Promoting the Progress of Science and Useful Arts
A Commentary on the Copyright Office Report on General Revision of the United States Copyright Law

Morton David Goldberg
PROMOTING THE PROGRESS OF SCIENCE AND USEFUL ARTS: A COMMENTARY ON THE COPYRIGHT OFFICE REPORT ON GENERAL REVISION OF THE UNITED STATES COPYRIGHT LAW

Morton David Goldberg†

I invite you to participate in the writing of a new copyright law. If history is a reliable guide, you and I are not likely to have another opportunity to do so in our careers.²

On July 7, 1961 the Librarian of Congress transmitted to Congress a document entitled COPYRIGHT LAW REVISION: Report of the Register of Copyrights on the General Revision of the U. S. Copyright Law.³ The end product of a series of copyright law revision studies conducted by the Copyright Office over several years,⁴ the Report contains the tentative recommendations of the Copyright Office for the revision of the present Copyright Act,⁵ which is essentially the statute enacted by Congress in 1909.⁶ The present article attempts to summarize these recommendations and their background;⁷ to suggest, in some instances, alternative proposals; and to set forth certain principles for application

† See contributors' section, masthead p. 631, for biographical data.
‡ Copyright © 1962 Morton David Goldberg. All Rights Reserved. For helpful comments on this article, the writer acknowledges especial gratitude to Barbara A. Ringer and Alan Latman. However, neither Miss Ringer nor Mr. Latman is necessarily of the same views as expressed herein, for which views the writer is solely responsible.
1 Address by Hon. Abraham L. Kaminstein, Register of Copyrights, at annual meeting of ABA Section of Patent, Trademark and Copyright Law, Aug. 5, 1961, Proceedings, 122.
3 Staff of Subcomm. No. 3 (Patents, Trademarks and Copyrights), House Committee on the Judiciary, 87th Cong., 1st Sess. (1961), cited hereinafter as "Report."
No general revision bill is pending in Congress at the present time, but the Copyright Office is presently preparing a tentative draft of such a bill.
4 These studies, sometimes hereinafter referred to as the "Copyright Office Studies," have been published as a series of eleven Senate Committee Prints by the Subcommittee on Patents, Trademarks and Copyrights of the Senate Committee on the Judiciary. They comprise to the writer's knowledge the most encyclopaedic treatment extant of the American copyright law, including its legislative and judicial history and its comparison with the laws of other countries. See note 26, infra.
5 17 U.S.C. (1958). Unless otherwise indicated by the context, references herein to "the act" are to this title, and section references, to the sections as presently codified therein.
7 In discussing the cases and predecessor acts, the writer has made no attempt to duplicate the excellent treatment thereof available in the Copyright Office Studies, see notes 4, supra, and 26, infra. Moreover, the introduction to each of the recommendations in the Report itself contains a helpful summary of the context within which the respective recommendations are to be considered. The references in this article are therefore foreshortened to those deemed necessary for comprehension of the discussion.
8 To impose a working limitation on the discussion itself, the article has been confined arbitrarily to the explicit questions with which the Report's recommendations are concerned. Accordingly, the scope of the article does not include discussion of the droit moral (moral right), droit de suite, lending right, domaine public payant, etc.
in the consideration of copyright law revision. This writer supports most of the Report's recommendations; issue can be taken with some of them—as this article does—but the Report constitutes a distinguished contribution by the Register of Copyrights and his able staff to furthering the cause of copyright law revision.

The Report's summary of its recommendations is set forth in the Appendix at the conclusion of this article.

**Table of Contents**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>I. The Need for Copyright Law Revision</strong></td>
<td>552</td>
</tr>
<tr>
<td><strong>II. Unpublished Works: Common Law and Statutory Protection</strong></td>
<td>556</td>
</tr>
<tr>
<td>A. The Present Dual System</td>
<td>556</td>
</tr>
<tr>
<td>B. The Report's Recommendations</td>
<td>558</td>
</tr>
<tr>
<td>C. The Advantages of an Alternative to the Report's Recommendation</td>
<td>559</td>
</tr>
<tr>
<td>1. Easier access to unpublished letters and manuscripts</td>
<td>559</td>
</tr>
<tr>
<td>2. Greater national uniformity</td>
<td>560</td>
</tr>
<tr>
<td>3. Fewer evidentiary problems</td>
<td>561</td>
</tr>
<tr>
<td>4. Closer alignment of the United States copyright law with that of major foreign countries</td>
<td>562</td>
</tr>
<tr>
<td>D. Possible Difficulties in the Suggested Alternative to the Report's Recommendation</td>
<td>562</td>
</tr>
<tr>
<td>1. United States obligations under the Universal Copyright Convention with respect to unpublished works</td>
<td>562</td>
</tr>
<tr>
<td>2. The Constitutional requirement of due process</td>
<td>565</td>
</tr>
<tr>
<td><strong>III. Duration of Copyright</strong></td>
<td>567</td>
</tr>
<tr>
<td>A. Inception of Copyright—the Alternatives and the Report's Recommendation</td>
<td>567</td>
</tr>
<tr>
<td>B. The Proposal for Copyright from &quot;First Public Dissemination&quot; Com- pared with an Alternative Proposal of Copyright from Creation</td>
<td>569</td>
</tr>
<tr>
<td>1. The evidentiary problem</td>
<td>569</td>
</tr>
<tr>
<td>2. The lack of uniformity under a &quot;life-plus&quot; system between the terms for works of identified natural authors and those of others</td>
<td>571</td>
</tr>
<tr>
<td>3. The adjustment to new concepts required if a &quot;life-plus&quot; term is adopted</td>
<td>571</td>
</tr>
<tr>
<td>C. The Renewal System—The Report's Proposal and the Problems</td>
<td>572</td>
</tr>
<tr>
<td>D. The Reversion of Renewal Copyright</td>
<td>576</td>
</tr>
<tr>
<td>E. The Application of the UCC to the Proposed Renewal System</td>
<td>577</td>
</tr>
<tr>
<td>F. The Application of the New Term Proposals to Pre-existing Works</td>
<td>578</td>
</tr>
</tbody>
</table>

8 Recommendations with which the writer differs are noted in the discussion, below, of the substance of the Report. The major recommendations on which the writer's opinion differs from that expressed in the Report relate to the protection of unpublished works and the duration of copyright (chs. IV and V of the Report, discussed in this article in pts. II and III, respectively). The Report recommends that the scheme of common law protection, sensible in perpetuity, be retained (with some modification) for undisseminated works and that the renewal system be retained (again, with some modification) for statutory copyright. The writer suggests that the common law protection be abolished and that all copyright protection be brought under the federal statute for a period, generally, of the life of the author and a term of years—perhaps fifty thereafter. See discussion in pt. II, infra.

9 Report, at v-vii.
IV. COPYRIGHTABILITY—GENERAL STANDARDS AND SPECIFIC WORKS .......... 581
   A. General Standards of Copyrightability .................................. 581
      1. "Writings" ................................................... 581
      2. Originality and creativity .................................... 582
   B. Classification of Copyrightable Works .................................... 582
   C. Copyrightability of Specific Works .................................. 584
      1. Works of applied art ........................................ 584
      2. Architectural drawings and structures .......................... 586
      3. Choreographic works ........................................ 586
      4. Sound recordings ............................................ 586

V. RIGHTS OF COPYRIGHT OWNERS ........................................ 587
   A. The General Rights ............................................ 587
   B. Fair Use ........................................................ 588
   C. Photocopying by Libraries ......................................... 589
   D. The "For Profit" Limitation on the Performance Right ............ 591
      1. The statutory history ........................................ 591
      2. The judicial history ........................................ 592
      3. The position of the Report ................................... 593
   E. The Extension of the Performance Right to Motion Pictures ....... 594
   F. Public Reception of Broadcasts .................................... 597
   G. The Jukebox Exemption ........................................... 599
   H. The Compulsory License for the Recording of Music ............... 600

VI. NOTICE OF COPYRIGHT ................................................ 602
   A. The Present Notice Requirement .................................. 602
   B. The Report's Recommendations Concerning Notice ................ 604
   C. The Copyright Notice Under a System of Copyright from Creation
      of the Work .................................................. 606

VII. REGISTRATION AND DEPOSIT OF COPIES ............................... 607
   A. The Present Registration System ................................ 607
   B. The Report's Proposals Concerning Registration .................. 608
   C. The Deposit System .............................................. 611

VIII. OWNERSHIP OF COPYRIGHT .......................................... 612
   A. Works Made for Hire, and Composite Works ....................... 612
   B. Co-Ownership of Copyright ...................................... 613
   C. Divisibility of Copyright ...................................... 614
   D. Protection of Authors Against Unremunerative Transfers ........... 615
   E. Execution and Recordation of Transfers ........................... 616

IX. REMEDIES FOR INFRINGEMENT ......................................... 617

X. INTERNATIONAL ASPECTS OF COPYRIGHT ................................ 619
   A. Works of Foreign Authors ....................................... 619
   B. The Manufacturing Clause ....................................... 621

XI. MISCELLANEOUS PROBLEMS ............................................. 623
   A. Government Publications ........................................ 623
   B. Regulation of the Performing Rights Organizations ............... 624

XII. ADMINISTRATIVE PROVISIONS .......................................... 625
   A. The Catalog of Copyright Entries ................................ 625
   B. Fees .......................................................... 625

CONCLUSION .......................................................... 626

APPENDIX: THE REPORT IN SUMMARY ..................................... 627
I.
THE NEED FOR COPYRIGHT LAW REVISION

Legal commentators often decry the incursions of outmoded statutes upon common sense. Nowhere is such criticism more applicable, however, than in the unreality of the present copyright law. For example: (1) A book written by an American is printed, bound and first published in Great Britain but is not published in the United States within five years thereafter. By reason of this sequence, the work has entered the public domain in this country. In this context, it is unfortunate for the writer of the book that he is an American citizen, for had he been a national of any other country in the world, he would have been able to obtain United States copyright immediately upon the first publication of his book in Britain. (2) A new play, never before disseminated to the public, is broadcast to an audience of millions. Under the Copyright Act, there has been no "publication" of the play, with the result that the "common law right" continues in perpetuity despite the exploitation of the work. (3) An author who for valuable consideration assigns to a publisher rights in his work for the renewal term of copyright can thereafter execute a will leaving the renewal copyright to a third party. If, before the time for renewal of the copyright, the author dies leaving no widow or children, his legatee—and not the publisher—will receive the rights under the renewal copyright.

The anachronistic 1909 Copyright Act has been recognized as needing revision almost from the time of its enactment. The days of the

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11 17 U.S.C. § 9(c) (1958); Universal Copyright Convention, art. II, and art. III(1).
13 The term "author" is used in this article interchangeably with the term "creator," and except where the context indicates otherwise includes both natural persons and legal entities (for example, a corporation which is an employer in the case of a work made for hire, 17 U.S.C. § 26 (1958)) who create any form of copyrightable work, including a book, play, musical composition, motion picture, photograph, painting, etc. The term "user" in this article includes any person or legal entity who or which exercises rights as a licensee or assignee by publishing the work or recording it, broadcasting it, making a motion picture based on it, etc. A user may also be a creator, as where a motion picture company creates a copyrighted motion picture based on an underlying copyrighted novel or on an original screen play.
Cf. the following President's Message to Congress:
Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under
nickelodeon, the pianola roll and the slow printing press, moreover, have long since given way to the sound (and smell) motion picture, to the long-playing record, and to printing presses on different continents activated simultaneously by electronic typesetter. Radio and television were without significance in 1909 but now constitute an integral part of contemporary life. New microphotographic and electronic means of information processing, storage and retrieval are with us.\(^{16}\) The publishing and "amusement" industry has now matured into an estimated six-billion dollar component of our total national income.\(^{17}\)

The 1909 act was the third of the three general revisions—1831,\(^{18}\) 1870\(^{19}\) and 1909—which have been enacted since the first copyright statute in 1790.\(^{20}\) Although changes in technology and business practices have vastly accelerated since 1909, the forthcoming revision of the 1909 act comes after a lapse of almost sixty years as compared with an interval of approximately forty years in enacting each of the three prior general revisions.\(^{21}\)

In the period between World Wars I and II, several revision bills were introduced in Congress\(^{22}\) which were intended in part to bring the 1909

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\(^{1}\) Of special interest to lawyers is the project currently being conducted by the American Bar Foundation utilizing electronic data retrieval equipment to produce a running index of the approximately 35,000 annual state enactments. See N. Y. Times, Feb. 26, 1962, p. 17, col. 6. See also Freed, "Prepare Now for Machine-Assisted Legal Research," 47 A.B.A.J. 764 (1961).

\(^{16}\) See Blaisdell, "Size of the Copyright Industries," Copyright Law Revision Study No. 2, infra note 27 (1960). According to this study, the copyright industries contributed in 1954 more to the total national income than mining or banking or the electric and gas utilities. Ibid.

\(^{17}\) See Goldman, supra note 15, at 4-11.

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act up to date and in large measure to make the amendments necessary for American membership in the Berne Union. None of these general revision bills were enacted. After World War II, the United States, under the aegis of the United Nations Educational, Scientific and Cultural Organization (UNESCO), participated with other countries in the development of a copyright convention which would be an alternative to membership in the Berne Union. The resulting Universal Copyright Convention became effective in the United States in 1955 and accommodates, as the various versions of the Berne Convention do not, certain characteristic features of the United States copyright law, such as the use of a copyright notice in all copies of published works and the dual term (original and renewal) of copyright for successive periods of years.

The present program for copyright law revision proceeds on a firmer foundation than the previous general revision bills. Over a period of more than five years commencing in 1955, the Copyright Office has undertaken a program of thirty-four separate studies of the major problems to be covered in drafting a revised Copyright Act. The Berne Union, formally designated as the International Union for the Protection of Literary and Artistic Works, consists of almost fifty countries which adhere to the original Berne Convention of 1886 and/or one or more of the revisions thereof adopted in Paris (1896), Berlin (1908), Rome (1928) and Brussels (1948). See 75 Le Droit d'Auteur 20-23 (1962).

The "Vestal bill," H.R. 12549, 71st Cong., 2d Sess. (1930), passed the House but was not brought to a vote in the Senate. See Goldman, supra note 15, at 5-7, for the legislative history. The "Duffy bill," S. 3047, 74th Cong., 1st Sess. (1932), passed the Senate but was not brought to a vote in the House. See Goldman, supra note 15, at 8-9.

The Copyright Office Studies are presently being prepared for incorporation in the near future in two bound volumes as a memorial to the late Arthur Fisher, the Register of Copyrights who initiated the Studies and to whom much is owed for the United States participation in the Universal Copyright Convention and the current revision program. The Studies, as incorporated in the Senate Committee Prints (Subcommittee on Patents, Trademarks and Copyrights, Sen. Comm. on the Judiciary 86th Cong., 1st Sess. (Comm. Print) 1960), are as follows:

First print:
2. Size of the Copyright Industries; by W. M. Blaisdell.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution; by staff members of N.Y.U. Law Review under the guidance of Professor Walter Derenberg.

Second print:
5. The Compulsory License Provisions of the U.S. Copyright Law; by Professor Harry G. Henn.

Third print:
7. Notice of Copyright; by Vincent A. Doyle, George D. Cary, Marjory McCannon, and Barbara A. Ringer.
8. Commercial Use of the Copyright Notice; by W. M. Blaisdell.
10. False Use of Copyright Notice; by Caruthers Berger.

Fourth print:
Report is based upon the results of these studies. It constitutes an excellent, impartial view of the present Act, its defects and certain proposed remedies. The recommendations contained in it are acknowledged by the Copyright Office to be tentative and, as such, intended to serve as a basis for discussion of copyright law revision.\textsuperscript{27}

A major portion of this article is devoted to a discussion of the proposals in Chapters IV ("Unpublished Works: Common Law and Statutory Protection") and V ("Duration of Copyright") of the Report.\textsuperscript{28}

\begin{enumerate}
\item Divisibility of Copyright; by Abraham L. Kaminstein with supplements by Lorna G. Margolis and Arpad Bogsch.
\item Joint Ownership of Copyrights; by George D. Cary.
\item Works Made for Hire and on Commission; by Borge Varmer.
\item Fair Use of Copyrighted Works; by Alan Latman.
\item Photoduplication of Copyrighted Material by Libraries; by Borge Varmer.
\item Limitations on Performing Rights; by Borge Varmer.
\item The Registration of Copyright; by Professor Benjamin Kaplan.
\itemAuthority of the Register of Copyrights to Reject Applications for Registration; by Caruthers Berger.
\item The Recordation of Copyright Assignments and Licenses; by Alan Latman assisted by Lorna G. Margolis and Marcia Kaplan.
\item Deposit of Copyrighted Works; by Elizabeth K. Dunne.
\item The Catalog of Copyright Entries; by Elizabeth K. Dunne and Joseph W. Rogers.
\item The Damage Provisions of the Copyright Law; by William S. Strauss.
\item The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study; by Professor Ralph S. Brown, assisted by William A. O'Brien and Herbert Turkington.
\item Remedies Other Than Damages for Copyright Infringement; by William S. Strauss.
\item Liability of Innocent Infringers of Copyrights; by Alan Latman and William S. Tager.
\item The Unauthorized Duplication of Sound Recordings; by Barbara A. Ringer.
\item Copyright in Architectural Works; by William S. Strauss.
\item Copyright in Choreographic Works; by Borge Varmer.
\item Protection of Unpublished Works; by William S. Strauss.
\item Duration of Copyright; by James L. Guinan.
\item Renewal of Copyright; by Barbara A. Ringer.
\item Protection of Works of Foreign Origin; by Arpad Bogsch.
\item Copyright in Government Publications; by Caruthers Berger.
\item Copyright in Territories and Possessions of the U.S.; by Borge Varmer.
\item A 12th Senate committee print contains a subject index to the 34 studies.\textsuperscript{27}
\end{enumerate}

\begin{thebibliography}{99}
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\bibitem{25} Liability of Innocent Infringers of Copyrights; by Alan Latman and William S. Tager.
\bibitem{26} The Unauthorized Duplication of Sound Recordings; by Barbara A. Ringer.
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\bibitem{31} Renewal of Copyright; by Barbara A. Ringer.
\bibitem{32} Protection of Works of Foreign Origin; by Arpad Bogsch.
\bibitem{33} Copyright in Government Publications; by Caruthers Berger.
\bibitem{34} Copyright in Territories and Possessions of the U.S.; by Borge Varmer.
\end{thebibliography}
I shall first discuss these proposals and then comment on the balance of the Report.

II

UNPUBLISHED WORKS: COMMON LAW AND STATUTORY PROTECTION

A. The Present Dual System

The United States now has a dual system of copyright: protection under common law; and protection under federal statute (presently the 1909 act, as amended) enacted under the eighth clause of article I, section 8 of the Constitution. The common law protects a work from the time of its creation; and if the work is never published the protection lasts in perpetuity. The traditional rule is that the common law protection is lost, however, upon the first publication of the work. For all works deemed copyrightable under the act, the statute makes protection available from the date of their publication. The act also provides that certain classes of works may be registered for statutory copyright even though still unpublished. It has been held that upon the registration of unpublished works for statutory copyright, the perpetual common law right is lost and the statutory copyright "for limited times" is substituted in its stead. State law defines the scope of the common law

31 "The Congress shall have Power... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8.
32 But see note 82, infra.
34 "Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title... " 17 U.S.C. § 10 (1958).
right, as well as providing the remedies for its infringement, whereas the federal act provides the remedies for infringement of statutory copyright.

The restrictive concept of "publication" in the present act has resulted in the anomaly of wide dissemination of works to the public through such media as phonograph recordings, broadcasts, and live stage performances with presumably no loss of common law protection. The protection of such works is thus deemed to continue in perpetuity, notwithstanding their wide public dissemination. The concept of perpetual protection of disseminated works, however, runs counter to two major theories of common law protection: first, the theory that the constitutional provision securing copyrights to authors only "for limited times" also imposes a similar finite limitation on the duration of common law protection; and second, the theory that perpetual protection for a work continuing to remunerate the author offends the bargain which the author has struck with society (i.e., in return for the author's creative contribution to the commonweal, society agrees to give him the exclusive right to exploit his contribution, but not forever). The historical validity of either theory may be criticized, but it is nonetheless likely that public policy will favor the author's exclusive domain over his disseminated work for a limited period, beyond which the domain should be that of the public.

