15-13100-cv

United States Court of Appeals
for the
Eleventh Circuit

FLO & EDDIE, INC., a California corporation, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

– against –

SIRIUS XM RADIO, INC., a Delaware corporation,

Defendant-Appellee,

DOES 1 THROUGH 10,

Defendants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 113C-1:1-13-cv-23182-DPG

MOTION OF PANDORA MEDIA, INC., FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE SIRIUS XM RADIO, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus curiae Pandora Media, Inc. ("Pandora") is a publicly owned corporation. Pursuant to Federal Rules of Appellate Procedure 26.1 and 29 and the Eleventh Circuit Rules, Pandora states that it has no parent corporation and that no publicly held corporation owns 10% or more of its shares.

Pandora hereby discloses each of the trial judge(s), and all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this case or appeal:

1. Barnett, Eleanor
2. Breuder, Drew
3. Cohen, Evan
4. Flo & Eddie, Inc.
5. Gayles, Darrin P.
6. Geller, Harvey
7. Gordon, Jason
8. Gradstein & Marzano, P.C.
9. Gradstein, Henry
10. Hacker, Jonathan
11. Heller Waldman, P.L.
12. Kaylan, Howard

13. Larson, Todd

14. Liberty Media Corporation (NASDAQ: LMCA, LMCB, LMCK)

15. Marks, Benjamin E.

16. Marroso, David

17. Marzano, Maryann

18. Massey, David

19. Mayor, Evan

20. O'Melveny & Myers LLP

21. Pandora Media, Inc. (NASDAQ: P)

22. Petrocelli, Daniel

23. Rich, R. Bruce

24. Seto, Cassandra

25. Sirius XM Holdings Inc. (NASDAQ: SIRI)

26. Sirius XM Radio Inc.

27. Soto, Edward

28. Sperle, Elisabeth

29. Turnoff, William

30. Volman, Mark

31. Waldman, Glenn

32. Weil, Gotshal & Manges LLP

Dated: October 13, 2015

/s/ Edward Soto
Edward Soto

Counsel for Amicus Curiae Pandora Media, Inc.

Pursuant to Fed. R. App. P. 29(b), Pandora Media, Inc. ("Pandora") moves for leave to file the accompanying proposed brief as *amicus curiae* in support of Defendant-Appellee Sirius XM Radio Inc. ("Sirius XM"), seeking affirmation of the District Court's Order, dated June 22, 2015, granting summary judgment in favor of Sirius XM and closing the case.

Pandora, the proposed *amicus curiae*, is the largest provider of Internet radio service nationwide. Pandora's advertising-supported service is available for free throughout the United States. Most of Pandora's sound recordings are protected by federal copyright law, under which Pandora maintains uninterrupted access to the necessary public performance rights pursuant to federal statutory licenses. Pandora also performs sound recordings fixed before February 15, 1972 that, until now, have never been subject to public performance rights under state or federal law.

Pandora requests permission to offer its unique perspective as an internet radio industry leader on the serious threat posed by the ruling that Appellant advocates to the careful balance, struck nationwide, ensuring the public's uninterrupted access to sound recording performances. Until a recent spate of lawsuits, the historic treatment of public performance rights for sound recordings has been the exclusive province of Congress, which over nearly a century has established a carefully calibrated system that governs the daily practice of myriad entities nationwide. The proposed brief seeks to provide this Court with further

explanation as to why a newly announced common law public performance right as sought by the Plaintiff-Appellant would effect a sea change in the law that threatens to destabilize numerous industries – well beyond the satellite radio service offered by Sirius XM – and for the first time restrict the public's uninterrupted access to sound recording performances.

The proposed brief also brings to the Court's attention "relevant matter . . . that has not already been brought to its attention by the parties," including legislative history surrounding the repeal of Florida Statute 543.02, as well as Congressional testimony and other legislative history surrounding the absence of public performance rights in sound recordings under state or federal law. *See* F. R. A.P. 29(b) (1998 Committee Notes) (quoting U.S. S. Ct. Rule 37.1).

Pandora sought the consent of all parties to the filing of its proposed brief as *amicus curiae*. Appellee Sirius XM provided its consent. Appellant Flo & Eddie, Inc., however, did not.

Accordingly, Pandora respectfully requests leave to file the accompanying brief as *amicus curiae* in support of Appellee Sirius XM.

Dated: Miami, Florida
October 13, 2015

Respectfully submitted,

/s/ Edward Soto
Edward Soto

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CERTIFICATION OF SERVICE

I, Edward Soto, certify that on October 13, 2015 the foregoing was served on all parties or their counsel of record and filed with the Court through the CM/ECF system.

Dated: Miami, Florida
October 13, 2015

Respectfully submitted,

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/s/ Edward Soto
Edward Soto

Counsel for Amicus Curiae Pandora Media, Inc.

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Pandora Media, Inc. ("Pandora") respectfully submits this brief as *amicus curiae* in support of Defendant-Appellee Sirius XM Radio Inc. ("Sirius XM") in Appellant's appeal from the District Court's Order, dated June 22, 2015, granting summary judgment in favor of Sirius XM and closing the case.[1] Pandora submits this brief together with a motion for leave to file pursuant to Fed. R. App. P. 29(b) and Circuit Rule 29-1.

STATEMENT OF INTEREST

Pandora is the largest provider of Internet radio service in the United States. In addition to offering pre-created stations, Pandora enables users to "create" stations by specifying the name of an artist, song, or genre. Pandora uses the intrinsic qualities of a user's selection to generate a radio station tailored to the user's continuing feedback. Pandora Form 10-Q filed Apr. 27, 2015 at 7. Users can access digital streams of the stations they create through Internet-connected devices. *Id.* Pandora's advertising-supported service is available for free throughout the United States. *See* Pandora Form 10-K filed Feb. 11, 2015 at 3, 8. Pandora submits this brief to provide its perspective as a radio industry leader on the untoward impact that a reversal of the District Court's ruling in this case would

[1] In accordance with Fed. R. App. P. 29(c)(5) and Circuit Rule 29-1, Pandora, as *amicus curiae*, states that this brief was not authored in any part by counsel to any party, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity other than the *amicus curiae* and its counsel.

have on the public's access to music.

The historic treatment of public performances of sound recordings, until a recent spate of lawsuits, has been the exclusive province of Congress, to which all legal and policy arguments surrounding the issue have been addressed. Congress's carefully calibrated responses over the better part of a century have set the legal parameters that have guided day-to-day practice by myriad entities nationwide. The District Court's holding that Florida common law does not provide Appellant with an exclusive right of public performance is consistent with such historic treatment and underscored by the dearth of authority suggesting any such right exists. Appellant's contention that such a right exists contravenes prior experience, undermines settled commercial expectations, and threatens deeply destabilizing results for thousands of businesses, educational institutions, and governmental entities that make public performances of music in Florida. Appellant is unable to point to *any* case or other authority even suggesting that a public performance right exists under Florida common law. Its position is dependent entirely on the specious contention that record labels own and have the right to control *all* possible uses of sound recordings fixed prior to February 15, 1972 ("pre-1972 recordings") even in the absence of any showing of competitive harm nor any other injury. As the District Court correctly recognized, neither property rights in general or copyright ownership in particular convey the unqualified, limitless power that

Appellant seeks to arrogate for itself.

Most of the sound recordings performed by Pandora were created on or after February 15, 1972 ("post-1972 recordings") and are governed exclusively by federal copyright law. *See* 17 U.S.C. §§ 106(6), 301. The right of public performance afforded by Congress to these sound recordings is carefully circumscribed, and Pandora is entitled to a compulsory license with rate-setting by a specialized federal tribunal for its digital radio transmissions and the reproductions made to facilitate them. Pandora also performs pre-1972 recordings. These sound recordings were deliberately left unprotected by federal copyright law, notwithstanding decades of complaints by the recording industry that radio broadcasters and others were performing the recordings for profit without compensation to record labels or performing artists. For decades, Congress, the U.S. Copyright Office, the recording industry, and broadcasters alike uniformly understood public performances of pre-1972 recordings to be free of state or federal regulation.

Appellant's contention that Florida state law provides a public performance right for pre-1972 recordings would instantly brand thousands of entities doing business in Florida—including AM/FM broadcasters, restaurants, bars, bowling alleys, hotels, health clubs, and public and private educational institutions—as copyright infringers. Such a ruling would reflect none of the balancing of

competing interests that infuses federal copyright law's treatment of the scope and degree of exclusive rights in sound recordings and declare a far broader scope of rights in pre-1972 recordings under Florida law than Congress determined to be applicable with respect to post-1972 recordings.

The latitude afforded owners of pre-1972 recordings by the position Appellant urges on appeal includes the unfettered discretion to withhold altogether Florida consumers' access to pre-1972 recordings, or to condition such access upon entities like Pandora's payment of potentially confiscatory license fees. In the interests of promoting digital commerce, as well as in furtherance of copyright law's paramount interest in fostering wide dissemination of works of creative expression, federal copyright law protects entities like Pandora from precisely such arbitrary exertions of monopoly power in relation to post-1972 recordings.

All prior experience in this field counsels judicial caution in declaring a new and unexpected copyright right that will directly and adversely affect the operations of thousands of Florida entities. As the District Court recognized, judgments as to how to balance the competing public policy interests implicated in creating performance rights in pre-1972 recordings are instead the proper province of the legislature. The ruling of the District Court should be affirmed.

SUMMARY OF ARGUMENT

I. The District Court correctly recognized that Florida common law does not provide an exclusive right of public performance in pre-1972 recordings. The District Court observed that no Florida court or Florida statute heretofore has recognized any such right. Appellant cannot show otherwise.

II. Appellant's contention that Florida common law has always provided a public performance right in sound recordings is undermined by the extensive history of failed legislative efforts by record labels and performing artists to secure a public performance right by statute, precisely because no such right existed under the common law in Florida or anywhere else.

III. The District Court correctly held that any decision to create a new state-law public performance right should be made, if it all, by the Florida legislature. It is not the province of a federal court to expand state common law. Moreover, a reversal of the District Court's decision in order to recognize a state-law performance right would threaten the careful balance, struck nationwide, that ensures the public's uninterrupted access to sound recording performances as afforded by, among others, digital radio services like Pandora and Sirius XM and their broadcast radio competitors. Pre-1972 recordings are regularly performed without licenses by bars, restaurants, museums, public educational institutions, hotels, health clubs, bowling alleys, and retail establishments, among others. If the

District Court's decision is reversed, all such entities engaging in such performances in Florida could be sued for infringement. Such a sea change in the law is exclusively the province of the legislature. Courts are not institutionally competent at balancing the competing policy interests and "difficult regulatory issues" at stake. *See* Appellant's Appendix ("FE") Vol. 2, Doc. 142 at 9.

IV. If the decision below is reversed and a state performance right is judicially declared, numerous constituencies will be harmed without any corresponding benefit to the public of greater access to creative works. Pandora, like other digital radio services that rely on the federal copyright statute's assurance of access to sound recordings, may need to remove some or all pre-1972 recordings from its service, to the detriment of both Pandora and those listeners who enjoy such recordings. Such a result would be particularly unfair, given that Pandora would be forced by Florida law to remove recordings from its nationwide service, including in states where, by statute or judicial decision, the claimed existence of a public performance right in pre-1972 recordings has been expressly denied.[2]

Numerous other constituencies would also be impaired. Because the

[2] *See, e.g.*, N.C. Gen. Stat. § 66-28 (2015) (denying performance right); S.C. Code Ann. § 39-3-510 (2015) (same). Pandora does not have the technological capability to isolate and screen only those subscribers located in Florida at the moment of a given performance.

exceedingly broad right advocated by Appellant affords no basis for distinction between digital radio services like Sirius XM and traditional radio broadcasters, terrestrial broadcasters will be unable to play pre-1972 recordings without licenses either. Thousands of small businesses would be in the same position, with even fewer resources available to undertake the effort to try to clear the rights to the music that can be heard by their customers. Local television broadcasters, cable television distributors, and online video programming distributors that, without choice, perform sound recordings embedded by the third-party producers of the television programs they transmit will be required to screen all content for pre-1972 recordings or face potential liability. Even online service providers may face liability for conduct that would otherwise fall within the explicit safe harbors of the Digital Millennium Copyright Act ("DMCA"). Appellant goes so far as to suggest that longstanding limitations on copyright ownership, such as the fair use doctrine and the first sale doctrine, do not apply to its rights in pre-1972 recordings under Florida common law, calling into question long-accepted activities of librarians, educators, used record stores, and countless others. These myriad harms are not offset by any benefits to the public of greater access to the recordings at issue, nor incentives to create new pre-1972 recordings which, by definition, is impossible.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT FLORIDA LAW DOES NOT PROVIDE A RIGHT OF PUBLIC PERFORMANCE IN PRE-1972 RECORDINGS

The District Court correctly determined that "Florida common law does not provide Flo & Eddie with an exclusive right of public performance in The Turtles' sound recordings." FE Vol. 2, Doc. 142 at 10. Neither Appellant nor the Recording Industry Association of America as *amicus curiae* can point to a single Florida case declaring that such a performance right in pre-1972 recordings exists.

Each of Appellant's various efforts to locate a right of public performance in Florida law fails. First, Appellant attempts to depict "ownership" as a limitless concept under Florida common law, such that no prior precedent recognizing a common law performance right is needed. The District Court properly rejected Appellant's contention that it enjoys an "unqualified property right wherein it would control everything related to the performance of the sound recordings," explaining that "copyright protection has never accorded the copyright owner complete control over all possible uses of his work." FE Vol. 2, Doc. 142 at 8 (quoting *Sony Corp. v. Universal City Studies, Inc.*, 464 U.S. 417, 432 (1984)).

Second, Appellant points to factually inapposite cases involving record bootleggers and the unlawful reproduction and competing sales of sound recordings and to decisions interpreting the laws of *other states*, the most salient of

which have been roundly criticized and are the subject of pending appeals. None establishes a performance right under Florida law, and the District Court was correct to so conclude.

Third, Appellant points to the 1977 repeal of Section 543.02 of the Florida code, which prevented sound recording owners from seeking performance royalties, as purportedly confirming the existence of a common law performance right. It did no such thing. The legislative history of that provision makes clear that Section 543.02 was repealed not because the legislature intended to restore a performance right, but merely because the larger section of the Florida code in which it was situated, Section 543 (addressing "combinations restricting use of musical compositions"), was deemed duplicative of federal antitrust law and largely unenforced due to the federal court consent decrees already governing ASCAP and BMI. While focused on the regulation of those two organizations, the legislative history is totally silent as to Section 543.02 or the impact of its repeal; there is no indication whatsoever that the legislature viewed it as reinstating a common-law performance right that had been forbidden since the 1930s. To the contrary, the legislature recognized that, after the repeal of Section 543, "the owners of the rights to music fixed before February 15, 1972 ***will not be protected under any law, state or Federal***." Florida H.R. Staff Report for HB 1780, at 2

(Apr. 27, 1977) (Add-30)[3] (emphasis added).

Recognizing the lack of "any" protection for pre-1972 recordings—let alone the absolute and unbounded protection Appellant purports to enjoy—the Florida legislature specifically retained and expanded section 543.041 to protect pre-1972 recordings from one activity: "unauthorized copying," *e.g.*, record piracy. *See* Florida Senate Staff and Economic Statement for SB 1007 (May 16, 1977) (Add-31) (identifying as the bill's sole "Effect on Present Situation" that "s. 543.041 would still provide state protection against unauthorized duplication of sound recordings to owners of the rights to music fixed prior to 1972" and saying nothing about restoring performance rights for such recordings). That addition is telling as well. To the extent the bill addressed the activities of radio broadcasters, it was to *exempt* them from the retained restrictions on copying. The revised Section 543.041 made clear that it did not apply to "any broadcaster who, in connection with or as part of a radio, television or cable broadcast transmission, or for the purpose of archival preservation transfers any such sounds recorded on a sound recording." Fla. Laws 1977, ch. 77-440 § 2, 543.041(7)(a) (Add-28). Appellant's theory of liability turns on the dubious notion that the legislature intended to shield broadcasters from liability for making copies to aid in their broadcasts while at the

[3] Certain authority cited in this brief has been appended as a courtesy for the Court and is cited using the following format "Add-[page number]."

same time exposing them, *sub silentio*, to common-law liability, never theretofore recognized or enforced, for making the broadcasts themselves.

In sum, Appellant is not asking the Court to interpret Florida law, but rather to expand it. The District Court correctly recognized that a federal court cannot undertake that task. *See* FE Vol. 2, Doc. 142 at 9; Section III *infra*.

II. APPELLANT'S CONTENTION THAT FLORIDA LAW HAS ALWAYS PROVIDED A PUBLIC PERFORMANCE RIGHT IN PRE-1972 RECORDINGS IS UNDERMINED BY THE EXTENSIVE HISTORY OF FAILED LEGISLATIVE EFFORTS BY RECORD LABELS AND PERFORMING ARTISTS TO SECURE SUCH A RIGHT BY STATUTE

Although Appellant contends that Florida law has always provided a right of public performance to owners of pre-1972 recordings, it has no explanation for why, if this were true, the right went unenforced by anyone, against anyone, until the instant suit. Appellant tries to waive off nearly 100 years of efforts by the recording industry and performing artists to secure a statutory performance right because those efforts were directed to Congress and the federal copyright law. Those extensive and well-documented efforts are not so easily dismissed, and they completely undermine Appellant's claims here.[4] They were motivated precisely by the absence of any rights—state or federal—to prevent unlicensed radio broadcasts

[4] Appellee Sirius XM addresses some of this history in its opposition brief. Appellee's Br. at 9-18. We supplement Sirius XM's showing herein with discussion of additional legislative history not elsewhere addressed by the parties.

or other public performances of sound recordings. The notion that the extensive legislative debate discussed below took place in a vacuum, with Florida and other states purportedly providing a common law performance right all the while, strains credulity well past the breaking point.

Record companies pursued performance rights in sound recordings before Congress as early as the 1920s, without success. H.R. Rep. No. 104-274, at 10 (1995) (Appellee's Appendix ("SXM") Vol. 1, Doc. 81-17); *see, e.g.*, H.R. 10434 § 37, 69th Cong. (1926) (Add-89). For example, during the 1932 general revision hearings, the National Association of Broadcasters ("NAB") opposed performing rights by observing that, at the time, "a station [that] broadcasts a phonograph record" is "responsible" to the composer "but not to the manufacturer of the phonograph record." *General Revision of the Copyright Law: Hearings Before the H. Comm. on Patents*, at 193 (1932) (Add-65). The NAB testified that the extension of performing rights to sound recordings "would be very prejudicial to the smaller broadcasting stations," which would become subject to "two license fees" or "may find that he is forbidden to play phonograph records altogether." *Id.* The bill was not passed.

As another example, in 1947, a bill was introduced that would have extended copyright, including performing rights, to sound recordings. H.R. 1270, 80th Cong. (1947) (Add-70-74). Performers again confirmed the absence of any

public performance right by arguing that "use of records . . . has become standard practice with hundreds of radio stations," to which the performer "has *no rights at all* beyond an original agreement with the manufacturer." *Authorizing a Composer's Royalty in Revenues from Coin-operated Machines and to Establish a Right of Copyright in Artistic Interpretations: Hearings Before Subcomm. on Patents, Trade-marks, and Copyrights of the H. Comm. on the Judiciary on H.R. 1269, H.R. 1270, and H.R. 2570,* at 6 (Comm. Print 1947) (Add-11) (emphasis added).[5] Broadcasters and author-composers vigorously opposed the bill because it "would make the control go away entirely from the creator and . . . put it into the hands of the maker of the record," who "would then be in a position to control whether it was played or not played in a juke box . . . [or] in recorded form over the air." *Id.* at 49 (Add-24). The bill was "adversely reported." 93 Cong. Rec. D406 (daily ed. July 19, 1947) (Add-4).

[5] Indeed, because performing artists were well aware that there were no performance rights in sound recordings under state or federal law, the American Federation of Musicians organized boycotts against the recording of new music in an effort to force broadcasters, bars, and hotels to hire live performers who were otherwise being displaced by uncompensated performances of recorded music. *See* MICHAEL JAMES ROBERTS, TELL TCHAIKOVSKY THE NEWS: ROCK 'N' ROLL, THE LABOR QUESTION, AND THE MUSICIANS' UNION, 1942–1968 (Duke Univ. Press 2014). These boycotts were so successful that Congress passed the Lea Act, which made it unlawful for musicians to threaten or compel a broadcaster to hire more persons than it needed. *See* ROBERT D. LEITER, THE MUSICIANS AND PETRILLO 159 (Bookman Associates 1953).

In 1965, the Register of Copyrights submitted to Congress a Supplementary Register's Report explaining the latest bill seeking sound recording copyright excluding public performance rights. *See Supplementary Register's Report on the General Revision of the U.S. Copyright Law* (1965), *available at* 9 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, App. 15 (Lexis 2013) ("*Supplementary Register's Report*") (SXM Vol. 2, Doc. 81-23); H.R. 4347, 89th Cong. (1965) (Add-81-82, Add-84-85); S. 1006, 89th Cong. (1965) (Add-99-100, Add-102-103). The Register explained that, while there was "little dispute" over affording exclusive reproduction and distribution rights, "exclusive rights of public performance" were "explosively controversial." *Supplementary Register's Report*, at 51. The Report concluded:

> [W]e cannot close our eyes to the tremendous impact a performing right in sound recordings would have throughout the entire entertainment industry. We are convinced that, under the situation now existing in the United States, the recognition of a right of public performance in sound recordings would make the general revision bill so controversial that the chances of its passage would be seriously impaired.

Id. at 51-52. In 1967, the House Judiciary Committee, when reporting a new bill, echoed the Register's sentiments by explaining that it "believe[d] that the bill, . . . in denying rights of public performance, represents the present thinking of other groups on that subject in the United States, and that further expansion of the scope

of protection for sound recordings is impracticable." H.R. Rep. No. 83, at 65 (1967) (Add-92).

In accord with this prevailing consensus, when Congress first extended copyright protections to sound recordings in 1971—on a prospective basis only—it declined to include a right of public performance. Sound Recording Act of 1971, Pub. L. No. 92-140 § 1(a), 85 Stat. 391 ("SRA of 1971") (SXM Vol. 1, Doc. 81-16). Congress explained that the purpose of the "limited copyright" was "protecting against unauthorized duplication and piracy of sound recordings . . . ." 117 Cong. Rec. 2002 (daily ed. Feb. 8, 1971) (Add-5). It sought to bring uniformity to the patchwork of laws combatting record piracy and eliminate the confusion between proliferating state laws on the issue. *See* S. Rep. No. 92-72, at 4 (1971) (Add-107); H.R. Rep. No. 92-487, at 2-3 (1971). As Congress later observed, it did "not grant[] the rights of public performance [in 1971], on the presumption that the granted rights would suffice to protect against record piracy." H.R. Rep. No. 104-274, at 11 (1995) (SXM Vol. 1, Doc. 81-17).

Certainly, had there been public performance rights in existence at the time under state law, Congress would have had no qualms about extending that right to post-1972 recordings (as it did with the reproduction right). Indeed, Congress similarly would have sought to unify the law on the topic of any state law performance rights. But there were none. Further, if the performance right had

existed at the state level as of 1971, Congress's decision *not* to extend the performance right to post-1972 recordings would have reflected a dramatic *diminution* of the rights of record owners, whose pre-1972 recordings would have enjoyed a performance right under state law but whose post-1972 recordings would enjoy no such right (under the new federal law). That reading cannot be reconciled with the legislative history of an act intended to *expand* the protections afforded to post-1972 recordings.

When Congress ultimately conferred a public performance right for sound recordings under federal copyright law in 1995, it did so specifically to alleviate the "effects" that "new technologies" like digital radio broadcasting had on the recording industry. H.R. Rep. No. 104-274, at 12 (SXM Vol. 1, Doc. 81-17). It did not simply announce the bare existence of a "right" and leave it at that. Rather, it developed an elaborate statutory system to define the newly established right and accommodate competing policy considerations. *See* 17 U.S.C. §§ 106(6), 114(d), 114(f), 801-805. In extending a limited performing right for the first time, it was careful to do so "without upsetting the longstanding business and contractual relationships among record producers and performers, music composers and publishers and broadcasters that have served all of these industries well for decades." H.R. Rep. No. 104-274, at 12 (SXM Vol. 1, Doc. 81-17).

Reflecting these important policy considerations, the narrow federal sound recording public performance right that Congress enacted is constrained by a litany of limitations, exceptions, and protections. *See* 17 U.S.C. §§ 106(6), 114, 801-805. For one, the right applied prospectively only, affording the affected industries time to undertake compliance without punishing them for past, lawful conduct. *See* SRA of 1971, at § 3. Traditional broadcasts are exempt, whether digital or analog. *See* 17 U.S.C. § 114(d)(1)(A) (exempting "digital audio transmission[s], other than as part of an interactive service" as long as "the performance is part of . . . a nonsubscription broadcast transmission"). Other key exemptions apply to transmissions "within a business establishment, confined to the premises or the immediately surrounding vicinity," and to "a retransmission by any retransmitter" as long as the underlying transmission is licensed. 17 U.S.C. § 114(d)(1)(C)(ii), (iii).

Just three years later, Congress added another important policy accommodation which limits the public performance right. In enacting the DMCA, Congress acknowledged the significant risk of unintentional infringement by digital service providers when *users* of the services post infringing content. *See* 17 U.S.C. § 512. Accordingly, Congress established a notice-and-takedown system through which copyright owners and service providers can work together to

resolve infringement and which affords service providers a statutory safe harbor from liability. 17 U.S.C. § 512(a), (c)(1)(C).

Congress also limited the scope of the public performance right to avoid holdout problems. The federal public performance right in sound recordings does not empower the rights-owners to preclude performances of the works by noninteractive Internet radio services like Pandora. *See* 17 U.S.C. § 114(d)(2). Rather, Congress ensured that performances of covered recordings would remain authorized by providing for a compulsory statutory license. *See* 17 U.S.C. § 114(d)(2), (f). These statutory licensing provisions were designed to ensure that satellite and Internet radio would maintain uninterrupted access to records at a reasonable, centrally regulated price. *See* H.R. Rep. No. 104-274, at 14, 22-23 (SXM Vol. 1, Doc. 81-17).

The compulsory licenses created under this system are administered by SoundExchange, which the Copyright Royalty Board ("CRB") has designated to be the sole organization authorized to collect and distribute royalties for exclusive rights in sound recordings. *See generally* 37 C.F.R. §§ 380, 382-84 (2014). Congress also established a complex rate-setting process for compulsory licenses and vested authority in the CRB to adjudicate disputes over licensing rates and terms. *See* 17 U.S.C. §§ 114(f), 801-805.

In stark contrast to this comprehensive federal statutory scheme, the state public performance right advocated by Flo & Eddie lacks any visible definition or detail. *See* FE Vol. 1, Doc. 77 at 17-18. Indeed, the entire thrust of Appellant's argument is that the common law public performance right it purports to possess is a natural property right that admits of no exceptions. Appellant's Br. at 18 (arguing that "the rights afforded by common law copyrights derive from the ability to exclude ***all*** unauthorized uses of those [sic] copyright"). Under this "unfettered" conception, there is no guaranteed access for historically protected industries like Pandora's. No deliberative body can hold hearings and tailor the right to accommodate the competing interests of different constituencies. Users will be unable to learn the contours of the right until they are hauled into court, accused of violating it.

Even if a user wanted to negotiate a common law license, it may not be feasible to do so, as the recording industry has itself acknowledged. *See* "Comments of Recording Industry of America (RIAA) and American Association of Independent Music (A2IM)," at 24-28, *In the Matter of: Fed. Copyright Protection of Sound Recordings Fixed Before Feb. 15, 1972*, Dkt. No. 2010-4, U.S. Copyright Office (Jan. 31, 2011). Pre-1972 recordings—a category stretching back to the turn of the century—are, by now, at least forty-four years old, and it may be quite difficult to discern who, if anyone, continues to own rights in them.

Record labels go out of business. Artists and bandleaders die without clear heirs. There is no central registry of common-law right-holders, like the U.S. Copyright Office, nor is there any organization authorized to administer the rights, like SoundExchange. Users could expend significant time and resources obtaining licenses and still face infringement liability when a new party comes along and claims to be the rightful owner. The natural result of the legal rule Appellant urges the Court to embrace would be a significant contraction of public access to these older recordings and the consignment of many to the scrap heap of history.

III. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT IT IS THE PROVINCE OF THE LEGISLATURE, NOT THE COURTS, TO BALANCE THE COMPETING INTERESTS AND "DIFFICULT REGULATORY ISSUES" IMPLICATED BY RECOGNIZING A PUBLIC PERFORMANCE RIGHT FOR PRE-1972 RECORDINGS

The District Court correctly held that any decision to recognize a state-law public performance right would need to be made, if it all, by the Florida legislature. FE Vol. 2, Doc. 142 at 9. It is not the province of a federal court to expand state common law.[6] As Judge Nichols has explained, for a federal court to "take the lead" in making "changes in state law" would be "contrary to the teaching of *Erie Railroad Co. v. Tompkins*" and "would be an outrageous imposition on the right of

[6] Even were the Legislature to do so, it would need to fashion the performance right in such a manner that its application would not run afoul of the Commerce Clause or Supremacy Clause of the U.S. Constitution. For the reasons cited in Appellee Sirius XM's opposition brief, *see* Appellee's Br. at 8, 17, 35-41, the unqualified right Appellant urges this Court to create would plainly do so.

the people of Florida to make their own laws and interpret or enforce them through institutions of their own creation." *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986) (J. Nichols, concurring); *see also Zombori v. Digital Equipment Corp.*, 878 F. Supp. 207, 209-10 (N.D. Fla. 1995) ("While the Court regularly interprets Florida law to resolve claims in diversity cases, it is not the Court's place to expand Florida's common law by creating new causes of action. Federal courts are entrusted to apply state law, not make it."). Decisions from sister circuits are in accord. *See, e.g., Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988) ("We must apply the law of the forum as we infer it presently to be, not as it might come to be." (citation omitted)); *City of Philadelphia v. Lead Indus. Ass'n, Inc.*, 994 F.2d 112, 123 (3d Cir. 1993) ("Our role is to apply the current law of the appropriate jurisdiction, and leave it undisturbed.").

Even were it within the Court's purview to expand Florida common law, it would be an exceedingly bad idea to do so. Copyright law has always "reflect[ed] a balance of competing claims upon the public interest. . . ." *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975). On the one hand, "[c]reative work is to be encouraged and rewarded," in the form of exclusive rights conferred on the creators. *Id.* On the other, "private motivation must ultimately serve the cause of promoting broad availability of literature, music, and the other arts." *Id.* Because of the broad policy implications of creating a new performance right in

pre-1972 recordings, it is not the kind of property right that ordinarily is, or should be, devised by the accretion of common law. Rather, "[d]eciding which laws are proper and should be enacted is a legislative function." *Carter v. City of Stuart*, 468 So. 2d 955, 957 (Fla. 1985). The carefully circumscribed federal performance right for post-1972 recordings evolved as a creature of statute, not common law, and a cautious and carefully circumscribed one at that. As noted in the preceding section, when Congress first created a public performance right for post-1972 recordings, it made a host of nuanced policy choices, including: (i) limiting the performance right to digital audio transmissions; (ii) exempting non-subscription broadcast transmissions and certain retransmissions; (iii) providing compulsory licenses and a rate-setting tribunal for non-interactive Internet and satellite radio services like Pandora and Sirius XM for not only public performance but also associated ephemeral copies of recordings made in aid of performance; (iv) ensuring that specific percentages of royalties would be paid directly to featured artists and non-featured musicians and vocalists; and (v) subjecting the performance right to a host of statutory defenses; among many others. *See, e.g.*, 17 U.S.C. §§ 106(6), 107-112, 114.

Policy choices like these, which affect broad constituencies and balance competing public and private interests with nuanced line-drawing, are the exclusive province of the legislature. The courts are not institutionally competent

to determine exactly which entities are (or are not) able to bear the costs of obtaining licenses, or to define the myriad other accommodations necessary to make a public performance right feasible for pre-1972 recordings.[7] As the District Court rightly noted, if it were to "recognize and create" a new performance right, "many unanswered and difficult regulatory issues" would remain, including "(1) who sets and administers the licensing rates; (2) who owns a sound recording when the owner or artist is dead or the record company is out of business; and (3) what, if any, are the exceptions to the public performance right." FE Vol. 2, Doc. 142 at 9.

For just such reasons, the Supreme Court has recognized the importance of judicial "reluctance to expand the protections afforded by the copyright" in light of the legislature's "constitutional authority and institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology." *Sony Corp.*, 464 U.S. at 430; FE Vol. 2, Doc. 142 at 9 (quoting same). Florida courts likewise have made it clear that "under our constitutional system of government . . . courts cannot legislate." *Cannon v.*

[7] Even if the courts could do so, it is grossly unfair to the affected constituencies to roll out rules like these in case-by-case decision-making—let alone apply them retroactively, after years or decades of acquiescence, as Appellant seeks to do. The numerous entities and individuals who would be bound by the new common-law rule ought to be given a fair opportunity to conform their conduct to its requirements in advance. Statutes can afford this opportunity by defining the contours of a right in detail and by doing so on a purely prospective basis.

Thomas, 133 So. 3d 634, 638 (Fla. 1st Dist. Ct. App. 2014) (quoting *State v. Egan*, 287 So. 2d 1, 7 (1973)); *see also Steiner v. Guardianship of S. Steiner*, 159 So. 3d 253, 256-57 (Fla. 2d Dist. Ct. App. 2015) (even if "courts are troubled by the statutory gap . . . it is not within the judiciary's power to remedy the problem."); *Fields v. Kirton*, 961 So. 2d 1127, 1130 (Fla. Dist. Ct. App. 2007) ("It is not the function of the courts to usurp the constitutional role of the legislature and judicially legislate that which necessarily must originate, if it is to be law, with the legislature."), *approved*, 997 So. 2d 349 (Fla. 2008).

IV. JUDICIAL CREATION OF A FLORIDA STATE LAW PERFORMANCE RIGHT WOULD UNLEASH WIDESPREAD, INEQUITABLE BURDENS ON NUMEROUS INDUSTRIES

The District Court was unquestionably correct that if it were "to recognize and create [a] broad performance right in Florida, the music industry – including performers, copyright owners, and broadcasters – would be faced with many unanswered questions and difficult regulatory issues." FE Vol. 2, Doc. 142 at 9. But the problems go beyond mere "questions" or "difficult issues." Judicial creation of a state law right of public performance would suddenly overturn a century's worth of accepted industry practice, carefully preserved by Congress.[8]

[8] Nothing in the record of this case warrants, nor does Appellant argue for, any distinction between traditional and digital broadcasters under state law. The concerns that motivated the distinction between satellite/Internet radio and AM/FM radio in the federal copyright law lack evidentiary support here.

Entire industries, developed over decades according to reasonable and justifiable expectations, would face major upheaval and the threat of significant retroactive liability on account of a judicially created common law right. A mere sampling of the deleterious and impractical consequences of such a ruling, and the resulting risk of self-censorship that will limit public access to performances of pre-1972 recordings across a variety of industries, are discussed below.

A. Satellite And Internet Radio Services

With respect to its digital transmissions of post-1972 recordings, Pandora has operated pursuant to the statutory license provisions of Sections 112 and 114 of the Copyright Act. Compulsory licenses afford Pandora unlimited access to recordings in return for reasonable license fees either as may be negotiated with a record industry clearinghouse (operating with a limited antitrust exemption), 17 U.S.C. §§ 112(e)(2), 114(e)(1), or as established by the CRB.

The creation of a new Florida common-law public performance right would provide no similar structure guaranteeing unfettered public access to pre-1972 recordings, nor any comparable mechanism to avert monopoly pricing by record labels. It would impose potentially prohibitive transaction and compliance costs with which services like Pandora, let alone countless other smaller music-using entities in Florida, may be unable or unwilling to cope. The resulting diminution in the transmission of pre-1972 recordings would be a loss to all interested parties.

Further, because Pandora offers its service on a nationwide basis, a Florida right potentially impairs its operations everywhere. To comply, Pandora will be required to create a complex system for identifying which subscribers are located in which states at any given time. Subscribers located in Florida will need to be automatically blocked from hearing pre-1972 recordings, a technological capability that Pandora does not currently possess. In the event such a system is impossible to design or prohibitively costly, Pandora will be forced to pull pre-1972 recordings nationwide, even in those states that have expressly rejected the existence of the right Plaintiff has asserted. *See, e.g.*, N.C. Gen. Stat. § 66-28 (2015); S.C. Code Ann. § 39-3-510 (2015).

B. Traditional Radio Broadcasters

A new public performance right would apply equally to traditional radio broadcasters, despite Congress's studied and repeated unwillingness to impose such a burden, and despite the Florida legislature explicitly exempting radio broadcasters from liability for making copies of sound recordings under Section 543.041 (now 540.11). *See* Part I, *supra*. Indeed, not only have record labels historically not demanded license fees from radio broadcasters, they have "spen[t] mi[ll]ions of dollars *promoting* their product to broadcasters" because airplay drives sales. *Testimony of the NAB Before the H. Judiciary Comm. Subcomm. on Courts & Intellectual Property: Hearing on H.R. 1506*, 1995 WL 371107, §§ A, C

(June 21, 1995) (emphasis added). When Congress fashioned a limited public performance right in sound recordings, it expressly exempted terrestrial radio broadcasters from its scope. 17 U.S.C. § 106(6). Thus, to this day, those traditional broadcasters do not pay for the public performance of any record. Reversing the decision below would undermine this considered policy judgment and, as the District Court noted, leave unanswered the question of whether similar exceptions to the public performance right should be afforded under Florida law. FE Vol. 2, Doc. 142 at 9 (explaining that the Florida legislature "is in the best position to address" the issue of "exceptions to the public performance right").

C. Restaurants, Bars, And Other Small Businesses

Another, enormous group of traditional record users are the many thousands of Florida small business owners that routinely play records for their customers' enjoyment. Until now, restaurants, bars, retail establishments, and other businesses have never paid anything to perform sound recordings of any kind. Indeed, Congress specifically exempted many of them from the scope of the federal right even as to the underlying compositions. *See* 17 U.S.C. §§ 110, 114(d)(1)(C)(ii).

An undefined common law performance right would threaten this long-settled practice. Any restaurant or bowling alley or club in Florida could be sued by the copyright owner of pre-1972 recordings for playing those records on their premises. And given their lack of resources, these businesses are ill-equipped even

to identify owners, let alone negotiate rights to these recordings. As a result, many could be forced to stop playing pre-1972 recordings for their customers and, to avoid accidental infringement, self-censor other content too.

D. Local Television Broadcasters And Cable Television System Operators

In addition to constraining intentional and knowing users of pre-1972 recordings, a new common law public performance right would implicate a vast number of *unintentional and unknowing* users that only transmit performances of sound recordings as part of other services. For example, because the federal performance right in post-1972 recordings is limited to "digital audio transmissions," 17 U.S.C. § 106(6), local television broadcasters have never needed to license the right to perform the copyrighted sound recordings synchronized with the audio-visual programming they transmit. But, under the position advocated by Appellant, they would now be required to license pre-1972 recordings. Because much of the programming broadcast on local television is produced by third parties, broadcasters may not even know what sound recordings are being performed, let alone whether they are pre-1972 recordings, or who owns them. *See Meredith Corp. v. SESAC, LLC*, 1 F. Supp. 3d 180, 187-88 (S.D.N.Y. 2014) ("As a practical matter, a television station cannot negotiate separately with the holder of the rights to each copyrighted work within each of its programs.") (discussing analogous problem for musical compositions). So even though

Congress has exempted audio-visual transmissions from the performance right afforded to sound recordings under federal copyright law, broadcasters would now risk liability were the lower court's interpretation of Florida law reversed.

The potential disruption to long-standing practices for the transmission of television programming to the public is hardly limited to those of local broadcasters. For example, Congress carved out an exception for "retransmissions by any retransmitter" from the scope of federal copyright for post-1972 recordings. 17 U.S.C. § 114(d)(1)(C)(iii). But unless and until the contours of any state-law public performance right are defined, no one will know how it affects retransmissions, such as those made by cable system operators that retransmit programs broadcast on television.

A retransmission of a public performance is itself a public performance. But no cable system operator has ever needed a license for secondary performances of sound recordings featured in the television programming that they retransmit. Accordingly, cable system operators currently have no system in place for identifying recordings that might subject them to liability. In order to prevent future state law liability, retransmitters would need to create and implement procedures for screening all content to be aired for pre-1972 sound recordings, and negotiate licenses accordingly. The resulting transaction and compliance costs would be enormous, if not insurmountable, and they too would be inclined to self-

censor content to avoid potential liability, further reducing the storehouse of content available to the public.

* * *

Liability under the stark right advocated by Flo & Eddie is hardly limited to the kinds of businesses described above. A host of other entities, ranging from online service providers to non-commercial entities, such as municipalities, educational institutions, and museums, among others, publicly perform music. The policy implications of subjecting such entities to an unqualified and undefined common law performance right are equally far-reaching.

CONCLUSION

For the foregoing reasons, and the reasons set forth in Sirius XM's briefing, the District Court's decision granting summary judgment should be affirmed.

Dated: Miami, Florida
October 13, 2015

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,956 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman font size 14.

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_____, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age, and resides at the address shown above, or _____

_____.

That on the 13th day of October, 2015, deponent served the within

Brief of Pandora Media, Inc. as Amicus Curiae in Support of Defendant-Appellee Sirius XM Radio, Inc.

upon the attorneys, and by the method designated below, who represent the indicated parties in this action, and at the addresses below stated, which are those that have been designated by said attorneys for that purpose.

☒ By giving one true copy of same enclosed in a properly addressed wrapper to Federal Express for delivery to the parties listed below.

On this date a PDF copy of the foregoing has been filed and served via the CM/ECF system.

Names of attorneys served, together within the names of the clients represented and the attorney's designated addresses.

VIA PRIORITY OVERNIGHT

See attached service rider

Sworn to before me this
13th day of October, 2015

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ADDENDUM

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ranchers raising breeding herds; Benjamin C. Marsh, representing the People's Lobby, Washington, D. C., on individual income tax; and Bernard S. Rodey, Jr., assistant secretary, Consolidated Edison Co., of New York, on electrical energy tax. Hearings will continue next July 21.

Met in executive session and ordered favorably reported to the House H. R. 479, with amendment, relating to the income tax liability of members of the armed forces dying in service; H. R. 4257, to extend time for claiming credit for refund with respect to war losses; and H. R. 4259, to amend the Internal Revenue Code relating to musical instruments sold to any religious or nonprofit educational institution; and also relating to photographic apparatus.

REPORTS ON JOINT COMMITTEE MEETINGS

SCIENCE FOUNDATION

Conferees on S. 526, National Science Foundation Act, held first meeting, but failed to reach agreement; continue July 19.

BILLS SIGNED BY THE PRESIDENT

(*New Laws*)

(For last listing of Public Laws, see p. D398)

S. 564, Presidential succession bill. Signed July 18, 1947 (P. L. 199).

S. 1419, to enable Hawaiian Legislature to authorize Honolulu to issue sewer bonds. Signed July 18, 1947 (P. L. 200).

Saturday, July 19, 1947

HIGHLIGHTS

Senate passed four veteran bills and recommitted another.
House passed national security (unification) bill.
Various Army-Navy bills approved by Senate committee.
House subcommittee approved universal military training bill.

Senate

Chamber Action

Routine Proceedings, pages 9345–9347.

Bills Introduced: Eight bills and one resolution were introduced, as follows: S. 1669–S. 1676, and S. Res. 154. Page 9346

Bills Reported: Bills were reported as follows:

Eight private claims bills: S. 551, H. R. 405, 704, 914, 1492, 2507, 2550, and 406 (S. Repts. 617–624, respectively);

S. 1174, to provide inactive duty training pay for Organized Reserve Corps (S. Rept. 625);

S. 1198, to authorize leases on stand-by plants (S. Rept. 626);

S. 1633, to authorize Marine Band attendance at National Convention of American Legion in N. Y. (S. Rept. 627);

S. 1675, to authorize Sec. of Navy to proceed with the construction of certain public works (S. Rept. 628);

S. 1676, to authorize Sec. of War to proceed with certain constructions (S. Rept. 629);

H. R. 3051, to amend Vinson-Trammell Act to repeal profit limitations and other limiting provisions relating to construction of vessels and aircraft (S. Rept. 630);

S. 1494, to amend Veterans' Preference Act to allow veterans to appear before Civil Service Commission for employment adjustments (S. Rept. 631); and

S. 1644, amending Veterans' Preference Act of 1944 to permit rescission of prior agency action in complying with Civil Service Commission's recommendations (S. Rept. 632). Pages 9345–9346

Bills Referred: The following House-passed bills were referred to committees indicated: H. R. 958 and 4043 (Committee on Finance); H. R. 4268 and 4269 (Committee on Appropriations). (For passage in House, see Digest, p. D401.) Page 9346

Indians: House amendments to H. R. 981, relative to refund of taxes illegally paid by Indians, were disagreed to, a conference asked, and Senators Watkins, Ecton, and Hatch appointed as conferees. Page 9347

Health: Executive D, terminating the International Office of Public Health, was ratified. Pages 9348–9349

Missouri Election: S. Res. 150, to discharge Judiciary Committee from further consideration of S. Res. 116, to investigate Missouri congressional primary election (Fifth District), was debated. Pages 9347–9348

Veterans' Subsistence: S. 1394, increasing subsistence payments to veterans under the education program, was passed. Pages 9349–9364

Terminal Leave: H. R. 4017, permitting cashing of terminal leave bonds after September 1, 1947, was passed, 85 yeas to 0 nays, and cleared for the White House. Pages 9364–9365, 9373–9377

Veterans' Housing: Senate debated S. 1293, to enable the Veterans' Administration to provide housing units for disabled World War II veterans. Motion of Senator Taft to recommit bill to Committee on Banking and Currency for further study was adopted 40 yeas to 37 nays. Pages 9377–9388

Pension: H. R. 3961, increasing pensions for Spanish-American and Civil War veterans, was passed 71 yeas to 0 nays, and cleared for President. Pages 9389–9390

Amputees: S. 1391, to authorize payment for purchase of automobiles for amputees and other disabled veterans, was passed by voice vote after adoption of committee amendment. Page 9390

Nominations: Three Diplomatic and Foreign Service appointments were received. Page 9393

Confirmations: The following nominations were confirmed: Kenneth C. Royall, as Secretary of War; Ernest A. Gross, as legal adviser to Department of State; William J. Kennedy, as member of Railroad Retirement Board; Chester S. Dishong, as United States marshal for southern district of Florida; together with 63 appointments in the Diplomatic and Foreign Service, 26 in the Public Health Service, 124 postmasters, and 1,925 in the Army. Pages 9393–9394

Reports on Committee Meetings

WAR DEPARTMENT, CIVIL

Committee on Appropriations: Subcommittee completed "marking up" H. R. 4002, War Department civil functions appropriation bill.

DEFICIENCY APPROPRIATIONS

Committee on Appropriations: Subcommittee held hearings with testimony from numerous witnesses on H. R. 4268 and 4269, supplemental deficiency appropriations. Full committee is scheduled to meet on these bills July 21.

SEC. OF WAR, AND ARMY-NAVY BILLS APPROVED

Committee on Armed Services: In executive session, the committee approved six bills and various nominations, as follows: S. 1198, to authorize leases on stand-by plants, with amendments; S. 1633, to authorize Marine Band attendance at National Convention of American Legion in N. Y.; S. 1213, to authorize $127,800,000 for naval public works in continental United States and overseas, with amendment; S. 1526, to authorize $225,000,000 for construction of Army public works in continental United States and overseas, with amendments; H. R. 3051, to amend Vinson-Trammell Act to repeal profit limitations as well as certain other limiting provisions relating to construction of vessels and aircraft, with amendments; and S. 1174, to provide inactive duty training pay for Organized Reserve Corps.

The nomination of Kenneth C. Royall, to be Secretary of War, as well as on pending Army and Navy nominations, were reported.

FPC NOMINATION

Committee on Interstate and Foreign Commerce: The following witnesses were heard on nomination of Burton N. Behling, to be FPC Commissioner: Harold Kennedy, Mid-Continent Oil & Gas Assn.; Russell B. Brown, Independent Petroleum Assn.; and the nominee. Committee will meet in executive session July 22 to consider this nomination and other pending business.

DISTRICT JUDGE

Committee on the Judiciary: Subcommittee met on nomination of Herbert W. Christenberry, to be judge for the eastern district of La., and heard Senator Ellender testify in support of it, and Harry W. Belford, attorney from Atlanta, against it.

House of Representatives

Chamber Action

Bills Introduced: Five public bills, H. R. 4286–4290; ten private bills, H. R. 4291–4300; and three resolutions, H. Res. 317, and H. J. Res. 246 and 247, were introduced. Page 9462

Bills Reported: Bills and resolutions were reported as follows:

Part II, supplemental report (H. Rept. 958) to S. 364, expediting disposition of surplus Government airports, airport facilities, and equipment.

H. R. 4259, excusing religious and nonprofit institutions from excise tax on musical instruments (H. Rept. 1005);

H. R. 479, correcting, retroactively, any situation arising under income-tax law upon death of a member of the armed forces (H. Rept. 1006);

H. Res. 276, requesting Secretary of Agriculture to act to prevent crop damage by use of "2,4-D," weed killer (H. Rept. 1007);

H. R. 4254, providing for disposition of farm-labor camps to public or nonprofit farm associations (H. Rept. 1008);

S. J. Res. 138, providing for return of Italian property in United States (H. Rept. 1009);

H. R. 3546, permitting retired officers and members of the United States armed forces to represent ex-service organizations in claims before the Veterans' Administration (H. Rept. 1010);

H. R. 4141, extending time wherein eligible veterans may apply for gratuitous insurance benefits (H. Rept. 1011);

H. R. 4243, providing minimum ratings for service-connected arrested tuberculosis (H. Rept. 1012); and

Conference report on H. R. 3123, Interior Department appropriation bill for 1948 (H. Rept. 1013).

Pages 9457, 9461–9462

D. C. Appropriations: Disagreed to Senate amendments on H. R. 4106, District of Columbia appropriation bill for 1948, agreed to the conference asked, and Representatives Horan, Stefan, Church, Stockman, Andrews of Alabama, Bates of Kentucky, and Fogarty were appointed conferees on the part of the House.

Pages 9395–9396

Newsprint: Passed H. J. Res. 238, amending Tariff Act of 1930 to permit free entry of standard newsprint paper in widths of 15 inches rather than the present 16-inch width. Page 9395

Unification Bill: Passed S. 758, as amended, the National Security Act of 1947, after 7 hours of general debate and consideration for amendments. This measure would establish a National Defense Establishment responsible directly to the President, and headed by the Secretary of Defense. This officer would have Cabinet status, with three secretaries, one each for Army, Navy, and Air, without Cabinet rank.

The House considered its own bill, H. R. 4124, and after perfecting its text by amendments, substituted the provisions of the House bill for the Senate measure; requested a conference, and appointed the following conferees: Representatives Hoffman, Bender, Latham, Wadsworth, Manasco, McCormack, and Holifield.

Pages 9396–9457

Insurance: Passed S. 1508, extending until June 30, 1948, duration of act affirming intent of Congress that regulation of the business of insurance should be left to the States. Page 9457

Reports on Committee Meetings

FARM LABOR CAMPS—WEED KILLER

Committee on Agriculture: In executive session the committee voted to favorably report to the House H. R. 4254, providing for the disposition of farm labor camps to public or semipublic agencies or nonprofit associations of farmers; and H. Res. 276, requesting Secretary of Agriculture to take immediate action to prevent further damage to crops as a result of the use of the weed killer known as "2,4-D."

UNIVERSAL MILITARY TRAINING

Committee on Armed Services: Subcommittee on Education and Training met in executive session on H. R. 4121, universal military training, and ordered favorably reported to the full committee a new bill, H. R. 4278, embodying clarifying amendments. The full committee expects to act on the new bill either July 22 or 23.

BANK HOLDING COMPANIES

Committee on Banking and Currency: Continued hearings on H. R. 3351, providing for the regulation of bank holding companies, and heard Charles F. Zimmerman, secretary, Pennsylvania Bankers Association; J. V. Norman, Jr., vice president, First National Bank of Louisville, Ky.; and Maj. Fred N. Oliver, representing National Association of Mutual Savings Banks, all of whom testified in favor of the bill generally.

Met in executive session and voted to report favorably to the House S. 1361, amended, providing for completion of certain public housing projects if cities pay the difference between the statutory construction cost limitation and the actual construction cost.

D. C. HOME RULE

Committee on the District of Columbia: Subcommittee on Home Rule and Reorganization held hearings on merit systems for the District of Columbia, and heard Kenneth C. Vipond, representing the United States Civil Service Commission; Walter L. Fowler, D. C. Budget Officer; Dr. Hobart M. Corning, Superintendent of Schools for the District; Clement Murphy, Chief, Fire Department; Inspector Smith, Assistant Chief, Police Department, all of whom discussed whether the District should have its own merit system entirely, or should stay under Federal civil service in some respects as at the present time.

Held hearings on the subject of institutional care for the District and heard Capt. A. H. Conner, Federal Bureau of Prisons; Donald Clemmer, Director, D. C. Department of Corrections; Dr. Winfred Overholser, Superintendent of St. Elizabeths Hospital; Raymond Clapp, Assistant Director, D. C. Department of Public Welfare; Charles E. Burbridge, Superintendent, Freedmen's Hospital; and Dr. George C. Ruhland, Director, D. C. Department of Health, all of whom discussed the problem involving use of Federal institutions by the District Government on a payment basis.

UNITED NATIONS

Committee on Foreign Affairs: Subcommittee on International Organization and Law met in open session on S. J. Res. 136, on convention on the privileges and immunities of the United Nations; and S. J. Res. 144,

United Nations headquarters agreement, and heard Charles Fahy, legal adviser, State Department.

FRIGATE "CONSTITUTION"—PATENTS

Committee on the Judiciary: Subcommittee No. 1 held hearings on H. J. Res. 200, to provide for the observance of the 150th anniversary of the launching of the United States frigate *Constitution,* and heard Representative Church and Captain Hicky, of the Navy Department, both of whom testified in favor of the resolution.

Subcommittee on Patents, Trade-Marks, and Copyrights met in executive session and ordered favorably reported to the full committee, with amendments, the following bills: H. R. 3366, permitting public libraries to acquire back copies of United States letters patent for $50 per year; H. R. 1107, providing for extension of the time limitation under which patents were issued in the case of persons who served in the military or naval forces of the United States during World War II. Subcommittee ordered adversely reported H. R. 1270, granting a copyright for artistic interpretations by entertainers.

ALIEN SEAMEN

Committee on Merchant Marine and Fisheries: In executive session the committee voted to favorably report to the House H. J. Res. 245, amending Public Law 27 (80th Cong.) relative to the employment of alien seamen on merchant vessels. The committee also had under consideration H. R. 4042, to control the export to foreign countries of gasoline and petroleum products from the United States. Executive session on H. R. 4042 will be continued July 21.

VETERANS' LEGISLATION

Committee on Veterans' Affairs: Met in executive session and ordered favorably reported to the House the following bills: H. R. 4243, amended, to provide minimum ratings for service-connected arrested tuberculosis; H. R. 4141, to extend for 2 years the time within which eligible persons may apply for gratuitous insurance benefits; and H. R. 3546, amended, to permit recognition of officers and enlisted men retired from the military and naval forces of the United States as representatives of certain organizations in the presentation of claims to the Veterans' Administration.

REPORT ON JOINT COMMITTEE MEETINGS

GOVERNMENT CORPORATIONS

Conferees on H. R. 3756, Government corporations appropriations, held first session, but failed to reach final agreement. Will meet again July 21.

INDEPENDENT OFFICES

Conferees on H. R. 3839, independent offices appropriations, held first session, but failed to reach final agreement. Will meet again July 21.

ATOMIC ENERGY

Joint Committee on Atomic Energy: Committee met in executive session with the Joint Chiefs of Staff (Gen. Eisenhower, Admiral Leahy, Admiral Nimitz, and Gen. Spaatz) and discussed how they fit into the atomic energy picture, as well as the coordination of the branches of service in that field.

SCIENCE FOUNDATION

Conferees on S. 526, National Science Foundation Act, in a second session, continued working on differences between House and Senate-passed versions of bill. Next meeting will be on July 21.

Monday, July 21, 1947

HIGHLIGHTS

Senate adopted Agriculture appropriations conference report, disposing of amendments in disagreement, and debated Missouri election investigation.

House passed anti-poll-tax and civil-service annuity bills, 71 Consent Calendar measures, and adopted Interior appropriation conference report.

Housing, public lands, judiciary, and coinage bills approved by Senate groups.

Oil export control bill approved by House Committee.

Senate

Chamber Action

Routine Proceedings, pages 9463–9469.

Bills Introduced: Fifteen bills and two resolutions were introduced, as follows: S. 1677–1691; S. Con. Res. 27; and S. Res. 155.

Pages 9464–9465, 9465–9466, 9466, 9466–9467, 9498–9499

Bills Reported: Bills and resolutions were reported, as follows:

H. R. 1995, to provide for return of civil-service retirement deductions of employee separated before completing 10 years of service (S. Rept. 633);

S. 1507, to authorize sale of land in Polson, Mont. (S. Rept. 634);

mark rights. The purpose of this legislation is to give patent and trademark applicants an opportunity to make a claim for a filing date earlier than the date on which the application was received by the Patent Office. The application would be entitled to the filing date which it would normally have received except for the disruption of postal service.

The PRESIDENT pro tempore. The bill will be received and appropriately referred.

The bill (S. 645) to provide relief in patent and trademark cases affected by the emergency situation in the U.S. postal service which began on March 18, 1970, introduced by Mr. McCLELLAN, by request, was received, read twice by its title, and referred to the Committee on the Judiciary.

S. 646—INTRODUCTION OF A BILL TO PROTECT AGAINST PIRACY OF SOUND RECORDINGS

Mr. McCLELLAN. Mr. President, as chairman of the Senate Subcommittee on Patents, Trademarks, and Copyrights, I introduce, for appropriate reference, on behalf of myself and Mr. SCOTT, a bill to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes.

