COPYRIGHT LAW REVISION

HEARINGS

BEFORE THE

SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES, AND THE ADMINISTRATION OF JUSTICE

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

NINETY-FOURTH CONGRESS

FIRST SESSION

ON

H.R. 2223

COPYRIGHT LAW REVISION

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COPYRIGHT LAW REVISION

WEDNESDAY, MAY 7, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs and Bruce A. Lehman, counsels; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order. We have met this morning to begin subcommittee hearings on H.R. 2223, introduced by the Chair, for the general revision of the copyright law.

Ten years ago this month in this room the subcommittee began what turned out to be 22 days of public hearings on a bill having the same purpose, namely, the total revision of title 17, United States Code, the copyright law.

The 1965 hearings, followed by many subcommittee meetings, resulted in a revision bill being reported to and passed by the House of Representatives on April 11, 1967. The Senate, however, failed to act on that bill and the House-passed bill expired.

In September 1974, when the Senate at last did pass a copyright law revision bill, the involvement of the House Judiciary Committee in the nomination of Nelson Rockefeller to be Vice President prevented House consideration of the measure during what was left of 1974. However, the Congress did enact legislation creating a National Commission on New Technological Uses of Copyrighted Works, of which the President is to appoint the members.

With the coming of 1975, Senator McClellan reintroduced the 1974 Senate-passed bill as S. 22, and the Chair introduced an identical bill in the House under the number H.R. 2223. Title II of the bills S. 22 and H.R. 2223, go beyond providing copyright law revision, and provide protection of ornamental designs of useful articles.

In addition, the subcommittee has before it two measures directly related to the proposed revision. One of these, H.R. 5345, introduced by our subcommittee colleague, Mr. Danielson, would create a performer's royalty as part of the bundle of rights known as copyright.

The other, H.R. 4965, introduced by Mr. Won Pat, would authorize the making of video tapes for transmission on noncontiguous cable television systems, that is, in places other than the 48 mainland States.

H.R. 2223, H.R. 5345, and H.R. 4965 will be placed in the record of the hearings at the conclusion of this statement.

Article I, section 8 of the Federal Constitution empowers Congress "to promote the progress of science and useful arts, by securing to authors * * * the exclusive right to their * * * writings * * *." At the very least, therefore, Congress has the constitutional obligation to determine whether and to what extent the progress of the useful arts will be promoted by congressional grants of exclusivity for the writings of authors.

The purpose of the pending legislation is, in short, to bring up to date the copyright law which has not been substantially revised since 1909. It should be our commitment to correct this neglect, for the great and growing acceleration of technology and the resultant new uses of copyrighted works have rendered much of the existing law inadequate and obsolete.

The subcommittee is pleased, this morning, to open the hearings by welcoming witnesses from the Library of Congress. We have the Honorable John G. Lorenz, Acting Librarian of Congress; Abraham L. Kaminstein, former Register of Copyrights who went through the 1965–67 hearings with us, and Barbara Ringer, also an old friend, the present Register of Copyrights. Mr. Lorenz, will you begin?

[H.R. 2223, H.R. 5345, and H.R. 4965 are as follows:]

94TH CONGRESS
1ST SESSION

H. R. 2223

IN THE HOUSE OF REPRESENTATIVES

JANUARY 28, 1975

Mr. KASTENMEIER introduced the following bill; which was referred to the Committee on the Judiciary.

A BILL

For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—GENERAL REVISION OF COPYRIGHT LAW

SEC. 101. Title 17 of the United States Code, entitled "Copyrights", is hereby amended in its entirety to read as follows:

TITLE 17—COPYRIGHTS

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2. COPYRIGHT OWNERSHIP AND TRANSFER	201
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Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT

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102. Subject matter of copyright: In general.
103. Subject matters of copyright: Compilations and derivative works.
104. Subject matter of copyright: National origin.
105. Subject matter of copyright: United States Government works.
106. Exclusive rights in copyrighted works.
107. Limitations on exclusive rights: Fair use.
108. Limitations on exclusive rights. Reproduction by libraries and archives.

TITLE 17—COPYRIGHTS—Continued

Chapter 1.—SUBJECT MATTER AND SCOPE OF COPYRIGHT—Continued

Sec.
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112. Limitations on exclusive rights: Ephemeral recordings.
113. Scope of exclusive rights in pictorial, graphic, and sculptural works.
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116. Scope of exclusive rights in nondramatic musical works. Public performances by means of coin-operated phonorecord players.
117. Scope of exclusive rights: Use in conjunction with computers and similar information systems.

§ 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 his immediate offspring, whether legitimate or not, and any children legally adopted by him.

A "collective work" is a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.

A "compilation" is a work formed by the collection and assembling of pre-existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship. The term "compilation" includes collective works.

"Copies" are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise

1 communicated, either directly or with the aid of a machine or
2 device. The term "copies" includes the material object, other than
3 a phonorecord, in which the work is first fixed.
4 "Copyright owner," with respect to any one of the exclusive
5 rights comprised in a copyright, refers to the owner of that par-
6 ticular right.
7 A work is "created" when it is fixed in a copy or phonorecord
8 for the first time; where a work is prepared over a period of time,
9 the portion of it that has been fixed at any particular time con-
10 stitutes the work as of that time, and where the work has been
11 prepared in different versions, each version constitutes a separate
12 work.
13 A "derivative work" is a work based upon one or more pre-
14 existing works, such as a translation, musical arrangement, dram-
15 atization, fictionalization, motion picture version, sound record-
16 ing, art reproduction, abridgment, condensation, or any other
17 form in which a work may be recast, transformed, or adapted. A
18 work consisting of editorial revisions, annotations, elaborations,
19 or other modifications which, as a whole, represent an original
20 work of authorship, is a "derivative work."
21 A "device," machine," or "process" is one now known or later
22 developed.
23 To "display" a work means to show a copy of it, either directly
24 or by means of a film, slide, television image, or any other device
25 or process or, in the case of a motion picture or other audiovisual
26 work, to show individual images nonsequentially.
27 A work is "fixed" in a tangible medium of expression when its
28 embodiment in a copy or phonorecord, by or under the authority
29 of the author, is sufficiently permanent or stable to permit it to
30 be perceived, reproduced, or otherwise communicated for a period
31 of more than transitory duration. A work consisting of sounds.
32 images, or both, that are being transmitted, is "fixed" for pur-
33 poses of this title if a fixation of the work is being made simultane-
34 ously with its transmission.
35 The terms "including" and "such as" are illustrative and not
36 limitative.
37 A "joint work" is a work prepared by two or more authors
38 with the intention that their contributions be merged into insepa-
39 rable or interdependent parts of a unitary whole.
40 "Literary works" are works other than audiovisual works,

1 expressed in words, numbers, or other verbal or numerical sym-
2 bols or indicia, regardless of the nature of the material objects,
3 such as books, periodicals, manuscripts, phonorecords, or film, in
4 which they are embodied.

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

8 To "perform" a work means to recite, render, play, dance, or
9 act it, either directly or by means of any device or process or, in
10 the case of a motion picture or other audiovisual work, to show its
11 images in any sequence or to make the sounds accompanying it
12 audible.

13 "Phonorecords" are material objects in which sounds other than
14 those accompanying a motion picture or other audiovisual work,
15 are fixed by any method now known or later developed, and from
16 which the sounds can be perceived, reproduced, or otherwise com-
17 municated, either directly or with the aid of a machine or device.
18 The term "phonorecords" includes the material object in which
19 the sounds are first fixed.

20 "Pictorial, graphic, and sculptural works" include two-dimen-
21 sional and three-dimensional works of fine, graphic, and applied
22 art, photographs, prints and art reproductions, maps, globes,
23 charts, plans, diagrams, and models.

24 A "pseudonymous work" is a work on the copies or phono-
25 records, of which the author is identified under a fictitious name.

26 "Publication" is the distribution of copies or phonorecords of a
27 work to the public by sale or other transfer of ownership, or by
28 rental, lease, or lending. The offering to distribute copies or
29 phonorecords to a group of persons for purposes of further dis-
30 tribution, public performance, or public display, constitutes
31 publication. A public performance or display of a work does not
32 of itself constitute publication.

33 To perform or display a work "publicly" means:

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

38 (2) to transmit or otherwise communicate a performance
39 or display of the work to a place specified by clause (1) or
40 to the public, by means of an device or process, whether the

1 members of the public capable of receiving the performance
2 or display receive it in the same place or in separate places
3 and at the same time or at different times.
4 "Sound recordings" are works that result from the fixation of
5 a series of musical, spoken, or other sounds, but not including the
6 sounds accompanying a motion picture or other audiovisual work,
7 regardless of the nature of the material objects, such as disks,
8 tapes, or other phonorecords, in which they are embodied.
9 "State" includes the District of Columbia and the Common-
10 wealth of Puerto Rico, and any territories to which this title is
11 made applicable by an act of Congress.
12 A "transfer of copyright ownership" is an assignment, mort-
13 gage, exclusive license, or any other conveyance, alienation, or
14 hypothecation of a copyright or of any of the exclusive rights
15 comprised in a copyright, whether or not it is limited in time or
16 place of effect, but not including a nonexclusive license.
17 A "transmission program" is a body of material that, as an
18 aggregate, has been produced for the sole purpose of transmission
19 to the public in sequence and as a unit.
20 To "transmit" a performance or display is to communicate it
21 by any device or process whereby images or sounds are received
22 beyond the place from which they are sent.
23 The "United States," when used in a geographical sense, com-
24 prises the several States, the District of Columbia and the Com-
25 monwealth of Puerto Rico, and the organized territories under
26 the jurisdiction of the United States Government.
27 "useful article" is an article having an intrinsic utilitarian
28 function that is not merely to portray the appearance of the
29 article or to convey information. An article that is normally a part
30 of a useful article is considered a "useful article."
31 The author's "widow" or "widower" is the author's surviving
32 spouse under the law of his domicile at the time of his death,
33 whether or not the spouse has later remarried.
34 A "work of the United States Government" is a work prepared
35 by an officer or employee of the United States Government as part
36 of his official duties.
37 A "work made for hire" is:
38 (1) a work prepared by an employee within the scope of
39 his employment; or

(2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture 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, as a photographic or other portrait of one or more persons, 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. 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. An "instructional text" is a literary, pictorial, or graphic work prepared for publication 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;

(7) sound recordings.

(b) In no case does copyright protection for an original work of authorship extend to any idea, plan, 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.

§ 103. Subject matter of copyright: Compilations and derivative works

(a) The subject matter of copyright as specified by section 102 in-

1 cludes compilations and derivative works, but protection for a work
2 employing pre-existing material in which copyright subsists does not
3 extend to any part of the work in which such material has been used
4 unlawfully.

5 (b) The copyright in a compilation or derivative work extends only
6 to the material contributed by the author of such work, as dis-
7 tinguished from the pre-existing material employed in the work,
8 and does not imply any exclusive right in the pre-existing material.
9 The copyright in such work is independent of, and does not affect
10 or enlarge the scope, duration, ownership, or subsistence of, any copy-
11 right protection in the pre-existing material.

12 **§ 104. Subject matter of copyright: National origin**

13 (a) UNPUBLISHED WORKS.—The works specified by sections 102 and
14 103 while unpublished, are subject to protection under this title with-
15 out regard to the nationality or domicile of the author.

16 (b) PUBLISHED WORKS.—The works specified by sections 102 and
17 103, when published, are subject to protection under this title if—

18 (1) on the date of first publication, one or more of the authors
19 is a national or domiciliary of the United States, or is a national,
20 domiciliary, or sovereign authority of a foreign nation that is a
21 party to a copyright treaty to which the United States is also a
22 party; or

23 (2) the work is first published in the United States or in a for-
24 eign nation that, on the date of first publication, is a party to the
25 Universal Copyright Convention of 1952; or

26 (3) the work is first published by the United Nations or any
27 of its specialized agencies, or by the Organization of American
28 States; or

29 (4) the work comes within the scope of a Presidential procla-
30 mation. Whenever the President finds that a particular foreign
31 nation extends, to works by authors who are nationals or domicili-
32 aries of the United States or to works that are first published in
33 the United States, copyright protection on substantially the same
34 basis as that on which the foreign nation extends protection to
35 works of its own nationals and domiciliaries and works first pub-
36 lished in that nation, he may by proclamation extend protection
37 under this title to works of which one or more of the authors is,
38 on the date of first publication, a national, domiciliary, or sov-
39 ereign authority of that nation, or which was first published in
40 that nation. The President may revise, suspend, or revoke any
41
42

1 such proclamation or impose any conditions or limitations on
2 protection under a proclamation.
3 (c) The expropriation, by a governmental organization of a for-
4 eign country, of a copyright, or the right to secure a copyright, or
5 any right comprised in a copyright, or any right in a work for which
6 copyright may be secured, or the transfer of a copyright or of any such
7 right, or the power to authorize any use of the work thereunder, from
8 the author or copyright owner to a governmental agency of a foreign
9 country pursuant to any law, decree, regulation, order or other action
10 of the government effecting or requiring such transfer, shall not be
11 given effect for the purposes of this title.
12 **§ 105. Subject matter of copyright: United States Government**
13 **works**
14 Copyright protection under this title is not available for any work
15 of the United States Government, but the United States Government
16 is not precluded from receiving and holding copyrights transferred
17 to it by assignment, bequest, or otherwise.
18 **§ 106. Exclusive rights in copyrighted works**
19 Subject to sections 107 through 117, the owner of copyright under
20 this title has the exclusive rights to do and to authorize any of the
21 following:
22 (1) to reproduce the copyrighted work in copies or phono-
23 records;
24 (2) to prepare derivative works based upon the copyrighted
25 work;
26 (3) to distribute copies or phonorecords of the copyrighted
27 work to the public by sale or other transfer of ownership, or by
28 rental, lease, or lending;
29 (4) in the case of literary, musical, dramatic, and choreographic
30 works, pantomimes, motion pictures and other audiovisual works,
31 to perform the copyrighted work publicly;
32 (5) in the case of literary, musical, dramatic and choreographic
33 works, pantomimes, and pictorial, graphic, or sculptural works,
34 including the individual images of a motion picture or other
35 audiovisual work, to display the copyrighted work publicly.
36 **§ 107. Limitations on exclusive rights: Fair use**
37 Notwithstanding the provisions of section 106, the fair use of a
38 copyrighted work, including such use by reproduction in copies or
39 phonorecords or by any other means specified by that section, for pur-
40 poses such as criticism, comment, news reporting, teaching, scholar

1 ship, or research, is not an infringement of copyright. In determining
2 whether the use made of a work in any particular case is a fair use
3 the factors to be considered shall include:
4 (1) the purpose and character of the use;
5 (2) the nature of the copyrighted work;
6 (3) the amount and substantiality of the portion used in re-
7 lation to the copyrighted work as a whole; and
8 (4) the effect of the use upon the potential market for or value
9 of the copyrighted work.
10 **§ 108. Limitations on exclusive rights: Reproduction by libraries**
11 **and archives**
12 (a) Notwithstanding the provisions of section 106, it is not an in-
13 fringement of copyright for a library or archives, or any of its em-
14 ployees acting within the scope of their employment, to reproduce no
15 more than one copy or phonorecord of a work, or distribute such copy
16 or phonorecord, under the conditions specified by this section, if:
17 (1) The reproduction or distribution is made without any pur-
18 pose of direct or indirect commercial advantage;
19 (2) The collections of the library or archives are (i) open to the
20 public, or (ii) available not only to researchers affiliated with the
21 library or archives or with the institution of which it is a part, but
22 also to other persons doing research in a specialized field; and
23 (3) The reproduction or distribution of the work includes a
24 notice of copyright.
25 (b) The rights of reproduction and distribution under this section
26 apply to a copy or phonorecord of an unpublished work duplicated in
27 facsimile form solely for purposes of preservation and security or for
28 deposit for research use in another library or achives of the type de-
29 scibed by clause (2) of subsection (a), if the copy or phonorecord
30 reproduced is currently in the collections of the library or archives.
31 (c) The right of reproduction under this section applies to a copy
32 or phonorecord of a published work duplicated in facsimile form solely
33 for the purpose of replacement of a copy or phonorecord that is dam-
34 aged, deteriorating, lost, or stolen, if the library or archives has, after
35 a reasonable effort, determined that an unused replacement cannot be
36 obtained at a fair price.
37 (d) The rights of reproduction and distribution under this section
38 apply to a copy, made from the collection of a library or archives
39 where the user makes his request or from that of another library or
40 archives, of no more than one article or other contribution to a copy-

1 righted collection or periodical issue, or to a copy or phonorecord of a
2 small part of any other copyrighted work, if:
3 (1) The copy becomes the property of the user, and the library
4 or archives has had no notice that the copy would be used for any
5 purpose other than private study, scholarship, or research; and
6 (2) The library or archives displays prominently, at the place
7 where orders are accepted, and includes on its order form, a warn-
8 ing of copyright in accordance with requirements that the Reg-
9 ister of Copyrights shall prescribe by regulation.
10 (e) The rights of reproduction and distribution under this section
11 apply to the entire work, or to a substantial part of it, made from the
12 collection of a library or archives where the user makes his request or
13 from that of another library or archives, if the library or archives has
14 first determined, on the basis of a reasonable investigation that a copy
15 or phonorecord of the copyrighted work cannot be obtained at a fair
16 price, if:
17 (1) The copy becomes the property of the user, and the library
18 or archives has had no notice that the copy would be used for any
19 purpose other than private study, scholarship, or research; and
20 (2) The library or archives displays prominently, at the place
21 where orders are accepted, and includes on its order form, a warn-
22 ing of copyright in accordance with requirements that the Register
23 of Copyrights shall prescribe by regulation.
24 (f) Nothing in this section—
25 (1) shall be construed to impose liability for copyright in-
26 fringement upon a library or archives or its employees for the un-
27 supervised use of reproducing equipment located on its premises,
28 provided that such equipment displays a notice that the making
29 of a copy may be subject to the copyright law;
30 (2) excuses a person who uses such reproducing equipment or
31 who requests a copy under subsection (d) from liability for copy-
32 right infringement for any such act, or for any later use of such
33 copy, if it exceeds fair use as provided by section 107;
34 (3) in any way affects the right of fair use as provided by sec-
35 tion 107, or any contractual obligations assumed at any time by
36 the library or archives when it obtained a copy or phonorecord of
37 a work in its collections;
38 (4) shall be construed to limit the reproduction and distribu-
39 tion of a limited number of copies and excerpts by a library or

1 archives of an audiovisual news program subject to clauses (1),
2 (2), and (3) of subsection (a).
3 (g) The rights of reproduction and distribution under this section
4 extend to the isolated and unrelated reproduction or distribution of a
5 single copy or phonorecord of the same material on separate occasions,
6 but do not extend to cases where the library or archives, or its
7 employee:
8 (1) is aware or has substantial reason to believe that it is
9 engaging in the related or concerted reproduction or distribution
10 of multiple copies or phonorecords of the same material, whether
11 made on one occasion or over a period of time, and whether
12 intended for aggregate use by one or more individuals or for sepa-
13 rate use by the individual members of a group; or
14 (2) engages in the systematic reproduction or distribution of
15 single or multiple copies or phonorecords of material described
16 in subsection (d).
17 (h) The rights of reproduction and distribution under this section
18 do not apply to a musical work, a pictorial, graphic or sculptural work,
19 or a motion picture or other audiovisual work other than an audio-
20 visual work dealing with news, except that no such limitation shall
21 apply with respect to rights granted by subsections (b) and (c).
22 **§ 109. Limitations on exclusive rights: Effect of transfer of par-**
23 **ticular copy or phonorecord**
24 (a) Notwithstanding the provisions of section 106(3), the owner of
25 a particular copy or phonorecord lawfully made under this title, or any
26 person authorized by him, is entitled, without the authority of the
27 copyright owner, to sell or otherwise dispose of the possession of that
28 copy or phonorecord.
29 (b) Notwithstanding the provisions of section 106(5), the owner
30 of a particular copy lawfully made under this title, or any person
31 authorized by him, is entitled, without the authority of the copyright
32 owner, to display that copy publicly, either directly or by the projec-
33 tion of no more than one image at a time, to viewers present at the
34 place where the copy is located.
35 (c) The privileges prescribed by subsections (a) and (b) do not,
36 unless authorized by the copyright owner, extend to any person who
37 has acquired possession of the copy or phonorecord from the copy-
38 right owner, by rental, lease, loan, or otherwise, without acquiring
39 ownership of it.

§ 110. Limitations on exclusive rights: Exemption of certain performances and displays

Notwithstanding the provisions of section 106, the following are not infringements of copyright:

(1) performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not lawfully made under this title, and that the person responsible for the performance knew or had reason to believe was not lawfully made;

(2) performance of a nondramatic literary or musicial work or display of a work, by or in the course of a transmission, if:

(A) the performance or display is a regular part of the systematic instructional activities of a governmental body or a nonprofit educational institution; and

(B) the performance or display is directly related and of material assistance to the teaching content of the transmission; and

(C) the transmission is made primarily for:

(i) reception in classrooms or similar places normally devoted to instruction, or

(ii) reception by persons to whom the transmission is directed because their disabilities or other special circumstances prevent their attendance in classrooms or similar places normally devoted to instruction, or

(iii) reception by officers or employees of governmental bodies as a part of their official duties or employment;

(3) performance of a nondramatic literary or musical work or of a dramatico-musical work of a religious nature, or display of a work, in the course of services at a place of worship or other religious assembly;

(4) performance of a nondramatic literary or musical work otherwise than in a transmission to the public without any purpose of direct or indirect commercial advantage and without payment of any fee or other compensation for the performance to any of its performers, promoters, or organizers, if:

(A) there is no direct or indirect admission charge, or

(B) the proceeds, after deducting the reasonable costs of producing the performance, are used exclusively for educational, religious, or charitable purposes and not for private financial gain, except where the copyright owner has served notice of his objections to the performance under the following conditions:

(i) The notice shall be in writing and signed by the copyright owner or his duly authorized agent; and

(ii) The notice shall be served on the person responsible for the performance at least seven days before the date of the performance, and shall state the reasons for his objections; and

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

(5) communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless:

(A) a direct charge is made to see or hear the transmission; or

(B) the transmission thus received is further transmitted to the public;

(6) performance of a nondramatic musical work in the course of an annual agricultural or horticultural fair or exhibition conducted by a governmental body or a nonprofit agricultural or horticultural organization;

(7) performance of a nondramatic musical work by a vending establishment open to the public at large without any direct or indirect admission charge, where the sole purpose of the performance is to promote the retail sale of copies or phonorecords of the work and the performance is not transmitted beyond the place where the establishment is located.

§ 111. Limitations on exclusive rights: Secondary transmissions

(a) Certain Secondary Transmissions Exempted.—The secondary transmission of a primary transmission embodying a performance or display of a work is not an infringement of copyright if:

(1) the secondary transmission is not made by a cable system, and consists entirely of the relaying, by the management of a hotel, apartment house, or similar establishment, of signals trans-

1 mitted by a broadcast station licensed by the Federal Communica-
2 tions Commission, within the local service area of such station, to
3 the private lodgings of guests or residents of such establishment,
4 and no direct charge is made to see or hear the secondary trans-
5 mission; or

6 (2) the secondary transmission is made solely for the purpose
7 and under the conditions specified by clause (2) of section 110; or

8 (3) the secondary transmission is made by a common, contract,
9 or special carrier who has no direct or indirect control over the
10 content or selection of the primary transmission or over the par-
11 ticular recipients of the secondary transmission, and whose activ-
12 ities with respect to the secondary transmission consist solely of
13 providing wires, cables, or other communications channels for the
14 use of others: *Provided*, That the provisions of this clause extend
15 only to the activities of said carrier with respect to secondary
16 transmissions and do not exempt from liability the activities of
17 others with respect to their own primary or secondary transmis-
18 sion; or

19 (4) the secondary transmission is not made by a cable system but
20 is made by a governmental body, or other nonprofit organization,
21 without any purpose of direct or indirect commercial advantage,
22 and without charge to the recipients of the secondary transmission
23 other than assessments necessary to defray the actual and reason-
24 able costs of maintaining and operating the secondary transmis-
25 sion service.

26 (b) SECONDARY TRANSMISSION OF PRIMARY TRANSMISSION TO CON-
27 TROLLED GROUP.—Notwithstanding the provisions of subsections (a)
28 and (c), the secondary transmission to the public of a primary trans-
29 mission embodying a performance or display of a work is actionable as
30 an act of infringement under section 501, and is fully subject to the
31 remedies provided by sections 502 through 506, if the primary trans-
32 mission is not made for reception by the public at large but is con-
33 trolled and limited to reception by particular members of the public.