37 The act does not define "publication," but does state that 
the date of publication shall in the case of a work of which copies are reproduced for sale or distribution be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority. . . .
17 U.S.C. § 26 (1958). Compare this definition with the definition of "publication" under the Universal Copyright Convention: "Publication, as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." UCC. art. VI.
38 See cases cited supra note 12.
39 Supra, note 31.
40 See Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657, 666-67 (2d Cir. 1955) (dissenting opinion of Learned Hand, Cir. J.):
[Under the argument that] New York should be deemed free, sub nomine "unfair competition," to determine what conduct shall constitute a "publication" of a "work" not covered by the Copyright Act . . . [it] could grant to an author a perpetual monopoly, although he exploited the "work" with all the freedom he would have enjoyed, had it been copyrighted. I cannot believe that the failure of Congress to include within the Act all that the Clause [i.e., U.S. Const. art. I, § 8] covers should give the states so wide a power. To do so would pro tanto defeat the overriding purpose of the Clause, which was to grant only for "limited Times" the untrammelled exploitation of an author's "Writings." Either he must be content with such circumscribed exploitation as does not constitute "publication," or he must eventually dedicate his "work" to the public. . . . I would hold . . . that the states are not free to follow their own notions as to when an author's right shall be unlimited both in user and in duration. Such power of course they have as to "works" that are not "Writings"; but I submit that, once it is settled that a "work" is in that class, the Clause enforces upon the author the choice I have just mentioned. . . .
41 See Whicher, supra note 30, passim, and especially at 109, 111-12 and 201.
B. The Report's Recommendations

These discrepancies between "dissemination" and "publication" comprise the basic premise for the Report's position that, although the common law right should not be abolished, it should be greatly limited. Specifically, it recommends that, where the author has fixed the work in some tangible form, statutory copyright should commence not with "publication" alone, but with any form of "public dissemination," including registration of the work in the Copyright Office. Inasmuch as little reason exists to continue the present system of permitting registration in unpublished form for some copyrightable works but not others, the Report also recommends that voluntary registration in unpublished form be made available for all copyrightable works.

The Report deals with protection of certain undisseminated manuscripts and other private papers by recommending that when any "holder" (semble, either the author, his heirs or any third party who has come into possession of such papers) has made the papers accessible to the public in an archive, the literary and artistic content of the papers should pass into the public domain when the papers are fifty years old and have been in the institution for more than ten years. An exception would be made, however, where the owner of the literary property rights has registered with the Copyright Office a claim for copyright which is still subsisting.

But the Report goes no further in limiting common law protection by substituting a federal right. Rather, three reasons appear for its position that common law protection should not be completely abolished in deference to an exclusive federal jurisdiction over copyright matters.

First, the argument is made that the time limit which the Constitution would impose on protection under the federal statute would be inadequate for the protection of undisseminated private papers whose authors would wish to protect against unauthorized disclosure for prolonged periods during life and after death. Fear of infringement of the "right of privacy," the Report reasons, would induce some authors to destroy papers which would be valuable for researchers and scholars. Second, until works are disseminated they are likely to be matters of purely private and local concern and should therefore be left to the province of state law and

42 See text at note 93, infra.
43 Report, at 43.
44 See note 35, supra.
45 Report, at 43.
46 Ibid.
47 Id. at 41-42.
state courts for adjudication of what are essentially "private rights." And third, the availability of voluntary registration for all classes of works (as recommended by the Report) would permit those wishing to obtain the benefits of statutory copyright to do so even if the work has not been disseminated.

C. An Alternative Recommendation

The writer proposes for consideration that the revision of the act should go further with respect to the protection of undisseminated works: the concept of separate common law protection of literary and artistic works should be abolished, and such works protected from the time of their creation under federal statute.

Many proposals for copyright law revision have merit; few are without difficulties. If the writer's proposal has merit, it would be unique in neither respect. I submit, however, that the advantages of supplanting the present dual system of copyright with a single system of federal protection outweigh the possible difficulties and, on balance, would be more favorable than a continuation of even the modified dual system proposed by the Report. The advantages include at least the following:

1. Easier access to unpublished letters and manuscripts. The Report states that the elimination of perpetual common law protection and the imposition of a copyright term of limited duration upon unpublished works might induce authors to destroy manuscripts and private papers for fear of unauthorized disclosure against which they would be without remedy. The solution proposed by the Report is to retain the perpetual common law right except where the manuscripts or papers have been deposited in a public archive. The writer suggests that a better solution would be provided for all such works, whether or not deposited in an archive, by a copyright term of sufficient length to assuage the fears of all but the most apprehensive author. Such a term would be measured by his own life and a substantial period thereafter (e.g., fifty

48 The late Judge Learned Hand took a similar position, although he advocated a fixed time limit after which works would enter the public domain or, alternatively, the transfer of the "literary property" in the work to the owner of the physical manuscript after a fixed period. See his letter to the Copyright Office, April 23, 1959, excerpted in appendix to Strauss, "Protection of Unpublished Works," Copyright Law Revision Study No. 29, supra note 26, at 52 (1957).
49 Nor, of course, is the proposal itself unique with the writer. See, e.g., the "Dallinger bill," H.R. 9137, 68th Cong., 1st Sess. (1926); the "Sirovich bill," H.R. 10364, 72d Cong., 1st Sess. (1930). See also Strauss, supra note 48, at 32-37. The United Kingdom Act of 1956 states expressly that, with certain exceptions not relevant here, "no copyright, or right in the nature of copyright, shall subsist other than" under that act. 4 & 5 Eliz. 2, c. 74, § 46(5) [1956]. The term of protection is, however, unlimited for undissemintated works. See id., § 2 (3).
50 Report, at 41.
51 Id. at 43.
52 It is of course possible to have a general term of copyright commence with the crea-
years\textsuperscript{58}, during which no unauthorized use could be made of his unpublished writings.

Moreover, the somewhat complicated scheme recommended by the Report,\textsuperscript{54} is in many cases unnecessary: the author or his executors or heirs can bind contractually any archive in which papers are deposited, so that, if desired, the archive must withhold such papers from publication for a period even longer than the term of copyright. The possibility of such a contractual arrangement does not, of course, assist the cause of the writer of personal letters (i.e., correspondence), which would customarily be in the hands of the recipients, not the author's. But for unpublished manuscripts, a contract with the archive could, by its terms, restrict access or publication to whatever extent the author or his heirs might deem desirable.

In its recommendation the Report does not take sufficient account of the classic problem—hunting down the heirs of the author of a newly discovered manuscript which has never been placed in a public archive. No one would bother tracking down the heirs of Caesar to render unto them what is theirs, but on the other hand, one would not be well-advised to publish without authorization a newly discovered manuscript by Mark Twain.\textsuperscript{55} Somewhere between the dates of death of these two writers there would seem to be an equitable point as which the line should be drawn: on the one hand, heirs of a deceased writer should not suffer needless embarrassment (nor be deprived of rightful income); on the other hand, a publisher should not be confronted unreasonably with the choice either of a costly search of heirs and an examination of wills and probate proceedings or of the apprehension of a lawsuit instituted by the great-great-grandson of the author. A grant of protection of the literary property for the author's life and a significant period thereafter would provide an equitable solution.

2. \textit{Greater national uniformity.} In our contemporary society the protection of undisseminated works can no longer be considered a matter of merely local concern.\textsuperscript{56} The letters of a distinguished author are of

\textsuperscript{58} The term in most of the major countries in the world for the works authored by a natural person is generally the life of the author plus fifty years. Art. 7 of the 1948 Brussels version of the Berne Convention grants a term of protection of that duration for most literary, dramatic and musical works.

\textsuperscript{54} See note 46, supra.


\textsuperscript{56} However, for a contrasting view, see the comments of Judge Learned Hand, cited in note 48, supra.

\textsuperscript{55} See note 46, supra.
national and international significance. The private diaries of an erstwhile President surely should not receive one measure of protection if he has deposited them in Missouri but another if the deposit has been in Pennsylvania. On the contrary, the need for national uniformity with respect to such matters increases. The rights and remedies of an author submitting a story outline to a television network in New York should be no different from those of an author submitting the same outline to the same network in California.\footnote{But compare Grombach v. Waring, 293 N.Y. 609, 59 N.E.2d 425 (1944) with Kurlan v. Columbia Broadcasting System, Inc., 40 Cal. 2d 799, 256 P.2d 962 (1953). Similar problems arise in multistate questions of defamation: Hartmann v. Time, Inc., 166 F.2d 127 (3d Cir.), cert. denied, 334 U.S. 838 (1948); and privacy and unfair competition: Ettore v. Philco Television Broadcasting Corp., 229 F.2d 481 (3d Cir.), cert. denied, 351 U.S. 926 (1956).} Although these difficulties may be alleviated by the Report's suggestion that voluntary registration (and consequent securing of statutory copyright) be permitted for all categories of undisseminated works, I submit that such a measure does not go far enough in obtaining the desired national uniformity.\footnote{Also, quaere, whether the fundamental policy question of the applicability of state or federal law to such works should be left to the choice of individual authors.} The creator and the user may well ask why their rights in literary property should have fifty-one variants. No virtue resides in tradition per se. Not infrequently the layman's common sense should be accorded weight in evaluating the merit of time-encrusted traditions such as the demarcations of state and federal jurisdiction.

3. Fewer evidentiary problems. The Report recommends that statutory copyright should commence when a work has been "publicly disseminated."\footnote{Report, at 43.} The amount of litigated confusion, however, over whether a work has been "published"\footnote{See, e.g., American Visuals Corp. v. Holland, 239 F.2d 740 (2d Cir. 1956); Patterson v. Century Prods., Inc., 93 F.2d 489 (2d Cir. 1937), cert. denied, 303 U.S. 655 (1938); Stanley v. Columbia Broadcasting System, Inc., 35 Cal. 2d 653, 221 P.2d 73 (1950); Jewelers Mercantile Agency v. Jewelers Weekly Publishing Co., 155 N.Y. 241, 49 N.E. 872 (1898).} would appear to be of substantially lesser magnitude than the litigation likely to arise over whether a work has been "publicly disseminated." And the determinations of law as to the significance of the size and circumstance of the group to which the work was allegedly "disseminated" would seem to be even less troublesome than the findings of fact which would be necessary with respect to obscure and little-remembered first public presentations of works half a century old and more. The comparison of the evidentiary burdens implicit in the Report's proposal and those to be encountered under a single federal copyright system is discussed below.\footnote{See text at notes 98-105, infra.}
4. Closer alignment of the United States copyright law with that of major foreign countries. By virtue of United States adherence to the Universal Copyright Convention, we have achieved the substantial benefits of a multilateral agreement with the major countries of Western Europe. A closer alignment of the United States copyright system with those of major foreign countries, however, will facilitate further increased international cooperation in the protection of literary and artistic property. Such a clear alignment is even now being sought in the joint meetings which the UNESCO Intergovernmental Copyright Committee, acting under the Universal Copyright Convention, and the Permanent Committee of the Berne Union have been holding during the last several years on common problems. A "neighboring rights" convention, for example, has been proposed for adherence by UCC member countries as well as those of the Berne Union. We must not be deprived of the opportunity to participate in international progress because of the idiosyncrasies of the United States copyright system.

D. Possible Difficulties in the Suggested Alternative to the Report's Recommendation

It must, of course, be recognized that the complete abolition of common law copyright in favor of blanket statutory copyright from creation also presents certain problems. These problems include the following:

1. Compliance with United States obligations under the Universal Copyright Convention with respect to unpublished works;

2. Observing the constitutional requirement of due process with respect to depriving owners of their perpetual common law literary property rights in pre-existing works; and

3. Fixing the period of protection for works where a measuring life may not be applicable, such as anonymous, pseudonymous and posthumous works and works created by corporate entities.

1. United States obligations under the Universal Copyright Convention with respect to unpublished works. The United States has two obligations under the UCC which are relevant here. First, any revision of the present Act must permit the continuation of a system of protecting

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64 See note 79, infra.
65 This problem is discussed in connection with duration. See text at notes 106-08, infra.
without formalities the unpublished works of foreign nationals.\textsuperscript{66} And second, the term of United States protection for Convention works must be not less than the life of the author and twenty-five years thereafter; or, if the term is not computed on the basis of the life of the author, the United States is "entitled" to compute the term from the date of first publication or prior registration, provided the term is not less than twenty-five years from the date of such first publication or prior registration.\textsuperscript{67}

Accordingly, a mandate of formalities such as registration and deposit as prerequisites for protection of unpublished works under the revised act would likely be inconsistent with the first of these two obligations under the UCC. As recognized by the Report,\textsuperscript{68} however, there are certain advantages to the continuation of these features of our copyright system. A satisfactory reconciliation of these features with the UCC requirements might be made by providing that registration and deposit would be prerequisites not for copyright per se but for additional rights or remedies to which the owner of a work would not otherwise be entitled. Such advantages might include a lengthened term of protection or extraordinary remedies such as statutory damages.\textsuperscript{69}

The minimum term of protection of life plus twenty-five years required by the UCC would present no conceptual problem with respect to the unpublished works of identified natural authors. But with regard to unpublished works authored by legal entities other than natural persons, there could be no measuring life. For such works there is authority to the effect that the UCC prescribes no minimum term.\textsuperscript{70}

\textsuperscript{66} "In each Contracting State there shall be legal means of protecting without formalities the unpublished works of nationals of other Contracting States." UCC art. III, § 4.

\textsuperscript{67} 2. The term of protection for works protected under this Convention shall not be less than the life of the author and 25 years after his death.

\textsuperscript{68} See Report at 72-73 with respect to registration, and id. at 77 with respect to deposit of copies.


\textsuperscript{70} Arpad Bogoch, Attorney-Adviser of the Copyright Office, who acted as Secretary of the UNESCO Geneva Conference at which the UCC was adopted in 1952 and who was associated with the Copyright Division of UNESCO from 1948 to 1954, has written with respect to the third subparagraph of UCC art. IV, § 2 [see note 67, supra]:
States would be "entitled" to establish for such works a minimum term which would not expire until twenty-five years from their first publication (or registration before first publication) at a later time, although the establishment of this minimum would apparently not be required.

If it were deemed contrary to the spirit of UCC for the United States not to be bound by any minimum term for unpublished works where there is no measuring life, the revised act could adopt the minimum which it is "entitled" to adopt. This would mean that the base point for the computation of such minimum term would be set at the publication or prior registration of the work. Because of the possibility that the work in question may in fact never be registered or "published" the "limited times" requirement of the Constitution, might create a problem. But the apparent conflict between the requirements of the UCC and the Constitution could perhaps be resolved by utilizing a conclusive statutory presumption: a work created by an author other than a natural person would be deemed to have been published at the expiration of a specified period of great length after its creation, for example, fifty years, unless prior to such time actual publication occurred. If the presumption of publication after fifty years were adopted in the Act, the term would continue for twenty-five years from the first publication (presumed or actual) or seventy-five years from creation, whichever were longer. The constitutional requirement would thus be fulfilled in that the maximum term of protection for the works of a corporate author would be seventy-five years.

As to unpublished works which are not registered prior to their publication the Convention does not contain a minimum. This is an anomaly, since there is no reason to prescribe minima for unpublished works in the case of all countries where duration is based (for one or more or all classes of works) on the life of the author, and not to prescribe minima for unregistered unpublished works in the case of countries like the United States and the Philippines. According to the law prevailing today in the United States, this anomaly has, of course, no practical ill effects, because the protection of unpublished works in which a claim to copyright has not been registered is governed by the common law and is limitless in time. Consequently, it is longer than any conceivable limited term. Technically, however, there is a gap in the Convention which should be filled in a future revision.

Bogsch, Universal Copyright Convention 58 (1958).

71 UCC art. IV, § 2, quoted at note 67, supra.

72 It should be noted that the UCC definition of "publication" requires "reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." Art. VI. Thus, in this context the revised act cannot substitute the broader concept of "public dissemination" (e.g., by broadcasting) for "publication" as the event which commences the running of the minimum term. See note 134, infra.

73 See note 31, supra.

74 But it should be noted that Congress seems to have recognized no constitutional infirmity to providing remedies, apparently without limitation of time, for infringement of unpublished works under the federal acts prior to 1909. See e.g., Act of May 31, 1790, ch. 15, § 6, 1 Stat. 124, 125; Act of Feb. 3, 1831, ch. 16, § 9, 4 Stat. 436, 438; Act of July 8, 1870, ch. 230, § 102, 16 Stat. 198, 215; Act of March 3, 1891, ch. 565, § 9, 26 Stat. 1106, 1109.

75 See text at note 107, infra.
A resolution of this apparent conflict might be made with respect to the works of anonymous and pseudonymous authors by adopting a similar presumption: for such works the author would be deemed to have died twenty-five years after the creation of the work, unless prior to such "death" or the expiration of, for example, fifty years thereafter, the author is identified. If the presumption of death after twenty-five years were adopted in the act, the term would continue for fifty years from the author's death (presumed or, where the author has become identified, actual). Alternatively, where an anonymous or pseudonymous work is published or registered during its term of copyright (i.e., prior to fifty years after the author's presumed death), the statute could limit the period of protection to any fixed period of twenty-five years or more from such publication or registration.

2. The constitutional requirement of due process. Where a work has already been created and exists in unpublished form, a problem arises as to whether the involuntary substitution of a statutory right for the common law right of which the author is being divested does not deprive him of his property without due process. Two questions must be answered: First, is there a deprivation without due process with respect to the extent of the rights and remedies involved? Second, is there a deprivation without due process with respect to the duration of the term of protection? Inasmuch as the rights and remedies, taken together, which would be afforded to the owner of a work under the statutory system appear to be no less favorable to the author than his corresponding rights and remedies under the common law, the first question would appear to be answered satisfactorily in the negative. And a like answer could be made to the second question if either of two alternative procedures were utilized by the revised act.

Under the first alternative, the common law rights could be continued outside the act, presumably in perpetuity, for all unpublished and unregistered works in existence at the effective date of the new act, subject

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76 Admittedly, an evidentiary problem may be presented in determining the year of creation of pseudonymous and anonymous works, but in view of the proportionately small number of such works which have literary or commercial significance, this problem would not seem to constitute a major objection to a system of copyright from creation.

77 See text at note 107, infra.

78 The United Kingdom Copyright Act of 1956 contains an analogous provision with respect to such works, permitting the extension of the copyright term (when the author becomes identifiable) to the full balance, if any, of the copyright term for an identified author. 4 & 5 Eliz. 2, c. 74, Second Schedule, ¶ 2 [1956].

79 "No person shall be . . . deprived of . . . property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

to divestiture only upon the occurrence of some elective act by the owner (e.g., publication, registration, resort to federal courts, etc.) by which statutory copyright might be obtained. Under this alternative there is the possibility of confusion at some later date as to the existence of a given work at the effective date of the new Act. The number of works of any significance whose status would be ambigious, however, is likely to be small, for probably few such works would not have come within the ambit of the statute by one means or another.

Under the second alternative, common law rights would be abolished as of the effective date of the statute, not only with respect to future works but also with respect to works which are in existence but unpublished and unregistered as of that date. The taking of such common law rights, even though involuntary (unlike the elective procedure under the first alternative), would be in exchange for statutory protection for a reasonably long period of time. In theory such an "exchange," although compulsory, complies with the requirements of due process: not only would the limited statutory term granted to the owner be sufficiently long to permit a reasonable opportunity to exploit the work, but the reduction from perpetuity to a limited time would be a provision necessary and proper to fulfill the purpose of constitutionally valid legislation.

81 See the "Shotwell bill," S. 3043, 76th Cong., 3d Sess., § 45 (1933), which provided for the election of statutory copyright by any one of various acts, including publication, registration, deposit, recordation of an assignment or other instrument pertaining to the work, and commencement of an infringement action or proceeding.

82 In summarizing a contemporary trend in the law of unfair competition as it pertains to literary and artistic property, Whicher, supra note 30 makes a strong argument that this "perpetual" common law right is in fact not unlimited in time: Between them . . . Congress and the Supreme Court have recognized (though indirectly) the power of the states to protect authors' common law property rights in published literary and artistic works concurrently with the similar protections given to such works by the federal copyright statute.

[In New York . . . at least, the INS [International News Service v. Associated Press, 248 U.S. 215 (1918)] doctrine extends to all forms of commercially marketed literary and artistic property . . . .] The most striking feature of this relatively new form of "unfair competition" is the virtual identity of the right it enforces with the old, eighteenth-century conception of a common law copyright in published works which Blackstone had set out in the Commentaries [2 BL. COMM *405-07] and Justices Willes, Aston, and Lord Mansfield had defended with such vigor and brilliance in Millar v. Taylor [4 Burr. 2303, 98 Eng. Rep. 201 (1769)] . . . . [Again like the old right, the new one protects the author and his successors only for as long as they actively market the work commercially: . . . . the protection endures only for the commercially exploited life of his work . . . . [This is a very different thing from perpetual protection. Because of this limitation, the new common law right does not include (as the statutory right does) the power to withhold a work, once published, from the market. . . .

Id. at 219-20.


It should be noted that the Report, in recommending the abolition of the common law right in manuscripts deposited in archives, Report, 42-43, discussed supra in text to notes 46 and 50-55, proposes a taking of the right without any "exchange" of statutory protection for the common law right taken. Therefore, quaere, whether the mere availability of
As Whicher notes, it is perhaps necessary, if Congress is to achieve a complete preemption of state common law protection of literary and artistic property, that resort be made to its constitutional powers under not only the copyright clause, but also under the commerce clause as well. His theory is that the common law right in literary and artistic property, which continues even after statutory copyright is secured, plays its role in our courts Sub nom. “unfair competition” (species, “misappropriation”). Under this theory, the pre-emption of the common law right can be achieved under the copyright clause “for limited times,” but for the pre-emption to be effective for a longer period (i.e., in perpetuo), Congress would have to utilize constitutional powers under the commerce clause, which are not circumscribed in time. Discussion of a federal unfair competition statute is beyond the scope of this article, but if the revised Copyright Act is to effect complete pre-emption of the state common law right, attention should be given to the possible use of the powers under the commerce clause in enacting such revision.