The bill which I am introducing today is identical to S. 4592 which I introduced on December 18, 1970. Information supplied to the Copyrights Subcommittee indicates a rapid increase in the unauthorized duplication and piracy of sound recordings. It has been estimated that as many as 18,000 illegal tapes are being produced each day depriving the record industry, its distributors and performing artists of an estimated $100 million annually in tape sales.

The Committee on the Judiciary has been advised that the Library of Congress and the Copyright Office are "fully and unqualifiedly in favor of the purpose the bill is intended to fulfill." The report of the Librarian of Congress on the predecessor bill states in part:

> The recent and very large increase in unauthorized duplication of commercial records has become a matter of public concern in this country and abroad. With the growing availability and use of inexpensive cassette and cartridge tape players, this trend seems certain to continue unless effective legal means of combatting it can be found. Neither the present Federal Copyright Statute nor the common law or statutes of the various states are adequate for this purpose.

The Library of Congress and the Copyright Office have indicated that "the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision." The substance of the bill I am introducing has already been approved by the Copyrights Subcommittee as part of the legislation for general revision of the copyright law.

Anyone having comments on this subject, or proposed amendments, should now submit them to the subcommittee.

The PRESIDENT pro tempore. The bill will be received and appropriately referred.

The bill (S. 646) to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes, introduced by Mr. McCLELLAN (for himself and Mr. SCOTT), was received, read twice by its title, and referred to the Committee on the Judiciary.

S. 647—INTRODUCTION OF THE "UNFAIR COMPETITION ACT OF 1971"

Mr. McCLELLAN. Mr. President, I introduce, for appropriate reference, on behalf of myself and Mr. SCOTT, the Unfair Competition Act of 1971.

The bill would establish a uniform body of Federal unfair competition law by creating a Federal statutory tort of unfair competition affecting interstate commerce, and by establishing Federal jurisdiction over such tort claims within the framework of the Trademark Act of 1946. The crux of the bill proposes a new section 43(a) of the Trademark Act including in three subsections those torts generally acknowledged to give rise to the major part of the law of unfair competition. In a fourth subsection, provision is made for the Federal courts to deal with other acts which constitute unfair competition because of misrepresentation or misappropriation of goods or services.

The bill provides that all the remedies set forth in the Trademark Act for infringement of trademarks would be available in respect to acts of unfair competition. However, the bill would not affect remedies which are otherwise available or preempt the jurisdiction of any State in cases of unfair competition.

The need for legislation in this area has been widely recognized. A national coordinating committee, composed of leading business and legal organizations, was established for the purpose of fostering such legislation. Other than for technical amendments the bill which Senator SCOTT and I are introducing today is identical to S. 766 of the 91st Congress. No action was taken on this legislation in the previous Congress, but it is anticipated that hearings will be scheduled on this bill during the current session.

Anyone interested in this legislation should address his comments to the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary.

The PRESIDENT pro tempore. The bill will be received and appropriately referred.

The bill (S. 647) to amend the act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes, introduced by Mr. McCLELLAN (for himself and Mr. SCOTT), was received, read twice by its title, and referred to the Committee on the Judiciary.

S. 649—INTRODUCTION OF BILL RELATING TO THE INTERSTATE COMMERCE COMMISSION

Mr. MANSFIELD. Mr. President, late in the 91st Congress the Senior Senator from Idaho (Mr. CHURCH) and I introduced legislation which would abolish the Interstate Commerce Commission. Today, I have sent to the desk an identical proposal which, if enacted, would abolish the Interstate Commerce Commission after a 2-year period during which a special committee would be given an opportunity to consider phasing out the Commission and the appropriate transfer of its duties to one or more existing Federal authorities. This legislation is being cosponsored by Senators AIKEN, CHURCH, FULBRIGHT, GOLDWATER, METCALF, MONTOYA, PROXMIRE, and TAFT.

This proposal is not offered lightly by me nor my colleagues. In my own case, it has been only after much thought and consideration of what has become one of the most serious crises in our domestic economy. Surface transportation is badly in need of some new guidance. If the ICC had more forcefully advocated and implemented their existing authority over the past several decades, I am convinced that we would not be in the position we are today. The Commission has been far too willing, in my opinion, to acquiesce in the demands of industry and has not given enough attention to the needs of the shippers and the general public. It is conceivable that the Commission could correct a number of the problems and set our policies in a different direction and avoid abolition. I hope so. Quite frankly, I would like to see the Commission take such steps. I never have, and I do not now, believe that doing away with something is always the answer. But, in this case, if the ICC cannot achieve the necessary reforms, we are going to have to find a better means of promoting sound surface transportation policy in this country.

The complaints I have registered against the Commission fall, generally, into four categories—boxcar shortages, freight rates, passenger train service, and small shipments.

During the 28 years that I have been in the Congress, the one problem that has always seemed to plague the people of Montana and elsewhere is the West, year after year, has been the shortage of freight cars.

In the beginning, the problem arose only during the harvest season or in the very active timber cutting season. Now, it can be almost anytime of the year. A State like Montana, with its large agricultural and lumber resources, is very dependent on the railroads for shipping products to the processing and shipping points in the East and West. The Interstate Commerce Commission has not been able to get the cars moving in the proper direction. I recall periods when certain areas of Montana were requesting as many as 1,000 cars at one time. The western railroads have done a reasonably good job of keeping their rolling stock up to date, but they have found it extremely difficult to get these cars back from the eastern lines. After much discussion and pressure, the ICC has

AUTHORIZING A COMPOSER'S ROYALTY IN REVENUES FROM COIN-OPERATED MACHINES AND TO ESTABLISH A RIGHT OF COPYRIGHT IN ARTISTIC INTERPRETATIONS

HEARINGS

BEFORE

SUBCOMMITTEE ON PATENTS, TRADE-MARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

EIGHTIETH CONGRESS

FIRST SESSION

ON

H. R. 1269, H. R. 1270, and H. R. 2570

BILLS TO AMEND THE ACT ENTITLED "AN ACT TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT," APPROVED MARCH 4, 1909, AS AMENDED

MAY 23, JUNE 4, 9, 11, 16, 18, AND 23, 1947

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STATEMENTS RELATIVE TO H. R. 1270

STATEMENT RELATIVE TO H. R. 1269, H. R. 1270 AND H. R. 2570

as far as the $232,000,000 a year is concerned, the composer, the man who does the real composing, is just not compensated.

Mr. KEATING. In other words the composer only gets 2 cents on that record and that record may be played 1,000 times in the juke box and he only gets 2 cents.

Mr. FELLOWS. That is right; he gets a share of the 2 cents because the publishers are involved and so it may be less than 1 cent.

Mr. WALTER. And this performance is a performance only for profit.

Mr. FELLOWS. That is all it could be.

Mr. KEATING. It is, when the machine works.

Mr. FELLOWS. Well all I can say is that whether the machine works or does not work, the composer is in the cold.

Mr. LANE. Congressman, can you give us an idea how many times one of those records can be played?

Mr. FELLOWS. I was told yesterday, roughly perhaps 200 times, Congressman. Of course, they will break if you drop them and I suppose that they crack, but somebody suggested that a record could be played on the average 200 times; and if that is done, irrespective of the return on that record, the composer and the publisher only get 2 cents.

Are there any other questions, Mr. Chairman?

Mr. LEWIS. That is all, unless some other member has some questions. Who is the next witness?

Mr. BERNHARDT. Mr. Sam B. Warner, the Register of Copyrights, is scheduled to be the next witness but I have not seen him this morning.

Mr. LEWIS. We will probably have to have more than 2 days of hearings on these bills and Mr. Warner, being in the city, can come at any time.

Mr. BERNHARDT. We have several witnesses from ASCAP, including Mr. Buck and Mr. Berlin. I do not know whether or not Mr. Berlin is here. We have several other witnesses whom Mr. Buck can introduce.

Mr. LEWIS. We should like to accommodate these people. Evidently there are more people here than we will be able to hear, since the House goes in session at 11 o'clock today. So we have just the remaining time until 11 o'clock.

Mr. SPEISER. Mr. Chairman, I am Maurice J. Speiser, general counsel for the National Association of Performing Artists.

May I suggest, Mr. Chairman, as representing the proponents of both bills, H. R. 1269 and H. R. 1270, that we be permitted to give our reasons for the proposed legislation; and if you will permit me, I would like to introduce Mr. Waring, the president of our association, as the first one to speak for the bill.

I have the distinct pleasure of introducing our president, Mr. Fred Waring.

STATEMENT OF FRED WARING, PRESIDENT, NATIONAL ASSOCIATION OF PERFORMING ARTISTS

Mr. WARING. Mr. Chairman and gentlemen, I decided to read my statement because, after all, I am a band leader and I might say some things which I could not remember having said and it is a little dangerous, so I decided to read it.

As president of the National Association of Performing Artists, it is my duty—and my privilege—to appear before this committee. Although I am unfamiliar with the methods of securing congressional recognition for a pressing problem, the simple rights of property and livelihood, native to all under our Government, are equally understandable to legislators and performing artists. It is with such innate rights that our problem is concerned.

We, the interpreting and performing artists, have no legislative recognition of our interpretive rights in the United States, and therefore have been subject to unauthorized commercial exploitation of our efforts. The nature of this will be explained to you in detail by our general counsel.

Trade practices have minimized flagrant piracies such as happened a few years ago when certain individuals were making off-the-air recordings of our commercial broadcasts, deleting our own commercial announcements, substituting those of another advertiser, and broadcasting that program in direct competition to the original. But today the use of records regularly manufactured for home use has become standard practice with hundreds of radio stations, and further has developed into a multimillion-dollar business in nickels through the juke box.

The performing artist whose name and so far legally undefined skills have made the popularity of the recording possible has no rights at all beyond an original agreement with the manufacturer at the time of performance. Yet the characteristic technique of this artist remains the strongest bid the record will make for popularity in its lifetime—which lifetime may be violently shortened by the intensity of its use in unrestrained and widespread radio and juke-box performances.

To those of us whose work is stamped with an unmistakable "trademark" of conception, instrumentation, manner, and "style," the loss of our property rights at the very moment of their greatest earning possibility represents a serious condition. The House bill, 1270, known as the Scott bill, we believe constitutes a solution. I speak with the wholehearted support of our membership, from Benny Goodman to Toscanini, from Eddy Duchin to Josef Hoffmann, from Bing Crosby to Lawrence Tibbett, and from Gertrude Niessen to Gladys Swarthout, when I say that we feel it will correct the most unfair and difficult condition, and when I urge your recommendation of its content.

Mr. LEWIS. Thank you.

Are there any questions to be asked of Mr. Waring?

Mr. WALTER. Mr. Waring, do I understand you to say it was possible for somebody to cut a record from your rendition and then play that record without your being compensated?

Mr. WARING. It is possible and has been done.

Mr. LEWIS. Is that a common practice?

Mr. WARING. It is no longer a common practice but we have got suits in courts in Pennsylvania which have eliminated that practice to a great extent, but it is still possible.

Mr. KEATING. You have been sustained in the courts when you brought suit?

Mr. WARING. We have.

Mr. KEATING. Have you been sustained anywhere else besides Pennsylvania?

Mr. SPEISER. Yes; in South Carolina and in the southern district of New York they have recognized our property rights, but in New York it was set aside by Judge Learned Hand in the circuit court of appeals, holding that the artist having performed, the sale of the record meant a dedication to the public; and that is why we are here on this legislation, to get relief from that.

Mr. KEATING. And to correct the situation, in that the extent of your compensation is 2 cents for a particular record that is made?

Mr. SPEISER. No; the record companies get that 2 cents and it is divided as the previous speaker has already stated between the publisher, the song writer, and the author of the words.

Mr. KEATING. In other words the composer gets only a part of the 2 cents.

Mr. SPEISER. Yes; and sometimes it is less than 2 cents.

Mr. WARING. You see, it comes to approximately 5 percent of the selling price of the record, depending on the deal the artists has made with the manufacturer, but it is approximately 2 cents.

Mr. LANE. Mr. Waring, have you any way of knowing how many records they make?

Mr. WARING. They naturally give us a statement of the number of records they have sold.

Mr. LANE. You have no way of checking that?

Mr. WARING. No, sir; we do not know other than from their statement.

Mr. CHADWICK. That is the return from the legitimate development or production and does not cover the reproduction irregularly, on which you get no figures.

Mr. WARING. Yes.

Mr. CHADWICK. Of course, reproduction pirated through the air, that is plain stealing, without giving you the 2 cents.

Mr. WARING. That is correct, and we feel that the use of recordings on radio stations for commercial concerns should bring compensation.

Mr. LEWIS. Are there any other questions?

Thank you very much, Mr. Waring.

STATEMENT OF MAURICE J. SPEISER, GENERAL COUNSEL, NATIONAL ASSOCIATION OF PERFORMING ARTISTS

Mr. SPEISER. I think I should explain this 2 cents. The performer does not get that 2 cents, but the 2 cents is divided between the composer, the author of the words, and the Music Publishers' Association. What the performer receives is a fee for the making of the record for the manufacturer and he has no further interest. Sometimes it is done on a royalty basis so that the musician or any interpretive artist obtains no part of that 2 cents. The fee that is paid to the performer is separate, alien, and has nothing to do with the constitutional provision. The Copyright Act provides for that. That was done so that there could not be a monopoly of recording. If a composer records a song and publishes that record, any other company has the right of publication of that particular song by simply paying the author of the song 2 cents a copy, and so can have access to all of the

Mr. CHADWICK. Well, the only ones that will be able to negotiate, of course, are the artists who are successful in their interpretations; they have a public commercial volue. Is that right?

Mr. TAYLOR. The successful ones; yes.

Mr. CHADWICK. I have been reaching back in my mind for a phrase that I cannot quite get out, something about a song is no good without a good singer or something.

Mr. TAYLOR. But the singer without the song is no good. Now, I might quote Ernest Newman who says, "Any music worth playing at all is worth playing badly."

I cannot feel, in my heart, that the interpreter is as valuable a contributor as the creator. I cannot feel that way because the music or the play or the book exists. It is there in printed form. If it is not done today, it might be done tomorrow or it might be done 10 years from now; it is still alive, it is there.

Mr. KEATING. Do you think that the public would agree with you?

Mr. TAYLOR. Well, if the public thought about it, I think that they might. I think that they might agree that the composition is the important thing.

Now, I think that they tend to confuse he performer with the work. Definitely, certainly they used to confuse Caruso with Rigoletto but Rigoletto is still with us. I do not think that public opinion is necessarily infallible.

Mr. KEATING. No; that is true, but it is something that sets standards and it is worth something.

Mr. TAYLOR. Well, then, my opinion ought to be worth something, too.

Mr. LEWIS. Are there any further questions by the committee of Mr. Taylor?

(No response.)

Mr. TAYLOR. Thank you, gentlemen.

Mr. LEWIS. Thank you, Mr. Taylor.

Is Mr. Schulman here?

Mr. BUCK. Yes, sir.

Mr. SCHULMAN. Yes, sir.

Mr. LEWIS. We will hear from you, Mr. Schulman.

STATEMENT OF JOHN SCHULMAN ON BEHALF OF THE SONGWRITERS' PROTECTIVE ASSOCIATION

Mr. SCHULMAN. Well, I thought that your committee was going to hear from the proponents of the bill today.

Mr. LEWIS. We started that but only one proponent is here and all of the rest of them on this list are opponents, so we will hear from you.

Mr. SCHULMAN. All right, thank you.

May I identify myself? My name is John Schulman, attorney, with my office at 120 Broadway, New York City. I represent the Songwriters' Protective Association, and I have represented that association for upward of 15 years.

Mr. KEATING. How is that different from ASCAP?

Mr. SCHULMAN. I was just about to come to that.

Mr. KEATING. I am sorry.

Mr. SCHULMAN. We differ from ASCAP in this sense—let me describe the association to you.

We have about 1,400 or more members who are authors and composers of music. They are scattered throughout the country. The President of our association is Mr. Sigmund Romberg, a prominent composer. Other members are Oscar Hammerstein, Mr. Ahlart, Mr. Leslie, and numerous other people who are professionally engaged in writing and composing music.

Now, the difference between writers and composers is this—we make this distinction: The composer writes the melody and the writer writes the words.

Mr. KEATING. You represent both?

Mr. SCHULMAN. We represent both composers and authors, but our distinction from ASCAP is this: ASCAP is concerned with performing rights. It is a collecting system or society which has as its function the licensing of public performances over the radio and in theaters and other places, and collecting money and distributing that money among the writers, the authors, the composers, and the publishers.

Now, we represent only writers—we have no publishers in our association—and our chief function has been to look after the economic interests of the writer, not only with respect to the so-called performing rights but in all of his rights.

In other words, to give you an example, Mr. Frohlich mentioned the fact that there has been, for 15 years, a standard contract between writers and publishers. Now, we were the ones who promulgated that standard contract. Before the existence of our association, for example, a writer would go to the publisher and he might sell a song for $25. He would get nothing more for it at all; although that song might have sold 1,000,000 copies, he would never get anything more than the original $25. It might have been released to a motion-picture company for the purposes of insertion in a motion picture and the writer might get nothing more from it as a result.

As a result of our efforts, our dealings have been very pleasant with publishers and others. We have established a royalty basis where, if the writer's song becomes popular and sells a great many copies, if there are a great many phonograph records made of it, and things like that, the writer gets a share.

In other words, the writer gets, under our form of contract a definite amount for each copy of sheet music that is sold and he gets a share if there is money received from records and if there is money received from users in the motion pictures and things of that sort; so you see we cover the entire gamut of the song writer's economic interests.

We are not conforming merely to the performing rights and things of that sort. As a matter of fact, those are lodged in ASCAP with the result that we have no control over performing rights. We have no control over any rights, as a matter of fact. We established this basis of contractual relations between the publisher and the writer.

Another one of our functions has been just what I am doing here: Trying to protect the writer's copyright; trying to protect his interests in questions which arise relating to the copyright which is the very basis that makes his work valuable.

Anybody can become a member of our association. We have no closed doors. Everybody who writes music or wants to write music can become a member of our association.

Mr. KEATING. How much?

Mr. SCHULMAN. The association members pay $10; the lowest class of member pays $10 a year. The highest is $50 a year.

Mr. WALTER. What makes the writer's work become popular?

Mr. SCHULMAN. Well, I should say, as Mr. Taylor says, the work itself. That is the fundamental. Lots of songs are written and lots of songs are published and some of them see the light of day and some of them do not.

Now, My Old Kentucky Home—I learned that song long before I knew there was an author or publisher or performer or anybody else. The same is true of all great works of music. Now, not every song that a performer sings, not every song that an orchestra plays in its own distinctive fashion, becomes a hit. If that were the case, then one performer would make a hit obviously on every song that he played.

Well, that is not so because if you have not got the basic material out of which to make a hit, you have not got it.

Now, how do you make a hit? I don't know. Someone says that an arranger makes a hit. Well, you cannot go to an arranger and say, "Arrange nothing." You have got to have the basic material.

Now, how was the song popularized? In many ways. I remember the day, and I suppose the committee does, too, when people sang songs off the back of a truck, when they sang and played songs in music halls, and those are the things—that is the way to popularize a song; you play it and you hear it and you see it. People play it on the piano. I remember the time when I was a youngster, we used to go to music stores where a girl had a lot of music in front of her and she played music and you picked out what you wanted when she played something that created an interest.

There are many ways in which songs become known. If a song is in a musical show—take Oklahoma, for instance; the songs from Oklahoma we all know.

Mr. KEATING. That is because of the performance; isn't it?

Mr. SCHULMAN. No; that is because of the song. After all, there are many shows put on the New York stage and they are gone and forgotten. We have not forgotten The Surrey With the Fringe on Top. That is not because of the performer; that is because of the song that is played.

So, the performer, after all, is one means of exploitation of a basic right. After all, what makes baseball popular and profitable? We all like baseball. Nevertheless, when I was a youngster and I went out to see Christy Mathewson go to the box and pitch, we were thrilled; that created a great deal of interest in wanting to play baseball.

Mr. KEATING. That was the performer; wasn't it?

Mr. SCHULMAN. Well, yes; I suppose so. I suppose I would have played baseball if Christy Mathewson had not lived, but I wanted to become a pitcher when I saw him pitch. That is one of the things that makes a song popular, getting back to the song; somebody hears it and somebody tells you about it and you read about it and you like it.

What makes a novel popular? The printer prints it and the publisher puts an advertisement in a newspaper or a periodical and somebody reviews it. You read the New York Times or the Tribune on a Sunday and you find reviews and you read those reviews and they cre-

ate an interest. Well, would you say that the reviewers made the book?

Mr. KEATING. Sometimes they do; and sometimes they kill them.

Mr. SCHULMAN. Well, Abie's Irish Rose was not made by the critics in New York, but it remained and it was a great play that people wanted to see.

Now, what makes a play? What makes Shakespeare? The fact that some unknown author or some unknown actor played a particular part back in the sixteenth century? Is that what makes Shakespeare?

No. You read Shapespeake; I read Shapespeare; we all read Shakespeare. We go to see performances of Shakespeare. Was that because someone whose name I do not know—if I ever knew it I do not remember—played Shakespeare's Hamlet back in the old days? No.

You see, you cannot say that, just because a performer acquainted you with something, they make it; because if that were the case, then later on it would not live. It would not live because the performer would not be living.

Take Homer. Who wrote Homer, if there was such a man?

He recited his own ballads, if he really existed, but they were great ballads; they were great odes, even though nobody recited them. The same is true of books.

Mr. LEWIS. Mr. Schulman, coming down to more recent days, the Maine Stein Song, I understand, was written many, many years before it became popular. Nobody remembers who made it popular or what particular interpretation made the Maine Stein Song popular, but everybody recognizes the virtue of that song.

Mr. SCHULMAN. That is true. Take the Star-Spangled Banner, our national anthem. Who sang it first? Can anyone here recall who first sang the Star-Spangled Banner?

(No response.)

Mr. SCHULMAN. We all know that Francis Scott Key wrote it. You see, it is the song, the story, the book, the novel—it is those things that live—and I have the privilege of representing the people who, in music, create the thing that lives, even though the performer may die or even though there may be no great performer to perform it.

Mr. KEATING. Well, authors die.

Mr. SCHULMAN. That is right; authors die but their works live if their works have character and force. You see, that is the difference between performance and creation. Creation is something which lives irrespective of whose voice may promulgate it.

Mr. Buck calls my attention to the fact that Foster is an example of that. He is one of our great creators and he did not have any great performers.

Mr. KEATING. Well, perhaps he had better material; maybe wrote better songs.

Mr. SCHULMAN. Well, since you are referring to my friends and my clients, I shall not answer that. [Laughter.] Some of them are here in the room.

Mr. BUCK. I think he did.

Mr. SCHULMAN. But, you see, it is with that excuse that I come to you and talk about this bill. I am opposed to it, philosophically, practically, and from the legal standpoint.

I agree with Mr. Frohlich. I think that bill is unconstitutional. Now, before I go into that, let me make a reference to something that

Mr. Speiser said at the first hearing, namely, that this bill or similar bills have been before Congress some 8 or 9 years ago, and have never had a hearing.

Well, there is a reason for that. The bill is fundamentally fallacious and defective. That may be one reason why it never came to the point of having a hearing. Something which is absolutely false in its premises does not get very far. But it is not true that Mr. Speiser's views have not had a hearing, because we have discussed this for years—not only he and I, but other people familiar with copyrights.

In 1940—1939, 1940, and 1941—under the auspices, I believe, of the Carnegie Foundation, a committee was appointed to discuss the revision of the present Copyright Act of 1909.

I feel that the 1909 act needs considerable revision; it does need revision very badly and I hope to come to you gentlemen and ask for revision of that act, but it is not before you now.

At any rate, we spent a year. I was privileged to be one of the members of that committee. I think, under the guidance of Dr. Shotwell of Columbia University, we spent almost 2 years, I would say, in trying to formulate a new Copyright Act.

Mr. Speiser appeared before that committee and he expressed the same views that he expressed here about the so-called interpreter's copyright. It has had a thorough airing among people familiar with copyrights and our answers have always been the same.

We said that they are trying to do something that just cannot be done. It is not consistent with the very fundamental foundation of copyright, because, you see, not only in the Constitution of the United States—in section I, article 8—is the reference made to the writer and to the exclusive rights of authors, but we can go mack to the days of Lord Mansfield and the early days of the decisions in our Supreme Court, in particular the case of *Holmes* v. *Hurst*, I believe, in 184 United States Supreme Court reports—it is in my memorandum—the courts have always made it clear that the subject matter of copyright is the intellectual creation of the author, not the physical artistry, which is the tangible thing that you see or feel or sell.

That case involved that famous work, the Autocrat of the Breakfast Table—where the senior Dr. Holmes, the father of Justice Holmes, had published the Autocrat of the Breakfast Table in a magazine, the Atlantic Monthly, in installments. Unfortunately, it was not copyrighted. Later on, the Autocrat of the Breakfast Table was published in book form and someone copied it and published his own book.

Dr. Holmes said:

> Now, here, I have not published this in book form before; therefore, when I published that book it was copyrighted. In other words, what I published in the magazine was not a book.

The Supreme Court said—Justice Brown said:

> No, you published your intellectual creation, your intellectual concept, and that was the publication of your work.

Now, that is true because when the Copyright Act speaks of books, it does not speak of a volume, the paper, the binding, and things of that sort. It speaks of the context.

If you look at section 1 of the Copyright Act of 1909, you will see what it speaks of. They do not speak of physical objects as this thing does. Section 1 speaks of literary works, dramatic works, non-

dramatic works, musical works—things which have a generic meaning of intellectual concept, and if you read through the copyright law, you see that that is the very tenor of it: it is the intellectual concept which is the subject of copyright.

When you come to section 41 of the act, that says specifically that the copyright is separate and distinct from the physical object. So, you see, all through our whole concept, going back to the Statute of Anne in 1710, which was the first copyright law in the Anglo-Saxon system—as a matter of fact, the first copyright statute because the other European countries did not adopt copyright until after 1710, even though there is a question if copyright existed under common law—you will find that the physical object is not the subject; it is the intellectual conception, whether it is a novel, a drama, a painting, or a picture. You do not copyright or you do not get protection for your physical object, you get protection for your intellectual concept.

That is very important because protection for physical objects, not being the subject of copyright protection, therefore protection for physical objects does not belong to Congress except to the extent that they regulate interstate commerce, because Congress has no power to regulate the manufacture and sale of physical objects except in interstate commerce.

Do I make myself clear?

(No response.)

But you have the right to enact patent laws and copyright laws but only because the Constitution specifically says so.

Section I, article 8, specifically grants the Congress the right to pass copyright laws and patent laws. Now, if you look at this bill, you will find that its very essence is to grant protection, if you call it that, to a physical object called a recording.

Now, just because you call a horse a cow does not make it a cow; it is still a horse; and just because you call something an acoustic work does not make it a work, if it is a phonograph record.

This whole bill, as I pointed out in my memorandum, is based upon a fundamental fallacy, it being a play upon the word "works." They run into all sorts of difficulties there because they are trying to squeeze a physical object into something which it is not, by calling it something, by saying it is, by calling it an acoustic work.

So that, from a legal standpoint, if the committee please, I do not see how you can engraft upon the copyright law a concept never known to the copyright law and therefore not within the congressional constitutional power.

There are all sorts of difficulties that arise in the act because of that. For example, in trying to distinguish between—and if I am talking too long I wish you would stop me——

Mr. LEWIS. Let me ask you one question, if I may interrupt your very interesting statement.

Mr. SCHULMAN. Yes, sir.

Mr. LEWIS. Do you feel that Congress, in passing the act of 1909, exhausted the powers of Congress under the Constitution?

Mr. SCHULMAN. I do not think they exhausted the powers.

Mr. LEWIS. I am referring to patents and copyrights, powers with regard to patents and copyrights, of course.

Mr. SCHULMAN. No; I think that Congress has powers it has not fully exercised but those powers relate to works, intellectual creations.

Mr. LEWIS. Haven't we protected all of those by the act of 1909?

Mr. SCHULMAN. Well, I say this: I think there are some anomalies in the act of 1909. One of them I mention because it is apropos here.

For example, section 1 states the rights are in various types of works of art. If it is a lecture, the author has the right of performance; if it is a play, he has the right of performance; if it is music, he has the exclusive right of performance for profit only.

But, here is a funny thing. Poems were not mentioned. The result is that the courts have held that the author of a poem, such as The Village Blacksmith, has no right of public performance. So that a radio station can have someone recite a copyrighted poem and the author cannot do anything about it. No one can print it, no one can print copies of that poem, but it being neither a dramatic work or a musical work or something of that sort, the Congress did not give protection against the recitation of poems publicly for profit or otherwise.

Now, here we have a very funny thing. You will notice that this act is not limited to music. It covers everything—plays, books, novels, lectures, addresses, and what not. So, we have the peculiar situation that if Longfellow were alive today and wrote The Village Blacksmith he could not prevent anybody from reciting it on the stage or over the radio. But if an actor were to record his recitation of that poem on a phonograph record, that actor could prevent everybody else from using that record for a public performance.

