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### WHAT EVERYONE SHOULD KNOW ABOUT THE COPYRIGHT LAW IN WONDERLAND

HENRY TSENG\*

#### INTRODUCTION

The Copyright Act of March 4, 1909,<sup>1</sup> as amended, was enacted "to promote the progress of science and the useful arts" pursuant to the United States Constitution. Anyone who has a certain amount of dealings in the area of copyright, however, is fully aware of our anachronic and outmoded copyright law.

Many aspects of the technological advances of the twentieth century were unheard of when the old law was drafted. If one sits down and thinks about what has happened to mass communications since 1909, one can come up with quite a long list: silent and, later, sound motion pictures; radio and, later, television and, still later, cable and pay-television; computers and their ability to assimilate, generate, and manipulate unlimited amounts of information; satellites and their potential for reaching and linking everyone on earth; sound recordings and, later, audio and video tape recordings; photocopying and microreprography; and automation in the composition and reproduction of printed matter. This certainly does not exhaust the list, and many of these developments combine and interact, providing nationwide and worldwide networks for quick or instantaneous dissemination of information and entertainment. Obviously, our cold copyright law had not anticipated and can not adequately cope with these new developments.

Congress had attempted several times to overhaul the U.S. Copyright Law since 1924,<sup>2</sup> but did not succeed in its efforts until

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1. Act of March 4, 1909, ch. 320, §§ 1-64, 35 Stat. 1075 as amended 17 U.S.C. §§ 1 *et seq.* (1970) [hereinafter cited as old law].

2. See Goldman, *The History of U.S.A. Copyright Law Revision From 1901 to 1954*, in 2 STUDIES ON COPYRIGHT 1101, 1107 (Fisher ed. 1963); Marke, *United States Copyright Revision and Its Legislative History*, 70 L. LIB. J. 121, 124 (1977) [hereinafter cited as Marke].

1976.<sup>3</sup> Like most complex subjects, the decades-old copyright controversy seemed to generate more heat than light. Everyone agreed that a new law was needed, but after more than fifty years of debate there was little consensus on what the new statute should provide. Ironically, few pieces of legislation in recent years have been the subject of so many groups' intensive and sustained lobbying. It was, indeed, a "wonder of wonders," a "miracle of miracles," when Congress, on September 30, 1976, approved and sent to the White House S. 22, a long-awaited and much-amended copyright revision bill which has been aptly described as a "compromise of compromises." President Gerald R. Ford on October 17, 1976 transformed the copyright revision bill, S. 22, into Public Law 94-553 (90 Stat. 2541). The new statute specifies that, with particular exceptions, its provisions are to enter into force on January 1, 1978.<sup>4</sup> Therefore, any cause of action in copyright arising before December 31, 1977 will continue to be governed by the 1909 Act. Considering the three-year statute of limitations in which such an action may be brought,<sup>5</sup> the 1909 law can be applicable in these cases until 1981. In addition, the Transitional Section 103 of the new law also provides that no work that has fallen into the public domain prior to January 1, 1978 can be renewed under the new law. Thus, for the next fifty-six years, it is important to know whether publication occurred before January 1, 1978. If it does, the provisions of the old law will govern.

It was my original intent to interpret and analyze every provision of the new law, and hopefully predict how it should work in practice; but that is not feasible at the present time. One thing is certain, however; in a series of complex modifications, the new law deals with the technological revolution of the twentieth century and will have a major impact on authors, composers, artists, publishers and users in such industries as broadcasting, cable television, motion pictures, music and recording, book, magazine and newspaper publishing, photocopying and computers.

Lawyers and executives working on problems in this area must contend with a new set of realities. Decision-makers at all levels can not afford to wait. Now is the time for them to start studying the

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3. Revised Copyright Act of 1976, PUB. L. NO. 94-533, 90 Stat. 2541 (Oct. 9, 1976) [hereinafter cited as Copyright Act]; Marke, *supra* note 2, at 121.

4. PUB. L. NO. 94-533, 90 Stat. 2541 (1976), Transitional and Supplemental Provisions § 102.

5. 17 U.S.C. § 115 (1970).

new law, absorbing the changes that affect them, and making plans for an orderly transition.

The new law will definitely bring fundamental and pervasive changes to our day-to-day ways of doing business and to our copyright system itself. Throughout the country, and indeed the world, there are countless individuals, organizations and industries affected by the revisions. As Hon. Barbara Ringer, the U.S. Register of Copyrights, pointed out,

[f]ew of them have anything but the vaguest notion of how they are affected by the changes and what they should be doing about them. The dangers of costly misunderstandings, damaging mistakes and administrative catastrophes are very real—much too real to risk muddling through and hoping for the best between now and . . . the effective date of the new law.<sup>6</sup>

The Copyright Office is now undertaking to issue regulations, etc., pertaining to the new law.<sup>7</sup>

The focus of this article will be a few of the highlights of the new law with which everyone involved in business or legal activities should become familiar. It will be seen that the new law substantially affects the common law copyright and the duration of copyright as well as the periods for terminations of copyright transfers. Provisions defining the subject matter and describing the exclusive rights of copyright will be shown to be essentially unchanged from the old law. Governmental publications are now specifically regulated by statute and rights in other works for hire are expressly delineated covering both works produced by employees and independent contractors.

Additions to the new law will be discussed in some detail. Wholly new sections include the codification of the old equitable fair use doctrine and the extremely important provisions governing reproduction by libraries and archives. The new law creates a Copyright Royalty Tribunal to oversee royalty rates in regard to sound recordings, juke boxes and cable television. Regulation of these three modern areas of concern will be explicated by this article as will the various statutory exemptions for productions involv-

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6. Ringer, *Finding Your Way Around in the New Copyright Law*, PUBLISHERS WEEKLY, Dec. 13, 1976, at 38.

