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# The 1976 Copyright Revision Act and Authors' Rights: A Negative Overview

ARTHUR STANLEY KATZ\*

*"The Congress shall have Power . . . To promote the Progress of  
Science and useful Arts, by securing for limited Times to Authors  
. . . the exclusive Right to their respective Writings. . . ."*

U.S. CONST., ART. I, § 8, cl. 8

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*"The beginning of wisdom is: Get wisdom;  
But with all thy getting, get understanding."*  
PROVERBS, IV, 7

## I. INTRODUCTION

In 1790 the first copyright law of the United States was enacted by the First Congress and signed into law by President George Washington on May 31, 1790.<sup>1</sup> In 1976 the second Session of the 94th Congress enacted the "Copyrights Act, An Act for the general revision of the Copyright Law, Title 17 of the United

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1. 1 Stat. 124 (1790).

States Code, and for other purposes.”<sup>2</sup> This act was signed into law on October 19, 1976 by President Gerald Ford. The 1976 Copyrights Act [hereinafter “the Act”]<sup>3</sup> was the fourth general revision of the copyright laws of the United States.<sup>4</sup> Title 17, which the Act amended in its entirety, is basically the Copyright Act of 1909, as amended.<sup>5</sup> The Act generally takes effect on January 1, 1978.<sup>6</sup> It was over two decades in the making<sup>7</sup>—and it shows it.

The Act bears the fingerprints, footprints and scuff marks of rival pressure groups, each anxious to shape the law in its own image and likeness.<sup>8</sup> Amendatory language overlays amenda-

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2. Pub. L. No. 94-553, 90 Stat. 2541. Before passage the Bill was called S.22.

*Effective Date of the Act:* Section 102 of Pub. L. No. 94-553, 90 Stat. 2598, provides that: This Act becomes effective on January 1, 1978, except as otherwise expressly provided by this Act, including provisions of the first section of this Act. The provisions of sections 118, 304 (b), and chapter 8 of title 17, as amended by the first section of this Act, take effect upon enactment of this Act [Oct. 19, 1976].

*Lost and Expired Copyrights: Recording Rights:* Section 103 of Pub.L. No. 94-553, 90 Stat. 2599, provides that:

This Act does not provide copyright protection for any work that goes into the public domain before January 1, 1978. The exclusive rights, as provided by section 106 of title 17 as amended by the first section of this Act, to reproduce a work in phonorecords and to distribute phonorecords of the work, do not extend to any nondramatic musical work copyrighted before July 1, 1909.

*Authorization of Appropriations:* Section 114 of Pub.L. No. 94-553, 90 Stat. 2602, provides that: “There are hereby authorized to be appropriated such funds as may be necessary to carry out the purposes of this Act.”

*Separability of Provisions:* Section 115 of Pub.L. No 94-553, 90 Stat. 2602, provides that: “If any provision of title 17, as amended by the first section of this Act, is declared unconstitutional, the validity of the remainder of this title is not affected.”

3. Sec. 101 of Pub. L. No. 94-553, 90 Stat. 2541 amended Title 17 of the United States Code in its entirety. The 1976 General Revision of Copyright Law is codified in Title 17, §§ 101 through 810. Sections of the Act, as referred to in this article, refer to these sections of Title 17.

4. H.R. (Judiciary Committee) No. 94-1476, 94th Cong., 2d Sess. at 47, Congressional Record Vol. 122 (1976) [hereinafter cited as HOUSE REPORT]; see also, U.S. CODE CONG. & AD. NEWS, No. 13 at 6090 (Nov. 29, 1976); Copyright Office Circular 1a, at 3-4 (October 1976).

5. 35 Stat.1075. The 1909 Act was codified into positive law as 17 U.S.C. § 1 *et seq.* by section 1 of the Act of July 30, 1974, ch. 391, 61 Stat. 652.

6. See note 2 *supra*.

7. In 1955, with funds provided by the Congress, the Copyright Office undertook a research program as the groundwork for the present copyright revision. Following its publication of 35 monographs on the various aspects of copyright revision and the issuance in 1961 of the Copyright Office's Report of the Register of Copyrights on the General Revision of the United States Copyright Law, the first revision legislation was introduced in the 88th Congress on July 20, 1964. Its designation in the House of Representatives was H.R. 11947, and in the Senate, S. 3008. For the subsequent history of the various revision bill versions, see HOUSE REPORT at 47-50.

8. See, e.g., REPORT ON THE COPYRIGHT REVISION BILL issued by THE AUTHORS LEAGUE OF AMERICA, INC. (Oct. 8, 1976). In his preface to said report, John

tory language.<sup>9</sup> The singleness of purpose and the clarity of text so essential for the construction and interpretation of statutes<sup>10</sup>—and absolutely vital in the exegesis of ground breaking legislation<sup>11</sup> lie buried under layers of verbiage.<sup>12</sup>

The Act is one huge legal *tell*.<sup>13</sup> Archaeologists may well fare better than jurists and lawyers in unearthing its hidden meanings, especially as they pertain to authors. In short, it is the contention of this writer that somewhere twixt cup and lip, somewhere between promise and performance, the Congress has short changed the authors of copyrightable works in its desire to accommodate the users of such works "for the public good."<sup>14</sup>

Hersey, the famous author, and President of the Authors League declared in part:

For two decades The Authors League has been working on this prime instrument and safeguard of our livelihood, [*i.e.*, the Act] and virtually every provision in it that concerns authors bears the stamp of our influence. The new law is not perfect; it has seen fighting and its body shows some scars. But on the whole—thanks in many instances to our hard work in the face of immensely powerful lobbies of interests inimical to our own—it is a good Bill. A search of the twenty year record of the Copyright Revision Bill will show Irwin Karp's fingerprints all over it. . . . [Mr. Karp is the distinguished legal counsel for The Authors League.]

The writer of this article, for the reasons noted therein, is not as sanguine as Mr. Hersey, concerning the *merits* of the new law as it affects authors' rights.

See also, the dissenting views of the Hon. Joshua Eilberg, of the House Judiciary Committee as contained in HOUSE REPORT at 365-368.

9. One need but read the various committee and conference reports accompanying each of the bills which culminated in the Act to note this phenomenon of drafting. Specific examples are cited in the body of this article.

10. See, *e.g.*, *Brewer v. Blougher*, 14 Pet. 178, 10 L.ed.408 (1840) and *McCullough v. Commonwealth of Virginia*, 172 U.S. 102 (1898). With specific application to copyright statutes, see *American Tobacco Co. v. Werckmeister*, 207 U.S. 284 (1907).

11. See, *e.g.*, *Re Kang-gi-shun-ca (Re Crow Dog)*, 109 U.S. 556 (1883). With specific application to copyright statutes, see, *De Sylva v. Ballentine*, 351 U.S. 570 (1955) and *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

12. See, *e.g.*, § 101, §§ 106-118, § 203 and § 304 of the Act.

13. A "*tell*" is the name (from the Babylonian *tilu* "ruinheap") given to the cone like mounds, with flat tops and sloping sides, found in the Middle East and containing the ruins of successive occupation of new settlers, "each marked by its own stratum, like the layers of a cake." See, W.F. ALBRIGHT, *THE ARCHAEOLOGY OF PALESTINE* at 16-18 (1961)

14. The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our

This article does not pretend to analyze all portions of the Act. Such an all encompassing analysis is best written by a treatise writer. Accordingly, this article is primarily concerned with examining the differing treatment afforded the subject of *DURATION OF COPYRIGHT* under the present Copyright Law, 17 USC §1 *et seq.*, and under the 1976 Copyrights Act for the purpose of determining the impact of such differences on the rights of “*authors*”, as that term is used in its broadest generic sense to encompass the maker, creator or originator of that broad gamut of tangibly expressed intellectual productions *other than* inventions, trademarks, trade names, service marks, trade secrets, and ornamental designs of useful articles (sometimes called “industrial designs”).<sup>15</sup>

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copyright law is to secure a fair return for an ‘author’s’ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. ‘The sole interest of the United States and the primary object in conferring the monopoly,’ this Court has said, ‘lie in the general benefits derived by the public from the labors of authors.’ *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 13 USPQ 243, 244 (1975). See *Kendall v. Winsor*, 21 How. 322, 327-328; *Grant v. Raymond*, 6 Pet. 218, 241-243. When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose. [*Fortnightly Corp. v. United Artists*, 391 U.S. 390 at 395-396 n.7 (1968)].

*Twentieth Century Music Corp. v. Aiken*, 422 U.S. at 154-155 (1975).

15. The Act does not define the term “author.” However, section 102 (a) of the Act sets forth seven (7) categories of “works of authorship” in which copyright protection subsists under the Act.:

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

HOUSE REPORT, note 3, *supra*, at 53, emphasized that the seven categories listed are “illustrative and not limitative”, that is, “. . . the list sets out the general area of copyrightable subject matter, but with sufficient flexibility to free the courts from rigid or outmoded concepts of the scope of particular categories [sic].”

Section 102(b) of the Act defines the *nature of copyright* and declares:

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

The HOUSE REPORT, note 3, *supra*, at 57 illustrates the scope of § 102(b) by discussing the copyrightability of computer programs:

Some concern has been expressed lest copyright in computer programs should extend protection to the methodology or processes adopted by the programmer, rather than merely to the ‘writing’ expressing his ideas. Section 102(b) is intended, among other things, to make clear that the expression adopted by the programmer is the copyrightable element in a computer program, and that the actual processes or methods embodied in the program are not within the scope of the copyright law.

Section 102(b) in no way enlarges or contracts the scope of copyright protection under the present law. Its purpose is to restate, in the con-

Duration of Copyright is covered by five (5) sections in chapter 3 of the Act, namely sections 301 through 305.<sup>16</sup> However, the format of the general revision of Title 17 is such that chapter 3 cannot be intelligently examined *in vacuo*. Accordingly, reference will be made to numerous sections in other chapters, particularly to sections in chapters 1 and 2.

Chapter 3 contains five sections: Section 301 does away with "common law copyright", and establishes a federal statutory copyright for all copyrightable works from their creation and, with certain exceptions, preempts the States from regulating rights in the nature of copyright in works coming within the scope of the Act. Section 302, with certain exceptions, establishes the term of copyright for the life of the author, plus 50 years after his death for works created on or after January 1, 1978. Section 303 covers copyrightable works now protected in perpetuity under commonlaw principles. This section grants statutory protection for the term set in section 302 with the possibility of a greater term if the work is published on or before December 31, 2002. Section 304 concerns subsisting copyrights. Works in their present first term and works in their present renewal term would be extended to expire 75 years after first publication or registration. In addition, the author (or if deceased, certain members of his family) is able to recapture his copyrights by terminating the transfer or licensing of his renewal rights. This right of recapture can only be exercised during

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text of the new single Federal system of copyright, that the basic dichotomy between expression and idea remains unchanged.