In other words, he would have more than the poet would have which is anomalous.

So, if you ask me whether you have exhausted your rights I do not think so. I think you could do a lot with the copyright law of 1909; but, one of the things that you cannot do is to give protection to an article of manufacture. So that I say that this bill is fallacious in its inception. I do not think that Congress has the power to pass it. If you want to give protection to the performing artist, letting him, let us say, pull his performance off the air, that you can do in your Radio Communications powers under your control of interstate commerce.

For example, you might pass a statute which would say that it would be unlawful to sell, in interstate commerce, a record which had been made without the consent of the original maker, perhaps you are able to do that.

But, when you come to such things as a public performance, the things which come within copyright and grant copyright on this article of manufacture, then I say that your power is lacking.

Now, there is another thing that we see in this bill; that is, its artificiality. For instance, the Supreme Court said, as Mr. Frohlich has told you, that a record is not a copy. But, in order to bring it within the theory of copyright, this bill says that a duplicated record shall be deemed to be a copy.

Well, it is or it isn't. It is a horse or it is a cow and you cannot say that it shall be deemed to be a cow if it is a horse in fact, for the purpose of this act.

Again, there was reference to that section which would amend section 6 and which says if a record is made under 1 (e), that is, under the compulsory license clause, it shall not be subject to copyright if it is made without the consent of the owner.

Now, look where we would get by adopting a false and artificial premise.

For example, if a record is subject to copyright under this new act, if a record made under the 2-cent license clause is not copyrighted, what happens to it? It falls into the public domain; that is, it becomes free for use by anybody, just as though it were a work that was published without a copyright.

Now, if that record then falls into the public domain, anybody can use it to make another record without paying the 2-cent license fee. That is where the bill leads you to.

In other words, by refusing copyrightability, it is a record made under 1 (e), you throw it into the public domain, and then you destroy 1 (e), as far as the author is concerned, because anybody can copy it freely if it is under the public domain. That is exactly where the bill leads to. I mean if you start on the wrong premise, you are bound to get an absurd result. So that I do not see how you can consider this bill as a copyright. You have got too many anomalies there.

What is Mr. Waring and his society trying to protect? They are trying to protect style because they disclaim any right to protect arrangement.

Now, the reason they do—and let me put my finger on that because if they are seeking protection for arrangement, they do not have to amend the act because, under section 6, if Mr. Waring should make a new arrangement of the Buggy With—I guess it is Surrey With the Fringe on Top. If he makes that new arrangement with Mr. Hammerstein's consent and Mr. Rogers' consent, he can get a copyright on that arrangement either by publishing it with notice or by filing it in manuscript form and he would have his copyright over the arrangement under the present act.

Mr. CHADWICK. Is that a desirable arrangement or a practical one?

Mr. SCHULMAN. Well, it exists today.

Mr. CHADWICK. It is desirable isn't it?

Mr. SCHULMAN. That is a desirable thing but it leaves the control in the hands of the original copyright owner. That is because Mr. Rogers may say or Mr. Hammerstein may say "I won't make this arrangement for you," or he may say "Let me see the arrangement that you want to copyright and I will see whether I will give you my consent to copyrighting it," and so, you see, the parties can bargain.

Mr. CHADWICK. I am asking questions because I was not particularly satisfied with the answers I got before.

Mr. SCHULMAN. I hope I can answer your questions. I would like to satisfy you.

Mr. CHADWICK. I am only trying to understand it. Is there any essential reason why an act could not be drawn which would commit to the consent of the original writer, the privilege of having a copyright on the interpretation? What is your thought?

Mr. SCHULMAN. My answer would be if you assume that such a thing as a phonographic record can be subject to copyright——

Mr. CHADWICK. Yes, of course, I assume that.

Mr. SCHULMAN. And if we assume the constitutionality of that.

Mr. CHADWICK. Yes, assuming that.

Mr. SCHULMAN. And if we assume that it is within the fundamental concept of copyright, I suppose you could draw such an act and that would be—well, it would be wholly undesirable.

Mr. CHADWICK. You say it would be undesirable.

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Mr. SCHULMAN. Yes; and let me tell you why. I think it is undesirable from both the practical and the legal standpoints.

What is Mr. Waring and his society trying to protect? They are trying to protect style. I think that is the word he used, "his style of performance."

Now, what is his style of performance? Maybe it is emphasis on the strings, maybe it is emphasis on the percussion instruments, or maybe it is even emphasis on the wind instruments, things of that kind, personal idiosyncrasies.

Now, it may be, when I say "personal idiosyncrasies" that he may take a singer who has a hoarse voice or a crooning voice, something which makes him think it is distinctive.

Were you to open the field to the protection of style, then you would get into a hornet's nest because even an author may not protect style. Now, we must start with that, that an author has no right, under the copyright law or any other law, to protect his style.

Although I might take Justice Holmes' Common Law and copy the words or the ideas that he expressed in there in their sequence, so that it is really copying his book, I nevertheless have the right to copy his style. That is, if I copy his words in the sequence, I cannot do that legally; but I can copy his style. When I was in law school, of course Holmes was our guide on common law and we were told to follow his sense too. We were told to copy Holmes style, that was the advice to the students. We were advised also to study the style of Cardozo. We were told to study the style of Harlan and White and Mansfield, one of the greatest writers.

Mr. WALTER. Mr. Schulman, you sound like you went to Harvard. I thought you went to Columbia. [Laughter.]

Mr. SCHULMAN. I went to Columbia, sir, but you see I have copied styles, because the copyright law gives me the right to do so. I can even copy a Harvard style. [Laughter.]

So you see you cannot protect style in any way.

Mr. CHADWICK. We have arrangement and we have style. What is the distinction between arrangement and style?

Mr. SCHULMAN. Arrangement is different from style. You see, you have to make a distinction between the two. Now, I am no musician; I cannot sing a note or play a note, but I am told that the difference is this:

When you arrange a work, you change various essential factors of it; you change the time, you change the beat, you change the emphasis, you may change the harmonics, and things of that sort. I am told that in arrangement you get a changed work. It is like taking a book and doing what the Reader's Digest does; it makes a condensed version of that. That is an arrangement, as you would have it in music or like taking a novel and making a play out of it. You really arrange it; you make something different and something new; you rearrange it, and you have a result that is different. You have something new.

Now, I am told—and Mr. Ahlart, whom I am going to ask the committee to hear and who is a musician and a writer and composer of note, can tell you more about it—but I am told that an arrangement means a change so that, really, you have got a song with something superimposed upon it, something that makes it really a different song.

Now, an interpretation, as Mr. Taylor told you, is a question, or may be a question, purely of emphasis of not following the composer's directions to play louder or to play softer. It may be an interpretation in that regard. It does not change a note; it may not change the time. It may not change the beat.

Mr. CHADWICK. But it may.

Mr. SCHULMAN. It may. An interpretation may run into arrangement, yes.

Mr. WALTER. And don't you conceive that a particular interpretation may so improve upon the work that it might make it popular, whereas it may be unpopular?

Mr. SCHULMAN. Well, that is a subject about which I suppose we could argue a long time.

It may. It may be that a particular interpretation may have the effect of making something popular.

But, as I said, My Old Kentucky Home, and Old Black Joe, and the song Dixie, and all the other songs that I knew years ago, I do not know where I heard them or who sang them. I do not know who sang them first. I think maybe it was my mother. Now, she was no performer, she was no interpreter, but mothers have made popular a lot of lullabys today.

Now, was it a particular style of singing, or was it the music that stayed in my mind? Can you answer that? I can. I should say it is the music. I should say when we gather around at times and sing some of the old songs, we sing them because they are songs, not because somebody sang them in a particular way.

Now, it may be that a particular artist, take Caruso, for instance, it may be that by listening to him, some of the things that he sang may have stuck in my mind, and if I had heard a lesser artist they may not have remained in my mind, I don't know. But I do know that the music that I sing and the music that my children sing is the music and not anybody's particular interpretation of it.

That is the only answer I can give you.

I think that the composer will tell you that a good interpretation may help, but it will not make a song. I think that is what they will tell you, and I think that is right, but I am not sufficient of an expert to say categorically.

What are they protecting? They are protecting their style, something which the author cannot protect because he cannot protect his style of writing. If Handy wrote The St. Louis Blues and "blues" became popular, everybody in the country could write "blues." He couldn't protect the style of writing. He could only protect one single composition. You see the difference there.

What the interpreters are trying to say is that they have a style which should be a subject of protection; but it is something which no author can protect.

Mr. CHADWICK. I do not see that that is what the act undertakes to do. They do not undertake to protect the style but to protect the producer, to protect a particular record of a particular performer with his name on it.

Mr. SCHULMAN. May I ask you this, though, what is he adding except the style?

Mr. CHADWICK. Well, leaving that.

Mr. SCHULMAN. Well, you see, you cannot separate those two things. You can separate these and that is where you run into a fundamental fallacy.

If all that he adds is the style, that is not subject to protection; what is there to protect? You come right down to that and that is the thing I am trying to make clear.

Mr. CHADWICK. I have not found any answer to my satisfaction, in the argument about the protection of style. I think that the style itself is susceptible of individuality and, possibly, should be protected.

Mr. SCHULMAN. Oh, individuality; there is no question about it. Style is a matter of individuality. There is nobody else in the world that argues like I do or speaks like I do. I have my own style and you, sir, have your own style.

The question is, is that the subject of protection? Is that the subject of copyright protection?

Now, coming back to baseball, every baseball player has his own style, his own style of fielding, his own particular style of batting, his own style of playing baseball. Some of them may be more colorful and some of them are less colorful. Well, that is individuality. There isn't any question about it. When Babe Ruth stood up at the bat, you could see him from miles away. You did not have to see his face, all you had to do is to look at him swing his bat and you could say "There is Babe Ruth."

Now, that is an individual style. But, is that something to call a creation which is the subject of copyright as we know copyright?

If you give it to the interpreter then the author is going to come along and say, "Protect my style," and what are you going to say to him?

Mr. WALTER. Well, didn't the Supreme Court in the Lajoie case protect Lajoie's contract, and, I believe, they did it because of his particular attainments?

Mr. SCHULMAN. They protected it on the ground that his services were unique.

Mr. WALTER. That is right.

Mr. SCHULMAN. That is right. Now, I am not saying at all that it is not unique, his attainments. When you discuss the big-name bands, you will be discussing unique attainments but that is not saying that you can protect them by copyright any more than you could protect a method of fielding a ball, in baseball. You cannot protect method; you cannot protect style; you cannot protect ideas. That is what the cases say.

Judge Frank recently said, in discussing a case involving a game, he said, "You cannot protect the game, all you can protect is your statement, your new statement of the rules." That is as far as you can go.

Now, I was going to say in answer to a question—and I have taken a terrific amount of time, but the committee asked a question, whether the author could protect himself by contract.

Well, let us look at the situation practically. Leaving aside 1 (e), that is, the compulsory license feature, suppose I were an author and I were to write a song. Then X comes to me and he says, "I will record it provided you will let me take a copyright on my recording."

Then Y comes to me and he says, "Let me take a copyright on my recording," and so on down the line. Well, I have 10 recordings, I

have 10 copyrights in addition to my own, and if you multiply that you may have 100 copyrights on top of the author's copyright.

Now who would control that? Not the author. The performer. That is because if you had 100 different styles, and if I wanted to license my song to be played by 1 broadcasting station, they would have to examine all of the 100 performances to make sure that their one hundred and first did not infringe upon those other 100.

Mr. KEATING. You are in accord with Mr. Waring's testimony, because I asked him that direct question, "Suppose Eddie Bergen could copy your method of playing and could get a copyright, and if he did that and performed it, would it constitute an infringement of your copyright?" And he said, "No, no; because it would be Eddie Bergen doing it and not me." Now you would not agree with that as being desirable?

Mr. SCHULMAN. Well, the bill, as I read it, would do just that.

Mr. KEATING. I could not follow it.

Mr. SCHULMAN. Well that is the difficulty; we have a lot of loose language in the bill. This thing that they are calling "a copyrightable thing" is really four different things. This "copyrightable thing" is called an acoustic recording, it is called—now, that is on page 1—it is called a device or instrumentality. If you look at page 2, line 10, you will see that is called an acoustically recorded work.

You see, they have got to use different language, to describe what? The same thing. That is all because they are trying to describe something which does not come within copyright. I do not know.

I understood Mr. Waring to say that if he made a record with a distinctive style, I could not come along and sing and play that record or make another record with that same distinctive style. That is what he wants, so I understood. I understood him to mean that, and as I read the bill, that is possible, that is so.

Now, I have analyzed in my memorandum which I have given the committee, various other sections of the bill, not in order to be captious, but in order to demonstrate the lack of logic and the lack of coherence and consistency in the bill itself, all of which go back to the fact that they start with air, and they do not have anything, they do not have a hook on which to hang.

They would take away from the author, even if it were possible to provide a reasonable profit, for obtaining the consent of the author, they would take away from him the control of his work and they would shift the entire control from the author to the performer and that——

Mr. WALTER. Well, now, is that entirely correct?

Mr. SCHULMAN. It is, as a practical matter. It would take away the control, as a practical matter, of copyrighted music. This applies, not only to music, sir, but it applies to everything that is written, whether it is a book, a poem, or anything else, because it is not limited to music.

If you gave a copyright on records, you would make the control go away entirely from the creator and you would put it into the hands of the maker of the record. That is the way this bill would operate as a practical matter, because the maker of the record would then be in a position to control whether it was played or not played in a juke box; he could control whether it was played or not played in recorded form over the air; it includes motion pictures, it includes everything else, and you are putting the control in the hands of the performer.

In other words, you are putting the performer in the driver's seat. That is true. You are doing that even though today he has got nothing to complain about. He gets paid for his performance. He admits that. He gets paid for each record that is sold that he makes.

Now, as Mr. Frohlich, says he wants now to control the right of public performance for profit.

The result would be—gentlemen, if you adopt this bill, I earnestly plead with you on behalf of the authors and composers—this bill would create a silly situation. Not only is the wording of the bill full of vagueness and uncertainty, but there will be litigation for years, because of that vagueness and uncertainty in addition to the rest of it.

I suppose, as a lawyer, I should welcome it, but I do not. What you would do fundamentally if this bill should be adopted, and if it should be held constitutional, would be that you would just relegate the author to a position very far below the publisher, the performer, the maker of records, below everybody; and yet, he is the man that creates the material which is sung and played.

Mr. LANE. Mr. Schulman, is your client, your own organization, opposed to these other two bills before us?

Mr. SCHULMAN. No; we are in favor of H. R. 2570; definitely so. I have said in my memorandum that H. R. 2570 would correct a defect which slipped into the 1909 bill, I think more or less as a result of a dispute.

In other words, there was a big fight. If you read the record and the testimony, you will see that there was a tremendous battle over 1 (e), the compulsory-licensing feature.

Then, the committee report said, as to public performances in coin-operated machines, that that was not particularly important. As a matter of fact, in those days, those machines were in the penny arcades. That is what they were thinking of at that time.

Now, the difference was this, in the penny arcade you listened to mechanical music but you listened to it through earphones and it did not make much difference, when you listened to a particular record in that way.

Today, however, you have got a huge industry, it is no longer unimportant and everybody——

Mr. WALTER. In other words, the defects in the act of 1909 were entirely due to the fact that Congress could not foresee this era.

Mr. SCHULMAN. No doubt. We advocate adoption of H. R. 2570 as earnestly as we recommend rejection of H. R. 1270.

Mr. WALTER. Was H. R. 2570 before the committee?

Mr. SCHULMAN. At the previous hearings?

Mr. WALTER. Before other Congresses.

Mr. BUCK. I don't think so.

Mr. SPEISER. It was introduced time and again.

Mr. BUCK. I don't think so.

Mr. SPEISER. It was.

Mr. BUCK. Well maybe as part of a revision of the entire Copyright Act.

Mr. SPEISER. Separate and apart from the other act. I have the history.

Mr. SCHULMAN. Then, I am mistaken. I think that Mr. Speiser is absolutely right. That was in bills which were submitted to amend

the entire act. I am for complete revision of the 1909 act. Now, with regard to the coin-operated exemption, that——

Mr. KEATING. I think that bill was up several times.

Mr. SPEISER. Well, I have been drawing them and having them introduced.

Mr. SCHULMAN. I am sorry, but they never got to the point for some reason or other, where they came to my attention.

Mr. LEWIS. What about H. R. 1269?

Mr. SCHULMAN. That is the same as H. R. 2570. We refer to H. R. 2570 because, I believe that the last session of the committee was opened with H. R. 2570.

Mr. LEWIS. You are in favor of those bills?

Mr. SCHULMAN. Yes, sir; definitely so.

Mr. LEWIS. All right.

Mr. SCHULMAN. Does the committee want to hear from Mr. Ahlert now? He may testify something about that.

Mr. LEWIS. No; we want to hear from Mr. Wattenberg. Is Mr. Wattenberg present?

Mr. WATTENBERG. Yes, sir.

STATEMENT OF SIDNEY W. WATTENBERG ON BEHALF OF THE MUSIC PUBLISHERS PROTECTIVE ASSOCIATION AND THE NATIONAL MUSIC COUNCIL

Mr. WATTENBERG. Mr. Chairman and gentlemen, my name is Sidney W. Wattenberg, and I am counsel for the Music Publishers Protective Association and the National Music Council.

Both of these associations are unalterably opposed to the enactment of H. R. 1270 into law. There is very little I can add.

Mr. KEATING. You are opposed to H. R. 1270?

Mr. WATTENBERG. Yes, sir. There is very little I can add to the statements of the gentlemen who preceded me.

I might say that the proposed bill as drawn is so hopelessly ambiguous that it defies a clear explanation or interpretation. It might well be interpreted as giving the right to secure the subsidiary copyright to the record manufacturer as distinguished from the interpretative artist.

Now, they talk about the sound recorded as the copyrighted work. Well, if those words were taken literally, the copyrighted work is the physical disk, the physical object, and the sound, I suppose, would be the interpretation and is to be distinguished from the copyrighted work which, as I say, is the disk.

Now, if that is true, it is possible for the man who mixes the shellac, or the man who presses the switch on the pressing machine, it is possible for them to claim that they made the copyrighted work.

I, frankly, do not know. I cannot glean from this bill any crystalized chain of thought which would distinguish as to which of these objects is the copyrighted work; namely, is it the tangible physical record or the intangible style?

I have heard a lot said about style and I have heard the proponents of the bill say what they want to protect is the original style of the artist.

Well, Mr. Schulman and Mr. Frohlich and Mr. Taylor have covered that field.

FILE: SB 1007 ('77 SESSION)

CHAPTER 77-440

House Bill No. 1780

18 1285

AN ACT relating to musical compositions; repealing chapter 543, Florida Statutes, consisting of ss. 543.01-543.04, 543.05-543.36, Florida Statutes, to remove provisions relating to combinations restricting the use of musical compositions; amending s. 543.041, Florida Statutes, providing definitions; providing for unauthorized copying; providing for unauthorized and unlawful sales; providing penalties; providing for seizure, forfeiture and destruction; providing a rebuttable presumption; providing exceptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Chapter 543, Florida Statutes, consisting of sections 543.01, 543.02, 543.03, 543.04, 543.05, 543.06, 543.07, 543.08, 543.09, 543.10, 543.11, 543.12, 543.13, 543.14, 543.15, 543.16, 543.17, 543.18, 543.19, 543.20, 543.21, 543.22, 543.23, 543.24, 543.25, 543.26, 543.27, 543.28, 543.29, 543.30, 543.31, 543.32, 543.33, 543.34, 543.35, and 543.36, Florida Statutes, is hereby repealed.

Section 2. Section 543.041, Florida Statutes, is amended to read:

543.041 Unauthorized copying of phonograph records, disc, wire, tape, film or other article on which sounds are recorded.--

(1) As used in this section, unless the context otherwise requires:

(a) "Owner" means the person who owns the original fixation of sounds embodied in the master phonograph record, master disc, master tape, master film, or other device used for reproducing sounds on phonograph records, discs, tapes, films, or other articles upon which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.

(b) "Performer" means the person or persons appearing in a performance. ~~"Person" means any individual, partnership, corporation, or association.~~

(2)(a) It is unlawful:

1.~~(a)~~ Knowingly and willfully and without the consent of the owner, to transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film, or other article on which sounds are recorded, with the intent to sell or cause to be sold for profit such article on which sounds are so transferred.

2. Knowingly and willfully, without the consent of the performer, to transfer to or cause to be transferred to any phonograph record, disc, wire, tape, film or other article, any performance, whether live before an audience or transmitted by wire or through the air by radio or television, with the intent to sell or cause to be sold for profit or used to promote the sale of any product or such article onto which such performance is so transferred.

(b) Any person violating any provision of paragraph (a) of this subsection shall be guilty of a felony of the third degree, punishable as provided in ss. 775.082, 775.083, or 775.084.

(3)(a) It is unlawful:

CODING: Words in ~~struck-through~~ type are deletions from existing law;

1.~~(b)~~ To sell or offer for sale any ~~such~~ article with the knowledge, with reasonable grounds to know, that the sounds thereon have been ~~so~~ ansferred without the consent of the owner.

2. To sell or offer for sale any article embodying any performance, ether live before an audience or transmitted by wire or through the air radio or television, recorded without the consent of the performer.

3. To sell or resell, or possess for such purposes, any phonograph cord, disc, wire, tape, film or other article on which sounds are corded, unless the outside cover, box, jacket, clearly and nspicuously discloses the actual name and address of the manufacturer ereof, and the name of the actual performer or group.

(b)~~(3)~~ Any person violating any provision of paragraph (a) of bsection (3)~~(2)~~ shall be guilty of a misdemeanor of the second degree, nishable as provided in s. 775.082, ~~or~~ s. 775.083, or s. 775.084.

(4) Any recorded article produced in violation of subsections (2) and of any equipment or components used in the production thereof, shall subject to seizure and forfeiture and destruction by the seizing law forcement agency.

(5) Possession of five or more duplicate copies or twenty or more dividual copies of such recorded articles, produced without the consent the owner or performer shall create a rebuttable presumption that such ticles are intended for sale or distribution in violation of bsections (2) or (3).

(6)~~(4)~~ This section shall neither enlarge nor diminish the right of cties in private litigation.

(7) This section does not apply:

(a) To any broadcaster who, in connection with or as part of a radio, levision or cable broadcast transmission, or for the purpose of chival preservation transfers any such sounds recorded on a sound cording.

(b) To any person who transfers such sounds in the home for personal e and without compensation for such transfer.

Section 3. This act shall take effect July 1, 1977.

Approved by the Governor June 30, 1977.

Filed in Office Secretary of State June 30, 1977.

This public document was promulgated at a base cost of $11.86 per page for 1,500 copies or $.0079 per single page for the purpose of informing the public of Acts passed by the Legislature.

Forward Full

FLORIDA HOUSE OF REPRESENTATIVES

DONALD L. TUCKER, Speaker/JOHN L. RYALS, Speaker Pro Tempore
COMMITTEE ON COMMERCE

John R. Forbes
Chairman

John W. Lewis
Vice Chairman

April 27, 1977

STAFF REPORT

HB 1780 - Mixson

Summary

This bill repeals Chapter 543, Florida Statutes, which relates to combinations restricting the use of musical compositions, including the unauthorized copying of musical compositions, radio broadcasts, use of compositions by theaters, sales of performing rights, copyrighted compositions, and charges for performance rights.

Current Situation

Chapter 543, Florida Statutes, Combinations Restricting Use of Musical Compositions, has only two registered licensees for the sale of performance rights in Florida (American Society of Composers, Authors and Publishers (A.S.C.A.P.) and Broadcast Music, Inc. (B.M.I.). The income to the state per year is $25,000. The only section of the chapter that the department applied to these two entities was section 543.28, which provides that they must pay 3% of their gross sales in Florida for the privilege of selling performance rights in Florida. This section states that the Division of Finance, through its authorized agents, may examine and audit books and records of any person it may deem subject to the tax or fees upon giving 30 days notice.

Due to Section 543.36, the chapter, except for the fee section, is not applicable to any person who is a member of any combination which licenses the right of public performance and who is under the terms of a judgment in a federal anti-trust action in which the U.S. is a party and pursuant to which the federal court in which such judgment is entered retains continuing jurisdiction. Therefore, A.S.C.A.P. and B.M.I., the only two registered licensees for the sale of performance rights in Florida, are not covered under Chapter 543 except for the fee section.

Gerri Raines Dolan, Staff Director
310 House Office Building, Tallahassee, Florida 32304 (904) 488-2123

Section 543.041 deals with the unauthorized copying of phonograph records, disc, wire, tape, film or other article on which sounds are recorded. Such unauthorized copying is made unlawful and the penalty for violating that section is made a misdeamnor of the second degree. Since the unauthorized copying of recorded music is covered by the Federal Copyright Laws (94-553, Public Law) for all recordings fixed after February 15, 1972, this state statute is effective only to protect those recordings fixed prior to that date due to the Supremacy clause of the U.S. Constitution. See State of Florida V. Gale Distributing, Inc., case no. 49297 (Fla. 1977). However, the Department of Banking and Finance has been sending investigators to check on retailers who are allegedly selling suspect tapes, although they actually have no such statutory mandate and can only turn over such "suspect" tapes to the F.B.I. when the pirated recording is determined to have been fixed after February 15, 1972 or to the state attorney when the pirated recording was fixed prior to that date.

Probable Effect and Economic Impact

The Department of Banking and Finance maintains that the repeal of Chapter 543 would eliminate double regulations under Federal and State Law, save the state money and manpower by eliminating the making of inspections of retailers and record keeping by the division, the State Treasurer's office, Secretary of State's office, and the Attorney General's office. The department also maintains it would eliminate the cost of handling the complaints the Division of Finance receives.

The department has stated there should probably be no economic impact on the general public; however, B.M.I. and A.S.C.A.P. will not be then required to pay the $25,000 to the state in fees. The department also states that there should be a net savings to the state when the cost of administration by the various state agencies is considered. However, this position cannot accurately be verified.

Comments

Owners of copyrights are now protected under the Federal Copyright Law. The users are protected under Federal court order.

However, if section 543.041 is repealed, the owners of the rights to music fixed before February 15, 1972 will not be protected under any law, state or Federal.

DATE: May 16, 1977

COMMITTEE ACTION: 1. F/3; 5-11-77
2. FAV; 5-17-77
3.

SENATE
STAFF ANALYSIS AND ECONOMIC STATEMENT
Judiciary-Civil Comm. (Greg Krasovsky)

Amend. ~~None~~ Attached X

Bill No. and Sponsor:	Subject:
SB 1007 Senator Vogt	Musical Compositions

REFERENCES: 1. Commerce; 2. Judiciary-Civil

I. BILL SUMMARY:

This bill repeals all but one section of Chapter 543, F.S., relating to the regulation of business combinations that restrict the use of musical compositions, and the regulation and antitrust prohibitions of performance rights.

II. PURPOSE:

A. Present Situation:

Chapter 543, F.S., prohibits monopolies, price-fixing agreements, and unauthorized copying of musical compositions, in addition to regulating the sales and charges for performance rights. Those provisions prohibiting monopolies and price-fixing appear to duplicate state and federal antitrust laws.

Section 543.041, the only section which would not be repealed, makes the unauthorized copying of phonograph records, disc, wire, tape, film, or other articles on which sounds are recorded a misdemeanor of the second degree. Since the Federal Copyright Law prohibits the same unauthorized copying of recordings fixed after 1972, the state statute has been construed to constitutionally apply only to those recordings fixed prior to 1972.

The provisions relating to performance rights are not currently in force due to s. 543.36, which provides that the chapter, except for the fee provision, is not applicable to any combination that licenses performance rights and is under a judgment of a federal antitrust action in which the court has retained continuing jurisdiction. The only two registered licensees under this chapter are subject to such federal court judgments, and are therefore exempt from all provisions except that requiring them to pay the state 3% of their gross sales in Florida for the privilege of selling performance rights. The Division of Finance collects this fee.

B. Effect on Present Situation:

This bill would leave the regulation of copyright owners to the federal government under the new Federal Copyright Law (P.L. 94-553). However, s. 543.041 would still provide state protection against unauthorized duplication of sound recordings to owners of the rights to music fixed prior to 1972. Persons forming monopolies or fixing prices in restraint of trade would still be subject to the state and federal antitrust laws. This bill would also eliminate the collection of gross receipts tax by the state.

III. ECONOMIC CONSIDERATIONS:

Significant Economic Impact: YES X NO

A. Economic Impact on Public or Implementing Agency:

By eliminating the right to collect the tax on gross sales in Florida, the state will lose approximately $25,000 per year. The Division of Finance has indicated that such loss should be offset by the savings experienced in the cost of administration of the law.

B. Economic Benefits to Public or Industry:

None.

IV. COMMENTS: None.

DO NOT use paste-up of printed bill or reduced copy of 8 x 14 bill

COMMITTEE AMENDMENT

No. 1
(reported favorably)

Line numbers on amendment blank have no relation to line numbers on bills.