7. Any person who is interested in obtaining further information can write to: Register of Copyrights, Library of Congress, Washington D.C. 20559.

ing copyrighted works. Procedural requirements of the new law will be outlined as well.

*Single National System: Its Effect on Unpublished Works*

The new law abolishes the old dual system of protecting works prior to publication under the common law and published works under federal statute. There is now a single system of statutory protection for all copyrightable works.<sup>8</sup> A copyright inheres in a work at the instant of its creation in a tangible form. When writing an article, for example, a federally cognizable copyright exists the moment the pen is lifted from the paper.

Specifically, under section 301<sup>9</sup> the copyright law now applies to all works created after January 1, 1978 whether or not they are ever published or disseminated, so long as the works involved are "works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103."<sup>10</sup> As a result, all state laws on copyright, whether statutory or common law, are preempted and abrogated. Beginning January 1, 1978 only the federal courts have jurisdiction over copyright matters. The following three areas, however, are left unaffected by the pre-emption: (1) works that do not come within the subject matter of federal copyright law; (2) causes of action arising under state law before January 1, 1978; and (3) violations of rights not equivalent to any of the exclusive rights under copyright, such as unfair competition, deceptive trade practices and misappropriation.<sup>11</sup>

*Duration of Copyright*

The effect of the new law is to generally extend the duration of a copyright. The new term of copyright will apply to new works created after January 1, 1978 as well as to unpublished works already in existence on that date. Provision is also made for existing works under copyright protection. Finally, the new law changes the computation of the copyright period to the calendar year standard.

For works created after January 1, 1978 the new law provides one term of copyright lasting throughout the author's life, plus an

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8. See Revised Copyright Act of 1976, PUB. L. NO. 94-533, 90 Stat. 2541 (1976).

9. Unless otherwise specified hereinafter all textual references to section numbers are to the Revised Copyright Act, *supra* note 3.

10. Copyright Act, *supra* note 3, at § 301.

11. *Id.* at § 301(b).

additional fifty years after his death. In cases of works made for hire, and anonymous or pseudonymous works, the new term will be seventy-five years from the date of publication or one hundred years from the time of creation, whichever is shorter.<sup>12</sup>

Unpublished works already in existence on January 1, 1978, which are not presently protected by statutory copyright and which have not yet gone into the public domain, will generally be afforded the same Federal copyright protection prescribed for new works. Copyrights in older works of this sort, however, are provided special dates of termination.<sup>13</sup> The new law does not restore copyright protection for any work that has gone into the public domain prior to January 1, 1978.<sup>14</sup>

For works already under statutory protection the new law retains the present term of copyright of twenty-eight years from first publication (or from registration in some cases), renewable by certain persons for a second period of protection, but increases the length of the second period to forty-seven years. Copyrights in their first term must still be renewed to receive the full new maximum term of seventy-five years. Copyrights in their second term between December 31, 1976 and December 31, 1977, however, are automatically extended up to the maximum of seventy-five years.<sup>15</sup>

The new law provides further that all terms of copyright shall run through the end of the calendar year in which they would otherwise expire.<sup>16</sup> This method of computation will affect the duration of copyrights, as well as the time limits for renewal registration.

### *Termination of Transfers*

The transfer termination provisions of the new law are designed to benefit authors. Under the old law, after the first term of twenty-eight years, the renewal copyright reverted in certain situations to the author or other specified beneficiaries. The new law drops the renewal feature except for works already in their first term of statutory protection on January 1, 1978. Instead, for transfers of rights made by an author or certain of the author's

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12. *Id.* at § 302(a) & (b).

13. *Id.* at § 303.

14. PUB. L. No. 94-533, 90 Stat. 2541 (1976) Transitional and Supplemental Provisions § 103.

15. Copyright Act, *supra* note 3, at § 304(a) & (b).

16. *Id.* at § 305.

heirs after its effective date, the new law generally permits the author or certain of his heirs to terminate the transfer after thirty-five years merely by serving written notice on the transferee within specified time limits. The most significant feature of the new law's protection is that such a termination of the grant may be effected notwithstanding any agreement to the contrary.<sup>17</sup>

A similar right of termination is provided for works presently under statutory copyright protection, but only with respect to transfers covering those years which extend the present maximum term of the copyright from fifty-six to seventy-five years. Within certain time limits, an author or specified heirs of the author are generally entitled to file a notice terminating the author's transfers covering any part of the usual nineteen years that have now been added to the end of the second term of copyright in a work already under protection when the new law comes into effect.<sup>18</sup> The most interesting aspect of this addition to the law is that an author or copyright claimant, who previously sold away his rights, can reclaim those last "nineteen years." There are surely some spectacularly valuable copyrights to which this provision of the law pertains. Estate settlement checklists should certainly be expanded to determine if any of these newly copyright properties might be available. The task of the executor in determining copyright assets of estates will not be enlarged by any newly includable work as the subject matter of federal protection remains anchored.

### *Subject Matter of Copyright*

Section 102(a) of the new law provides that copyright protection subsists in "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device."<sup>19</sup> It should be noted that the phrase appearing in the old law, "writings of an author," has been replaced by "original works of authorship."<sup>20</sup> Thus, the new law avoids any problem of interpretation with respect to what "writing" means. What constitutes an "original work of authorship," however, has not been changed. The description includes the following seven categories: (1) literary works; (2) musical works, in-

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17. *Id.* at § 203(a).

18. *Id.* at 304(c).

19. *Id.* at 102(a).