III.

Duration of Copyright

A. Inception of Copyright—the Alternatives and the Report’s Recommendation

There are three basic events which can generally be used to mark the inception of statutory copyright:

statutory protection for such works by voluntary registration, as recommended by the Report, would be sufficient to afford due process.

See Whicher, supra note 30, at 227:

[The developing state common law of “unfair competition,”... [which] forbids essentially uncreative appropriations of authors’ expressions [i.e., “Chinese copying”] and purely imitative appropriations of the non-functional features of inventors’ discoveries... operates in fields which, it is submitted, are beyond the scope of the dedicated powers of Congress under the patent-copyright clause [i.e., U.S. Const. art. I, § 8], limited as those powers are to the realization of the objectives stated in the opening, purposive phrase of that clause.

This is not to say that Congress lacks power to preempt and “federalize” the entire law of literary property. It is only to say that such a power cannot be distilled from the patent-copyright clause alone. A preemptive federal law of “unfair competition” by or in any transaction concerning literary or artistic property, which in any way affects interstate commerce, would, when coupled with as preemptive a copyright statute as Congress could enact, certainly clear the decks of state action in the field.

The Congress shall have Power... To regulate Commerce... among the several States...” U.S. Const. art. I, § 8.

Such a bill is at this writing pending before Congress. S. 1036, H. R. 7833, 87th Cong., 2d Sess. (1961).

Report ch. V, at 45-58. For the general background, see Guinan, “Duration of Copyright,” Copyright Law Revision Study No. 30, supra note 76, at 57(1957), and Ringer, “Renewal of Copyright,” Copyright Law Revision Study No. 31, Id. at 105 (1960).

Inception of copyright is not necessarily the point from which the term of copyright is computed. For example, in those countries where copyright has its inception with the creation of the work, the length of the term is generally computed from the author’s date
1. Creation of the work;
2. Registration or other formal act; or
3. First public dissemination or "publication."

The present act provides for the inception of statutory copyright (as opposed to the common law right) with the publication of a work or its registration in the Copyright Office prior thereto. The copyright endures for a period of twenty-eight years and may, during its last year, be renewed for a further period of like duration.

In most foreign countries the copyright generally begins with the creation of the work, and continues for a period measured by the life of the author plus a term of years after the author's death. In the case of jointly authored works, the term of years usually is computed from the date of the death of the last survivor. In the case of corporate, anonymous, and posthumous works, however, the term is usually computed from the date of publication and runs for a period of years equal to the period subsequent to the death of an identifiable natural author.

The Report states three basic objections to the adoption of the foreign system of copyright inception upon creation: (1) the evidentiary problem in determining an author's date of death for use in ascertaining the term, as opposed to the apparent ease in measuring the term from the date shown on registration records or in published copies of the work; (2) the lack of uniformity in establishing a general period of life plus a term of years while at the same time establishing a period on some other basis for corporate and anonymous works; and (3) the adjustment which would be necessary in the practices of industries dealing with copyrighted materials.

For the reasons stated, the Report rejects the system of copyright from creation. It proposes instead that copyright commence with the "first public dissemination" of a work, a term which would include registration of the work in the Copyright Office (if the creator chose to effect registration) prior to its exploitation. By implication the Report rejects the use of registration or other formal act as the sole event which would commence the copyright term. This rejection seems wise, in view of the gap in statutory protection which would likely result in many instances of death, in which case the copyright expires, e.g., fifty years after that date. See note 53, supra. Under our present act, the length of the term is computed, however, from its inception at first publication or prior registration. See text at notes 91-93, infra.

89 See note 81, supra.
90 See text at notes 30 to 41, supra.
92 See id. § 12.
93 Id. § 24.
94 Report, at 48-49.
95 See text at notes 37, 38, 42 and 44, supra.
between the date a work is first exposed to the public and the date the statutory protection would commence.

B. The Proposal for Copyright From "First Public Dissemination" Compared With an Alternative Proposal of Copyright From Creation

As indicated above in connection with the discussion of protection of unpublished works, the writer advocates that copyright commence with the creation of the copyrightable work rather than with its "first public dissemination." Some of the relative advantages of the former system have already been discussed, but let us focus here on the three basic objections which the Report posits for its rejection of that system and, inferentially, for its recommendation of the latter system.

1. The evidentiary problem. It is claimed that the date of death of an author who is not well known might be difficult to determine, thus rendering uncertain the termination date of his copyrights under a "life-plus" system. For several reasons, however, this problem is not as great as might appear. First, there is no need for concern about the precise month and day of the author's demise, but only the year. Countries utilizing the "life-plus" system customarily run the term of copyright to the end of the calendar year in which the relevant anniversary (e.g., fiftieth) of the author's death occurs. Second, the obscure author has become increasingly less obscure (i.e., with respect to his existence, not necessarily his writings) in contemporary society, and his vital statistics have become increasingly available to the public. This is true even in the case of an author whose works are of lesser artistic or commercial value and hence less likely to be utilized after his death.

Third, the revised act could reward the exercise of reasonable diligence to ascertain the relevant facts by a would-be user of a work, and could also contain inducements to the heirs or other successors in interest

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96 See text at notes 49-63, supra.
97 Ibid.
98 See text at note 93, supra.
99 See, e.g., the United Kingdom Act of 1956, 4 & 5 Eliz. 2, c. 74, § 2(3) [1956], and the 1948 (Brussels) version of the Berne Convention art. 7(6). It should be noted that under the Report's proposals concerning term of copyright, all terms would also run to the end of the calendar year in which they would otherwise expire. Report, at 56.
100 It is not inconceivable, for example, that the electronic marvels to be utilized by the Internal Revenue Service in storing information on every taxpayer in the country could be utilized to inform the Copyright Office of the year in which an author, because of his death, ceased to file returns. See, e.g., a discussion of the Automatic Data Processing program by the Deputy Commissioner of Internal Revenue: Harding, "New Directions—Automation and Integrity," 40 Taxes 79 (1962). It would indeed be ironic if a copyright law revised to cope with technological progress did not itself utilize the benefits of such progress.
101 It should be noted that the diligent research typical of the Copyright Office Studies failed to unearth any published reports of significant difficulty in establishing the date of the author's death in the countries of Western Europe employing the "life-plus" system, although it was acknowledged that some such reports may exist. See Guinan, "Duration of Copyright," Copyright Law Revision Study No. 30, supra note 26, 57 at 73 (1957).
of a deceased author to record his date of death with the Copyright Office.\textsuperscript{102} Under such a statutory arrangement, the user would evidence his diligence by checking the records of the Copyright Office and, if the date of the author's death were not contained in such records, by checking with the author's publisher or in the standard biographical listings. The owners of a copyright after the author's death could then be denied the remedy of statutory damages if the date of the author's death had not been recorded in the Copyright Office within a specified period after that date (or, alternatively, at any time prior to the commencement of an infringement) and the defendant showed that he had exercised reasonable diligence in trying to ascertain the necessary information. The court could be required, in determining the user's diligence, to take into account the evidentiary value afforded the defendant by the year date in any copyright notice appearing on a copy of the work to which the defendant had access.

The evidentiary problems inherent in computing the term from first public dissemination, as recommended by the Report, are probably greater than those to be encountered in commencing the term with creation of the work. The first network telecast of a play written for television or the first public exhibition of a blockbuster motion picture are likely to be recorded amply, but neither the evanescent memory of man nor his records are likely to retain the date of the first reading of a poem on a local radio station, the first performance of a song at a summer resort, the first performance of a play in summer stock or the first sneak preview of a low-budget second feature. Moreover, the year date in the copyright notice on a published copy of the work would not, under the Report's recommendation, be that of first public dissemination but rather of first publication.\textsuperscript{103} The date in the notice would thus provide only an estimate of the date when a work would enter the public domain.\textsuperscript{104} The informa-

\textsuperscript{102} It is also possible to utilize inducements to insert helpful information in the copyright notice. See note 104 infra, and note 313 infra and text thereto.

\textsuperscript{103} Report, at 66.

\textsuperscript{104} It is true that under the Report's recommendations, one could probably assume that a work bearing a notice with a year date more than seventy-six years old is in the public domain, but where the date is more recent the work might enter the public domain at any one of many points in time, e.g.: twenty-eight years from the first publication date (if publication constituted its first public dissemination and the copyright were not renewed); seventy-six years therefrom (assuming the same facts but renewal of the copyright); ten years from the publication date (assuming either (1) first public dissemination eighteen years prior to first publication, followed by no renewal, or (2) first public dissemination sixty-six years prior to first publication, followed by renewal); etc.

For works other than those of foreign nationals protected under the UCC, the revised act could require—and for all works, advantages such as statutory damages could be offered to induce—the insertion of a legend or symbol in the copyright notice on published works to indicate that the author is alive at the time of first publication. See note 313 infra, and text thereto. Accordingly, quaere, whether it is of any greater value to be able to ascertain that a work is in the public domain because more than seventy-six years have elapsed from
tion to be obtained from a copyright notice is therefore not a significant consideration in evaluating whether copyright should begin with creation or with dissemination. Also, since registration would continue to be optional (except as a condition precedent to renewal or institution of suit) under the Report's proposal, the evidentiary value of registration is likewise not a significant consideration.

2. The lack of uniformity under a "life-plus" system between the terms for works of identified natural authors and those of others. The Report objects that a general system of life plus a term of years for natural authors would require separately computed terms for the works of corporate authors and joint authors as well as for anonymous authors. However, in view of the advantages otherwise to be obtained from the "life-plus" system, this objection is not a serious one. For example, for corporate works (and those of other legal entities), the term to be prescribed under the revised act could be set at fifty years (if such is to be the term after the death of a natural author) plus a period equal to the average span of years during which a natural author enjoys copyright during his lifetime.

This span would be the average span between the median age of natural authors at the dates of publication of their works and their average age at death. Extrapolating from the statistics of the survey conducted by the staff of the Copyright Office, this average span is now approximately twenty-five years. Adding this twenty-five year period to the term of fifty years described above, a flat term of seventy-five years from the date of creation of corporate works is obtained, as compared with a term of life plus fifty years for the works of identified individual authors. As already suggested, the term for anonymous works would also be seventy-five years. For jointly-authored works, there is little need to alter the system customarily adopted in Berne Convention countries: calculation of the term from the date of the death of the last surviving author.

3. The adjustment to new concepts required if a "life-plus" term is

the date of first publication than to know that the work is not in the public domain because less than fifty years have passed from that date.

See Report, at 76.


The relevant American obligations under the UCC and the constitutional requirements in this context have been discussed in text at notes 72-75, supra.

See text at notes 76-78, supra.

See, e.g., the United Kingdom Act of 1956, 4 & 5 Eliz. 2, c. 74, Third Schedule, ¶ 2 [1956] and the 1948 (Brussels) version of the Berne Convention art. 7 bis.

It should be noted, however, that in the United States joint authorship is more broadly defined than under most foreign laws. See Cary, infra note 362 at 102-04. Jointly-authored works may therefore be a more significant factor in evaluating the merits of a "life-plus" system for the United States.
adopted. As an objection to the measurement of the term from the author's death, the Report states that a much greater adjustment would be necessary in business practices if the term were so computed rather than computed from the first public dissemination. That such an adjustment would be so great, however, as to make the adoption of this system undesirable is, at the very least, doubtful. For example, in the comments and views submitted to the Copyright Office on its study concerning duration, it is significant that among those persons favoring the life-plus system were experts, speaking either for themselves or their professional or trade groups, who have had considerable experience in the representation of the interests of authors, composers, book publishers, motion picture companies, and music publishers. The matter is thus one of opinion. On balance, my opinion is that the modification in business practices necessary to accommodate a change to the "life-plus" system poses no significant obstacle to its adoption.

C. The Renewal System—the Report's Proposal and the Problems

Under the renewal system provided in the present act, if the author has died prior to the time for renewing the copyright, the renewal right vests in the author's widow (or widower) and children. If there be none of this class still living, then the renewal vests in the author's executors; and in the absence of a will (assuming none of the first class is still alive), the renewal vests in the author's next of kin. The renewal right in works posthumously published and works made for hire vests in the proprietor at the time of renewal.

After weighing the results of the Copyright Office study of the longevity of creators, the Report concludes that the present maximum term of fifty-six years (twenty-eight years each for the original and renewal terms) is too short a period of time to permit the author and the dependents of a deceased author adequate enjoyment of the benefits of copyright. It therefore advocates a maximum period of seventy-six years from the first public dissemination of a work, a period which would be roughly equivalent to the term of life plus fifty years granted in the major foreign countries. On the premise, however, that the maximum term of copyright is neither necessary nor advisable for all works, the Report advocates the continuation of a renewal system of

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110 In essence, nine out of the sixteen persons who transmitted their views to the Copyright Office favored the "life-plus" system. The views were for the most part tentative, subject to reconsideration during the continuing discussion of the revision program. See Appendix to Guinan, supra note 101 at 87 et seq.


113 Id. at 51.
REVOLUTION OF THE COPYRIGHT LAW

The Report cites as an advantage of the renewal system the fresh record which renewal registration affords as to the copyright ownership after a lapse of many years. It is true that the Copyright Office renewal record frequently provides a starting point for one searching for the owner of a copyright which has been renewed. It is also true, however, that the nature of the present renewal system limits the extent to which the renewal record can assist the searcher: and in fact one of the recommendations which the Report makes for liberalizing the present renewal system would make the renewal record even more limited in its assistance to the searcher.

The Report, although favoring a renewable term, recognizes two major objections to it: (1) the imposition on authors and other renewal claimants of a burden (which the opponents of the renewal system claim is a needless burden) of filing a renewal application; and (2) the risk to such claimants of the loss of their copyrights by reason of an inadvertent failure to file the renewal application within the appropriate time.

In answer to the first objection, the Report cites, as evidence that the maximum term is not "needed" for most works, the recent Copyright Office statistics to the effect that less than fifteen percent of all registered copyrights are being renewed: approximately seventy per cent of motion picture copyrights, thirty-five per cent of music copyrights, eleven per cent of periodicals and seven per cent of "books." The Report argues, moreover, that "there are many circumstances in which copyright restrictions inhibit the dissemination of works or their use

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114 Id. at 53.
115 Id. at 52.
116 Cf. Ringer, "Renewal of Copyright," Copyright Law Revision Study No. 31, supra note 26, at 105, 188 et seq. (1960):
As a registration formality, the usefulness of renewal in leading to the true owner of the second term is sharply limited by two possibilities: that the renewal term may have been assigned, or that there may be others in the same class of renewal claimants.
117 We propose that the law simply provide for the extension of the first 28-year period to the maximum term upon the filing of a renewal application by any person claiming an interest in the copyright. This is in contrast with the present law, under which the copyright can be renewed only in the name of the particular claimant specified in the statute. Our proposal would mean that the renewal becomes a mere extension of term without affecting ownership of rights under existing contracts. Any person claiming an interest in the copyright—author, executor, heir, employer, assignee, licensee, etc.—could make renewal registration. . . . Report, at 54.
118 Id. at 52.
119 Id. at 51. The figures in the Report are apparently based on the study set forth in Appendix C to Ringer, "Renewal of Copyright," Copyright Law Revision Study No. 31, supra note 26, at 105, 220 et seq. (1960).
in the creation of new works" and that many works which no longer have substantial commercial value (and hence, presumably, do not need copyright protection) remain useful to scholars and educators as well as authors of new works based on such pre-existing works. The Report's argument is perhaps summarized in its statement that "when authors or other copyright owners feel that they have no need for a longer term, the termination of copyright restrictions after twenty-eight years is in the public interest."

The Report attempts to answer the objection concerning the danger of inadvertent failure to renew by suggesting that the revised act should permit the filing of renewal applications during the last five of the initial twenty-eight years, instead of the last year, as provided in the present act.

In the writer's view, however, to retain the system of original and renewal terms of copyright in the new act would be losing a golden opportunity to remove one of the most troublesome provisions of the present act. The suggestions made for lengthening the period for renewing from one to five years, for lengthening the renewal period itself from twenty-eight to forty-eight years and for the elimination of the reversion of renewal rights to the author or specified heirs would all ameliorate some of the present difficulties but the essence of the problem would remain: the renewal system would continue to be an unjustified burden on the owners of copyright.

While it may be true that the termination of copyright after twenty-eight years is in the public interest where the copyright owner deliberately decides not to renew it, this view begs the question as to renewal decisions. The writer's experience is that most copyrights—certainly most of those that still have value after twenty-eight years—which fail of renewal do so inadvertently. The failure to file a renewal application is almost never the result of a conscious decision on the part of the copyright proprietor to let the work go into the public domain. In most cases he would be foolish to make such a decision. It may be, for example, that a work is not being exploited at the time the expiration of the original term of copyright approaches, yet the value of the work may be revived by the subsequent development of new media. This has happened with

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120 Report, at 52.
121 Ibid.
122 Id. at 53.
123 Report, at 46.

As pointed out by the Report, at 54, the reversionary feature is frequently confused with the renewal system itself, and objections to the renewal system are made for the wrong reasons. As indicated in the text, however, the writer is of the opinion that the renewal system is unwise even without the reversionary feature. See note 132, infra.
respect to television and may also happen with respect to pay-television and new media still unknown.

If in fact a use broader than a "fair use" is to be made of a work during the forty-eight years after the expiration of the original term, the copyright proprietor (i.e., the person who would have owned the exclusive rights had the copyright been renewed) should benefit from such use. Put most simply, if the property is valuable enough to be used, the author should profit from the use. Although in some cases a user would not exploit a particular property if it were protected by copyright and a royalty payment were necessitated, the importance and the certainty of long-term copyright protection in encouraging the creation and dissemination of intellectual and artistic contributions outweighs the value of providing an additional body of public domain material for royalty-free adaptation and performance by others.

It is doubtful that giving copyright proprietors five years, instead of the present one year, in which to renew will work a transmogrification of the renewal system into a socially valuable mechanism for making available to many the works no longer desired by the few. On the contrary, the unwary will still fail to renew, while the wary will still renew indiscriminately. And in fact indiscriminate renewal will be easier for those who are better-equipped, for electronic data processing devices in the hands of large creators and users (or their professional or industry groups, or third parties undertaking to serve them) may be able to process the entire renewal application automatically.

Thus, those who may be placed at a disadvantage under a continuation of the renewal system would likely be the less consequential creators and users who do not retain copyright counsel to advise them of the needless intricacies of the Copyright act. The *reductio ad absurdum* of such a system is the imposition on a poet or photographer, or his heirs, of the never-ending, time-consuming and expensive job of seeing to it that hundreds or thousands of his individual works are renewed.

The Report's approach has perhaps been influenced by the Trademark Act, under which, to retain the initial registration an affidavit of use must be filed in the sixth year thereafter and a renewal application must be filed every twenty years for the same purpose. Rights in a trademark, however, are merely the results of user; and the registration evidences such result. The mere failure to renew a trademark registra-

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125 Id. at § 8, 15 U.S.C. at § 1058 (1958).
tion does not impair the owner's rights in the mark itself. Inasmuch as the trademark does not give the owner any exclusivity to deal in the product to which it is affixed but only the exclusive right to say that his product is his product, the registration can properly continue in perpetuo so long as the public identifies the owner as the source or origin of the product bearing his mark.

The exclusive rights under a copyright, however, are not the result of user but a grant which the Constitution has empowered Congress to make. Congress may of course impose an obligation to renew the copyright in order to retain the exclusive rights, but the writer submits that a copyright owner should not be required to take affirmative action in order to preserve his exclusive rights for the maximum period.

D. The Reversion of Renewal Copyright

As we have already seen, the present act provides that successive classes of persons have the right to renew an author's copyright if he is not alive at the time for renewing. However, not only do persons have the right to renew but the ownership of the renewal copyright reverts to them in such case, thus defeating any license or assignment which the author may have made with respect to the renewal term prior to his death. Although the reversion of the renewal term was intended to give the author and his family the benefit of a second chance in the event of an improvident bargain with respect to his original term of copyright, the author frequently grants rights in the renewal copyright at the time of the grant under the original term; and if the author is alive at the time of renewal, his earlier grant of rights in the second term is binding.

The reversionary feature has compounded the difficulties inherent in our system of renewal copyright without fulfilling the paternalistic aim of Congress. The Report is rightly critical of this feature which it states has been "the source of more confusion and litigation than any other

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127 See text at note 111, supra.
129 See, e.g., the report accompanying the Smoot-Currier bill, which became the 1909 act: It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law, so that he could not be deprived of that right. H.R. Rep. No. 2222, 60th Cong., 2d Sess. 14 (1909).