SB 1007

HB

The Committee on Commerce offered the following amendment which was moved by Senator and adopted: and failed:

Amendment

On page 1, line 17, strike

is

and insert:

are

FOR COMMITTEE USE ONLY	PRINTER: Do not pick up
Amendment No. 1, taken up by committee:	Adopted XX Failed
Offered by Senator Thomas	

If amendment is text of another bill, insert: Bill No.________ or Draft No.________)

12-77 5th copy may be removed SENATE AMENDMENT

DO NOT use paste-up of printed bill or reduced copy of 8 x 14 bill

COMMITTEE AMENDMENT No. 2
(reported favorably)

Line numbers on amendment blank have no relation to line numbers on bills.

SB 1007

HB

The Committee on Commerce offered the following amendment which was moved by Senator and adopted: and failed:

Amendment

On page 1, line 11 & 12, strike all of lines 11 and 12

and insert:

Section 1. Sections 543.01, 543.02, 543.03, 543.04, 543.05

FOR COMMITTEE USE ONLY	PRINTER: Do not pick up
Amendment No. 2, taken up by committee:	Adopted XX, Failed
Offered by Senator Thomas	

f amendment is text of another bill, insert: Bill No. or Draft No.)

2-77 5th copy may be removed SENATE AMENDMENT

DO NOT use paste-up of printed bill or reduced copy of 8 x 14 bill

COMMITTEE AMENDMENT No. 3 (reported favorably)

Line numbers on amendment blank have no relation to line numbers on bills.

SB 1007

HB

The Committee on Commerce offered the following amendment which was moved by Senator and adopted: and failed:

Title Amendment

On page 1, line 3 & 4, strike

all of lines 3 and 4

and insert:

repealing ss. 543.01-543.04 and 543.05-543.36, Florida

FOR COMMITTEE USE ONLY	PRINTER: Do not pick up
Amendment No. 3., taken up by committee:	Adopted XX Failed
Offered by Senator Thomas	

(If amendment is text of another bill, insert: Bill No. or Draft No.)

12-77 5th copy may be removed SENATE AMENDMENT

GENERAL REVISION OF THE COPYRIGHT LAW

HEARINGS

HELD BEFORE

THE COMMITTEE ON PATENTS HOUSE OF REPRESENTATIVES

SEVENTY-SECOND CONGRESS

FIRST SESSION

FEBRUARY 1, 2, 3, 12, 15, 23, 24, 26, 29, 1932
MARCH 1, 2, 7, 10, 14, 1932

UNITED STATES
GOVERNMENT PRINTING OFFICE
113839 WASHINGTON : 1932

COMMITTEE ON PATENTS

HOUSE OF REPRESENTATIVES

SEVENTY-SECOND CONGRESS, FIRST SESSION

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ROBERT F. RICH, Pennsylvania.
WILLIAM A. PITTENGER, Minnesota.

MALVINA WEISBERG, *Clerk*

II

CONTENTS

APPENDIX

The CHAIRMAN. Do you think that would be germane to our inquiry now? Do you still want to put it into the record?

Mr. SHAW. No; we will withdraw that, although I think we desire to put that in to show our activities——

The CHAIRMAN. If you want that inserted in the record to show that this happened two years ago, namely, that you were opposed to the bill, I think we will put it into the record. However, at the present time, we are interested in legislation that will help you men.

Mr. CALDWELL. I think Mr. Shaw wants to show what was done two years ago.

The CHAIRMAN. Then I think that statement should be put in the record. It confused me without that statement.

Mr. SHAW. Then there was a resolution adopted in Detroit.

The CHAIRMAN. When?

Mr. SHAW. In October of this past year. I will read that.

Resolved, That the National Association of Broadcasters, in convention assembled, calls renewed attention to the fact that the primary purpose of any copyright legislation is and must be, in the words of Article I, section 8, clause 8, of the Constitution of the United States, "to promote the progress of science and useful arts," and that, therefore, the broadcasting industry insists on its right to receive fair and reasonable consideration by the Congress before any bill proposing a modification of our copyright laws is acted upon; and be it further

Resolved, That this association hereby empowers and directs its duly constituted officers, or such committee as may be appointed by them, to present to the Congress its recommendations with regard to any pending legislation concerning copyright; and be it further

Resolved, That this association hereby endorses and reaffirms the proposals made in its behalf by its duly authorized representatives on January 28 and 29, 1931, as made a matter of public record in the printed report of the hearings before the Committee on Patents of the United States Senate, Seventy-first Congress, third session, on H. R. 12549, pages 42 to 100 inclusive.

The CHAIRMAN. Just what recommendations would you like to make before this committee or which you would like to have your counsel, Mr. Caldwell, speak on in behalf of the organization?

Mr. SHAW. It was thought, in order to help your committee, we would retain the services of Mr. Caldwell who has spent considerable time in the study of copyrights.

The CHAIRMAN. Is Mr. Caldwell the official attorney of your organization or has he just been engaged for this case at the present time?

Mr. SHAW. Mr. Caldwell has represented us in copyright matters for a long period of time.

The CHAIRMAN. I am very glad to have the pleasure of calling upon Mr. Caldwell, for whom I have a great admiration.

Mr. CALDWELL. Thank you, Mr. Chairman.

STATEMENT OF LOUIS G. CALDWELL, ON BEHALF OF THE NATIONAL BROADCASTERS' ASSOCIATION

Mr. CALDWELL. Mr. Chairman, there seems to be a little rivalry as to which was the first broadcasting station. There are about the same number of claimants, I believe, as for the birthplace of Homer. Usually we accept the date of the first broadcast as of 1920, when KDKA broadcasted the election returns of that year.

The broadcasting industry is the youngest of those that will appear before you. It is only a little over 11 years since November, 1920, when the first broadcasting station in the United States (and, indeed, in the world) sent out the first broadcast program, consisting of election returns. Since then the industry has pursued a course of development and has assumed a magnitude and public importance that were foreseen by almost no one. To a large extent, the broadcasting station has replaced the public platform and it has become one of the major avenues by which the public is entertained, instructed, and kept informed of current events.

With this development have come a host of problems, legal, economic, and social, which are novel and perplexing. One of the most important of these problems, both to the broadcasting industry and, we believe, to the owners of some twelve or fifteen million receiving sets, is that of obtaining copyright legislation which will at the same time give the author and composer the protection he should have and yet will not lend itself to abuses which will stifle this new industry and cripple the service which it is giving the public. The problem is not made any easier by the rapid progress which radio continues to make, and the uncertainties as to new discoveries which may change the whole structure to-morrow; for example, no one knows whether television will be commercially practicable in the near future, or, if it is, what form it will take or what its economic basis will be.

It is not difficult to give you a list of the evils from which the broadcasting industry suffers under the present copyright law and from which it desires protection under any new law you may draft. With reference to some of these evils, however, it is not so easy to tell you how to remedy them, particularly if future developments are to be properly safeguarded. Much depends on the structure and theory of copyright law you adopt; in one kind of bill a certain provision might be necessary, whereas in another kind of bill an entirely different provision would be called for.

I assume, however, that you are at present more interested in a general presentation of our problems than in specific remedies, and that you will permit us to cooperate with you in the working out of the latter.

It is necessary, first, to call your attention to a few facts about the broadcasting industry as a background for what I shall have to say. There are slightly over 600 broadcasting stations in the United States. As you know, these stations derive their authority to broadcast from licenses issued from time to time by the Federal Radio Commission which was established under an act of Congress approved February 23, 1927.

The CHAIRMAN. On that subject, as a digression, for the benefit of the record, will you state how many of those 600 stations are clear-channel stations, how many are regional-channel stations, and how many are local-channel stations, if you know?

Mr. CALDWELL. First, there are 90 wave lengths or channels. Of those channels, 40 are clear channels, 44 regional, and 6 are local channels. There are some stations dividing time and others have full time; so the number of stations is not necessarily the number of stations on the air at any one time. There are, as a matter of

fact, 420 stations in simultaneous operation in the evening at any time.

On the 40 clear channels, due to a division of time, and so forth, there are about 80 or 90 stations, but there is the equivalent of 40 full-time stations.

On the regional channels, I think there is the equivalent of something like 187 full-time stations and about 250 altogether. I believe there are about 150 small or local stations or about 250 in full-time operation. You will see from that that about five-sixths of the stations belong to the local or regional channel class and perhaps 50 belong to the clear-channel class.

The CHAIRMAN. Are those local channel or regional channel stations at the mercy of the clear-channel groups?

Mr. CALDWELL. Are you speaking from the point of view of interference?

The CHAIRMAN. Yes.

Mr. CALDWELL. A perfect broadcasting structure would mean that all these stations of virtually the same power would be grouped together; that is, all stations of 50-kilowatt power would be on adjacent channels. It is pretty well recognized that if you took stations on adjacent channels and raised them considerably in power, they do not do any harm. If you have the next class grouped, you would not have any trouble, one group with another, but unfortunately we have an arrangement with Canada whereby this can not be carried out fully. There is a possibility in a few of these cases of cross talk if the smaller station is too close to the larger station.

The CHAIRMAN. Are many of the small stations at a local disadvantage because their competitive small station is in the chain of a large clear-channel group?

Mr. CALDWELL. That is a hard question to answer. You are talking from the economic point of view?

The CHAIRMAN. Exactly.

Mr. CALDWELL. I would think the answer generally to that is no; that some of the stations you can point to in the large centers of this country, which have no chain connections, are among the best money makers in the country for instance, in your city.

The CHAIRMAN. But that is in New York City. What about the small cities around the United States? Do they have an equal opportunity of employing artists and others to go on their stations as have the chains with the large radio stations?

Mr. CALDWELL. I can not think of any case offhand where I could say a station suffered because of that.

The CHAIRMAN. In other words, all the local stations are perfectly satisfied as they are?

Mr. CALDWELL. I think there are quite a few stations that would like to get in the chains. There is no question about that.

The CHAIRMAN. In other words, some of the smaller stations would welcome the formation of more big chains?

Mr. CALDWELL. Yes, sir; and, on the other hand, you must realize this, that the average station does not make money off its chain prgrams; it loses money.

The CHAIRMAN. But it would enable them to give a program that a smaller station, individually, can not give.

May I ask you, as counsel for the small stations, and in which most of the Congressmen are interested, is it their thought that larger stations like WEAF and WABC should be the only chains throughout the country, or should there be more?

Mr. CALDWELL. I have no authority to speak for the association on that. I will be perfectly willing to give you my personal opinion.

The CHAIRMAN. I want the views of your association. Can you give it, Mr. Shaw?

Mr. SHAW. I do not think that phase of it has ever been discussed. Our organization represents the industry as a whole, and the things that you may say are factional or pertaining to local stations, we do not take care of.

Mr. CALDWELL. There are in the organization many stations with no chain affiliations; in other words, we have both groups in our organization.

Until December 31, 1930, under restrictions imposed by Congress, the licenses were for a maximum of three months. Under the law as it has been since then, the commission may issue licenses for a period as long as three years, although at present it issues them on a 6-month basis.

The entire industry is, of course, fervently hoping for a longer license period so that it may enjoy a corresponding increase in stability that will be reflected in improved service to the public.

The CHAIRMAN. Are there any stations being licensed for three years?

Mr. CALDWELL. No, sir; six months is the longest period now.

The CHAIRMAN. But they are being renewed regularly?

Mr. CALDWELL. Yes, sir. I am speaking of broadcasting, of course. There are other stations in other lines of service that have licenses for more than six months—mostly for one year.

The broadcasting station, to receive a license, must meet the test which Congress laid down in the radio act, "Public interest, convenience or necessity." Some people contend that under this language broadcasting stations are public utilities; others say the contrary. I shall not attempt to answer that question. But it is clear that if the entire United States is to receive some measure of broadcasting service, there must be a fairly equitable distribution of stations in sparsely settled areas as well as in the thickly populated centers. Congress has prescribed a rather rigid yardstick for accomplishing this and the commission is attempting to carry it out. At any rate, I think you will agree with me that where a business is operated under license from the Government, as the broadcasting business is, and is stamped with a public interest, no private individual or combination of individuals should have the power under the law to nullify a license or to put a station out of business. Yet, as I shall show you a little more fully later on, that is just what the present copyright act permits. This is a matter which concerns not merely the broadcaster but the entire listening public.

Naturally, there is a great disparity in the economic condition of the 600 broadcasting stations in the United States. A number of factors enter into this, but by far the most important is the station's location. A station of small or medium power in a large metropolitan center has a larger potential audience and is more attractive to

an advertiser than a high-power clear-channel station in the sparsely settled Rocky Mountain area.

The highly-exaggerated stories you sometimes hear about profits in the broadcasting business are based largely on a few instances of this sort, of stations with a small overhead, fortunately located. The great majority of the smaller stations (which account for maybe five-sixths of the 600 broadcasting stations) are located in small cities and towns where the advertising support is, to say the least, precarious. On the other hand, the high-power, clear-channel stations, even in large centers, have to maintain so high a standard of varied public service and have so great an overhead that most of them are even now on an unprofitable basis. Another important factor is a station's hours of operation. About half of the stations are permitted to operate only part time; they divide time with each other or they must close down at sunset, and so forth; still, in most respects they have the same overhead as full-time stations have. The truth is that the great majority of stations are in no position to be subjected to heavy burdens of expense for research in copyright matters or for defending litigation for alleged copyright infringements which are innocent and yet impossible to guard against in the present state of the law.

The CHAIRMAN. Is there an opportunity in your organization to unify 2 or 3 or 4 local stations that may be sharing the same time during the day, so they will have one unit and share the overhead?

Mr. CALDWELL. The association does not enter into that matter.

The CHAIRMAN. But since the association is formed for the purpose of developing the best interests of the membership, has that subject ever been discussed?

Mr. CALDWELL. No, sir; I do not believe it has, not so far as I am familiar with the activities of the association. You realize, in order to do that, you have to have three or four stations in the same city.

The CHAIRMAN. It is very unfair to the small stations.

Mr. CALDWELL. That process is going on independently of any plans of the association. It is a natural thing that these stations should combine to save overhead. In the larger cities it is going on. In the other cities you do not have that situation. It is mostly in cities with the larger stations.

Broadcasters are interested in copyright legislation from two points of view; first, as users of copyrighted works (principally music); and, secondly, as creators of original works.

The CHAIRMAN. What percentage of music goes over the radio and what percentage of speeches or matter that can be found in dramatizations or novels or books?

Mr. CALDWELL. I had planned to cover that later but only generally, and I should just as soon answer that now. You can not announce any rule.

The CHAIRMAN. Would you say 80 per cent is music and 20 per cent is other than music?

Mr. CALDWELL. It would be difficult to say.

The CHAIRMAN. Or is 60 or 70 per cent music?

Mr. CALDWELL. You can find stations with 90 per cent music and others less than 50 per cent. You have stations of a religious character, that have some special purpose, not of a general character, that emphasize speeches or one thing and another.

The CHAIRMAN. Lectures, and so forth?

Mr. CALDWELL. Yes, sir; and so I think the safest guess is to take 60 to 70 per cent of music as an average. I do not think anyone would dare make a guess as to what percentage of literature is used. I think it varies from week to week. I suppose, in the coming week, when we have celebrations due to the Lincoln and Washington anniversaries, you will have one type of broadcasting that you will not have the week following.

The first of these seems much the more important at present, but the second is important enough so that it can not be disregarded, particularly in view of possible future developments.

By the term "users," which I use for want of a better, I mean those industries through which the author's work reaches the public. The term carries with it no opprobrium, the group is indispensable, both to the author and to the public. Examples of users are:

1. Publishers, both of literature and music, in the form of printed copies.

2. Persons who convert the copyrighted work into some form of mechanical record from which it may be reproduced, heard, or seen—e. g., manufacturers of phonograph records, mechanical piano-player rolls, moving pictures, and so forth.

3. Persons who perform the copyrighted work in public—e. g., the theatrical producer, the concert artist, the moving-picture exhibitor, and so forth.

4. Persons who communicate the copyrighted work to the public—e. g., the broadcaster, whether by radio or by wire.

Obviously, in several industries these different uses overlap. For example, the larger broadcasting stations with their numerous staffs of employees engaged in program production, engage extensively in adapting and arranging music, in performing music through artists employed for the purpose, and in communicating such performance to the public.

I do not need to tell you, for it is already apparent from this and previous copyright hearings, that it is characteristic of each class of users to claim rights superior to the other classes, and sometimes at the expense of the author.

I gather from the testimony I have already heard that some publishers of literary works insist on the dramatic rights, the moving-picture rights, and every other kind of rights as against the author. I know that the publisher of music insists on keeping control of the performing rights and broadcasting rights; that is why he is opposed to divisibility of copyright and insists that the copyright be assignable only as a whole and not in part.

Let me make clear at this point that the broadcasters have no quarrel with the claims made in behalf of the author and composer at these hearings, as I have understood them. In other words, we agree—

1. That the copyright should originally vest in the author or composer who creates the work;

2. That the author or composer should have the right to assign to whomever he chooses;

3. That the author or composer should have the right to assign divisible portions of his copyright, in other words, divisibility of copyright, and give good title to the several assignees.

The CHAIRMAN. By that you mean the license? He has the right to license anyone to a part or to the whole of his copyright?

Mr. CALDWELL. What they are claiming, as I understand it, is the right to assign a portion.

The CHAIRMAN. They claimed, when they were here, the right to license—the right to license the serial rights, the dramatic rights, motion-picture or stock rights—any rights that may come out of the whole.

Mr. CALDWELL. It does not make any difference what words you use. They want to see that the licensee gets the right to protect himself in court.

The CHAIRMAN. Exactly; by registering it and recording it here.

Mr. CALDWELL. These, of course, are all subject to proper safeguards by way of notice and registration, which I shall discuss presently.

Let me also make it clear that the broadcasters are not seeking the privilege of broadcasting of copyrighted works without paying therefor. A charge to the contrary is made against the industry ever so often but it is absolutely without foundation.

The CHAIRMAN. I have been told in hearings here that the broadcasters have been using literary works for which they have paid no royalty.

Mr. CALDWELL. On the contrary; although I do not think the law compels the broadcaster to pay for the mere reading of a literary work, any broadcaster who has had his attention called to that, is voluntarily paying the author of that work.

The CHAIRMAN. Then you have no objection, when we revise that, to putting that in the law?

Mr. CALDWELL. No; provided we are protected against other abuses that we would need to be protected against, as in the case of music. You realize the broadcasting of literary work is not important even to the author. You do not have the same situation as claimed against us in music.

The CHAIRMAN. Of course, this does not provide for quotations, provided you give credit to the author.

Mr. CALDWELL. Broadcasting does not permit of the reading of a whole novel. It has been attempted, but it is not a frequent happening. It is usually the recitation of a verse or a poem.

This charge dates back to the period eight years ago at a time when it was not foreseen that broadcasting would acquire a commercial status, and virtually all stations were operated without economic support. Ever since broadcasting has become a business the broadcaster has readily recognized that he is under obligation to pay a reasonable fee for the use of copyrighted works. There have been intense differences of opinion at times as to how much that fee should be, in negotiations between the broadcaster and the American Society of Composers, Authors, and Publishers, but there is no difference of opinion on the fundamental principle.

The copyrighted works which chiefly concern the broadcaster are musical compositions. Stations vary, of course, in the proportion of music used in their programs but it would be fair to assume, I think, that on an average of 60 to 70 per cent of a station's hours of operation are taken up with music and that a full-time station will

broadcast somewhere between 100 and 200 musical compositions a day. A large proportion of these are copyrighted and can not be played without a license from the copyright proprietors.

The CHAIRMAN. That is mainly the American Society of Composers, Authors, and Publishers?

Mr. CALDWELL. Yes, sir; mainly, and some others, as I shall point out.

For the sake of simplicity I shall assume that musical compositions are the only kind of copyrighted work that is used by broadcasting stations. To make the broadcaster's problem clear to you I shall have to review very briefly the interpretation which has been placed on the present copyright act.

The courts have so far held—

(1) That a broadcaster who broadcasts a copyrighted musical composition performed in his studio is engaged in a public performance for profit of that composition, and is liable for infringement if he is not authorized by the copyright owner.

(2) That a broadcaster who broadcasts a copyrighted musical composition performed elsewhere than in his studio (e. g., by a hotel orchestra connected with the station by remote control) is likewise engaged in a public performance for profit of that composition, and is liable if neither he nor the person actually performing the composition (e. g., the hotel proprietor) is authorized by the copyright owner.

(3) That a hotel proprietor that operates a receiving set and loud-speaker for the entertainment of the hotel guests is likewise engaged in a public performance for profit of that same musical composition and is liable for infringement if neither he nor the broadcaster is authorized by the copyright owner.

Questions which are not yet settled are such as the following:

(1) Is the hotel proprietor in the case last mentioned liable if he does not have a license but the broadcasting station to which the receiving set is tuned does have a license?

(2) Is the broadcaster liable for a program which he receives by remote control from a hotel dining room or a dance hall where the broadcaster does not have a license but the hotel or dance hall proprietor does have a license?

You will see from what I have said that there are certain gaps yet unsettled.

The American Society is attempting to settle such questions by itself in the form of license agreement which it imposes on the broadcaster.

Leaving such questions aside, I want you to get the complete picture of what happens as the result of the decisions already made by the courts. Let me give a few cases of what are almost everyday occurrences.

Case No. 1. A broadcasting station which has done its best to protect itself by securing licenses, broadcasts a football game and in the intermission between the halves lets the listening public hear the college bands. These bands may play, and frequently do play, compositions not covered by the license from the society or any of the other organizations. Or they may play what is known as a "restricted number," that is, a composition controlled by the society but not permitted to be played except by special permission. Not only

is the broadcaster liable for infringement, so also is every hotel, restaurant, barber shop, or drug store proprietor which lets that program go to the listening public over a receiving set.

Case No. 2. Take a performance of a musical composition which originates in the key station of a national network such as the National Broadcasting Co. or Columbia Broadcasting System. Such organizations, of course, take every possible precaution to avoid infringements and yet, occasionally, have been unable to avoid them. If, innocently, an unauthorized number is broadcast, the network is guilty of infringement; so also are the 40, 50, or 60 stations which take the program by wire and broadcast it in all parts of the country; so also are the countless hotel, restaurant, barber shop, or drug store proprietors which operate receiving sets—all on that one performance.

If time permitted I could recite a number of such pitfalls for the innocent infringer.

The CHAIRMAN. What would be your suggestion to remedy a situation where a local station or a large station or chain station is broadcasting a college football game and you hear the cheering and men and women singing, and that song they may be singing may be copyrighted? I do not think the Members of Congress would want to see a chain of radio stations penalized for just letting you listen to something that you do not have control over.

Mr. RICH. Suppose a band is playing a copyrighted piece of music? I myself have personally listened in to football games, and have enjoyed very much the college band coming on. I can not see where the radio station should be penalized or sued by the author for infringement in a case of that kind.

The CHAIRMAN. We will take care of that when we frame a bill. We will be glad to have your suggestions offered to us.

Mr. CALDWELL. The sort of case I have described leads us to advocate the principle which we have come to call the single-performance principle. We urge that the man who has no control over what music is played and who can not possibly protect himself against infringement, no matter what precautions he takes and no matter how many license fees he pays, should not be held liable under sound copyright legislation. It seems unsound to us to say that the hotel proprietor who operates a radio receiving set is "performing" the musical compositions which happen to be transmitted from some broadcasting station or to say that a station in Washington, D. C., temporarily hooked up to a network is performing a composition which it receives by wire and which is really being performed at the studio of the key station of a chain in New York.

The CHAIRMAN. Suppose I am living in the Mayflower Hotel and there is a radio in my room and the hotel charges me a certain amount of money every month for the utilization of that radio. That hotel is charging a fee, and if the hotel is charging me for the use of that radio, is it not justifiable to require that hotel to pay royalties? I am not talking of the innocent hotel man who is furnishing that for the convenience and interest and amusement of his guests, but where you have a hotel charging fees for the use of that radio?

Mr. CALDWELL. I am inclined to agree with you. I am talking about the case where there is no charge. I do not know whether the author should be allowed to collect——

The CHAIRMAN. I do not care who collects; I am speaking of the principle involved. It is not fair to allow one man to collect for the work of your mind and not pay for it.

Mr. CALDWELL. Yes, sir; let all responsibility and all liability rest with the person originating or controlling the original performance, but let all others be protected.

The copyright owner is not injured by such a principle; presumably, the court will allow him considerably greater damages against a network where the performance has been relayed to and broadcast over 60 stations than where it is limited to one station. Similarly, a license to the key station will protect all the other stations as well as all hotel proprietors, and so forth. Such a rule will not relieve the other stations from paying fees for broadcasting music. The stations not directly operated by the networks do not take chain programs exclusively or even a major portion of the time. They put on their own programs, for which they have to accept responsibility and must pay, but they will be protected from innocent infringement.

This brings up the question of damages. Under the present law there is a minimum of $250 specified for each infringing performance, whether guilty or innocent. The nature of this provision is best described in the language of the attorney for the American society at the hearings held before the Senate Committee on Patents last year. He said, in a brief filed with the committee (hearings on H. R. 12549, p. 309)——

The CHAIRMAN. Who said that?

Mr. CALDWELL. Mr. Burkan.

The CHAIRMAN. Nathan Burkan?

Mr. CALDWELL. Yes, sir. He said:

> The broadcasters overlook the purpose Congress had in mind in fixing the amount of recovery for infringement. The amount fixed in the statute does not represent the value of the composition, nor does it represent the license fee or license value of the work. The purpose of the statute is to prohibit infringement of the author's work and in order to effectuate that purpose and intent, the law must have teeth so as to discourage the pirate; otherwise, why not have a compulsory license fee?

In other words, the minimum damages are not damages (as they are described in the statute); they are a penalty (which the statute expressly says they are not), and are payable not to the United States Government, but to the copyright owner. This statutory provision gives a combination of copyright owners power to accumulate vast claims for damages against a broadcaster or hotel proprietor, $250 for each musical composition (plus attorneys' fees) and then, armed with the threat of a claim for $50,000 or $100,000, to force the station to enter into the sort of license agreement the combination desires.

The CHAIRMAN. About how much money has been collected by the American Society of Composers, Authors, and Publishers for these various infringements throughout the country, based on the $250 fee?

Mr. CALDWELL. We have no means of knowing. The procedure usually takes a different course. They will accumulate a huge claim of $50,000 or $100,000.

The CHAIRMAN. They can break a local station?

Mr. CALDWELL. Yes, sir; and use that as a persuasion for taking out a license.

The CHAIRMAN. This society swoops down upon a small restaurant, ice-cream parlor, bootblack, etc., and collects money on that basis in the same way. To protect these smaller organizations from paying tribute which, to my mind, is nothing but a racket, I have been thinking very seriously when we prepare our bill, of incorporating the following thoughts—and I am speaking for the small interests, like a little restaurant, ice-cream parlor, drug store, barber shop, etc., who have been forced to pay $250 throughout the United States, half of which goes to some local lawyer who is in partnership with the general organization in New York—to state that where no admission is charged and no cover charge is collected, that no service fee is charged or any similar fee, there shall be no collection of royalties. Would that be fair?

Mr. CALDWELL. It certainly would.

Mr. RICH. You say there is no time limit within which they must sue a station? They can allow them to accumulate?

The CHAIRMAN. In other words, they serve no notice?

Mr. CALDWELL. There is a statute of limitations, but at the daily rate the sum runs up into huge figures.

Mr. RICH. Do you not think notice should be given to a station in case of an alleged infringement?

Mr. CALDWELL. I do not know that I understand what you mean.

The CHAIRMAN. What Mr. Rich meant is, if a local station uses music that it is not entitled to use, when the organization, whether the American Society of Composers, Authors, and Publishers or any other organization, finds out they have used copyrighted music which they are not entitled to use, they shall be notified that they will be held responsible if they persist in the practice.

Mr. RICH. And have a time limit of 10 days or 30 days.

Mr. CALDWELL. Of course, you have already suggested another element of evil. This, of course, does give incentive to attorneys all around the country to go after innocent infringers. Not only the damages of $250 is collectible but the fees of the lawyer also are collectible.

It is our position that the minimum should be reduced so as to correspond somewhere near to the damage actually suffered by the copyright owner; that in the case of innocent infringement—particularly where there has been no copyright notice or registration—there should be no damages at all, and that there should be adequate provision against the accumulating of statutory damages out of all proportion to the actual injury. In other words, damages should be damages and not penalties. Penalties should go to the United States Government. I do not know of any other Federal statute which gives private parties the right to collect penalties from other private parties such as does the present copyright act. This minimum penalty clause, together with the provision for attorneys' fees, is one of the corner stones of the power which the American society has exercised over broadcasting stations, hotels, restaurants, and others. It is the means by which an unscrupulous lawyer can make a living out of innocent infringements. It is a club by which organizations such as the American society force broadcasting stations not

only to pay license fees but to help the society collect fees from others.

The CHAIRMAN. You have no objection, as the representative of these various radio stations, to paying them just royalties that it is but fair you should pay?

Mr. CALDWELL. Yes, sir; we want to pay them.

For example, in the standard form now used by the American society, there is a paragraph reading:

> This license is limited solely to the copyrighted works of members of the society in programs rendered at said radio station or at a place duly licensed by the society to transmit rendition of such works to said radio station for the purpose of being broadcast thereupon.

In other words, a broadcasting station at Washington can not broadcast music played by the Wardman Park Hotel Orchestra unless the Wardman Park Hotel also has a license. If the station does so, it immediately hears from the society, and is put in the position of having to persuade the hotel to take out a license.