34 (c) SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

35 (1) Subject to the provisions of clause (2) of this subsection, sec-
36 ondary transmissions to the public by a cable system of a primary
37 transmission made by a broadcast station licensed by the Federal
38 Communications Commission and embodying a performance or dis-
39 play of a work shall be subject to compulsory licensing upon compli-
40 ance with the requirements of subsection (d) in the following cases:

(A) Where the signals comprising the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the community of the cable system is in whole or in part within the local service area of the primary transmitter; or

(C) Where the carriage of the signals comprising the secondary transmission is permissible under the rules, regulations or authorizations of the Federal Communications Commission.

(2) Notwithstanding the provisions of clause (1) of this subsection, the secondary transmission to the public by a cable system of a primary transmission made by a broadcast station licensed by the Federal Communications Commission and embodying a performance or display of a work is actionable as an act of infringement under section 501, and is fully subject to the remedies provided by sections 502 through 506, in the following cases:

(A) Where the carriage of the signals comprising the secondary transmission is not permissible under the rules, regulations or authorizations of the Federal Communications Commission; or

(B) Where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d).

(d) COMPULSORY LICENSE FOR SECONDARY TRANSMISSIONS BY CABLE SYSTEMS.—

(1) For any secondary transmission to be subject to compulsory licensing under subsection (c), the cable system shall at least one month before the date of the secondary transmission or within 30 days after the enactment of this Act, whichever date is later, record in the Copyright Office, a notice including a statement of the identity and address of the person who owns or operates the secondary transmission service or has power to exercise primary control over it together with the name and location of the primary transmitter, or primary transmitters and thereafter, from time to time, such further information as the Register of Copyrights shall prescribe by regulation to carry out the purposes of this clause.

(2) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall, during the months of January, April, July, and October, deposit with the Register of

1 Copyrights, in accordance with requirements that the Register shall
2 prescribe by regulation—
3 (A) A statement of account, covering the three months next
4 preceding, specifying the number of channels on which the cable
5 system made secondary transmissions to its subscribers, the names
6 and locations of all primary transmitters whose transmissions
7 were further transmitted by the cable system, the total number
8 of subscribers to the cable system, and the gross amounts paid to
9 the cable system irrespective of source and separate statements of
10 the gross revenues paid to the cable system for advertising, leased
11 channels, and cable-casting for which a per-program or per-
12 channel charge is made and by subscribers for the basic service of
13 providing secondary transmissions of primary broadcast trans-
14 mitters; and
15 (B) A total royalty fee for the period covered by the state-
16 ment, computed on the basis of specified percentages of the gross
17 receipts from subscribers to the cable service during said period
18 for the basic service of providing secondary transmissions of
19 primary broadcast transmitters, as follows:
20 (i) ½ percent of any gross receipts up to $40,000;
21 (ii) 1 percent of any gross receipts totalling more than
22 $40,000 but not more than $80,000;
23 (iii) 1½ percent of any gross receipts totalling more than
24 $80,000, but not more than $120,000;
25 (iv) 2 percent of any gross receipts totalling more than
26 $120,000, but not more than $160,000; and
27 (v) 2½ percent of any gross receipts totalling more than
28 $160,000.
29 (3) The royalty fees thus deposited shall be distributed in accord-
30 ance with the following procedures:
31 (A) During the month of July in each year, every person claiming
32 to be entitled to compulsory license fees for secondary transmissions
33 made during the preceding twelve-month period shall file a claim
34 with the Register of Copyrights, in accordance with requirements that
35 the Register shall prescribe by regulation. Notwithstanding any pro-
36 visions of the antitrust laws (the Act of October 15, 1914, 38 Stat. 730,
37 and any amendments of such laws), for purposes of this clause any
38 claimants may agree among themselves as to the proportionate divi-
39 sion of compulsory licensing fees among them, may lump their claims

1 together and file them jointly or as a single claim, or may designate
2 a common agent to receive payment on their behalf.
3 (B) After the first day of August of each year, the Register of
4 Copyrights shall determine whether there exists a controversy con-
5 cerning the statement of account or the distribution of royalty fees. If
6 he determines that no such controversy exists, he shall, after deduct-
7 ing his reasonable administrative costs under this section, distribute
8 such fees to the copyright owners entitled, or to their designated
9 agents. If he finds the existence of a controversy he shall certify to
10 that fact and proceed to constitute a panel of the Copyright Royalty
11 Tribunal in accordance with section 803. In such cases the reasonable
12 administrative costs of the Register under this section shall be de-
13 ducted prior to distribution of the royalty fee by the tribunal.
14 (C) During the pendency of any proceeding under this subsection,
15 the Register of Copyrights or the Copyright Royalty Tribunal shall
16 withhold from distribution an amount sufficient to satisfy all claims
17 with respect to which a controversy exists, but shall have discretion
18 to proceed to distribute any amounts that are not in controversy.
19 (e) DEFINITIONS.—
20 As used in this section, the following terms and their variant forms
21 mean the following:
22 A "primary transmission" is a transmission made to the public
23 by the transmitting facility whose signals are being received and
24 further transmitted by the secondary transmission service, regard-
25 less of where or when the performance or display was first
26 transmitted.
27 A "secondary transmission" is the further transmitting of a
28 primary transmission simultaneously with the primary trans-
29 mission or nonsimultaneously with the primary transmission if by
30 a "cable system" not located in whole or in part within the bound-
31 ary of the forty-eight contiguous States, Hawaii, or Puerto Rico:
32 *Provided, however*, That a nonsimultaneous further transmission
33 by a cable system located in a television market in Hawaii of a
34 primary transmission shall be deemed to be a secondary trans-
35 mission if such further transmission is necessary to enable the
36 cable system to carry the full complement of signals allowed it
37 under the rules and regulations of the Federal Communciations
38 Commission.

1 A "cable system" is a facility, located in any State, Territory,
2 Trust Territory or Possession that in whole or in part receives
3 signals transmitted or programs broadcast by one or more tele-
4 vision broadcast stations licensed by the Federal Communications
5 Commission and makes secondary transmissions of such signals
6 or programs by wires, cables, or other communications channels
7 to subscribing members of the public who pay for such service.
8 For purposes of determining the royalty fee under subsection
9 (d)(2)(B), two or more cable systems in contiguous communi-
10 ties under common ownership or control or operating from one
11 headend shall be considered as one system.
12 The "local service area of a primary transmitter" comprises
13 the area in which a television broadcast station is entitled to
14 insist upon its signal being retransmitted by a cable system
15 pursuant to the rules and regulations of the Federal Communica-
16 tions Commission.
17 **§112. Limitations on exclusive rights: Ephemeral recordings**
18 (a) Notwithstanding the provisions of section 106, and except in the
19 case of a motion picture or other audiovisual work, it is not an
20 infringement of copyright for a transmitting organization entitled to
21 transmit to the public a performance or display of a work, under a
22 license or transfer of the copyright or under the limitations on exclu-
23 sive rights in sound recordings specified by section 114(a), to make
24 no more than one copy or phonorecord of a particular transmission
25 program embodying the performance or display, if—
26 (1) the copy or phonorecord is retained and used solely by the
27 transmitting organization that made it, and no further copies or
28 phonorecords are reproduced from it; and
29 (2) the copy or phonorecord is used solely for the transmitting
30 organization's own transmissions within its local service area, or
31 for purposes of archival preservation or security; and
32 (3) unless preserved exclusively for archival purposes, the copy
33 or phonorecord is destroyed within six months from the date the
34 transmission program was first transmitted to the public.
35 (b) Notwithstanding the provisions of section 106, it is not an in-
36 fringement of copyright for a governmental body or other nonprofit
37 organization entitled to transmit a performance or display of a work,
38 under section 110(2) or under the limitations on exclusive rights in
39 sound recordings specified by section 114(a), to make no more than

1 thirty copies or phonorecords of a particular transmission program
2 embodying the performance or display, if—
3 (1) no further copies or phonorecords are reproduced from the
4 copies or phonorecords made under this clause; and
5 (2) except for one copy or phonorecord that may be preserved
6 exclusively for archival purposes, the copies or phonorecords are
7 destroyed within seven years from the date the transmission pro-
8 gram was first transmitted to the public.
9 (c) Notwithstanding the provisions of section 106, it is not an in-
10 fringement of copyright for a governmental body or other nonprofit
11 organization to make for distribution no more than one copy or phono-
12 record for each transmitting organization specified in clause (2) of this
13 subsection of a particular transmission program embodying a perform-
14 ance of a nondramatic musical work of a religious nature, or of a sound
15 recording of such a musical work, if—
16 (1) there is no direct or indirect charge for making or dis-
17 tributing any such copies or phonorecords; and
18 (2) none of such copies or phonorecords is used for any per-
19 formance other than a single transmission to the public by a trans-
20 mitting organization entitled to transmit to the public a perform-
21 ance of the work under a license or transfer of the copyright; and
22 (3) except for one copy or phonorecord that may be preserved
23 exclusively for archival purposes, the copies or phonorecords are
24 all destroyed within one year from the date the transmission pro-
25 gram was first transmitted to the public.
26 (d) The transmission program embodied in a copy or phonorecord
27 made under this section is not subject to protection as a derivative
28 work under this title except with the express consent of the owners
29 of copyright in the pre-existing works employed in the program.
30 **§ 113. Scope of exclusive rights in pictorial, graphic and sculp-**
31 **tural works**
32 (a) Subject to the provisions of clauses (1) and (2) of this subsec-
33 tion, the exclusive right to reproduce a copyrighted pictorial, graphic,
34 or sculptural work in copies under section 106 includes the right to
35 reproduce the work in or on any kind of article, whether useful or
36 otherwise.
37 (1) This title does not afford, to the owner of copyright in a
38 work that portrays a useful article as such, any greater or lesser
39 rights with respect to the making, distribution, or display of the
40 useful article so portrayed than those afforded to such works

1 under the law, whether title 17 of the common law or statutes of
2 a State, in effect on December 31, 1976. as held applicable and
3 construed by a court in an action brought under this title.
4 (2) In the case of a work lawfully reproduced in useful articles
5 that have been offered for sale or other distribution to the public,
6 copyright does not include any right to prevent the making, dis-
7 tribution, or display of pictures or photographs of such articles
8 in connection with advertisements or commentaries related to the
9 distribution or display of such articles, or in connection with news
10 reports.
11 (b) When a pictorial, graphic, or sculptural work in which copy-
12 right subsists under this title is utilized in an original ornamental
13 design of a useful article, by the copyright proprietor or under an
14 express license from him, the design shall be eligible for protection
15 under the provisions of title III of this Act.
16 (c) Protection under this title of a work in which copyright subsists
17 shall terminate with respect to its utilization in useful articles when-
18 ever the copyright proprietor has obtained registration of an orna-
19 mental design of a useful article embodying said work under the pro-
20 visions of title III of this Act. Unless and until the copyright pro-
21 prietor has obtained such registration, the copyright pictorial, graphic,
22 or sculptural work shall continue in all respects to be covered by and
23 subject to the protection afforded by the copyright subsisting under
24 this title. Nothing in this section shall be deemed to create any addi-
25 tional rights or protection under this title.
26 (d) Nothing in this section shall affect any right or remedy held
27 by any person under this title in a work in which copyright was sub-
28 sisting on the effective date of title II of this Act, or with respect to
29 any utilization of a copyrighted work other than in the design of a
30 useful article.
31 **§ 114. Scope of exclusive rights in sound recordings**
32 (a) The exclusive rights of the owner of copyright in a sound record-
33 ing are limited to the rights specified by clauses (1) and (3) of sec-
34 tion 106, and do not include any right of performance under section
35 106(4).
36 (b) The exclusive right of the owner of copyright in a sound record-
37 ing to reproduce it under section 106(1) is limited to the right to
38 duplicate the sound recording in the form of phonorecords that directly
39 or indirectly recapture the actual sounds fixed in the recording. This
40 right does not extend to the making or duplication of another sound

1 recording that is an independent fixation of other sounds, even though
2 such sounds imitate or simulate those in the copyrighted sound
3 recording.
4 (c) This section does not limit or impair the exclusive right to per-
5 form publicly, by means of a phonorecord, any of the works specified
6 by section 106(4).
7 **§ 115. Scope of exclusive rights in nondramatic musical works:**
8 **Compulsory license for making and distributing phono-**
9 **records**
10 In the case of nondramatic musical works, the exclusive rights pro-
11 vided by clauses (1) and (3) of section 106, to make and to distribute
12 phonorecords of such works, are subject to compulsory licensing under
13 the conditions specified by this section.
14 (a) AVAILABILITY AND SCOPE OF COMPULSORY LICENSE.—
15 (1) When phonorecords of a nondramatic musical work have
16 been distributed to the public under the authority of the copyright
17 owner, any other person may, by complying with the provisions
18 of this section, obtain a compulsory license to make and distribute
19 phonorecords of the work. A person may obtain a compulsory
20 license only if his primary purpose in making phonorecords is to
21 distribute them to the public for private use. A person may not
22 obtain a compulsory license for use of the work in the duplication
23 of a sound recording made by another.
24 (2) A compulsory license includes the privilege of making a
25 musical arrangement of the work to the extent necessary to con-
26 form it to the style or manner of interpretation of the perform-
27 ance involved, but the arrangement shall not change the basic
28 melody or fundamental character of the work, and shall not be
29 subject to protection as a derivative work under this title, except
30 with the express consent of the copyright owner.
31 (b) NOTICE OF INTENTION TO OBTAIN COMPULSORY LICENSE; DESIG-
32 NATION OF OWNER OF PERFORMANCE RIGHT.—
33 (1) Any person who wishes to obtain a compulsory license
34 under this section shall, before or within thirty days after making,
35 and before distributing any phonorecords of the work, serve notice
36 of his intention to do so on the copyright owner. If the registra-
37 tion or other public records of the Copyright Office do not identify
38 the copyright owner and include an address at which notice can
39 be served on him, it shall be sufficient to file the notice of intention
40 in the Copyright Office. The notice shall comply, in form, con-

1 tent, and manner of service, with requirements that the Register
2 of Copyrights shall prescribe by regulation.
3 (2) If the copyright owner so requests in writing not later than
4 ten days after service or filing of the notice required by clause (1),
5 the person exercising the compulsory license shall designate, on
6 a label or container accompanying each phonorecord of the work
7 distributed by him, and in the form and manner that the Register
8 of Copyrights shall prescribe by regulation, the name of the
9 copyright owner or his agent to whom royalties for public per-
10 formance of the work are to be paid.
11 (3) Failure to serve or file the notice required by clause (1), or
12 to designate the name of the owner or agent as required by clause
13 (2), forecloses the possibility of a compulsory license and, in the
14 absence of a negotiated license, renders the making and distribu-
15 tion of phonorecords actionable as acts of infringement under
16 section 501 and fully subject to the remedies provided by sections
17 502 through 506.
18 (c) ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—
19 (1) To be entitled to receive royalties under a compulsory
20 license, the copyright owner must be identified in the registration
21 or other public records of the Copyright Office. The owner is
22 entitled to royalties for phonorecords manufactured and distrib-
23 uted after he is so identified but he is not entitled to recover for
24 any phonorecords previously manufactured and distributed.
25 (2) Except as provided by clause (1), the royalty under a
26 compulsory license shall be payable for every phonorecord manu-
27 factured and distributed in accordance with the license. With
28 respect to each work embodied in the phonorecord, the royalty
29 shall be either three cents, or three quarter cent per minute of
30 playing time or fraction thereof, whichever amount is larger.
31 (3) Royalty payments shall be made on or before the twentieth
32 day of each month and shall include all royalties for the month
33 next preceding. Each monthly payment shall be accompanied
34 by a detailed statement of account, which shall be certified by a
35 Certified Public Accountant and comply in form, content, and
36 manner of certification with requirements that the Register of
37 Copyrights shall prescribe by regulation.
38 (4) If the copyright owner does not receive the monthly pay-
39 ment and statement of account when due, he may give written
40 notice to the licensee that, unless the default is remedied within

thirty days from the date of the notice, the compulsory license will be automatically terminated. Such termination renders the making and distribution of all phonorecords, for which the royalty had not been paid, actionable as acts of infringement under section 501 and fully subject to the remedies provided by sections 502 through 506.

§ 116. Scope of exclusive rights in nondramatic musical works: Public performances by means of coin-operated phonorecord players

(a) LIMITATION ON EXCLUSIVE RIGHT.—In the case of a nondramatic musical work embodied in a phonorecord, the exclusive right under clause (4) of section 106 to perform the work publicly by means of a coin-operated phonorecord player is limited as follows:

(1) The proprietor of the establishment in which the public performance takes place is not liable for infringement with respect to such public performance unless:

(A) he is the operator of the phonorecord player; or

(B) he refuses or fails, within one month after receipt by registered or certified mail of a request, at a time during which the certificate is required by subclause (1) (C) of subsection (b) is not affixed to the phonorecord player, by the copyright owner, to make full disclosure, by registered or certified mail, of the identity of the operator of the phonorecord player.

(2) The operator of the coin-operated phonorecord player may obtain a compulsory license to perform the work publicly on that phonorecord player by filing the application, affixing the certificate, and paying the royalties provided by subsection (b).

(b) RECORDATION OF COIN-OPERATED PHONORECORD PLAYER, AFFIXATION OF CERTIFICATE, AND ROYALTY PAYABLE UNDER COMPULSORY LICENSE.—

(1) Any operator who wishes to obtain a compulsory license for the public performance of works on a coin-operated phonorecord player shall fulfill the following requirements:

(A) Before or within one month after such performances are made available on a particular phonorecord player, and during the month of January in each succeeding year that such performances are made available in that particular phonorecord player, he shall file in the Copyright Office, in accordance with requirements that the Register of Copyrights

1 shall prescribe by regulation, an application containing the
2 name and address of the operator of the phonorecord player
3 and the manufacturer and serial number or other explicit
4 identification of the phonorecord player, and in addition to
5 the fee prescribed by clause (9) of section 708(a), he shall
6 deposit with the Register of Copyrights a royalty fee for
7 the current calendar year of $8 for that particular phono-
8 record player. If such performances are made available on a
9 particular phonorecord player for the first time after July 1
10 of any year, the royalty fee to be deposited for the remainder
11 of that year shall be $4.00.
12 (B) Within twenty days of receipt of an application and a
13 royalty fee pursuant to subclause (A), the Register of Copy-
14 rights shall issue to the applicant a certificate for the phono-
15 record player.
16 (C) On or before March 1 of the year in which the certifi-
17 cate prescribed by subclause (B) of this clause is issued, or
18 within ten days after the date of issue of the certificate, the
19 operator shall affix to the particular phonorecord player, in a
20 position where it can be readily examined by the public, the
21 certificate, issued by the Register of Copyrights under sub-
22 clause (B), of the latest application made by him under sub-
23 clause (A) of this clause with respect to that phonorecord
24 player.
25 (2) Failure to file the application, to affix the certificate or to
26 pay the royalty required by clause (1) of this subsection renders
27 the public performance actionable as an act of infringement under
28 section 501 and fully subject to the remedies provided by section
29 502 through 506.
30 (c) DISTRIBUTION OF ROYALTIES.—
31 (1) During the month of January in each year, every person
32 claiming to be entitled to compulsory license fees under this section
33 for performances during the preceding twelve-month period shall
34 file a claim with the Register of Copyrights, in accordance with
35 requirements that the Register shall prescribe by regulation.
36 Such claim shall include an agreement to accept as final, except as
37 provided in section 809 of this title, the determination of the Copy-
38 right Royalty Tribunal in any controversy concerning the distri-
39 bution of royalty fees deposited under subclause (a) of subsec-
40 tion (b)(1) of this section to which the claimant is a party. Not-

1 withstanding any provisions of the antitrust laws (the Act of
2 October 15, 1914, 38 Stat. 730, and any amendments of any such
3 laws), for purposes of this subsection any claimants may agree
4 among themselves as to the proportionate division of compulsory
5 licensing fees among them, may lump their claims together and
6 file them jointly or as a single claim, or many designate a common
7 agent to receive payment on their behalf.
8 (2) After the first day of October of each year, the Register of
9 Copyrights shall determine whether there exists a controversy
10 concerning the distribution of royalty fees deposited under sub-
11 clause (A) of subsection (b)(1). If he determines that no such
12 controversy exists, he shall, after deducting his reasonable ad-
13 ministrative costs under this section, distribute such fees to the
14 copyright owners and performers entitled, or to their designated
15 agents. If he finds that such a controversy exists, he shall certify
16 to that fact and proceed to constitute a panel of the Copyright
17 Royalty Tribunal in accordance with section 803. In such cases the
18 reasonable administrative costs of the Register under this section
19 shall be deducted prior to distribution of the royalty fee by the
20 tribunal.
21 (3) The fees to be distributed shall be divided as follows:
22 (A) To every copyright owner not affiliated with a perform-
23 ing rights society the pro rata share of the fees to be dis-
24 tributed to which such copyright owner proves his entitle-
25 ment; and
26 (B) To the performing rights societies the remainder of
27 the fees to be distributed in such pro rata shares as they shall
28 by agreement stipulate among themselves, or, if they fail to
29 agree, the pro rata share to which such performing rights
30 societies prove their entitlement.
31 (C) During the pendency of any proceeding under this
32 section, the Register of Copyrights or the Copyright Royalty
33 Tribunal shall withhold from distribution an amount suffi-
34 cient to satisfy all claims with respect to which a controversy
35 exists, but shall have discretion to proceed to distribute any
36 amounts that are not in controversy.
37 (4) The Register of Copyrights shall promulgate regulations
38 under which persons who can reasonably be expected to have
39 claims may, during the year in which performances take place,
40 without expense to or harassment of operators or proprietors of

1 establishments in which phonorecord players are located, have
2 such access to such establishments and to the phonorecord players
3 located therein and such opportunity to obtain information with
4 respect thereto as may be reasonably necessary to determine, by
5 sampling procedures or otherwise, the proportion of contribution
6 of the musical works of each such person to the earnings of the
7 phonorecord players for which fees shall have been deposited.
8 Any person who alleges that he has been denied the access per-
9 mitted under the regulations prescribed by the Register of Copy-
10 rights may bring on an action in the United States District Court
11 for the District of Columbia for the cancellation of the compul-
12 sory license of the phonorecord player to which such access has
13 been denied, and the court shall have the power to declare the
14 compulsory license thereof invalid from the date of issue thereof.
15 (d) CRIMINAL PENALTIES.—Any person who knowingly makes a
16 false representation of a material fact in an application filed under
17 clause (1)(A) of subsection (b), or who knowingly alters a certificate
18 issued under clause (1)(B) of subsection (b) or knowingly affixes
19 such a certificate to a phonorecord player other than the one it covers,
20 shall be fined not more than $2,500.
21 (e) DEFINITIONS.—As used in this section, the following terms and
22 their variant forms mean the following:
23 (1) A "coin-operated phonorecord player" is a machine or
24 device that:
25 (A) is employed solely for the performance of non-
26 dramatic musical works by means of phonorecords upon being
27 activated by insertion of a coin;
28 (B) is located in an establishment making no direct or
29 indirect charge for admission;
30 (C) is accompanied by a list of the titles of all the musical
31 works available for performance on it, which list is affixed to
32 the phonorecord player or posted in the establishment in a
33 prominent position where it can be readily examined by the
34 public; and
35 (D) affords a choice of works available for performance
36 and permits the choice to be made by the patrons of the
37 establishment in which it is located.
38 (2) An "operator" is any person who, alone or jointly with
39 others:
40 (A) owns a coin-operated phonorecord player; or

(B) has the power to make a coin-operated phonorecord player available for placement in an establishment for purposes of public performance; or

(C) has the power to exercise primary control over the selection of the musical works made available for public performance in a coin-operated phonorecord player.

(3) A "performing rights society" is an association or corporation that licenses the public performance of nondramatic musical works on behalf of the copyright owners, such as the American Society of Composers, Authors and Publishers, Broadcast Music, Inc., and SESAC, Inc.

§ 117. Scope of exclusive rights: Use in conjunction with computers and similar information systems

Notwithstanding the provisions of sections 106 through 116, this title does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems capable of storing, processing, retrieving, or transferring information, or in conjunction with any similar device, machine, or process, than those afforded to works under the law, whether title 17 or the common law or statutes of a State, in effect on December 31, 1976, as held applicable and construed by a court in an action brought under this title.

Chapter 2.—COPYRIGHT OWNERSHIP AND TRANSFER

Sec.
201. Ownership of copyright.
202. Ownership of copyright as distinct from ownership of material object.
203. Termination of transfers and licenses granted by the author.
204. Execution of transfers of copyright ownership.
205. Recordation of transfers and other documents.

§ 201. Ownership of copyright

(a) Initial Ownership.—Copyright in work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work.

(b) Works Made for Hire.—In the case of a work made for hire, the employer or other persons 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

1 or of any rights under it, the owner of copyright in the collective
2 work is presumed to have acquired only the privilege of reproducing
3 and distributing the contribution as part of that particular collective
4 work, any revision of that collective work, and any later collective
5 work in the same series.
6 (d) TRANSFER OF OWNERSHIP.—
7 (1) The ownership of a copyright may be transferred in whole
8 or in part by any means of conveyance or by operation of law, and
9 may be bequeathed by will or pass as personal property by the
10 applicable laws of intestate succession.
11 (2) Any of the exclusive rights comprised in a copyright,
12 including any subdivision of any of the rights specified by section
13 106, may be transferred as provided by clause (1) and owned sepa-
14 rately. The owner of any particular exclusive right is entitled, to
15 the extent of that right, to all of the protection and remedies
16 accorded to the copyright owner by this title.

