, need not be more than a rental payment of \$7.50 to the distributor for an alleged licensed use at a small theater or hall, or it may even be delivered to him free for an alleged charitable purpose, or he may secure the print from a friendly, but not quite scrupulous exhibitor, or from a bootleg distributor dealing in lost, stolen, junked, or duped prints.

"The stage-play pirate steals only plot and dialog. He still has the great cost of hiring living performers, sets, costumes, and properties for such infringing performance. The photoplay pirate only incidentally steals plot and dialog, but of greater importance, appropriates the producer's best and only production, including the personal performances, whenever and wherever he wants, of a Chaplin, Lloyd Shearer, Mimi, Barrymore, Astaire, Laughton, or Garbo, and if he can lay his hands on the film of "The Country Doctor," of the very performances by the Dionne quintuplets themselves.

"The same unreasonable situation applies in respect of a further proposed amendment to section 25(g)(2) of the Duffy bill which would deny the copyright owner any relief or remedies whatsoever under the copyright law, to protect his theater licensees from the unfair competition of unauthorized exhibitions by infringers in public places, but where admission fees are not charged to the place of infringement. Accordingly, the following amendment to section 25(g)(2) of the Duffy bill is vitally necessary.

"If proposed section 25(g)(2) of the Duffy bill be retained, the following proviso clause must be added after the semicolon in line 5 on page 43, to exempt motion-

picture exhibitions from its unusual limitation upon remedies. Free shows, to advertise automobiles, or other commodities or department store sales, whether by the General Motors Caravan or by itinerant 'jackrabbit' exhibitors, on village greens, in streets, tents, or auditoriums, factories, summer hotels, or camps, or where direct or indirect charges are made for lodging, beer, programs, subscriptions, dues, or assessments, must be controlled by the copyright owner to protect his licensees. The following is the clause:

"*Provided, however,* That this subsection shall not apply to any exhibition or performance of a work which is a copyrighted motion picture or any part thereof."

As I have previously indicated to you, I do not speak for the motion-picture producers and distributors, or that industry, in any views or comments I voice in this or any of the other papers in the Copyright Office Revision Studies. The above reflect my personal views, although in this instance gathered in the crucible of representing motion picture producers and distributors in thousands of matters throughout the country involving unauthorized exhibitions of their copyrighted motion pictures. These have been, of course, also the views of the major producers and distributors on any right restricted to "public exhibition," or requiring an admission charge, as presented in their behalf to Congress in 1936 in the Hearings before the Sirovich Committee on the Duffy, Daly, and Sirovich general revision bills. The same views were strongly presented for the producers and distributors in the Shotwell Committee deliberations, and the Thomas bill (S. 3043, 1940, 76th Cong., 2d Sess.) expressly provided a separate subsection (e) to its Section 4, giving an exclusive right to exhibit or perform the work, if it be a motion picture with or without sound. The "publicly" requirement was omitted, as in the above Sirovich 1936 bill, H.R. 11420. A dramatic or dramatic-musical work on the other hand, was limited so as "to perform, represent, exhibit, or deliver it publicly," under subsection (d) of Section 4, while all other works under subsection (d) added "for profit," as well, to the performing representation, or delivery right. I am not aware, nor do I in the remotest way have any basis to suppose, that the position of major producers and distributors has changed in any such respect as to objecting to a right for copyrighted motion pictures limited to exhibitions given "publicly" or "in public," or the imposition of any requirement that there must be a charge to the place of admission.

The Varmer study observes that there are some motion picture films, in 8 millimeter and 16 millimeter size (largely of motion pictures not produced for theatrical or other public showing), which are being sold for home use, rather than the customary licensing. He feels that it would be questionable to impose a statutory restraint on the use of copyrighted motion pictures for private exhibitions, implying that there should be some statutory exception in such regard, so as freely to permit strictly private exhibitions of copyrighted motion pictures without liability or the necessity for licensing. The almost invariable method of marketing motion pictures to the consuming public is by way of licensing its exhibition under copyright (usually for 1 or more days) at a designated place, with a temporary lease or bailment of the necessary print to project the licensed exhibitions. There undoubtedly are some 8 millimeter and 16 millimeter film prints which are sold at retail for home use to members of the public as the ultimate consumers. The economics of the situation would require that these be very short films which could be vended at a modest retail price, and here such prices would usually be substantially above the retail prices for the most expensive book publications, unless it is just a sale of a small amount of filmed footage of cartoons, for example, for projection by children in toy projection machines. Apart from the substantial investment in making the negative, the manufacturing and distribution cost per positive print is ordinarily so substantial, as compared to the cost of printing and distributing a book or other kinds of copyrighted works, that in the total economy of motion picture copyright, where production and distribution costs, as well as income from licensing exhibitions, runs in the hundreds of millions of dollars annually, and income from exhibition would substantially exceed a billion dollars income from the vending of copyrighted motion picture prints at retail would be virtually infinitesimal.