Section 103 treats of "compilations and derivative works" as subject matter of copyright. Protection is the same as accorded such works under 17 U.S.C. § 7 of the present Copyright Act. See section 103 in Appendix.

In short, the Act, in section 101, emphasizes that copyright protects only the *expression* of the idea, and not the idea itself. See also, A.S. KATZ, *Copyright Protection of Architectural Plans, Drawings and Designs*, 19 LAW & CONTEMP. PROB. 224, 239-241 (1954). Section 101 also uses the term "works of authorship" to cover those tangibly expressed copyrightable products of the mind which fall under the broad rubric "applied art." The writer uses the term "author" in this article to refer to all who create copyrightable works of applied art, as well as to all who create concretely expressed non-copyrightable works such as slogans, titles and television program ideas. For the distinction between works of applied art subject to protection under the Act, and industrial designs not subject to copyright protection, see HOUSE CONFERENCE REPORT NO. 94-1733, 94th Cong., 2d Sess. 82 [hereinafter cited as HOUSE CONFERENCE REPORT]; see also U.S. CODE CONG. & AD. NEWS, No. 13, 6253 (Nov. 19, 1976).

16. The subject sections are reproduced in the Appendix to this article.

the last 19 years of the extended copyright, and then only within a specific period. Under section 305 all copyright terms run to the end of the calendar year in which they would otherwise expire.

Section 301 is examined in Part II of this article, NATURE OF THE RIGHTS GRANTED,<sup>17</sup> and sections 302 through 305 are examined in Part III, DURATION OF THE RIGHTS GRANTED.<sup>18</sup>

Section 301 is designed to give the Federal Government preemption over the regulation of rights equivalent to copyright. This principle is epitomized in the House Report<sup>19</sup> as follows:

Section 301, one of the bedrock provisions of the bill, would accomplish a fundamental and significant change in the present law. Instead of the dual system of 'common law copyright' for unpublished works and statutory copyright for published works, which has been in effect in the United States since the first copyright statute in 1790, the bill adopts a single system of Federal statutory copyright from creation. Under Section 301 a work would obtain statutory protection as soon as it is 'created' or, as that term is defined in Section 101, when it is 'fixed in a copy or phonorecord for the first time.' *Common law copyright protection for works coming within the scope of the statute would be abrogated, and the concept of publication would lose its all-embracing importance as a dividing line between common law and statutory protection and between both of these forms of legal protection and the public domain.*

By substituting a single Federal system for the present anachronistic, uncertain, impractical, and highly complicated dual system, the bill would greatly improve the operation of the copyright law and would be much more effective in carrying out the basic constitutional aims of uniformity and the promotion of writing and scholarship . . . (emphasis supplied)

The same House Report declares that the Register of Copyrights regards the "life-plus-50 term [to be] . . . the foundation of the entire bill."<sup>20</sup>

These are salutary purposes: to bring order out of chaos and fair economic benefits to the author and his family. However, the Act fails to fulfill these purposes. *Indeed, it may well be less beneficial to authors than the present Copyright Act.* Poor draftsmanship is a prime reason.<sup>21</sup> Strong special interests pressures is another.<sup>22</sup> The intervention of government into licens-

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17. See, p. 177 *infra*.

18. See, p. 192 *infra*.

19. HOUSE REPORT note 4 *supra* at 129.

20. *Id.* at 133.

21. See note 12 *supra*.

22. The pressures by community antenna television systems (CATV) for special treatment is a key example, see, § 111 of the Act.

ing and royalty setting arrangements is a third.<sup>23</sup>

Too much of the Act's critical language is opaque, obtuse, convoluted and unclear. And too many of the author's "exclusive" rights have been eroded by undue exceptions, suspect emendations and abject abdications of legislative responsibility.<sup>24</sup> As a consequence, the Act is peculiarly pregnant with possibilities for persistent pettifogging, perpetuation of error, and incitement of limitless litigation. The proud glowing promise of more protection for products of the mind, and more prosperity for their creators, has paled into a pallid pile of potash. In short, the Act will create havoc in the halls of academe, consternation in the seats of commerce and crises in the courts.

An analysis of some pertinent provisions will bear this thesis out.

## II. NATURE OF THE RIGHTS GRANTED

It is neither the intent, nor the function of this article to dwell at length on sections of the Act other than those in chapter 3. However, the interdependence of the various sections of the Act is so pronounced that a lawyerlike analysis of chapter 3 is impossible without some reference to, and brief comment upon, sections in other chapters of the Act.

Of prime importance is section 101 "Definitions".<sup>25</sup> This section defines numerous terms and concepts, however, it fails to define the terms "Author", "Writings" of an author, or to provide the meaning of the term "original." This is passing strange in light of the fact that the Congress' constitutional right to enact legislation to protect "Authors" is restricted to protecting their "respective, i.e., 'original', Writings." That the definition of these vital terms can be done succinctly is evidenced by the ease with which it was done in one paragraph by the United States Supreme Court in *Goldstein v. California*.<sup>26</sup>

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23. See, e.g., §§ 115, 116, 118 and §§ 801-810 of the Act.

24. A glaring example is § 113 which plays games with the rights enjoyed by architects and engineers, among others, who create works in a two dimensional plan form from which three dimensional structures are constructed. For further discussion, see pp. 181-83 *infra*.

25. See Appendix for full text of section 101.

26. 412 U.S. 546, 561-62 (1973)

By Art I, § 8, cl 8, of the Constitution, the States granted to Congress the power to protect the 'Writings' of 'Authors'. These terms have not



Section 101 states that:

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.

One notes four interesting factors: (1) without "fixation" there is no "creation"; (2) the "original" of a work is also its copy (this is consistent with the common law meaning of the term, *i.e.*, the "copy-right" being the author's right to control the reproduction of the copy, or text of his work);<sup>27</sup> (3) the term "phonorecord", a term new to copyright law is introduced; and (4) a work of episodic or monumental portions, such as a serialized novel, or a symphonic work, can have a number of measurable "creation" dates. This can cause confusion as to the duration of a particular copyright, since, under section 302(a) of the Act<sup>28</sup> "[c]opyright in a work . . . subsists from its creation . . . ."

The definitions of "fixation" of a "copy" demonstrate that a work expressed in words, signs or symbols cannot be deemed "created" unless it is preserved in some tangible form called the "copy." By the same rationale, a work expressed in sounds or images, or both, cannot be deemed "created" unless it too is preserved in some tangible form. These tangible forms, insofar as they concern "images", are called "Audiovisual Works", and as they concern sounds, they are described in the Act as "phonorecords" (an awkward term) or as "sound recordings."

Inasmuch as there can be no creation without fixation, it follows that the performance of a work consisting of sounds, images, or both—which has never been fixed in some tangible form or medium—does not render such work eligible for copyright under the Act, since the work has not yet been "created." The same result obtains where the performance of such work is transmitted "live", for example, by television, and no videotaping or filming and recording is simultaneously being

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been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an 'author' may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an 'originator,' 'he to whom anything owes its origin.' *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884). Similarly, although the word 'writings' might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor. *Ibid.*; *Trade-Mark Cases*, 100 U.S. 82, 94 (1879). Thus, recordings of artistic performances may be within the reach of Clause 8.

27. *Millar v. Taylor*, 4 Burr. 2303, 2396-97, 98 Eng. Rep. 201, 251 (K.B. 1769).

28. See Appendix for complete text.

made of such transmitted performance.<sup>29</sup>

Under the foregoing definitions, a live extemporaneous lecture, a live non-taped and scriptless television interview with a public figure, a live, non-filmed performance of a stageplay or teleplay, and a live, unrecorded symphonic concert (and other analogous non-fixed works) are incapable of protection under Federal Copyright until "fixed".<sup>30</sup> However, the preemption by the federal government in section 301(a) of the Act<sup>31</sup> of all jurisdiction over

... all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after [January 1, 1978] and whether published or unpublished

explicitly permits a state court to grant relief under common law principles, or under its statutes, to those "works of authorship not fixed in any tangible medium of expression".<sup>32</sup>

The drafters of the Act do not always fare as well in making their thoughts clear as they did in treating of the protection accorded non-fixed works of authorship. Thus the Act is replete with vagaries and inconsistencies. Two examples (among many) are particularly illustrative. One example concerns subsection (b) of section 102, as interrelated to section 301.<sup>33</sup> The second concerns subsection (b) of section 113,<sup>34</sup> as interrelated to the definition of a "derivative work"<sup>35</sup> in section 101, clause (2) of section 106,<sup>36</sup> and to section 301.

It is the cornerstone upon which the edifice of copyright law has been built that copyright does not protect the ideas used in a work.<sup>37</sup> Copyright protection embraces solely the arrangement of the words (or symbols),<sup>38</sup> or the expression of the ideas.<sup>39</sup>

29. See section 101 in the Appendix for the definitions of "fixed" and "created".

30. See section 102 in the Appendix.

31. For the full text of section 301, see Appendix.

32. See Section 301(b) (1) in the Appendix.

33. Compare § 102(b) with § 301. See full text in the Appendix.

34. See Appendix for full text.

35. See section 101 in the Appendix.

36. See Appendix for full text.

37. *Jefferys v. Boosey*, 4 H.L.Cas. 815, 867, 10 Eng. Rep. 681, 701 (1854).

38. *Holmes v. Hurst*, 174 U.S. 82 (1899); *Eichel v. Marcin*, 241 F. 404, 408-409 (S.D.N.Y. 1917).

39. *Dellar v. Samuel Goldwyn, Inc.*, 150 F.2d 612 (2d Cir. 1945).

Subsection (a) of section 102 declares that “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression. . . .”<sup>40</sup> Seven (7) illustrative categories of “works of authorship” are identified.<sup>41</sup> Then, in an evident desire to define those “original works of authorship” in which copyright protection cannot subsist, subsection (b) of section 102 declares:

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Subsection (b) of section 102 is misleading, if not incorrect. Clearly, “[c]opyright in a work does not prevent others from using the information it contains, from employing the systems it explains or from constructing the devices it describes.”<sup>42</sup> However, copyright *does* protect an original work of authorship which contains information which explains a system, or which describes a device, when the work containing these non-protectible elements is itself copied *in toto* or in substantial part. A person reading a copyrighted book describing an accounting system could safely copy the system and use it.<sup>43</sup> But such a person could not *lawfully copy* the copyrighted book and publish the same as his own work in order to save himself the trouble of having to restate the non-copyrightable system in his own words.<sup>44</sup>

The poor draftsmanship in section 102(b) may create problems rather than resolve them. This confusion could have been avoided had the entire phrase beginning with “regardless” been deleted.<sup>45</sup> An early amendment is recommended.