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

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

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

28 (a) CONDITIONS FOR TERMINATION.—In the case of any work other
29 than a work made for hire, the exclusive or nonexclusive grant of a
30 transfer or license of copyright or of any right under a copyright,
31 executed by the author on or after January 1, 1977, otherwise than
32 by will, is subject to termination under the following conditions:
33 (1) In the case of a grant executed by one author, termination
34 of the grant may be effected by that author or, if he is dead, by
35 the person or persons who, under clause (2) of this subsection,
36 own and are entitled to exercise a total of more than one half of
37 that author's termination interest. In the case of a grant executed
38 by two or more authors of a joint work, termination of the grant
39 may be effected by a majority of the authors who executed it;
40 if any of such authors is dead, his termination interest 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 his 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 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 his 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 his 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 grant 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, his legal representatives, legatees, or heirs at law represent him 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

1 the persons provided by clause (3) of this subsection and the
2 original grantee or his successor in title, after the notice of termi-
3 nation has been served as provided by clause (4) of subsection (a).
4 (5) Termination of a grant under this section affects only those
5 rights covered by the grant that arise under this title, and in no
6 way affects rights arising under any other Federal, State, or for-
7 eign laws.
8 (6) Unless and until termination is effected under this section,
9 the grant, if it does not provide otherwise, continues in effect for
10 the term of copyright provided by this title.

11 **§ 204. Execution of transfers of copyright ownership**

12 (a) A transfer of copyright ownership, other than by operation of
13 law, is not valid unless an instrument of conveyance, or a note or
14 memorandum of the transfer, is in writing and signed by the owner
15 of the rights conveyed or his duly authorized agent.
16 (b) A certificate of acknowledgement is not required for the valid-
17 ity of a transfer, but is prima facie evidence of the execution of the
18 transfer if:
19 (1) in the case of a transfer executed in the United States, the
20 certificate is issued by a person authorized to administer oaths
21 within the United States; or
22 (2) in the case of a transfer executed in a foreign country, the
23 certificate is issued by a diplomatic or consular officer of the
24 United States, or by a person authorized to administer oaths
25 whose authority is proved by a certificate of such an officer.

26 **§ 205. Recordation of transfers and other documents**

27 (a) CONDITIONS FOR RECORDATION.—Any transfer of copyright own-
28 ership or other document pertaining to a copyright may be recorded
29 in the Copyright Office if the document filed for recordation bears the
30 actual signature of the person who executed it, or if it is accompanied
31 by a sworn or official certification that it is a true copy of the original,
32 signed document.
33 (b) CERTIFICATE OF RECORDATION.—The Register of Copyrights
34 shall, upon receipt of a document as provided by subsection (a) and
35 of the fee provided by section 708, record the document and return it
36 with a certificate of recordation.
37 (c) RECORDATION AS CONSTRUCTIVE NOTICE.—Recordation of a docu-
38 ment in the Copyright Office gives all persons constructive notice of the
39 facts stated in the recorded document, but only if:

(1) the document, or material attached to it, specifically identifies the work to which it pertains so that, after the document is indexed by the Register of Copyrights, it would be revealed by a reasonable search under the title or registration number of the work; and

(2) registration has been made for the work.

(d) RECORDATION AS PREREQUISITE TO INFRINGEMENT SUIT.—No person claiming by virtue of a transfer to the owner of copyright or of any exclusive right under a copyright is entitled to institute an infringement action under this title until the instrument of transfer under which he claims has been recorded in the Copyright Office, but suit may be instituted after such recordation on a cause of action that arose before recordation.

(e) PRIORITY BETWEEN CONFLICTING TRANSFERS.—As between two conflicting transfers, the one executed first prevails if it is recorded, in the manner required to give constructive notice under subsection (c) within one month after its execution in the United Stat[illegible] ithin two months after its execution abroad, or at any time before re[illegible]rdation in such manner of the later transfer. Otherwise the later transfer prevails if recorded first in such manner, and if taken in good faith, for valuable consideration or on the ba[illegible]is of a binding promise to pay royalties, and without notice of the earlier transfer.

(f) PRIORITY BETWEEN CONFLICTING TRANSFER OF OWNERSHIP AND NONEXCLUSIVE LICENSE.—A nonexclusive license, whether recorded or not, prevails over a conflicting transfer of copyright ownership if the license is evidenced by a written instrument signed by the owner of the rights licensed or his duly authorized agent, and if:

(1) the license was taken before execution of the [illegible]sfer; or

(2) the license was taken in good faith before recordation of the transfer and without notice of it.

Chapter 3.—DURATION OF COPYRIGHT

Sec.
301. Pre-emption with respect to other laws.
302. Duration of copyright: Works created on or after January 1, 1977.
303. Duration of copyright: Works created but not published or copyrighted before January 1, 1977.
304. Duration of copyright: Subsisting copyrights.
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§ 301. Pre-emption with respect to other laws

(a) On and after January 1, 1977, all rights in the nature of copyright in works that come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that

1 date and whether published or unpublished, are governed exclusively
2 by this title. Thereafter, no person is entitled to copyright, literary
3 property rights, or any equivalent legal or equitable right in any such
4 work under the common law or statutes of any State.
5 (b) Nothing in this title annuls or limits any rights or remedies
6 under the common law or statutes of any State with respect to:
7 (1) unpublished material that does not come within the subject
8 matter of copyright as specified by sections 102 and 103, including
9 works of authorship not fixed in any tangible medium of ex-
10 pression;
11 (2) any cause of action arising from undertakings commenced
12 before January 1, 1977;
13 (3) activities violating rights that are not equivalent to any of
14 the exclusive rights within the general scope of copyright as speci-
15 fied by section 106, including breaches of contract, breaches of
16 trust, invasion of privacy, defamation, and deceptive trade prac-
17 tices such as passing off and false representation.
18 **§ 302. Duration of copyright: Works created on or after Janu-**
19 **ary 1, 1977**
20 (a) In General.—Copyright in a work created on or after January
21 1, 1977, subsists from its creation and, except as provided by the
22 following subsections, endures for a term consisting of the life of the
23 author and fifty years after his death.
24 (b) Joint Works.—In the case of a joint work prepared by two
25 or more authors who did not work for hire, the copyright endures for
26 a term consisting of the life of the last surviving author and fifty
27 years after his death.
28 (c) Anonymous Works, Pseudonymous Works, and Works Made
29 for Hire.—In the case of an anonymous work, a pseudonymous work
30 or a work made for hire, the copyright endures for a term of seventy-
31 five years from the year of its first publication, or a term of one
32 hundred years from the year of its creation, whichever expires first.
33 If, before the end of such term, the identity of one or more of the
34 authors of an anonymous or pseudonymous work is revealed in the
35 records of a registration made for that work under subsection (a)
36 or (d) of section 407, or in the records provided by this subsection,
37 the copyright in the work endures for the term specified by subsections
38 (a) or (b), based on the life of the author or authors whose identity
39 has been revealed. Any person having an interest in the copyright in
40 an anonymous or pseudonymous work may at any time record, in

1 records to be maintained by the Copyright Office for that purpose, a
2 statement identifying one or more authors of the work; the statement
3 shall also identify the person filing it, the nature of his interest, the
4 source of his information, and the particular work affected, and shall
5 comply in form and content with requirements that the Register of
6 Copyrights shall prescribe by regulation.

7 (d) RECORDS RELATING TO DEATH OF AUTHORS.—Any person having
8 an interest in a copyright may at any time record in the Copyright
9 Office a statement of the date of death of the author of the copy-
10 righted work, or a statement that the author is still living on a par-
11 ticular date. The statement shall identify the person filing it, the
12 nature of his interest, and the source of his information, and shall
13 comply in form and content with requirements that the Register
14 of Copyrights shall prescribe by regulation. The Register shall main-
15 tain current records of information relating to the death of authors
16 of copyrighted works, based on such recorded statements and, to the
17 extent he considers practicable, on data contained in any of the records
18 of the Copyright Office or in other reference sources.

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

29 **§ 303. Duration of copyright. Works created but not published**
30 **or copyrighted before January 1, 1977**

31 Copyright in a work created before January 1, 1977, but not thereto-
32 fore in the public domain or copyrighted, subsists from January 1,
33 1977, and endures for the term provided by section 302. In no case,
34 however, shall the term of copyright in such a work expire before
35 December 31, 2001; and, if the work is published on or before December
36 31, 2001, the term of copyright shall not expire before December 31,
37 2026.

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

39 (a) COPYRIGHTS IN THEIR FIRST TERM ON JANUARY 1, 1977.—Any
40 copyright, the first term of which is subsisting on January 1, 1977,

1 shall endure for twenty-eight years from the date it was originally
2 secured: *Provided*, That in the case of any posthumous work or of any
3 periodical, cyclopedic, or other composite work upon which the copy-
4 right was originally secured by the proprietor thereof, or of any work
5 copyrighted by a corporate body (otherwise than as assignee or li-
6 censee of the individual author) or by an employer for whom such
7 work is made for hire, the proprietor of such copyright shall be en-
8 titled to a renewal and extension of the copyright in such work for the
9 further term of forty-seven years when application for such renewal
10 and extension shall have been made to the Copyright Office and duly
11 registered therein within one year prior to the expiration of the origi-
12 nal term of copyright: *And provided further*, That in the case of any
13 other copyrighted work, including a contribution by an individual
14 author to a periodical or to a cyclopedic or other composite work, the
15 author of such work, if still living, or the widow, widower, or children
16 of the author, if the author be not living, or if such author, widow,
17 widower, or children be not living, then the author's executors, or in
18 the absence of a will, his next of kin shall be entitled to a renewal and
19 extension of the copyright in such work for a further term of forty-
20 seven years when application for such renewal and extension shall
21 have been made to the Copyright Office and duly registered therein
22 within one year prior to the expiration of the original term of copy-
23 right: *And provided further*, That in default of the registration of
24 such application for renewal and extension, the copyright in any work
25 shall terminate at the expiration of twenty-eight years from the date
26 copyright was originally secured.

27 (b) COPYRIGHTS IN THEIR RENEWAL TERM OR REGISTERED FOR RE-
28 NEWAL BEFORE JANUARY 1, 1977.—The duration of any copyright, the
29 renewal term of which is subsisting at any time between December 31,
30 1975, and December 31, 1976, inclusive, or for which renewal registra-
31 tion is made between December 31, 1975, and December 31, 1976,
32 inclusive, is extended to endure for a term of 75 years from the date
33 copyright was originally secured.

34 (c) TERMINATION OF TRANSFERS AND LICENSES COVERING EXTENDED
35 RENEWAL TERM.—In the case of any copyright subsisting in either
36 its first or renewal term on January 1, 1977, other than a copyright
37 in a work made for hire, the exclusive or nonexclusive grant of a trans-
38 fer or license of the renewal copyright or of any right under it,
39 executed before January 1, 1977, by any of the persons designated by

1 the second proviso of subsection (a) of this section, otherwise than by
2 will, is subject to termination under the following condition:
3 (1) In the case of a grant executed by a person or persons other
4 than the author, termination of the grant may be effected by the
5 surviving person or persons who executed it. In the case of a
6 grant executed by one or more of the authors of the work, termina-
7 tion of the grant may be effected, to the extent of a particular
8 author's share in the ownership of the renewal copyright, by the
9 author who executed it or, if such author is dead, by the person or
10 persons who, under clause (2) of this subsection, own and are
11 entitled to exercise a total of more than one half of that author's
12 termination interest.
13 (2) Where an author is dead, his or her termination interest is
14 owned, and may be exercised, by his widow (or her widower) and
15 children or grandchildren as follows:
16 (A) The widow (or widower) owns the author's entire
17 termination interest unless there are any surviving children
18 or grandchildren of the author, in which case the widow (or
19 widower) owns one half of the author's interest;
20 (B) The author's surviving children, and the surviving
21 children of any dead child of the author, own the author's
22 entire termination interest unless there is a widow (or wid-
23 ower), in which case the ownership of one half of the author's
24 interest is divided among them;
25 (C) The rights of the author's children and grandchildren
26 are in all cases divided among them and exercised on a per
27 stirpes basis according to the number of his children repre-
28 sented; the share of the children of a dead child in a termina-
29 tion interest can be exercised only by the action of a major-
30 ity of them.
31 (3) Termination of the grant may be effected at any time dur-
32 ing a period of five years beginning at the end of fifty-six years
33 form the date copyright was originally secured, or beginning on
34 January 1, 1977, whichever is later.
35 (4) The termination shall be effected by serving an advance
36 notice in writing upon the grantee or his successor in title. In the
37 case of a grant executed by a person or persons other than the
38 author, the notice shall be signed by all of those entitled to termi
39 nate the grant under clause (1) of this subsection, or by their duly
40 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 him or his duly authorized agent or, if he is dead, by the number and proportion of the owners of his 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 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.

(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 he is dead, to the persons owning his 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 termi-

nation has been served as provided by clause (4) of this subsection.

(C) Where an 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, his legal representatives, legatees, or heirs at law represent him for purposes of this subclass.

(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 his 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 section, 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.

1 Chapter 4.—COPYRIGHT NOTICE, DEPOSIT, AND
2 REGISTRATION

Sec.
401. Notice of copyright: Visually perceptible copies.
402. Notice of copyright: Phonorecords of sound recordings.
403. Notice of copyright. Publications incorporating United States Government works.
404. Notice of copyright: Contributions to collective works.
405. Notice of copyright: Omission of notice.
406. Notice of copyright: Error in name or date.
407. Deposit of copies or phonorecords for Library of Congress.
408. Copyright registration in general.
409. Application for registration.
410. Registration of claim and issuance of certificate.
411. Registration as prerequisite to infringement suit.
412. Registration as prerequisite to certain remedies for infringement.

3 **§ 401. Notice of copyright: Visually perceptible copies**

4 (a) General Requirement.—Whenever a work protected under
5 this title is published in the United States or elsewhere by authority
6 of the copyright owner, a notice of copyright as provided by this sec-
7 tion shall be placed on all publicly distributed copies from which the
8 work can be visually perceived, either directly or with the aid of a
9 machine or device.

10 (b) Form of Notice.—The notice appearing on the copies shall con-
11 sist of the following three elements:

12 (1) the symbol © (the letter C in a circle), the word "Copy-
13 right," or the abbreviation "Copr.";

14 (2) the year of first publication of the work; in the case of
15 compilations or derivative works incorporating previously pub-
16 lished material, the year date of first publication of the compila-
17 tion or derivative work is sufficient. The year date may be omitted
18 where a pictorial, graphic, or sculptural work, with accompanying
19 text matter, if any, is reproduced in or on greeting cards, post-
20 cards, stationery, jewelry, dolls, toys, or any useful articles;

21 (3) the name of the owner of copyright in the work, or an ab-
22 breviation by which the name can be recognized, or a generally
23 known alternative designation of the owner.

24 (c) Position of Notice.—The notice shall be affixed to the copies in
25 such manner and location as to give reasonable notice of the claim
26 of copyright. The Register of Copyrights shall prescribe by regula-
27 tion, as examples, specific methods of affixation and positions of the
28 notice on various types of works that will satisfy this requirement, but
29 these specifications shall not be considered exhaustive.

30 **§402. Notice of copyright: Phonorecords of sound recordings**

31 (a) General Requirement.—Whenever a sound recording pro-

1 tected under this title is published in the United States or elsewhere by
2 authority of the copyright owner, a notice of copyright as provided
3 by this section shall be placed on all publicly distributed phonorecords
4 of the sound recording.

5 (b) FORM OF NOTICE.—The notice appearing on the phonorecords
6 shall consist of the following three elements:

7 (1) the symbol ℗ (the letter P in a circle);

8 (2) the year of first publication of the sound recording;

9 (3) the name of the owner of copyrights in the sound record-
10 ing, or an abbreviation by which the name can be recognized, or a
11 generally known alternative designation of the owner; if the
12 producer of the sound recording is named on the phonorecord
13 labels or containers, and if no other name appears in conjunction
14 with the notice, his name shall be considered a part of the notice.

15 (c) POSITION OF NOTICE.—The notice shall be placed on the surface
16 of the phonorecord, or on the phonorecord label or container, in such
17 manner and location as to give reasonable notice of the claim of copy-
18 right.

19 **§ 403. Notice of copyright: Publications incorporating United**
20 **State Government works**

21 Whenever a work is published in copies or phonorecords consisting
22 preponderantly of one or more works of the United States Govern-
23 ment, the notice of copyright provided by section 401 or 402 shall
24 also include a statement identifying, either affirmatively or negatively,
25 those portions of the copies or phonorecords embodying any work or
26 works protected under this title.

27 **§ 404. Notice of copyright: Contributions to collective works**

28 (a) A separate contribution to a collective work may bear its own
29 notice of copyright, as provided by section 401 through 403. How-
30 ever, a single notice applicable to the collective work as a whole is
31 sufficient to satisfy the requirements of sections 401 through 403 with
32 respect to the separate contributions it contains (not including adver-
33 tisements inserted on behalf of persons other than the owner of copy-
34 right in the collective work), regardless of the ownership of copyright
35 in the contributions and whether or not they have been previously
36 published.

37 (b) Where the person named in a single notice applicable to a
38 collective work as a whole is not the owner of copyright in a separate
39 contribution that does not bear its own notice, the case is governed
40 by the provisions of section 406(a).

1 **§ 405. Notice of copyright: Omission of notice**

2 (a) EFFECT OF OMISSION ON COPYRIGHT.—The omission of the copy-
3 right notice described by sections 401 through 403 from copies or
4 phonorecords publicly distributed by authority of the copyright
5 owner does not invalidate the copyright in a work if:

6 (1) the notice has been omitted from no more than a relatively
7 small number of copies or phonorecords distributed to the public;
8 or

9 (2) registration for the work has been made before or is made
10 within five years after the publication without notice, and a
11 reasonable effort is made to add notice to all copies or phono-
12 records that are distributed to the public in the United States
13 after the omission has been discovered; or

14 (3) the notice has been omitted in violation of an express re-
15 quirement in writing that, as a condition of the copyright owner's
16 authorization of the public distribution of copies or phonorecords,
17 they bear the prescribed notice.

18 (b) EFFECT OF OMISSION ON INNOCENT INFRINGERS.—Any person
19 who innocently infringes a copyright, in reliance upon an authorized
20 copy or phonorecord from which the copyright notice has been
21 omitted, incurs no liability for actual or statutory damages under sec-
22 tion 504 for any infringing acts committed before receiving actual
23 notice that registration for the work has been made under section 408,
24 if he proves that he was misled by the omission of notice. In a suit
25 for infringement in such a case the court may allow or disallow re-
26 covery of any of the infringer's profits attributable to the infringe-
27 ment, and may enjoin the continuation of the infringing undertaking
28 or may require, as a condition for permitting the infringer to con-
29 tinue his undertaking, that he pay the copyright owner a reason-
30 able license fee in an amount and on terms fixed by the court.

31 (c) REMOVAL OF NOTICE.—Protection under this title is not affected
32 by the removal, destruction, or obliteration of the notice, without
33 the authorization of the copyright owner, from any publicly distrib
34 uted copies or phonorecords.

35 **§ 406. Notice of copyright: Error in name or date**

36 (a) ERROR IN NAME.—Where the person named in the copyright
37 notice on copies or phonorecords publicly distributed by authority of
38 the copyright owner is not the owner of copyright, the validity and
39 ownership of the copyright are not affected. In such a case, however,
40 any person who innocently begins an undertaking that infringes the

1 copyright has a complete defense to any action for such infringement
2 if he proves that he was misled by the notice and began the undertak-
3 ing in good faith under a purported transfer or license from the person
4 named therein, unless before the undertaking was begun:
5 (1) registration for the work had been made in the name of
6 the owner of copyright; or
7 (2) a document executed by the person named in the notice
8 and showing the ownership of the copyright had been recorded.
9 The person named in the notice is liable to account to the copyright
10 owner for all receipts from purported transfers or licenses made by
11 him under the copyright.
12 (b) ERROR IN DATE.—When the year date in the notice on copies or
13 phonorecords distributed by authority of the copyright owner is
14 earlier than the year in which publication first occurred, any period
15 computed from the year of first publication under section 302 is to be
16 computed from the year in the notice. Where the year date is more
17 than one year later than the year in which publication first occurred,
18 the work is considered to have been published without any notice and
19 is governed by the provisions of section 405.
20 (c) OMISSION OF NAME OR DATE.—Where copies or phonorecords
21 publicly distributed by authority of the copyright owner contain no
22 name or no date that could reasonably be considered a part of the
23 notice, the work is considered to have been published without any
24 notice and is governed by the provisions of section 405.
25 **§ 407. Deposit of copies or phonorecords for Library of Congress**
26 (a) Except as provided by subsection (c), the owner of copyright
27 or of the exclusive right of publication in a work published with no-
28 tice of copyright in the United States shall deposit, within three
29 months after the date of such publication:
30 (1) two complete copies of the best edition; or
31 (2) if the work is a sound recording, two complete phono-
32 records of the best edition, together with any printed or other
33 visually perceptible material published with such phonorecords.
34 This deposit is not a condition of copyright protection.
35 (b) The required copies or phonorecords shall be deposited in the
36 Copyright Office for the use or disposition of the Library of Congress.
37 The Register of Copyrights shall, when requested by the depositor
38 and upon payment of the fee prescribed by section 708, issue a receipt
39 for the deposit.
40 (c) The Register of Copyrights may by regulation exempt any

1 categories of material from the deposit requirements of this section,
2 or require deposit of only one copy or phonorecord with respect to
3 any categories.
4 (d) At any time after publication of a work as provided by sub-
5 section (a), the Register of Copyrights may make written demand
6 for the required deposit on any of the persons obligated to make the
7 deposit under subsection (a). Unless deposit is made within three
8 months after the demand is received, the person or persons on whom
9 the demand was made are liable:
10 (1) to a fine of not more than $250 for each work; and
11 (2) to pay to the Library of Congress the total retail price of
12 the copies or phonorecords demanded, or, if no retail price has
13 been fixed, the reasonable cost to the Library of Congress of
14 acquiring them.
15 **§ 408. Copyright registration in general**
16 (a) Registration Permissive.—At any time during the subsistence
17 of copyright in any published or unpublished work, the owner of
18 copyright or of any exclusive right in the work may obtain registration
19 of the copyright claim by delivering to the Copyright Office the deposit
20 specified by this section, together with the application and fee specified
21 by sections 409 and 708. Subject to the provisions of section 405(a),
22 such registration is not a condition of copyright protection.
23 (b) Deposit for Copyright Registration.—Except as provided by
24 subsection (c), the material deposited for registration shall include:
25 (1) in the case of an unpublished work, one complete copy or
26 phonorecord;
27 (2) in the case of a published work, two complete copies or
28 phonorecords of the best edition;
29 (3) in the case of a work first published abroad, one complete
30 copy or phonorecord as so published;
31 (4) in the case of a contribution to a collective work, one com-
32 plete copy or phonorecord of the best edition of the collective
33 work.
34 Copies or phonorecords deposited for the Library of Congress under
35 section 407 may be used to satisfy the deposit provisions of this section,
36 if they are accompanied by the prescribed application and fee, and by
37 any additional identifying material that the Register may, by regula-
38 tion, require.
39 (c) Administrative Classification and Optional Deposit.—The
40 Register of Copyrights is authorized to specify by regulation the

1 administrative classes into which works are to be placed for purposes of
2 deposit and registration, and the nature of the copies or phonorecords
3 to be deposited in the various classes specified. The regulations may
4 require or permit, for particular classes, the deposit of identifying
5 material instead of copies or phonorecords, the deposit of only one copy
6 or phonorecord where two would normally be required, or a single
7 registration for a group of related works. This administrative classi-
8 fication of works has no significance with respect to the subject matter
9 of copyright or the exclusive rights provided by this title.
10 (d) CORRECTIONS AND AMPLIFICATIONS.—The Register may also
11 establish, by regulation, formal procedures for the filing of an applica-
12 tion for supplementary registration, to correct an error in a copyright
13 registration or to amplify the information given in a registration. Such
14 application shall be accompanied by the fee provided by section 708,
15 and shall clearly identify the registration to be corrected or amplified.
16 The information contained in a supplementary registration augments
17 but does not supersede that contained in the earlier registration.
18 (e) PUBLISHED EDITION OF PREVIOUSLY REGISTERED WORK.—Reg-
19 istration for the first published edition of a work previously registered
20 in unpublished form may be made even though the work as published is
21 substantially the same as the unpublished version.
22 **§ 409. Application for registration**
23 The application for copyright registration shall be made on a form
24 prescribed by the Register of Copyrights and shall include:
25 (1) the name and address of the copyright claimant;
26 (2) in the case of a work other than an anonymous or pseudony-
27 mous work, the name and nationality or domicile of the author or
28 authors and, if one or more of the authors is dead, the dates of
29 their deaths;
30 (3) if the work is anonymous or pseudonymous, the nationality
31 or domicile of the author or authors;
32 (4) in the case of a work made for hire, a statement to this
33 effect;
34 (5) if the copyright claimant is not the author, a brief state-
35 ment of how the claimant obtained ownership of the copyright;
36 (6) the title of the work, together with any previous or alterna-
37 tive titles under which the work can be identified;
38 (7) the year in which creation of the work was completed;
39 (8) if the work has been published, the date and nation of its
40 first publication;

1 (9) in the case of a compilation or derivative work, an identi-
2 fication of any pre-existing work or works that it is based on or
3 incorporates, and a brief, general statement of the additional
4 material covered by the copyright claim being registered;
5 (10) in the case of a published work containing material of
6 which copies are required by section 601 to be manufactured in
7 the United States, the names of the persons or organizations
8 who performed the processes specified by subsection (c) of sec-
9 tion 601 with respect to that material, and the places where those
10 processes were performed; and
11 (11) any other information regarded by the Register of Copy-
12 rights as bearing upon the preparation or identification of the
13 work or the existence, ownership, or duration of the copyright.
14 **§ 410. Registration of claim and issuance of certificate**
15 (a) When, after examination, the Register of Copyrights deter-
16 mines that, in accordance with the provisions of this title, the material
17 deposited constitutes copyrightable subject matter and that the other
18 legal and formal requirements of this title have been met, he shall reg-
19 ister the claim and issue to the applicant a certificate of registration
20 under the seal of the Copyright Office. The certificate shall contain
21 the information given in the application, together with the number
22 and effective date of the registration.
23 (b) In any case in which the Register of Copyrights determines
24 that, in accordance with the provisions of this title, the material de-
25 posited does not constitute copyrightable subject matter or that the
26 claim is invalid for any other reason, he sall refuse registration and
27 shall notify the applicant in writing of the reasons for his action.
28 (c) In any judicial proceedings the certificate of a registration made
29 before or within five years after first publication of the work shall
30 constitute prima facie evidence of the validity of the copyright and
31 of the facts stated in the certificate. The evidentiary weight to be
32 accorded the certificate of a registration made thereafter shall be
33 within the discretion of the court.
34 (d) The effective date of a copyright registration is the day on
35 which an application, deposit, and fee, which are later determined by
36 the Register of Copyrights or by a court of competent jurisdiction to
37 be acceptable for registrtion, have all been received in the Copyright
38 Office.