The Fisher case and the Miller case, supra note 128, comprise an inadequate sampling of the extensive litigation which has arisen concerning the reversion and other features of the United States renewal system. For an exhaustive discussion of these cases see Ringer, supra note 116, at 124-87.
To avoid these difficulties, it recommends that the renewal system in the revised act should delete the automatic reversion of the renewal term.\textsuperscript{132}

E. The Application of the UCC to the Proposed Renewal system

The Universal Copyright Convention, of which the United States is a member, requires that, where the term of protection for Convention work is computed from the date of a work’s first publication or prior registration, a minimum term of at least twenty-five years from the date of first publication or prior registration, as the case may be, must be provided.\textsuperscript{133} Because the Report recommends a term of copyright commencing with a work’s “first public dissemination,”\textsuperscript{134} it recommends a further provision for a separate minimum term which would run from the work’s first publication.\textsuperscript{135} Under this provision, if a work is first disseminated otherwise than by publication and is later published before the first twenty-eight year term expires, the term would continue for at least twenty-eight years after first publication.\textsuperscript{136}

In other words, where a work is copyrighted upon its first public dissemination other than by publication, and is later published during the first twenty-eight year term, the dates of each of these two events as well as the date of the renewal of the copyright would be of possible significance to a prospective user seeking to determine the copyright status of the work.

If in fact there is to be a renewal system under the revised act, this further recommendation appears to be a reasonable reconciliation with the requirements of the Universal Copyright Convention. However, the system of twenty-eight and forty-eight year terms or, more precisely, the twenty-eight and forty-eight year system with a separate twenty-eight year term to overlap the other two, is likely to create confusion in the

\begin{footnotesize}
\begin{enumerate}
\item[131] Report, at 53.
\item[132] In summarizing the arguments for elimination of the reversion, the Report states: “The widespread sentiment for elimination of the present renewal system seems to be prompted largely by the welter of confusion and uncertainty caused by the reversionary provision.” Id. at 54. The writer respectfully submits that irrespective of the basis for such “sentiment,” substantial reason appears for the elimination of even a non-reversionary renewal system. An attempt has been made, in section B of the text, to set forth the non-sentimental objections to the renewal system per se.
\item[133] UCC art. IV, \S 2, third subparagraph, quoted in note 67, supra.
\item[134] Under the Report’s recommendation, publication or registration would be forms of “public dissemination,” but alternative forms would include public performance or the public distribution of sound recordings. Report, at 41. Neither of these alternative forms would constitute “publication” under the UCC. See note 37, supra.
\item[135] Report, at 55.
\item[136] If the copyright on such a work were renewed, the term would endure for a total term of seventy-six years, regardless of the date of first publication.
\end{enumerate}
\end{footnotesize}
minds of both creators and users. In evaluating the merit of a proposal for legislation, its complexity must be weighed against the likely result when those whom the legislation purports to benefit attempt to guide themselves under it.\footnote{137} If there were no renewal system, the provision just described would be unnecessary.\footnote{138}

F. The Application of the New Term Proposals to Pre-Existing Works

With respect to pre-existing copyrights, two significant questions arise under the Report’s proposals: Inasmuch as the Report recommends the elimination of the automatic reversion of the renewal term to the author or other specified persons, who is to own the future renewal term of a copyright in its original term at the effective date of the new act? And secondly, where renewal rights have already been granted by the owner prior to the effective date of the new act, who is to have the benefit of the copyright for the lengthened renewal term of forty-eight years (as opposed to the present renewal term of twenty-eight years)—the grantor or the grantee? As for the first question, the Report recognizes the unfairness of cutting off the expectancies of heirs and others concerning future renewals of existing copyrights under the present system of reversion. Accordingly, it wisely recommends that the automatic reversion of renewal rights should continue in effect for those copyrights not yet renewed as of the effective date of the new act.\footnote{139}

In approaching the problem posed by the second question, the Report enters the area in which some of the greatest conflicts between creators and users have occurred in past efforts at copyright law revision.\footnote{140} The Report states as its premise that although the interests of the grantees must be considered, “there would be little justification for

\footnote{137} Obfuscation may be permitted to creators as free poetic license. Cf. Cummings, Poems 1923-1954 at p. 331 (1954): “The poems to come are for you and for me and are not for mostpeople. . . .” Clarity, however, should be a mandate to those charged with the assignment of drafting a new Copyright Act, which must, so far as possible, be understandable to “mostpeople” and not to copyright lawyers alone.

\footnote{138} A computation of a single term of years from first public dissemination would likewise require an alternative computation of minimum term (from first publication) in order to comply with the UCC. Such a computation would also be complicated; but adding the complexity of the renewal system to that of the alternative term required by the UCC piles Ossa on Pelion.

\footnote{139} Report, at 57.

\footnote{140} See Ringer, supra note 116, at 202, in summarizing the legislative proposals since 1909 affecting renewals:

The transitory provision dealing with the extension of subsisting copyrights turned out to be one of the most troublesome and difficult problems facing the revision drafters, and no completely satisfactory solution was ever found. Everyone appeared to agree that, at least nominally, the extension had to be given to the author or his family, but there was considerable pressure to allow previous grantees to share in the extension. There was also some feeling that, rather than face all these problems, it would be better not to extend subsisting copyrights at all.

For a detailed discussion of these legislative proposals, see id. at 191-202.
lengthening the term unless the author or his heirs were to receive some benefit from it."\textsuperscript{141} The Report attempts to reconcile these conflicting interests by proposing that if the assignee has a continuing obligation to the author or his heirs to pay a royalty or a portion of the revenue derived from the copyright, the assignment should remain effective for the additional twenty years; but if the grant was made for a lump sum payment, the copyright should revert to the author or his heirs for the extended twenty-year period even though the grant may explicitly have included "any extensions" of copyright.\textsuperscript{142}

Let us acknowledge first that there is no easy answer to this question, for no legislative disposition of the rights in the extension of term for existing works will please everyone. Nor need any such disposition please everyone, for the prime purpose of copyright legislation is not to please, but to promote the progress of science and useful arts. The practicalities of the legislative process, however, would indicate that substantial opposition to any important provision in a proposed bill may impair the likelihood of the bill's passage.\textsuperscript{143}

The denial of the benefits of an extended term to a grantee under a lump-sum grant which explicitly includes rights in "any extensions" appears, at the very least,\textsuperscript{144} an unfair modification of a contract already made. The contract should govern, and the rights in the extension should be disposed of as the contract provides. On the other hand, where there is in fact a continuing arrangement for the copyright owner to receive a royalty or portion of the revenue from the work, there should be little argument against the grantee continuing to exercise the rights granted. The core of the problem, however, would appear to be the lump-sum grant which does not refer to the period of "any extensions" of copyright. The core contains two seeds of controversy: (1) what is a "lump-sum" grant? and (2) should the grantor or the grantee under such a grant obtain the benefit of the extension?

The answer to the first question weighs heavily in determining the answer to the second question, for there is a large gray area in the permutations and combinations of contractual arrangements where the grant can with no great assurance be classified as either "lump-sum" or "continuing payment."\textsuperscript{145} A contract may specify that the grantor is to

\textsuperscript{141} Report, at 58.
\textsuperscript{142} Ibid.
\textsuperscript{143} See note 140, supra.
\textsuperscript{144} Possibly there may also be a violation of the constitutional prohibition against the taking of property without due process. A full discussion of this problem is beyond the scope of this article, but for a discussion of the similar due process question in connection with abolition of common law literary property rights, see text to notes 79-83 supra, and references cited in those notes, including Strauss, supra note 83, at 34-36.
\textsuperscript{145} See text at note 379, infra.
receive a sum certain on signing with a further sum certain on the happening of any various contingencies (revenues in excess of a specified amount; grant of rights to the work in another medium; exploitation of the rights beyond a specified point in time; etc.). The grant may instead provide that the grantor is to receive a minimum of a sum certain at regular intervals, plus an additional sum at each interval if the revenues exceed a specified amount. The grantee may have a right to pay the grantor a fixed sum in lieu of any continuing royalties. And so on. The variety of such arrangements reflects both the complexity of our business and tax practices and the ingenuity of our legal minds.

Under the Report's proposal each of the contractual arrangements would have to be classified as either "lump-sum" or "continuing royalty." It is not clear whether a minimum continuing royalty would be specified. This would be most difficult for the legislative draftsman to formulate, but no more difficult than the onus upon the attorney who must determine whether or not the grantor or the grantee has the rights in a given work for the extended period of copyright. Thus, the requirement that the extended term revert to the grantor under a "lump-sum" grant would present substantial problems of contract interpretation.

Turning now from the administrative question to that of substance, it is proper that the grantor should, if it is feasible, obtain benefits from the extension of term. There are, however, frequent instances in which a lump sum payment has fairly compensated the author and his heirs for whatever use the grantee may make of the copyright for the entire period of the renewal copyright, including the twenty-year extension. Moreover, the grantee may have made a substantial investment in, for example, a motion picture which is based on an underlying work the exclusive rights in which the motion picture producer was led to believe were his. The producer's investment was thus premised on the assumption that he would be free from any restraint on the exhibition of his motion picture both during and after the present term of copyright on the underlying work. The automatic reversion of the extended term,

146 See Ringer, supra note 116, at 205:

... Provisions aimed at adjusting the length of the copyright term in a variety of situations are increasingly common in the copyright statutes of other countries. Even more striking are the provisions intended to help preserve and maintain the author's personal and economic rights as against transferees and users, or to give him and his family a "second chance" to benefit from his work. These provisions are extremely common and growing more so: both the scope of these provisions, and the particularity with which they are set out, also appear to be increasing. It is probably no exaggeration to call the growth in provisions regulating an author's contract relations the most important recent development in world copyright law.

See also the recommendation made by the Report for a general limitation on the term of lump-sum transfers to twenty years from the date of execution. Report, at 94, discussed in text to notes 373-79, infra.
however, would require the producer to obtain a further grant from the grantor. Somewhat the same issues are presented by the joint resolution which was introduced by Representative Celler on February 15, 1962, to continue until December 31, 1967, any subsisting renewal term of copyright which would otherwise expire prior to that date.\textsuperscript{147} In essence, the lengthening of the term under either the recommendation of the Report or the pending joint resolution constitutes a windfall. Thus, the question is whether the wisest course is to grant the benefits of the windfall to the author and his heirs, to grant the benefits to the user or to avoid any windfall at all by permitting renewal copyrights to expire on the dates dictated by the provisions of the present act.\textsuperscript{148} There is no easy solution, but the last alternative would appear to be the least favorable of the three.

IV.

COPYRIGHTABILITY—GENERAL STANDARDS AND SPECIFIC WORKS\textsuperscript{149}

A. General Standards of Copyrightability

1. "Writings." The present act states: "The works for which copyright may be secured under this title shall include all the writings of an author."\textsuperscript{150} Not merely do copyrightable works include "all the writings of an author," as stated in the statute, but the Constitution requires that a work must be a "writing" if it is to be protected.\textsuperscript{151} The Report therefore recommends that the statute should mention a general requirement that any work, in order to be copyrightable, must be fixed in some tangible form.\textsuperscript{152} It would also seem advisable to use the specific phrase "tangible form," in view of the use of that phrase in the definition of "publication" in the Universal Copyright Convention.\textsuperscript{153}

2. Originality and creativity. The Report also recommends that the

\textsuperscript{147} H.J. Res. 627, 87th Cong., 2d Sess. (1962). S.J. Res. 178 and S.J. Res. 182 were introduced in the same Session by Sen. Kefauver on April 2, and May 2, 1962, respectively. Inasmuch as the revised act will in all likelihood provide in some manner for a longer term, the various bills provide interim measures for saving the benefits of the new act for those renewal copyrights about to expire. S.J. Res. 182 is identical with H.J. Res. 627. S.J. Res. 178, however, would limit the period of the continuation to "the date of enactment into law of a general revision of the copyright laws" if such enactment occurs prior to December 31, 1967.

\textsuperscript{148} See note 140, supra.


\textsuperscript{152} Report, at 9-10.

\textsuperscript{153} See note 72 supra.
new act set forth two further pre-requisites for copyrightability, neither of which is explicit in the present act: originality and creativity. "Originality" means that the work was created by the author himself and was not copied from the work of another. If an isolated genius who had never had access to the works of Shakespeare were to create *Hamlet* anew, theoretically he would have a copyrightable work even though his work were a replica, word for word, of the earlier work of Shakespeare. "Originality" is thus not "novelty." An invention to be patentable, must be "novel," in the sense that it has not been disclosed in the prior art.\(^{154}\) A work to be copyrightable must be original, but need not be novel.\(^{155}\) As for the second suggested prerequisite, the cases do indeed state that at least a modicum of creative authorship is necessary for copyrightability.\(^{156}\) When the proposed statute is actually drafted, however, I submit that the draftsmen should phrase the requirement of creativity so that it does not appear that either the Register of Copyrights or the courts are to be appointed as arbiters of literary and artistic taste. The wisdom required to assess the "creativity" of blank \(^{157}\) or circus posters\(^{158}\) is as nothing compared to the Solomonic talent required to enter controversy as to whether a given example of modern painting, sculpture, poetry or music does or does not represent an appreciable amount of creative authorship.

**B. Classification of Copyrightable Works**

The present act states in section 5 that the application for registration must specify which of certain designated classes the work in which copyright is claimed belongs.\(^{159}\) Section 5 also states, however, that this classification "shall not be held to limit the subject matter of copyright" as defined in section 4.\(^{160}\) Inasmuch as section 4 states that copyrightable works under the act "include all the writings of an author," it might be assumed that any "writing" would be copyrightable, whether or not among the classes designated in section 5.\(^{161}\) Such an assumption,


\(^{155}\) Alfred Bell & Co. v. Catalda Fine Arts, 191 F.2d 99 (2d Cir. 1951).


\(^{158}\) Bleistein v. Donaldson Lithographing Co., supra note 156.


\(^{160}\) See text accompanying note 150, supra.

\(^{161}\) The following classes are designated:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations.

(b) Periodicals, including newspapers.

(c) Lectures, sermons, addresses (prepared for oral delivery).

(d) Dramatic or dramatico-musical compositions.
REVISION OF THE COPYRIGHT LAW

however, is not warranted. The question thus arises whether the revised act should more specifically express an intent of Congress to grant copyright protection to the full range of works which may be eligible for such protection under the Constitution.

The Report recommends that Congress not do so but instead set forth the specific classes of works to be copyrightable under the new act. The Report further suggests that the specification by Congress should include all of the classes presently set forth in section 5 of the act and such others as Congress may now deem appropriate. This classification would, however, be set forth broadly in order to permit the inclusion in these general categories of similar works in new forms or media which may be developed. The Report takes the position that delimiting the classes of eligible works in this manner is preferable to the automatic inclusion of every work which may be eligible under the Constitution, and cites typography, broadcast emissions and industrial designs as examples of the sort of works constitutionally eligible but which Congress would probably not want to protect under the copyright statute.

There is merit in the Report's position that "the extension of the copyright statute to entirely new areas of subject matter should be left to the determination of Congress rather than to the chance interpretation of an omnibus provision." But if a revision of the act is achieved, it will have taken Congress more than half a century to bring the act into alignment with current technology. In the interim, the burden has fallen upon the courts to protect creators of new forms of works by narrowing this Congressional equivalent of "cultural lag." In the light of past experience, therefore, only the most sanguine would feel confident that Congress would amend the Copyright Act with sufficient frequency in the future to accommodate its provisions to the rapid changes of technology. The Report appears to recommend that the Congressional classification

(e) Musical compositions.
(f) Maps.
(g) Works of art; models or designs for works of art.
(h) Reproductions of a work of art.
(i) Drawings or plastic works of a scientific or technical character.
(j) Photographs.
(k) Prints and pictorial illustrations including prints or labels used for articles of merchandise.
(l) Motion-picture photoplays.
(m) Motion pictures other than photoplays.


162 See Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955) holding that although under the Constitution Congress could give to one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition, Congress had not done so under the act.

163 Report, at 11-12.

164 Id. at 11.

165 Ibid.
of copyrightable works under the new act should be set forth more broadly than under the present act. If this approach is to be adopted (rather than granting statutory protection to all works constitutionally eligible), a thorough study should first be made of the various new forms of works which are presently known although perhaps not yet of the same commercial significance as older forms. Only after such a study has been made should the legislative draftsmen prepare a classification of the works eligible for protection under the new act.

C. Copyrightability of Specific Works

1. Works of applied art. The statuette of a Bali dancer was responsible for the leading case of Mazer v. Stein, in which the United States Supreme Court held that the incorporation of the statuette into a lamp base did not deprive it of its protection as a work of art. Since that time the scope of protection which should be given to the designs of useful articles has become a question of growing significance. The Report recommends that where a work of art (including pictorial, graphic and sculptural works) is employed as a design or decoration of a useful article, the work of art should continue to be protectible under the Copyright Act, but that the design of a useful article per se should be protected under a sui generis design statute. Such a design statute would govern protection of the design of useful articles such as automobiles, sewing machines, wearing apparel, etc.

The Report points out that many of the customary features of the copyright statute are inappropriate for the protection of the design of useful articles per se. The term of copyright is probably much too long for the protection of industrial designs, and the necessary statutory provisions with respect to notice, deposit, registration and liability of certain innocent infringers must be based on different considerations under a copyright statute than under a design statute.

166 The writer has in mind such "works" as electronic music (music prepared not from the customary written notation but from an admixture of separate tape recordings and technical effects), the composite of magnetic impulses or photo-chemical impressions recorded in the "memory" unit of an information retrieval unit, etc.

167 Supra note 151.


170 Id. at 13.

171 A bill providing for a design statute such as that supported by the Report is now pending in Congress. H.R. 6776 and H.R. 6777, identical bills, 87th Cong., 1st Sess. (1961); S. 1884, 87th Cong., 1st Sess., identical with H.R. 6776 and H.R. 6777 (1961).
Although the recommendation is made that copyright protection on a work of art should be continued when it is utilized as a design on a useful article, the Report states that the registration of the embodiment of the work of art in the useful article poses substantial administrative problems for the Copyright Office. Providing for the deposit of the useful article and making the administrative determination as to whether the useful article does or does not embody the copyrightable work of art are troublesome. Accordingly, the Report recommends that registration and deposit under the revised Act be denied to the embodiment of the work of art in the useful article, and that only the work of art per se be eligible for registration and deposit.

The Report suggests that where a work of art has been copyrighted but is thereafter registered as a design under the present patent law or under the proposed design law, the protection of the design with respect to useful articles should thereafter be governed solely under the patent or design law, although the original copyright protection on the work would continue with respect to expressions of the work other than in useful articles.
2. Architectural drawings and structures.\textsuperscript{176} The Report’s recommendations concerning architectural drawings and structures parallel its recommendations concerning works of applied art generally.\textsuperscript{177} Guided by the provision on the subject in the present act,\textsuperscript{178} it proposes that the new statute continue to protect architectural drawings against infringement by the making and distribution of copies of the drawings; but that the copyright on the drawing should protect against unauthorized “execution” of the drawing (\textit{i.e.}, by erecting the structure) only where the structure is itself a “work of art,” \textit{i.e.}, a purely non-functional structure such as a monument.

With regard to functional structures having non-functional “artistic” features, the Report makes a recommendation similar to that concerning the ornamental design of useful articles: these non-functional “artistic” features should be protected under separate legislation proposed generally for the protection of ornamental designs of useful articles. Where a work of art such as a mural or painting, however, is superimposed on an architectural structure but retains its separate identity, the Report proposes that the copyright protection on such work of art should continue as under the present statute.

3. Choreographic works.\textsuperscript{179} These works are not mentioned under the present act, although the Copyright Office permits their registration as dramatic compositions if the story or theme expressed by music and action combined or by actions alone is of a dramatic character.\textsuperscript{180} The Report recommends that choreographic works be specifically copyrightable as such under the new act, regardless of whether they be of dramatic or “abstract” character.\textsuperscript{181} Inasmuch as the copyright protection of such works relates primarily to their public performance, it suggests that ballroom and social dance steps designed merely for the personal enjoyment of the dancers be excluded from protection under the act.\textsuperscript{182}

4. Sound recordings.\textsuperscript{183} The questions in this area relate to the protection of the creative contributions to a recording which derive from three sources: (1) the author (2) the performer and (3) the record

\textsuperscript{176} For the general background, see Strauss, “Copyright in Architectural Works,” Copyright Law Revision Study No. 27, supra note 26, at 63 (1959).
\textsuperscript{177} Report, at 15-16.
\textsuperscript{178} 17 U.S.C. §§ 1(b), 5(g) (1958).
\textsuperscript{179} For the general background, see Varmer, “Copyright in Choreographic Works,” Copyright Law Revision Study No. 28, supra note 26, at 89 (1959).
\textsuperscript{180} 37 C.F.R. § 202.7 (1960).
\textsuperscript{181} Report, 17.
\textsuperscript{182} Id., 16-17.
\textsuperscript{183} For the general background, see Ringer, “The Unauthorized Duplication of Sound Recordings,” Copyright Law Revision Study No. 26, supra note 26, at 1 (1957).
producer (e.g., the engineering and directing personnel). The present act clearly protects the creative contribution of the author.\textsuperscript{184} The protection of the act does not extend to the second and third classes of contributors,\textsuperscript{185} however, although some protection for these persons has been obtained under state law.\textsuperscript{186}

The Report makes no specific proposal with respect to the protection of sound recordings, but suggests generally that they should be protected under copyright principles.\textsuperscript{187} At the time the Report was submitted, the joint meeting of the UNESCO Intergovernmental Copyright Committee, acting under the Universal Copyright Convention, and the Permanent Committee of the Berne Union had not yet taken place. At that meeting, however, a "neighboring rights" convention was proposed which has important ramifications on the protection of sound recordings.\textsuperscript{188} The Report indicates that the Copyright Office is continuing its study of this question and will shortly submit detailed recommendations.\textsuperscript{189}

V.