Attention is now directed to the second example, of many, of the vagaries and inconsistencies which beset the 1976 Copyright Revision Act. Section 101<sup>46</sup> instructs, *inter alia*, that:

[a] ‘derivative work’ is a work based upon one or more preexisting works, such as a translation, musical arrangement . . . art reproduction . . . or any other form in which a work may be recast, transformed, or adapted. . . . (emphasis supplied)

Section 106 informs us: “Subject to sections 107 through 118,

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40. See section 102 in the Appendix.

41. See note 15 *supra*.

42. A.S. KATZ, *Copyright Protection of Architectural Plans, Drawings and Designs*, 19 LAW & CONTEMP. PROB. 224, 240 (1954) and cases cited therein.

43. Baker v. Selden, 101 U.S. 99 (1879).

44. See, e.g., Fitch v. Young, 230 F. 743, 745-46 (S.D.N.Y. 1916).

45. This might be an excellent area for early amendment.

46. See full text of section 101 in the Appendix.

the owner of copyright has the exclusive rights . . . (2) to prepare derivative works based upon the copyrighted work. . . ."

Further, section 102(a)(5) indicates that "pictorial, graphic, and sculptural works", of "original works of authorship" are copyrightable subject matter. In discussing this portion of the then pending Bill, the 1966 Report of the House of Representatives<sup>47</sup> stated

. . . the definition of 'pictorial, graphic, and sculptural works' carries with it no implied criterion of artistic taste, aesthetic value, or intrinsic quality. The term is intended to comprise *everything now covered by classes (f) through (k) of section 5 in the present statute, including* not only 'works of art' in the traditional sense but also works of graphic art and illustration, art reproductions, plans and drawings, photographs and reproductions of them, maps, charts, globes, and other cartographic works, works of these kinds intended for use in advertising and commerce, and works of 'applied art.' (emphasis supplied)

For example, architectural plans, drawings and designs fall within class (i) of section 5 of the present Copyright Law.<sup>48</sup> It is clear that these architectural works were encompassed within subsection (5) of section 102(a) of the 1966 Bill. However, the emphasized portion was deleted from the related section of the 1976 House Report.<sup>49</sup> The retention of "plans and drawings" in the 1976 House Report, while less clear, suggests that architectural plans, drawings, designs and related three dimensional models<sup>50</sup> remain within the purview of the Act.

Inasmuch as the above cited sections appear to grant the proprietor of copyrighted architectural plans, drawings and designs the exclusive right to make derivative works from these plans, etc., it would appear to follow that the Act now grants the architectural copyright proprietor the exclusive right to *build* the house, office building or other three dimensional structure embodied within his two dimensional plans, etc. If so, this would

47. On October 12, 1966 the HOUSE COMM. ON THE JUDICIARY, 89th CONG., 2d SESS., issued its REPORT NO. 2237 on H.R. 4347, the then current version of the Bill for the general revision of the Copyright Law (Title 17 U.S. . . .). [hereinafter cited as 1966 HOUSE REPORT]. The portion quoted is at p. 46 of the Report.

48. 17 U.S.C. § 5(i); Regulations of the Copyright Office, 37 C.F.R. § 202.12(a) (1976).

49. HOUSE REPORT note 4 *supra* at 54.

50. To the extent that an architectural work is a work of art, 17 U.S.C. § 1(b) gives the copyright proprietor the exclusive right ". . . to complete, execute, and finish it if it be a model or design for a work of art."

be a signal advance in the protection of architects. The architect would now have copyright protection in the edifice itself, a right he enjoys, for instance, under the Stockholm Convention,<sup>51</sup> and under the United Kingdom Copyright Act.<sup>52</sup> Such an interpretation would lay to rest, once and for all, the pesky question of whether an architect "publishes" his plans, etc. *eo instanti* he files them of public record in order to obtain the necessary construction permits and financing. It would further avoid the problem of educating the courts to recognize that one who substantially copies from the completed structure and then commits this copying to a drawing or plan has committed copyright infringement by indirect copying. Over the years, commencing in 1954, the law on these two issues has steadily evolved in favor of the architect;<sup>53</sup> however, there are jurisdictions which still live in the Dark Ages.<sup>54</sup>

Unfortunately, the fourth general revision of the Copyright Law, as represented by the 1976 Act, fails to meet the pressing needs of architects and others who concretely conceptualize plans, drawings and designs for useful works and, thereafter, cause such plans, etc. to be transformed into useful, three dimensional structures. Instead of forthrightly granting an architect the express exclusive derivative right to build the structure embodied in his plans, etc., the Act, in section 113(b)<sup>55</sup> lets this important derivative right dangle unresolved, enmeshed in a plethora of unclear and vacillating verbiage:

This title does not afford, to the owner of copyright in a work that portrays a useful article as such, *any greater or lesser rights* with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State in effect on December 31, 1977, *as held applicable and construed by a court in an action brought under this title.* (emphasis supplied)

This is legislative abdication most foul! Everything is back to

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51. Stockholm Copyright Convention, 1967, Arts. 2 and 9. (Berne Union, The International Convention for the Protection of Literary and Artistic Works).

52. United Kingdom Copyright Act, 1956, 4 & 5 Eliz. 1, c.74, §§ 3(1) (b) & 48. *See also*, COPINGER AND SKONE JAMES ON COPYRIGHT, §§ 710-12, pp. 295-96 (11th ed. 1971).

53. *See* KATZ note 42 *supra* and cases cited therein; *see, e.g.*, May v. Bray, 30 Copy.Off.Bull. 435 (S.D. Cal. 1955); Smith v. Paul, 174 Cal. App. 2d 804, 345 P.2d 546, 123 U.S.P.Q. 463 (1959); Edgar H. Wood Associates, Inc. v. Skene, 197 N.E. 2d 886, 141 U.S.P.Q. 454 (Mass. 1964); Nucor Corp. v. Tennessee Forging Steel Service, Inc., 476 F.2d 386, 177 U.S.P.Q. 353 (8th Cir. 1973); Scholz Homes v. Maddox, 397 F.2d 84 (6th Cir. 1967). *See also* 3 A.L.R. Fed. 793.

54. *See* KATZ, *supra* note 42 at 233, n.51-53; *cf.* Fotomat Corp. v. Photo Drive Thru, 425 F. Supp. 693, 706-07 n.13-14 (D.N.J. 1977).

55. *See* Appendix for full text of section 113.

"Square One." An architect's derivative rights, if any, under the Act would depend on a federal court's interpretation of state law, on a case by case basis. This can only perpetuate bad precedents—and continue the lack of uniformity which the Act is designed, ostensibly, to avoid.

The rationale behind the Act's peculiar stance on pictorial, graphic or sculptural works is found in the House Report.<sup>56</sup>

The broad language of section 106(1) and of subsection (a) 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?<sup>57</sup>

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.' Section 113(b) reflects the Register's conclusion that 'the real need is to make clear that there is no intention to change that present law with respect to the scope of protection in a work portraying a useful article as such.'

It is respectfully suggested that there is a vast difference between the making of automobiles, which are turned out in the millions each year, and the construction of one of a kind three dimensional structures, or the construction of a limited number of homes built from an architect's copyrighted design.

The foregoing examples aside, the Act creates much uncertainty in its efforts to establish federal preemption over the regulation of all copyrightable works. Despite Congress' representations that it seeks clarity, the language of sections 301 and 302 is muddled and unclear.

Section 301 of the Act is a key section in the Act, dealing, as it does, with federal preemption.<sup>58</sup> Its evolution, and the underly-

56. HOUSE REPORT note 4 *supra* at 105.

57. See, *Rolls Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 425 F. Supp. 689, 692-93 (N.D. Ga. 1977), wherein the court reviewed copyright protection aspects of automobile design in granting protection akin to trademark in the distinctive grill and hood ornament and the Rolls Royce under the Lanham Act, 15 USC § 1051 *et. seq.*

58. The HOUSE REPORT note 4 *supra* at 130-31 declares:

ing legislative reports relating thereto, confirm this writer's opinion that section 301, as enacted into law, creates more problems than it solves. Thus, Senate Bill S.1361,<sup>59</sup> a precursor of S.22, which bill became the new Act declared in subsection (b) that:

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) *unpublished material* that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression;

(2) any cause of action arising from undertakings commenced before January 1, 1975;

(3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, *including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.* (emphasis supplied)

Senate Report No. 93-983<sup>60</sup> which accompanied S.1361 discussed section 301(b) as follows:<sup>61</sup>

The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) *unpublished material outside the subject matter of copyright*; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

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The intention of Section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright and that extend to works coming within the scope of the Federal copyright law. The declaration of this principle in section 301 is intended to be stated in the clearest and most unequivocal language possible, so as to foreclose any conceivable misinterpretation of its unqualified intention that Congress shall act preemptively, and to avoid the development of any vague borderline areas between State and Federal protection.

Under section 301(a) all 'legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106' are governed exclusively by the Federal copyright statute if the works involved are 'works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103.' All corresponding State laws, whether common law or statutory, are preempted and abrogated. Regardless of when the work was created and whether it is published or unpublished, disseminated or undissemminated, in the public domain or copyrighted under the Federal statute, the States cannot offer it protection equivalent to copyright. Section 1338 of title 28, United States Code, also makes clear that any action involving rights under the Federal copyright law would come within the exclusive jurisdiction of the Federal courts. The preemptive effect of section 301 is limited to State laws; as stated expressly in subsection (d) of section 301, there is no intention to deal with the question of whether Congress can or should offer the equivalent of copyright protection under some constitutional provision other than the patent-copyright clause of article 1, section 8.

59. S.1361 was passed by the Senate on July 3, 1974 at the 2d Session of the 93d Congress. This Bill was introduced by Senator McClellan at the 1st Session of the 93d Congress, on March 26, 1973.