1 **§ 411. Registration as prerequisite to infringement suit**

2 (a) Subject to the provisions of subsection (b), no action for in-
3 fringement of the copyright in any work shall be instituted until
4 registration of the copyright claim has been made in accordance with
5 this title. In any case, however, where the deposit, application, and fee
6 required for registration have been delivered to the Copyright Office
7 in proper form and registration has been refused, the applicant is
8 entitled to institute an action for infringement if notice thereof, with
9 a copy of the complaint, is served on the Register of Copyrights. The
10 Register may, at his option, become a party to the action with respect
11 to the issue of registrability of the copyright claim by entering his
12 appearance within sixty days after such service, but his failure to do
13 so shall not deprive the court of jurisdiction to determine that issue.

14 (b) In the case of a work consisting of sounds, images, or both, the
15 first fixation of which is made simultaneously with its transmission,
16 the copyright owner may either before or after such fixation takes
17 place, institute an action for infringement under section 501, fully
18 subject to the remedies provided by sections 502 through 506, if, in
19 accordance with requirements that the Register of Copyrights shall
20 prescribe by regulation, the copyright owner—

21 (1) serves notice upon the infringer, not less than ten or more
22 than thirty days before such fixation, identifying the work and
23 the specific time and source of its first transmission, and declar-
24 ing an intention to secure copyright in the work; and

25 (2) makes registration for the work within three months after
26 its first transmission.

27 **§ 412. Registration as prerequisite to certain remedies for**
28 **infringement**

29 In any action under this title, other than an action instituted under
30 section 411(b), no award of statutory damages or of attorney's fees, as
31 provided by sections 504 and 505, shall be made for:

32 (1) any infringement of copyright in an unpublished work
33 commenced before the effective date of its registration; or

34 (2) any infringement of copyright commenced after first pub-
35 lication of the work and before the effective date of its registra-
36 tion, unless such registration is made within three months after
37 its first publication.

1 **Chapter 5.—COPYRIGHT INFRINGEMENT AND REMEDIES**

Sec.
501. Infringement of copyright.
502. Remedies for infringement: Injunctions.
503. Remedies for infringement: Impounding and disposition of infringing articles.
504. Remedies for infringement: Damages and profits.
505. Remedies for infringement: Costs and attorney's fees.
506. Criminal offenses.
507. Limitations on actions.
508. Notification of filing and determination of actions.

2 **§ 501. Infringement of copyright**

3 (a) Anyone who violates any of the exclusive rights of the copy-
4 right owner as provided by sections 106 through 117, or who imports
5 copies or phonorecords into the United States in violation of section
6 602, is an infringer of the copyright.

7 (b) The legal or beneficial owner of an exclusive right under a
8 copyright is entitled, subject to the requirements of sections 205(d)
9 and 411, to institute an action for any infringement of that particular
10 right committed while he is the owner of it. The court may require
11 him to serve written notice of the action with a copy of the complaint
12 upon any person shown, by the records of the Copyright Office or
13 otherwise, to have or claim an interest in the copyright, and shall re-
14 quire that such notice be served upon any person whose interest is
15 likely to be affected by a decision in the case. The court may require
16 the joinder, and shall permit the intervention, of any person having
17 or claiming an interest in the copyright.

18 (c) For any secondary transmission by a cable system that em-
19 bodies a performance or a display of a work which is actionable as an
20 act of infringement under subsection (c) of section 111, a television
21 broadcast station holding a copyright or other license to transmit or
22 perform the same version of that work shall, for purposes of subsection
23 (b) of this section, be treated as a legal or beneficial owner if such
24 secondary transmission occurs within the local service area of that
25 television station.

26 **§ 502. Remedies for infringement: Injunctions**

27 (a) Any court having jurisdiction of a civil action arising under
28 this title may, subject to the provisions of section 1498 of title 28,
29 grant temporary and final injunctions on such terms as it may deem
30 reasonable to prevent or restrain infringement of a copyright.

31 (b) Any such injunction may be served anywhere in the United
32 States on the person enjoined; it shall be operative throughout the
33 United States and shall be enforceable, by proceedings in contempt or
34 otherwise, by any United States court having jurisdiction of that per-

1 son. The clerk of the court granting the injunction shall, when re-
2 quested by any other court in which enforcement of the injunction is
3 sought, transmit promptly to the other court a certified copy of all
4 the papers in the case on file in his office.

5 **§ 503. Remedies for infringement: Impounding and disposition of**
6 **infringing articles**

7 (a) At any time while an action under this title is pending, the court
8 may order the impounding, on such terms as it may deem reasonable,
9 of all copies or phonorecords claimed to have been made or used in vio-
10 lation of the copyright owner's exclusive rights, and of all plates,
11 molds, matrices, masters, tapes, film negatives, or other articles by
12 means of which such copies or phonorecords may be reproduced.

13 (b) As part of a final judgment or decree, the court may order the
14 destruction or other reasonable disposition of all copies or phonorec-
15 ords found to have been made or used in violation of the copyright
16 owner's exclusive rights, and of all plates, molds, matrices, masters,
17 tapes, film negatives, or other articles by means of which such copies
18 or phonorecords may be reproduced.

19 **§ 504. Remedies for infringement: Damages and profits**

20 (a) In General.—Except as otherwise provided by this title, an in-
21 fringer of copyright is liable for either:

22 (1) the copyright owner's actual damages and any additional
23 profits of the infringer, as provided by subsection (b); or

24 (2) statutory damages, as provided by subsection (c).

25 (b) Actual Damages and Profits.—The copyright owner is en-
26 titled to recover the actual damages suffered by him as a result of the
27 infringement, and any profits of the infringer that are attributable to
28 the infringement and are not taken into account in computing the
29 actual damages. In establishing the infringer's profits, the copyright
30 owner is required to present proof only of the infringer's gross revenue,
31 and the infringer is required to prove his deductible expenses and the
32 elements of profit attributable to factors other than the copyrighted
33 work.

34 (c) Statutory Damages.—

35 (1) Except as provided by clause (2) of this subsection, the
36 copyright owner may elect, at any time before final judgment is
37 rendered, to recover, instead of actual damages and profits, an
38 award of statutory damages for all infringements involved in
39 the action, with respect to any one work, for which any one
40 infringer is liable individually, or for which any two or more

1 infringers are liable jointly and severally, in a sum of not less
2 than $250 or more than $10,000 as the court considers just. For
3 the purposes of this subsection, all the parts of a compilation or
4 derivative work constitute one work.
5 (2) In a case where the copyright owner sustains the burden
6 of proving, and the court finds, that infringement was committed
7 willfully, the court in its discretion may increase the award of
8 statutory damages to a sum of not more than $50,000. In a case
9 where the infringer sustains the burden of proving, and the court
10 finds, that he was not aware and had no reason to believe that his
11 acts constituted an infringement of copyright, the court in its
12 discretion may reduce the award of statutory damages to a sum
13 of not less than $100. In a case where an instructor, librarian or
14 archivist in a nonprofit educational institution, library, or ar-
15 chives, who infringed by reproducing a copyrighted work in copies
16 or phonorecords, sustains the burden of proving that he believed
17 and had reasonable grounds for believing that the reproduction
18 was a fair use under section 107, the court in its discretion may
19 remit statutory damages in whole or in part.
20 **§ 505. Remedies for infringement: Costs and attorney's fees**
21 In any civil action under this title, the court in its discretion may
22 allow the recovery of full costs by or against any party other than
23 the United States or an officer thereof. Except as otherwise provided
24 by this title, the court may also award a reasonable attorney's fee to
25 the prevailing party as part of the costs.
26 **§ 506. Criminal offenses**
27 (a) CRIMINAL INFRINGEMENT.—Any person who infringes a
28 copyright willfully and for purposes of commercial advantage or pri-
29 vate financial gain shall be fined not more than $2,500 or imprisoned
30 not more than one year, or both, for the first such offense, and shall
31 be fined not more than $10,000 or imprisoned not more than three
32 years, or both, for any subsequent offense, provided however, that any
33 person who infringes willfully and for purposes of commercial advan-
34 tage or private financial gain the copyright in a sound recording
35 afforded by subsections (1) and (3) in section 106 or the copyright in
36 a motion picture afforded by subsections (1), (3), and (4) in section
37 106 shall be fined not more than $25,000 or imprisoned for not more
38 than one year, or both, for the first such offense and shall be fined
39 not more than $50,000 or imprisoned not more than two years, or
40 both, for any subsequent offense.

1 (b) FRAUDULENT COPYRIGHT NOTICE.—Any person who, with fraud-
2 ulent intent, places on any article a notice of copyright or words of
3 the same purport that he knows to be false, or who, with fraudulent
4 intent, publicly distributes or imports for public distribution any
5 article bearing such notice or words that he knows to be false, shall be
6 fined not more than $2,500.
7 (c) FRAUDULENT REMOVAL OF COPYRIGHT NOTICE.—Any person who,
8 with fraudulent intent, removes or alters any notice of copyright
9 appearing on a copy of a copyrighted work shall be fined not more
10 than $2,500.
11 (d) FALSE REPRESENTATION.—Any person who knowingly makes a
12 false representation of a material fact in the application for copyright
13 registration provided for by secton 409, or in any written statement
14 filed in connection with the application, shall be fined not more than
15 $2,500.
16 **§ 507. Limitations on actions**
17 (a) CRIMINAL PROCEEDINGS.—No criminal proceeding shall be main-
18 tained under the provisions of this title unless it is commenced within
19 three years after the cause of action arose.
20 (b) CIVIL ACTIONS.—No civil action shall be maintained under the
21 provisions of this title unless it is commenced within three years after
22 the claim accrued.
23 **§ 508. Notification of filing and determination of actions**
24 (a) Within one month after the filing of any action under this title,
25 the clerks of the courts of the United States shall send written notifica-
26 tion to the Register of Copyrights setting forth, as far as is shown
27 by the papers filed in the court, the names and addresses of the parties
28 and the title, author, and registration number of each work involved
29 in the action. If any other copyrighted work is later included in the
30 action by amendment, answer, or other pleading, the clerk shall also
31 send a notification concerning it to the Register within one month
32 after the pleading is filed.
33 (b) Within one month after any final order or judgment is issued
34 in the case, the clerk of the court shall notify the Register of it,
35 sending him a copy of the order or judgment together with the written
36 opinion, if any, of the court.
37 (c) Upon receiving the notifications specified in this section, the
38 Register shall make them a part of the public records of the Copyright
39 Office.

Chapter 6.—MANUFACTURING REQUIREMENT AND IMPORTATION

Sec.
601. Manufacture, importation, and public distribution of certain copies.
602. Infringing importation of copies or phonorecords.
603. Importation prohibitions. Enforcement and disposition of excluded articles.

§ 601. Manufacture, importation, and public distribution of certain copies

(a) Except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.

(b) The provisions of subsection (a) do not apply:

(1) where, on the date when importation is sought or public distribution in the United States is made, the author of any substantial part of such material is neither a national nor a domiciliary of the United States or, if he is a national of the United States, has been domiciled outside of the United States for a continuous period of at least one year immediately preceding that date; in the case of work made for hire, the exemption provided by this clause does not apply unless a substantial part of the work was prepared for an employer or other person who is not a national or domiciliary of the United States or a domestic corporation or enterprise;

(2) where the Bureau of Customs is presented with an import statement issued under the seal of the Copyright Office, in which case a total of no more than two thousand copies of any one such work shall be allowed entry; the import statement shall be issued upon request to the copyright owner or to a person designated by him at the time of registration for the work under section 408 or at any time thereafter;

(3) where importation is sought under the authority or for the use, other than in schools, of the government of the United States or of any State or political subdivision of a State;

(4) where importation, for use and not for sale, is sought:

(A) by any person with respect to no more than one copy of any one work at any one time;

(B) by any person arriving from abroad, with respect to copies forming part of his personal baggage; or

(C) by an organization operated for scholarly, educational, or religious purposes and not for private gain, with respect to copies intended to form a part of its library;

(5) where the copies are reproduced in raised characters for the use of the blind;

(6) where, in addition to copies imported under clauses (3) and (4) of this subsection, no more than two thousand copies of any one such work, which have not been manufactured in the United States or Canada, are publicly distributed in the United States.

(c) The requirement of this section that copies be manufactured in the United States or Canada is satisfied if:

(1) in the case where the copies are printed directly from type that has been set, or directly from plates made from such type, the setting of the type and the making of the plates have been performed in the United States or Canada; or

(2) in the case where the making of plates by a lithographic or photoengraving process is a final or intermediate step preceding the printing of the copies, the making of the plates has been performed in the United States or Canada; and

(3) in any case, the printing or other final process of producing multiple copies and any binding of the copies have been performed in the United States or Canada.

(d) Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material; if he proves:

(1) that copies of the work have been imported into or publicly distributed in the United States in violation of this section by or with the authority of the owner of such exclusive rights; and

(2) that the infringing copies were manufactured in the United States or Canada in accordance with the provisions of subsection (c); and

(3) that the infringement was commenced before the effective

1 date of registration for an authorized edition of the work, the
2 copies of which have been manufactured in the United States or
3 Canada in accordance with the provisions of subsection (c).
4 (e) In any action for infringement of the exclusive rights to repro-
5 duce and distribute copies of a work containing material required by
6 this section to be manufactured in the United States or Canada, the
7 copyright owner shall set forth in the complaint the names of the per-
8 sons or organizations who performed the processes specified by subsec-
9 tion (c) with respect to that material, and the places where those
10 processes were performed.
11 **§ 602. Infringing importation of copies or phonorecords**
12 (a) Importation into the United States, without the authority of
13 the owner of copyright under this title, of copies or phonorecords of
14 a work that have been acquired abroad is an infringement of the
15 exclusive right to distribute copies or phonorecords under section 106,
16 actionable under section 501. This subsection does not apply to.
17 (1) importation of copies or phonorecords under the authority
18 or for the use of the government of the United States or of any
19 State or political subdivision of a State but not including copies
20 or phonorecords for use in schools, or copies of any audiovisual
21 work imported for purposes other than archival use;
22 (2) importation, for the private use of the importer and not
23 for distribution, by any person with respect to no more than one
24 copy or phonorecord of any one work at any one time, or by any
25 person arriving from abroad with respect to copies or phono-
26 records forming part of his personal baggage; or
27 (3) importation by or for an organization operated for schol-
28 arly, educational, or religious purposes and not for private gain,
29 with respect to no more than one copy of an audiovisual work
30 solely for its archival purposes, and no more than five copies or
31 phonorecords of any other work for its library lending or archival
32 purposes.
33 (b) In a case where the making of the copies or phonorecords would
34 have constituted an infringement of copyright if this title had been
35 applicable, their importation is prohibited. In a case where the copies
36 or phonorecords were lawfully made, the Bureau of Customs has no
37 authority to prevent their importation unless the provisions of section
38 601 are applicable. In either case, the Secretary of the Treasury is
39 authorized to prescribe, by regulation, a procedure under which any

1 person claiming an interest in the copyright in a particular work may,
2 upon payment of a specified fee, be entitled to notification by the
3 Bureau of the importation of articles that appear to be copies or
4 phonorecords of the work.

5 **§ 603. Importation prohibitions: Enforcement and disposition of**
6 **excluded articles**

7 (a) The Secretary of the Treasury and the United States Postal
8 Service shall separately or jointly make regulations for the enforce-
9 ment of the provisions of this title prohibiting importation.

10 (b) These regulations may require, as a condition for the exclusion
11 of articles under section 602:

12 (1) that the person seeking exclusion obtain a court order
13 enjoining importation of the articles; or

14 (2) that he furnish proof, of a specified nature and in accord-
15 ance with prescribed procedures, that the copyright in which he
16 claims an interest is valid and that the importation would violate
17 the prohibition in section 602; he may also be required to post a
18 surety bond for any injury that may result if the detention or
19 exclusion of the articles proves to be unjustified.

20 (c) Articles imported in violation of the importation prohibitions
21 of this title are subject to seizure and forfeiture in the same manner
22 as property imported in violation of the customs revenue laws. For-
23 feited articles shall be destroyed as directed by the Secretary of the
24 Treasury or the court, as the case may be; however, the articles may be
25 returned to the country of export whenever it is shown to the satisfac-
26 tion of the Secretary of the Treasury that the importer had no reason-
27 able grounds for believing that his acts constituted a violation of law.

28 **Chapter 7.—COPYRIGHT OFFICE**

Sec.
701. The Copyright Office: General responsibilities and organization.
702. Copyright Office regulations.
703. Effective date of actions in Copyright Office.
704. Retention and disposition of articles deposited in Copyright Office.
705. Copyright Office records. Preparation, maintenance, public inspection, and searching.
706. Copies of Copyright Office records.
707. Copyright Office forms and publications.
708. Copyright Office fees.
709. Delay in delivery caused by disruption of postal or other services.

29 **§ 701. The Copyright Office: General responsibilities and organi-**
30 **zation**

31 (a) All administrative functions and duties under this title, ex-
32 cept as otherwise specified, are the responsibility of the Register of
33 Copyrights as director of the Copyright Office in the Library of Con-

1 gress. The Register of Copyrights, together with the subordinate
2 officers and employees of the Copyright Office, shall be appointed by
3 the Librarian of Congress, and shall act under his general direction
4 and supervision.
5 (b) The Register of Copyrights shall adopt a seal to be used on
6 and after January 1, 1977, to authenticate all certified documents
7 issued by the Copyright Office.
8 (c) The Register of Copyrights shall make an annual report to
9 the Librarian of Congress of the work and accomplishments of the
10 Copyright Office during the previous fiscal year. The annual report
11 of the Register of Copyrights shall be published separately and as
12 a part of the annual report of the Librarian of Congress.

13 **§ 702. Copyright Office regulations**

14 The Register of Copyrights is authorized to establish regulations
15 not inconsistent with law for the administration of the functions and
16 duties made his responsibility under this title. All regulations estab-
17 lished by the Register under this title are subject to the approval of
18 the Librarian of Congress.

19 **§ 703. Effective date of actions in Copyright Office**

20 In any case in which time limits are prescribed under this title
21 for the performance of an action in the Copyright Office, and in
22 which the last day of the prescribed period falls on a Saturday, Sun-
23 day, holiday or other non-business day within the District of Colum-
24 bia or the Federal Government, the action may be taken on the next
25 succeeding business day, and is effective as of the date when the
26 period expired.

27 **§ 704. Retention and disposition of articles deposited in Copyright**
28 **Office**

29 (a) Upon their deposit in the Copyright Office under sections 407
30 and 408, all copies, phonorecords, and identifying material, including
31 those deposited in connection with claims that have been refused
32 registration, are the property of the United States Government.
33 (b) In the case of published works, all copies, phonorecords, and
34 identifying material deposited are available to the Library of Con-
35 gress for its collections, or for exchange or transfer to any other
36 library. In the case of unpublished works, the Library is entitled to
37 select any deposits for its collections.
38 (c) Deposits not selected by the Library under subsection (b), or
39 identifying portions or reproductions of them, shall be retained under
40 the control of the Copyright Office, including rentention in Govern-

1 ment storage facilities, for the longest period considered practicable
2 and desirable by the Register of Copyrights and the Librarian of
3 Congress. After that period it is within the joint discretion of the
4 Register and the Librarian to order their destruction or other disposi-
5 tion; but, in the case of unpublished works, no deposit shall be de-
6 stroyed or otherwise disposed of during its term of copyright.
7 (d) The depositor of copies, phonorecords, or identifying material
8 under section 408, or the copyright owner of record, may request
9 retention, under the control of the Copyright Office, of one or more
10 of such articles for the full term of copyright in the work. The Regis-
11 ter of Copyright shall prescribe, by regulation, the conditions under
12 which such requests are to be made and granted, and shall fix the
13 fee to be charged under section 708(a)(11) if the request is granted.
14 **§ 705. Copyright Office records: Preparation, maintenance, public**
15 **inspection, and searching**
16 (a) The Register of Copyrights shall provide and keep in the Copy-
17 right Office records of all deposits, registrations, recordations, and
18 other actions taken under this title, and shall prepare indexes of all
19 such records.
20 (b) Such records and indexes, as well as the articles deposited in
21 connection with completed copyright registrations and retained under
22 the control of the Copyright Office, shall be open to public inspection.
23 (c) Upon request and payment of the fee specified by section 708,
24 the Copyright Office shall make a search of its public records, indexes,
25 and deposits, and shall furnish a report of the information they dis-
26 close with respect to any particular deposits, registrations, or recorded
27 documents.
28 **§ 706. Copies of Copyright Office records**
29 (a) Copies may be made of any public records or indexes of the
30 Copyright Office; additional certificates of copyright registration and
31 copies of any public records or indexes may be furnished upon request
32 and payment of the fees specified by section 708.
33 (b) Copies or reproductions of deposited articles retained under
34 the control of the Copyright Office shall be authorized or furnished
35 only under the conditions specified by the Copyright Office regulations.
36 **§ 707. Copyright Office forms and publications**
37 (a) CATALOG OF COPYRIGHT ENTRIES.—The Register of Copyrights
38 shall compile and publish at periodic intervals catalogs of all copy-
39 right registrations. These catalogs shall be divided into parts in
40 accordance with the various classes of works, and the Register has

1 discretion to determine on the basis of practicability and usefulness,
2 the form and frequency of publication of each particular part.
3 (b) OTHER PUBLICATIONS.—The Register shall furnish, free of
4 charge upon request, application forms for copyright registration and
5 general informational material in connection with the functions of the
6 Copyright Office. He also has authority to publish compilations of
7 information, bibliographies, and other material he considers to be
8 of value to the public.
9 (c) DISTRIBUTION OF PUBLICATIONS.—All publications of the Copy-
10 right Office shall be furnished to depository libraries as specified under
11 section 1905 of title 44, United States Code, and, aside from those fur-
12 nished free of charge, shall be offered for sale to the public at prices
13 based on the cost of reproduction and distribution.
14 **§ 708. Copyright Office fees**
15 (a) The following fees shall be paid to the Register of Copyrights:
16 (1) for the registration of a copyright claim or a supplementary
17 registration under section 408, including the issuance of a certifi-
18 cate of registration, $6;
19 (2) for the registration of a claim to renewal of a subsisting
20 copyright in its first term under section 304(a), including the
21 issuance of a certificate of registration, $4:
22 (3) for the issuance of a receipt for a deposit under section
23 407, $2;
24 (4) for the recordation, as provided by section 205, of a transfer
25 of copyright ownership or other document of six pages or less,
26 covering no more than one title, $5; for each page over six and
27 for each title over one, 50 cents additional;
28 (5) for the filing, under section 115(b), of a notice of intention
29 to make phonorecords, $3;
30 (6) for the recordation, under section 302(c), of a statement
31 revealing the identity of an author of an anonymous or pseu-
32 donymous work, or for the recordation, under section 302(d), of a
33 statement relating to the death of an author, $5 for a document of
34 six pages or less, covering no more than one title; for each page
35 over six and for each title over one, 50 cents additional;
36 (7) for the issuance, under section 601, of an import state-
37 ment, $3;
38 (8) for the issuance, under section 706, of an additional certifi-
39 cate of registration, $2;

1 (9) for the issuance of any other certification, $3; the Register
2 of Copyrights has discretion, on the basis of their cost, to fix the
3 fees for preparing copies of Copyright Office records, whether
4 they are to be certified or not;
5 (10) for the making and reporting of a search as provided by
6 section 705, and for any related services, $5 for each hour or frac-
7 tion of an hour consumed;
8 (11) for any other special services requiring a substantial
9 amount of time or expense, such fees as the Register of Copyrights
10 may fix on the basis of the cost of providing the service.
11 (b) The fees prescribed by or under this section are applicable to the
12 United States Government and any of its agencies, employees, or
13 officers, but the Register of Copyrights has discretion to waive the
14 requirement of this subsection in occasional or isolated cases involving
15 relatively small amounts.