20. *Id.*

cluding any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic and sculptural works; (6) motion pictures and other audio-visual works; and (7) sound recordings.<sup>21</sup> Like the old law, in no case will copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work.<sup>22</sup>

Also unchanged under the new law: "The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the pre-existing material employed in the work. . . ."<sup>23</sup> Thus, copyright in new versions extends only to the new material in the work. Also the new material can not have any effect upon the nature of any copyright protection that may exist in the original work itself.<sup>24</sup>

Provisions regarding "national origin" extend statutory protection in the new law to unpublished works "without regard to the nationality or domicile of the author."<sup>25</sup> Published works of foreign nationals are eligible for United States copyright protection on the date of first publication if: (1) one of the authors is a national or domiciliary of the United States or a national or domiciliary of a foreign nation that is a party to a copyright treaty to which the United States is a party; or (2) the work is first published in the United States, or in a foreign nation that is a party to the Universal Copyright Convention; or (3) the work is published by the United Nations or any of its specialized agencies, or by the Organization of American States; or (4) the work comes within the scope of a presidential proclamation.<sup>26</sup>

As with the subject matter of copyright, the exclusive rights to which the copyright proprietor is entitled remain essentially the same. The owner of the copyright is given the exclusive right to produce, to prepare derivative works, to distribute copies, and to perform publicly.<sup>27</sup> There is but one change. The new law explicitly gives the holder of the copyright the right to display the

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21. *Id.*

22. *Id.* at § 102(b).

23. *Id.* at § 103(b).

24. *Id.*

25. *Id.* at § 104(a).

26. *Id.* at § 104(b).

27. *Id.* at § 106(1)-(4).



copyrighted work publicly in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audio-visual work.<sup>28</sup> Although the categories of subject matter of copyright and exclusivity of rights have not been altered by Congress, refinements controlling under what circumstances copyright may be sought have been made.

### *Government Publications*

Works produced by the U.S. government and its officers and employees, as part of their official duties are not subject to copyright protection.<sup>29</sup> The effect of this provision is intended to place all such works, whether published or unpublished, in the public domain.

Nevertheless government officials and employees may secure copyright in works they have written independently, outside their official duties, even though the subject matter involves their government work or professional field. A work privately copyrighted is protected regardless of subsequent publication by the government. Works generated by government research contracts, especially when commissioned by a government agency for its own use, can be denied copyright when it is in the public interest to do so.<sup>30</sup> The House Committee on the Judiciary recognizes, however, that there are some cases where the denial of copyright protection would be unfair or would hamper the production and publication of important works. The House Report further suggests that Congress or the agency involved can remedy this problem by specific legislation, agency regulation or contractual restriction.<sup>31</sup>

It should be noted, however, that prohibition on copyright protection for United States government works is not intended to have any effect on the protection provided these works abroad. This is primarily because works of most foreign governments are copyrighted.<sup>32</sup>

### *Works for Hire*

The new law incorporates the basic principle of the old law in the case of works made for hire. The employer is still considered the

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28. *Id.* at § 106(5).

29. *Id.* at § 105.

30. Copyright Law Revision, H.R. REP. NO. 94-1476, 94th Cong. 2d Sess. 59 (1976) [hereinafter cited as HOUSE REPORT].

31. *Id.*

32. *Id.*

author of the work, and is regarded as the initial owner of copyright absent an agreement to the contrary.<sup>33</sup> Any agreement under which the employee is to own rights must be in writing and signed by the parties.<sup>34</sup> The impact of this provision is a copyright statute of frauds. No argument on behalf of the employee-author of an implied ownership of copyright will prevail.

The old law made no provisions for works made on commission or on special order by independent contractors. It was therefore within the discretion of courts to interpret the rights in works created by an independent contractor.<sup>35</sup> From early decisions, there evolved a general principle that where a person is engaged (as an independent contractor) to produce a work capable of copyright protection, the presumption arises that, in the absence of an express contractual reservation of copyright in the independent contractor or artist, the title to the copyright shall be in the person who commissioned the work.<sup>36</sup> The new law points to the opposite direction. If the work is "specially ordered or commissioned" for a certain purpose,<sup>37</sup> the parties must "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."<sup>38</sup> Without such written agreement, there is absolutely no way the employer will be considered to own the copyright. For the first time, the copyright of a commissioned work belongs to the artist unless the work falls within the statutory definition of "[a] work made for hire."<sup>39</sup>

33. Copyright Act, *supra* note 3, at § 201(a) & (b). By retaining the old law's denial of copyright to the author of works made for hire §§ 203(a) and 304(c) rights of termination naturally do not apply.

34. Copyright Act, *supra* note 3, at § 201(b).

35. See, e.g., *Brattleboro Publishing Co. v. Winmill Publishing Corp.*, 369 F.2d 565 (2d Cir. 1966); *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965); *Lumiere v. Robertson—Cole Distributing Corp.*, 280 F. 550 (2d Cir. 1922); *Altman v. New Haven Union Co.*, 254 F. 113 (D. Conn. 1918); *Picture Music, Inc. v. Bourne, Inc.*, 314 F. Supp. 640 (S.D.N.Y. 1970), *aff'd* 457 F.2d 1213 (2d Cir. 1972).

36. *Lin-Brook Builders Hardware v. Gertler*, 352 F.2d 298 (9th Cir. 1965); *Yardley v. Houghton Mifflin Co.*, 108 F.2d 28 (2d Cir. 1939); *W. H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928); *Grant v. Kellogg Co.*, 58 F. Supp. 48 (S.D.N.Y. 1944); *Dielman v. White*, 102 F. 892 (C.C.D. Mass. 1900); *Tumey v. Little*, 18 Misc. 2d 462, 186 N.Y.S.2d 94 (1959). See also *Uproar Co. v. National Broadcasting Co.*, 81 F.2d 373 (1st Cir. 1936).

37. Copyright Act, *supra* note 3, at § 101, limits these purposes to works "for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas. . . ."

38. Copyright Act, *supra* note 3, at § 101.

39. *Id.* By granting copyright protection to artists of certain commissioned works, it is important to recognize that the new law also affords these artists the benefits of transfer terminations provided in §§ 203(a) and 304(c).