Take another paragraph which reads:

> This license does not grant any right, license, or privilege to transmit such renditions or performances to any other party for reperformance or rendition by any means, method, or process whatever, except and unless the receiver of such transmission shall have license of the society.

That is to say, a network can not give chain programs to a station which does not have a license, and the fact that a station has a license confers no privilege on a restaurant proprietor who operates a receiving set for the benefit of his guests. Thus the society gets around the points which are still uncertain in the law, although the Supreme Court intimated in its recent decision on the hotel case that if the broadcasting station had a license, then that might be held to imply authority to the hotel proprietor to permit his guests to hear the music composition as rendered by the receiving set.

That is the way the society is getting around the dictum in the recent United States Supreme Court decision.

Mr. RICH. May I interrupt here?

Mr. CALDWELL. Yes, sir.

Mr. RICH. As I understand that, if the orchestra of the Wardman Park Hotel should purchase the right to play certain music, if they have a station there, they are not permitted to broadcast that program unless they have paid another fee to some one else for that particular purpose?

Mr. CALDWELL. In that case, the Wardman Park Hotel would probably get one license to cover both. I am speaking of the case which, of course, has been the fact in the past two or three years, of a station in a town, independently owned, using music of the Wardman Park Hotel orchestra. Both the station and the hotel must have a license. If the station broadcasts the orchestra and the hotel does not have a license, then the station is guilty of an infringement.

Take still another instance: The Music Publishers' Protective Association, which has offices in the same quarters as the society, and which has in part the same directors, has retained control over recorded music—that is, phonograph records, and so forth.

The CHAIRMAN. The Music Publishers' Protective Association—is that an association of which a gentleman by the name of Mr. Paine was a director?

Mr. CALDWELL. Yes, sir.

The CHAIRMAN. You say that is a subsidiary of the American Society of Composers, Authors, and Publishers?

Mr. CALDWELL. No, sir; but it has in part the same directors and has a very close affiliation.

The CHAIRMAN. The gentleman denied that in the questions I asked him Friday. I asked if there were any affiliation, directly or indirectly, between the Music Publishers' Association and the American Society of Composers, Authors, and Publishers, and he stated that while he only represented the publishers of music, there may be six men of his whole organization on the board of directors of the American Society of Composers, Authors, and Publishers. The American Society of Composers, Authors, and Publishers have 12 music composers on the board, and the publishers have 12; so, on that basis, 6 of the 24 are members of this society.

You heard that, Mr. Rich, on Friday?

Mr. CALDWELL. I do not believe he meant to say they were divorced in their activities.

The CHAIRMAN. Exactly. If you have the record, you will see I distinctly called that to their attention, and he was in thorough sympathy with you, too, in regard to what the American Society of Composers, Authors, and Publishers is doing. That is the reason I was cross-examining him on that subject.

Mr. CALDWELL. The rumor is current that they are soon to have the same president.

The CHAIRMAN. Never believe all you hear, and only half of what you see.

Mr. CALDWELL. I think we will know that in two weeks.

Under the copyright act, as it now stands, there is a fixed royalty of 2 cents a record. I understand, however, that the Publishers' Association makes certain claims about what we call electrical transcriptions. Electrical transcriptions are phonograph records, usually of a large size, which are specially prepared for broadcasting and are not sold commercially to the public. I understand that the publishers claim that not only must the manufacturer of these records pay a royalty to the publishers, the amount of which I do not know, but he must also pay something like 50 cents a record for each time that a broadcasting station broadcasts each record. The station must also, of course, pay a license fee to the American Society covering, in most cases, the very same music that is on the record.

The CHAIRMAN. You are not opposed to that? I think it is no more than fair or right, when you take a great, big organization or a small organization, which gathers together 40 or 50 musicians and secures the greatest conductor it can, and the finest singers and artists and rehearses them, and fixes them in the proper places and arranges for the proper acoustics, and so forth, and destroys God knows how many records in order to get them in the right shape, and your organization uses them—should they not pay for that?

Mr. CALDWELL. This is not a case of protecting the manufacturer of the record but the manufacturer of the record paying 50 cents to the publishers.

The CHAIRMAN. You have no objection to the station doing justice to those people?

Mr. CALDWELL. We have no quarrel with these special paragraphs.

Now, I want to say a few words directly about the American Society of Composers, Authors, and Publishers. Representatives of the society will undoubtedly appear before you and will give you detailed information about the society's set-up, its by-laws, forms of contract, and ways of doing business.

The CHAIRMAN. May I ask you at this moment, as counsel for the radio stations of the United States, if you will be kind enough to be here when I have the representatives of the American Society of Composers, Authors, and Publishers here?

Mr. CALDWELL. Yes, sir. A large amount of material appears on this subject in the transcripts of previous hearings. I shall be very brief, therefore, in describing the society to you.

It was originally organized about February 13, 1914, by a few composers, including some men of high repute and fame, such as Victor Herbert. It was patterned after a similar society which had been organized in France in January and February, 1851.

The CHAIRMAN. Such societies were organized also in Italy.

Mr. CALDWELL. But the French were the first, and the others followed suit.

I may say here that one reason why the foreign notions of copyright have developed along the lines they have, first in France and later reflected in the international conventions, is due to the constant activities of this organization which preceded by many years any effective organization on the part of users of copyrighted material.

The CHAIRMAN. What was the purpose of that organization in 1851?

Mr. CALDWELL. Protection against performing rights, and so forth.

The CHAIRMAN. Against the violation of the author's work?

Mr. CALDWELL. Yes, sir. Until the end of 1920 the board of directors of the society consisted of 21 directors, 9 of whom were publishers, 6 composers, and 6 authors.

The CHAIRMAN. About when was that?

Mr. CALDWELL. 1920. The fees collected by the society under the articles of association were divided one third to the authors, one third to the composers, and one third to the publishers.

The CHAIRMAN. In other words, up to 1920 all money collected by this society of composers, authors, and publishers, one third went to the author, one third to the composer, and one third to the publisher?

Mr. CALDWELL. Yes, sir.

The CHAIRMAN. I call your attention to this one fact, which to me is a very important fact, that any man or woman who has ever attended a musical production and seen the producer put on a musical production knows that it costs about a quarter of a million dollars to put it on. He takes a chorus of 30 or 40 girls, beautifully gowned, and a magnificent orchestra, with the finest coloring of lights and shadows, and obtains the best music, to which he lends dignity, and publishes it; and while every dramatic producer gets 50 per cent of any by-products of any drama, this man who has made that music and given it birth and expression does not get a cent out of this whole thing.

Mr. CALDWELL. I know that is true.

In other words, the authors and composers have the controlling voice and the greater portion of the fees. Due to complaints on the part of the publishers, the society was reorganized so that it thenceforth had a board of 24 directors, 12 of whom were publishers and the other 12 were composers and authors.

The CHAIRMAN. Why was that done—do you know?

Mr. CALDWELL. I can not give you the details. There were differences of opinion, publishers withdrawing from the organization and not giving it support, and so forth.

The CHAIRMAN. Was it not really done as a matter of justice and fairness, from the fact the copyright was in the name of the publisher and he had the poor author and composer by the neck and could strangle him and make him do anything he wanted?

Mr. CALDWELL. It was done in order to get the publishers in together and have the whip hand. I understand that the royalties collected go half to the publishers and the other half to the composers and authors. It is obvious that with such an arrangement control is really in the hands of the publishers.

Every member of the society, including both publishers and composers and authors, was required to confer upon this society the exclusive nondramatic performing rights in copyrighted works controlled by him for a period of five years from January 1, 1931. This arrangement has been continued from time to time and the present arrangement will expire, I think, in 1935.

The society has in its membership about 95 music publishers and several hundred composers.

I am not going to try to tell you just what percentage of all copyrighted music is controlled by the society because I do not know. In previous hearings they have claimed to control about 90 per cent of all copyrighted popular music, a lesser per cent of what may be called classical music and about 100 per cent of what is called production music that is contained in musical comedies, and so forth. I am speaking, of course, only of small performing rights, which, however, are an all-important matter.

The CHAIRMAN. For your benefit, I have looked up the figures, and of all music played in the United States, 95 per cent of that music is the result of the work of American authors and composers and 5 per cent foreign, whereas in Europe the music that is performed in Europe, 60 per cent is the production of European authors and composers, whereas 40 per cent is American.

Mr. CALDWELL. I am speaking, of course, now, only of the small performing rights which are an unimportant matter to us.

The CHAIRMAN. The small performing rights which you call minor rights are now the major rights?

Mr. CALDWELL. Yes, sir.

Whatever the percentage is, a broadcasting station can not go through the usual day's program which the public wants and expects without using music controlled by the society.

It is true that every copyright is in a sense a monopoly for a certain term of years. On the other hand, just as one of the witnesses has already told you, copyrighted works compete with each other. If there is competition, while I may not be able to get a license from a given music publisher to perform one musical composition,

I may easily be able to get a license from another music publisher to perform another composition which is of the same general character and which will serve the purpose just as well.

This competition is destroyed when any large proportion of copyright owners is permitted to pool their interests in one combination, especially when that combination has control of enough music so as practically to have a veto power on the continued operation of a broadcasting station. In other words, copyrighted music is one of the most important raw materials from which a broadcast program is made. Yet, control over a very large percentage of this raw material is lodged in one organization. This is a condition which is not permitted by law in most industries, or, in the cases where it is permitted, the combination is subjected to severe restrictions and regulation.

The CHAIRMAN. But you will admit, for the benefit of the author and composer, they need an organization like that. If I am an author and Mr. Rich is a composer and our combined work is played, I can not go about the United States and find out in what theaters and restaurants they are using it; so, there is a necessity for an organization and the only objection to the organization is the manner it utilizes to collect its fees.

Mr. CALDWELL. In justice to the composers and authors we are willing to assume that such an organization is necessary.

The CHAIRMAN. Do you not agree with me?

Mr. CALDWELL. In justice to the composer and author I am not so sure that the broadcaster would not be better off if we had competing authors to deal with.

The CHAIRMAN. The copyright ought to belong to the author, and it would give you an opportunity to deal directly with the author or composer.

Mr. CALDWELL. That is right. I think even then there might have to be safeguards proposed to prevent the power of combination. I do not object to a combination to protect the author and composer.

One of the most disastrous results of the situation is that a broadcaster has no assurance as to the cost of running his business next month or next year. In the past it has been the practice of the society to enter into license agreements for one-year periods with most stations, and it has consistently refused to enter into arrangements which cover a longer period of time which permit the broadcasting industry to know what the future will be.

The CHAIRMAN. They are perfectly justified in doing that. You stated before that the Government of the United States does not license you for more than a year and you can never tell what will happen. Your license may be taken away. Why should they tie down their musical compositions to you for more than a year?

Mr. CALDWELL. Their license can easily provide it shall be terminated in case the license is taken away from the station. On the other hand, it is easy to exaggerate the changes that take place. Most stations have their licenses regularly renewed, and while, of course, the courts have denied there is any property right in the continued use of the station, of course, there must be some ground of public convenience and necessity before they can take it away.

The CHAIRMAN. The stations want to make contracts for national advertising for two or three years in advance and they would like

to know what programs they can present, and if you can not do that, you are up in the air?

Mr. CALDWELL. The can not make up their budget for more than a year.

Mr. RICH. And the station may spend a lot of money in developing this for the benefit of the public and have to give it up at the end of the year?

Mr. CALDWELL. Yes, sir. At the end of the year it has been the practice of the society to impose enormous increases of royalties on the licensees who are virtually powerless to oppose these increases since there is no equality of bargaining power. The station must either take the agreement or refuse it on the society's terms and there is no room for negotiation.

Right now instead of a yearly basis practically all stations are on a month to month basis. The society announced last November that on or before January 1, 1932, it planned to announce new terms as the basis of licenses, existing licenses to become inoperative on February 1, 1932.

The CHAIRMAN. Have they done that?

Mr. CALDWELL. They have not announced higher rates due really to the illness and death of their general manager. It is being postponed from month to month.

The CHAIRMAN. Are the radio stations losing money in the past year as compared with the same months in the preceding year?

Mr. CALDWELL. I think their business improved.

The CHAIRMAN. Irrespective of the business depression, their condition has improved?

Mr. CALDWELL. Yes, sir. The advertiser, I may say, in this depression, has turned to this new means as a stimulus to business, but the broadcasting stations are now commencing to feel the depression.

The CHAIRMAN. For what purpose was the organization formed of which you are counsel?

Mr. CALDWELL. Originally it grew out of the copyright quarrel in 1923.

The CHAIRMAN. Did the radio broadcasters ever attempt to clean their own house as far as lotteries, gambling, and so forth are concerned until Congress went into it?

Mr. CALDWELL. I think the Association of Broadcasters in 1929 adopted a code of ethics that, if the stations adhered to, there would not be a complaint from Congress or anyone else.

The CHAIRMAN. Of course, you must not only preach something but practice it.

Mr. CALDWELL. You must know from experience with other organizations, it is one thing for an organization to know what to do but another to get the members to do it.

The CHAIRMAN. That is where the good suffer for the actions of the bad.

Mr. CALDWELL. The association has no power to force the members to do a thing. All it can do is attempt to persuade members to live up to certain standards. The standards are there and they can not be improved on.

Mr. SHAW. I believe that the only criticism or the greatest criticism of the advertising management has been during the last four months. Starting about six months ago, the radio stations of the

United States began to feel this depression. They had built up these enormous programs and had educated the public, and the advertising started to fall off or decrease, and the peculiar thing about a radio station is that the less business you run, the higher the expense. Formerly when an advertiser was paying for a 15-minute program or a 30-minute program with an orchestra and he canceled, you had to fill out that 30 minutes with as equally good a program and the expense goes up. So there has been in the last four months on the part of some stations a determination to go ahead regardless of what they had to take out of their pockets. That is in accordance with the code of ethics. However, there have been some stations that have not been able to do that.

The CHAIRMAN. They were competing unfairly with the newspapers of the country. Every local newspaper throughout the United States had to contend with the same difficulty. They have had to lose advertising and the radio stations were, therefore, taking an unfair advantage of the newspapers of the country. It was highly unethical and unjust.

Mr. SHAW. We have the opposite feeling. In most stations you can not get a medicine ad, and yet the newspapers are filled with them. I have been in the newspaper business all of my life up until a year ago, and I know our radio station has been run much cleaner from the standpoint of advertising than the newspapers.

The CHAIRMAN. Then it is your statement, which you would like Congress to know, as president of this Association of Radio Broadcasters of the country, that the ethics you are employing are far superior to those of the newspapers of the country generally?

Mr. SHAW. No; I do not wish to make that statement.

The CHAIRMAN. So far as the medical advertisements and other advertisements are concerned?

Mr. SHAW. Yes, sir; I will make that statement.

The CHAIRMAN. You will make that statement?

Mr. SHAW. Yes, sir.

The CHAIRMAN. Do you think Congress should pass the same law covering newspapers prohibiting them from exploiting a lot of hokum ads in the newspapers in regard to medicine good for no particular condition which have been so pronounced by the American Medical Association and the American College of Surgeons, and have them step up to the line as clearly as you do?

Mr. SHAW. Many things can be successful in newspapers that can not be successful on the radio. There are certain classes of advertisements that will be successful in a newspaper that will drive away your listeners; that will be accepted by the reader but not by the listener.

The CHAIRMAN. I am interested in the public. So far as the public is concerned, they can apply the same remedy to both of you. The average layman, to-day, who tunes in on the radio when he does not like something, can shut it off and go somewhere else. The same is true with the newspaper reader. If you do not like an advertisement, you can go to another page.

Mr. RICH. It seems to me the gentleman was fair in his statement to this effect, that if anything was approved by an advertisement, so far as medicine was concerned—if it was approved by the

Medical Society, it could be put in the newspapers and read, but if put on the radio, people would not listen to it.

Mr. SHAW. The radio advertisement is very much different.

The CHAIRMAN. I do not agree with the gentleman on this matter. It is a matter of putting it across. If you can get a person to present a medical theme in a manner that is intelligent and interesting, anyone will listen to it, but if it is presented obnoxiously or uninterestingly, people will turn it off.

Mr. SHAW. We have avoided all of that at the Waterloo station because the people might be offended.

Mr. RICH. As far as people advertising in the newspapers or over the radio, I do not think we should in any way interfere so long as it is something fit for the public. I do not think we should interfere in how they put it across to the public.

The CHAIRMAN. But you see, Congress has already interfered. That is the duty of the Committee on Merchant Marine, Radio, and Fisheries. They have brought in a bill in which they have taken away from the local station the right to pass on lotteries, gambling, and so forth.

Mr. CALDWELL. Right now instead of a yearly basis practically all stations are on a month-to-month basis. The society announced last November that on or before January 1, 1932, it planned to announce new terms as the basis of licenses, existing licenses to become inoperative on February 1, 1932. This, of course, meant higher rates. In its published announcement the society complained that the sale of sheet music had fallen off 90 per cent during the previous 12 months and blamed it all on broadcasting.

Since then, on account, I believe, of illness or death of its general manager, the society has postponed the date of reckoning, first to March 1, and probably, I believe, for two or three more months. In other words, broadcasting stations do not know right now whether they will have the right to broadcast music controlled by the society two or three weeks from now, and yet have to carry on a business of tremendous proportions, which, like every other business, requires advance knowledge of what costs will have to be paid before contracts can be entered into.

Another instance of the abuse of the society's power is the right it reserves in its license agreement to conduct an inquisition into the business of every broadcaster. The agreement, for example, requires the licensees upon demand by the society upon forms supplied by the society to furnish a list of all music rendered at the premises, showing the title of each composition and the publisher thereof. Elaborate questionaires have been sent out in the past, inquiring with more detail into the business of broadcasters than does the United States Government.

Needless to say the society recognizes no limitation on the amount of fee it may charge and recognizes no obligation not to discriminate between stations in the same class.

The CHAIRMAN. What did you mean by "inquisition"?

Mr. CALDWELL. Questionaires will go out which demand details of your business to the nth degree, to a far greater degree than demanded by the Federal Radio Commission.

The CHAIRMAN. Why do they do that?

Mr. CALDWELL. Apparently to learn what they can charge in the next licensing fee.

The CHAIRMAN. In other words, there is no uniformity by the American Society of Composers, Authors, and Publishers in charging stations with the same frequency or power, an so forth?

Mr. CALDWELL. There is no uniformity; no, sir.

The CHAIRMAN. Is this statement sent out more on the basis of a statement that a bank would ask you to give in order to determine your financial ability to pay your obligations?

Mr. CALDWELL. It is more detailed than a bank has ever asked for. For instance, you have to give a list of every piece you have played at the station, the name of the author and publisher, which is quite a job for a small 100-watt station to do. Take a station where they have played a lot of phonograph records and it means quite a little work to keep up with the requirements.

Now take the other side of the picture and let us see what protection the broadcaster gets who takes out a license from the society. In the first place the license does not give him the right to perform all music controlled by the society but only such numbers as have not been withdrawn from its repertory. Every so often the society issues a rather extensive list of music which may not be played by the licensee. This list consists in part of music which may not be played at all and in part of music which may only be played upon permission granted after special request which is usually made by telegram or letter. In the latter case the broadcasting station must announce that the number is played by special permission of the copyright owner. In the list of restricted music is either the whole or part of many musical comedies and operas. There were about 40 of these in the list last issued. The list is added to or changed frequently by mimeographed notices and is published in printed form, I think, about every two months. It means that every station to be safe must exercise a constant check which requires the time of an employee which the smaller stations are in a poor position to afford.

Even, however, if this difficulty be overlooked, the broadcasting station is not protected. The American society does not control all of the American music by any means, and only controls a portion of foreign music. There is another organization in this country known as Associated Music Publishers (Inc.), which claims to control some 600,000 foreign titles, about 10 per cent of which are registered in the United States and have copyright protection. A large number of stations have felt it necesary to take out licenses from this organization which has made a demand upon virtually all of them. There is still a third organization which during the past 18 months has appeared on the scene, Elkan-Vogel Co., of Philadelphia, which claims to have the grand performing rights on French music. So far as foreign music is concerned, the license of the American society gives protection, or is supposed to give protection, on music controlled by similar organizations in Brazil, Denmark, Finland, France, Great Britain, Hungary, and Sweden.

The CHAIRMAN. For the benefit of the record I would like to call your attention to the fact that I wrote a letter to the Elkan-Vogel organization in Philadelphia and the Associated Music Publishers

(Inc.), to come here on Friday so I could derive the benefit of their suggestions and advice and cross-examine them. I never received an acknowledgment of the letter, nor did they appear.

Mr. CALDWELL. They have never appeared, I believe, at any previous hearing.

This, however, does not cover all the music in all these countries. For example, three important English publishing houses do not belong to the English society—Stainer & Bell, Novello & Co., Gould & Co. The very important music of Germany and Austria is in an unsettled state. A few German and Austrian publishers are represented by this second organization, the Associated Music Publishers. There is still another organization known as the Society of European State Authors and Composers, which controls music which is not covered by the license of the American society, including the Society of Spanish Authors and Composers, the Society of German Stage Authors, and miscellaneous publishers. You will notice that the Italian music is not included in the lists I have mentioned. You can readily see what would happen if all foreign music were given automatic copyright protection in this country and the number of new organizations broadcasters might have to deal with.

To return to American music, I want to tell you briefly what one broadcasting organization has felt it necessary to do to protect itself. It is true that it is the largest, but its problems are no different in kind than that of every station. In addition to securing licenses from the American society and the Associated Music Publishers, it has found it necessary to secure 205 other licenses from other organizations, mostly American-controlled music of one sort or another which is commonly necessary to the giving of programs which the public wants. This organization has to maintain a large department of employees to check every individual number or every program. Even with all this care, it suffers occasional claims for infringement. I know of one instance where the leader of the Navy Band, who is a composer himself, could not play his own number over a broadcasting station, because the publisher of his music was not a member of this society, until he had gone to extreme lengths to obtain special permission. There is music which no broadcaster can get permission to broadcast. This includes MacDowell's "To a Wild Rose."

The CHAIRMAN. With respect to MacDowell's music, is not that due to the fact that he left that in his will and bequeathed that to his wife to be published only by one individual?

Mr. CALDWELL. That is right—to be published by Arthur Smith of Boston.

I trust that you will appreciate from what I have told you, what a problem is faced by the small broadcasting station which can not possibly maintain a sufficient staff to protect itself. A small station may be playing phonograph records for a large part of the day as many of them have to, and in so doing may run counter to the performing rights of a large number of organizations.

I have told you of the evils suffered by the broadcasting industry in the present situation. It is not so easy to tell you what the remedy should be. In view of the conflicting interests involved, and the uncertainty as to what provisions you may find necessary to protect the composer from the publisher, I think it will be best

if I simply give a brief statement of the different remedies which have been proposed at one time or another in the past and not attempt to make any specific recommendation.

It has been proposed from time to time that the law should be amended so as to make a combination such as the American society illegal.

We have already discused that and I have assumed that it is an economic necessity for the author and composer.

It has been proposed from time to time that the law should be amended so as to make a combination such as the American society illegal. In fact, such a proposal was made on the floor of the House last year. In opposition to this it is claimed by the composers that for them the society is an economic necessity, since the individual composer can not, as a practical matter, protect himself against unauthorized performances of his work. I am not sure whether the broadcasters would not be better off if they had to deal with competing music publishing houses. In view of the position taken by the composers, however, I am willing to assume, for the purpose of this hearing at least, that their claim is correct and that they do need such an organization. I may say in passing that several years ago there were several attempts to have the American society declared an illegal monopoly. For example, the motion-picture people filed a complaint against the society before the Federal Trade Commission, which on January 2, 1923, announced its conclusions that the case was not one calling for the exercise of the commission's corrective powers. (Hearings on S. 2600, April, 1924, pp. 195–196.) In 1918 an action was brought by the corresponding organization in England, Performing Rights Society (Ltd.) against one Thompson, in the High Court of Justice, King's Bench Division (34 T. L. R. 351. The legality of the society, its objects and methods were put in question, and the court upheld the society. (Hearing on S. 2600, p. 197.) An action was brought on behalf of the motion-picture exhibitors to restrain the society from demanding license fees from the plaintiff, in a case known as One hundred and seventy-fourth Street and St. Nicholas Avenue Amusement Co. *v.* George Maxwell (109 N. Y. S. 895). (Hearings on S. 2600, p. 189.) This also resulted in a victory for the society. On the other hand, in the case entitled United States *v.* Consolidated Music Corporation et al., pages 18–320, in the United States District Court for the Southern District of New York, the Government sought to enjoin an alleged unlawful conspiracy in violation of the Sherman Antitrust Act against six music publishers, who it was claimed had combined to fix royalties, and to make certain requirements of manufacturers of mechanical musical devices.

Judge Augustus N. Hand wrote an opinion dated February 27, 1932, which found that the practices of the defendants were unlawful. (Hearings on S. 2600, 264–265.) In Harms et al. *v.* Cohen (E. D. Pa., March 25, 1922) (279 Fed. 276) it was held that it is no defense to a suit for infringement of copyright of musical selections that the authors, composers, and publishers have formed an unlawful combination in violation of the Sherman Antitrust Act; that the copyright is an intangible thing and the right to perform a musical composition under a copyright is not "trade or commerce," and such combination of composers, authors, and publishers under

which extortionate license fees are demanded for public performances for profit of musical numbers copyrighted by the various members does not constitute a violation of the Sherman Antitrust Act. This was a suit brought against a moving-picture theater owner. (See also Standard *v.* Sanitary Manufacturing Co., 226 U. S. 20; U. S. *v.* Motion Picture Patent Company, 235 Fed. 800; Ferris *v.* Froham, 223 U. S. 424; Standard Oil Co. of Indiana et al. *v.* United States, 283 U. S. 163.)

On the whole, it appears from the decisions so far rendered that the society has successfully resisted the charge that it is an illegal combination. This has been due to reasoning based partly on the fact that a copyright is in itself a monopoly and partly on the view that interstate commerce was not involved. I do not know what the courts would hold to-day if a showing were made as to the restraint placed by such a combination on broadcasting. Broadcasting is clearly interstate commerce; a number of courts have so held.

Another type of remedy proposed is that which has been adopted by a number of foreign countries. In these countries, the existence of such a combination is recognized, but the combination is subjected to certain restrictions and regulation.

The first country to enact regulation along this line was, I believe, Italy, which adopted a statute on June 14, 1928, providing that as to certain classes of music the broadcaster had the right to broadcast it to the public, but was under the obligation to pay to the copyright owner an equitable compensation, the amount of which was to be determined by an arbitration commission (hearings on H. R. 12549, before Senate Committee on Patents, 1931, p. 71; Journal of Radio Law, Vol. I, p. 161), a member of which would be the minister of communications in Italy.

New Zealand adopted the same theory in a law passed October 9, 1928, limited, however, to the broadcasting of works of a dramatico-musical character. Incidentally, Russia, under a decree of April, 1927, provided that broadcasters might broadcast certain musical and dramatic works without providing any compensation at all.

Since then both Norway and Canada have followed the example of Italy.

The CHAIRMAN. Do they apply the rule to their own composers or to foreign composers?

Mr. CALDWELL. Yes, sir; unless they have changed that recently. The last periodical I have examined indicates it is still the law, but I do not want to be held accountable for what has happened in the recent past.

Norway is one of the European countries in which broadcasting has been in the hands of private broadcasters. In Norway there was a continuous legislative struggle between the broadcasters on the one hand and the copyright owners on the other, which resulted in protracted legislative deliberations from 1925 until June 6, 1930, when the law now in effect was finally passed. This law provided the following:

> When one year has passed since the first publication of the work, the ministry having authority may (subject to the provisions of the last paragraph of article 13) authorize the broadcasting of the work, if the author and the broadcasting company are unable to reach an agreement. In such case the ministry will fix the amount of compensation to which the author is entitled.

If a dramatic work or a musical composition of substantial length is involved, the ministry shall not grant the authorization unless the work has been played in Norway. (Journal of Radio Law, vol. 1, pp. 421-423.)

The Canadian statute is even more striking. It was passed on June 9, 1931, after hearings in which the American society played a prominent part:

Each association, society, or company which carries on in Canada the business of acquiring copyrights of dramatico-musical or musical works or of performing rights therein, and which deals with or in the issue or grant of licenses for the performance in Canada of dramatico-musical or musical works in which copyright subsists, shall, from time to time, file with the minister at the copyright office:

(a) *Lists of all dramatico-musical and musical works, in respect of which* such association, society or company claims authority to issue or grant performing licenses or to collect fees, charges or royalties for or in respect of the performance of such works in Canada; and

(b) Statements of all fees charges or royalties which such society, association or company proposes from time to time or at any time to collect in compensation for the issue or grant of licenses for or in respect of the performance of such works in Canada.

Whenever in the opinion of the minister, after an investigation and report by a commissioner appointed under the inquiries act, any such society, association, or company which exercises in Canada a substantial control of the performing rights in dramatico-musical or musical works in which copyright exists, unduly withholds the issue or grant of licenses for or in respect of the performance of such works in Canada, or proposes to collect excessive fees, charges, or royalties in compensation for the issue or grant of such licenses, or otherwise conducts its operations in Canada in a manner which is deemed detrimental to the interests of the public, then and in any such case the governor in council on the recommendation of the minister is authorized from time to time to revise, or otherwise prescribe the fees, charges, or royalties which any such society, association, or company may lawfully sue or collect in respect of the issue or grant by it of licenses for the performance of all or of any such works in Canada.