16 **§ 709. Delay in delivery caused by disruption of postal or other**
17 **services**

18 In any case in which the Register of Copyright determines, on the
19 basis of such evidence as he may by regulation require, that a deposit,
20 application, fee, or any other material to be delivered to the Copyright
21 Office by a particular date, would have been received in the Copyright
22 Office in due time except for a general disruption or suspension of
23 postal or other transportation or communications services, the actual
24 receipt of such material in the Copyright Office within one month after
25 the date on which the Register determines that the disruption or sus-
26 pension of such services has terminated, shall be considered timely.

27 **Chapter 8.—COPYRIGHT ROYALTY TRIBUNAL**

Sec.
801. Copyright Royalty Tribunal: Establishment and purpose.
802. Petitions for the adjustment of royalty rates.
803. Membership of the Tribunal.
804. Procedures of the Tribunal.
805. Compensation of members of the Tribunal; expenses of the Tribunal.
806. Reports to the Congress.
807. Effective date of royalty adjustment.
808. Effective date of royalty distribution.
809. Judicial review.

28 **§ 801. Copyright Royalty Tribunal: Establishment and purpose**

29 (a) There is hereby created in the Library of Congress a Copyright
30 Royalty Tribunal.
31 (b) Subject to the provisions of this chapter, the purpose of the
32 Tribunal shall be: (1) to make determinations concerning the adjust-
33 ment of the copyright royalty rates specified by sections 111 and 115
34 so as to assure that such rates are reasonable and in the event that the

1 Tribunal shall determine that the statutory royalty rate, or a rate pre-
2 viously established by the Tribunal, or the revenue basis in respect to
3 section 111, does not provide a reasonable royalty fee for the basic
4 service of providing secondary transmissions of the primary broad-
5 cast transmitter or is otherwise unreasonable, the Tribunal may change
6 the royalty rate or the revenue basis on which the royalty fee shall be
7 assessed or both so as to assure reasonable royalty fee; and (2) to de-
8 termine in certain circumstances the distribution of the royalty fees
9 deposited with the Register of Copyrights under sections 111 and 116.

10 **§ 802. Petitions for the adjustment of royalty rates**

11 (a) On July 1, 1977, the Register of Copyrights shall cause to be
12 published in the Federal Register notice of the commencement of pro-
13 ceedings for the review of the royalty rate specified by sections 111
14 and 115.

15 (b) During the calendar year 1984, and in each subsequent fifth
16 calendar year, any owner or user of a copyrighted work whose royalty
17 rates are specified by this title, or by a rate established by the Tri-
18 bunal, may file a petition with the Register of Copyrights declaring
19 that the petitioner requests an adjustment of the rate. The Register
20 shall make a determination as to whether the applicant has a signifi-
21 cant interest in the royalty rate in which an adjustment is requested.
22 If the Register determines that the petitioner has a significant interest,
23 he shall cause notice of his decision to be published in the Federal
24 Register.

25 **§ 803. Membership of the Tribunal**

26 (a) In accordance with Section 802, or upon certifying the existence
27 of a controversy concerning the distribution of royalty fees deposited
28 pursuant to sections 111 and 116, the Register shall request the Amer-
29 ican Arbitration Association or any similar successor organization to
30 furnish a list of three members of said Association. The Register shall
31 communicate the names together with such information as may be
32 appropriate to all parties of interest. And such party within twenty
33 days from the date said communication is sent may submit to the Regis-
34 ter written objections to any or all of the proposed names. If no such
35 objections are received, or if the Register determines that said objec-
36 tions are not well founded, he shall certify the appointment of the three
37 designated individuals to constitute a panel of the Tribunal for the
38 consideration of the specified rate or royalty distribution. Such panel
39 shall function as the Tribunal established in section 801. If the Register
40 determines that the objections to the designation of one or more of the

1 proposed individuals are well founded, the Register shall request the
2 American Arbitration Association or any similar successor organiza-
3 tion to propose the necessary number of substitute individuals. Upon
4 receiving such additional names the Register shall constitute the panel.
5 The Register shall designate one member of the panel as Chairman.
6 (b) If any member of a panel becomes unable to perform his duties,
7 the Register, after consultation with the parties, may provide for the
8 selection of a successor in the manner prescribed in subsection (a).

9 **§ 804. Procedures of the Tribunal**

10 (a) The Tribunal shall fix a time and place for its proceedings and
11 shall cause notice to be given to the parties.
12 (b) Any organization or person entitled to participate in the pro-
13 ceedings may appear directly or be represented by counsel.
14 (c) Except as otherwise provided by law, the Tribunal shall deter-
15 mine its own procedure. For the purpose of carrying out the provisions
16 of this chapter, the Tribunal may hold hearings, administer oaths,
17 and require, by subpoena or otherwise, the attendance and testimony
18 of witnesses and the production of documents.
19 (d) Every final decision of the Tribunal shall be in writing and
20 shall state the reasons therefor.
21 (e) The Tribunal shall render a final decision in each proceeding
22 within one year from the certification of the panel. Upon a showing
23 of good cause, the Senate Committee on the Judiciary and the House of
24 Representatives Committee on the Judiciary may waive this require-
25 ment in a particular proceeding.

26 **§ 805. Compensation of members of the Tribunal; expenses of the**
27 **Tribunal**

28 (a) In proceedings for the distribution of royalty fees, the compen-
29 sation of members of the Tribunal and other expenses of the Tribunal
30 shall be deducted prior to the distribution of the funds.
31 (b) In proceedings for the adjustment of royalty rates, there is
32 hereby authorized to be appropriated such sums as may be necessary.
33 (c) The Library of Congress is authorized to furnish facilities and
34 incidental service to the Tribunal.
35 (d) The Tribunal is authorized to procure temporary and inter-
36 mittent services to the same extent as is authorized by section 3109 of
37 title 5, United States Code.

38 **§ 806. Reports to the Congress**

39 The Tribunal immediately upon making a final determination in
40 any proceeding for adjustment of a statutory royalty shall transmit

1 its decision, together with the reasons therefor, to the Secretary of the
2 Senate and the Clerk of the House of Representatives for reference
3 to the Judiciary Committees of the Senate and the House of
4 Representatives.

5 **§ 807. Effective date of royalty adjustment**

6 (a) Prior to the expiration of the first period of ninety calendar
7 days of continuous session of the Congress, following the transmittal
8 of the report specified in section 806, either House of the Congress may
9 adopt a resolution stating in substance that the House does not favor
10 the recommended royalty adjustment, and such adjustment, therefore,
11 shall not become effective.

12 (b) For the purposes of subsection (a) of this section

13 (1) Continuity of session shall be considered as broken only by
14 an adjournment of the Congress sine die. and

15 (2) In the computation of the ninety-day period there shall be
16 excluded the days on which either House is not in session because
17 of an adjournment of more than three days to a day certain.

18 (c) In the absence of the passage of such a resolution by either
19 House during said ninety-day period, the final determination by the
20 Tribunal of a petition for adjustment shall take effect on the first day
21 following ninety calendar days after the expiration of the period speci-
22 fied by subsection (a).

23 (d) The Register of Copyrights shall give notice of such effective
24 date by publication in the Federal Register not less than sixty days
25 before said date.

26 **§ 808. Effective date of royalty distribution**

27 A final determination of the Tribunal concerning the distribution
28 of royalty fees deposited with the Register of Copyrights pursuant to
29 sections 111 and 116 shall become effective thirty days following such
30 determination unless prior to that time an application has been filed
31 pursuant to section 809 to vacate, modify or correct the determination,
32 and notice of such application has been served upon the Register of
33 Copyrights. The Register upon the expiration of thirty days shall dis-
34 tribute such royalty fees not subject to any application filed pursuant
35 to section 809.

36 **§ 809. Judicial review**

37 In any of the following cases the United States District Court for
38 the District of Columbia may make an order vacating, modifying or
39 correcting a final determination of the Tribunal concerning the distri-
40 bution of royalty fees—

(a) Where the determination was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in any member of the panel.

(c) Where any member of the panel was guilty of any misconduct by which the rights of any party have been prejudiced.

TRANSITIONAL AND SUPPLEMENTARY PROVISIONS

SEC. 102. This title becomes effective on January 1, 1977, except as otherwise provided by section 304(b) of title 17 as amended by this title.

SEC. 103. This title does not provide copyright protection for any work that goes into the public domain before January 1, 1977. The exclusive rights, as provided by section 106 of title 17 as amended by this title, 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.

SEC. 104. All proclamations issued by the President under sections 1(e) or 9(b) of title 17 as it existed on December 31, 1976, or under previous copyright statutes of the United States shall continue in force until terminated, suspended, or revised by the President.

SEC. 105. (a)(1) Section 505 of title 44, United States Code, Supplement IV, is amended to read as follows:

"§ 505. Sale of duplicate plates

"The Public Printer shall sell, under regulations of the Joint Committee on Printing to persons who may apply, additional or duplicate stereotype or electrotype plates from which a Government publication is printed, at a price not to exceed the cost of composition, the metal, and making to the Government, plus 10 per centum, and the full amount of the price shall be paid when the order is filed."

(2) The item relating to section 505 in the sectional analysis at the beginning of chapter 5 of title 44, United States Code, is amended to read as follows:

"505. Sale of duplicate plates."

(b) Section 2113 of title 44, United States Code, is amended to read as follows:

"§ 2113. Limitation on liability

"When letters and other intellectual productions (exclusive of patented material, published works under copyright protection, and unpublished works for which copyright registration has been made) come into the custody or possession of the Administrator of General

1 Services, the United States or its agents are not liable for infringe-
2 ment of copyright or analogous rights arising out of use of the mate-
3 rials for display, inspection, research, reproduction, or other purposes."
4 (c) In section 1498(b) of title 28 of the United States Code, the
5 phrase "section 101 (b) of title 17" is amended to read "section 504 (c)
6 of title 17".
7 (d) Section 543 (a) (4) of the Internal Revenue Code of 1954, as
8 amended, is amended by striking out "(other than by reason of sec-
9 tion 2 or 6 thereof)".
10 (e) Section 3202(a) of title 39 of the United States Code is
11 amended by striking out clause (5). Section 3206(c) of title 39 of the
12 United States Code is amended by striking out clause (c). Section
13 3206(d) is renumbered (c).
14 (f) In section 6 of the Standard Reference Data Act (section
15 290(e) of title 15 of the United States Code, Supplement IV), sub-
16 section (a) is amended to delete the reference to "section 8" and to
17 substitute therefor the phrase "section 105".
18 SEC. 106. In any case where, before January 1, 1977, a person has
19 lawfully made parts of instruments serving to reproduce mechani-
20 cally a copyrighted work under the compulsory license provisions of
21 section 1(e) of title 17 as it existed on December 31, 1976, he may
22 continue to make and distribute such parts embodying the same me-
23 chanical reproduction without obtaining a new compulsory license
24 under the terms of section 115 of title 17 as amended by this title.
25 However, such parts made on or after January 1, 1977, constitute
26 phonorecords and are otherwise subject to the provisions of said
27 section 115.
28 SEC. 107. In the case of any work in which an ad interim copyright
29 is subsisting or is capable of being secured on December 31, 1976,
30 under section 22 of title 17 as it existed on that date, copyright pro-
31 tection is hereby extended to endure for the term or terms provided
32 by section 304 of title 17 as amended by this title.
33 SEC. 108. The notice provisions of sections 401 through 403 of title
34 17 as amended by this title apply to all copies or phonorecords publicly
35 distributed on or after January 1, 1977. However, in the case of a work
36 published before January 1, 1977, compliance with the notice provi-
37 sions of title 17 either as it existed on December 31, 1976, or as amended
38 by this title, is adequate with respect to copies publicly distributed
39 after December 31, 1976.

1 SEC. 109. The registration of claims to copyright for which the
2 required deposit, application, and fee were received in the Copyright
3 Office before January 1, 1977, and the recordation of assignments of
4 copyright or other instruments received in the Copyright Office before
5 January 1, 1977, shall be made in accordance with title 17 as it existed
6 on December 31, 1976.

7 SEC. 110. The demand and penalty provisions of section 14 of title 17
8 as it existed on December 31, 1976, apply to any work in which copy-
9 right has been secured by publication with notice of copyright on or
10 before that date, but any deposit and registration made after that date
11 in response to a demand under that section shall be made in accordance
12 with the provisions of title 17 as amended by this title.

13 SEC. 111. Section 2318 of title 18 of the United States Code is
14 amended to read as follows:

15 **"§ 2318. Transportation, sale or receipt of phonograph records**
16 **bearing forged or counterfeit labels**

17 "Whoever knowingly and with fraudulent intent transports, causes
18 to be transported, receives, sells, or offers for sale in interstate or
19 foreign commerce any phonograph record, disk, wire, tape, film, or
20 other article on which sounds are recorded, to which or upon which is
21 stamped, pasted, or affixed any forged or counterfeited label, knowing
22 the label to have been falsely made, forged, or counterfeited shall be
23 fined not more than $25,000 or imprisoned for not more than one
24 year, or both, for the first such offense and shall be fined not more than
25 $50,000 or imprisoned not more than two years or both, for any sub-
26 sequent offense."

27 SEC. 112. All causes of action that arose under title 17 before Jan-
28 uary 1, 1977, shall be governed by title 17 as it existed when the cause
29 of action arose.

30 SEC. 113. If any provision of title 17, as amended by this title, is
31 declared unconstitutional, the validity of the remainder of the title
32 is not affected.

33 TITLE II—PROTECTION OF ORNAMENTAL DESIGNS
34 OF USEFUL ARTICLES

35 DESIGNS PROTECTED

36 SEC. 201. (a) The author or other proprietor of an original orna-
37 mental design of a useful article may secure the protection provided
38 by this title upon complying with and subject to the provisions hereof.

39 (b) For the purposes of this title—

40 (1) A "useful article" is an article which in normal use has an
41 intrinsic utilitarian function that is not merely to portray the appear-

1 ance of the article or to convey information. An article which normally
2 is a part of a useful article shall be deemed to be a useful article.
3 (2) The "design of a useful article", hereinafter referred to as a
4 "design", consists of those aspects or elements of the article, including
5 its two-dimensional or three-dimensional features of shape and sur-
6 face, which make up the appearance of the article.
7 (3) A design is "ornamental" if it is intended to make the article
8 attractive or distinct in appearance.
9 (4) A design is "original" if it is the independent creation of an
10 author who did not copy it from another source.

11 DESIGNS NOT SUBJECT TO PROTECTION

12 SEC. 202. Protection under this title shall not be available for a
13 design that is—
14 (a) not original;
15 (b) staple or commonplace, such as a standard geometric figure,
16 familiar symbol, emblem, or motif, or other shape, pattern, or con-
17 figuration which has become common, prevalent, or ordinary;
18 (c) different from a design excluded by subparagraph (b) above
19 only in insignificant details or in elements which are variants com-
20 monly used in the relevant trades; or
21 (d) dictated solely by a utilitarian function of the article that
22 embodies it;
23 (e) composed of three-dimensional features of shape and sur-
24 face with respect to men's, women's, and children's apparel, in-
25 cluding undergarments and outerwear.

26 REVISIONS, ADAPTATIONS, AND REARRANGEMENTS

27 SEC. 203. Protection for a design under this title shall be available
28 notwithstanding the employment in the design of subject matter ex-
29 cluded from protection under section 202, if the design is a substantial
30 revision, adaptation, or rearrangement of said subject matter: *Pro-*
31 *vided*, That such protection shall be available to a design employing
32 subject matter protected under title I of this Act, or title 35 of the
33 United States Code or this title, only if such protected subject matter is
34 employed with the consent of the proprietor thereof. Such protection
35 shall be independent of any subsisting protection in subject matter
36 employed in the design, and shall not be construed as securing any
37 right to subject matter excluded from protection or as extending any
38 subsisting protection.

39 COMMENCEMENT OF PROTECTION

40 SEC. 204. (a) The protection provided for a design under this title
41 shall commence upon the date when the design is first made public.

1 (b) A design is made public when, by the proprietor of the design
2 or with his consent, an existing useful article embodying the design
3 is anywhere publicly exhibited, publicly distributed, or offered for
4 sale or sold to the public.

5 TERM OF PROTECTION

6 SEC. 205. (a) Subject to the provisions of this title, the protection
7 herein provided for a design shall continue for a term of five years
8 from the date of the commencement of protection as provided in sec-
9 tion 204(a), but if a proper application for renewal is received by
10 the Administrator during the year prior to the expiration of the five-
11 year term, the protection herein provided shall be extended for an
12 additional period of five years from the date of expiration of the first
13 five years.

14 (b) If the design notice actually applied shows a date earlier than
15 the date of the commencement of protection as provided in section
16 204(a), protection shall terminate as though the term had commenced
17 at the earlier date.

18 (c) Where the distinguishing elements of a design are in substan-
19 tially the same form in a number of different useful articles, the
20 design shall be protected as to all such articles when protected as
21 to one of them, but not more than one registration shall be required.
22 as provided in this title all rights under this title in said design shall
23 Upon expiration or termination of protection in a particular design
24 terminate, regardless of the number of different articles in which the
25 design may have been utilized during the term of its protection.

26 THE DESIGN NOTICE

27 SEC. 206. (a) Whenever any design for which protection is sought
28 under this title is made public as provided in section 204(b), the
29 proprietor shall, subject to the provisions of section 207, mark it or
30 have it marked legibly with a design notice consisting of the following
31 three elements:

32 (1) the words "Protected Design", the abbreviation "Prot'd
33 Des." or the letter "D" within a circle thus Ⓓ;

34 (2) the year of the date on which the design was first made
35 public; and

36 (3) the name of the proprietor, an abbreviation by which the
37 name can be recognized, or a generally accepted alternative desig-
38 nation of the proprietor; any distinctive identification of the
39 proprietor may be used if it has been approved and recorded by

the Administrator before the design marked with such identification is made public.

After registration the registration number may be used instead of the elements specified in (2) and (3) hereof.

(b) The notice shall be so located and applied as to give reasonable notice of design protection while the useful article embodying the design is passing through its normal channels of commerce. This requirement may be fulfilled, in the case of sheetlike or strip materials bearing repetitive or continuous designs, by application of the notice to each repetition, or to the margin, selvage, or reverse side of the material at reasonably frequent intervals, or to tags or labels affixed to the material at such intervals.

(c) When the proprietor of a design has complied with the provisions of this section, protection under this title shall not be affected by the removal, destruction, or obliteration by others of the design notice on an article.

EFFECT OF OMISSION OF NOTICE

SEC. 207. The omission of the notice prescribed in section 206 shall not cause loss of the protection or prevent recovery for infringement against any person who, after written notice of the design protection, begins an undertaking leading to infringement: *Provided*, That such omission shall prevent any recovery under section 222 against a person who began an undertaking leading to infringement before receiving written notice of the design protection, and no injunction shall be had unless the proprietor of the design shall reimburse said person for any reasonable expenditure or contractual obligation in connection with such undertaking incurred before written notice of design protection, as the court in its discretion shall direct. The burden of proving written notice shall be on the proprietor.

INFRINGEMENT

SEC. 208. (a) It shall be infringement of a design protected under this title for any person, without the consent of the proprietor of the design, within the United States or its territories or possessions and during the term of such protection, to—

(1) make, have made, or import, for sale or for use in trade, any infringing article as defined in subsection (d) hereof; or

(2) sell or distribute for sale or for use in trade any such infringing article: *Provided, however*, That a seller or distributor of any such article who did not make or import the same shall be deemed to be an infringer only if—

(i) he induced or acted in collusion with a manufacturer to make, or an importer to import such article (merely purchasing or giving an order to purchase in the ordinary course of business shall not of itself constitute such inducement or collusion); or

(ii) he refuses or fails upon the request of the proprietor of the design to make a prompt and full disclosure of his source of such article, and he orders or reorders such article after having received notice by registered or certified mail of the protection subsisting in the design.

(b) It shall be not infringement to make, have made, import, sell, or distribute, any article embodying a design created without knowledge of, and copying from, a protected design.

(c) A person who incorporates into his own product of manufacture an infringing article acquired from others in the ordinary course of business, or who, without knowledge of the protected design, makes or processes an infringing article for the account of another person in the ordinary course of business, shall not be deemed an infringer except under the conditions of clauses (i) and (ii) of paragraph (a)(2) of this section. Accepting an order or reorder from the source of the infringing article shall be deemed ordering or reordering within the meaning of clause (ii) of paragraph (a)(2) of this section.

(d) An "infringing article" as used herein is any article, the design of which has been copied from the protected design, without the consent of the proprietor: *Provided, however*, That an illustration or picture of a protected design in an advertisement, book, periodical, newspaper, photograph, broadcast, motion picture, or similar medium shall not be deemed to be an infringing article. An article is not an infringing article if it embodies, in common with the protected design, only elements described in subsections (a) through (d) of section 202.

(e) The party alleging rights in a design in any action or proceeding shall have the burden of affirmatively establishing its originality whenever the opposing party introduces an earlier work which is identical to such design, or so similar as to make a prima facie showing that such design was copied from such work.

APPLICATION FOR REGISTRATION

SEC. 209. (a) Protection under this title shall be lost if application for registration of the design is not made within six months after the date on which the design was first made public as provided in section 304(b).

(b) Application for registration or renewal may be made by the proprietor of the design.

(c) The application for registration shall be made to the Administrator and shall state (1) the name and address of the author or authors of the design; (2) the name and address of the proprietor if different from the author; (3) the specific name of the article, indicating its utility; (4) the date when the design was first made public as provided in section 204(b); and (5) such other information as may be required by the Administrator. The application for registration may include a description setting forth the salient features of the design, but the absence of such a description shall not prevent registration under this title.

(d) The application for registration shall be accompanied by a statement under oath by the applicant or his duly authorized agent or representative, setting forth that, to the best of his knowledge and belief (1) the design is original and was created by the author or authors named in the application; (2) the design has not previously been registered on behalf of the applicant or his predecessor in title; (3) the design has been made public as provided in section 204(b); and (4) the applicant is the person entitled to protection and to registration under this title. If the design has been made public with the design notice prescribed in section 206, the statement shall also describe the exact form and position of the design notice.

(e) Error in any statement or assertion as to the utility of the article named in the application, the design of which is sought to be registered, shall not affect the protection secured under this title.

(f) Errors in omitting a joint author or in naming an alleged joint author shall not affect the validity of the registration, or the actual ownership or the protection of the design: *Provided*, That the name of one individual who was in fact an author is stated in the application. Where the design was made within the regular scope of the author's employment and individual authorship of the design is difficult or impossible to ascribe and the application so states, the name and address of the employer for whom the design was made may be stated instead of that of the individual author.

(g) The application for registration shall be accompanied by two copies of a drawing or other pictorial representation of the useful article having one or more views, adequate to show the design, in a form and style suitable for reproduction, which shall be deemed a part of the application.

1 (h) Related useful articles having common design features may be
2 included in the same application under such conditions as may be pre-
3 scribed by the Administrator.

4 BENEFIT OF EARLIER FILING DATE IN FOREIGN COUNTRY

5 SEC. 210. An application for registration of a design filed in this
6 country by any person who has, or whose legal representative or pred-
7 ecessor or successor in title has previously regularly filed an applica-
8 tion for registration of the same design in a foreign country which af-
9 fords similar privileges in the case of applications filed in the United
10 States or to citizens of the United States shall have the same effect
11 as if filed in this country on the date on which the application was
12 first filed in any such foreign country, if the application in this country
13 is filed within six months from the earliest date on which any such
14 foreign application was filed.