*Fair Use Doctrine*

The new law adds a provision to the statute specifically recognizing the principle of "fair use" as a limitation on the exclusive rights of copyright owners, and further indicates the factors to be considered in determining whether the use made is a "fair use."<sup>40</sup> They are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for a value of the copyrighted work. With reference to the purpose and character of the use, Congress added an additional factor to be considered by the courts to decide whether the "fair use" doctrine applies—a consideration which is of value to scholarly researchers and educators—namely, "whether such use is of a commercial nature or is for nonprofit educational purposes."<sup>41</sup> The House Report explicitly notes that this provision "is an express recognition that, as under the present law, the commercial or nonprofit character of an activity while not conclusive with respect to fair use, can and should be weighed along with other factors in fair use decisions."<sup>42</sup> Congress expects the courts to be free to adapt the doctrine to particular situations on a case-by-case basis. Thus, section 107 codifies the present equitable doctrine of fair use which the courts should apply according to the specific facts of a case. The commonly accepted criteria of "fair use," as now delineated in the new law, provides that copyrighted works can be reproduced for purposes such as criticism, comment, newsreporting, teaching, research and things of a similar nature if those uses are fair.<sup>43</sup>

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40. Copyright Act, *supra* note 3, at § 107.

41. *Id.* at § 107(1).

42. HOUSE REPORT, *supra* note 30, at 66.

43. Should you be accosted by your teacher-neighbors for free legal advice vis-a-vis their playing the xerox machine at school next year, I suggest that you refer them to the "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions" (West Point could use a copy), prepared by the Ad Hoc Committee of Educational Institutions and Organizations and others. These guidelines set forth requirements such as spontaneity on the part of the teacher; a limit of one copy per pupil; brevity, for instance, a copy of a poem can't exceed 250 words; no more than one copying operation per author, and so on in great detail. The purpose of the guidelines is to state the minimum standards of educational fair use under section 107 of the new law. The educational community is not in agreement with these guidelines, considering them too limiting for pedagogical programs in institutions of higher learning, such as professional schools and graduate university programs. The Association of American Law Schools, for example, has noted its dissatisfaction. *Id.* at 66-72.

*Reproduction by Libraries and Archives*

In addition to the provision for "fair use," the new law specifies circumstances where the making or distribution of *single* copies of works by libraries and archives for *noncommercial* purposes does not constitute a copyright infringement. For example, it is not an infringement for a library or archives, or any of its employees acting within the scope of their employment, to reproduce or distribute not more than one copy or phonorecord of a work under all three of the following conditions. (1) The reproduction or distribution is made without any purpose of direct or indirect commercial advantage. (2) The collections of the library or archives are open to the public or available not only to researchers affiliated with the library or archives, but also to other persons doing research in a specialized field. (3) The reproduction or distribution of the work includes a notice of copyright.<sup>44</sup> By negative inference all other reproductions

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44. Copyright Act, *supra* note 3, at § 108(a). Additionally, section 108(a)(1) has raised questions as to the status of photocopying done by or for libraries or archival collections affiliated with industrial, profitmaking, or proprietary institutions such as the research and development departments of chemical, pharmaceutical, automobile, and oil corporations, the library of a proprietary hospital, the collections owned by a law or medical partnership, etc. In this context, the House Report sets forth Congressional intent as to the meaning of "indirect commercial advantage." It states that:

There is a direct interrelationship between this problem and the prohibitions against "multiple" and "systematic" photocopying in section 108(g)(1) and (2). Under section 108, a library in a profit-making organization would not be authorized to:

- (a) use a single subscription or copy to supply its employees with multiple copies of material relevant to their work; or
- (b) use a single subscription or copy to supply its employees, on request, with single copies of material relevant to their work, where the arrangement is "systematic" in the sense of deliberately substituting photocopying for subscription or purchase; or
- (c) use "interlibrary loan" arrangements for obtaining photocopies in such aggregate quantities as to substitute for subscriptions or purchase of material needed by employees in their work.

Moreover, a library in a profit-making organization could not evade these obligations by installing reproducing equipment on its premises for unsupervised use by the organization's staff. Isolated, spontaneous making of single photocopies by a library in a for-profit organization, without any systematic effort to substitute photocopying for subscriptions or purchases, would be covered by section 108 [(a) and (g)] even though the copies are furnished to the employees of the organization for use in their work. Similarly, for-profit libraries could participate in interlibrary arrangements for exchange of photocopies, as long as the production or distribution was not "systematic." These activities, by themselves, would

or distributions would constitute an actionable infringement of copyright.<sup>45</sup>

A purely commercial enterprise could not establish a collection of copyrighted works, call itself a library or archive, and engage in for-profit reproduction and distribution of photocopies. Such an operation would be providing reproductions for the purpose of direct commercial advantage. Similarly, it would not be possible for a non-profit institution, by means of contractual arrangements with a commercial copying enterprise, to authorize the enterprise to carry out copying and distribution functions that would be exempt if conducted by the non-profit institution itself.

The new law delineates several other conditions under which *single* copies of copyrighted materials may be non-commercially reproduced by librarians. It is not an infringement of copyright for a library or archives or its employees to reproduce a single copy of an unpublished work in its collection, when it is done solely for purposes of conservation or for deposit or research use in another library.<sup>46</sup> Reproduction is authorized for purposes of replacement of a published work which is deteriorating or has been lost or stolen but only after an unsuccessful attempt is made to replace it at a fair price.<sup>47</sup> An entire work may be reproduced if it has been established that a copy can not be obtained at a fair price, i.e., out-of-print, after reasonable investigation.<sup>48</sup>

Librarians are relieved from an obligation to supervise photocopying under certain conditions. A library or archives or its employees are exempted from liability for the unsupervised use of

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ordinarily not be considered "for direct or indirect commercial advantages," since the "advantage" referred to in this clause must attach to the immediate commercial motivation behind the reproduction or distribution itself, rather than to the ultimate profit-making motivation behind the enterprise in which the library is located. On the other hand, section 108 would not excuse reproduction or distribution if there were a commercial motive behind the actual making or distributing of the copies, if multiple copies were made or distributed, or if the photocopying activities were "systematic" in the sense that their aim was to substitute for subscriptions or purchases.