RIGHTS OF COPYRIGHT OWNERS\textsuperscript{190}

A. The General Rights\textsuperscript{191}

Under the language of the present act, a copyright owner is granted essentially the following "exclusive" rights in his work:\textsuperscript{192}

1. to make and publish copies of the work;
2. to make new versions of the work if it is literary, dramatic or musical;
3. to execute a work of art from a model or design thereof;
4. to perform a musical work in public "for profit"\textsuperscript{193} (but whether or not "for profit," if the work is dramatico-musical);
5. to perform a literary work in public ("for profit," if the work is non-dramatic; whether or not "for profit," if the work is dramatic);

\textsuperscript{184} 17 U.S.C. §§ 1(d), 1(e), 101(c) (1958).
\textsuperscript{185} Capitol Records, Inc. v. Mercury Records Corp., 221 F.2d 657 (2d Cir. 1955).
\textsuperscript{187} Report, at 17-18.
\textsuperscript{188} See note 63 supra.
\textsuperscript{189} Report, at 18.
\textsuperscript{190} Report ch. III, at 19-36.
\textsuperscript{191} Report, at 21-24.
\textsuperscript{193} This right is subject to the "jukebox exemption," the right to perform music on coin-operated machines without payment to the copyright owner of the music. 17 U.S.C. § 1(e), third paragraph (1958). See text at notes 267-72, infra.
6. to reproduce a literary, dramatic or musical work in a transcription or recording.\textsuperscript{194}

Even in outline form, the specification of the proprietor's rights is far short of lucid; but the periphrastic draftsmen of the act did not incline to clarity. The Report wisely counsels a clearer statement of these rights in the new act.\textsuperscript{195}

B. Fair Use\textsuperscript{196}

Notwithstanding the "exclusive" rights granted to the copyright proprietor under the act, the courts have sanctioned the doctrine of "fair use," which permits another to make use of copyrighted material even though no express authorization has been granted by the copyright proprietor.\textsuperscript{197}

"Fair use" is permitted in order that a proper balance may be struck between society's interest, in maintaining the pecuniary incentive of a creator to produce an intellectual property and in facilitating the wide dissemination of intellectual and cultural contributions. Contrary to a wide misconception, there is no valid general rule permitting the "fair use" of a specified number of words or lines of a given work. Generally, the following criteria constitute a fair use: the use should not impair the value of the copyright on the copied work; the copier should not have substituted the intellectual effort of the copyright owner as a substitute for the copier's own efforts; and the use should be truly "fair," one which would not appear to a reasonable person to be unjust to the original.\textsuperscript{198} In weighing these factors, special significance must be accorded to the purpose of the use: for example, a use made in a scholarly dissertation is more likely to be deemed a "fair use" than one made in a commercial advertisement.\textsuperscript{199}

The Report recognizes the anomaly created by the absence from the statute of any mention of fair use, and accordingly suggests that a provision be inserted in the new act to affirm the principle and to indicate

REVISION OF THE COPYRIGHT LAW

its scope. Statutory recognition of the principle is indeed desirable, but it would probably be wise not to define the scope of the principle in any but the broadest terms. The United Kingdom Copyright Act of 1956 sets forth in elaborate detail the criteria of "fair dealing" under that act. To insert such precise specification in our act, however, might well create, with the passage of years and continuing changes in business practices, difficulty for both copyright owners and users.

C. Photocopying by libraries

From the days of the medieval monks, scholars have made handwritten notes and transcriptions of the works of others. The physical limitations on such laborious copying have acted as a check on its extent. With the advent, however, of the Xerox, Verifax, Thermofax and other marvels of modern technology, the use of copying devices presents a problem not sufficiently covered by a copyright act premised on the copying methods of the past. Libraries as well as private organizations and governmental agencies presently make great use of photocopying devices to copy excerpts, or the entirety of copyrighted works.

Thus, the problem: the researcher demands quick and economical access to otherwise unavailable works, while the copyright proprietors of books and periodicals demand revenue from the use of their works. In the case of technical and scientific periodicals of small circulation, such revenue may constitute the economic differential between the publication's survival and demise. With the exception of such minor uses as may fall within the doctrine of fair use, the present act proscribes any copying of a copyrighted work without the permission of the copyright proprietor. Much of the photocopying now performed may, therefore, constitute copyright infringement which is frequently difficult to discover and which is almost invariably prohibitively expensive to control. The new act must therefore provide a system which will not unreasonably inhibit scholarship and research while providing a feasible means for protecting the rights of copyright owners.

The Report makes a valid distinction between photocopying performed by public libraries, whose collections are available to the public

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200 Report, at 25.
201 4 & 5 Eliz. 2, c. 74, §§ 6, 9 [1956]. See also id., §§ 7, 41.
202 A statement in the statute of the general principle of fair use, rather than of its detailed criteria, has an analogue in the present statutory recognition of the general principles of equity: "Any court . . . shall have power . . . to grant injunctions according to the course and principles of courts of equity, on such terms as said court or judge may deem reasonable." 17 U.S.C. § 112 (1958).
without charge, and industrial organizations, whose customary concern in this area is to provide multiple copies of excerpts to their research workers. For this latter group the Report suggests that an inter-industry arrangement be established on a private basis, apart from direct regulation under Copyright Act. Under such an arrangement the industrial organizations would pay royalties to the publishers in return for the blanket right to make photocopies for internal use.

With regard to free public libraries, the Report recommends that the library should be permitted to supply a single photocopy of an article in a periodical or of a "reasonable part" of any other publication to an applicant who states in writing that he requires the material and will use it solely for his own research. Where, however, the library is requested for a photocopy of an entire publication, the Report favors that the library be permitted to supply such photocopy only when the applicant's statement adds that the publication is not available from the publisher, and the library has no knowledge of such availability inconsistent with this statement. As a final safeguard, where the work which is photocopied bears a copyright notice, the library would be required, under the Report's recommendation, to affix to the photocopy a warning that the material appears to be copyrighted.

The Report's recommendations with regard to photocopying are generally meritorious, but a few modifications to strengthen the protection of the copyright owner would perhaps be in order. For example, where a library is requested to photocopy an entire publication, the library should be required to make at least a minimal effort to determine whether the publication is in fact available from the publisher. Moreover, a publisher may have granted a license to an agent for the photoduplica-

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207 Ibid. An arrangement somewhat along these lines has been established in Germany. There, an agreement was signed in 1948 between the German Publishing Ass'n and the German Industrial Ass'n, setting forth the terms under which members of the Industrial Ass'n may utilize photocopies of articles appearing in periodicals published by members of the Publishing Ass'n. See discussion of this agreement in Varmer, supra note 203, at 57-58. But see also Hein, Gerhard, Vereinbarkeit des "Rahmenabkommens über die Herstellung von Fotokopien" mit § 1 GWB. (11 Wirtschaft und Wettbewerb 18-25, no. 1, Jan. 1961.), noted at 9 Bull. Cr. Soc. 270, Item 182 (1962). The Hein article discusses the application of the German antitrust law to an agreement along the lines of the one described above.
208 The formal recommendation employs the quoted phrase, but it would appear more appropriate to use the phrase, "relatively small part," which appears in the Report's discussion leading up to this recommendation. Report, 26.
209 Ibid.
210 Such effort could take the form either of an inspection of Books in Print (a standard annual bibliographic listing) or an insistence by the library that the person requesting the photocopy present a statement from the publisher that the book is out of print.
tion of the works on the publisher's list which are out of print, in which case the person seeking a photocopy should be required to obtain it from the agent, not from the library. It would probably be an oppressive burden neither on the publisher to announce to libraries through trade media that it has appointed such an agent nor on the library to ascertain this through the same media. And lastly, a publisher may wish to put back into print a work which has been out of print but which has increased in demand over the years; accordingly, where the library has made available a photocopy of an entire work, the library might be required to transmit to the publisher or copyright proprietor a simple notification (such as a postal card) that it has done so.

The new act should in any event make explicit that the photocopying to be permitted without the proprietor's consent is not to include the making of such copies for profit. If such photocopies are supplied at a profit by the copier, there seems little question that the consent of the copyright proprietor should first be obtained. The supplying of such photocopies for profit has become a substantial business, and the copyright proprietor should be permitted to receive the share of such profit to which he is entitled.

D. The "For Profit" Limitation on the Performance Right

1. The statutory history. Protection of the copyright proprietor's exclusive right to authorize public performance of his work was first recognized in connection with dramatic works over one hundred years ago. But it was not until almost the close of the nineteenth century that the statute recognized this right in musical compositions. It was not until 1952, almost twenty years after Jiminy Durante nosed out

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211 Quaere, however, whether such a license would be valid where an author has exercised his right under a publication contract's customary "out-of-print clause" to have all publication and other rights reassigned to him by the publisher.

212 In a statement issued recently by Xerox Corporation, a major manufacturer of photocopying machines, upon its acquisition of University Microfilms, Inc., Xerox stated that University's sales of document facsimiles to scholars, scientists and libraries were currently at an annual rate of $2 million. It was indicated by Xerox that University's total net income for 1961 was more than $180,000. Wall Street Journal, Feb. 21, 1962, p. 9, col. 1.

University Microfilms' catalog includes books printed in England in the fifteenth century, early American publications, thousands of out-of-print books of this century, and 1,500 popular magazines and technical journals currently in use.

University Microfilms estimates it can prepare a full-sized copy of a rare book for "as little as 3½ cents a page," or about $7 for a 200-page volume.

Most of these duplications are made one copy at a time and sold to libraries, universities, researchers, and scholars. The company also records most of the dissertations submitted to American universities by candidates for doctors' degrees.

Ibid. It is the writer's experience that, prior to photocopying works which are not in the public domain, University requests permission from the copyright proprietor.


the plaintiff who had unsuccessfully sued him for his unauthorized broadcast of the plaintiff's poems, that Congress granted public performance rights to the proprietors of nondramatic literary works. And even today the statute does not explicitly recognize a public performance right in a motion picture.

Through the years, Congress has granted increasing recognition to the public performance right per se but it also has developed a distinction between a work’s performance “for profit” and not “for profit.” Since the enactment of the present statute in 1909, the exclusive performing right granted to copyright proprietors of musical compositions and works prepared for oral delivery (i.e., lectures, sermons, addresses and similar productions) has been limited to the performance of such works “for profit”; and the extension in 1952 of such right to nondramatic literary works was also made subject to the limitation of performance “for profit.” There is, however, no “for profit” limitation on the performance right in dramatic compositions.

2. The judicial history. It has been held that, to constitute performance “for profit,” it is not necessary that money be taken at the door, where the performances are not eleemosynary... [but] 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. 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 quoted principle, enunciated by Mr. Justice Holmes in a case involving the unauthorized performance in a restaurant of Victor Herbert’s song “Sweethearts,” has been followed in a variety of cases including those holding the public performance of music to be “for profit” where it is performed as live or recorded accompaniment to the exhibition of silent motion pictures; by the playing of the sound track of a talking motion picture; by a radio broadcast from a station carrying commercial messages (even where the broadcasting station is operated by

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218 See discussion in text at notes 238-55, infra.
220 Id. § 1(c).
221 See note 217 supra.
222 Id. § 1(c) (1958).
223 Id. § 1(d).
226 Irving Berlin, Inc. v. Daigle, 31 F.2d 832 (5th Cir. 1929).
3. The position of the Report. The Report acknowledges three arguments for the imposition of a "for profit" limitation on the performance right in nondramatic literary and musical works without a corresponding limitation for dramatic and dramatico-musical works: (1) persons who have attended a nonprofit performance of a work are less inclined to make payment for a later performance of the same work if the work is a dramatic work (e.g., a play) than if it is a nondramatic work (e.g., a musical composition); (2) the primary remuneration to the proprietor of a dramatic work is usually from public performances, although for the proprietor of a nondramatic work "revenue is also available" from the sale of copies and phonograph records; and (3) nondramatic works are much more frequently and easily performed for nonprofit aims (such as charitable or educational purposes) than are dramatic works.

For these reasons, the Report favors that under the new act the "for profit" limitation be continued on the public performance right in nondramatic literary and musical works and that the public performance right in dramatic works continue without this limitation.

Where the musical compositions to which the Report refers are works of popular music, the Report's position appears sound. Issue can be taken, however, with the validity of these three arguments as applied to serious musical works: (1) a person who has attended a nonprofit performance of a work is less inclined to make payment for a later performance of the same work if the work is a dramatic work (e.g., a play) than if it is a nondramatic work (e.g., a musical composition); (2) the primary remuneration to the proprietor of a dramatic work is usually from public performances, although for the proprietor of a nondramatic work "revenue is also available" from the sale of copies and phonograph records; and (3) nondramatic works are much more frequently and easily performed for nonprofit aims (such as charitable or educational purposes) than are dramatic works.

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For these reasons, the Report favors that under the new act the "for profit" limitation be continued on the public performance right in nondramatic literary and musical works and that the public performance right in dramatic works continue without this limitation.
of a symphony or concerto is probably no more inclined to pay for a repeat performance soon afterward than is a person who has attended the nonprofit performance of a play; (2) the income from public performances of such serious musical works, although usually small, is greater than from the sale of copies and recordings; and (3) the seemingly more widespread performance of serious musical works (than of dramatic works) for charitable and educational purposes occurs with a loss to the music creators of royalties (from both professional and amateur performances) which, under similar circumstances, are paid to creators of dramatic works. Thus, some merit appears for granting a public performance right in serious music without a "for profit" limitation. The drafting of a workable distinction between serious music and popular music (based perhaps not only on the character of the work but also on its length) is not an enviable task, but further consideration should be given to this question.

Although musical compositions are the nondramatic works most frequently discussed in connection with the "for profit" limitation, there are of course works other than musical compositions which also fall in the nondramatic category, and such works should be mentioned here. The nonprofit public performance of many works such as books, poetry, maps, art reproductions and photographs is likely to increase sharply within the near future by their significant use in non-commercial educational broadcasting. The familiar problem is that of fostering dissemination of cultural works for worthy purposes while not unreasonably depriving creators of income. Perhaps before a "for profit" limitation is imposed by the new Act on all public performance rights in the works just mentioned, some further consideration should be given to the familiar problem in this still unfamiliar context.

E. The Extension of the Performance Right to Motion Pictures

Motion pictures as such were not expressly recognized as copyrightable subject matter under the 1909 act; and even though a subsequent amendment to the act added "motion picture photoplays" (i.e., dramatic motion pictures) and "motion pictures other than photoplays" (i.e., nondramatic motion pictures) to the classes of copyrightable works

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Footnotes:

238 See Varmer, supra note 213, at 114.
239 Report, at 28-30. For the general background, see Varmer, supra note 213, at 104-11, 115-18.
under section 5, the act to this day contains no designation of the rights of copyright owners in motion pictures per se.

In a series of cases, however, beginning at about the turn of the century, the courts undertook to fill in the gap in statutory protection. The unauthorized copying of a motion picture was held an infringement of the copyright in a photograph. The unauthorized exhibition of a motion picture photoplay was held an infringement of the right under section 1 (d) of the act to publicly perform a dramatic composition. And the unauthorized exhibition of a documentary film (i.e., a nondramatic motion picture) was held an infringement of the right to copy under section 1(a) of the act, in that the images projected upon the screen, evanescent though they might be, constituted copies of a portion of the copyright proprietor’s work.

The Report takes the position that the holding of an unauthorized exhibition to be copying under section 1(a) is an unwise precedent because it entitles the motion picture proprietor to claim that an unauthorized exhibition is an infringement even though it is not a “public” exhibition but takes place, rather, in the private confines of one’s living room. The motion picture proprietors, however, take the position that their rights should extend even this far, in large part because of the expanding business of the sale and license of home movies and the probable future expansion of pay television and devices for the home recording of programs appearing on television screens.

If, as the Report proposes, a distinction is to be drawn between “public” exhibition and exhibition in private places, the obvious question which arises is one of definition. In apparently the only case deciding the question of when the exhibition of a motion picture constitutes a “public performance,” a federal district court held that exhibition before

241 Tiffany Prods., Inc. v. Dewing, 50 F.2d 911 (D. Md. 1931); Metro-Goldwyn-Mayer Distrib. Corp. v. Bijou Theatre Co., 3 F. Supp. 66 (D. Mass. 1933). In the latter case, the court cited as an alternative ground for its decision the theory that if the motion picture were deemed to be a non-dramatic work, its exhibition on the screen would constitute the dramatization of a nondramatic work and thus an infringement of the copyright proprietor’s right under § 1(b) of the act. See Kalem Co. v. Harper Bros., 222 U.S. 55 (1911).
242 Patterson v. Century Prods., Inc., 93 F.2d 489 (2d Cir. 1937), cert. denied, 303 U.S. 655 (1938).
244 See the commentary on the Report by the Copyright Committee of the Motion Picture Ass'n of America, Inc. ("MPAA"). "The Register's Recommendations to Congress for a New Copyright Statute as They Pertain to Producers and Distributors of Motion Pictures," March 2, 1962, pp. 8-12. See also statement of Thomas J. Robinson, Esq., Chairman of the MPAA Copyright Committee at meeting of Copyright Office Panel of Experts concerning general revision of the U.S. Copyright Law, held at Library of Congress, September 14, 1961, Transcript, pp. 61-63.
members and guests of a social club was not such a performance. The Report questions this holding but takes the view, nonetheless, that the statute should not attempt to define what is a “public” performance of a motion picture, the better course being to leave the definition to be evolved by the courts in the same manner as the courts have defined what is a “public” performance of music and what constitutes such a performance “for profit.” If, however, the only judicial definition to date is one which the Report itself does not accept, I think it advisable to enact a statutory definition. And inasmuch as those performances which take place at social clubs, camps and schools should be included within the scope of a proposed statute, the right should be designated as one of both “public” and “semi-public” performance.

The fundamental concern of the motion picture proprietors, however, with respect to unauthorized home exhibitions appears not to be the person who exhibits in the home. The greater culprit seems to be the person who licenses the bootleg print (i.e., an authorized print which has been lost or stolen or an illicit “dupe” of an authorized print) of a motion picture or one who has received a valid license of an authorized print and then grants unauthorized sublicenses. A possible solution here would appear to be that of granting the motion picture proprietor the exclusive right to make bailments of the work. The grant of such a right would afford recognition of a unique practice of the motion picture industry which accounts for the major portion of the dollar value of motion pictures: customarily, a bailment is made of the physical property in the print, accompanied by a license to exhibit the copyrighted work of which the print is a fixation. Granting the exclusive right of bailment would in general permit the motion picture proprietor under the act to pursue the possessor of a bootleg print who does not exhibit it but merely lends or sells the physical property in the print. Combining

247 Report, at 29.
249 See cases cited notes 224-31, supra.
250 See commentary on the Report by the MPAA Copyright Committee, supra note 244, at 10-12.
251 See id., at 6-8.
252 See letter of Edward A. Sargoy, Esq., December 1, 1958, in Comments and Views Submitted to the Copyright Office on Limitations on Performing Rights, appendix to Varmer, supra note 213, at 133.
such a right with a right of public and semi-public performance would perhaps constitute a proper balance of the interests of motion picture proprietors and the interests of the public.

Although it would limit the performance right in motion pictures to public exhibitions, the Report counsels that the performance right should not be limited to exhibitions "for profit."254 The Report suggests that the reasons for not imposing the "for profit" limitation on performances of dramatic works are equally applicable with respect to motion pictures.255 If in addition the right of semipublic performance is granted to motion picture proprietors, it would seem proper to grant such a right also without any "for profit" limitation.

F. Public Reception of Broadcasts256

Broadcasts of copyrighted material are today received not only in homes but also in hotels, bars, supermarkets and other public places. Inasmuch as the acts of the proprietors of such hotels, etc., in making the broadcasts available to their patrons may constitute a "public performance,"257 the question arises whether the authorization for such performance should be obtained by the proprietor of the establishment where the broadcast is received or should be "cleared at the source" with the broadcaster. In an analogous procedure, ASCAP and Broadcast Music, Inc. ("BMI"), the primary organizations which license the performing rights in music, grant to networks licenses which do not require any further license by affiliated stations for their retransmission of network broadcasts.258 And a similar arrangement is made by these organizations with Muzak and other operators of wired music services259 and with producers of motion pictures.260 In such cases, no further license is required to perform the wired music where it is received, and no further license is required to exhibit the motion picture.