60. Calendar No. 946, 93d Congress, 2d Session, July 3, 1974.

61. S. REP. NO. 93-983, 93d CONG., 2d SESS. at 166.

Clause (1) is limited to unpublished material to make clear that there is no intention to change the established doctrine of *Wheaton v. Peters*, protection in a work terminates upon its publication. *Use of the word unpublished avoids any implication that the common law equivalent to copyright, for material outside the subject matter of the statute, might continue after 'publication' as that term is defined in section 101.* (emphasis supplied)

S.1361 was followed by S.22.<sup>62</sup> Section 301(b) now read as follows:

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:

(1) *subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or*

(2) Any cause of action arising from undertakings commenced before January 1, 1977; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106, including *rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deception [sic] trade practices such as passing off and false representation; or*

(4) sound recordings fixed prior to February 15, 1972. (emphasis supplied)

The House Report,<sup>63</sup> in analyzing S.22, as it concerned subsection (b) of section 301, deleted all reference to the material quoted above from Senate Report No. 93-983 and, in its place, substituted the following:

The numbered clauses of subsection (b) list three general areas left unaffected by the preemption: (1) subject matter that does not come within the subject of copyright; (2) causes of action arising under State law before the effective date of the statute; and (3) violations of rights that are not equivalent to any of the exclusive rights under copyright.

The examples in clause (3), while not exhaustive, are intended to illustrate rights and remedies that are different in nature from the rights comprised in a copyright and that may continue to be protected under State common law or statute. The evolving common law rights of 'privacy,' 'publicity,' and trade secrets, and the general laws of defamation and fraud, would remain unaffected as long as the causes of action contain elements, such as an invasion of personal rights or a breach of trust or confidentiality, that are different in kind from

62. S.22 was introduced by Senator McClellan at the 1st Session of the 94th Congress, on January 15, 1975. On November 20, 1975 it was reported by Mr. McClellan with an amendment in the nature of a substitute. Subsection (b) of Section 301, as quoted in this article, is found in said substitute.

63. HOUSE REPORT note 4 *supra* at 132; U.S. CODE CONG. & AD. NEWS at 6177-78.



copyright infringement. Nothing in the bill derogates from the rights of parties to contract with each other and to sue for breaches of contract; however, to the extent that the unfair competition concept known as 'interference with contract relations' is merely the equivalent of copyright protection, it would be preempted.

The last example listed in clause (3)—deceptive trade practices such as passing off and false representation—represents an effort to distinguish between those causes of action known as 'unfair competition' that the copyright statute is not intended to preempt and those that it is. Section 301 is not intended to preempt common law protection in cases involving activities such as false labeling, fraudulent representation, and passing off even where the subject matter involved comes within the scope of the copyright statute.

'Misappropriation' is not necessarily synonymous with copyright infringement, and thus a cause of action labeled as 'misappropriation' is not preempted if it is in fact based neither on a right within the general scope of copyright as specified by section 106 nor on a right equivalent thereto. For example, state law should have the flexibility to afford a remedy (under traditional principles of equity) against a consistent pattern of unauthorized appropriation by a competitor of the facts (i.e., not the literary expression) constituting 'hot' news, whether in the traditional mold of *International News Service v. Associated Press*, 248 U.S. 215 (1918) or in the newer form of data updates from scientific, business, or financial data bases. Likewise, a person having no trust or other relationship with the proprietor of a computerized data base should not be immunized from sanctions against electronically or cryptographically breaching the proprietor's security arrangements and accessing the proprietor's data. The unauthorized data access which should be remediable might also be achieved by the intentional interception of data transmissions by wire, microwave or laser transmissions, or by the common unintentional means of 'crossed' telephone lines occasioned by errors in switching.

The proprietor of data displayed on the cathode ray tube of a computer terminal should be afforded protection against unauthorized printouts by third parties (with or without improper access), even if the data are not copyrightable. For example, the data may not be copyrighted because they are not fixed in a tangible medium of expression (i.e., the data are not displayed for a period or [*sic*] not more than transitory duration).

It is to be noted that S.22 deleted the initial phrase "unpublished material" in section 301(b)(1) and substituted the phrase "subject matter". The amended language thus indicated that there was no federal preemption with respect to "subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103. . ."<sup>64</sup> The House Report<sup>65</sup> gives no reason for the change. Why not? The change is important.

An examination of the text of section 301 reveals that S.22 was again amended before passage. This time section 301 was changed materially by the deletion of all illustrative examples

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64. For the complete text of sections 102 and 103 see Appendix

65. HOUSE REPORT note 4 *supra* at 132.

of non-copyright causes of action which were not affected by the federal preemption of the Act. The deletion was made in the Committee of Conference of the Senate and House. The following cryptic statement is found in the House Conference Report:<sup>66</sup>

The House bill deleted the clause of section 301(b)(3) enumerating illustrative examples of causes of action, such as certain types of misappropriation, not preempted under section 301. . . .

No reasons are given. What was wrong with illustrating types of actions available in state forums for the redressing of injuries to intellectual productions not otherwise protectible under copyright principles? Why the earlier unexplained deletion from section 301 (b)(1) of the reference to "unpublished material"?<sup>67</sup> Are these deletions intended to broaden or to narrow federal preemption? What works came within the scope of the Act? A nice series of questions, particularly in light of the following quotation from the House Report:<sup>68</sup>

The preemption of rights under State law is complete with respect to any work coming within the scope of the bill, even though the scope of exclusive rights given the work under the bill is narrower than the scope of common law rights in the work might have been.

The foregoing quotation, when read with that portion of the House Report set out above,<sup>69</sup> makes one wonder whether there might not be a bit of self indulgent puffery in the House Report's observation that the principle of preemption in section 301 was ". . . stated in the clearest and most unequivocal language possible. . . ."<sup>70</sup>

What does section 301 mean? Two decades of legislative tinkering have made the Act, in general, and section 301 in particular, less than lucid. Certainly, when one examines section 301 in its S.1361 form<sup>71</sup> one can see a certain clear cut rationale. It appears section 301 was designed to limit state court jurisdiction to the regulation of only two classes of intellectual works: (1) *copyrightable works not yet eligible* for protection under the Federal Copyright Law, *e.g.*, works which have not yet been

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66. HOUSE CONFERENCE REPORT note 15 *supra* at 79.

67. See notes 63-66 *supra* and accompanying text.

68. HOUSE REPORT note 4 *supra* at 131.

69. *Id.* at 130-31.

70. *Id.*

71. See notes 58 and 59 *supra*.

“fixed” and hence have not yet been “created” for the purposes of Federal Law, and (2) *non-copyrightable works*, e.g., those which do not come within the scope of the Federal Copyright Law.

Within the class of *non-copyrightable works* one finds such commercially important intellectual productions as: “literary characters”; “slogans/jingles”; “titles”; “advertising and promotion ideas”; “ideas/synopses/formats for motion pictures, television series, books, songs and plays.”<sup>72</sup> Certainly, section 301 (b) (1) of S.1361<sup>73</sup> would have presented no questions of interpretation. S.1361 excluded non-copyrightable works from the preemptive grasp of federal copyright law as long as such works remained unpublished material. However, the Act deleted the reference to unpublished works. Now the certainty is gone.

The effort of the House Report<sup>74</sup> to explain section 301 (b) only complicates matters:

As long as a work fits within one of the general subject matter categories of sections 102 and 103, the bill prevents the States from protecting it *even if it fails to achieve Federal statutory copyright because it is too minimal or lacking in originality to qualify*, or because it has fallen into the public domain. On the other hand, section 301(b) explicitly preserves common law copyright protection for one important class of works: works that have not been ‘fixed in any tangible medium of expression.’ (emphasis supplied)

Which works fit within sections 102 and 103? And when is a work, other than a slogan or title “too minimal . . . to qualify” for copyright protection? Further what about the concept of “publication” as affecting a work’s eligibility for protection under state law?

The House Report has this to say about “publication”<sup>75</sup>:

‘Publication,’ perhaps the most important single concept under the present law, also represents its most serious defect.

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72. “Literary characters,” as that term is used in this article, means verbalized descriptions of *personae*, as opposed to artistic illustrations of such personae. Thus, an oral or written description of Hercules would describe a literary character of the “Superman” type. Such a literary character *qua* character is not copyrightable. A cartoon strip drawing of “Clark Kent—Superman,” is copyrightable, not as a literary character, but as a two dimensional drawing, or a three dimensional doll. So, too with Mickey Mouse. However, a substantial taking of the copyrighted story materials of “Clark Kent—Superman” would be a copyright infringement.

With reference to “slogans, etc.,” *see, e.g.*, Regulations of the Copyright Office, 37 C.F.R. § 202.1; *see also* Copyright Office Circulars Nos. 34, 40C, 47 and 48B. The non-copyrightability of these works is so well established that the cases thereon are legion.

73. *See* note 59 *supra* and accompanying text.

74. HOUSE REPORT note 4 *supra* at 131.

75. *Id.* at 129-130, 138.

[p. 130]

Although at one time, when works were disseminated almost exclusively through printed copies, 'publication' could serve as a practical dividing line between common law and statutory protection, this is no longer true. With the development of the 20th century communications revolution, the concept of publication has become increasingly artificial and obscure. To cope with the legal consequences of an established concept that has lost much of its meaning and justification, the courts have given 'publication' a number of diverse interpretations, some of them radically different. Not unexpectedly, the results in individual cases have become unpredictable and often unfair. A single Federal system would help to clear up this chaotic situation.

Enactment of section 301 would also implement the 'limited times' provisions of the Constitution, which has become distorted under the traditional concept of 'publication.' Common law protection in 'unpublished' works is now perpetual, no matter how widely they may be disseminated by means other than 'publication'; the bill would place a time limit on the duration of exclusive rights in them. The provision would also aid scholarship and the dissemination of historical materials by making unpublished, undissemminated manuscripts available for publication after a reasonable period.

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[p. 138]

*Although 'publication' would no longer play the central role assigned to it under the present law, the concept would still have substantial significance under provisions throughout the bill, including those on Federal preemption and duration.* Under the definition in section 101, a work is 'published' if one or more copies or phonorecords embodying it are distributed to the public—that is, generally to persons under no explicit or implicit restrictions with respect to disclosure of its contents—without regard to the manner in which the copies or phonorecords changed hands. The definition clears up the question of whether the sale of phonorecords constitutes publication, and it also makes plain that any form or [sic] dissemination in which a material object does not change hands—performances or displays on television, for example—is not a publication no matter how many people are exposed to the work. On the other hand, the definition also makes clear that, when copies or phonorecords are offered to a group of wholesalers, broadcasters, motion pictures, etc., publication takes place if the purpose is 'further distribution, public performance, or public display.' (emphasis supplied) [p. 138]

A reading of section 301(b)(1) of the Act might suggest, at first blush, that state courts have original and non-exclusive jurisdiction<sup>76</sup> to regulate rights and remedies in cases concerning *all* non-copyrightable works. However, in light of the evolution of

76. As a practical matter state court jurisdiction over common law cases would be exclusive of the Federal District Courts. However, where federal jurisdiction was based upon diversity principles (U.S. Const. Art. III, § 2, Cl. 1; 28 U.S.C. § 1332) common law cases would be brought in Federal District Courts.

section 301(b)(1) of the Act, this does not appear to be a certainty. *Only unpublished and non-fixed non-copyrightable works* are clearly within the jurisdiction of the states. One example should suffice to illustrate this point:

"W", a writer, conceives a concretely expressed idea for the format of a television series. W's format is based on making an English language dramatic adaptation of a foreign language, public domain non-dramatic literary work. W writes the idea down on a piece of paper. He submits the paper containing his concretely expressed television series format idea to "P", a producer, with the understanding that if the idea is used W will be paid X dollars. P submits the written idea to several networks to ascertain their interest in the idea. Several bid for the television format idea.