15 OATHS AND ACKNOWLEDGMENTS

16 SEC. 211. Oaths and acknowledgments required by this title may be
17 made before any person in the United States authorized by law to
18 administer oaths, or, when made in a foreign country, before any
19 diplomatic or consular officer of the United States authorized to ad-
20 minister oaths, or before any official authorized to administer oaths in
21 the foreign country concerned, whose authority shall be proved by a
22 certificate of a diplomatic or consular officer of the United States, and
23 shall be valid if they comply with the laws of the state or country
24 where made.

25 EXAMINATION OF APPLICATION AND ISSUE OR REFUSAL OF REGISTRATION

26 SEC. 212. (a) Upon the filing of an application for registration in
27 proper form as provided in section 209, and upon payment of the fee
28 provided in section 215, the Administrator shall determine whether
29 or not the application relates to a design which on its face appears to
30 be subject to protection under this title, and if so, he shall register the
31 design. Registration under this subsection shall be announced by
32 publication.

33 (b) If, in his judgment, the application for registration relates to
34 a design which on its face is not subject to protection under this title,
35 the Administrator shall send the applicant a notice of his refusal to
36 register and the grounds therefor. Within three months from the date
37 the notice of refusal is sent, the applicant may request, in writing, re-
38 consideration of his application. After consideration of such a request,
39 the Administrator shall either register the design or send the applicant
40 a notice of his final refusal to register.

(c) Any person who believes he is or will be damaged by a registration under this title may, upon payment of the prescribed fee, apply to the Administrator at any time to cancel the registration on the ground that the design is not subject to protection under the provisions of this title, stating the reasons therefor. Upon receipt of an application for cancellation, the Administrator shall send the proprietor of the design, as shown in the records of the Office of the Administrator, a notice of said application, and the proprietor shall have a period of three months from the date such notice was mailed in which to present arguments in support of the validity of the registration. It shall also be within the authority of the Administrator to establish, by regulation, conditions under which the opposing parties may appear and be heard in support of their arguments. If, after the periods provided for the presentation of arguments have expired, the Administrator determines that the applicant for cancellation has established that the design is not subject to protection under the provisions of this title, he shall order the registration stricken from the record. Cancellation under this subsection shall be announced by publication, and notice of the Administrator's final determination with respect to any application for cancellation shall be sent to the applicant and to the proprietor of record.

(d) Remedy against a final adverse determination under subparagraphs (b) and (c) above may be had by means of a civil action against the Administrator pursuant to the provision of section 1361 of title 28, United States Code, if commenced within such time after such decision, not less than 60 days, as the Administrator appoints.

(e) When a design has been registered under this section, the lack of utility of any article in which it has been embodied shall be a defense to an infringement action under section 220, and no ground for cancellation under subsection (c) of this section or under section 223.

CERTIFICATION OF REGISTRATION

SEC. 213. Certificates of registration shall be issued in the name of the United States under the seal of the Office of the Administrator and shall be recorded in the official records of that Office. The certificate shall state the name of the useful article, the date of filing of the application, the date on which the design was first made public as provided in section 204(b) or any earlier date as set forth in section 205(b), and shall contain a reproduction of the drawing or other pictorial representation showing the design. Where a description of the salient fea-

tures of the design appears in the application, this description shall also appear in the certificate. A renewal certificate shall contain the date of renewal registration in addition to the foregoing. A certificate of initial or renewal registration shall be admitted in any court as prima facie evidence of the facts stated therein.

PUBLICATION OF ANNOUNCEMENTS AND INDEXES

SEC. 214. (a) The Administrator shall publish lists and indexes of registered designs and cancellations thereof and may also publish the drawing or other pictorial representations of registered designs for sale or other distribution.

(b) The Administrator shall establish and maintain a file of the drawings or other pictorial representations of registered designs, which file shall be available for use by the public under such conditions as the Administrator may prescribe.

FEES

SEC. 215. (a) There shall be paid to the Administrator the following fees:

(1) On filing each application for registration or for renewal of registration of a design, $15.

(2) For each additional related article included in one application, $10.

(3) For recording assignment, $3 for the first six pages, and for each additional two pages or less, $1.

(4) For a certificate of correction of an error not the fault of the Office, $10.

(5) For certification of copies or records, $1.

(6) On filing each application for cancellation of a registration, $15.

(b) The Administrator may establish charges for materials or services furnished by the Office, not specified above, reasonably related to the cost thereof.

REGULATIONS

SEC. 216. The Administrator may establish regulations not inconsistent with law for the administration of this title.

COPIES OF RECORDS

SEC. 217. Upon payment of the prescribed fee, any person may obtain a certified copy of any official record of the Office of the Administrator, which copy shall be admissible in evidence with the same effect as the original.

CORRECTION OF ERRORS IN CERTIFICATES

SEC. 218. The Administrator may correct any error in a registration incurred through the fault of the Office, or, upon payment of the required fee, any error of a clerical or typographical nature not the fault of the Office occurring in good faith, by a certificate of correction under seal. Such registration, together with the certificate, shall thereafter have the same effect as if the same had been originally issued in such corrected form.

OWNERSHIP AND TRANSFER

SEC. 219. (a) The property right in a design subject to protection under this title shall vest in the author, the legal representatives of a deceased author or of one under legal incapacity, the employer for whom the author created the design in the case of a design made within the regular scope of the author's employment, or a person to whom the rights of the author or of such employer have been transferred. The person or persons in whom the property right is vested shall be considered the proprietor of the design.

(b) The property right in a registered design, or a design for which an application for registration has been or may be filed, may be assigned, granted, conveyed, or mortgaged by an instrument in writing, signed by the proprietor, or may be bequeathed by will.

(c) An acknowledgement as provided in section 311 shall be prima facie evidence of the execution of an assignment, grant, conveyance, or mortgage.

(d) An assignment, grant, conveyance, or mortgage shall be void as against any subsequent purchaser or mortgage for a valuable consideration, without notice, unless it is recorded in the Office of the Administrator within three months from its date of execution or prior to the date of such subsequent purchase or mortgage.

REMEDY FOR INFRINGEMENT

SEC. 220. (a) The proprietor of a design shall have remedy for infringement by civil action instituted after issuance of a certificate of registration of the design.

(b) The proprietor of a design may have judicial review of a final refusal of the Administrator to register the design, by a civil action brought as for infringement if commenced within the time specified in section 212(d), and shall have remedy for infringement by the same action if the court adjudges the design subject to protection under this title: *Provided*, That (1) he has previously duly filed and duly pros-

1 ecuted to such final refusal an application in proper form for regis-
2 tration of the designs, and (2) he causes a copy of the complaint in
3 action to be delivered to the Administrator within ten days after the
4 commencement of the action, and (3) the defendant has committed acts
5 in respect to the design which would constitute infringement with
6 respect to a design protected under this title.

7 INJUNCTION

8 SEC. 221. The several courts having jurisdiction of actions under
9 this title may grant injunctions in accordance with the principles of
10 equity to prevent infringement, including in their discretion, prompt
11 relief by temporary restraining orders and preliminary injunctions.

12 RECOVERY FOR INFRINGEMENT, AND SO FORTH

13 SEC. 222. (a) Upon finding for the claimant the court shall award
14 him damages adequate to compensate for the infringement, but in
15 no event less than the reasonable value the court shall assess them.
16 In either event the court may increase the damages to such amount,
17 not exceeding $5,000 or $1 per copy, whichever is greater, as to the
18 court shall appear to be just. The damages awarded in any of the
19 above circumstances shall constitute compensation and not a penalty.
20 The court may receive expert testimony as an aid to the determination
21 of damages.

22 (b) No recovery under paragraph (a) shall be had for any infringe-
23 ment committed more than three years prior to the filing of the
24 complaint.

25 (c) The court may award reasonable attorney's fees to the prevail-
26 ing party. The court may also award other expenses of suit to a
27 defendant prevailing in an action brought under section 220(b).

28 (d) The court may order that all infringing articles, and any plates,
29 molds, patterns, models, or other means specifically adapted for mak-
30 ing the same be delivered up for destruction or other disposition as
31 the court may direct.

32 POWER OF COURT OVER REGISTRATION

33 SEC. 223. In any action involving a design for which protection is
34 sought under this title, the court when appropriate may order registra-
35 tion of a design or the cancellation of a registration. Any such order
36 shall be certified by the court to the Administrator, who shall make
37 appropriate entry upon the records of his Office.

38 LIABILITY FOR ACTION ON REGISTRATION FRAUDULENTLY OBTAINED

39 SEC. 224. Any person who shall bring an action for infringement
40 knowing that registration of the design was obtained by a false or

1 fraudulent representation materially affecting the rights under this
2 title, shall be liable in the sum of $1,000, or such part thereof as the
3 court may determine, as compensation to the defendant, to be charged
4 against the plaintiff and paid to the defendant, in addition to such
5 costs and attorney's fees of the defendant as may be assessed by the
6 court.

7 PENALTY FOR FALSE MARKING

8 SEC. 225. (a) Whoever, for the purpose of deceiving the public,
9 marks upon, or applies to, or uses in advertising in connection with any
10 article made, used, distributed, or sold by him, the design of which
11 is not protected under this title, a design notice as specified in section
12 306 or any other words or symbols importing that the design is pro-
13 tected under this title, knowing that the design is not so protected,
14 shall be fined not more than $500 for every such offense.

15 (b) Any person may sue for the penalty, in which event, one-half
16 shall go to the person suing and the other to the use of the United
17 States.

18 PENALTY FOR FALSE REPRESENTATION

19 SEC. 226. Whoever knowingly makes a false representation mate-
20 rially affecting the rights obtainable under this title for the purpose
21 of obtaining registration of a design under this title shall be fined
22 not less than $500 and not more than $1,000, and any rights or privi-
23 leges he may have in the design under this title shall be forfeited.

24 RELATION TO COPYRIGHT LAW

25 SEC. 227. (a) Nothing in this title shall affect any right or remedy
26 now or hereafter held by any person under title I of this Act.

27 (b) When a pictorial, graphic, or sculptural work in which copy-
28 right subsists under title I of this Act is utilized in an original orna-
29 mental design of a useful article, by the copyright proprietor or under
30 an express license from him, the design shall be eligible for protection
31 under the provisions of this title.

32 RELATION TO PATENT LAW

33 SEC. 228. (a) Nothing in this title shall affect any right or remedy
34 available to or held by any person under title 35 of the United States
35 Code.

36 (b) The issuance of a design patent for an ornamental design for
37 an article of manufacture under said title 35 shall terminate any pro-
38 tection of the design under this title.

39 COMMON LAW AND OTHER RIGHTS UNAFFECTED

40 SEC. 229. Nothing in this title shall annul or limit (1) common law
41 or other rights or remedies, if any, available to or held by any person

with respect to a design which has not been made public as provided in section 304(b), or (2) any trademark right or right to be protected against unfair competition.

ADMINISTRATOR

SEC. 230. The Administrator and Office of the Administrator referred to in this title shall be such officer and office as the President may designate.

SEVERABILITY CLAUSE

SEC. 231. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of the title or the application to other persons or circumstances shall not be affected thereby.

AMENDMENT OF OTHER STATUTES

SEC. 232. (a) Subdivision a(2) of section 70 of the Bankruptcy Act of July 1, 1898, as amended (11 U.S.C. 110(a)), is amended by inserting "designs," after "patent rights".

(b) Title 28 of the United States Code is amended—

(1) by inserting "designs," after "patents," in the first sentence of section 1338(a);

(2) by inserting ", design," after "patent" in the second sentence of section 1338(a);

(3) by inserting "design," after "copyright," in section 1338(b);

(4) by inserting "and registered designs" after "copyrights" in section 1400; and

(5) by revising section 1498(a) to read as follows:

"(a) Whenever a registered design or invention is used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, the owner's remedy shall be by action against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture.

"For the purposes of this section, the use or manufacture of a registered design or an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

"The court shall not award compensation under this section if the claim is based on the use or manufacture by or for the United States of any article owned, leased, used by, or in the possession of

1 the United States, prior to, in the case of an invention, July 1, 1918,
2 and in the case of a registered design, July 1, 1978.
3 "A Government employee shall have the right to bring suit against
4 the Government under this section except where he was in a position
5 to order, influence, or induce use of the registered design or invention
6 by the Government. This section shall not confer a right of action on
7 any registrant or patentee or any assignee of such registrant or pat-
8 entee with respect to any design created by or invention discovered or
9 invented by a person while in the employment or service of the United
10 States, where the design or invention was related to the official func-
11 tions of the employee, in cases in which such functions included
12 research and development, or in the making of which Government
13 time, materials, or facilities were used."

14 TIME OF TAKING EFFECT

15 SEC. 233. This title shall take effect one year after enactment of this
16 Act.

17 NO RETROACTIVE EFFECT

18 SEC. 234. Protection under this title shall not be available for any
19 design that has been made public as provided in section 204(b) prior
20 to the effective date of this title.

21 SHORT TITLE

22 SEC. 235. This title may be cited as "The Design Protection Act of
23 1975".

94TH CONGRESS
1ST SESSION

H. R. 5345

IN THE HOUSE OF REPRESENTATIVES

MARCH 21, 1975

Mr. DANIELSON introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend the Copyright Act of 1909, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That this Act may be cited as the "Performance Rights
4 Amendment of 1975".
5 SEC. 2. The first section of title 17, United States Code,
6 is amended—
7 (1) by striking out "and" where it appears at the
8 end of subsections (c) and (d);
9 (2) by striking out the period at the end of sub-
10 section (e) and inserting in lieu thereof a semicolon and
11 "and";

1 (3) by striking out subsection (f) and inserting in
2 lieu thereof the following:
3 "(f) (1) To perform publicly for profit and to reproduce
4 and distribute to the public by sale or other transfer of owner-
5 ship, or by rental, lease, or lending, any reproduction of a
6 copyrighted work which is a sound recording: *Provided,*
7 That the exclusive rights of the owner of a copyright in a
8 sound recording to reproduce and perform it are limited to
9 the rights to duplicate the sound recording in a tangible
10 form that directly or indirectly recaptures the actual sounds
11 fixed in the recording, and to perform those actual sounds:
12 *Provided further,* That these rights do not extend to the
13 making or duplication of another sound recording that is an
14 independent fixation of other sounds, or to the performance
15 of other sounds, even though such sounds imitate or simulate
16 those in the copyrighted sound recording; or to reproduc-
17 tions made by broadcasting organizations exclusively for
18 their own use.
19 "(2) Where the copyrighted sound recording has been
20 distributed to the public under the authority of the copyright
21 owner, the public performance of the sound recording shall
22 be subject to compulsory licensing in accordance with the
23 provisions of section 33 of this title."; and
24 (4) by inserting immediately before the period at
25 the end of the last sentence of such section (relating to

1 coin-operated machines) a comma and the following:
2 "except that the provisions of this sentence shall not
3 apply to the public performance of a sound recording
4 under subsection (f) of this section".

5 SEC. 3. (a) Chapter 1 of title 17, United States Code,
6 is amended by adding at the end thereof the following new
7 section:

8 "§ 33. **Compulsory licensing; royalties**

9 "(a) The annual royalty fees for the compulsory li-
10 cense provided for in section 1 (f) (2) of this title may,
11 at the user's option, be computed on either a blanket or a
12 prorated basis. Although a negotiated license may be substi-
13 tuted for the compulsory license prescribed by this subsec-
14 tion, in no case shall the negotiated rate amount to less than
15 the following applicable rate or payment:

16 "(1) For a radio broadcast station licensed by the
17 Federal Communications Commission, the royalty rate
18 or payment shall be as follows:

19 "(A) in the case of a broadcast station with
20 gross receipts from its advertising sponsors of more
21 than $25,000 but less than $100,000 a year, the
22 yearly performance royalty payment shall be $250;
23 or

24 "(B) in the case of a broadcast station with
25 gross receipts from its advertising sponsors of more

1 than $100,000 but less than $200,000 a year, the
2 yearly performance royalty payment shall be $750;
3 or
4 "(C) in the case of a broadcast station with
5 gross receipts from its advertising sponsors of more
6 than $200,000 a year, the yearly blanket rate shall
7 be 1 per centum of the net receipts from the adver-
8 tising sponsors during the applicable period, and the
9 alternative prorated rate is a fraction of 1 per centum
10 of such net receipts, taking into account the amount
11 of the station's commercial time devoted to play-
12 ing copyrighted sound recordings.
13 "(2) For a television broadcast station licensed by
14 the Federal Communications Commission, the royalty
15 rate or payment shall be as follows:
16 "(A) in the case of a broadcast station with
17 gross receipts from its advertising sponsors of more
18 than $1,000,000 but less than $4,000,000 a year,
19 the yearly performance royalty payment shall be
20 $750; or
21 "(B) in the case of a broadcast station with
22 gross receipts from its advertising sponsors of more
23 than $4,000,000 a year, the yearly performance
24 royalty payment shall be $1,500.
25 "(3) For background music services and other

1 transmitters of performances of sound recordings, the
2 yearly blanket rate is 2 per centum of the gross receipts
3 from subscribers or others who pay to receive the trans-
4 mission during the applicable period, and the alternative
5 prorated rate is a fraction of 2 per centum of such gross
6 receipts, taking into account the proportion of time
7 devoted to musical performances by the transmitter dur-
8 ing the applicable period.

9 "(4) For an operator of coin-operated phonorecord
10 players, the yearly performance royalty payment shall
11 be $1 for each phonorecord player.

12 "(5) For all other users not otherwise exempted,
13 the blanket rate is $25 per year for each location at
14 which copyrighted sound recordings are performed,
15 and the alternative prorated rate shall be based on the
16 number of separate performances of such works during
17 the year and shall not exceed $5 per day of use.

18 "(6) No royalty fees need be paid for a compulsory
19 license for the public performance of copyrighted sound
20 recordings by a radio broadcast station where its annual
21 gross receipts from advertising sponsors were less than
22 $25,000, by a television broadcast station where its an-
23 nual gross receipts from advertising sponsors were less
24 than $1,000,000, or by a background music service or
25 other transmitter of performances of sound recordings

1 where its annual gross receipts from subscribers or others
2 who pay to receive the transmission were less than
3 $10,000.
4 "(b) The annual royalty fees provided in subsection (a)
5 shall be applicable until such time as the royalty rate is
6 agreed upon by negotiation between the copyright owner and
7 the licensee, or their designated representatives: *Provided,*
8 That the annual royalty fees provided for in subsection (a)
9 shall be applicable for a period of not less than two years
10 following the date of enactment of the Performance Rights
11 Amendment of 1975. In the event that the parties or their
12 representatives are unable to agree upon a royalty rate pur-
13 suant to negotiation, the public performance of the sound
14 recording shall be subject to compulsory licensing at a royalty
15 rate and under terms which shall be set by an arbitration
16 panel composed of three members of the American Arbitra-
17 tion Association, of which one member of the panel shall be
18 selected separately by each of the parties in disagreement,
19 and one member shall be selected jointly by the parties in
20 disagreement.
21 "(c) The royalty fees collected pursuant to this section
22 shall be divided equally between the performers of the
23 sound recording and the copyright owners of the sound
24 recording. Neither a performer nor a copyright owner may
25 assign his right to the royalties provided for in this section

1 to the copyright owner or performer of the sound recording,
2 respectively.
3 "(d) As used in this section, the term—
4 "(1) 'performers' means musicians, singers, con-
5 ductors, actors, narrators, and others whose performance
6 of a literary, musical, or dramatic work is embodied in a
7 sound recording; and
8 "(2) 'net receipts from advertising sponsors' means
9 gross receipts from advertising sponsors less any com-
10 missions paid by a broadcast station to advertising
11 agencies.".
12 (b) The analysis of such chapter is amended by add-
13 ing at the end thereof the following new item:

"33. Compulsory licensing; royalties.".

94TH CONGRESS
1ST SESSION

H. R. 4965

IN THE HOUSE OF REPRESENTATIVES

MARCH 14, 1975

Mr. WON PAT introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

For the amendment of the Copyright Law, title 17 of the United States Code.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*
3 That title 17 of the United States Code, entitled "Copy-
4 rights", is hereby amended by adding new section 101 (f)
5 to read as follows:
6 "(f) For all the purposes of the provisions of this
7 title dealing with infringements of copyright, including crimi-
8 nal prosecution pursuant to section 104 of this title, a
9 person shall not infringe or have infringed the copyright in
10 any work protected under the copyright laws of the United
11 States who,

1 "(1) for the purpose of transmission on a noncon-
2 tiguous area cable television system, has made or
3 shall cause to be made, or has transmitted or shall
4 cause to be transmitted, a videotape of a television pro-
5 gram or programs broadcast by one or more television
6 stations licensed by the Federal Communications
7 Commission; and when after the enactment of this
8 subsection:
9 "(i) the videotape is transmitted no more
10 than one time, without deletion of any material
11 including commercials, on any such system; and
12 "(ii) an owner or officer of such facility erases
13 or destroys, or causes the erasure or destruction of
14 such videotape; and
15 "(iii) subject to the provisions of subparagraph
16 (2) of this subsection, on or before the end of each
17 calendar quarter, an owner or officer of such system
18 executes an affidavit attesting to the erasure or
19 destruction of all such videotapes made or used dur-
20 ing the preceding quarter; and
21 "(iv) said owner or officer places or causes said
22 affidavit, or the affidavit received pursuant to section
23 101 (f) (2) (ii) of this title, to be placed in a file,
24 open to public inspection, at such system's main
25 office in the community where the transmission is

1 made or in the nearest community where such sys-
2 tem maintains an office.
3 "(2) Nothing herein shall prevent any such system,
4 pursuant to written contract, from transferring the video-
5 tapes to another such system provided that:
6 "(i) said written contract is placed in the file,
7 open to public inspection, required hereunder; and
8 "(ii) the last such facility transmitting the pro-
9 grams shall comply with the provisions of section
10 101 (f) (1) (ii) through (iv) of this title, and shall
11 "(iii) provide a copy of the affidavit required
12 hereunder to each such system making a previous
13 transmission of the same videotape.
14 (3) As used in this subsection, the following terms
15 and their variant forms mean the following:
16 "(i) a 'transmission' is the distribution by a
17 noncontiguous area cable television system of a
18 videotape to its subscribers and is the equivalent of
19 the carriage of broadcast signals for all the purposes
20 of the rules and regulations of the Federal Com-
21 munications Commission.
22 "(ii) a 'noncontiguous area cable television' is
23 a facility located in any State, territory, trust ter-
24 ritory, or possession not within the boundary of
25 the forty-eight contiguous continental States, that

1 receives signals transmitted or makes or obtains
2 videotapes of programs broadcast by one or more
3 television broadcast stations licensed by the Federal
4 Communications Commission and delivers such sig-
5 nals or programs by wires, cables, or other commu-
6 nications channels to subscribing members of the
7 public who pay for such service.

8 "(iii) A 'videotape' is the reproduction of the
9 images and sounds of a program or programs, in-
10 cluding commercials, broadcast by a television sta-
11 tion licensed by the Federal Communications Com-
12 mission, regardless of the nature of the material
13 objects, such as tapes or motion pictures, in which
14 the reproduction is embodied.

TESTIMONY OF JOHN G. LORENZ, ACTING LIBRARIAN OF CONGRESS, ACCOMPANIED BY ABRAHAM L. KAMINSTEIN, FORMER REGISTER OF COPYRIGHTS AND HONORARY CONSULTANT IN COPYRIGHT AT THE LIBRARY OF CONGRESS, AND BARBARA RINGER, REGISTER OF COPYRIGHTS, THE LIBRARY OF CONGRESS

Mr. LORENZ. Mr. Chairman, I am John Lorenz, the Acting Librarian of Congress. It is an honor for me to appear as the opening witness at these historic hearings, and to urge your favorable consideration of H.R. 2223, the bill for general revision of the copyright law.

In 1905, President Theodore Roosevelt called upon Congress to bring together and completely revise the copyright laws of the United States. After long hearings and several years of controversy Congress responded by enacting a new statute on the last day of President Roosevelt's administration. The act of March 4, 1909 remains, 66 years later, the governing American copyright law.

President Theodore Roosevelt's message of 1905 is still valid for us today. He wrote:

> Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair practices of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public.

The aptness of Roosevelt's message today is not as ironic as it might seem. Legislation is often specific. It grows out of individual circumstances and relates to definite purposes at definite times and consequently is subject to change.

As time passes, the ability of courts to adapt the letter of the law to each change diminishes. Cardozo put it well: "The law tends to expand to the limits of its logic." The logical limits of the present copyright laws have long since been reached and exceeded.

In recent years there have been several important Supreme Court decisions illustrating the inadequacy of the 1909 act. At the same time, administrative regulations cannot cure the law's inequities and private understandings or agreements cannot settle the crucial issues of copyright.