254 Report, at 29.
255 See text at notes 232-234, supra. The reasons are in fact even more applicable to motion pictures: while a small town charitable performance of a play would require the assembling of a cast and scenery at great expense to provide some semblance of the first-run Broadway performance, the exhibition of a multi-million-dollar blockbuster movie by such a local organization would require little more than a projector and screen to be substantially identical to the "hard-ticket" performance for which a world premiere audience pays at least several dollars. See Varmer, supra, note 213 at 117.

257 As to "performance," see Buck v. Jewell-LaSalle Realty Co., 283 U.S. 191 (1931). As to "public," see the same case on remand from the cited decision, 51 F.2d 726 (8th Cir. 1931).
258 See Varmer, supra note 213, at 90.
259 See ibid.
260 See id., at 86-87.
With respect to all works which are to enjoy the public performance right, the Report recommends that the mere reception of broadcasts should be exempted from this right, except for those recipients of broadcasts who make a charge to the public for such reception.\textsuperscript{261} As the basis for its recommendation, the Report states that the enforcement of this right against the broadcast recipients should not be left to the forbearance of the copyright proprietors themselves or the performing rights organizations, who, according to the Report, have sometimes sought to require performing licenses from small establishments for their mere operation of receiving sets.\textsuperscript{262}

To the extent that demanding licenses from small establishments may constitute economic duress, however, the solution would appear to lie not under the Copyright Act but in the regulation of performing rights organizations\textsuperscript{263} But a more basic question with respect to "clearance at the source" is that of privity.\textsuperscript{264} There is privity of contract between the proprietor of the wired music service and the restaurant which subscribes to the service; between the network and the affiliated station which retransmits the network programs; and between the motion picture producer and the exhibitor. But there is customarily no privity between the broadcaster and the hotel, the bar or the supermarket which receives the broadcaster's transmissions. Where there is no privity of contract, it would seem unfair to require the broadcaster to clear the recipient of any obligation to pay for the exercise of a performing right, for the broadcaster would not be able to recoup any part of his payment from the broadcast recipient.\textsuperscript{265}

The proposal for exemption of broadcast reception from the performance right would appear to be a minor foray into the major question of regulation of the performing rights organizations.\textsuperscript{266} The seriousness of the privity problem suggests, however, that the foray should not be undertaken without a separate study of the entire question.

\textsuperscript{261} Report, at 31.
\textsuperscript{262} Ibid.
\textsuperscript{263} The question of regulating performing rights organizations is acknowledged by the Report to be "too large and complex to be dealt with in the present program for copyright law revision," although it recommends that Congress make a separate comprehensive study of the question. Report, at 138.
\textsuperscript{264} See Finkelstein, supra note 236; Varmer, supra note 213, at 90.
\textsuperscript{265} See also statements by Herman Finkelstein, counsel for ASCAP and Sidney Kaye, Esq., Chairman of the Board, Broadcast Music, Inc., at meeting of Copyright Office Panel of Experts concerning general revision of the U.S. Copyright Law, held at Library of Congress, September 14, 1961, Transcript, pp. 56-57 and 59-60, respectively.
\textsuperscript{266} It would likewise be unfair to expect the broadcaster to recoup from its advertisers the payments made by the broadcaster to clear for broadcast recipients who may block out the broadcast commercials to insert their own, e.g., in store-wide broadcasts.
G. The Jukebox Exemption

Under the present act the performance of a musical composition on a "coin-operated machine" (i.e., a jukebox) is expressly designated as not a public performance for profit unless a fee is charged for admission to the place where the performance occurs. The "jukebox exemption," as this provision has come to be known, is unique in the act. No other commercial users of copyrighted material enjoy an explicit exemption from remunerating the copyright owner for the performance of his work for profit. As the Report points out, the jukeboxes of 1909 were a comparatively insignificant novelty of the day, as contrasted with the jukebox industry of today which is one of the largest commercial users of music, grossing an estimated annual revenue of over $500,000,000. Many attempts at Congressional repeal or modification of this exemption have been made since 1909, but without avail. The Report advocates repeal of the jukebox exemption without awaiting general revision of the Act, or at least replacement by a requirement that the copyright owners of music be paid reasonable license fees by jukebox operators.

The Music Operators of America, Inc., the industry organization of jukebox operators, takes the position that the performance of music on coin-operated machines ordinarily is not a public performance, in that the individual invariably selects his record, it is his choice, he pays for it, no other person has any choice in that selection, he has to listen to it or close his ears, it is a private performance—ordinarily this is the way the jukebox is played.

No comment need be made on the characterization of the playing of a jukebox as a "private performance." It speaks, quite audibly, for itself.
But if the crux of the jukebox operators' position is indeed that a jukebox performance is not a public performance, the act should perhaps be revised to state that the exclusive rights granted to the copyright proprietor shall include the right to authorize jukebox performances in any public place, irrespective of whether the performances are "public" or "private."

Moreover, it does not follow from the fact that the major performing rights organizations have been defendants in government antitrust actions that the members of such organizations should be deprived of royalties for jukebox performances. If, in their negotiation of licenses with jukebox operators, the performing rights organizations run afoul of our country's antitrust policy, the solution is not to insert in the Copyright Act a bar to the collection of royalties from specified users but, rather, to enact statutory regulation of these organizations or utilize the existing or future antitrust laws.

H. The compulsory license for the recording of music.

In the leading case of White-Smith Music Publishing Co. v. Apollo Co., the United States Supreme Court held that under the Copyright Act then in force a pianola roll was not a "copy" of a copyrighted musical composition and that the manufacture and sale thereof therefore did not constitute an infringement of the copyrighted work. Thereafter, to insure to copyright proprietors of music their rightful revenue from "parts of instruments serving to reproduce mechanically the musical work," Congress, under the 1909 act, granted to such proprietors the exclusive right to control mechanical reproduction. At the hearings prior to the passage of the act, however, Congress was informed that, in anticipation of a possible decision by the Supreme Court in the White-Smith case recognizing mechanical reproduction rights, the Aeolian Co. had obtained exclusive contracts for such rights from more than eighty leading music publishers, and that it was in partial consideration for these agreements that the Aeolian Co. was carrying the White-Smith case to the Supreme Court. It was also alleged that after the decision in the White-Smith case adverse to the interests of the Aeolian Co., modifica-

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272 See United States v. ASCAP, Civil Action No. 13-95, Domestic Consent Decree, entered March 4, 1941, amended March 14, 1950 (S.D.N.Y.); United States v. BMI Civil Action No. 459, Consent Decree, entered February 5, 1941, modified May 14, 1941 (E.D. Wis.).


274 209 U.S. 1 (1908).


tions of such contracts were prepared in anticipation of the grant of mechanical reproduction rights by Congress. To avoid the danger of monopolization of the manufacture and sale of mechanical reproductions, Congress therefore inserted the "compulsory licensing" provision into the present act.

The essence of the compulsory license provision is that a copyright proprietor's exclusive right to license the recording of his music expires with the first recording he makes or authorizes, after which any other person may record the work upon payment to the copyright proprietor of two cents per recording of the work. The customary practice of record companies is to secure licenses from copyright proprietors rather than rely on the compulsory license, but the two cent ceiling imposed by the statute acts as an artificial limitation on the royalty which the copyright proprietor may demand. And the copyright proprietor may not prevent a third party from recording the work, regardless of the possibly inferior technical or artistic quality of the third party's recording or his financial instability. The Report approaches the question of the compulsory license from the valid premise that unless there is a conflict with the public interest the author of a work should have the exclusive right to its exploitation. Accordingly, it recommends that the compulsory licensing provision be eliminated as unnecessary—if indeed it ever was necessary—to meet the anti-monopoly purpose for which it was originally enacted by Congress.

In reaching its conclusion on this question the Report answers three arguments favoring the provision which it states are made by the record manufacturers (who would be required to negotiate for recording rights without any fixed ceiling on the recording fees if the provision were eliminated). One of the contentions is that the provision makes available to the record purchaser a greater variety of recordings of a given work than would be available if the copyright proprietor granted an exclusive license to a single record company. The Report takes the position, however, that if recording rights were licensed on an exclusive basis each record company would record different works, and the resulting increase in the variety of works recorded would more than offset any decline in the variety of recordings of a more limited number of works. To the contention that the provision permits smaller record

277 H.R. Rep. No. 2222, 60th Cong., 2d Sess. 7-8 (1909). For a detailed study of the legislative history of the compulsory licensing provision, see Henn, supra note 273, at 2-12.
279 Report, at 33.
280 Id. at 35.
281 Id. at 35-36.
282 Id. at 33-35.
companies to compete more effectively with larger companies (by offering other recordings of the same works), the Report replies that this is a street which can be travelled both ways: the unique hit of the smaller record company frequently loses out in the competition with the larger companies (with well-known recording artists), which quickly bring out their own recordings of the smaller company's hit.

The third contention which is discussed by the Report is that, because of the variety of recordings made, copyright proprietors receive greater revenues under the present system than they would receive if the compulsory license were abolished. The Report, however, points out that most author and publisher groups favor the abolition of the compulsory license, and that if non-exclusive licenses are truly in the best interests of copyright proprietors it can be assumed that, left to their own devices—mechanical and other—the copyright proprietors will grant such licenses. But in any event the copyright proprietor, with the abolition of the compulsory license, would be able to make his own decision to deal with a record company, or to decline to do so because that company cannot offer the copyright proprietor sufficiently favorable terms, artistic or financial.

VI.

NOTICE OF COPYRIGHT

A. The Present Notice Requirement

The United States is the only major producer of copyrightable works which imposes on all published works the use of a copyright notice as a condition for securing copyright. With the recent advent of the Universal Copyright Convention, the member countries have acknowledged the concept of copyright notice, but the United States remains the prime country in which the notice is generally used.

Notice has been a requirement in our federal law since 1790, and

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284 See Doyle, Cary, McCannon & Ringer, supra note 283, at 26-28. Many countries, however, require the use of a notice with respect to specific categories of works. See id., at 29-36.

285 The UCC does not mandate the use of a copyright notice but states, rather, that the proper use of the UCC form of notice will satisfy the "formalities" required by a member country as a condition of copyright, such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that country. UCC art. III, § 1.

286 The Act of May 31, 1790, 1 Stat. 124 required that notice of registration be published in newspapers. Id. § 3.
the requirement that such notice be placed in published copies of copyrighted works has been with us since 1802.\textsuperscript{287} With the exception of those classes of works which may be copyrighted by registration in unpublished form,\textsuperscript{288} a work generally obtains protection under the present statute by means of publication with a copyright notice on all copies,\textsuperscript{289} such notice to be in a specified form\textsuperscript{290} and position.\textsuperscript{291} Where the copyright proprietor has attempted to comply with the notice requirements of the act, however, the accidental or mistaken omission of the prescribed notice from a particular copy or copies does not necessarily invalidate the copyright.\textsuperscript{292}

The requirement of copyright notice has served a valuable function. The notice in a published copy of a book, for example, customarily discloses the name of the original copyright proprietor or that of a successor record owner of the copyright and the date of the first publication of the work. Thus, the copyright notice can be utilized in determining whether the work is still in copyright and from whom permission may be sought for use of the work.\textsuperscript{293} The present rigidity of our notice requirements, however, is an onerous counterweight to these advantages. For example, a failure to record an assignment of copyright before substituting the assignee's name for that of the assignor in the notice will void the copyright.\textsuperscript{294} The insertion of the notice on an incorrect page of a book may achieve the same unfortunate result.\textsuperscript{295} A similar result is obtained by the placement of a single notice, rather than repetitions of the notice, on a sheet containing several reproductions of a painting;\textsuperscript{296} or by the placement of the notice on a tag affixed to a piece

\textsuperscript{287} Act of April 29, 1802, 2 Stat. 171 at §§ 1-2.

\textsuperscript{288} See note 35, supra.

\textsuperscript{289} 17 U.S.C. § 10 (1958).

\textsuperscript{290} Id. § 19.

\textsuperscript{291} Id. § 20.

\textsuperscript{292} See id. § 21. But see cases cited note 299, infra.

\textsuperscript{293} If the name in the notice is not that of the present copyright proprietor, it can nonetheless be used as a starting point in searching the recorded chain of title in the Copyright Office. See 17 U.S.C. §§ 30-32 (1958); 37 C.F.R. §§ 201.2.

The Report (at 62) points out that the notice requirement is valuable in placing most of the great mass of published material (which includes miscellaneous pamphlets, circulars, manuals, corporation reports, etc.) in the public domain for free use by all. Quaere, however, whether this is truly an advantage of the notice requirement, or whether the doctrine of fair use would not afford sufficient access to such materials if they were protected by copyright from the time of their creation, as under the system advocated by the writer and others. (Under a system of copyright from creation, works would automatically be subject to protection.) See the discussion of fair use in text at notes 196-202 supra. See also text at notes 309-11 and 312-315 infra.


of jewelry from which it may become detached. Moreover, an omission of the notice from the work deprives the work of its statutory protection, and may do so even where the omission is an oversight.

B. The Report's Recommendations Concerning Notice

In recognition of the value of the copyright notice, the Report suggests that it continue as a requirement for published copies of copyrighted works, but that the requirement be made less stringent. The Report proposes that the provision in section 21 of the present act for avoiding forfeiture where the notice has been omitted from "a particular copy or copies" should be broadened in the new act. Under its proposal, if the notice is omitted inadvertently from as much as an entire edition or printing of a work, the copyright claimant would be able to avoid forfeiture by filing with the Copyright Office, within one year after the publication of the defective copies, a statement of the circumstances causing the omission of the notice. The Report also recommends that an innocent infringer who has been misled by the omission of notice should not be liable for an infringement commenced prior to learning of the registered copyright claim and should not be enjoined from completing such an infringement unless he is fully reimbursed for his outlay. And recommendations are made for the filing of an explanatory statement and the exculpation of an innocent infringer with respect to a work carrying an erroneous name or date in the copyright notice.

300 "A notice of copyright, consisting of either the word 'copyright' or the symbol ©, accompanied by the name of the copyright owner and the year date of first publication, should be required in all published copies of copyrighted works." Report, at 66.
301 See text accompanying note 292 supra.
302 With respect to inadvertent omission of the notice:
(a) If the notice is omitted inadvertently from a few copies only, and other copies bear the notice, the copyright should not be invalidated.
(b) If the notice is omitted inadvertently from more than a few copies or from an entire edition or printing, the copyright should not be invalidated if—
(1) A copyright claim is registered before, or within 1 year after, publication of the copies without notice; and
(2) A statement of the circumstances of the omission is filed within that 1-year period.
(c) In any case, an innocent infringer who is misled by the omission should not be liable for an infringement begun before he is actually informed that a copyright claim has been registered, and should not be enjoined from completing the infringement innocently begun unless he is fully reimbursed for his outlay.
Report, at 66.
303 An erroneous name or date in the notice should not invalidate the copyright. However:
(a) Any person not actually informed otherwise should be entitled to act on the assumption that the name and date given in the notice are correct.
The Universal Copyright Convention (UCC) does not require the insertion of the UCC notice in any specified location in the work, but requires only that the notice be "placed in such manner and location as to give reasonable notice of claim of copyright." The Report wisely favors adopting the more lenient requirement as to location rather than continuing the present detailed specifications of required position for various classes of works.

Where the elements of the notice are dispersed so that it is not clear which name or which date is to accompany the symbol "©" or the word "Copyright," the Report proposes that the notice not be invalidated. The new act, under this proposal, would instead adopt the presumption that if no name is clearly a part of the notice, the author, or if no author is named then the publisher, is the copyright owner. And likewise, if no date is clearly a part of the notice, the date should be presumed as that of the imprint or issue date in the copy. Where a collective work contains a single notice, the Report recommends that it be deemed sufficient under the new act for not only the work as a whole but also each of the individual component works, including those previously copyrighted.

The notice proposals of the Report are a small step in the direction of the notice provisions of the patent and trademark laws. Under these laws the omission of notice does not necessitate forfeiture of the owner's rights in his patent or in his trademark registration but may merely deprive the owner of certain of his remedies. Even though the

(b) Where the year date in the notice is more than 1 year later than the date of first publication, the claimant should be required to record in the Copyright Office, within 1 year after the publication of copies bearing the later date, a statement showing the correct year date and the circumstances in which the later date was given.

Ibid.

304 UCC art. III, § 1.
305 Report, at 66.
308 Ibid.
309 Patentees, and persons making or selling any patented article for or under them, may give notice to the public that the same is patented, either by fixing thereon the word "patent" or the abbreviation "pat.", together with the number of the patent . . . .

In the event of failure so to mark, no damages shall be recovered by the patentees in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.

310 Notwithstanding the . . . [constructive notice afforded the registrant's claim of ownership], a registrant of a mark . . . shall give notice that his mark is registered by displaying with the mark as used the words "Registered in U.S. Patent Office" or "Reg. U.S. Pat. Off.," or the letter R enclosed within a circle, thus ®; and in any suit for infringement under this chapter by such a registrant failing so to mark goods bearing the registered mark . . . no profits and no damages shall be recovered under the provisions of this chapter unless the defendant had actual notice of the registration.

CORNELL LAW QUARTERLY

Copyright notice requirements proposed by the Report are less stringent than those of the present act, it would remain essentially true under the proposed requirements that the omission of a copyright notice on published copies of a work would deprive the copyright claimant of not merely his remedies but also his rights under the act. Further consideration should be given to the question of a permissive rather than mandatory, theory of copyright notice, more similar to the theory underlying the notice provisions in the patent and trademark laws.\footnote{311}

C. The Copyright Notice Under a System of Copyright From Creation of the Work

A proposal made by the writer and others is that the new act reject a theory of separate common law protection for unpublished (or undisseminated) works and adopt instead a single system of federal copyright under which the period of protection would not run from the date of first publication (or dissemination) but from the creation of the work.\footnote{312} The year date in any copyright notice to be prescribed under such a system should provide information to assist persons in determining whether the work is still in copyright. For works authored by natural persons, the date of the author’s death would be the point from which the term would be measured; but the uncertainty of this date would obviously present a practical obstacle while the author is still alive. A legend or symbol could however accompany the date of first publication in the notice, to indicate that the author is alive at the time of such publication.\footnote{313} After the author’s death, the year of his death could be inserted in any republication of the work.

The Universal Copyright Convention requires that the United States grant protection to certain foreign works which bear a notice containing only the symbol © accompanied by the name of the copyright proprietor and the year of the work’s first publication.\footnote{314} The new act therefore cannot require of such foreign works a notice containing the further information as to whether or not the author is alive. The new act could of course impose the requirement on domestic works only. It might be preferable, however, to maintain a uniform requirement for both foreign and domestic works; and the additional information

\footnote{311} Detailed consideration of this question is not within the scope of this article, but it should be noted that there are of course significant differences among these laws which have ramifications for the question of notice: patent protection is founded upon novelty, trademark protection on user and copyright protection on originality; etc.

\footnote{312} See discussion in pts. II and III hereof, supra.

\footnote{313} This would permit one to determine that the term of copyright on a given work is to last at least fifty years (i.e., if a “life-plus-fifty” system is adopted) from the date contained in the copyright notice. See note 104, supra.

\footnote{314} UCC art. III, § 1.
suggested for the notice might be obtained instead by offering an inducement to its inclusion. For example, extraordinary remedies such as statutory damages could be made available to foreign and domestic works only where the notice contains the additional information.

A requirement, or an inducement, for the inclusion of information in the copyright notice in addition to that already required by the act would of course make the notice provisions more complicated, and hence make more difficult the task of the claimant who seeks to obtain maximum protection for his work. This difficulty therefore poses a practical consideration against which any proposal for the inclusion of further information must be weighed. It may be that, after the matter has been considered further, the inclusion of such additional information would not appear to justify the additional complexity. If such is the case, the date of an author's death would appear nonetheless to be sufficiently ascertainable in our contemporary society to permit the use of that date as the base point for measuring the term of protection for a natural author.315

VII.