Has *W* created a work within the scope of the Act? Certainly it is "fixed," pursuant to section 101.<sup>77</sup> Is it a "publication", under section 101?<sup>78</sup> If it is both, is it within the subject matter of copyright, pursuant to sections 102 and 103? If it is—but "... it fails to achieve federal statutory copyright because it is too minimal . . . to qualify",<sup>79</sup> then "the bill [Act] prevents the states from protecting it. . . ."<sup>80</sup> *W* is in legal limbo. His commercially viable idea is now unprotectible at both the state and federal level. Is this any way to protect an author?

The reason for this sorry situation is again poor drafting, coupled, this time, with an inability to clearly perceive the *concept of publication*. The House Report has observed<sup>81</sup> that "... a work [which can fit] within one of the general subject matter categories of sections 102 and 103"—and thus be copyrightable subject matter regulated solely under the Act—can, nevertheless, be denied protection by the states, and by the federal government under the Act, if the work "... fails to achieve federal statutory copyright because it is too minimal or lacking in originality to qualify, or because it has fallen into the public domain" such an observation is a most unsettling one.

Does the House Report's observation mean that a detailed written synopsis of a concretely expressed idea for a television series (which synopsis may be only a few pages) and which has been distributed to several television sources to solicit possible sales, is a work which could fall within sections 102 and 103, but which is not protectible under the Act as being "too minimal"?

Does the House Report's observation mean that a written

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77. See Appendix for text of section 101.

78. *Id.*

79. HOUSE REPORT note 4 *supra* at 131; see also note 61 *supra* and accompanying text.

80. HOUSE REPORT note 4 *supra* at 131.

81. *Id.* at 130-131, see note 58 *supra*.

slogan separately submitted, or contained within a written presentation of a concretely expressed idea for an advertising campaign, and submitted to several interested parties to solicit possible clients to use the same, is copyrightable subject matter which cannot be protected under the Act because it is "too minimal"? Or are both works truly noncopyrightable, but because they were "published" they cannot be given "protection equivalent to copyright"?<sup>82</sup> But can they be given protection under state law? And if so, what kind? Is this the way to state the preemptive intent of Congress "in the clearest and most unequivocal language possible"?<sup>83</sup>

The Act's treatment of the concept of publication only adds to the chaos. It does this "by failing to recognize that publication as used in the law of intellectual productions is a *word of art*."<sup>84</sup> "There is a distinction between 'publication' for purposes of exploitation and 'publication' for purposes of creating or destroying legal rights. The two are not synonymous, yet there are instances when the one act of publication will have both connotations. . . ."<sup>85</sup> Thus, only the unqualified distribution to the public of copies of a work *subject to statutory copyright regulation* will be a publication in the exploitation sense and also a publication in the legal sense, so that unless done in accordance with the requirements of the statute, legal rights in the work will be destroyed.

Drone, the dean of American copyright commentators, has stated that in order to determine whether a creator's common law rights in his work are terminated by its publication ". . . two tests are to be applied: 1, whether there is any statute relating to the species of production for which protection is sought, or governing the kind of right which is claimed; 2, whether the work has been published within the meaning of the statute . . . ."<sup>86</sup>

It follows from the foregoing that it serves only a destructive purpose to restrict state protection of *non-copyrightable* works to "unpublished materials." "Publication" as a word of art has

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82. *Id.*

83. *Id.* at 130.

84. A.S. KATZ, *The Publication of Intellectual Productions—A Common Sense Approach*, 30 SO. CALIF. LAW REV. 48, 49 n.6 (1956).

85. *Id.* at 49.

86. DRONE ON COPYRIGHT 118 (1879).

absolutely no bearing upon those categories of works which are not within the scope of federal copyright law. This important point was brought home by Chief Justice Burger in the tape piracy case, *Goldstein v. California*,<sup>87</sup> when he wrote:

Petitioners place great stress on their belief that the records or tapes which they copied had been 'published.' We have no need to determine whether, *under state law*, these recordings had been published or what legal consequences such publication might have. *For purposes of federal law*, 'publication' serves only as a term of the art which defines the legal relationships which Congress has adopted under the federal copyright statutes. As to categories of writings which Congress has not brought within the scope of the federal statute, the term has no application. (Court's emphasis)

Consonant with the foregoing it is recommended that clause (1) of section 301(b) of the Act be amended to read as follows:

[301(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to:]

(1) *any* material traditionally not protected by statutory copyright, such as literary characters, slogans, jingles, titles, advertising and promotion ideas, and ideas, synopses and formats of works of authorship falling within Sections 102 and 103 of the Act whether the same be published or unpublished; and copyrightable works not yet fixed in any tangible medium of expression.

As amended, clause (1) of section 301(b), when applied in conjunction with the salutary equity and contract provisions of clause (3), should lay to final rest the spectre of publication which has long plagued works not within the scope of federal statutory copyright. The amendment would also make it crystal clear that *Sears and Compco*<sup>88</sup> do not bar state protection of such non-copyrightable works under principles of unfair competition law, provided such state action is not designed as a subterfuge to protect a work clearly within sections 301 and 302 but failing to obtain or maintain federal statutory protection.

### III. DURATION OF THE RIGHTS GRANTED

Perhaps the most beneficial provisions of the Act, from the point of view of the economic well being of authors, are those found in sections 302 through 305. A brief description of these sections was given in the INTRODUCTION portion of this article.<sup>89</sup> This portion of the article will examine these sections in greater depth.

To "... authors and their representatives . . . the adoption of a life-plus-50 term was by far the most important legislative goal

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87. 412 U.S. 546, 570 n.28 (1973).

88. *Sears Roebuck and Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting*, 376 U.S. 234 (1964).

89. See pp. 175-76 *supra* and Appendix for full text of sections 302 through 305.

in copyright revision."<sup>90</sup> The Register of Copyrights regarded this term "... as the foundation of the entire bill [the present Act]."<sup>91</sup>

**Section 302 of the Act deals with the duration of copyright for works created on or after January 1, 1978.**<sup>92</sup> In summary, it provides:

(a): Copyright subsists from the work's "creation"<sup>93</sup> and continues for a term consisting of the author's life and 50 years after his or her death.

(b): Copyright in a jointly authored work lasts until 50 years after the death of the last surviving joint author.

(c): Copyright in anonymous<sup>95</sup> and pseudonymous<sup>96</sup> works, and in works made for hire<sup>97</sup> lasts 75 years from first publication<sup>98</sup> of the work or 100 years from creation, whichever expires first. If, with reference to anonymous and pseudonymous works, one or more of the authors are identified, and the appropriate data recorded in the Copyright Office, then the copyright in such cases will last for the life of the author (or last surviving joint author) so identified and 50 years.<sup>99</sup>

(d): Copyright Office records relating to the death of authors are provided for and regulated.<sup>100</sup>

(e): A presumption as to an author's death is created.<sup>101</sup> The section is silent whether the presumption is conclusive or rebuttable and the House Report does not elaborate on this aspect.<sup>102</sup> However, this writer is persuaded such a presumption was intended to be rebuttable.<sup>103</sup>

90. HOUSE REPORT note 4 *supra* at 133.

91. *Id.*

92. See Appendix for full text of Section 302.

93. See section 101 in Appendix for the definition of "creation".

94. The Act does not define the terms "author" or "joint authors". Section 101 defines a "joint work"; see Appendix.

95. See section 101 in Appendix for the definition of "anonymous".

96. See section 101 in Appendix for the definition of "pseudonymous".

97. See section 101 in Appendix for the definition of "work made for hire." See also sections 201 and 202 in the Appendix.

98. See section 101 in Appendix for definition of term "publication".

99. See section 302(c) in Appendix. See also HOUSE REPORT note 4 *supra* at 137.

100. See section 302(d) in Appendix. See also HOUSE REPORT note 4 *supra* at 138.

101. See section 302(e) in Appendix.

102. HOUSE REPORT note 4 *supra* at 138.

103. The Federal Rules of Evidence are contained within Pub. L. No. 93-595, 88 Stat. 1926, signed into law by President Gerald Ford on January 2, 1975, effective date, July 1, 1975. Rule 301 declares:



**Section 303 of the Act concerns the duration of copyright works created, but not published, before January 1, 1978.**<sup>104</sup> Specifically section 303 deals with the granting of preemptive statutory protection under the Act to existing works now enjoying *perpetual* protection under common law principles.<sup>105</sup> As the House Report notes:<sup>106</sup>

... section 303 would have a genuinely restrictive effect. Its basic purpose is to substitute statutory for common law copyright for everything now protected at common law, [here again unclear language: slogans, titles, program ideas *inter alia*, are protected at common law, but are not subjects of copyright] and to substitute reasonable time limits for the perpetual protection now available. . . .

Thus, for copyrightable works now protected at common law, *e.g.*, a play being performed from an unpublished text (the making of copies for cast and stage crew use only is not a "publication"),<sup>107</sup> statutory copyright shall subsist from January 1, 1978, and shall endure for the life of the author plus 50 years, or in the case of an unpublished anonymous, pseudonymous work or works made for hire, the statutory copyright endures for 100 years from creation.

Some nice constitutional questions would be raised were the

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Rule 301. Presumptions in General in Civil Actions and Proceedings.

In all civil actions and proceedings not otherwise provided for by Act of Congress or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

Rule 302 declares:

Rule 302. Applicability of State Law in Civil Actions and Proceedings.

In civil actions and proceedings, the effect of a presumption respecting a fact which is an element of a claim or defense as to which State law supplies the rule of decision is determined in accordance with State law.

*See also*, §§ 600-607 California Evidence Code. Section 602 makes clear that under the law of California a statutory presumption, as in Section 302(e) of the Act, is a rebuttable presumption.