It would not be necessary for this minuscule situation, involving the vending to the public of copyrighted film prints, to provide a general limitation on the exclusive exhibition right which would expressly exclude semipublic and private exhibitions of such films being deemed unlicensed infringements of the copyright, so as to take such exhibitions generally out of the licensing orbit. In those comparatively rare situations where it is the policy or practice of the copyright owner, or authorized distributor of the copyright owner, to vend film prints to

the ultimate consumer for home use instead of temporarily renting or bailing them to a limited exhibition licensee for the purpose of projecting the licensed exhibitions, the sale of the prints in such cases would undoubtedly carry either an express exhibition license under the copyright, or if they did not do so, such a license would naturally be implied in the absence of any express prohibition thereof. When patented fountain pens or other patented articles are sold at retail in stationery, drug, and other stores to the ultimately consuming public, and the vending right under the patent has been exhausted, there nevertheless would run with the patented article so vended an implied license "to use" it under the patent. The patent statute, which simply provides an exclusive right "to make, vend, and use" has found no necessity expressly to spell out such situations. Similarly, the rare instances of vending copyrighted film prints to ultimate consumers, does not require in the copyright statute a general limitation of exclusive exhibition rights to those only given "publicly," "in public," or "for profit."

I do not think we should be controlled in this situation by what some European countries have done by providing a so-called public exhibition right for motion pictures. Possibly the conditions of development have differed from that in the United States. The motion picture industry has had its major development in this country, including not only the theatrical field, but a very large industry concerned with nontheatrical exhibition. Projection equipment is available not only in hundreds of thousands of public and semipublic nontheatrical places of exhibition, but in hundreds of thousands of private institutions and homes. As also previously pointed out, virtually the sole insurance in our country for securing the availability of our consuming market for licensed exhibitions, and deterring nonlicensed uses, has been the minimum statutory damage provisions of our copyright statute. European countries have not found the necessity for such a statutory copyright remedy, and I certainly would not recommend the abandonment of minimum statutory damages because European countries have gotten along without it. I likewise see no reason for adopting the European provision of a limited "public exhibition" right for copyrighted motion pictures. The European situation is not necessarily comparable with that in the United States in either case.

The economics of motion picture production and distribution to the consuming public, under copyright, is such in the United States that, as a practical matter, prints must be loaned or rented, usually by the day, to the licensee to project the duplication of their images, whether publicly, semipublicly, or for home use, to recoup the large investment not only in creating the negative, but the high cost of manufacturing and distributing each positive print. As far as the consuming public is concerned, motion picture prints have no value other than to view the screen duplication of the images on the film print which must necessarily be projected each time through a machine upon a screen, as the so-called exhibition. No one would give a plugged nickel for the privilege of inspecting copyrighted film print footage in its container. Copyrighted music has a major market in the sale at retail of sheet music and sound recordings. Copyright control of private performances of the music, which the consumer is likely to repeat *ad nauseum* during its vogue, is unnecessary to secure an appropriate reward to the author and publisher to encourage music creation. Such dramatic works as would have a possible market for private performance would in all likelihood be those of which copies are available to the general public through publication and sale of books containing the play. (If the dramatic work were unpublished and uncopyrighted, a license would be needed under its common law rights even for a private performance.) Furthermore, the injury to the author or owner of a copyrighted dramatic work by amateur private performance, insofar as economic incentive and reward from the creation is concerned, is literally *de minimis*. Semipublic performances of a play might possibly affect to some extent the pecuniary reward to the author, but even here amateur performance would be more likely to advertise and enhance the value of the work and the public audience for a professional production by a professional cast in professional settings. In the case of motion pictures, there is no genuine market other than the audience (public, semipublic, or home) for projected screen duplications of the "rented" film, by way of license of the exhibition right under copyright. If it has any value at all, it is the best and only professional production, which is identical for all reproductions, regardless of where given. To deprive the copyright owner of the market for such licensed exhibitions in the hundreds of thousands, if not millions, of homes where there is projection equipment, would be a most serious invasion of the pecuniary reward to which this type of copyright creator is reasonably entitled. It would be no deprivation to the public, to be subject to copyright control in observing license

limitations, in securing for a modest rental price the temporary use of an expensive film print for specified home showing of the picture. In the comparatively rare instances of sales of prints for home use, an express or implied exhibition license would undoubtedly run with the print. I do not see why the duplication of the images of a copyrighted film print, necessarily involved in every projected exhibition upon the screen, should carry express statutory limitations by way of "publicly" or "in public," when other rights of duplication under Section 1(a) such as printing, reprinting, and copying such prints tangibly, or any other kind of copyrighted work, and rights of transformation under Section 1(b) such as translating, dramatizing, novelizing, adapting, arranging, completing, and making other versions of film prints, or other copyrighted works, as the case may be, have no such limitations. If the question of examination of a copyrighted film for private scholastic or research purposes were involved, so as to require its necessarily private projection for such purpose, I would think that this would more appropriately be left to the doctrine of "fair use," than to seriously affect the copyright product of an important copyright industry by an express limitation of exhibition rights to exhibitions given "publicly," "in public," or "for profit," or even as ventured in the Varmer study, to exhibitions other than in a home for domestic entertainment.

Accordingly, with respect to the issues concerning motion pictures posed at page 119 of the Varmer study, my views are:

- (a) There should expressly be, in any new statute, an exclusive right to exhibition for motion pictures.
- (b) Such right should be extended to all exhibitions without qualification.
- (c) Such rights, insofar as exclusivity is concerned, should not be subject to any other limitations.

Sincerely yours,

EDWARD A. SARGOY.