HOUSE REPORT, *supra* note 30, at 74-75.

45. *Id.*

46. *Id.* at § 108(b).

47. *Id.* at § 108(c).

48. *Id.* at § 108(e). Note, however, that the use of such reproduced material is subject to the same restrictions and warnings as required by § 108(d). For a full discussion see note 50 *infra* and accompanying text.

reproducing equipment located on its premises.<sup>49</sup> This exemption applies only if a notice is prominently displayed near the equipment, to the effect, that the unauthorized making of a copy of a copyrighted work may be an infringement of the copyright law. It should be noted, however, that this exemption from liability if infringement of copyright results applies only to the library and its employees. The individual making such an unauthorized copy may well be liable.

There is an explicit provision for single copies used in interlibrary loan arrangements subject to certain limitations. It is permissible to reproduce an article, a short work in a copyrighted collection, or an issue of a periodical for distribution through an interlibrary loan. The copy must become the property of the user, however, and cannot merely be lent-out and later recirculated. The use of the reproduction is limited to private study, scholarship or research. Additionally, the library or archives must prominently display a warning of copyright both at the place where the orders are accepted and on the order form itself.<sup>50</sup> On the other hand, the new law emphatically disables members of a network or consortium from sharing resources through interlibrary loan transactions involving multiple photocopies. Section 108(g)(1) states that the limited privilege of one library to reproduce and distribute single copies of journal articles and small parts of other copyrighted works to other libraries in interlibrary loan transactions does not extend "to cases where the library or archives . . . is engaging in the related or concerted reproduction or distribution of multiple copies . . . of the same material . . . over a period of time." Section 108(g)(2) prohibits a library or archives or its employees from engaging in the "systematic reproduction or distribution of single or multiple copies. . . ." The adverse effect upon interlibrary loan arrangements is readily apparent. The House Report indicates that this section "provoked a storm of controversy centering around the extent to which the restrictions on 'systematic' activities would prevent the continuation and development of interlibrary networks and other arrangements involving the exchange of photocopies."<sup>51</sup> In response to this controversy, there is a proviso in section 108(g)(2) stating that nothing in this section "prevents a library or archives from participating in interlibrary arrangements that do not have, as their purpose or effect, that the library or archives receiving such copies or phonorecords . . . does so in such aggregate quantities as to

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49. Copyright Act, *supra* note 3, at § 108(f).

50. *Id.* at § 108(d).

51. HOUSE REPORT, *supra* note 30, at 77-78.

substitute for a subscription to or purchase of such work."<sup>52</sup> Participating institutions are seemingly free to exchange multiple copies if they do not do so to avoid purchasing new acquisitions.

Congress clarified this situation in the House Conference Report which created guidelines embodying an agreement reached among the representatives of library, publisher and author organizations with the encouragement of the National Commission on New Technological Uses of Copyrighted Works (CONTU) and under its aegis.<sup>53</sup> The agreement is reflected in the "Guidelines" interpreting the provisions of subsection 108(g)(2) and allows a "requesting" library to obtain on interlibrary loan at least five copies during a calendar year of an article published in a periodical within five years prior to the date of the request. Receipt of a sixth copy will be considered as a violation of systematic photocopying of copyrighted materials to the extent that the library receiving such sixth or additional copies "does so in such aggregate quantities as to substitute for a subscription of or purchase of such work."<sup>54</sup>

### *Copyright Royalty Tribunal*

The new law creates a Copyright Royalty Tribunal. Its function will be to determine whether copyright royalty rates in connection with sound recordings of music, playings on jukeboxes and cable television are reasonable and, if not, to adjust them.<sup>55</sup> In certain circumstances, the Tribunal will determine the distribution of those statutory royalty fees deposited with the Register of Copyrights.<sup>56</sup> Also established is a form of compulsory licensing for the use of music and graphic works by non-commercial broadcasters, with the terms and rates of the licenses also to be set ultimately by this Tribunal if the copyright owners and public broadcasting entities do not reach voluntary agreement.<sup>57</sup> An apparent trend toward more governmental intervention is discernable by the creation of the Tribunal and requirements for more compulsory licenses in the Copyright field.

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52. *Id.* at 78.

53. *General Revision of the Copyright Law, Title 17 of the United States Code*, H.R. CONF. REP. NO. 94-1733, 94th Cong., 2d Sess. 70-74 reprinted in [1976] U.S. CODE CONG. & AD. NEWS 5811-5815.

54. *Id.* at 72-73.

55. Copyright Act, *supra* note 3, at § 801.

56. *Id.*

57. *Id.* at § 118.

*Sound Recordings and Recording Rights in Music*

The old law did not protect sound recording copyrights until the Sound Recording Amendment of 1971.<sup>58</sup> This amendment marked the first recognition in federal copyright law of sound recordings as copyrightable works. The new law retains the added provisions and accords protection against unauthorized duplication.<sup>59</sup> It also raises the statutory royalty of compulsory license from the previous rate of two cents to a rate of two and three-fourth cents or one half cent per minute of playing time, whichever amount is larger.

The new law does not, however, create a performance right for sound recordings as such.<sup>60</sup> The lack of such protection has been criticized by some of the leaders in the United States music industry as being a factor in discouraging young people from studying and making a career in professional music. When the interests of these people were brought before the congressional committee, such a strong case was made that it would appear now that within the next few years we will see an amendment to the Copyright Act securing some modicum of recompense for their efforts. An interesting aspect of the appearances before the Committee on the Judiciary was a performance given by Julie London which demonstrated just how much the individual performer can contribute over and above the contribution of the author of the music itself.<sup>61</sup> Miss London gave a highly imaginative and very sultry rendition of the Mickey Mouse Club theme song.<sup>62</sup>

*Exempt Performances and Face-to-Face Teaching Activities*

The new law accords the copyright owner comprehensive rights, exclusive in nature, concerning public performance of their works.<sup>63</sup> It also removes the old law's general exemption regarding not "for profit" public performances of non-dramatic literary and musical works. Several specific exemptions for certain types of non-profit uses, however, are provided. Thus, it is not an infringement of copyright if the performance or display of a work by instructors or

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58. See PUB. L. NO. 92-140, § 1(f) & (n), 85 Stat. 391 (1971) (amending 17 U.S.C. § 1, 5 (1970)).