104. *See* section 303 in Appendix.

105. 17 U.S.C. § 2 of the present Copyright Act declares:

§ 2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK.—Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

106. HOUSE REPORT note 4 at 139.

107. The present Copyright Act, 17 U.S.C. § 1 *et seq.*, does not define "publication", but it does define the "date of publication" as "... the earliest date when copies of the first authorized edition were placed on sale, sold or publicly distributed by the proprietor of the copyright or under his authority." 17 U.S.C. § 26. *See also* Copyright Office Circular No. 48 *re*: Dramatico-Musical Works.

government to terminate the perpetual rights held by a proprietor of an unpublished work without giving an adequate *quid pro quo* in return. The constitutional issue turns on whether there would be such a "taking" of the property concerned, by limiting its term of protection, as to place such an author in a position different from that accorded authors of works in which copyrights presently subsist, or in which copyrights would subsist in the future. In short, in violation of the fifth amendment to the Constitution, an improper limited extension of statutory protection in lieu of perpetual common law protection could constitute an unlawful taking of property without due process of law and also could constitute a denial of equal protection of the laws to the proprietors of *copyrightable* works presently enjoying perpetual common law protection.<sup>108</sup>

The constitutional question is resolved in section 303 as follows: federal statutory copyright subsists from January 1, 1978, and endures for the life of the author plus fifty years as set forth in section 302. To cover those few cases where the substituted statutory term would be of little economic advantage to the author, or to his family, section 303 specifically declares:

In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

The foregoing provision ensures protection under the statute for not less than twenty five years as measured from January 1, 1978, and, if the work is subsequently published, for not less than fifty years from January 1, 1978.

**Section 304 of the Act treats of the duration of copyright in subsisting copyrights and of the termination of transfers and licenses affecting rights of copyright proprietors in the renewal copyright, which transfers and licenses were executed before January 1, 1978.**<sup>109</sup>

(a): For all copyrights in their *first term* of copyright on January 1, 1978, this subsection reenacts and preserves the renewal provision in the present Copyright Act, 17 U.S.C. § 24. Thus, all existing first term copyrights, and all those secured

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108. For a *fuller* discussion of the constitutional issues, see A.E. KATZ, *The General Revision of the Copyright Law—From Bare Bones to Corpulence—A Partial Overview*, 4 PEPPERDINE L. REV. 213 (1977).

109. See section 304 in Appendix.

through December 31, 1977, continue under the present two tier renewal system. The first term will last for 28 years. The copyright *must* be renewed and extended to receive a second term of protection. However, the renewal/extension term will last for 47 years rather than the present 28 years, for a two term total of 75 years. The last sentence of subsection (a) of section 304 declares:

[t]hat in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty eight years from the date copyright was originally secured.

It is respectfully submitted that the default provision is unnecessarily regressive.

It is suggested that section 304 (a) of the Act be amended to provide substantially as follows:

Should there be a default of registration of an application for renewal and extension, then, in such event, the underlying copyright would be renewed by the government on behalf of a national trust to be set up to receive the royalties derived from the trust's continued exploitation of such work. These royalties could be used, *inter alia*, to support indigent authors and their families, or to endow useful projects designed to advance the state of the arts, or to advance and encourage legal studies in the field of intellectual property.

(b): All renewal copyrights in force on October 19, 1976 (the day the Bill was signed into law) are automatically extended to last for a term of 75 years as measured from the date the copyright was first secured.

(c): This subsection permits an author, or if the author were dead, those claiming through the author, to recapture rights in the copyright by acting to terminate transfers and licenses effective in the extended renewal term where such transfers were executed before January 1, 1978. The termination provisions are convoluted, to say the least. An analysis of subsection (c) and its myriad clauses would serve no useful purpose, since the exposition of the analysis would prove as lengthy as the provisions themselves, or as complex as the House Reports' "explanations" thereof.<sup>110</sup>

Suffice it to say that the right of recapture must be exercised "at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later."<sup>111</sup>

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110. HOUSE REPORT note 4 *supra* at 141-42. It is noted therein that each owner of a reverted right is a tenant in common, thus each owner could independently sell his or her share, or could use or license the work subject to an accounting to the other co-owners. Imagine the problems this "splitting" of the copyright can entail.

111. Section 304(c) (3) of the Act.

Naturally, the right of recapture does not apply to works made for hire. For the procedure concerning the termination of transfers and licenses executed after January 1, 1978, see section 203 of the Act.<sup>112</sup> Note the time constraints in section 203(a)(3).

**Section 305 of the Act deals with the terminal date in measuring duration of copyright.**<sup>113</sup> All copyright terms set forth in sections 302 through 304 run to the end of the year in which they would otherwise expire, a salutary provision which will make these copyright terms easier to compute. It must be cautioned that section 305 affects only "terms of copyright." Thus, the latter section has no application to the copyright recapture procedures in section 304 (c).<sup>114</sup>

#### IV. CONCLUSION

The 1976 Copyright Revision Act shows the effects of over two decades of legal tinkering. As is the woeful wont of too many lawyers, amendments have added verbiage rather than clarity to the Act. As stated in the INTRODUCTION: "Too much of the Act's critical language is opaque, convoluted and unclear."<sup>115</sup> Perhaps it is too late, but it is suggested that the draftsmen of the Act could have profited from an examination of the *United Kingdom Copyright Act, 1956*<sup>116</sup> and the *Stockholm Copyright Convention of 1967* (Berne Union).<sup>117</sup> These two statutes are such paragons of clarity as to merit the cynosure of all perceptive legal draftsmen. Additionally, the more lucid portions of the explanatory language contained in the *1966 and 1976 House Reports*<sup>118</sup> could be recast in condensed form and incorporated into the text of the Act to good purpose. Failing such amendment (exclusive of those suggested by the writer)<sup>119</sup> it will be necessary to assure that the Regulations of the Copyright Office interpreting the Act are drawn with great clarity and specificity.

112. For the House Report explanation's of this section, see HOUSE REPORT note 4 *supra* at 124-28. See also section 203 in Appendix.

113. See section 305 in Appendix.

114. See HOUSE REPORT note 4 *supra* at 142. See also section 304 in Appendix. The same applies to section 203(a)(3), see Appendix.

115. See notes 23 and 24 *supra* and accompanying text.

116. See note 52 *supra*.

117. See note 51 *supra*.

118. See 1966 HOUSE REPORT note 47 and HOUSE REPORT note 4, *supra*. See also SENATE REPORT note 61 and HOUSE CONFERENCE REPORT note 15, *supra*.

119. See suggested amendments pp. 192 and 196 *supra*.

ty.<sup>120</sup> Here, the clear and noncontradictory portions of the explanatory language contained in the above noted House and Senate Reports could be used to great advantage.<sup>121</sup>

As noted in the INTRODUCTION this article does not pretend to analyze all portions of the Act. For example, the writer has not discussed the codification in section 107 of the doctrine of fair use, as such codified doctrine affects the exclusive rights granted copyright owners under section 106. The writer has not reviewed section 108, which endeavors to grant an author protection from the unrestricted copying of his or her works through the use of photocopying machines in libraries.<sup>122</sup> Nor has the "wisdom" of involving the government in the setting of royalties payable for the recording of nondramatic musical works under compulsory license as set forth in section 115 or for the juke box performance of such works under section 116 been discussed. These royalties will be regulated by the Copyright Royalty Tribunal, an independent legislative agency whose structure and operations are detailed in chapter 8 of the Act, sections 801 through 810. Neither has there been any discussion

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120. As per a Notice of Proposed Rulemaking, 41 Fed. Reg. No. 221, November 15, 1976, the Register of Copyrights informed the public of her intention to amend 37 C.F.R. 201 *et seq.* by promulgating new regulations, §§201.9 and 201.10, to set up machinery to carry Section 304(c) of the Act into effect. The writer wishes her well. Her task is not an easy one. An illustrative example of such rulemaking, and its related problems, is found in the Regulations concerning "Recording of Notices of Identity and Signal Carriage Complement of Cable Systems," 42 Fed. Reg. 15,065-068 (No. 53, March 18, 1977). Excerpts from the text of this illustrative Regulation are found in the Appendix.

121. The legislative analyses of the various versions of the bills to revise the Copyright Law and the legislative analyses of the 1976 Copyright Revision Act far exceed in total words the Act itself. Normally, one looks to the legislative analyses to interpret an act. In the instant case it might not be far fetched to suggest that one must look to the Act in order to interpret the legislative analyses.

122. The problem was highlighted in *Williams & Wilkins Company v. United States*, 487 F.2d 1345 (Ct. Cl. 1973) where the Court of Claims found that the library copying of copyrighted professional journals did not constitute infringement. The problem remained unsolved when the United States Supreme Court in a *per curiam* decision, 420 U.S. 376 (1975), affirmed the lower court decision by a 4 to 4, vote, Mr. Justice Blackmun taking no part in the decision.

The HOUSE REPORT note 4 *supra* at 65-79. sets forth the rationale for sections 107 and 108. The HOUSE CONFERENCE REPORT, note 15 *supra* at 70-74, explains why these sections in S.22 were amended in the form as they appear in the Act. The HOUSE REPORT at 68-70 sets forth an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions" and at 70-72, the HOUSE REPORT sets forth "Guidelines For Educational Uses of Music." The HOUSE CONFERENCE REPORT at 72-74 sets forth "Guidelines For The Proviso Of Subsection 108(G) (2)." A careful study of the foregoing Reports and related Guidelines should make clear that whatever the intent of sections 107 and 108, and whatever the meaning is accorded the words of these sections, the sections will most assuredly provide fertile soil for the incubation of substantial litigation concerning their day to day application.

of the definition of "audiovisual works"<sup>123</sup> their distinctions from "motion pictures"<sup>124</sup> and the impact on the videotape recording industry by the granting of copyright protection to a new genre of works called "audiovisual works". Further, the writer has wisely skirted the quagmire for authors created by section 111 which endeavors to resolve, insofar as "free television" and "cable television" are concerned, the conflict between the creators of copyrighted works and the broadcasting industry. These critical areas of the Act call for serious analysis, some of which has already begun.<sup>125</sup>

This article will have served its purpose if it encourages scholarly controversy, if it persuades even one reader to look at the Act with fresh insight, if it persuades even one reader to see that the Act, on balance, ill serves the author, and if it causes such reader to exclaim, as did the little lad in the fairy tale,<sup>126</sup> "Hey, the Emperor is naked!" This article will have served its purposes if even one reader learns that to succeed in the quest for wisdom one must first get understanding.<sup>127</sup>

It is the writer's considered opinion that the fourth general revision of the copyright laws of the United States ill serves the author, in that the Act is so poorly drafted and so unclear in its material parts as to render it both a commercial nightmare and a lawyer's dream. It is the writer's further considered opinion—even were the Act considered a paragon of clarity—that two decades of special interest pressures have warped the purposes of the Act by subordinating the rights of the *author* to those of the *user* of the author's work product.<sup>128</sup>

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123. See section 101 in Appendix.