Everyone affected by copyright or concerned with its administration is looking to Congress for action. New legislation, a new ordering of the relationships that depend upon copyright, is required, and only Congress can do the job.

As Acting Librarian of Congress I am proud of the role that the Copyright Office has played for many years in the efforts to reform the existing copyright system. I am particularly pleased to see Abraham L. Kaminstein here, who as Register of Copyrights from 1960 to 1971 was largely instrumental in planning the present revision effort. But beyond these efforts the basic responsibility, with its broad social and indeed philosophical implications, continues to fall upon your subcommittee.

Mr. Chairman, you have been involved in this work for well over a decade, and more than most, you appreciate the infinite complexity of many of the issues treated in H.R. 2223. Ten years ago the former

Librarian of Congress, L. Quincy Mumford, sat before this subcommittee and said:

"Copyright law is by nature a difficult and complex subject, and my understanding of its details is imperfect, to say the least. But, like any other intricate field of knowledge, there are certain simple and fundamental principles underlying our copyright system, and their importance cannot be overemphasized.

As Dr. Mumford said, one simple principle underlying copyright is the encouragement and reward of individual creativity. This principle is, I would suggest, a basic corollary of the principle of freedom of speech and press. It is a recognition that those parts of our civilization that have endured are the product of individual creators, and the principle of copyright is basic to civilization itself.

But the principle of copyright is also rooted in the present, and the practical concerns of authors and all those who disseminate and use their works. Since 1909, the pace of technological innovation, especially in communications, has been breathtaking.

In these hearings you will hear those who argue, forcefully and in good faith, that technology threatens to strip copyright of its meaning and value. Others, in equally good faith, will stress that copyright is impeding the application of technology to the growing informational needs of society.

Congress must chart the way, and, difficult as that task is, it can be made easier, I believe, by keeping always in mind the underlying social premises of copyright in a free society.

Recognizing the equities on both sides of the arguments you will be hearing, the Library of Congress urges favorable consideration of H.R. 2223. This legislation is the culmination of 15 years of painstaking negotiation and compromise.

It does not provide all of the answers, but it does provide a modern framework for growth and change: New tools for the courts, the Copyright Office, for the authors and the users of copyrighted materials, to meet the challenges of the future.

This is the kind of effort that involves little widespread recognition and a great deal of difficulty and toil. But I am convinced that, when all is said and done, your work will have a significant impact on the lives of all Americans—those who create and those whose lives are shaped and changed by their creations.

As the present administrator of the world's greatest collection of those creative works, I believe that your success in this endeavor will be one of your greatest legislative achievements.

Thank you very much.

Mr. KASTENMEIER. Thank you, Mr. Lorenz.

Mr. Kaminstein?

Ms. RINGER. If I may, Mr. Chairman, I would like to ask the privilege of introducing Mr. Kaminstein.

Mr. KASTENMEIER. Yes, of course, Ms. Ringer.

Ms. RINGER. The current program for general revision of the copyright law started in the fifties under Arthur Fisher, who was a great Register of Copyrights. He charted a course which we endeavored to follow, and he put his personal stamp on the revision program.

Arthur Fisher died in 1960, at a crucial point in the revision program, and was succeeded by Abraham L. Kaminstein. It is hard to

realize how difficult it was for Kami to take over an ongoing program of that sort, one that had as much of a personal stamp on it as the revision program had in 1960, and to make the changes that were necessary to make it go, and eventually to chart a different course—because there were many things in the original planning that had to be changed.

All of these Mr. Kaminstein did. He made a number of personal sacrifices, including sacrifices in his health. The revision program certainly would have gone nowhere without his disinterested optimism and his willingness to explore every possibility, his spirit of good will, and his personal integrity. He earned everyone's respect.

As a personal note, he hired me out of law school, and everything I know about copyright I either owe to him directly or to the opportunities he gave me to learn. He is a loyal friend and a noble human being, and it is a great honor for me to introduce him.

Mr. KASTENMEIER. Mr. Kaminstein?

Mr. KAMINSTEIN. Mr. Chairman and members of the subcommittee, my name is Abraham Kaminstein, and I hold the position of Honorary Consultant in Copyright at the Library of Congress. Despite this fancy title, I must state that I appear before you representing only myself and without any brief except for my own profound belief in the value of the legislation you are considering.

I am privileged and pleased to appear before you in support of H.R. 2223 for the general revision of the copyright law. This legislation, which many of you are now involved with for the first time, has been for me almost a life's work.

Before my retirement in 1971 I spent 23 years in the Copyright Office, the last 11 of them as the Register of Copyrights. Interestingly enough, it is almost exactly 20 years since my immediate predecessor, Arthur Fisher, asked for and was granted funds by Congress to initiate studies leading to the overall revision of the copyright laws.

Published between 1956 and 1960, 35 major studies examined current interpretations of the 1909 Copyright Act, analyzed its shortcomings and inequities and set out alternative measures for reform. Well over a decade later, they still remain vital and enduring contributions to our law.

In the early 1960's the Copyright Office sponsored a series of roundtable discussions based on recommendations made in the 1961 Register's Report on Copyright Revision and the preliminary legislative drafts that began to emerge. The talks filled four volumes; they were sometimes difficult, but they did succeed in identifying areas of agreement and dispute, thus sharpening the issues.

By 1964, it was possible to submit a bill for the general revision of the law, and to participate in hearings in 1965 before your subcommittee and under your dedicated chairmanship. Looking back to 1965, I am startled by the scope of our achievements and I have become a bit philosophical about the problems we failed to recognize at the time.

As incredible as it may seem now, our first proposals said nothing about cable television, and photocopying was not regarded as an issue which required special legislative provisions. Some of these problems were aired in the extensive hearings which you conducted, Mr. Chairman, and new provisions were added, and when, in 1967, the House passed the bill, we seemed well on our way to success.

We all know that the entire bill reached an impasse in the Senate because of the inability to solve the issue of cable television. I must confess that in 1968, recognizing that nothing was going to move unless somehow the CATV issue could be solved or dealt with separately, I gave in to some despair.

Testifying before the Senate Subcommittee on Patents, Trademarks and Copyrights, I said that I had been musing on Yeats' poem, "To a Friend Whose Work Has Come to Nothing." Nothing much to encourage me happened for a long time.

Certainly I feel no such despair today.

At the last session of Congress, the Senate passed the revision bill by a margin of 70-1, and every indication seems to point to a consensus in that body that this is a measure whose time, at long last, has come.

Although insufficient time remained in the last session for House consideration, the status of the general revision legislation was one of the points covered in your subcommittee's hearings on November 26, 1974, on S. 3976, a short bill whose enactment effective December 31, 1974, appears to pave the way for favorable action in both Houses during the current Congress.

I should like to close my statement by offering some personal observations based on years of involvement with copyright revision. I should like to recall the constructive spirit of the 1965 hearings for I fervently hope that they will be repeated in the work you begin today. Nine years ago, Mr. Chairman, your subcommittee met for 51 executive sessions, over a 7-month period, to prepare a bill for the full Judiciary Committee.

Congressmen, members of a busy subcommittee, were willing and glad to spend an extraordinary amount of time and effort on a bill that could not have meant much to them politically, that could not gain them any votes. What made this extraordinary effort possible, and indeed successful, was the prevailing spirit of compromise—constructive and reasonable, rather than destructive and extreme. I called it "An Experiment in Legislative Technique." It was the most exhilarating experience of my legal career.

All of us are special pleaders, no matter how moral we feel our case to be. For my part, I make no bones about favoring authors, composers, and artists. But I know, nevertheless, that everyone must make some compromise. My experience convinces me that there are no easy shortcuts in copyright, and no side can afford the luxury of a complete victory. Neither can we embrace categorical solutions; what they possess in simplicity, they sacrifice in ordinary justice. What is needed is a responsible and considered compromise, for only such a compromise will best serve the interests of all.

This will require statesmanship of the highest order, and I hope you will feel the personal satisfaction that comes with a job well done.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Kaminstein, for a most eloquent and personal statement on a subject many regard as impersonal.

I am almost sorry, however, to mention that in 1966 we had 51 executive sessions over a 7-month period. You will detect some trepidation among my subcommittee members who have not been through that experience. [Laughter.]

Much of that work will not have to be redone, I expect. Perhaps this is not the time, as I introduce the next witness, to commend people

before our task is completed for indeed historically one day I am sure that the names of Fisher, Kaminstein, and Ringer will, in terms of copyright and its history of this country, have an extraordinary place.

For my part, legislatively, I would like to recall that the chairman of the full committee, Mr. Celler, who served Congress so well for so many years, has always felt so deeply about and has been a very great patron of copyright.

From the legislative standpoint I think he also deserves very special recognition.

In any event, I would like to call on the person on whom we are going to have to lean heavily, not only this morning but in days to come, in resolving whatever of the issues still remain.

We would be very pleased to hear from our Register of Copyrights, Ms. Barbara Ringer.

Ms. RINGER. Thank you very much, Mr. Chairman. I am accompanied by Dorothy Schrader, general counsel of the Copyright Office, who I hope will get me out of trouble if I get into it.

The Copyright Office has prepared portfolios consisting of 19 folders, 18 of which deal with separate issues or chapters of sections of the bill. Some are much more important than others. On the left side of each folder we have put the relevant sections on the particular issue, and on the right side we have tried to summarize the contents of the bill, give some of the background of the provisions and analyze the contents of the bill in a rather simple, brief way.

Some of the provisions of the bill, as you well know, Mr. Chairman, do not yield their meaning readily on a first, or second, or even third reading.

In any case I hope that they will be useful to the committee. They are intended for reference and not as fundamental legislative history.

But I hope the material on the right side can be considered, in effect, my statement on the issues that are involved at this point and be made a part of the record of the hearings. I have also a prepared statement which is for the record and I don't think I need to go into it in vast detail because both you, Mr. Chairman, and Mr. Kaminstein, have referred to the comments I have made in it.

I would, however, like to make a few points from it and then go on to a summary of the principal issues speaking more or less from these briefing papers.

[The material referred to appears in app. 2.]

As I see them now but without in any way trying to predict what other witnesses will say during the course of these hearings because I don't think anyone, no matter how close they are to the subject, can do that——

Mr. KASTENMEIER. I urge you not to oversummarize. We do hope that—we regard your testimony as very important at the outset to get certain frames of reference for the committee. Some of it may be lost to us if it is confined exclusively to the record.

Ms. RINGER. I take your point, Mr. Chairman. Then I will read at least a major part of this statement.

[The prepared statement of Ms. Ringer follows:]

STATEMENT OF BARBARA RINGER, REGISTER OF COPYRIGHTS

Mr. Chairman, I am Barbara Ringer, Register of Copyrights in the Copyright Office of the Library of Congress. I appear today in support of H.R. 2223, to review its long and difficult legislative history, and to try to answer any questions you have about its contents, its status, and the issues remaining to be settled.

The Federal copyright law now in effect in the United States was adopted in

1909 and has been amended in only a few relatively minor ways. It is essentially a Nineteenth Century copyright law, based on assumptions concerning the creation and dissemination of author's works that have been completely overturned in the past fifty years. A Twentieth-Century copyright statute is long overdue in the United States, and the present need for a revised law that will anticipate the Twenty-First Century is so obvious as to be undeniable.

It is startling to realize that the program for general revision of the copyright law actually got underway more than 50 years ago, in 1924, and produced four distinct legislative efforts before World War II: The Dallinger, Perkins, and Vestal Bills in 1924–1931, the Sirovich Bill in 1932, the Duffy Bill in 1934–1936, and the "Shotwell" Bill in 1939. One of these measures passed the House, and a later one passed the Senate, but in every case the revision program ultimately failed of enactment because of fierce opposition to particular provisions by certain groups. The history of U.S. copyright law revision in the 1920's and 1930's teaches a basic lesson: the need to work out accommodations on the critical issues in an atmosphere of good will and give and take. It is a great deal easier to recognize the validity of this proposition than to put it into practice.

The failure of the earlier efforts at general revision of the copyright law has been blamed on one group or another, and on the face of it there does appear to be quite a bit of blame to go around. At the same time it is important not to forget that the main purpose behind some of the revision bills was to permit U.S. adherence to the International Convention of Berne. There can be little doubt that some of the Congressional opposition to copyright law revision stemmed from basic objections to U.S. acceptance of foreign principles of copyright jurisprudence and to U.S. assumption of the international obligations involved in becoming a member of the Berne Union.

After World War II the proponents of copyright law reform adopted a new approach. It was assumed, on the basis of past experience, that efforts to revise the copyright law in a way that would permit adherence to the Berne Convention would continue to be futile. It was also recognized that the emergence of the United States as a major exporter of cultural materials made our adherence to a multilateral convention essential. Thus, efforts to secure general revision of the copyright law were temporarily deferred in favor of a major program aimed at developing and implementing a new international copyright convention to which the United States could adhere without major changes in our law. These efforts, under the leadership of Register of Copyrights, Arthur Fisher, achieved success in 1952 with the signing at Geneva of the Universal Copyright Convention, followed in 1954 by the enactment of revisions to the 1909 statute permitting U.S. adherence to the UCC, and by the coming into force of the Convention in 1955.

Noteworthy as it was, the achievement of bringing the United States into the international copyright community also served to dramatize once more how archaic and inadequate the U.S. copyright statute of 1909 had become. The autumn of 1955, which saw the coming into force of the Universal Copyright Convention and the inauguration of the current program for general revision of the copyright law, marked the end of one epoch and the beginning of another. In August 1955, Congress authorized the formation of a Panel of Consultants on General Revision of the Copyright Law under the chairmanship of the Register of Copyrights, and the Copyright Office undertook a series of basic studies of the major substantive issues involved in revision. At the same time began what has become a seemingly endless series of meetings and discussions with representatives of virtually every interest group affected by the copyright law. By now these discussions, which have been as valuable as they have been time-consuming, must literally run into the thousands.

The study phase of the current revision program began almost exactly 20 years ago, in 1955. It was supposed to take three years, but it took about six. It produced 35 studies covering most of what we thought at the time were the substantive issues in copyright revision. These were published, together with a large body of comments from the Panel of Consultants, and I am proud to say that they are all still in print.

The culmination of this effort was the publication, in 1961, of the 1961 Report of the Register of Copyrights on General Revision of the Copyright Law. The Register's Report was the first of many major contributions to the general revision program by Abraham L. Kaminstein, Mr. Fisher's successor as Register of Copyrights. The purpose of the Reports, as Mr. Kaminstein said in his 1962 Annual Report, "was to furnish a tangible core around which opinions and conclusions could crystalize—to achieve the widest possible agreement on basic principles

before proceeding to draft a revised copyright law." The Report attempted to pinpoint the major issues in revision, summarize the present law with respect to each of them, analyze alternative solutions, and present specific recommendations.

The Register's Report succeeded very well in clarifying the issues and in focusing the discussions on them, but some of its most fundamental recommendations proved more controversial than anyone in the Copyright Office had expected. In particular, the Register's proposal for copyright to begin with "public dissemination" and to last for a first term of 28 years, renewable for a second term of 48 years, provoked a flood of opposition; there was strong support for a single Federal copyright system with protection commencing upon the creation of a work and ending 50 years after the author's death. A series of meetings of the Panel of Consultants on General Revision was held between September 1961, and March 1962, at which all of the Report's recommendations were discussed in an increasingly tense atmosphere. The heated arguments at these and other meetings actually stalled the revision program for several months and brought it to a genuine crisis in the later summer and fall of 1962. It became apparent that, if the entire project was not to flounder, some method for advancing and considering alternative recommendations would have to be found.

In November 1962, the Register announced that the Copyright Office was prepared to change its position on some debatable questions and to draft alternative language on others. He indicated that the Office was prepared to revise its recommendations concerning "public dissemination" and the retention of common law protection, and that "at least one alternative version of our draft bill will adopt the life-plus basis for computing the term—in conjunction with a system of notice, deposit, and registration that we consider essential." The Register also announced that he would send preliminary drafts of statutory language to the members of an expanded Panel of Consultants on General Revision for their comments, and that he would convene another series of meetings on the preliminary draft. The process of preparing draft language for circulation occupied practically all of 1963, and included a total of eight meetings of the Panel of Consultants.

The development of this preliminary draft proved to be a difficult but enormously productive phase of the program. The procedure adopted provided a motive and a forum for detailing, critical scrutiny of the language and substance of a new copyright statute by representatives of nearly all of the groups affected. It also created an atmosphere of cooperative effort that has survived various stresses and strains and has continued to grow in breadth and depth.

The preliminary draft of the general revision bill that had reached completion at the beginning of 1964 was never intended to be a final report. The next six months were devoted to compiling, analyzing, and synthesizing all of the comments received on the draft, to making substantive decisions and changes on the basis of these comments, and to preparing a complete, section-by-section revision of the bill. The draft of the bill that emerged from this process was prepared entirely within the Copyright Office without collaboration or consultation with any private groups or individuals. The introduction of the 1964 draft in July 1964 marked the end of the drafting phase of the revision program and the opening of the legislative phase.

Like the preliminary draft on which it was based, the 1964 bill was not intended as a finished product, but as a focal point for further comments and suggestions. In August 1964, a full week of detailed discussions of the bill showed that a great deal of progress had been made, but that still further revisions would be necessary before legislative hearings could profitably begin. During the fall and winter of 1964–1965 the Copyright Office reviewed and analyzed the many oral and written comments on the bill and prepared another complete revision.

At the beginning of the 89th Congress, on February 4, 1965, Representative Celler introduced the 1965 general revision bill and the Copyright Office spent the next three months preparing a supplement to the 1961 Register's Report. The Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill which was published in May 1965, set forth the reasons for changing a number of recommendations in the 1961 report and clarified the meaning of the provisions of the 1965 bill.

Publication of the Supplementary Report coincided with the opening of Congressional hearings on the bill. Over a period of more than three months, between May 26, 1965 and September 2, 1965, 22 days of public hearings were held before your subcommittee, under the objective and dedicated chairmanship of the man who is still your chairman, Robert W. Kastenmeier. A total of 163 witnesses, representing an extraordinarily wide range of public and private interests,

appeared to testify. The record of those 1965 hearings comprises nearly 2,000 pages of printed text, including not only the oral transcript but also more than 150 written statements. The Senate Judiciary Subcommittee under the chairmanship of Senator John McClellan of Arkansas, held brief hearings on the revision bill in August 1965, but delayed a full series pending the conclusion of the intense activity in the House subcommittee.

Several significant factors with respect to the general revision program emerged from the 1965 hearings. Most obvious were the sharp controversies remaining to be settled on some old issues (such as the jukebox exemption, the royalty rate to be paid under the compulsory license for recording music, and the manufacturing requirements with respect to English-language books and periodicals), and on some relatively new issues (such as fair use, and the reproduction of copyrighted works for educational and research purposes, the liability of educational broadcasters and similar transmitters, and the status of community antenna television systems under the copyright law).

Aside from the need to work out further accommodations on several critical issues, the most serious problem arising from the 1965 hearings was now to organize the massive contents of the record in a way that would overlook no significant comment or suggestion but that still would form a comprehensive basis for decision-making. Working in close collaboration, the Copyright Office and the House Judiciary Committee counsel prepared summaries of every statement that had been made, and then divided the entire corpus of the hearings into ten general areas: subject matter of copyright, ownership, duration, notice and registration, manufacturing and importation requirements, community antenna systems and other secondary transmissions, jukebox performances, compulsory license for phonorecords, educational copying and fair use, and educational broadcasting and other performing rights. Each subject was then divided into subtopics, under which were listed every issue raised at the hearings.

This "experiment in legislative technique," as it has been called, proved effective. It enabled the House Judiciary Subcommittee, in its deliberations of the bill, to consider each issue in context, to weigh the arguments for and against it, and to arrive at reasoned decisions. Meeting regularly, usually twice a week, from February through September 1966, the subcommittee held 51 executive sessions, all of which were attended by representatives of the Copyright Office. Examining each issue in depth and then redrafting the pertinent section of the bill as they went along, the subcommittee produced an entirely revised bill in an atmosphere of informal, bipartisan discussions that could well serve as a model for similar legislative projects.

The bill, as revised by the subcommittee, was reported unanimously to the full House Judiciary Committee on September 21, 1966, and was reported without amendment by the full Judiciary Committee on October 12, 1966. The House Report still remains the basic legislative explanation of the content of the bill, and the reports succeeding it in both Houses have all been drawn from it.

The bill was reported too late in the 89th Congress for further legislative action, and indeed none had been expected in 1966. In the revised form reported by the House, it was introduced by Representative Celler in the 90th Congress, and was considered by the newly-constituted membership of Subcommittee 3, again chaired by Representative Kastenmeier on February 20, 24 and 27, 1967. It was reported to the full Committee on the last of these dates and, after rather heated debates in the full committee on February 28 and March 2, 1967, was again reported to the House. This time, however, the report included minority views by Representatives Byron G. Rogers of Colorado and Basil L. Whitener of North Carolina, devoted to the jukebox issue, and additional dissent by Mr. Whitener on the bill's treatment of CATV.

It was becoming increasingly apparent, as the bill moved toward the House floor, that extremely sharp and unreconciled conflicts on the issues of jukebox performance and CATV transmissions remained, and that there was a serious danger that one or both of these issues could defeat the bill. The bill was considered by the House Rules Committee on March 8, 1967, and the rather acrimonious arguments in the Committee before it took action authorizing full debate on the House floor were another danger signal.

The debates of the bill in the House of Representatives on April 6, 1967, were difficult and protracted. When the House finally recessed after 7:00 p.m., it was apparent that a rescue operation was essential. Over the next four days, in an atmosphere of intense crisis, several crucial compromises were achieved, and on

Tuesday, April 11, an amended bill was passed by the House after mild debate with the extraordinary vote of 379 yeas to 29 nays. Fairly radical changes were made in three areas: there were drastic revisions in the provisions establishing copyright liability for jukebox performances; the provisions dealing with community antenna transmission were dropped entirely and the exemptions for instructional broadcasting were considerably broadened. On the other hand, the structure and content of the bill itself has remained substantially intact.

The Senate Judiciary Committee, which had opened hearings in 1965 and had had a short series of hearings on the CATV problem in 1966, resumed full-scale consideration of the bill, under the joint chairmanship of Senators McClellan and Burdick, on March 15, 1967. Indeed, the Senate hearings were in full swing during the crisis in the House, and for a time the general revision program resembled a two-ring circus in more ways than one. To everyone's surprise the record of the Senate hearings, which lasted 10 days and ended on April 28, 1967, very nearly equals that of the House hearings in size and content.

Of the several areas that emerged as fullblown issues at the Senate hearings, by far the most important is the problem of the use of copyrighted works in automated information storage and retrieval systems. This problem was addressed separately in the context of the creation of a National Commission on New Technological Uses which Congress enacted as separate legislation only last year, and which is still awaiting staffing.

Meanwhile, as the 1967 legislative momentum began to slow more and more, it was increasingly apparent that cable television had become the make-or-break issue for copyright revision. Although the Senate Judiciary Subcommittee worked long and hard between 1968 and 1970 to resolve controversies over a number of issues other than cable, and succeeded in reporting the revised bill to the full Senate Judiciary Committee during the 91st Congress, it was not able to push revision any further. An effort spearheaded by the Copyright Office to gain enactment of a "barebones" bill, containing everything except the cable section and other controversial provisions dealing with economic rights, also failed. By 1971 it was apparent that the bill was completely stymied over the CATV issue, and even the issuance of comprehensive FCC rules in 1972, governing the carriage of signals and programming by cable systems, failed to break the impasse.

Because of this long delay, Congress has passed a series of successive bills extending the term of copyright. These now run through the end of the current Congress, and are scheduled to expire on December 31, 1976. The urgent problem of tape piracy was also taken care of through separate legislation. A total of seven years passed between House passage of the bill in 1967 and the resumption of its active consideration in the Senate Subcommittee last year.

There may have been other reasons, but certainly the most immediate cause of the revision bill's new momentum was the Supreme Court decision in *CBS* v. *Teleprompter*, holding that under the 1909 statute cable systems are not liable for copyright infringement when they import distant signals. The decision was followed quickly by favorable actions in the Senate Judiciary Subcommittee and full Committee and, after a brief referral to the Commerce Committee, by passage in the Senate on September 9, 1975, by a vote of 70-1. In late November your Subcommittee held a hearing which, in one respect was a forerunner of these hearings. I testified in an optimistic vein at that time, and I remain hopeful that at long last the entire revision measure will be enacted into law during the current Congress.

Ms. RINGER. The Federal copyright law now in effect in the United States was adopted in 1909 and has been amended in only a few relatively minor ways. It is essentially a 19th century copyright law, based on assumptions concerning the creation and dissemination of author's works that have been completely overturned in the past 50 years.

A 20th-century copyright statute is long overdue in the United States, and the present need for a revised law that will anticipate the 21st century is so obvious as to be undeniable.