59. Copyright Act, *supra* note 3, at § 102(a)(7).

60. *Id.* at § 114(a).

61. Copyright Law Revision: Hearings on S.597 Before the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary, 90th Cong., 1st Sess. 818-819 (1967) (Statement of Julie London).

62. *Id.*

63. See Copyright Act, *supra* note 3, at § 106(4) & (5).



pupils occurs in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.<sup>64</sup>

The House Report provides the framework for interpreting the language of this exemption. The term "instructors" is intended to be broad enough to cover a guest lecturer and the like. Outside performers can not, however, be brought in order to successfully avoid copyright infringement. In general, the term "pupils" refers to the enrolled members of a class.<sup>65</sup> The "Face to Face" provision excludes broadcasting and other transmissions, whether radio or television, open or closed circuit, from an outside location into a classroom.<sup>66</sup> The exemption does, however, extend to the use of devices for amplifying or reproducing sound and for projecting visual images, provided that the instructor and the students are in the same area.<sup>67</sup>

Certain types of public performances and displays because of their noncommercial or special nature are exempted.<sup>68</sup> Included under this exemption are the performances of a non-dramatic literary or musical work and displays of a work transmitted as a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution. This exemption, however, only applies if used as part of the teaching content and primarily for reception in classrooms or for disabled persons or to governmental employees as part of their official duties. Also exempted are: performances for religious services of non-dramatic literary or musical works or of a dramatico-musical work of religious nature; not-for-profit performances of nondramatic literary and musical works other than a transmission to the public; provided neither performers, promoters or organizers are paid or compensated and there is no admission charge, or where there is a charge, if the net proceeds are for educational, religious, or charitable purposes.<sup>69</sup> Nevertheless, even in an exempted activity, if the copyright owner objects to the performance in writing, the performance is no longer exempt.<sup>70</sup>

Other exemptions include communications to the public of a transmission of a multiple performance (secondary transmission) on

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64. *Id.* at § 110(1).

65. *See* HOUSE REPORT, *supra* note 30, at 82.

66. *Id.* at 81.

67. *Id.*

68. Copyright Act, *supra* note 3, at § 110.

69. *Id.* at § 110(4).

70. *Id.* at § 110(4)(B).

a single private receiving set, unless a charge is made or the communications go beyond the place where the receiving apparatus is located.<sup>71</sup> Performances of a nondramatic literary work, specially designed for blind or other handicapped persons unable to read normal, printed material, or designed for the deaf or other handicapped persons unable to hear also are exempt, if the performances are non-profit and the transmissions are made through the facilities of a non-commercial educational broadcast station or a cable system.<sup>72</sup> The new law also gives broadcasting organizations a limited privilege of making "ephemeral recordings" of their broadcasts.<sup>73</sup>

### *Jukebox Royalty*

For the first time, the new law requires the operator of a coin-operated phonorecord player to obtain a compulsory license to perform the copyrighted music publicly on the phonorecord player. The owner must file an application, affix the certificate to the machine, and pay an annual royalty fee of eight dollars per jukebox to the Register of Copyrights for later distribution by the Copyright Royalty Tribunal to the copyright owners. If such performances are made available on a particular phonorecord player after July 1 of any year, the royalty fee deposited for the remainder of that year shall be four dollars.<sup>74</sup>

### *Cable Television and Secondary Transmission*

The complex and economically significant problem of "secondary transmission" is dealt with in section 111.<sup>75</sup> For the most part, this section is directed to the operation of cable television systems (CATV) and the terms and conditions of their liability for the retransmission of copyrighted works. A compulsory license for cable systems has hereby been established. The new law provides that any secondary transmission made to the public by a cable system, of a primary transmission made by a broadcast station licensed by the FCC or by an appropriate governmental authority of Canada or Mexico, is subject to compulsory licensing.<sup>76</sup> The CATV operators

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71. *Id.* at § 110(5).

72. *Id.* at § 110(8).

73. *Id.* at § 112.

74. *Id.* at § 116.

75. *Id.* at § 111(f) defines "secondary transmission as "the further transmitting of a primary transmission simultaneously with the primary transmission, or non-simultaneously with the primary transmission if by a 'cable system' . . . ."

76. Copyright Act, *supra* note 3, at § 111(c).

are required to identify and record, then deposit with the Register of Copyrights a semi-annual statement of account, and finally, to make royalty fee payments for the period covered by the statement of account.<sup>77</sup> The compulsory license provision would apply only to the broadcast of the signals comprising the secondary transmission which is permissible under the rules and regulations of the FCC. Furthermore, the royalty payments are computed on the basis of specified percentages of the gross receipts from cable subscribers during the period covered by the statement.<sup>78</sup> For purposes of computing royalty payments, only receipts concerning the basic service of providing secondary transmissions of primary broadcast transmitters are to be considered. Other receipts from subscribers, such as those for pay-cable services or installation charges, are not included in gross receipts.<sup>79</sup>

Certain secondary transmissions receive general exemptions.<sup>80</sup> The first of these applies to secondary transmissions consisting "entirely of the relaying, by the management of a hotel, apartment house, or similar establishment" of a transmission to the private lodgings of guests or residents and provided "no direct charge is made to see or hear the secondary transmission."<sup>81</sup> This exemption is not applicable if the secondary transmission consists of anything other than the mere relay of ordinary broadcasts. The deletion of advertising, the addition of new commercials, or any other change in the signal relayed would subject the secondary transmitter to full liability. Moreover, the term "private lodgings" is limited to rooms used as living quarters or for private parties, and does not include dining rooms, meeting halls, theatres, ballrooms, or similar places that are outside of the normal circle of a family and its social acquaintances.<sup>82</sup> Three further exemptions are provided for secondary transmissions.<sup>83</sup> First, an instructional transmission is exempt whether "primary or secondary" so long as it falls within the scope of section 110(2).<sup>84</sup> Second, a carrier is exempt if it "has no direct or indirect control over the content or selection of the primary transmission or over the particular recipients of the secondary transmission." For this purpose, its activities must "consist solely of

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77. *Id.* at § 111(d).