124. See section 101 in Appendix.

125. See, e.g., A.E. Katz, *The General Revision of the Copyright Law—From Bare Bones to Corpulence—A Partial Overview*, 4 PEPPERDINE L. REV. 213 (1977). See also June 1977 lecture series by Professor Melville B. Nimmer, author of NIMMER ON COPYRIGHT.

126. H.C. ANDERSEN, *THE EMPEROR'S CLOTHES*.

127. See Proverbs IV: 7 quoted at page 1 of this article. The translation from the original Hebrew is by this article's writer.

128. The purported "exclusive rights" of copyright owners in section 106 of the Act are materially diluted by the "limitations" on such rights, and the concessions granted to users, as enumerated in sections 107-18. One example concerning recorded music succinctly illustrates this point. Under the present copyright law, 17 U.S.C. § 1(b), the copyright owner of a musical work controls the exclusive right to arrange said work, whether the arrangement is for use in a recording or otherwise. Under §115 (a)(2) of the Act the copyright owner has no

The tension between the creator of a work and the commercial exploiter of that work has existed since that fateful day, many millennia ago, when the *first* transaction took place between an author and the person acquiring rights in his work. The "love-hate" relationship engendered by such tension will continue: each party needs the other. However, an American copyright act misconceives its constitutional purpose<sup>129</sup> when it exacerbates the tension between author and user by favoring, even by one jot or tittle, the user over the author. And of this vice the 1976 Copyright Revision Act stands condemned!

From the perspective of "authors"<sup>130</sup> there is something basically wrong with a Copyright Act which grants "Exclusive Rights in Copyrighted Works" in one brief section,<sup>131</sup> only to systematically erode such rights through a lengthy series of debilitating sections<sup>132</sup> materially destructive of an author's creative and economic interests.

For the reasons hereinabove set forth the writer respectfully submits that sections 301 through 305 of chapter 3 of the Act and their interrelated sections, must be extensively clarified by early amendment to assure to authors and their kin that no man or woman who labors with head and heart should labor for nought.<sup>133</sup>

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further right to control the making of arrangements of the copyrighted work where a compulsory license is issued for its recodation. Further, the arrangement is not protectible as a "derivative work" (See Section 101 in Appendix) unless the copyright owner consents. In effect, this has the copyright owner bargaining against himself. To obtain copyright protection of another person's arrangement of the copyright owner's musical work, the owner will be required to buy back such arrangement. This adds insult to injury, as the copyright owner cannot obtain a fee under the 1976 Act from the recording party as a condition of granting him a right to arrange the owner's musical work.

129. See U.S. Const. Art. I, §8, cl. 8 set forth at the beginning of this article.

130. *Id.*

131. See section 106 in Appendix.

132. See, e.g., sections 107, 710 and sections 801-10 of the Act.

133. The author of intellectual productions creates a most *special* sort of property:

. . . intellectual property is, after all, the only absolute possession in the world . . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property . . . the inventor of a book or other contrivance of thought holds his property as a God holds it, by the right of creation.

Nathaniel Shaler\*

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Back of the canvas that throbs the painter is hinted and hidden;  
Into the statue that breathes the soul of the sculptor is bidden;  
Under the joy that is felt lie the infinite issues of feeling;  
Crowning the glory revealed is the glory that crowns the revealing.

The third of five stanzas of the poem, Indirection by Richard Realf\*

\* [As quoted in A.S. Katz, *The Creative Process And The Law*, THE JOURNAL OF THE PRODUCERS GUILD OF AMERICA 9 at 11 (1968).]

Such *special property* deserves better protection than that accorded by the 1976 Copyright Revision Act.

## Appendix

### PART ONE—SELECTED SECTIONS FROM THE 1976 COPYRIGHT ACT

#### § 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.

"Audiovisual works" are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.

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 that person's immediate offspring, whether legitimate or not, and any children legally adopted by that person.

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 preexisting 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.

To "display" a work means to show a copy of it, either directly or by means of a film, slide, television image, or any other device or process or, in the case of a motion picture or other audiovisual work, to show individual images nonsequentially.

A work is "fixed" in a tangible medium of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficient-



ly permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration. A work consisting of sounds, images, or both, that are being transmitted, is "fixed" for purposes of this title if a fixation of the work is being made simultaneously with its transmission.

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, other than audiovisual 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, film, tapes, disks, or cards, in which they are embodied.

"Motion pictures" are audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

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 or other audiovisual work, to show its images in any sequence or to make the sounds accompanying it audible.

"Phonorecords" are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, 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, technical drawings, diagrams, and models. Such works shall include works of artistic craftsmanship insofar as their form but not their mechanical or utilitarian aspects are concerned; the design of a useful article, as defined in this section, shall be considered a pictorial, graphic, or sculptural work only if, and only to the extent that, such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.

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. The offering to distribute copies or phonorecords to a group of persons for purposes of further distribution, public performance, or public display, constitutes publication. A public performance or display of a work does not of itself constitute publication.

To perform or display a work "publicly" means—

(1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

"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 or other audiovisual work, 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 "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 nonexclusive license.

A "transmission program" is a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit.

To "transmit" a performance or display 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.

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".

The authors "widow" or "widower" is the author's surviving spouse under the law of the author's domicile at the time of his or her death. Whether or not the spouse has later remarried.

A "work of the United States Government" is a work prepared by an officer or employee of the United States Government as part of that person's official duties

A "work made for hire" is—

(1) a work prepared by an employee within the scope of his or her 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 or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities

## § 102. Subject Matter of Copyright. In General

(a) 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 and other audiovisual works; and
- (7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method or operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

**§ 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 preexisting 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 preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not effect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

**§ 106. Exclusive rights in copyrighted works**

Subject to sections 107 through 118, 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 and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

**§ 113. Scope of exclusive rights in pictorial, graphic, and sculptural works**

(a) Subject to the provisions of subsections (b) and (c) of this section, 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.

(b) This title does not afford, to the owner of copyright in a work that portrays a useful article as such, any greater or lesser rights with respect to the making, distribution, or display of the useful article so portrayed than those afforded to such works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1977, as held applicable and construed by a court in an action brought under this title.

(c) 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 display of pictures or photographs of such articles in connection with advertisements or commentaries related to the distribution or display of such articles, or in connection with news reports.

**§ 201. Ownership of copyright**

(a) INITIAL OWNERSHIP.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

(b) **WORKS MADE FOR HIRE.**—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

(c) **CONTRIBUTIONS TO COLLECTIVE WORKS.**—Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

(d) **TRANSFER OF OWNERSHIP.**—

(1) The ownership of a copyright may be transferred in whole or in part by any means of conveyance or by operation of law, and may be bequeathed by will or pass as personal property by the applicable laws of intestate succession.

(2) Any of the exclusive rights comprised in a copyright, including any subdivision of any of the rights specified by section 106, may be transferred as provided by clause (1) and owned separately. The owner of any particular exclusive right is entitled, to the extent of that right, to all of the protection and remedies accorded to the copyright owner by this title.

(e) **INVOLUNTARY TRANSFER.**—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the exclusive rights under a copyright, shall be given effect under this title.

**§ 202. Ownership of copyright as distinct from ownership of material object**

Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object; nor, in the absence of an agreement, does transfer of ownership of a copyright or of any exclusive rights under a copyright convey property rights in any material object.

**§ 203. Termination of transfers and licenses granted by the author**

(a) **CONDITIONS FOR TERMINATION.**—In the case of any work other than a work made for hire, the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright, executed by the author on or after January 1, 1978, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by one author, termination of the grant may be effected by that author or, if the author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest. In the case of a grant executed by two or more authors of a joint work, termination of the grant may be effected by a majority of the authors who executed it; if any of such authors is dead, the termination interest of any such author may be exercised as a unit by the person or persons who,

under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the author's entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of thirty-five years from the date of execution of the grant; or, if the grant covers the right of publication of the work, the period begins at the end of thirty-five years from the date of publication of the work under the grant or at the end of forty years from the date of execution of the grant, whichever term ends earlier.

(4) The termination shall be effected by serving an advance notice in writing, signed by the number and proportion of owners of termination interests required under clauses (1) and (2) of this subsection, or by their duly authorized agents, upon the grantee or the grantee's successor in title.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition to its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(b) **EFFECT OF TERMINATION.**—Upon the effective date of termination, all rights under this title that were covered by the terminated grants revert to the author, authors, and other persons owning termination interests under clauses (1) and (2) of subsection (a), including those owners who did not join in signing the notice of termination under clause (4) of subsection (a), but with the following limitations:

(1) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(2) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of subsection (a). The rights vest in the author, authors, and other persons named in, and in the proportionate shares provided by, clauses (1) and (2) of subsection (a).

(3) Subject to the provisions of clause (4) of this subsection, a further grant, or agreement to make a further grant, of any right covered by a

terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under clause (2) of this subsection, as are required to terminate the grant under clauses (1) and (2) of subsection (a). Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under clause (2) of this subsection, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representatives, legatees, or heirs at law represent him or her for purposes of this clause.

(4) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the persons provided by clause (3) of this subsection and the original grantee or such grantee's successor in title, after the notice of termination has been served as provided by clause (4) of subsection (a).

(5) Termination of a grant under this section affects only those rights covered by the grants that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(6) Unless and until termination is effected under this section, the grant, if it does not provide otherwise, continues in effect for the term of copyright provided by this title.

#### § 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

(b) Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to—

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103, including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106.

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2047.

(d) Nothing in this title annuls or limits any rights or remedies under any other Federal statute.

**§ 302. Duration of copyright: Works created on or after January 1, 1978**

(a) **IN GENERAL.**—Copyright in a work created on or after January 1, 1978, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of the life of the author and fifty years after the author's death.

(b) **JOINT WORKS.**—In the case of a joint work prepared by two or more authors who did not work for hire, the copyright endures for a term consisting of the life of the last surviving author and fifty years after such last surviving author and fifty years after such last surviving author's death.