No such society, association, or company shall be entitled to sue for, or *collect any fees, charges, or royalties* for or in respect of licenses for the performance of all or of any such works in Canada which are not specified in the lists from time to time filed by it at the copyright office as herein provided, nor to sue for or collect any fees, charges, or royalties in excess of those specified in the statements so filed by it, nor of those revised or otherwise prescribed by order of the governor in council. (Journal of Radio Law, Vol. I, pp. 638-641.)

The CHAIRMAN. Do you realize what that would cost the society if we attempted that in the United States? If they have two or three million songs, and they have to pay a registration fee in Canada——

Mr. CALDWELL. Of course they must be originally registered anyway, but this simply called for catalogues which they could file in bulk and not file by number. The society is forbidden under that law to collect any fees other than those shown in the list of tariffs or those decided upon by the Government in case of a dispute.

It has been this type of law and the school of thought which believes that broadcasting is of sufficient social importance to require a somewhat different rule than where public performances are given to limited audiences in theaters, where an admission fee is charged, that led to the provision in the Rome convention for the protection of literary and artistic property in 1928. This provision is as follows:

(1) The authors of literary and artistic works enjoy the exclusive right to authorize the communication of their works to the public by radio diffusion (broadcasting).

(2) It belongs to the national legislatures of the countries of the union to regulate the conditions for the exercise of the right declared in the preceding paragraph, but such conditions shall have an effect strictly limited to the country which establishes them. They can not in any case adversely affect the moral right of the author, nor the right which belongs to the author of obtaining an equitable remuneration fixed, in default of amicable agreement, by competent authority.

In other words, the Rome convention expressly recognizes the right of each country to adopt a different rule in the case of broadcasting than it adopts in the cases of industries where payment is received directly from the audience which enjoys the performance.

This leads directly into a question upon which we can be somewhat more specific in our position. From what I have already said, you will readily see the importance to the broadcaster of being able to ascertain what musical compositions are protected by copyright and what are in the public domain. This is why we have so vigorously urged that where copyrighted works are published, they must be accompanied by a printed notice of copyright, and also that they must be registered in a central office of such as is now done under the present copyright act. The term of copyright protection must also be a definite term of years so that the broadcaster or other user of music can tell when the work passes into the public domain and is free for use by anyone.

Naturally, the small broadcaster is not going to be able to conduct his own research at the copyright office. We fully appreciate, furthermore, the difficulties and imperfections of the present system which do not make it any too easy to determine what music is in the public domain. Nevertheless, it is the hope and purpose of the broadcasters, through their association or some other organization acting in their behalf, to compile and collect a trustworthy list of musical compositions in the public domain which will be available to all broadcasters. There is an enormous amount of music in the public domain, but even now it is hard enough to determine what it is.

If the floodgates are completely opened with automatic copyright in the sense which it is in force in Europe, together with a copyright term consisting of the life of the author plus 50 years so that no one can tell when the term ends, there will hardly be any public domain and there will in reality be almost perpetual copyright.

I confess that I am not able to understand the reasoning of those who urge that copyright is a natural right, in fact, a sancrosanct property right which justifies all this. The Supreme Court of the United States has held that it is not a natural right but a statutory right. Committees of Congress in reporting copyright statutes have said the same thing; the Constitution itself makes it clear, since it gives power to Congress only to give protection for a limited time. Congress does not have to give this protection at all; there is nothing in the Constitution which requires it, and if it chooses to give this protection, it can give something less than the whole and subject it to restrictions and regulations. Otherwise, every copyright act we have ever had would be invalid, since they all impose some sort of restriction on the author's right.

The truth is, of course, that the extent of copyright protection is to be judged, like everything else, by the best interests of the public. This is only just, since the purpose of such legislation is not simply

to benefit the author, but to benefit the author in so far as this will also benefit the public. No literary or musical work is completely original; in all cases, the author or composer draws heavily on his contemporaries and on the literature and music which have been handed down to us from the past, a public inheritance upon which we may all draw at will.

Our law frequently suffers from figures of speech. No better instance of this can be found than that of the use of the word "property" with reference to the statutory rights conferred upon the author by copyright legislation. By use of the word "property" many persons who have appeared before this committee seem to think that they have demonstrated that the same rules should apply (when they seem advantageous) as applied to a pair of shoes or other personal property. The fact is, of course, that copyright protection is not given to the tangible reproduction of the author's thought, such as a book which may be sold to anyone and which is in itself personal property. Copyright protects something intangible, the author's thought, which can not be known or recognized unless it is somehow recorded; it is more a right not to have others profit from the author's thought without his consent.

We do not desire to stand in the way of the author's wish to have the United States enter the international union if the broadcasters' vital interests can at the same time be protected. Last year, in connection with the Vestal bill, we proposed certain definite amendments which in substance took away virtually all rights to sue for infringement from anyone who had not fulfilled the requirements of notice and registration. There may be some other ways of accomplishing the same thing.

There are other issues in which the broadcasters are interested as users of copyrighted works, but time will not permit me to take them up in detail. For example, if we enter the international union, the United States will be under an obligation to give legislative protection to what is known as the author's moral right. As described in the Rome convention (Ar. 6 bis) this is:

> The right to claim the paternity of the work, as well as the right to object to every deformation, mutilation, or other modification of said work, which may be prejudicial to his honor or to his reputation.

No one knows exactly where this moral right begins and ends. As interpreted by some, it is innocuous and we can all agree with it. As interpreted by others, it is extremely unjust and dangerous. The broadcaster is interested only in seeing that any legislation on this subject does not prevent him from any reasonable arrangement or adaptation of a copyrighted work for broadcasting where he has a license from the copyright owner to broadcast it, or from any of the usual incidents of broadcasting.

The CHAIRMAN. But any sensible man or woman would have objection to some static noises that diminish or affect a work of art, but what they mean by that is that you, as a broadcaster, or some one else, shall not have the right to take that work and mutilate or destroy it and bring the author into disrepute. You can take any work by any man or woman, take out a few lines, read them, and destroy the work when it is taken out of its context.

Mr. CALDWELL. All we want is the usual protection that goes with radio broadcasting. It will be adapted slightly or to the extent necessary for broadcasting.

The CHAIRMAN. I guess they mean an instance where a drama is brought over to this country from Europe, and it is so altered that he would not recognize it and he is not the father of it as presented.

Mr. CALDWELL. Another issue that is likely to arise has to do with giving phonograph records copyright protection as such. Phonograph record manufacturers do not enjoy this protection at present. If a station broadcasts a phonograph record of a copyrighted musical composition, it is, of course, responsible to the copyright owner but not to the manufacturer of the phonograph record. It will probably be urged that you should give the latter such protection. This would be very prejudicial to the smaller broadcasting stations, particularly those located in small towns which do not have adequate program resources to support a program of live talent. Such a broadcaster would then be subject to two license fees, one to the music copyright owner and one to the phonograph record copyright owner. Or he may find that he is forbidden to play phonograph records altogether. I am speaking, of course, of ordinary commercial phonograph records sold to the public. I do not see that it makes any difference to the broadcaster whether you extend copyright protection to the manufacturer of electrical transcriptions specially prepared for broadcasting and not sold to the public.

A word more about the International Union. Last year and in previous years any number of organizations represented to this committee that it was absolutely imperative that the United States adhere to the union immediately, or at least prior to August 1, 1931, and that—

> If the United States fails to enter the union, the evidences are convincing that its authors, publishers, and producers will be subject to retaliatory legislations abroad within a very few months. (Report of House Committee on Patents, H. R. 12549, 71st Cong., 2d sess., p. 4.)

The threatened calamity has not happened and does not seem likely to happen. So far in these hearings this year we have heard nothing more about the danger of retaliatory legislation. I do not say this for the purpose of arguing against adhering to the union but simply to point out that there is no need for rash or precipitate action. The United States may want to place reservations on its entry into the union; if it does, it will not be the only country to attempt to do so. The Canadian copyright acts is, as I read it, not at all consistent with the interpretation of automatic copyright which has been urged before this committee, yet Canada is a member of the union. Section 9 of the Canadian act of June 9, 1931, provides for the registration of a grant of an interest in a copyright, but if such grant is not registered any assignment thereunder is void (see Canadian Performing Right Society (Ltd.) *v.* Famous Players Canadian Corporation (Ltd.), 1927, 60; L. R. 614, affirming 60 O. L. R. 250), holding that under copyright act (R. S. C., 1927, ch. 32, secs. 40–43), a grantee of an interest in a copyright can not maintain an action under the act unless his grant has been registered. Even Turkey has placed a reservation on its adherence to the Rome convention, although I understand that the adherence has been rejected on that account. The United States may desire suffi-

ciently to guard its entry into the union so that protection will not be given to foreign works which are now in our public domain.

The CHAIRMAN. As far as America is concerned, I recall a statement given by Mr. Romberg, who told me that 95 per cent of all music rendered over the radio stations of our country is American composers' work and only 5 per cent foreign composers. How can we protect you with the 5 per cent? I think you are unduly alarmed when you speak of foreign competition.

Mr. CALDWELL. I think those figures are somewhat misleading. The 5 per cent sounds small, but I think if you took that out, you would miss it. That 5 per cent covers the foreign classical music. In eight hours of broadcasting 95 per cent of this music may be the work of American composers, but the high-class chamber music that comes at the dinner hour is largely European music.

The CHAIRMAN. You are being protected at the present time against this 5 per cent?

Mr. CALDWELL. No. I have already mentioned the two or three organizations that control that music.

The CHAIRMAN. What legislation would you recommend to stop that?

Mr. CALDWELL. In one respect, we do not want to see it get any worse and see the automatic copyright extended to foreign works. I do not know how you could force all the composers to get into one organization so as to have only one to deal with.

The CHAIRMAN. Now, in one breath you are speaking against the union of all together, because you say it would be a monopoly, and now you say you do not know how you could force them all together. It sounds inconsistent.

Mr. CALDWELL. I think it would be a fine thing to deal with them all in one organization subject to regulation to prevent abuse.

The CHAIRMAN. Like they have in Italy?

Mr. CALDWELL. Yes, sir. I do not mean to propose any specific remedy on that; my judgment is not mature enough on that. But there should be some protection against the abuses that go with the power of these organizations.

Now, I turn to the interests of broadcasters as creators of artistic works. As you know, many stations, and particularly the larger ones, have large staffs engaged in the production of programs, in arranging and adapting music, in writing skits, dialogues, and plays, and so forth. It is a distinctly creative work, analogous to what the moving-picture producer does. The moving-picture producer must get a license from the copyright owner of a novel, but once having done so and having turned it into a moving-picture production, he can get copyright protection on that production. Similarly, if I make an arrangement and selection of a dozen songs in a book, having secured the necessary permission of the persons owning the copyright on those songs, I can also get a copyright on the resulting book. The same thing can be done on works in the public domain, so far as the original adaptation or arrangement is concerned. We feel that the broadcaster should have the same protection, particularly in view of the possible advent of television. In other words, the broadcaster, having secured from the copyright owner the exclusive right to adapt a work for broadcasting and to communicate it to the public by broadcasting, and having made a

large expenditure in adapting it and in securing artists to perform it, should be protected against unauthorized use of it by others.

Now, I do not mean that the broadcaster wants to collect royalties from hotel or restaurant proprietors or other persons operating receiving sets who do not profit from a direct admission fee. We believe that no one, either author, publisher, or broadcaster, should have such a right. The person listening to such receiving sets are part of the broadcaster's audience, to reach whom the advertiser pays the broadcaster. Such persons receive much more than merely a bare musical composition; they receive the benefit of large expenditures by the broadcaster in creating a satisfactory performance of the composition, and the copyright owner is not entitled to collect royalties for all this. If anyone is to have such a right, it should be the broadcaster.

The broadcaster is interested in situations of a very different sort, such as the following:

1. The broadcaster broadcasts the rendition of a song by a very famous artist and A reproduces the performance on phonographic records by attaching suitable apparatus to a receiving set and sells them.

2. Or A takes the performance as received over a receiving set and sends it out to subscribers over telephone or electric power lines for a fixed monthly fee.

3. Or A opens up a theater where he charges admission and uses the performance as rendered by the receiving set to entertain the audience.

This last instance is a very real possibility if television develops and if television receiving apparatus proves too cumbersome or expensive for the home. It will then go into the theater where it might conceivably replace the motion picture. I do not know whether this is going to happen or not.

The other two instances are not imaginary; they have already happened.

The CHAIRMAN. How would you do justice to the author or composer who sells to you, as the broadcasting medium, your broadcasting rights, and then, through the invention of television, this very thing that goes over the wire to the several local stations can be projected in the same way on a screen in the moving-picture houses all over the country? You are destroying the motion-picture industry, and you are collecting royalties and fees for yourself. Where does the author and composer come in unless he makes an agreement with you which in one payment will repay him for everything?

Mr. CALDWELL. I think we ought to pay him and that he will collect his payment from us.

The CHAIRMAN. Instead of going around to each subdivision?

Mr. CALDWELL. Or that we should both have the right, as in the motion-picture industry now, that he can collect from the exhibitor, except in the motion-picture business he sells that right.

The case of piracy of a broadcast program by the phonograph record method has gone to a high court in Germany where the broadcaster was upheld in his right to enjoin it. (See Columbia Law Review, December, 1930, p. 1104.) The use of programs over

telephone lines is occurring right now in three important American cities and in several European cities.

They set up a receiving set and take the program and rebroadcast it and charge the subscriber for it. The broadcaster pays for the program and these people make money out of it. In several European countries the broadcasters have been given statutory protection against these practices.

I concede that the subject seems complicated, but believe that satisfactory provisions can be worked out based on the theory that the broadcaster, having obtained a right from the copyright owner, is entitled to be protected in the exercise of that right both as against the copyright owner himself and as against third parties who utilize the broadcaster's production for direct profit. The American society, which also foresees the growing importance of the subject, is doing its utmost to prevent its recognition, e. g., by clauses in its license agreements, as I have already pointed out. As long as it has the whip hand it will force broadcasters to surrender this right on paper unless there is specific statutory protection.

In concussion, I must apologize for this rather lengthy discussion of the broadcasters' position on copyright legislation. I know that I speak for the whole industry in commending this committee on the open-mindedness with which it is conducting this inquiry and its desire to understand the complicated problems which modern scientific developments have introduced into this branch of the law.

The points in which broadcasters are interested may be summarized as follows:

1. A trustworthy and practicable means by which copyrighted works can be distinguished from works that are in the public domain. In the present state of our knowledge we believe that copyright notice, registration, and definite term of copyright protection are all necessary for this purpose, but we shall maintain ourselves open minded and receptive to any substitute which adequately accomplishes the same purpose.

2. Protection against penalties, particularly for innocent infringement. This means—

(*a*) That the minimum damage clause should either be made to correspond with the actual damages suffered or be eliminated. Penalties, as distinguished from damages, should be payable to the United States Government, not to private parties.

(*b*) That the single-performance principle should be recognized, so that only the person originating the performance will be liable and no person who does not have control over what music will be played can be held.

3. Protection against abuses of power on the part of combinations of copyright owners.

4. If the author's so-called moral right is to be recognized, protection against the exercise of it against the usual incidents of broadcasting.

5. That ordinary commercial phonograph records shall not be given copyright protection as such.

6. Protection of broadcast programs from piracy.

The CHAIRMAN. I want to take this opportunity, Mr. Caldwell, of thanking you on behalf of the committee for your very instructive

and illuminating address. It is a very wonderful address, and I have learned a great deal therefrom.

Do any gentlemen of the committee desire to ask any questions?

Mr. RICH. You mentioned a fear in connection with your business, namely, that composers and authors should not have an automatic copyright, but that it should be registered with the Government as a means of recognizing their claims.

Mr. CALDWELL. Yes, sir. What we want is a sure means of knowing what music is protected and what is not. To us it seems notice and registration are necessary.

The CHAIRMAN. In other words, your whole objection to the automatic copyright is that any man may claim he is the author and composer of music and you know nothing about it. When it is registered you know there is something registered of which you can always take notice?

Mr. CALDWELL. Yes, sir.

The CHAIRMAN. Are there any other gentlemen who wish to be heard? If not, we will adjourn the meeting until to-morrow morning at 10 o'clock.

(Whereupon, at 12.15 o'clock p. m., the hearing was adjourned until to-morrow, Tuesday, February 16, 1932, at 10 o'clock a. m.)

80TH CONGRESS
1ST SESSION

H. R. 1270

IN THE HOUSE OF REPRESENTATIVES

JANUARY 23, 1947

Mr. HUGH D. SCOTT, Jr., introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Act entitled "An Act to amend and consolidate the Acts respecting copyright", approved March 4, 1909, as amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to amend and consolidate the Acts respecting copyright", approved March 4, 1909, as amended, be amended as follows: Amend section 1 by adding the following new subsection (f):

"(f) To make or to procure the making, if the copyrighted work or any component part thereof be an acoustic recording, of any duplicated or recaptured recording thereof on a disk, film, tape, wire, record, or other device or instrumentality, by or from which, in whole or in part, the

sound recording on the copyrighted work may in any manner, or by any method, be reproduced or communicated acoustically; to publish and vend such recordings of sound; and to communicate and reproduce the same acoustically to the public, for profit, by any method or means utilizing any such recording in, or as part of, any transmitting or communicating apparatus: *Provided, however,* That, except if the recorded sound be part of a copyrighted motion picture, no exclusive right other than contained in this subsection (f) shall exist in respect of any acoustically recorded work."

Amend section 5 by striking out the present subsection (1) and substituting therefor the following subsection:

"(1) Motion pictures, with or without sound."

Amend section 5 by striking out the present subsection (m) and substituting therefor the following subsection:

"(m) Recordings which embody and preserve any acoustic work in a fixed permanent form on a disk, film, tape, record, or on any and all other substances, devices, or instrumentalities, by any means whatever, from or by means of which it may be acoustically communicated or reproduced."

Amend section 6 to read as follows:

"SEC. 6. That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain, or of copyrighted works when produced with the consent of the proprietor of the copyright

in such works, or works republished with new matter, shall be regarded as new works subject to copyright under the provisions of this Act; but the copyright secured in any such new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works, or to secure or extend copyright in such original works: *Provided, however,* That acoustic recordings of any copyrighted musical work made pursuant to the provisions of subsection (e) of section 1 upon payment to the copyright proprietor of the royalty specified in such subsection whenever the owner of such musical copyright has used or permitted or knowingly acquiesced in the use of such copyrighted musical work upon the parts of instruments serving to reproduce the same mechanically, shall not be regarded as new works subject to copyright under the provisions of this title unless the proprietor of such musical copyright has consented to the securing of copyright in such recording."

Amend section 11 to read as follows:

"SEC. 11. Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or a dramatico-musical composition; of a

title and description, with not less than five prints taken from different sections of the film, accompanied by corresponding portions of its acoustic recording, if any, if the work be a motion picture with or without sound; or a photographic print, if the work be a photograph; of a title and description, with the record or instrumentality containing the recorded sound, if the work be an acoustic recording; or of a photograph or other identifying reproduction thereof if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 12 and 13 of this title, where the work is later reproduced in copies for sale."

Amend section 12 by adding the following:

"For the purpose of this title, any duplicated or recaptured recording on a disk, film, tape, wire, record, or other device or instrumentality, by or from which, in whole or in part, the sound recorded on the copyrighted work may in any manner, or by any method, be reproduced or communicated acoustically, shall be deemd a copy of the work."

Amend section 15 by adding the following:

"Of the acoustic recording, except if such recording be part of a copyrighted motion picture with sound, any du-

plicated or recaptured recording thereof given protection under section 1, subsection (f), of this title, shall be manufactured by a process wholly performed within the limits of the United States."

This Act shall take effect as of July 1, 1947.

80TH CONGRESS
1ST SESSION

H. R. 1270

A BILL

To amend the Act entitled "An Act to amend and consolidate the Acts respecting copyright", approved March 4, 1909, as amended.

By Mr. HUGH D. SCOTT, JR.

JANUARY 23, 1947
Referred to the Committee on the Judiciary

89TH CONGRESS
1ST SESSION

H. R. 4347

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 4, 1965

Mr. CELLER introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

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

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

TITLE 17—COPYRIGHTS

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

J. 35-001-L——1

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

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

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

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

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

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

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

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

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

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other

modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

The terms "including" and "such as" are illustrative and not limitative.

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

"Literary works" are works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

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

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

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

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

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

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

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

A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work, such as forewords, introductions, prefaces, pictorial illustrations, maps, charts, tables, editorial notes, tests and answers, bibliographies, appendixes, and indexes.

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

To "transmit" a performance or exhibition is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

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

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

§ 102. Subject matter of copyright: In general

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures;

(7) sound recordings.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

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

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

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

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

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

(4) the work comes within the scope of a Presidential proclamation. Whenever he finds it to be in the national interest, the President may in his discretion extend, by proclamation, protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or

sovereign authority of any designated foreign nation, or which are first published in any designated foreign nation, and he may revise, suspend, or revoke any proclamation or impose any conditions or limitations on protection under a proclamation.

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

(a) Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment.

§ 106. Exclusive rights in copyrighted works

(a) GENERAL SCOPE OF COPYRIGHT.—Subject to sections 107 through 114, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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

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

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

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

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sulptural works, to exhibit the copyrighted work publicly.

(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

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

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

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

(A) to perform or exhibit it at a place open to the public

or at any place where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered;

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

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.

§ 108. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(a)(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(a)(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to exhibit that copy publicly to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

§ 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction;

(2) performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work, or exhibition of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

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

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

(5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission;

(6) the further transmitting of a transmission embodying a performance or exhibition of a work by relaying it to the private rooms of a hotel or other public establishment through a system of loudspeakers or other devices in such rooms, unless the person responsible for relaying the transmission or the operator of the establishment:

(A) alters or adds to the content of the transmission; or

(B) makes a separate charge to the occupants of the private rooms directly to see or hear the transmission;

(7) communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmissions; or

(B) the transmission thus received is further transmitted to the public.

§ 110. Limitations on exclusive rights: Ephemeral recordings

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to

make no more than one copy or phonorecord of the work solely for purposes of the organization's own lawful transmissions or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only.

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

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

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

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

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

§ 112. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 106(a), and do not include any right of performance under section 106(a)(4).

(b) The exclusive right of the owner of copyright in a sound recording to reproduce it under section 106(a)(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other

sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(a)(4).

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

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106(a), to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

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

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

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

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) Failure to serve or file the notice as required in clause (1) forecloses the possibility of a compulsory license and, in the ab-

COPYRIGHT

HEARINGS

HELD BEFORE

THE COMMITTEE ON PATENTS

HOUSE OF REPRESENTATIVES

SIXTY-NINTH CONGRESS

FIRST SESSION

ON

H. R. 10434

A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, AND TO PERMIT THE UNITED STATES TO ENTER THE INTERNATIONAL COPYRIGHT UNION

COMMITTEE ON PATENTS

SIXTY-NINTH CONGRESS

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KNUD WEFALD, Minnesota.	

MARY E. NULLE, *Clerk*

APRIL 15, 16, 29, and 30, 1926

WASHINGTON
GOVERNMENT PRINTING OFFICE
98974 1926

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Only one registration shall be necessary in the case of any work which, if made, shall inure to the benefit of the author as well as all persons claiming under him.

The Copyright Office shall have no discretion to refuse to receive such application or to refuse to register such work upon such application being made.

If any person other than the author of any work shall apply for registration under this section, he shall register at the time of making said application all instruments under which he claims ownership of such copyright or right or rights thereunder.

SEC. 37. The form of application for registration shall state to which of the following classes the work to be registered belongs. The classes of works enumerated below are expressly recognized as subject matter of copyright, but the following specifications shall not be held to limit the subject matter of copyright:

(a) Books, including composite and cyclopedic works, directories, gazetteers, and other compilations, abridgments, adaptations, and translations;

(b) Periodicals, including newspapers;

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

(d) Dramatic compositions, dramatizations, and dramatico-musical compositions;

(e) Musical compositions;

(f) Maps;

(g) Works of art;

(h) Reproductions of a work of art, including engravings, lithographs, photoengravings, photogravures, casts, plastic works, or copies by any other methods of reproduction;

(i) Drawings and plastic works of a scientific or technical character;

(j) Photographs;

(k) Prints and pictorial illustrations, including prints or labels for articles of manufacture;

(l) Motion-picture photoplays;

(m) Motion pictures other than photoplays;

(n) Scenarios (so-called continuities) for motion pictures;

(o) Works of architecture, models, or designs for architectural works;

(p) Choreographic works and pantomimes, the scenic arrangements or acting form of which is fixed in writing or otherwise;

(q) Phonographic records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced;

(r) Works not specifically hereinabove enumerated.

SEC. 38. The copy deposited for registration may either be printed, typewritten, or be in legible handwriting if the work be a book or a dramatic, musical, or dramatico-musical composition; a scenario of a motion picture; a lecture, sermon, or address, or the acting form of a choreographic work or a pantomime. For a photograph, there shall be deposited one print from the negative; for any work of art, or for a model or design for a work of art, or a drawing or plastic work of a scientific or technical character, or any work not particularly specified in this section, a photograph or other identifying reproduction; for a motion picture, the title, and a description or synopsis or prints sufficient for identification; for an architectural work, a photographic or other identifying representation of such work and such drawings as are necessary to identify it. For a record, roll, or other contrivance by means of which sound may be mechanically reproduced, a description or copy of the music which has been recorded thereon, which shall differentiate and identify the particular rendition so recorded and its performer.

SEC. 39. The register of copyrights upon receipt of such application and such copy or identifying matter and fee shall make a full and complete record of the copyright claim and send a certificate of registration under the seal of the Copyright Office to the person indicated in the application.

SEC. 40. In the case of any work in connection with which application for registration of copyright is filed, where a copy thereof otherwise required or permitted which by reason of its character, bulk, fragility, or because of its dangerous ingredients, can not expediently be kept on file, the register of copyrights may determine that there shall be deposited with the application for registration, or on subsequent notice by registered mail, in lieu of a copy of such work, such identifying photographs or prints, together with such written,

90TH CONGRESS } HOUSE OF REPRESENTATIVES { REPORT
1st Session } { No. 83

COPYRIGHT LAW REVISION

MARCH 8, 1967.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. KASTENMEIER, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany H.R. 2512]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2512) for the general revision of the copyright laws, title 17 of the United States Code, and for other purposes, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of H.R. 2512 is to enact a general revision of the U.S. copyright law, constituting title 17 of the United States Code, in light of the profound technological and commercial changes that have taken place since the 1909 revision. The present bill is an outgrowth of H.R. 4347 which was introduced on February 4, 1965, in the 89th Congress. After extensive hearings and thorough deliberations on H.R. 4347 by Subcommittee No. 3, the committee reported favorably an amended version of H.R. 4347 (H. Rept. No. 2237, 89th Cong., second sess., Oct. 12, 1966). The present bill is substantially identical with H.R. 4347 as so amended and reported by the committee. The changes proposed by the committee from H.R. 4347 as introduced, reflected consideration of a number of the issues as they became clarified by the hearings and subsequent discussions. The purpose of these proposed changes is indicated below in the sections of this report captioned "Summary of Principal Provisions" and "Sectional Analysis and Discussion." A comparative print showing (1) the reported bill, (2) existing law, and (3) the provisions of H.R. 4347, 89th Congress *as introduced* will be found in the section captioned "Changes in Existing Law."

extent of copyright protection in "works of applied art." The section takes as its starting point the Supreme Court's decision in *Mazer* v. *Stein*, 347 U.S. 201 (1954), and the first sentence of subsection (a) restates the basic principle established by that decision. The rule of *Mazer*, as affirmed by the bill, is that copyright in a pictorial, graphic, or sculptural work will not be affected if the work is employed as the design of a useful article, and will afford protection to the copyright owner against the unauthorized reproduction of his work in useful as well as nonuseful articles. The term "useful article" is defined in section 113(b) as "an article having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information." This is the same as the language used in the design bills introduced in the 1st session of the 89th Congress (H.R. 450, H.R. 3366, and S. 1237) and in the present Congress (H.R. 2886, H.R. 3542, and H.R. 6124).

The broad language of section 106(1) and of the first sentence of section 113 raises questions as to the extent of copyright protection for a pictorial, graphic, or sculptural work that portrays, depicts, or represents an image of a useful article in such a way that the utilitarian nature of the article can be seen. To take the example usually cited, would copyright in a drawing or model of an automobile give the artist the exclusive right to make automobiles of the same design?

The 1961 Report of the Register of Copyrights stated, on the basis of judicial precedent, that "copyright in a pictorial, graphic, or sculptural work, portraying a useful article as such, does not extend to the manufacture of the useful article itself," and recommended specifically that "the distinctions drawn in this area by existing court decisions" not be altered by the statute. The Register's Supplementary Report, at page 48, cited a number of these decisions, and explained the insuperable difficulty of finding "any statutory formulation that would express the distinction satisfactorily." The committee adopts the Register's conclusion that "the real need is to make clear that there is no intention to change the present law with respect to the scope of protection in a work portraying a useful article as such." It has therefore made no changes in section 113(a)(1), which states that proposition directly.