78. *Id.*

79. See HOUSE REPORT, *supra* note 30, at 96.

80. Copyright Act, *supra* note 3, at § 111(a).

81. *Id.* at § 111(a)(1).

82. HOUSE REPORT, *supra* note 30, at 91-92.

83. Copyright Act, *supra* note 3, at § 111(a) (2-4).

84. *Id.* at § 111(a)(2).

providing wires, cables, or other communications channels for the use of others."<sup>85</sup> Third, the operations of non-profit "translators" or "boosters," which do nothing more than amplify broadcast signals and retransmit them to everyone in an area for free reception, would be exempt if there is no charge to the recipients "other than assessments necessary to defray the actual and reasonable costs of maintaining and operating the secondary transmission service."<sup>86</sup> This last exemption, however, would not apply to a cable television system.<sup>87</sup>

### *Notice of Copyright*

The new law retains the requirement that notice of copyright must appear on all publicly distributed copies. The form of this notice shall consist of the copyright symbol, the year of first publication, and the name of the copyright proprietor.<sup>88</sup> The copyright symbol may be © (the letter C in a circle) or the word "Copyright", or the abbreviations "Corp.";<sup>89</sup> for sound recordings, the symbol ® (the letter P in a circle) must be used.<sup>90</sup> The year date may be omitted, however, where a pictorial, graphic or sculptural work, with accompanying text matter, if any, is reproduced in or on greeting cards, postcards, stationery, jewelry, dolls, toys or any useful articles. In cases involving compilations or derivative works incorporating previously published material, the year of first publication of the compilation or derivative work is sufficient.<sup>91</sup>

With respect to the notice provisions, the new law merely requires the symbol to be affixed in a manner and location that will give reasonable notice of the claim of copyright. The Register shall prescribe by regulation how this is to be done.<sup>92</sup>

It is noteworthy that the outright omission of a copyright notice does not automatically forfeit copyright protection and cast the work into the public domain. Not only does this represent a major change in the theoretical framework of American copyright law, but it also seems certain to have immediate practical consequences in a great many individual cases. Omission of notice, whether inten-

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85. *Id.* at § 111(a)(3).

86. *Id.* at § 111(a)(4).

87. *Id.*

88. See Copyright Act, *supra* note 3, at § 401(b).

89. *Id.*

90. *Id.* at § 402(b).

91. Copyright Act, *supra* note 3 at § 402(b)(1).

92. *Id.* at § 401(c).

tional or unintentional, does not invalidate the copyright if either of two conditions is met: (1) if "no more than a relatively small number" of copies or phonorecords have been publicly distributed without notice; or (2) if registration for the work has already been made, or is made within five years after the publication without notice, and a reasonable effort is made to add notice to copies or phonorecords publicly distributed in the United States after the omission is discovered.<sup>93</sup> Thus, if notice is omitted from more than a "relatively small number" of copies or phonorecords, copyright is not lost immediately, but the work will go into the public domain if no effort is made to correct the error or if the work is not registered within five years.

Innocent infringement of a work without notice is a defense to an action for actual or statutory damages.<sup>94</sup> The burden is on the innocent infringer to prove that he did not have actual notice of the copyright and that he was misled by the lack of notice in order for the defense to prove that he did not have actual notice of the copyright and that he was misled by the lack of notice in order for the defense to be effective.

When a notice of copyright is defective because the name or date has been incorrectly stated, the result, while fatal under the old law, is not so under the new law. The validity or ownership of the copyright is protected where the registration has been made in the name of the true owner or where "a document executed by the person named in the notice and showing the ownership of the copyright has been recorded" in spite of defective notice.<sup>95</sup> Defects due to wrongly stated dates include antedated and postdated notice. When the year in the notice is earlier than the year of first publication, however, the statutory term is computed from the year given in the notice.<sup>96</sup> It is evident that this applies to anonymous works, pseudonymous works, and works made for hire.<sup>97</sup> When the year in the notice is one more than the year of first publication, it is treated as if the notice had been omitted<sup>98</sup> and is governed by section 405. When the name or date is omitted from the notice, section 406(c) provides that the work is considered by statute to have been published without any notice.<sup>99</sup>

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93. *Id.* at § 405(a).

94. *Id.* at § 405(b).

95. *Id.* at § 406(a).

96. *Id.* at § 406(b).

97. *See Id.* at § 302(c).

98. *See* notes 93 and 94 *supra* and accompanying text.