(c) **ANONYMOUS WORKS, PSEUDONYMOUS WORKS, AND WORKS MADE FOR HIRE.**—In the case of an anonymous work, a pseudonymous work, or a work made for hire, the copyright endures for a term of seventy-five years from the year of its first publication, or a term of one hundred years from the year of its creation, whichever expires first. If, before the end of such term, the identity of one or more of the authors of an anonymous or pseudonymous work is revealed in the records of a registration made for that work under subsections (a) or (d) of section 408, or in the records provided by this subsection, the copyright in the work endures for the term specified by subsection (a) or (b), based on the life of the author or authors whose identity has been revealed. Any person having an interest in the copyright in an anonymous or pseudonymous work may at any time record, in records to be maintained by the Copyright Office for that purpose, a statement identifying one or more authors of the work; the statement shall also identify the person filing it, the nature of that person's interest, the source of the information recorded, and the particular work affected, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation.

(d) **RECORDS RELATING TO DEATH OF AUTHORS.**—Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the date of death of the author of the copyrighted work, or a statement that the author is still living on a particular date. The statement shall identify the person filing it, the nature of that person's interest, and the source of the information recorded, and shall comply in form and content with requirements that the Register of Copyrights shall prescribe by regulation. The Register shall maintain current records of information relating to the death of authors of copyrighted works, based on such recorded statements and, to the extent the Register considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources.

(e) **PRESUMPTION AS TO AUTHOR'S DEATH.**—After a period of seventy-five years from the year of first publication of a work, or a period of one hundred years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing to indicate that the author of the work is living, or died less than fifty years before, is entitled to the benefit of a presumption that the author has been dead for at least fifty years. Reliance in good faith upon this presumption shall be a complete defense to any action for infringement under this title.

**§ 303. Duration of copyright: Works created but not published or copyrighted before January 1, 1978**

Copyright in a work created before January 1, 1978, but not theretofore in the public domain or copyrighted, subsists from January 1, 1978, and endures for the term provided by section 302. In no case, however, shall the term of copyright in such a work expire before December 31, 2002; and, if the work is published on or before December 31, 2002, the term of copyright shall not expire before December 31, 2027.

**§ 304. Duration of copyright: Subsisting copyrights**

(a) **COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1978.**—Any copyright, the first term of which is subsisting on January 1, 1978, shall endure for twenty-

eight years from the date it was originally secured: *Provided*, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his or her next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of forty-seven years when application for such renewal and extension shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall terminate at the expiration of twenty-eight years from the date copyright was originally secured.

(b) COPYRIGHTS IN THEIR RENEWAL TERM OR REGISTERED FOR RENEWAL BEFORE JANUARY 1, 1978.—The duration of any copyright, the renewal term of which is subsisting at any time between December 31, 1976, and December 31, 1977, inclusive, or for which renewal registration is made between December 31, 1976, and December 31, 1977, inclusive, is extended to endure for a term of seventy-five years from the date copyright was originally secured.

(c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED RENEWAL TERM.—In the case of any copyright subsisting in either its first or renewal term of January 1, 1978, other than a copyright in a work made for hire, the exclusive or nonexclusive grant of a transfer before January 1, 1978, by any of the persons designated by the second proviso of subsection (a) of this section, otherwise than by will, is subject to termination under the following conditions:

(1) In the case of a grant executed by a person or persons other than the author, termination of the grant may be effected by the surviving person or persons who executed it. In the case of a grant executed by one or more of the authors of the work, termination of the grant may be effected, to the extent of a particular author's share in the ownership of the renewal copyright, by the author who executed it or, if such author is dead, by the person or persons who, under clause (2) of this subsection, own and are entitled to exercise a total of more than one-half of that author's termination interest.

(2) Where an author is dead, his or her termination interest is owned, and may be exercised, by his widow or her widower and his or her children or grandchildren as follows:

(A) the widow or widower owns the authors entire termination interest unless there are any surviving children or grandchildren of the author, in which case the widow or widower owns one-half of the author's interest;

(B) the author's surviving children, and the surviving children of any dead child of the author, own the author's entire termination interest unless there is a widow or widower, in which case the ownership of one-half of the author's interest is divided among them;

(C) the rights of the author's children and grandchildren are in all cases



divided among them and exercised on a per stirpes basis according to the number of such author's children represented; the share of the children of a dead child in a termination interest can be exercised only by the action of a majority of them.

(3) Termination of the grant may be effected at any time during a period of five years beginning at the end of fifty-six years from the date copyright was originally secured, or beginning on January 1, 1978, whichever is later.

(4) The termination shall be effected by serving an advance notice in writing upon the grantee or the grantee's successor in title. In the case of a grant executed by a person or persons other than the author, the notice shall be signed by all of those entitled to terminate the grant under clause (1) of this subsection, or by their duly authorized agents. In the case of a grant executed by one or more of the authors of the work, the notice as to any one author's share shall be signed by that author or his or her duly authorized agent or, if that author is dead, by the number and proportion of the owners of his or her termination interest required under clauses (1) and (2) of this subsection, or by their duly authorized agents.

(A) The notice shall state the effective date of the termination, which shall fall within the five-year period specified by clause (3) of this subsection, and the notice shall be served not less than two or more than ten years before that date. A copy of the notice shall be recorded in the Copyright Office before the effective date of termination, as a condition of its taking effect.

(B) The notice shall comply, in form, content, and manner of service, with requirements that the Register of Copyrights shall prescribe by regulation.

(5) Termination of the grant may be effected notwithstanding any agreement to the contrary, including an agreement to make a will or to make any future grant.

(6) In the case of a grant executed by a person or persons other than the author, all rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to all of those entitled to terminate the grant under clause (1) of this subsection. In the case of a grant executed by one or more of the authors of the work, all of a particular author's rights under this title that were covered by the terminated grant revert, upon the effective date of termination, to that author or, if that author is dead, to the persons owning his or her termination interest under clause (2) of this subsection, including those owners who did not join in signing the notice of termination under clause (4) of this subsection. In all cases the reversion of rights is subject to the following limitations:

(A) A derivative work prepared under authority of the grant before its termination may continue to be utilized under the terms of the grant after its termination, but this privilege does not extend to the preparation after the termination of other derivative works based upon the copyrighted work covered by the terminated grant.

(B) The future rights that will revert upon termination of the grant become vested on the date the notice of termination has been served as provided by clause (4) of this subsection.

(C) Where the author's rights revert to two or more persons under clause (2) of this subsection, they shall vest in those persons in the proportionate shares provided by that clause. In such a case, and subject to the provisions of subclause (D) of this clause, a further grant, or agreement to make a further grant, of a particular author's share with respect to any right covered by a terminated grant is valid only if it is signed by the same number and proportion of the owners, in whom the right has vested under this clause, as are required to terminate the grant under clause (2) of this subsection. Such further grant or agreement is effective with respect to all of the persons in whom the right it covers has vested under this subclause, including those who did not join in signing it. If any person dies after rights under a terminated grant have vested in him or her, that person's legal representa-

tives, legatees, or heirs at law represent him or her for purposes of this subclause

(D) A further grant, or agreement to make a further grant, of any right covered by a terminated grant is valid only if it is made after the effective date of the termination. As an exception, however, an agreement for such a further grant may be made between the author or any of the persons provided by the first sentence of clause (6) of this subsection, or between the persons provided by subclause (C) of this clause, and the original grantee or such grantees successor in title, after the notice of termination has been served as provided by clause (4) of this subsection.

(E) Termination of a grant under this subsection affects only those rights covered by the grant that arise under this title, and in no way affects rights arising under any other Federal, State, or foreign laws.

(F) Unless and until termination is effected under this subsection, the grant, if it does not provide otherwise, continues in effect for the remainder of the extended renewal term.

#### § 305. Duration of copyright: Terminal date

All terms of copyright provided by sections 302 through 304 run to the end of the calendar year in which they would otherwise expire.

### PART TWO—SELECTED EXCERPTS—COPYRIGHT OFFICE REGULATIONS

#### Title 37—Patents, Trademarks, and Copyrights

#### CHAPTER II—COPYRIGHT OFFICE, LIBRARY OF CONGRESS

#### PART 201—GENERAL PROVISIONS

##### Recording of Notices of Identity and Signal Carriage Complement of Cable Systems

AGENCY: Library of Congress, Copyright Office.

ACTION: Final Regulation.

SUMMARY: This regulation makes clear that the public records of the Copyright Office are open to the recording of notices of identity and signal carriage complement required to be made by cable systems under section 111(d)(1) of Title 17 of the United States Code as amended by Pub. L. 94-553 (90 Stat. 2541), the Act for General Revision of the Copyright Law. The regulation pertains to the nature of the document to be filed and the action to be taken by the Copyright Office upon its receipt. The regulation is interim in nature and may be modified and supplemented in further rulemaking proceedings.

EFFECTIVE DATE: March 18, 1977.

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2. *Additional information.* Comments from copyright owners and broadcast organizations urged that the regulation be modified to require the recording of various items of information not referred to in the proposal. These included such matters as: identifying and classifying signals as independent or network, local or distant; telephone numbers of cable systems; channel numbers; time periods of secondary carriage; dates of operation; and special information pertaining to substituted programming.

The Copyright Office has considerable doubt whether it has statutory authority to require such information in initial notices required to be recorded by April 18, 1977. This doubt, coupled with the short time period remaining before the

initial filing deadline and the desirability of further exploration of the issues, has led us to conclude we cannot require the recording of such additional information at the present time. This conclusion is, however, limited to the adoption of this interim regulation. It is possible that all or part of this information should be required to be filed in supplemental records under the "further information" clause of section 111(d)(1). It is equally possible that all or part of such information should not be required until the filing of accountings under section 111(d)(2). These are serious issues to be explored in the further rulemaking proceedings referred to earlier and no inferences or grounds of argument should be drawn from our present action.

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6. *Regular carriage.* Several copyright owners and broadcast organizations objected to the statement in the preamble to the Notice of Proposed Rulemaking that "identification of primary transmitters whose signals are carried on a sporadic basis, such as under the program substitution rules of the Federal Communications Commission, is not required." They asserted that cable systems might well engage in the consistent or "regular carriage" of particular primary transmitters on a substitute basis. Some argued that identification of even "sporadically" carried signals was required. Cable systems, however, took the position that substituted programming can never be considered "regularly carried."

The controversy appears to revolve around the issue of whether the word "regular" has a categorical meaning (e.g., as opposed to "substituted" carriage), or relates simply to the frequency or consistency of a carriage of any signal. The Office is not in a position to determine this issue in the instant proceeding. (Similarly, the Office cannot, under the statutory language and present record, adopt the suggestion of one comment that it draw a definition of "regular carriage" for radio signals.) The interim regulation adopts, without interpretation, the language of the statute.