Clause (2) of section 113(a), which aroused no opposition during the hearings, is intended to clear up an uncertainty under the present law. Under the provision it would not be an infringement, where a copyrighted work has been lawfully published as the design of useful articles, to make, distribute or display pictures of the articles in advertising, in feature stories about the articles, or in news reports.

SECTION 114. SOUND RECORDINGS

As explained above in connection with section 102, the bill recognizes sound recordings as copyrightable works in themselves, and protects them against unauthorized duplication and the distribution of phonorecords duplicated without authority. Section 114 makes clear, however, that the owner of copyright in a sound recording is not given an exclusive right of public performance or rights against mere imitation of his recording without capturing the same sounds.

The provisions of section 114(a), limiting the exclusive rights in a sound recording to those specified by clauses (1) and (3) of section

106 and excluding "any right of performance under section 106(4)," proved to be controversial. As a practical matter, the question is whether radio and television broadcasters, community antenna systems, jukebox operators, background music services, and others who use phonorecords for public performances should have to pay royalties to the owner of copyright in the sound recording itself, as well as to the owner of copyright in the musical or literary work embodied in the recording.

At the hearings representatives of the American Federation of Musicians opposed the 1965 bill because of its failure to give performers an exclusive right in the public performance of sound recordings embodying their performance. They argued that performing musicians now suffer economic deprivation because of competing performances from their own records, and that the bill discriminates against them by denying exclusive rights under the statute while abolishing any vestige of protection under the common law. They asserted that opposition to the principle of a performing right in sound recordings is limited to competing economic interests who either do not want to share in remuneration from performances or do not want to have to pay any more than they do now. Their position was that this represents a "sharp moral issue" which some other countries have resolved in the performers' favor, and they proposed an amendment establishing a special performing right that would endure for 10 years and would be subject to compulsory licensing.

While the position of record producers on this question appeared somewhat more qualified, individual representatives of the industry spoke strongly in favor of recognizing full rights of public performance in sound recordings. They condemned the 1965 bill as inequitable in denying public performance rights to record producers who, they argued, are responsible for the most creative and valuable elements of sound recordings today. They recommended recognition of full performing rights in sound recordings, with ownership being divided between the record producer and the various performers involved.

Although there was little direct response to these arguments, it was apparent that any serious effort to amend the bill to recognize even a qualified right of public performance in sound recordings would be met with concerted opposition. The committee believes that the bill, in recognizing rights against the unauthorized duplication of sound recordings but in denying rights of public performance, represents the present thinking of other groups on that subject in the United States, and that further expansion of the scope of protection for sound recordings is impracticable. This conclusion in no way disparages the creativity and value of the contributions of performers and record producers to sound recordings, or forecloses the possibility of a full consideration of the question by a future Congress.

Subsections (b) of section 114 makes clear that statutory protection for sound recordings extends only to the particular sounds of which the recording consists, and would not prevent a separate recording of another performance in which those sounds are imitated. Thus, infringement takes place whenever the actual sounds that go to make up a copyrighted sound recording are reproduced in phonorecords by repressing, transcribing, recapturing off the air, or any other method. Mere imitation of a recorded performance would not constitute a

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copyright infringement even where one performer deliberately sets out to simulate another's performance as exactly as possible.

Section 114(c) state explicitly that nothing in the provisions of section 114 should be construed to "limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(4)." This principle is already implicit in the bill, but it is restated to avoid the danger of confusion between rights in a sound recording and rights in the musical composition or other work embodied in the recording.

SECTION 115. COMPULSORY LICENSE FOR PHONORECORDS

The provisions of section 1(e) and 101(e) of the present law, establishing a system of compulsory licensing for the making and distribution of phonorecords of copyrighted music, are retained with a number of modifications and clarifications in section 115 of the bill. Under these provisions, which represented a compromise of the most controversial issue in the 1909 act, a musical composition that has been reproduced in phonorecords with the permission of the copyright owner may generally be reproduced in phonorecords by anyone else if he notifies the copyright owner and pays a specified royalty.

As explained at pages 53 to 54 of the Register's Supplementary Report, the fundamental question of whether to retain the compulsory license or to do away with it altogether was a major issue during earlier stages of the program for general revision of the copyright law. At the hearings it was apparent that the argument on this point had shifted, and the real issue was not whether to retain the compulsory license but how much the royalty rate under it should be. Nevertheless, before considering the details of the compulsory licensing system, the committee considered the arguments for and against retaining the system itself.

On this question the record producers argued vigorously that the compulsory license system must be retained. They asserted that the record industry is a half-billion-dollar business of great economic importance in the United States and throughout the world; records today are the principal means of disseminating music, and this creates special problems, since performers need unhampered access to musical material on nondiscriminatory terms. Historically, the record producers pointed out, there were no recording rights before 1909 and the 1909 statute adopted the compulsory license as a deliberate antimonopoly condition on the grant of these rights. They argued that the result has been an outpouring of recorded music, with the public being given lower prices, improved quality, and a greater choice. The position of the record producers is that the compulsory license has avoided antitrust problems that have plagued the performing rights field, and for the same reasons has been adopted (and recently retained) in a number of foreign countries. They maintained that the dangers of monopolies and discriminatory practices still exist, and repeal would result in a great upheaval of the record industry with no benefit to the public.

The counterargument of the music publishers was that compulsory licensing is no longer needed to meet the special antitrust problems existing in 1909, and that there is no reason why music, alone of all copyrighted works, should be subject to this restriction. They main-

89TH CONGRESS
1ST SESSION

S. 1006

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 1965

Mr. MCCLELLAN (by request) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

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

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

TITLE 17—COPYRIGHTS

CHAPTER 1—SUBJECT MATTER AND SCOPE OF COPYRIGHT

J. 35-001-L——1

§ 101. Definitions

As used in this title, the following terms and their variant forms mean the following:

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

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

A person's "children" are his immediate offspring, whether legitimate or not, and any children legally adopted by him.

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

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

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

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

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

A "derivative work" is a work based upon one or more preexisting works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other

modifications which, as a whole, represent an original work of authorship, is a "derivative work."

A "device," "machine," or "process" is one now known or later developed.

The terms "including" and "such as" are illustrative and not limitative.

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

"Literary works" are works expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, or film, in which they are embodied.

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

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

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

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

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

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

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

A "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, illustrating, explaining, commenting upon, or assisting in the use of the other work, such as forewords, introductions, prefaces, pictorial illustrations, maps, charts, tables, editorial notes, tests and answers, bibliographies, appendixes, and indexes.

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

To "transmit" a performance or exhibition is to communicate it by any device or process whereby images or sounds are received beyond the place from which they are sent.

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

The author's "widow" or "widower" is the author's surviving spouse under the law of his domicile at the time of his death, whether or not the spouse has later remarried.

A "work made for hire" is:

(1) a work prepared by an employee within the scope of his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture, as a translation, or as a supplementary work, if the parties expressly agree in writing that the work shall be considered a work made for hire.

§ 102. Subject matter of copyright: In general

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures;

(7) sound recordings.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, but protection for a work employing pre-existing material in which copyright subsists does not extend to any part of the work in which such material has been used unlawfully.

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

§ 104. Subject matter of copyright: National origin

(a) UNPUBLISHED WORKS.—The works specified by sections 102 and 103, while unpublished, are subject to protection under this title without regard to the nationality or domicile of the author.

(b) PUBLISHED WORKS.—The works specified by sections 102 and 103, when published, are subject to protection under this title if—

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

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

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

(4) the work comes within the scope of a Presidential proclamation. Whenever he finds it to be in the national interest, the President may in his discretion extend, by proclamation, protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or

sovereign authority of any designated foreign nation, or which are first published in any designated foreign nation, and he may revise, suspend, or revoke any proclamation or impose any conditions or limitations on protection under a proclamation.

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

(a) Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise.

(b) A "work of the United States Government" is a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment.

§ 106. Exclusive rights in copyrighted works

(a) GENERAL SCOPE OF COPYRIGHT.—Subject to sections 107 through 114, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

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

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

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

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

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sulptural works, to exhibit the copyrighted work publicly.

(b) DEFINITIONS OF CERTAIN EXCLUSIVE RIGHTS.—

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

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

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

(A) to perform or exhibit it at a place open to the public

or at any place where a substantial number of persons outside of a normal circle of family and social acquaintances is gathered;

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

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright.

§ 108. Limitations on exclusive rights: Effect of transfer of particular copy or phonorecord

(a) Notwithstanding the provisions of section 106(a)(3), the owner of a particular copy or phonorecord lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.

(b) Notwithstanding the provisions of section 106(a)(5), the owner of a particular copy lawfully made under this title, or any person authorized by him, is entitled, without the authority of the copyright owner, to exhibit that copy publicly to viewers present at the place where the copy is located.

(c) The privileges prescribed by subsections (a) and (b) do not, unless authorized by the copyright owner, extend to any person who has acquired possession of the copy or phonorecord from the copyright owner, by rental, lease, loan, or otherwise, without acquiring ownership of it.

§ 109. Limitations on exclusive rights: Exemption of certain performances and exhibitions

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction;

(2) performance of a nondramatic literary or musical work, or exhibition of a work, by or in the course of a transmission, if the transmission is made primarily for reception in classrooms or similar places normally devoted to instruction and is a regular part of the systematic instructional activities of a nonprofit educational institution;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work, or exhibition of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work, otherwise than in a transmission to the public, without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

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

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

(5) the further transmitting to the public of a transmission embodying a performance or exhibition of a work, if the further transmission is made without altering or adding to the content of the original transmission, without any purpose of direct or indirect commercial advantage, and without charge to the recipients of the further transmission;

(6) the further transmitting of a transmission embodying a performance or exhibition of a work by relaying it to the private rooms of a hotel or other public establishment through a system of loudspeakers or other devices in such rooms, unless the person responsible for relaying the transmission or the operator of the establishment:

(A) alters or adds to the content of the transmission; or

(B) makes a separate charge to the occupants of the private rooms directly to see or hear the transmission;

(7) communication of a transmission embodying a performance or exhibition of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmissions; or

(B) the transmission thus received is further transmitted to the public.

§ 110. Limitations on exclusive rights: Ephemeral recordings

Notwithstanding the provisions of section 106, it is not an infringement of copyright for an organization lawfully entitled to transmit a performance or exhibition of a copyrighted work to the public to

make no more than one copy or phonorecord of the work solely for purposes of the organization's own lawful transmissions or for archival preservation, if the copy or phonorecord is not used for transmission after six months from the date it was first made, and is thereafter destroyed or preserved for archival purposes only.

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

(a) Subject to the provisions of clauses (1) and (2) of this subsection, the exclusive right to reproduce a copyrighted pictorial, graphic, or sculptural work in copies under section 106 includes the right to reproduce the work in or on any kind of article, whether useful or otherwise.

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

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

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

§ 112. Scope of exclusive rights in sound recordings

(a) The exclusive rights of the owner of copyright in a sound recording are limited to the rights specified by clauses (1) and (3) of section 106(a), and do not include any right of performance under section 106(a)(4).

(b) The exclusive right of the owner of copyright in a sound recording to reproduce it under section 106(a)(1) is limited to the right to duplicate the sound recording in the form of phonorecords that directly or indirectly recapture the actual sounds fixed in the recording. This right does not extend to the making or duplication of another sound recording that is an independent fixation of other

sounds, even though such sounds imitate or simulate those in the copyrighted sound recording.

(c) This section does not limit or impair the exclusive right to perform publicly, by means of a phonorecord, any of the works specified by section 106(a)(4).

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

In the case of nondramatic musical works, the exclusive rights provided by clauses (1) and (3) of section 106(a), to make and to distribute phonorecords of such works, are subject to compulsory licensing under the conditions specified by this section.

(a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—

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

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

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

(1) Any person who wishes to obtain a compulsory license under this section shall, before or within thirty days after making, and before distributing any phonorecords of the work, serve notice of his intention to do so on the copyright owner. If the registration or other public records of the Copyright Office do not identify the copyright owner and include an address at which notice can be served on him, it shall be sufficient to file the notice of intention in the Copyright Office. The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(2) Failure to serve or file the notice as required in clause (1) forecloses the possibility of a compulsory license and, in the ab-

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92D CONGRESS 1st Session } SENATE { REPORT No. 92-72

CREATION OF A LIMITED COPYRIGHT IN SOUND RECORDINGS

APRIL 20, 1971.—Ordered to be printed

Mr. MCCLELLAN, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 646]

The Committee on the Judiciary, to which was referred the bill (S. 646) to amend title 17 of the United States Code to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes, having considered the same, reports favorably thereon, with amendments, and recommends that the bill as amended do pass.

AMENDMENTS

(1) On page 2, lines 9 and 10, strike out "single ephemeral recordings" and insert in lieu thereof "reproductions".

(2) On page 2, line 10, after the word "organizations", insert "exclusively".

(3) On page 2, line 13, after the word "recordings", strike out "other than fixations of sound accompanying a motion picture".

(4) On page 3, line 10, after the word "surface", insert "of reproductions".

(5) On page 3, line 18, after the period, insert the following:

> "Sound recordings" are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. "Reproductions of sound recordings" are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and

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from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the "parts of instruments serving to reproduce mechanically the musical work," "mechanical reproductions," and "interchangeable parts, such as discs or tapes for use in mechanical music-producing machines" referred to in sections 1(e) and 101(e) of this title.

(6) On page 3, between lines 18 and 19, insert the following new section:

SEC. 2. That title 17 of the United States Code is further amended in the following respect:

In section 101, title 17 of the United States Code, delete subsection (e) in its entirety and substitute the following:

"(e) INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall service notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the Copyright Office, sending to the Copyright Office a duplicate of such notice."

(7) On page 3, line 19, strike out "SEC. 2", and insert in lieu thereof "SEC. 3".

(8) On page 3, line 19, strike out "three", and insert in lieu thereof "four".

(9) On page 3, line 20, strike out the period, and insert the following:

except that section 2 of this Act shall take effect immediately upon its enactment.

(10) On page 3, line 21, after the word "Code", insert the following: "as amended by section 1 of this Act,".

PURPOSE OF AMENDMENTS

Most of the amendments are of a perfecting nature or provide for the definition of various terms. In addition the effective date of the legislation as it applies to the creation of a copyright in sound recordings is established at 4 months after enactment rather than 3 months. This amendment is at the request of the Copyright Office

which indicated that additional time would be necessary to take the various measures required to implement the provisions of this bill. S. 646 as introduced permitted the making of a single ephemeral recording by transmitting organizations for their own use. As amended the bill contains no limitation on the number of reproductions made by transmitting organizations exclusively for their own use.

A significant substantive amendment is the addition of a new section 2 relating to the remedies available to the proprietors of copyrighted music for the unauthorized use of such music in the making of sound recordings. The Copyright Act of 1909 contains special and limited remedies in the event of the unauthorized use of copyrighted music in a recording. The purpose of the new section 2 is to extend to the owners of copyrighted music used in the making of recordings the same remedies available for other copyright infringements under the act of 1909, including in a case of willful infringement for profit, the criminal prosecution provided in section 104 of title 17.

Views of Government Agencies

The Library of Congress and the Copyright Office support the enactment of this legislation.

Statement

The creation of a limited copyright in sound recordings has been under active consideration by the Congress for a number of years in connection with the program for general revision of the copyright law. The Library of Congress recommended the granting of such copyright protection in its recommendations for the general revision of the copyright law. Such a provision was included in H.R. 2512 of the 90th Congress as passed by the House of Representatives. This provision was also included in S. 597 of the 90th Congress on which this committee's Subcommittee on Patents, Trademarks, and Copyrights held extensive hearings in 1967. No further action was taken in the Senate on this legislation during the 90th Congress primarily because of developments relating to the cable television issue.

On December 10, 1969, the Senate Subcommittee on Patents, Trademarks, and Copyrights reported S. 543 of the 91st Congress, for the general revision of the copyright law with an amendment in the nature of a substitute. This bill, as amended, established a copyright in sound recordings, but again because of the situation relating to the cable television issue no further action was taken. S. 543 as reported by the subcommittee, in addition to creating a limited copyright in sound recordings, extended that protection to encompass a performance right so that record companies and performing artists would be compensated when their records were performed for commercial purposes. This provision is not included in S. 646 but will be considered subsequently when the committee acts on the legislation for the general revision of the copyright law.

Subsequently the attention of the committee was directed to the widespread unauthorized reproduction of phonograph records and tapes. While it is difficult to establish the exact volume or dollar value of current piracy activity it is estimated by reliable trade sources that the annual volume of such piracy is now in excess of $100 million. It

has been estimated that legitimate prerecorded tape sales have an annual value of approximately $300 million. The pirating of records and tapes is not only depriving legitimate manufacturers of substantial income, but of equal importance is denying performing artists and musicians of royalties and contributions to pension and welfare funds and Federal and State governments are losing tax revenues.

If the unauthorized producers pay the statutory mechanical royalty required by the Copyright Act for the use of copyrighted music there is no Federal remedy currently available to combat the unauthorized reproduction of the recording. The States of New York and California have enacted statutes intended to suppress record piracy, but in other jurisdictions the only remedy available to the legitimate producers is to seek relief in State courts on the theory of unfair competition. A number of suits have been filed in various States but even when a case is brought to a successful conclusion the remedies available are limited. In addition the jurisdiction of States to adopt legislation specifically aimed at the elimination of record and tape piracy has been challenged on the theory that the copyright clause of the Federal Constitution has preempted the field even if Congress has not granted any copyright protection to sound recordings. While the committee expresses no opinion concerning this legal question, it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in connection with the efforts to combat piracy in State courts.

On December 18, 1970, Senator John L. McClellan introduced S. 4592 of the 91st Congress which would have created a limited copyright in sound recordings. This bill was based on the provisions contained in S. 543, as approved by the subcommittee in the 91st Congress. Because of the adjournment of the 91st Congress no action was taken on that bill. On February 8, 1971, Senator McClellan on behalf of himself and Senator Hugh Scott introduced S. 646 which is identical to S. 4592. On March 16, 1971, Senator John Tower was added as a cosponsor of this legislation.

The United States recently participated in an international conference of government experts at which the draft of an international treaty to combat record piracy was prepared. It is anticipated that a diplomatic conference to sign a treaty on this subject will be held later in 1971.

The enactment of S. 646 will mark the first recognition in American copyright law of sound recordings as copyrightable works. The copyrightable work comprises the aggregation of sounds and not the tangible medium of fixation. Thus, "sound recordings" as copyrightable subject matter are distinguished from "reproductions of sound recordings," the latter being physical objects in which sounds are fixed. They are also distinguished from any copyrighted literary, dramatic, or musical works that may be reproduced on a "sound recording."

The committee believes that, as a class of subject matter, sound recordings are clearly within the scope of the "writings of an author" capable of protection under the Constitution, and that the extension of limited statutory protection to them is overdue. Aside from cases in which sounds are fixed by some purely mechanical means without originality of any kind, the committee favors copyright protection

that would prevent the reproduction and distribution of unauthorized reproductions of sound recordings.

The copyrightable elements in a sound recording will usually, though not always, involve "authorship" both on the part of the performers whose performance is captured and on the part of the record producer responsible for setting up the recording session, capturing and electronically processing the sounds, and compiling and editing them to make the final sound recording. There may be cases where the record producer's contribution is so minimal that the performance is the only copyrightable element in the work, and there may be cases (for example, recordings of birdcalls, sounds of racing cars, et cetera) where only the record producer's contribution is copyrightable. As in the case of motion pictures, the bill does not fix the authorship, or the resulting ownership, of sound recordings, but leaves these matters to the employment relationship and bargaining among the interests involved.

This legislation extends copyright protection to sound recordings "that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture." In excluding "the sounds accompanying a motion picture" from the scope of this legislation the committee does not intend to limit or otherwise alter the rights that exist currently in such works. The exclusion reflects the committee's opinion that soundtracks or audio tracks are an integral part of the "motion pictures" already accorded protection under subsections (l) and (m) of section 1 of title 17, and that the reproduction of the sound accompanying a copyrighted motion picture is an infringement of copyright in the motion picture. This is true whatever the physical form of the reproduction, whether or not the reproduction also includes visual images, and whether the motion picture copyright owner had licensed use of the soundtrack on records.

Under the existing title 17, "motion pictures" represent a broad genus whose fundamental characteristic is a series of related images that impart an impression of motion when shown in succession, including any sounds integrally conjoined with the images. Under this concept the physical form in which the motion picture is fixed—film, tape, discs, and so forth—is irrelevant, and the same is true whether the images reproduced in the physical object can be made out with the naked eye or require optical, electronic, or other special equipment to be perceived. Thus, to take a specific example, if there is an unauthorized reproduction of the sound portion of a copyrighted television program fixed on video tape, a suit for copyright infringement could be sustained under section 1(a) of title 17 rather than under the provisions of this bill, and this would be true even if the television producer had licensed the release of a commercial phonograph record incorporating the same sounds.

This legislation grants to the owners of the copyright in sound recordings the exclusive right to "reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending," reproductions of the copyrighted work. Section 1(a) of the present title 17 gives the copyright owner the exclusive right to "print, reprint, publish, copy, and vend" the copyrighted work. As a technical matter, this is broad enough to include rental, leasing, and lending, as well as sales and gifts. The right is subject to the "first sale doctrine," under which a copyright owner who unconditionally parts with a physical

object embodying his work cannot restrain any later disposition of that physical object. However, in the case of a transaction such as a rental, lease, or loan, where the copyright owner delivers a physical object embodying his work only on certain stated conditions, distribution by any unauthorized means would violate his exclusive right to "publish."

S. 646 would add a new exclusive right with respect to sound recordings which, in addition to reproduction, would include public distribution "by sale or other transfer of ownership, or by rental, lease, or lending" of reproductions. The purpose of this language is to identify as clearly as possible the limited rights being accorded to sound recordings, and it should in no way be construed as limiting the exclusive rights of copyright owners in other types of works with respect to forms of distribution short of the outright sale of copies.

In approving the creation of a limited copyright in sound recordings it is the intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17.

Certain of the manufacturers engaged in the unauthorized reproduction of records and tapes have proposed the inclusion in the legislation of provisions granting a compulsory license to reproduce records and tapes upon payment of a statutory royalty. It has been argued that such a provision would be an appropriate adjunct to the compulsory license provided the record industry by the mechanical royalty contained in the Copyright Act. The committee sees no valid parallel. By the mechanical royalty the record company in effect receives the right to make use of raw material—in this instance a copyrighted song. The record label, the performing artist, musicians, and arrangers develop this song into the finished product—the recorded song. The committee sees no justification for the granting of a compulsory license to copy the finished product, which has been developed and promoted through the efforts of the record company and the artists. Any unauthorized manufacturer who wishes to produce a record containing the same songs may do so by paying the mechanical royalty and making the same investment in production and talent as is being done by the authorized record companies.

Sectional Analysis

Section 1(a) of the bill, as amended, adds a new subsection (f) to section 1 of title 17 of the United States Code adding to the enumerated exclusive rights of copyright proprietors the right to reproduce the copyrighted work if it be a sound recording. It is provided that the right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, or to reproductions made by transmitting organizations exclusively for their own use.

Section 1(b) amends section 5 of title 17 to add to the classification of works for copyright registration the category of "sound recordings."

Section 1(c) amends section 19 of title 17 to specify the required form of the copyright notice on sound recordings.

Section 1(d) amends section 20 of title 17 to specify the proper location of the notice of copyright as it pertains to a sound recording.

Section 1(e) amends section 26 of title 17 to enumerate the various sections of title 17 concerning which the reproduction of a sound

recording is "considered to be a copy thereof." The subsection also defines the terms "sound recordings" and "reproduction of sound recordings."

Section 2 of the bill, as amended, amends section 101 of title 17 to delete subsection (e) which relates to "Royalties for Use of Mechanical Reproduction of Musical Works." The section substitutes a new subsection (e) providing that any person engaging in the unauthorized use of copyrighted music in the mechanical reproduction of musical works shall be subject to all of the provisions of title 17 dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104. The existing statutory provision in title 17 limits the remedy for such unauthorized use of musical works to the payment of a royalty of 2 cents on each part manufactured and a discretionary award of not more than 6 cents.

Section 3 of the bill, as amended, provides that the effective date of this legislation shall be 4 months after its enactment except, that section 2 shall become effective upon the bill's enactment. It is further provided that the provisions of title 17 as amended by section 1 of this legislation apply only to sound recordings "fixed, published, and copyrighted on and after the effective date of this Act."

Attached, hereto, is the report of the Librarian of Congress, dated January 19, 1971:

THE LIBRARIAN OF CONGRESS,
Washington, D.C., January 19, 1971.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR SENATOR EASTLAND: This is in reply to your request for a report on S. 4592, a bill amending the copyright statute to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recording, and for other purposes.

I am fully and unqualifiedly in favor of the purpose the bill is intended to fulfill. The recent and very large increase in unauthorized duplication of commercial records has become a matter of public concern in this country and abroad. With the growing availability and use of inexpensive cassette and cartridge tape players, this trend seems certain to continue unless effective legal means of combating it can be found. Neither the present Federal copyright statute nor the common law or statutes of the various States are adequate for this purpose. The best solution, an amendment of the copyright law to provide limited protection against unauthorized duplication, is that embodied in S. 4592.

In general, we also support the amendatory language adopted in the bill, which draws heavily upon the language of the bill for general revision of the copyright law (S. 543), before your committee this past session. It may be that some further refinements, particularly with respect to the definition of certain terms used, would benefit the bill technically, but these improvements are more desirable than essential.

A point of some concern to libraries and librarians is the extent to which the bill would prevent library tape duplication aimed at preserving the quality of disk recordings. Although many activities of this sort would be considered "fair use" and thus automatically exempt, we would favor addition of a specific exemption along the lines of the exemption for "ephemeral recordings" in section 1(a). Another important practical question is whether the 3-month period provided in section 2 would allow the Copyright Office enough time to prepare for implementation of the new law. Recognizing the urgency of the record piracy problem, we nevertheless think that a somewhat longer period would improve the chances of an efficient registration system from the outset.

The most fundamental question raised by the bill is its relationship to the program for general revision of the copyright law. The revision bill before your committee this past session and which Senator McClellan proposes to reintroduce, has parallel provisions, and if general revision were on the threshhold of enactment, S. 4592 would be unnecessary. However, some fundamental problems impeding the progress of general revision of the copyright law, notably the issue of cable television, have not yet been resolved. We agree that the national and international problem of record piracy is too urgent to await comprehensive action on copyright law revision, and that the amendments proposed in S. 4592 are badly needed now. Upon enactment of the revision bill, they would, of course, be merged into the larger pattern of the revised statute as a whole.

I might also mention that the problem of record piracy is one of immediate concern internationally, and that a treaty closely corresponding to the content and purpose of S. 4592 is now under active development. If current plans remain unchanged, this special treaty will be signed at Paris next July, and favorable action on the domestic bill will not only help our negotiators but encourage protection of our records against the growing menace of piracy in other countries.

For the foregoing reasons, I recommend that your committee give S. 4592 its favorable consideration.

Sincerely yours,

L. QUINCY MUMFORD,
Librarian of Congress.

CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

COPYRIGHTS

(Act of July 30, 1947, ch. 391 (62 Stat. 652; 17 U.S.C.))

§1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

* * * * * * *

(f) To reproduce and distribute to the public by sale or other transfer of ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use.

* * * * * * *

§5. Classification of works for registration

The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

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

* * * * * * *

(n) Sound recordings.

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§19. Notice; form

The notice of copyright required by section 10 of this title shall consist either of the word "Copyright", * * *

In the case of reproductions of works specified in subsection (n) of section 5 of this title, the notice shall consist of the symbol P (the letter P in a circle), the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: Provided, That if the producer of the sound recording is named on the labels or containers of the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

§ 20. Same; place of application of; one notice in each volume or number of newspaper or periodical

The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music, *or if a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.* One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

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S.R. 72

§ 26. Terms defined

In the interpretation and construction of this title "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, and the word "author" shall include an employer in the case of works made for hire.

For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereoff "Sound recordings" are works that result from the fixation of a series o. musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. "Reproductions of sound recordings" are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the "parts of instruments serving to reproduce mechanically the musical work," "mechanical reproductions," and "interchangeable parts, such as discs or tapes for use in mechanical music-producing machines" referred to in sections 1(e) and 101(e) of this title.

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Chapter 2.—INFRINGEMENT PROCEEDINGS

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§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) INJUNCTION.—

To an injunction restraining such infringement;

* * * * * * *

[(e) ROYALTIES FOR USE OF MECHANICAL REPRODUCTION OF MUSICAL WORKS.—Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instruments serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages a royalty as provided in section 1, subsection (e), of this title: Provided also, That whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office,

sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award the complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), of this title, by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid.]

(e) *INTERCHANGEABLE PARTS FOR USE IN MECHANICAL MUSIC-PRODUCING MACHINES.—Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce mechanically for the purposes of this section 101 and sections 106 and 109 of this title, and the unauthorized manufacture, use or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to section 104 of this title. Whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this title, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice.*

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