REGISTRATION AND DEPOSIT OF COPIES316

A. The Present Registration System

Unlike many other countries,317 the United States maintains an official system for registration of claims to protection of literary and artistic property: for published works, mandatory registration "promptly" after publication;318 and for certain unpublished works, registration at the option of the owner.319 From the time of our original copyright statute in 1790,320 the registration system has been an integral feature of the United States copyright law.321 Although the governmental system of registration is not commonly found in the major foreign countries, the need for some sort of registration system is evidenced by the fact that in those foreign countries which lack a governmental system

315 See notes 100, 101, supra and accompanying text, and text at note 102, supra.
317 See Kaplan, supra note 316, at 60-63.
320 Act of May 31, 1790, 1 Stat. 124, at §§ 1, 3.
321 See Kaplan, supra note 316, at 9-20.
of registration it has been necessary for private organizations to maintain a registry for their own use.\textsuperscript{322}

The registration system under the present act performs several valuable functions.\textsuperscript{323} It provides proof of the existence of the copyrighted work as of a given time and evidence (including the prima facie evidentiary value of the registration certificate\textsuperscript{324}) of the facts supporting the copyright claim. The registration of the original copyright claim, together with the recordation of subsequent assignments of copyright, provides a recorded chain of title which can be traced by any person interested in acquiring rights under the copyright. The Examining Division of the Copyright Office reviews the copyright claims which are submitted for registration and is in a position to sift out claims which are obviously invalid (e.g., claims for registration of a trademark or for patent protection on an invention) and to inform misguided claimants of the basic provisions of the act. Also, as discussed below, the present registration system enables the Library of Congress to obtain automatic deposits of works for its collections.\textsuperscript{325}

B. The Report's Proposals Concerning Registration

The premise of the Report concerning registration provisions under the new act appears to be sound: it favors a public registration system affording the most complete and dependable record possible without imposing forfeiture of copyright as a penalty for failure to register.\textsuperscript{326} In other words, the carrot rather than the stick is to be relied upon, and strong inducements are recommended to encourage registration within a reasonable time.

The present remedies under the act include the traditional tort remedies of injunction against infringement\textsuperscript{327} and recovery of actual damages.\textsuperscript{328} But also included are more extraordinary remedies such as: an award of costs and attorney's fees;\textsuperscript{329} the impounding and destruction of the infringing copies;\textsuperscript{330} and an award of the defendant's profits or statutory damages in lieu of actual damages and profits.\textsuperscript{331} The Report recommends that where registration has not been effected within a

\textsuperscript{322} See id. at 60-61; Report, at 73.
\textsuperscript{323} See Report, at 72-73.
\textsuperscript{324} 17 U.S.C. § 209 (1958). See id. § 210, with respect to the prima facie evidentiary value of the catalog of copyright entries.
\textsuperscript{325} See text at notes 345-53, infra.
\textsuperscript{326} Report, at 73.
\textsuperscript{327} 17 U.S.C. §§ 101(a), 101(e), 112 (1958).
\textsuperscript{328} Id. § 101(b).
\textsuperscript{329} Id. §§ 1(e), 116.
\textsuperscript{330} Id. § 101(c), (d).
\textsuperscript{331} Id. §§ 1(e), 101(b), (e).
specified short period of time, or prior to the commencement of an infringement, the copyright owner's civil remedies with respect to an infringement begun prior to registration should be limited. The remedies in such a case would be confined to an award of the proprietor's actual damages and, in the discretion of the court: (1) an injunction against future infringement and, on condition that the infringer be reimbursed for his outlay, against completion of the infringement already commenced; and (2) an order for the impounding and destruction of the infringing articles. The Report suggests that in all cases the court should be left with discretion concerning the award of costs and attorney's fees to the prevailing party.

Under the present act, registration is a prerequisite to the institution of suit. It has been held that where the Register of Copyrights has refused registration of a work, the claimant may not sue for infringement until registration has been secured by means of a mandamus proceeding against the Register. The Report recognizes the needless expense of such an additional proceeding. It therefore recommends that where the claimant has complied with the procedural requirements for registering but registration has been refused by the Register, the claimant may nonetheless sue for infringement. The Register, however, must be notified of such suit and be given the right to appear in the action. In this manner, the single action would adjudicate the validity of the copyright claim.

Under present law, there is no explicit statement of the Register's authority to refuse registration because of the claimant's failure to comply with the requirements of the act. The Report points out that it would be most inadvisable for the Copyright Office to register claims without regard to their validity, for to do so would materially lessen the probative value of registration and of the registration certificate. Accordingly, the Report suggests that, although the revised act should explicitly require the Register to make registration of any claim which has complied with the procedural requirements and appears valid under

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332 The period would be three months after first public dissemination of the work in the United States, or six months after the work's first public dissemination abroad. Under the recommendation, foreign works entitled to protection under the Universal Copyright Convention would be entitled to all remedies regardless of the time of registration. Report, at 76-77.
333 Ibid.
334 Report, at 77.
337 Report, at 75-76.
338 Id. at 76.
the statute he should be expressly authorized to refuse registration, subject to judicial review, for any claim which he finds to be invalid.\textsuperscript{339}

It is sound to make explicit the Register’s authority to refuse registration. But it would also be sound to restrict the exercise of this authority to copyright claims which have not fulfilled the procedural requirements or do not appear to be valid under the express terms of the statute. To grant the Register broader authority than this would be granting him what in some instances would constitute a power of censorship. The statute does not explicitly deny copyright to seditious, libelous or obscene works or other works containing matter which is illegal or contrary to public policy. There is judicial authority, however, that such works may be denied copyright protection.\textsuperscript{340} Under the present act, the Register is apparently empowered, but not required, to refuse registration on such grounds.\textsuperscript{341} I submit that to authorize the Register to examine the copyrightability of works from any standpoint other than that of the prerequisites specified in the act would be administratively unfeasible and unwise policy.\textsuperscript{342}

The Report recommends that the certificate of registration continue to be prima facie evidence of the facts set forth therein, but with an important qualification.\textsuperscript{343} It acknowledges that where the registration is made after a considerable period of time following the inception of the copyright the reliability of the facts set forth in the registration application has been impaired. Thus, it recommends that the prima facie evidentiary feature of such information should be available only where the registration has been made not more than one year following the date of the work’s first public dissemination. In instances where the registration has been made after the one-year period has expired, the Report recommends that the evidentiary value of the facts set forth in the certificate should be left to the discretion of the court.\textsuperscript{344} Such

\begin{footnotes}
\item[\textsuperscript{339}] Ibid.
\item[\textsuperscript{341}] This may be inferred from the somewhat pleonastic prose of the Attorney General in a recent opinion:

\begin{quote}
I am of the opinion that the discretion conferred upon the Register by the Copyright Law leaves him free to decide not to attempt to refuse or deny registration of claims to copyright in works of the nature [discussed in the text] . . . .
\end{quote}

41 Ops. A.G. [No. 73], p. 8 (1958) [121 U.S.P.Q. at 333].
\item[\textsuperscript{342}] Cf. the Opinion of the Attorney General, supra note 341:

\begin{quote}
. . . [Examinations [by the Register] of any more than the question whether the works involved meet the specific statutory requirements of the Act may be regarded as not feasible administratively. In addition, for policy reasons it may not be thought appropriate for the Register to undertake to be a conservator of public morals.
\end{quote}

Ibid. at p. 7.
\item[\textsuperscript{343}] Report, at 75.
\item[\textsuperscript{344}] Ibid.
\end{footnotes}
a provision would be of further value, in that it would encourage prompt registration and thus enhance the accuracy of the Copyright Office records for prospective searchers.

C. The Deposit System

Most of the major countries of the world require deposits of domestically published works with a public archive, in order to enrich the national cultural collection. The United States has such a requirement, for the purpose of enriching the collections of the Library of Congress and identifying the works for which a claim to copyright is registered.

The Report recognizes the general soundness of the present deposit system, under which two copies of the best edition of a published work are generally required to be deposited in the Copyright Office. With regard to certain classes of works, however, the deposit is either not wanted by the Library of Congress or may present difficulties by reason of certain characteristics of the work, such as its size, fragility or weight. For such works, the deposit of photographs of the work is permitted in lieu of actual copies of the work; or, in the case of a motion picture, the depositor is permitted to retrieve the copies of the work after deposit, upon agreement with the Library of Congress to supply a copy if later requested. The Report recommends, however, that the Register be given statutory authority to require compliance with such alternative deposit procedures as the Register may deem fit. The flexibility inherent in such a system would permit the accommodation of the deposit system to such changes as experience and technological development may from time to time require.

Under the present act, where the required deposit has not been made the Register may make written demand on the copyright proprietor for such deposit. If the deposit is not then forthcoming, the copyright proprietor is liable to certain penalties, including a fine of one hundred dollars and forfeiture of the copyright. Such forfeiture, however, occurs in only four or five cases a year. The Report recommends that the fine be increased to two hundred dollars but takes no

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345 See Report, at 77; Dunne, supra note 316, at 1-11.  
347 Id. § 13.  
349 See Report, at 78.  
350 Id. at 79.  
352 Report, at 80.
position as to whether the present provision for forfeiture of copyright should be continued under the new act. 353

VIII.

OWNERSHIP OF COPYRIGHT 354

A. Works Made for Hire, and Composite Works 355

The present act permits statutory copyright to be secured by either the author or proprietor (or his personal representatives or assigns), 356 or, in the case of a work made for hire, by the employer (who is deemed to be the "author"). 357 Under present law, a work is "made for hire" if it is created by one who is a salaried employee in the regular scope of his employment. 358

The Report recommends that the revised act continue recognition of the employer as the one entitled to the copyright under such circumstances. 359 It rejects as unworkable any plan under which the rights in a work would be divided between the employer and the employee by means of a statutory formula. For example, in the case of a motion picture, where the work is the composite product of many employees, it would be impractical or impossible to separate the various contributions of the creative employees involved; and consequently any prospective user of a portion of the composite work would find it difficult to ascertain the correct person to whom the rights in a specific creative contribution belonged. 360

In the case of certain printed copyrighted works, however, such as periodicals and encyclopedias, that contain the contributions of a number of authors, the Report recommends that the publisher should have the right to secure copyright but that such copyright should cover only the contributions not separately copyrighted; and in the absence of an express agreement, the only right assigned to the publisher would be the right to publish the contribution in a similar composite work, the

353 Id. at 81.
354 Report ch. VIII, at 83-98.
355 For the general background, see Varmer, "Works Made for Hire and on Commission," Copyright Law Revision Study No. 13, supra note 26, at 123 (1958).
357 Id. § 26.
359 Report, at 88.
360 Id. at 86.
balance of rights in the author's contribution to be held by the publisher in trust for the author.\textsuperscript{361}

B. Co-ownership of Copyright\textsuperscript{362}

The present act does not deal explicitly with the rights of co-owners among themselves and with respect to third parties. The courts have generally established, however, that where a copyright is owned by more than one person, any co-owner may transfer to a third party non-exclusive rights under the copyright, although the transferor in such a case must account to his co-owners for any proceeds received by him.\textsuperscript{363}

The result is that one seeking to acquire exclusive rights under a copyright owned by more than one person must obtain his grant from all of the co-owners.

As the Report points out, the law is otherwise in the United Kingdom and certain other countries, where no valid grant of rights, exclusive or non-exclusive, may be made without the consent of all co-owners of the copyright.\textsuperscript{364} This rule, however, while protecting the control of every co-owner over the copyright, may inhibit the widespread dissemination of jointly owned works. Of course, the inducement to dissemination of a work through a nonexclusive grant from a single co-owner, under the American rule, is frequently nullified by the fact that each of the remaining co-owners can likewise make grants to third parties: a motion picture producer would understandably be reluctant to undertake a multimillion-dollar production based on a literary work the rights in which might also be acquired by a competitor for the production of another motion picture. But on balance the American rule would appear to facilitate, rather than hinder, dissemination of jointly owned works. The Report therefore properly recommends that the new act leave unimpaired the American rule established by court decisions.\textsuperscript{365}

Where the contributions of two or more authors are merged into a single work the present act does not provide criteria for determining whether the work is one of "joint authorship." The Report favors a retreat under the revised act from the holding in the \textit{Twelfth Street Rag}
that where the assignee of the copyright in a musical composition had later commissioned a lyricist to write words for the music, the resulting work was one of "joint authorship." There was in fact no collaboration by the "joint authors" nor any intention on the part of the original author that the musical composition be combined with the lyric contribution of the later author. The Report recommends that the new act define a work of joint authorship as one in which the authors have joined their contributions with the intention of integrating them into a single work.367

C. Divisibility of Copyright368

Copyright secured under the present act is in theory "indivisible." Under the theory of indivisibility, a complete transfer of one of the rights under a copyright cannot be made by the copyright proprietor unless it is accompanied by a transfer of all the other rights under the copyright.369 As a practical matter, however, the exclusive license of a specific right by the proprietor amounts to an "assignment" of that right and is frequently denominated as such by the transferor and the transferee.

The theory of indivisibility has created certain problems in connection with such grants. Perhaps the most difficult of these is whether the transferee of less than all rights under the copyright has standing to sue (without joining as a party the owner of the remaining rights under the copyright) for infringement of the right which has been transferred to him.370 The Report recommends that the revised act provide specifically that each of the rights under a copyright may be assigned separately and that the assignee of any specific right be entitled to sue in his own name for infringement of that right.371

Specific recognition of divisibility under the revised act would mean that the proprietor of any separate right under the copyright would be entitled to put his own name in the copyright notice. This might lead to some confusion as to who owns the specific rights which a prospective user may wish to acquire. The chain of title recorded in the Copyright Office records, however, would be available to him; and he would be permitted to rely in good faith on the facts disclosed in such records.

367 Report, at 90.
368 For the general background, see Kaminstein, "Divisibility of Copyrights," Copyright Law Revision Study No. 11, supra note 26, at 1 (1957).
369 See Kaminstein, supra note 368, at 11.
371 Report, at 92. Fed. R. Civ. P. 19-22 spell out procedural safeguards with respect to joinder and intervention of parties, and anyone else having an interest in the subject matter of the infringement suit would presumably be able to have his day in court.
In the absence of further information appearing in the records, the prospective user would be able to deal with the person named in the notice, who would act as trustee for any other owner.\textsuperscript{372}

D. \textit{Protection of Authors Against Unremunerative Transfers}\textsuperscript{373}

In perhaps its most controversial single recommendation, the Report makes the proposal that no transfer made by an author (or his representative or heirs) for a lump sum consideration shall be valid for a period of more than twenty years.\textsuperscript{374} If a right is to be obtained under the copyright for any period longer than twenty years, the transferee would have to undertake a continuing payment to the transferor of royalties based on the exploitation of the work or the revenue derived from it.\textsuperscript{375}

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\textsuperscript{372} Report, at 92. \\
\textsuperscript{373} For the general background, see Ringer, "Renewal of Copyright," Copyright Law Revision Study No. 31, supra note 26, 105, passim, and especially at 125, 188-90 and 208-16 (1960). \\
\textsuperscript{374} Report, at 94. The controversy can be indicated by comparing the position of The Authors League of America, Inc. with that of the Motion Picture Ass'n of America, Inc. In a letter from the Authors League Copyright Committee to the Register of Copyrights, Feb. 23, 1962, submitting the Authors League's comments on the Report, the League takes the following position: \\
We approve the Register's recommendation that a twenty year limitation be placed on transfers of copyrights. However, we believe, it should apply to all transfers, including those made on a royalty basis. \\
\ldots \ldots \ldots Seldom, if ever, is \ldots unlimited assignment in the author's interest; it usually is made because he does not have equal bargaining power to withstand the user's demand for it. \\
\ldots \ldots No exception should be made for royalty assignments. It would make the 20-year limitation ineffective in all instances. \\
Id. at 16, 17. \\
The commentary on the Report by the MPAA Copyright Committee, supra note 244, on the other hand, states: \\
Perhaps the most disturbing portions to us of the Register's proposals are in his recommendations \ldots to permit authors and their heirs to recapture and renegotiate their assignments to rights under copyright after twenty years \ldots \ldots \\
This is intrusion by the government into business in one industry. If this be the direction of the law, we might as well suggest the same ideas to Congress as to all property and all industries. \\
\ldots \ldots We shall oppose these proposals with candor and vigor as long as their inclusion in a general revision of the copyright law is mooted. \\
Id. at 21, 27. \\
In the light of the quoted comments, it may be appropriate at this point to recall the history of other revision efforts in the past half-century: \\
It may be said in general that the major controversies were rooted in the conflicting interests of the various author and publisher groups on the one hand, and the users of copyright material—such as broadcasters, motion picture producers, and record manufacturers—on the other hand. Each effort to revise the law resolved itself into an attempt to reconcile this conflict of interests through extended discussion and negotiation with the various groups concerned in order to work out compromise solutions to the controversial issues. Such an attempt was successful in the enactment of the 1909 revision and almost succeeded with the Vestal bill in 1931. \\
Goldman, supra note 15, at 11. \\
\textsuperscript{375} The Report makes a related proposal, discussed in text at notes 140-46, supra, that the benefits of the extended renewal term in pre-existing works under the new Act should
The Report takes the position that "authors are often in a relatively poor bargaining position," and points out that the laws of many foreign countries in one way or another seek to protect authors against unremunerative transfers by prohibiting the effectiveness of transfers for more than a maximum period of time, by prohibiting transfers for a lump sum, or by imposing a statutory minimum on the author's royalties. But the Report recognizes that the automatic reversionary principle of our renewal system has failed in its purpose and has instead provoked much litigation. It also rejects another common feature of foreign copyright laws, with the statement that

statutory specifications [of the terms and conditions of transfer agreements] or prohibitions [of transfers on any particular terms] may hamper authors, as well as potential users, in arranging for the exploitation of copyright works.

In the view of the Report, there is, however, one form of transaction which is most likely to result in the author's receipt of less than the fair value of the rights in his work. This is the transfer for a lump-sum payment. The Report recommends that this form of transfer be limited to a period of twenty years. From the standpoint of fairness, the Report's position is valid, insofar as it refers to authors who lack bargaining power: the first author, the unknown, the writer who receives critical acclaim but commercial rejection, etc. For the best-selling author and the top songwriter, however, the imposition of such a statutory restriction would appear to be an improper interference with the bargaining process.

But if we consider the question of administrative practicality, the question of fairness or unfairness is perhaps rendered academic. For, against the background of the many different forms of business arrangements utilized today, a statutory requirement of a continuing royalty or other payment to the author is most likely unworkable.

E. Execution and Recordation of Transfers

The Report makes several recommendations to maintain and to increase the usefulness of the present copyright recording system. One
of the more important of these is the clarification of an ambiguity in the recording provisions of the present act. Under this provision, the earlier of two conflicting assignments prevails when it is recorded within the statutory grace period (three months after execution in the United States, or six months after execution abroad). If, however, the earlier transfer is not recorded within the grace period, but is nonetheless recorded prior to the recordation of the later transfer to a bona fide purchaser, the statute is silent as to whether the earlier or later transfer prevails.

Under the Report's proposal, the earlier of the conflicting transfers would prevail if it is recorded within the grace period or at any time prior to the recordation of the later transfer. Although the Report does not recommend that recording of nonexclusive licenses be required, it does recommend that such a license, if taken in good faith from the copyright owner of record, should remain effective against a prior unrecorded assignment.

Viewing another facet of the recording system, the Report states that the system should encourage broader disclosure of pertinent facts in the Copyright Office records and at the same time should avoid charging third parties with constructive notice of facts not clearly of record. Accordingly, it favors that the new act deny constructive notice to those facts not set forth in the recorded instrument itself (i.e., incorporated only by reference) and with respect to those works not specifically identified in the instrument (e.g., designated only as part of a blanket transfer of "all copyrights" of the transferor).

IX. REMEDIES FOR INFRINGEMENT

In essence, the remedies for infringement provided by the present

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381 Every assignment of copyright shall be recorded in the copyright office within three calendar months after its execution in the United States or within six calendar months after its execution without the limits of the United States, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded. 17 U.S.C. § 30 (1958).

382 See Latman, supra note 380, at 120-22; Report, at 97.

383 The statute should provide that if an assignment is not recorded within 1 month after its execution in the United States, or within 3 months after its execution abroad, or before the recordation of a subsequent assignment, then the subsequent assignment will prevail when it is taken for a valuable consideration without notice and recorded first. Report, at 98.

384 "The statute should specify that a nonexclusive license taken without notice of an unrecorded assignment will be valid as against the assignee; and that a nonexclusive license, though not recorded, will be valid as against a subsequent assignment." Ibid.

385 Id. at 95-96, 98.

act include: an injunction against the infringement; the impounding and destruction of infringing copies and devices for making them; and an award of (1) the greater of the copyright owner's actual damages plus the infringer's profits or (2) of statutory damages, the latter in a discretionary amount generally not less than two hundred fifty dollars nor more than five thousand dollars. The prevailing party is allowed costs and, in the discretion of the court, reasonable attorney's fees.

The recommendations of the Report in this area aim primarily to clarify the meaning of the statutory provisions by eliminating some of the encrusted verbiage which hinders their usefulness. There is ambiguity, for example, as to whether the copyright owner's remedies of an award of his actual damages "as well as" an award of the infringer's profits are cumulative or alternative where the infringer's profits are more than a measure of the damages. The Report recommends that the revised act state the copyright owner’s remedy to be the award of either damages or profits, whichever is greater. Also, in view of the conflict in court decisions as to whether the infringer's "profits" are to include the profits from the entire infringing work or only from the specific portion of the defendant's work which infringes the plaintiff's copyrights, the Report recommends that the new statute specifically permit the court to apportion the infringer's profits in those cases where the court deems apportionment to be just.