99. Copyright Act, *supra* note 3, at § 406(c).

*Deposit and Registration*

Unlike the old law, deposit and registration are treated as separate procedures under the new law, but the two can be combined. Neither deposit nor registration will be a condition to copyright protection. Deposit is mandatory within three months after the work is first published in the United States with a notice of the copyright. Two copies of the best edition are to be deposited.<sup>100</sup> Furthermore, the Register may make a written demand for the required deposit and failure to comply would result in penalty to the defaulting party. A fine up to \$250 for each work, plus the total retail price of the copies demanded or the reasonable cost expended by the Library of Congress in acquiring them, if no retail price has been fixed, can be imposed.<sup>101</sup>

While registration is not mandatory, there are incentives to register promptly. In any judicial proceedings, a certificate of registration secured before or within five years after the first publication constitutes *prima facie* evidence of the validity of the copyright and of the facts stated in the certificate. The evidentiary weight to be accorded a certificate of registration secured thereafter is within the discretion of the court.<sup>102</sup> In addition, "registration" is not only a pre-requisite to any infringement action,<sup>103</sup> but is also a pre-requisite to certain remedies.<sup>104</sup> For example, no award of statutory damages or attorney's fees may be made for any copyright infringement of an unpublished work commenced before the effective date of registration, or for any copyright infringement commenced after first publication of the work and before the effective date of its registration, unless registration is made within three months after the first publication.<sup>105</sup>

*Manufacturing Clause*

On July 1, 1982,<sup>106</sup> some 92 years after its embodiment into American law as a form of trade protection for United States printing industries and American labor, the manufacturing clause will cease to be a part of the copyright statute. During the interim

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100. *Id.* at § 407(a).

101. *Id.* at § 407(d).

102. *Id.* at § 410(c).

103. *Id.* at § 411(a).

104. *Id.* at § 412.

105. *Id.*

106. *See Id.* at § 601(a). *See also* 122 CONG. REC. S 17253 (daily ed. Sept. 30, 1976).

period between now and then, the manufacturing clause will be substantially liberalized. The new law equates manufacture in Canada with manufacture in the United States.<sup>107</sup> The requirement of manufacture in the United States or Canada is satisfied if the setting of type or the making of the plates has been performed in either of the two countries. Furthermore, this requirement for manufacture in the United States or Canada will apply only to works consisting principally of nondramatic literary material in English. Even where the work as a whole comes within the manufacturing requirement, those parts of it not subject to the requirement (illustrations, foreign-language text, etc.) can be manufactured abroad.<sup>108</sup> The requirement will apply only to works by American authors and will not apply where the author's permanent residence is outside the United States or where the individual author independently arranges for first publication outside the United States through a foreign publisher.<sup>109</sup>

The principal sanction for failure to comply with the manufacturing requirements between January 1, 1978, and July 1, 1982, will be limitations on the number of copies that can be imported.<sup>110</sup> As under the old law, the Copyright Office will issue import statements permitting 2000 copies (500 more than under the old law) to be brought into the United States for distribution.<sup>111</sup> The statute clearly provides that violation of this requirement does not invalidate the copyright.<sup>112</sup> In the event that more than 2000 copies are imported, the copyright owner loses protection only against an infringer of publishing rights; other rights are not affected, and even publishing rights can be restored by manufacture and registration of a domestic edition.<sup>113</sup>

### *Divisibility of Copyright*

Since the old law spoke of a single "copyright"<sup>114</sup> to which the author of a work was entitled, and referred in the singular to "the copyright proprietor,"<sup>115</sup> it was inferred that the bundle of rights<sup>116</sup>

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107. See Copyright Act, *supra* note 3, at § 601(a) & (c).

108. Copyright Act, *supra* note 3, at § 601(a).

109. *Id.* at § 601(b).

110. *Id.* at § 601(b)(2).

111. *Id.*

112. *Id.* at § 601(d).

113. *Id.*

114. See, e.g., old law, *supra* note 1, at § 10.

115. *Id.* at §§ 1, 2, 3, 7, 8, 9, 10, 12, 14, 19, 21, 22, 24, 25, 26, 28, 101, 107, 109, 214, 215.

116. *Id.* at § 1.

which accrue to a copyright owner were "indivisible," that is, incapable of assignment in parts.<sup>117</sup> This "concept of indivisibility," if literally followed, rendered it impossible to assign anything less than the totality of rights commanded by copyright. Therefore, any grant of rights less than the entire copyright was regarded as merely a license, and not an assignment of ownership.

The new law abolishes the "doctrine of indivisibility" entirely and clearly states that "any of the exclusive rights comprised in a copyright, including any subdivision of any rights specified by section 106, may be transferred . . . and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner under this title."<sup>118</sup> Consequently, infringement takes place when any one of the rights is violated. There can no longer be any question about an author's right to divide up a copyright in the most remunerative way, and to retain for future bargaining those portions that he does not wish to include in the transfer.

### CONCLUSION

Dissatisfaction with the 1909 Copyright Act appears to have started about 1924 and continued to 1976. Looking over the myriad of proposed revision bills over that period, it is hard to believe that after several decades of heated debates, intensive lobbying and revision efforts, Congress finally enacted a very complex, modern, and sophisticated copyright statute consonant with the technological advances of the century.

As the reader may have already concluded, the single most dominant trend in this legislation has been the utilization of compulsory licenses to balance the competing interests of creators and users of copyrighted works. It contains provisions clearly intended to induce efforts toward voluntary agreement and licensing with a clear forewarning of government intervention should they fail.<sup>119</sup> The new law also provides a mechanism for less drastic revision whenever the need arises. Perhaps the most interesting legal

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117. *Goldwyn Pictures Corp. v. Howells Sales Co.*, 282 F. 9 (2d Cir. 1922); *M. Witmark & Sons v. Pastime Amusement Co.*, 298 F. 470 (E.D.S.C. 1924); *New Fiction Pub. Co. v. Star Co.*, 220 F. 994 (S.D.N.Y. 1915). See *Commissioner v. Wodehouse*, 337 U.S. 369 (1949); *Dam v. Kirke La Shelle Co.*, 166 F. 589 (C.C.S.D.N.Y. 1908), *aff'd* 175 F. 902 (2d Cir. 1910).

118. See, e.g., Copyright Act, *supra* note 3, at §§ 108(i), 118(b) & (d).



change brought about by the new law is the almost false pre-emption of the common law copyright of the states. Overall, it is a fine piece of legislation, but it will take time to appreciate the intricacies and ramifications of the whole law. This article was intended only as a beginning point in the understanding and usage of a complicated though vastly improved federal copyright statute.