The provision for statutory damages serves to deter infringements and to establish criteria for the amount of damages where the copyright owner's actual damages or the infringer's actual profits are minimal or difficult to ascertain. The Report discusses the opposing positions of certain creators and users with respect to a mandatory minimum of statutory damages in actions against innocent infringers: the former

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388 Id. § 101 (c), (d).
389 Id. § 101(b).
390 Id. § 116.
391 Id. § 101(b).
393 Report, at 102.
395 Report, at 102.
group favoring the retention of a mandatory minimum and the latter group expressing concern that an unwitting infringer may perhaps be penalized too severely by the automatic imposition of a minimum. It is the position of the Report that imposing a two hundred fifty dollar minimum in statutory damages on an unwitting infringer does not serve to deter infringement. 396 It proposes, accordingly, that where an infringer has carried the burden of proving his innocence, the statutory minimum should not be mandatory but, rather, the court should have discretion to withhold statutory damages or to award less than two hundred fifty dollars, as it deems just. 397

The Report notes that concern has been expressed by motion picture and broadcasting groups that, in a case involving multiple infringements, the court may apply the statutory damage formula mechanically by multiplying the two hundred fifty dollar minimum by the number of infringements. It therefore proposes that the new statute specify that where statutory damages are to be awarded in a case of multiple infringements, the prescribed minimum and maximum are to govern the total statutory damages awarded for all of the infringements. 398  

The Report recommends that the present maximum limit of statutory damages be increased from five thousand to ten thousand dollars and cites three valid reasons: 399 first, the five thousand dollar maximum was adopted in 1909, more than a half century ago, when the value of the dollar was considerably higher than its present value; second, in the light of the change suggested for the application of statutory damages to multiple infringements, the maximum should be high enough to permit the court to award an adequate total sum for the multiple infringement; and third, (a reason somewhat similar to the second), the Report has also recommended the deletion of the present provision permitting an award of statutory damages in excess of the maximum where infringement occurs after actual notice to the infringer 400 and recommended a higher maximum to permit a more adequate award in such a case.

X

INTERNATIONAL ASPECTS OF COPYRIGHT 401

A. Works of Foreign Authors

The present international copyright relations of the United States are governed, in the main, by our adherence to two multilateral copyright

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396 Id. at 103-104.
397 Id. at 107.
398 Id. at 104-105.
399 Id. at 105.
400 Ibid.
401 Report ch. X, at 111-26. For the general background, see Bogsch, "Protection of
conventions and the issuance of numerous presidential proclamations with respect to individual countries. The conventions are the Universal Copyright Convention (the "UCC") and the Pan American Convention of 1910. The UCC, by far the more significant, includes among its members (numbering forty-one at this writing) most of the major producers and users of copyrighted works. The Pan American Convention in its 1910 version (the version also known as the Buenos Aires Convention) is adhered to by sixteen Latin American countries and the United States.

Prior to World War II the only major international copyright convention was the Berne Convention. Our membership in the Berne Union was effectively precluded, however, by our insistence on retaining certain features in our act (e.g., the copyright notice and the manufacturing clause) which were inconsistent with the original and subsequent versions of the convention. With the ratification of the UCC by the United States in 1954, however, the United States agreed to waive certain domestic requirements for foreign works protected under the UCC. In return, the member countries of the UCC agreed to utilize an agreed form of copyright notice as a condition for securing protection in this country. Protection under the UCC is founded on the principle of "national treatment": each member country agrees to grant the same protection to the unpublished works of other member countries as it grants to the unpublished works of its own nationals; and it agrees to grant the same protection to the published works of other member countries as it grants to the works of its own nationals first published in its own territory.

In recognition of the fact that American works are today protected in almost all countries in which the exploitation of such works is of commercial value, the Report recommends that the revised act make copyright protection available to the works of all authors, regardless of their nationality or domicile or the place of first publication of their works.
This recommendation, although a radical departure from the present basis for protection of foreign works, would do much to eliminate complexity with respect to the protection of foreign works in this country, and would perhaps increase our prestige abroad—a helpful increment, considering the state of contemporary international affairs. To safeguard against the possibility, however, that a foreign country may give insufficient protection to American works, the Report further recommends that the President be authorized in such event to restrict the protection granted to the works of that country.  

B. The Manufacturing Clause

The present Copyright Act contains a "manufacturing clause" which conditions copyright for certain works on their manufacture in this country. These works include English-language books and periodicals written by either American or foreign authors; foreign-language books and periodicals authored by Americans; and many pictorial works. The restrictions of the manufacturing clause are further implemented by a prohibition against the importation of such works not produced in compliance with such restrictions. Inasmuch as the UCC does not permit the United States to require domestic manufacture of certain works protected under that convention, the Copyright Act was specifically amended in 1954 to abrogate the requirements of the manufacturing clause and the accompanying import restrictions for foreign works first published abroad which are seeking United States protection pursuant to the UCC.

The manufacturing clause was originally inserted in our copyright law in 1891 when protection was first granted to the published works of foreign authors. The printing industry had expressed the fear that the granting of copyright protection to works printed abroad would inflict substantial damage to an American industry busily engaged in the printing of piratical copies of foreign works. Today, however, as was brought out in the Congressional consideration of the UCC, it is uncertain whether there is any substantial competition with American printers by reason of the importation of works printed abroad. But in terms

special exemption which UCC works enjoy from certain formal requirements would continue. Ibid.

410 Id. at 119.
412 Id. § 107.
413 UCC art. III, § 1.
414 See note 407, supra.
of copyright legislation, the real issue is not whether American printers require protection against competition from foreign printers. If Congress deems that such protection is needed, the protection should be embodied not in a copyright statute but in the Tariff Act.\(^{418}\)

The real question in connection with copyright legislation is whether the manufacturing clause constitutes an unreasonable burden upon creators and thus impairs the constitutional purpose of the Copyright Act "to promote the progress of science and useful arts." The present writer would answer this question in the affirmative. The manufacturing clause is perhaps rivaled only by the present system of renewal copyright in the needless trouble and complication which it inflicts not merely on the legal practitioner but on the creators and users of copyrighted works. Photographers and artists, for example, bear a special burden under this provision, in view of the costs which make unfeasible the domestic publication of many books of photographs or reproductions of works of art. The cost of quality reproduction of such works in this country has forced many Americans to arrange for the first publication of their material in works manufactured abroad, with the consequent loss in many cases of their American copyright protection.\(^{419}\)

Those creators with established reputations have sometimes been able either to have their works produced in this country or to retain counsel to work out elaborate arrangements to comply with the manufacturing clause for editions of their works actually produced abroad. Less-established creators, however, usually have not been able to work either such arrangement, with the net result that the encouragement of their art and the wide dissemination of their work has been inhibited.

The abrogation of the manufacturing clause by the 1954 amendment for foreign authors qualifying under the UCC\(^{420}\) has had the anomalous result that a provision originally designed to protect American interests in many cases now works a discrimination in favor of foreign authors and against their American counterparts.\(^{421}\)

The Report recommends that the manufacturing clause be deleted in the revised act.\(^{422}\) The writer strongly supports this recommendation.


\(^{418}\) See Report, at 123-24.


\(^{420}\) See note 407, supra.

\(^{421}\) See Younger, supra note 419, at 230-31.

\(^{422}\) Report, at 124.
XI.
MISCELLANEOUS PROBLEMS

A. Government Publications

The present act provides that no copyright shall subsist in any publication of the United States Government, but that the publication or republication by the government of any material in which copyright is subsisting shall not forfeit the copyright in such material. In addition, the Printing Law provides that no publication privately produced from government plates and no other Government publication shall be copyrighted. "Government," in these contexts, however, does not include state and local governments: although public policy precludes copyright in the text of official state documents such as statutes and judicial decisions, the general informational material published by state governments can validly be copyrighted. But the definition of a "government publication" remains ambiguous under the present law. The Report therefore recommends that the term should be defined to mean "published works produced for the government by its officers or employees" (presumably limited, however, to works produced within the scope of their employment) and to avoid duplication and possible confusion, the parallel provision in the Printing Law should be deleted.

There may, nonetheless, be certain exceptional circumstances, according to the Report, in which a publication of the government should be protected by copyright. In this connection, the Report refers to the views of a number of government agencies with extensive publication programs. The agencies concurred that as a general rule there should be no copyright in government publication, but as exceptional instances to the contrary they cited a work which may be the joint product of a government agency and a private organization; a work being published commercially on behalf of an agency; and a work produced by a government agency under a grant from a private organization. The Report recommends that to cover instances such as these a central government

424 For the general background, see Berger, "Copyright in Government Publications," Copyright Law Revision Study No. 33, supra note 26, at 23 (1939).
427 See Berger, supra note 424, at 27-28; Report, at 129-30.
428 See Report, at 133. Such a definition would perhaps remove the ambiguity which in part occasioned the dispute in Public Affairs Associates, Inc. v. Rickover, 284 F.2d 262 (D.C. Cir. 1960), rev'd per curiam on other grounds, 82 Sup. Ct. 580 (1962), where an admiral's public speeches on the subject of current naval developments were held to be his personal property, notwithstanding his government employment.
429 See Berger, supra note 424, at 38-40.
agency (such as the Bureau of the Budget or the Joint Congressional Committee on Printing) be permitted under the statute to grant exceptions to the general rule that no copyright is to subsist in government publications.\textsuperscript{431}

On balance, the recommendation for government copyright appears to be acceptable, but such a provision should be drafted carefully in order that the central government agency shall have neither the power of censorship nor the power to grant unreasonable privileges to private persons. For example, one of the premises cited by the Report for the desirability of such a provision is that the governmental agency may have "reason to believe that reproduction of a publication must be controlled to prevent distortion in a dangerous manner."\textsuperscript{432} When the government seeks the power to prevent "distortion" of its publications, the Congress should carefully consider the possible inroads made on free speech. If the "distortion" is in deceptive use of the material in advertising, as the Copyright Law Revision Study on this question seems to indicate,\textsuperscript{433} the proper remedy does not lie in the amendment of the Copyright Act.

B. Regulation of the Performing Rights Organizations

The Report notes that while performing rights organizations, such as the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music, Inc. (BMI) and SESAC, Inc. (formerly the Society of European Stage Authors and Composers), customarily operate under governmental regulation in most foreign countries, no such general regulation is in effect in the United States.\textsuperscript{434} Both ASCAP and BMI, however, have been defendants in antitrust proceedings, as a result of which consent decrees are in effect with respect to both organizations.\textsuperscript{435}

The Report makes no recommendation with respect to the regulation of performing rights organizations, preferring instead to leave this question to further study and consideration by Congress apart from the general question of revision of the Copyright Act. The Report's position appears sound. To the extent that Congress becomes enmeshed in peripheral issues before enacting a revised copyright statute, revision is less likely to be achieved. Whether the performing rights organizations should be regulated by a governmental agency or should come

\textsuperscript{431} Report, at 133.
\textsuperscript{432} Id. at 131. See Berger, supra note 424, at 42.
\textsuperscript{433} Berger, supra note 424, at 42.
\textsuperscript{434} Report, at 136-38.
\textsuperscript{435} See note 272, supra.
under the general provisions of the antitrust laws is a question which should be excised from the matter of copyright law revision.\textsuperscript{436}

XII.

\textbf{ADMINISTRATIVE PROVISIONS}\textsuperscript{437}

A. \textit{The Catalog of Copyright Entries}\textsuperscript{438}

The act presently requires the Copyright Office to prepare and to offer for sale to the public at periodic intervals an indexed catalog of copyright registrations.\textsuperscript{439} The Report recommends that the Register should not be under a Congressional mandate to issue a printed catalog, but should instead be authorized to make his own determination as to whether the various parts of the catalog should be issued and in what form.\textsuperscript{440} Under this recommendation, the Register would have authority to omit portions of the catalog appearing to be useful only to a small number of persons, although such catalogs as are issued would continue to be available for free distribution to libraries and for sale to the public.

B. \textit{Fees}

In its recommendations concerning the fees to be charged by the Copyright Office, the Report proposes that the fee for all original and renewal registrations should be uniform, instead of, as at present, four dollars for the former and two dollars for the latter.\textsuperscript{441} If in fact the renewal system is to be continued under the revised act, the writer suggests that those works (\textit{e.g.}, poems, photographs, illustrations, etc.) which were originally copyrighted as components of larger composite works (\textit{e.g.}, books and periodicals) should be renewable at a lower fee than required for other works, or perhaps at no fee at all. True, the burden of the Copyright Office in renewal of components may be equal or greater than the burden in renewal of other works; but, on balance, the burden upon the renewal claimant is much more onerous where, as in some instances, he must strive to renew hundreds (or more) of such smaller works. This question relates also to the theory put forth in the Report that renewal is not "too great a burden" for those copyright proprietors

\textsuperscript{436} In this respect, the regulation of the performing rights societies is analogous to the manufacturing clause in the present Copyright Act: If the domestic printing industry is to receive congressional protection, that protection should be embodied not in the copyright statute but in tariff legislation. See text at notes 415-18, supra.

\textsuperscript{437} Report ch. XII, at 139-146.

\textsuperscript{438} For the general background, see Dunne & Rogers, \textit{"The Catalog of Copyright Entries,"} Copyright Law Revision Study No. 21, supra note 26, at 51 (1960).

\textsuperscript{439} 17 U.S.C. §§ 210, 211 (1958).

\textsuperscript{440} Report, at 145.

\textsuperscript{441} Report, at 146. The fees are presently set forth in the schedule contained in 17 U.S.C. § 215 (1958), and include a $6 fee for registration of commercial prints and labels.
who wish to protect their works for a second term of copyright. The validity of such a theory can be questioned. If, however, the theory is to be put into practice in the revision of the act, the burden of the mere time and effort required for filing innumerable renewals for the smaller works described above should not be compounded with the burden of a renewal fee larger than at present.

CONCLUSION

The problems under the present Copyright Act are manifest and many. The need for copyright law revision cannot be gainsaid. Only general revision can oblige the growth and change of the half-century since our present Copyright Act was enacted.

The Report has given a substantial impetus to the revision effort, an effort which, it is hoped, will continue its momentum. This article has been premised on the need for revision and the recognition that the Report must be discussed widely if revision is to be achieved. If the effort at revision falters, it will likely do so for the same reason which obstructed the earlier revision efforts of this century. Those efforts failed. They failed largely because the various industry groups—creators and users—were unable to come to substantial agreement. The writer hopes that the continuing discussion of the revision proposals under the leadership of the Copyright Office and the various bar associations will enable the current revision program to avoid the fate of its predecessors.

Congress is today understandably preoccupied with the grave problems of survival in the space age, and with the many foreign and domestic questions which must be legislated upon to that end. If the burden is thrust upon Congress to resolve sharp controversies between various groups of creators and users over highly technical questions of copyright revision legislation, it is quite possible that resolution will be deferred in favor of considering the more portentous questions referred to above.

The Constitution does not indicate that it is the prime purpose of the Copyright Act to promote the welfare of creators or users. It is of course necessary to provide incentives to creators to create literary and artistic works and to users to disseminate these works. But the lesson of history is that creators and users must avoid the philippics of the past if copyright law revision is to be achieved. Thus it becomes necessary to belabor the obvious in order to admonish both creators and users that the Constitution does not choose sides between them but aims only to achieve the greater public good: the progress of science and useful arts.

442 Report, at 52.
The following summary is intended to highlight some of the principal recommendations of the report without analyzing their background or describing how the provision would operate. It is necessarily oversimplified.

**WORKS AND RIGHTS PROTECTED**

_Scope of works protected._—The report proposes that the statute drop the present reference to "all the writings of an author." Instead, the kinds of works to be protected would be specified in terms broad enough to cover everything now considered copyrightable, including future works presented in newly developed forms or media.

_Architecture and applied art._—The report recommends that the copyright statute should not be extended to functional architectural structures or industrial designs as such, but that they should be given more limited protection under separate design legislation. However, when a pictorial, graphic, or sculptural work is used as a design or decoration of a useful article, it would continue to have all the protection now afforded by the copyright law.

_Choreography and sound recordings._—The report recommends that the statute expressly cover choreographic works prepared for presentation to an audience. It also favors the principle of protecting sound recordings against unauthorized duplication, but makes no specific proposals pending further study.

_Rights protected and "fair use."_—In general the report proposes to retain the exclusive rights given to copyright owners under the present law—to make and publish copies, to make new versions, to give public performances, and to make recordings. It would, however, add a provision to the statute specifically recognizing the doctrine of fair use.

_Library photocopying._—The report would permit a library to make a single photocopy of material in its collections for research purposes under explicit conditions.

_Performing rights._—As under the present law, the copyright owner of a dramatic work would have the exclusive right to perform it in public, and this right would be extended to all choreographic works and motion pictures. The performing right in nondramatic literary and musical works would continue to be limited to public performances "for profit." The mere reception of a broadcast of copyrighted material at no charge to the public would be excluded from the public performance right.

_Jukebox exemption._—The report favors enactment, in advance of the general revision, of proposed legislation to repeal or modify the provision exempting jukebox operators from payment of performance royalties.

_Compulsory license._—The present law provides that, when the copyright owner of music once permits it to be recorded, anyone else may record it upon payment of a statutory royalty. It is recommended that this "compulsory license" be eliminated.

* This appendix is taken verbatim from the Report (at v-vii).
BEGINNING AND LENGTH OF COPYRIGHT TERM

"Public dissemination."—Works are now protected by the common law until they are either published in copies or registered voluntarily in unpublished form. The report proposes that common law protection should end, and the term of statutory copyright should begin, when a work has been "publicly disseminated" in any of the following ways: (1) publication of copies, (2) registration, (3) public performance, or (4) public distribution of sound recordings.

Voluntary registration.—The privilege of securing statutory copyright by voluntary registration—now available for some classes of unpublished works only—would be extended to all classes of undisseminated works.

Manuscripts in libraries.—The report also proposes to terminate common law rights, after a period of time, in manuscripts made available to the public in a library.

Duration of term.—The present term of copyright is 28 years from first publication or registration, renewable by certain persons for a second period of 28 years. The report recommends that the maximum term be increased from 56 to 76 years. With certain exceptions, the basic term would run for 28 years from first public dissemination, and would be renewable for a second term of 48 years. Unlike the present law, the second term would merely be an extension of existing rights. Any person claiming an interest in the copyright could submit the renewal application, and the longer term would accrue to the benefit of everyone holding any interest under the copyright.

Limitation on lump-sum assignments.—Under the present law the renewal copyright reverts in certain situations to the author or other specified beneficiaries. The report proposes to drop this reversion and to substitute a limitation on the duration of lump-sum assignments. Any assignment by an author or his heirs would not be effective after 20 years unless it provided for continuing royalties based on use or revenue from the work.

FORMAL REQUIREMENTS OF COPYRIGHT PROTECTION

Notice of copyright.—The statute now requires, as a condition of copyright protection, that the published copies of a work bear a copyright notice. The report recommends that the requirement of notice on published copies be retained, but that inadvertent omission or errors in the notice should not forfeit the copyright. However, innocent infringers misled by the omission or error would be shielded from liability.

Deposit and registration.—For works published with a copyright notice, the present law also requires registration in the Copyright Office, including the deposit of copies for the Library of Congress. The report proposes that the deposit of copies wanted for the Library should be mandatory, but that failure to register should not forfeit the copyright. However, application for registration would still be a prerequisite to bringing an infringement suit. And, unless registration is made within 3 months of first public dissemination, certain special remedies could not be recovered for infringements begun before registration.

OWNERSHIP OF COPYRIGHT

Ownership and divisibility.—The report would leave unchanged in most respects the present law regarding the ownership of copyright. Copyright
would be made divisible, however, so that ownership of the various rights comprised in a copyright could be assigned separately. Under the present law an assignment is not effective against third persons without notice unless it is recorded, and this provision would be extended to exclusive licenses and partial assignments.

Contributions to periodicals.—The report proposes that the copyright secured by the publisher in a periodical or other composite work cover all contributions not separately copyrighted. In the absence of an express assignment, however, the publisher would hold in trust for the author all rights in the contribution except the right to publish it in a similar composite work.

REMEDIES FOR INFRINGEMENT

Actual damages or profits.—Infringers are now liable for the actual damages suffered by the copyright owner “as well as” the infringer’s profits. The report recommends clarifying the statute to provide for recovery either of actual damages or of profits, whichever is higher.

Statutory damages.—If actual damages and profits are smaller than $250, the court must now award statutory damages of at least $250. The report recommends that the court should not be required to award the minimum of $250 against an innocent infringer. It also proposes that the court be given discretion to award up to $10,000 as the total sum of statutory damages against any infringer.

INTERNATIONAL ASPECTS OF COPYRIGHT

Copyright in foreign works.—At present statutory protection is available to foreign works only if the author’s country is covered by a copyright treaty or Presidential proclamation. The report proposes to extend the copyright statute to all foreign works but the President could restrict or withhold the application of the statute in the case of works originating in any particular country.

Manufacturing clause.—Certain works must now be manufactured in the United States to have copyright protection here. The report recommends elimination of the manufacturing requirement and related import limitations.