It is startling to realize that the program for general revision of the copyright law actually got underway more than 50 years ago, in 1924, and produced four distinct legislative efforts before World War II. I will not go through the bills, but the period covered was 1924

to 1939. One bill was produced just on the eve of World War II after extensive consideration. That bill died because of the war.

One of these measures passed the House, and a later one passed the Senate, but in every case the revision program ultimately failed of enactment because of fierce opposition to particular provisions by certain groups.

The history of the U.S. copyright law revision in the 1920's and 1930's teaches a basic lesson: The need to work out accommodations on the critical issues in an atmosphere of good will and give and take. It is a great deal easier to recognize the validity of this proposition than to put it into practice.

The failure of the earlier efforts at general revision of the copyright law has been blamed on one group or another, and on the face of it there does appear to be quite a bit of blame to go around. At the same time, it is important not to forget that the main purpose at that time behind some of the revision bills was to permit U.S. adherence to the International Convention of Berne.

There can be little doubt that some of the congressional opposition to copyright law revision stemmed from basic objections to U.S. acceptance of foreign principles of copyright jurisprudence, and to U.S. assumption of the international obligations involved in becoming a member of the Berne Union.

If it had not been for that issue, the copyright law would have been revised during that period, in my opinion.

After World War II the proponents of copyright law reform adopted a new approach. It was assumed, on the basis of past experience, that efforts to revise the copyright law in a way that would permit adherence to the Berne Convention would continue to be futile.

It was also recognized that the emergence of the United States as a major exporter of cultural materials made our adherence to a multilateral convention essential. Thus, efforts to secure general revision of the copyright law were temporarily deferred in favor of a major program aimed at developing and implementing a new international copyright convention to which the United States could adhere without major changes in our law.

It was essential to develop and get implemented a new international convention aimed at bringing the United States into a multilateral copyright arrangement without requiring us to make major changes in the 1909 law. This was done under the leadership of Arthur Fisher, then register of copyrights. They succeeded in 1952 with the signing of the Universal Copyright Convention, followed in 1954 by the enactment of revisions to the 1909 statute permitting U.S. adherence to the UCC, and by the coming into force of the convention in 1955.

Noteworthy as it was, the achievement of bringing the United States into the international copyright community also served to dramatize once more how archaic and inadequate the U.S copyright statute of 1909 had become.

The autumn of 1955, which saw the coming into force of the Universal Copyright Convention and the inauguration of the current program for general revision of the copyright law, marked the end of one era and the beginning of another. I think the dividing line was August 1955.

In August 1955, Congress authorized the formation of a Panel of Consultants on General Revision of the Copyright Law under the chairmanship of the register of copyrights, and the Copyright Office undertook a series of basic studies of the major substantive issues involved in revision.

At the same time began what has become a seemingly endless series of meetings and discussions with representatives of virtually every interest group affected by the copyright law.

By now these discussions, which have been as valuable as they have been time consuming, must literally run into the thousands, and they are still going on.

The study phase of the current revision program began almost exactly 20 years ago, in 1955. It was supposed to take 3 years, but it took about 6. It produced 35 fairly comprehensive studies covering most of what we thought at the time were the substantive issues in copyright revision.

These were published, together with a large body of comments from the Panel of Consultants, and I am proud to say that they are all still in print.

The culmination of this effort was the publication, in 1961, of the 1961 Report of the Register of Copyrights on General Revision of the Copyright Law. The Register's report was the first of many major contributions to the general revision program by Abraham L. Kaminstein, Mr. Fisher's successor as Register of Copyrights. The purpose of the reports, as Mr. Kaminstein said in his 1962 annual report:

"Was to furnish a tangible core around which opinions and conclusions could crystalize—to achieve the widest possible agreement on basic principles before proceeding to draft a revised copyright law."

The report attempted to pinpoint the major issues in revision, summarize the present law with respect to each of them, analyze alternative solutions, and present specific recommendations.

The Register's report succeeded very well in clarifying the issues and in focusing the discussions on them, but some of its most fundamental recommendations proved more controversial than anyone in the Copyright Office had expected.

In particular, the Register's proposal for copyright to begin with "public dissemination" and to last for a first term of 28 years, renewable for a second term of 48 years, provoked a flood of opposition; there was strong support for a single Federal copyright system with protection commencing upon the creation of a work and ending 50 years after the author's death.

A series of meetings of the Panel of Consultants on General Revisions, after the publication of the Register's report, was held between September 1961, and March 1962, at which all of the report's recommendations were discussed in an increasingly tense atmosphere.

The heated arguments at these and other meetings actually stalled the revision program for several months and brought it to a genuine crisis in the late summer and fall of 1962. It became apparent that, if the entire project were not to founder, some method for advancing and considering alternative recommendations would have to be found. In other words, the Copyright Office had to reconsider its position.

In November 1962, the Register announced that the Copyright Office was prepared to change its position on some debatable questions and to draft alternative language on others. He indicated that the Office was prepared to revise its recommendations concerning "public dissemination" and the retention of common law protection, and that, "at least one alternative version of our draft bill will adopt the life-plus basis for computing the term—in conjunction with a system of notice, deposit, and registration that we consider essential."

The Register also announced that he would send preliminary drafts of statutory language to the members of an expanded Panel of Consultants on General Revision for their comments, and that he would convene another series of meetings on the preliminary draft.

The process of preparing draft language for circulation occupied practically all of 1963, and included a total of eight meetings of the Panel of Consultants.

The development of this preliminary draft proved to be a difficult but enormously productive phase of the program. The procedure adopted provided a motive and a forum for detailed, critical scrutiny of the language and substance of a new copyright statute by representatives of nearly all of the groups affected.

It also created an atmosphere of cooperative effort that has survived various stresses and strains and has continued to grow in breadth and depth.

The preliminary draft of the general revision bill, that had reached completion at the beginning of 1964, was never intended to be a final product. The next 6 months were devoted to compiling, analyzing, and synthesizing all of the comments received on the draft, to making substantive decisions and changes on the basis of these comments, and to preparing a complete, section-by-section revision of the bill.

The draft of the bill that emerged from this process was prepared entirely within the Copyright Office without collaboration or consultation with any private groups or individuals involved. The introduction of the 1964 draft in July 1964, marked the end of the drafting phase of the revision program and the opening of the legislative phase.

Like the preliminary draft on which it was based, the 1964 bill was not intended as a finished product, but as a focal point for further comments and suggestions. In August 1964, a full week of detailed discussions of the bill showed that a great deal of progress had been made, but that still further revisions would be necessary before legislative hearings could profitably begin.

During the fall and winter of 1964–65, the Copyright Office reviewed and analyzed the many oral and written comments on the bill and prepared another complete revision.

At the beginning of the 89th Congress, on February 4, 1965, Representative Celler introduced the 1965 General Revision bill and the Copyright Office spent the next 3 months preparing a supplement to the 1961 Register's Report. The supplementary rep[illegible] f the Register of Copyrights on the General Revision of the U.S [illegible]opyright Law: 1965 Revision bill which was published in May [illegible]5, set forth the reasons for changing a number of recommenda[illegible] in the 1961 report and clarified the meaning of the provisions of the 1965 bill.

Publication of the supplementary report coincided with the open-

ing of congressional hearings on the bill. Over a period of more than 3 months, between May 26, 1965 and September 2, 1965, 22 days of public hearings were held before your subcommittee, under the objective and dedicated chairmanship of the man who is still your chairman, Robert W. Kastenmeier.

A total of 163 witnesses, representing an extraordinarily wide range of public and private interests, appeared to testify. The record of those 1965 hearings comprises nearly 2,000 pages of printed text, including not only the oral transcript but also more than 150 written statements.

The Senate Judiciary Subcommittee under the chairmanship of John McClellan of Arkansas, held brief hearings on the Revision bill in August 1965, but delayed a full series pending the conclusion of the intense activity in the House subcommittee.

Several significant factors with respect to the general revision program emerged from the 1965 hearings. Most obvious were the sharp controversies remaining to be settled on some old issues—such as the jukebox exemption, the royalty rate to be paid under the compulsory license for recording music, and the manufacturing requirements with respect to English-language books and periodicals—and on some relatively new issues—such as fair use, and the reproduction of copyrighted works for educational and research purposes, the liability of educational broadcasters and similar transmitters, and the status of community antenna television systems under the copyright law.

Aside from the need to work out further accommodations on several critical issues, the most serious problem arising from the 1965 hearing was how to organize the massive contents of the record in a way that would overlook no significant comment or suggestion but that still would form a comprehensible basis for decisionmaking. Let me say a personal word about those 51 days of subcommittee meetings, since they were very significant.

Working in close collaboration, the Copyright Office and the House Judiciary Committee counsel prepared summaries of every statement that had been made, and then divided the entire corpus of the hearings into 10 general areas: Subject matter of copyright, ownership, duration, notice and registration, manufacturing and importation requirements, community antenna systems and other secondary transmissions, jukebox performances, compulsory license for phonorecords, educational copying and fair use, and educational broadcasting and other performing rights.

Each subject was then divided into subtopics, under which were listed every issue raised at the hearings.

The "experiment in legislative technique," as it has been called, proved effective. I think the effectiveness will become more and more apparent as you progress in 1975. It enabled the House Judiciary Subcommittee, in its deliberations of the bill, to consider each issue in context, to weigh the arguments for and against it, and to arrive at reasoned decisions.

Meeting regularly, usually twice a week, from February through September 1966, the subcommittee held 51 executive sessions, all of which were attended by representatives of the Copyright Office. Examining each issue in depth and then redrafting the pertinent sec-

tion of the bill as they went along, the subcommittee produced an entirely revised bill in an atmosphere of informal, bipartisan discussions that could well serve as a model for similar legislative projects.

The bill, as revised by the subcommittee, was reported unanimously to the full House Judiciary Committee on September 21, 1966, and was reported without amendment by the full Judiciary Committee on October 12, 1966.

The House report still remains the basic legislative explanation of the content of the bill, and the reports succeeding it in both Houses have all been drawn from it.

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It was reported to the full committee on the last of these dates, and, after rather heated debates in the full committee on February 28 and March 2, 1967, was again reported to the House.

This time, however, the report included minority views by Representatives Byron G. Rogers of Colorado and Basil L. Whitener of North Carolina, devoted to the jukebox issue, and additional dissent by Mr. Whitener on the bill's treatment of CATV.

It was becoming increasingly apparent, as the bill moved toward the House floor, that extremely sharp and unreconciled conflicts on the issues of jukebox performance and CATV transmissions remained, and that there was a serious danger that one or both of these issues could defeat the bill.

The bill was considered by the House Rules Committee on March 8, 1967, and the rather acrimonious arguments in the committee before it took action authorizing full debate on the House floor were another danger signal.

The debates of the bill in the House of Representatives on April 6, 1967, were difficult and protracted, to say the least. When the House finally recessed after 7 p.m., it was apparent that a rescue operation was essential. Over the next 4 days, in an atmosphere of intense crisis, several crucial compromises were achieved, and on Tuesday, April 11, 1967, an amended bill was passed by the House after mild debate with the extraordinary vote of 379 yeas to 29 nays.

Fairly radical changes were made in three areas: There were drastic revisions in the provisions establishing copyright liability for jukebox performances; the provisions dealing with community antenna transmission were dropped entirely and the exemptions for instructional broadcasting were considerably broadened. On the other hand, the structure and content of the bill itself has remained substantially intact.

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Indeed, the Senate hearings were in full swing during the crisis in the House, and for a time the general revision program resembled a

two-ring circus in more ways than one. To everyone's surprise the record of the Senate hearings, which lasted 10 days and ended on April 28, 1967, very nearly equals that of the House hearings in size and content.

Of the several areas that emerged as fullblown issues at the Senate hearings, by far the most important is the problem of the use of copyrighted works in automated information storage and retrieval systems. This problem was addressed separately in the context of the creation of a National Commission on New Technological Uses which Congress enacted as separate legislation only last year, and which is still awaiting staffing from the White House.

Meanwhile, as the 1967 legislative momentum began to slow more and more, it was increasingly apparent that cable television had become the make-or-break issue for copyright revision. Although the Senate Judiciary Subcommittee worked long and hard between 1968 and 1970 to resolve controversies over a number of issues other than cable, and succeeded in reporting the revised bill to the full Senate Judiciary Committee during the 91st Congress, it was not able to push revision any further.

An effort spearheaded by the Copyright Office to gain enactment of a "barebones" bill, containing everything except the cable section and other controversial provisions dealing with economic rights, also failed for tactical reasons.

By 1971, it was apparent that the bill was completely stymied over the CATV issue, and even the issuance of comprehensive FCC rules in 1972, governing the carriage of signals and programing by cable systems, failed to break the impasse.

Because of this long delay, Congress has passed a series of successive bills extending the term of expiring copyrights. These now run through the end of the current Congress, and are scheduled to expire on December 31, 1976. The urgent problem of tape piracy was also taken care of through separate legislation.

A total of 7 years passed between House passage of the bill in 1967 and the resumption of its active consideration in the Senate subcommittee last year.

There may have been other reasons, but certainly the most immediate cause of the Revision bill's new momentum was the Supreme Court's decision in *CBS* v. *Teleprompter*, in March 1974, holding that under the 1909 statute, cable systems are not liable for copyright infringement when they import distant signals.

The decision was followed quickly by favorable actions in the Senate Judiciary Subcommittee and full committee and, after a brief referral to the Commerce Committee, by passage in the Senate on September 9, 1975, by a vote of 70 to 1.

In late November, your subcommittee held a hearing which, in one respect, was a forerunner of these hearings. I testified in an optimistic vein at that time, and I remain hopeful that at long last the entire revision measure will be enacted into law during the current Congress.

Mr. Chairman, this is the end of my prepared statement, but I would also like to identify seven or perhaps eight issues which will certainly come before you. I am preparing what I hope will be a second supplementary report of the register of copyrights which will be

available to you and also to the subcommittee by the time you need to consider the bill in a markup sense.

This would not be something that would be part of the record of this hearing, but I would hope that I might have a chance to speak to it again later toward the end of these hearings or perhaps during the markup sessions.

I have no intention now in trying to guess what the other witnesses are going to say or in arguing anyone's case.

My feeling as the head of the Copyright Office is that my responsibility is to one group and one group only, and that is the group that is identified as the sole and only beneficiary of the copyright law of the United States under the Constitution, the authors of the so-called writings. In other words, the creators of copyrighted works as we now know them.

I am profoundly of the belief that authors in this country have been treated shabbily and stingily from the very beginning of our copyright system.

And, whatever I say will be with the thought that the situation of authors, not only as the creators of works of economic value, but as something that is infinitely precious to our country, needs to be promoted.

I don't think this has been done effectively under previous legislation. I will return to this point later. I am also conscious that everyone else besides the author is a user of the author's work, and as between users there may be arguments which are extremely persuasive for reasons unrelated to protection of the author but in some respects are irrelevant to the essential purpose of the copyright law.

In these areas I think compromises have been reached. I think compromises have been necessary and I think further compromises will be made. But it is vitally important that you consider the effect of a particular provision on the individual author and not primarily of its effect on an economic group using the author's work for good or for ill.

Turning to H.R. 2223, as it now stands, I will try to give you an idea of its framework and its approach and pinpoint a few of the major issues that you will be hearing debated in the weeks to come.

In the long, I am afraid, and rather boring statement that I made on the history of this project, I did want to make a point. Obviously, there is a long history behind the provisions in this bill, and aside from the chairman, all the members of your subcommittee are coming on it as new legislation, and you should not take it on faith.

No one in their right mind would ask you to. What I am trying to say, though, is that your predecessor members on the subcommittee went over most of these provisions in vast and searching detail. And, to a remarkable degree, aside from a few of the widely-publicized issues like cable, your subcommittee did its work so well that the basic legislation and its wording have become generally accepted.

A lot of things are not issues that once were, because what you did has been accepted. I think you will realize this as you go along.

Very simply, the present law is outdated, it is vague, it is ambiguous, it is arbitrary, and results in a great deal of unproductive work both on the part of those who have to operate under it and on the part of the Copyright Office.

It is completely unlike any other copyright law in the world and, in some cases, is simply a historic vestige. We have in this country a dual system of copyright. We are the only country that has this. We have a system that consists of common law copyright in a work up to the point of first publication. At that point the work either falls into the public domain or it becomes subject to statutory copyright. Publication is the dividing line between common law protection and either the public domain or the limited statutory protection of the 1909 law.

I don't think I need to stress that the concept of publication has now become outdated and slightly ridiculous. We are now in an era in which there are very few works that are not capable of being disseminated by media other than print, and many works never see print and are disseminated entirely through various electronic media.

This system has resulted in peculiarities and injustices, none of these less than the monstrous formalities that were retained and added to in the 1909 law. The fact is that if you publish a work, publish in the print sense, without a copyright notice in the correct form and position, you throw your work into the public domain regardless of what your intentions were.

The revision bill attempts to deal with the entire copyright situation as it now exists and, to the extent that it is possible to predict it, into the next century.

It provides essentially a simple system which is nothing novel. This system exists everywhere in the world. It is a system of a term based on the creation of the work. In other words, when the author figuratively lifts his pen from his paper, he has a copyright under the Federal law and under the Constitution, and he has it for his lifetime.

There is no possibility that it would expire during his life, which is possible and in fact likely, under the present law. The international norm for the term of copyright is the life of the author plus 50 years. This is now in effect in a large majority of countries that have copyright laws.

Mr. DANIELSON. Mr. Chairman, I should like to inquire.

Mr. KASTENMEIER. The gentleman from California.

Mr. DANIELSON. Ms. Ringer, you just mentioned that automatically under the bill the creator has a lifetime copyright. Perhaps as we go along as a new member of this subcommittee, I will have my present question resolved.

As I read the Constitution it authorizes to secure for limited times and in the absence of compelling evidence I am going to assume we have the right to make that less than a lifetime.

Can you explain that difference, please?

Ms. RINGER. There is nothing unconstitutional about the present law which provides a first term of 28 years with a second term under a renewal system of 28 years; and as I mentioned this second term has been extended by recent enactments of Congress.

There is nothing unconstitutional about that. At the same time, I would find myself unable to agree with any argument that a term based on the life of the author and a finite number of years after his death was not a limited term.

Obviously people die. Everyone dies and that in itself is a limited term. If you add 50 years after that, you are definitely creating a limited term.

I think a better argument could be made that, under the present law, when you lift the pen from the paper you have an automatic common law copyright that is perpetual as long as the work is not "published."

And I believe there might be some question as to whether or not this is constitutional. That there are many, many manuscripts sitting over in the Library of Congress which may well be subject to protection for generations, centuries, perhaps even eons.

This seems against the public interest. One of the arguments for a life-plus-50 term is that not only does it provide a clearcut cutoff date but the date is the same for every work that an author writes.

In other words, for all of an author's works under a life-plus-50 system, every work falls into the public domain at the same time and you don't have this system that we have now where you have to do a lot of research to determine when a work falls into the public domain.

Mr. DANIELSON. Suppose Congress would enact a law which would limit this to 10 years, which might very well be less than a lifetime?

Ms. RINGER. I am not suggesting that the system in the bill is something dictated by the Constitution or anything other than international norms that have been established and accepted throughout the rest of the world.

What I am saying is that 10 years might be sufficient——

Mr. DANIELSON. I am only talking about constitutionality. If we limited a copyright to 10 years, I can see no reason why that would not be constitutional.

Ms. RINGER. Nor can I.

Mr. KASTENMEIER. You may continue.

Ms. RINGER. Thank you. The present bill, the bill we are now considering, H.R. 2223, in addition retains the formalities that have been bugaboos under the present law, but liberalizes them to the extent that they are not the all-or-nothing disasters that authors face now.

In other words, if you publish your work without a notice or with an incorrect notice, the bill allows you to correct your mistake. This is true of other formalities. You would do something because there is a reason for it and not just because the law says you have to.

There is another provision which I am doubtful anyone will raise as an issue, but I might mention in the context of the general content of the bill. There are reforms that are of benefit to authors and artists with respect to ownership, in addition to the longer term, and one of the most notable of these is in section 203 of the bill.

Instead of the present complex and rather arbitrary and capricious renewal provisions, it allows an author or his beneficiaries to re-do a bad deal. In effect, the present law was intended to accomplish that result but has been most imperfect in doing this.

Section 203 is the reversion provision which basically allows an author, if he is still living or his widow and children and grandchildren to terminate a transfer after 35 years under certain circumstances.

If they don't do that, then the contract continues. If they do do it, then they have an absolute right to call the deal to a halt. In my opinion, despite the complexity of the provisions, it is a real plus for authors.

Let me say that most of the real issues that you are going to be considering are not going to be before you in the testimony. The real issues are the reform of the copyright law and the things that I have been talking about.

The issues that you will be hearing about are very, very important to authors, among other groups, but they are almost all outside the basic guts, if you will, of the bill itself.

The most important of these separate issues still remains, cable television. There were some hopeful signs in the early seventies that an agreement might be reached on this issue, but they turned out to be somewhat premature.

Let me say that your subcommittee in the middle sixties was a pioneer on this issue. It hit your predecessors cold. There had been some consideration of this in the context of FCC regulations and Senator Pastore had sponsored a bill in the communications area. But in terms of the major issues raised by copyright liability for cable operators, no one before you, in my opinion, had come to grips with the ultimate problems, the question of division of markets, and the importation of local as against distant signals and how the whole thing might be worked out in a way that will benefit authors.

Your first essay on this, your bill that was put before the House in 1967, was a pioneering effort, and no one should be ashamed of it.

I think it is recognized today as more sophisticated than anyone could have expected for a bill at that time. You recognized complex truths about this important public issue before others did and in fact up until the end of the sixties, people were still asking, what is cable television?

This issue, I believe, is finally approaching a resolution, although there will be sharply conflicting testimony. You cannot blame people for wanting to get the best deal they can, and nothing is black, white, or even gray on this issue.

I will answer any questions that you have. The bill itself establishes a compulsory licensing system which in effect is based on this principle, that if the FCC says that a system can carry a signal, then the system automatically has a compulsory license to carry that signal and the copyrighted program, on the signal, and there is an elaborate compulsory licensing procedure and a complex schedule of fees that cable systems would have to follow and pay in order to insulate themselves from liability for copyright infringement.

Essentially, the thing is basically a complete compulsory license. The bill that you reported in 1967 did not have a compulsory license for CATV, although you considered it. It did have exemptions and complete liability. It was black and white and no gray.

What has emerged is quite different and yet I think that the principles underlying it are still the same principles and I think the result is probably an acceptable one.

The testimony you hear, I hope, will be largely over the details of the system and not whether or not cable ought to pay. There will be some testimony to this effect, but it seems to me that maybe we are beyond that point. As things stand now, it is mainly a question of how they pay and how much.

Another issue which was not dealt with by your committee at all, although you heard testimony on it, was that of library photo-

copying and I would rank this as the second most important issue in the bill.

It is now dealt with in section 108 of H.R. 2223. The reason that you did not report a provision on this subject was that the parties respectively, and for absolutely opposite reasons, agreed that the bill should not address the problem.

At that time, and it was before the full impact of library photocopying and photocopying machines generally had been felt, the feeling on the part of the copyright owners was that a provision specifying explicitly what the liability of libraries would be would have deleterious effects, since the owners felt that they had complete rights and libraries should not photocopy at all without paying. The library community felt just the opposite.

I think it was a mistake for the bill to say nothing. Looking back, I think that some provision on this was essential. What has emerged in section 108 has been fought over in a friendly way for a number of years in the Senate context. Essentially, section 108 insulates libraries from liability for the operation of coin-operated machines on their premises and allows them to photocopy single copies of articles and excerpts from journals and books, and so forth, in their collections. If it is clear that a work is out of print, they can make a single complete copy for a user. Some of this activity can be carried out for inter-library loan purposes.

The big issue in section 108 is found in subsection (g), and the briefing paper in the folder that I will give you goes into this in some detail.

Under the final version that emerged in the Senate, after saying what libraries can do, the bill says that this does not apply to multiple copying, including making multiple copies one at a time and it does not apply to single copying when it is done systematically.

It is still not altogether clear in anyone's mind what systematic copying means, but there is a good deal of concern on the part of librarians as to the chilling effect this would have on their interlibrary loan and network activities which are ongoing and very important as a public issue.

This is something that badly needs resolution. You passed and the President did sign on December 31 of last year, a bill setting up a national commission that has as part of its mandate, a study of this problem.

At the same time you yourselves, will have to decide what section 108 and specifically section 108(g), says on this particular subject. There are other activities going on in the library photocopying arena and you will hear more about them as your hearings proceed.

An issue of great immediate importance in the subcommittee level right now is the liability of public broadcasting. In 1967 your subcommittee agreed that instructional television should be given an exemption to a certain extent from copyright liability and during the House debates, this exemption was expanded.

But at the same time the exemption was limited to instructional television. Public broadcasting which to some extent enjoys an exemption today would be liable under H.R. 2223. The public broadcasters and their representatives have been seeking a very broad and far-

reaching compulsory license with respect to the use of copyrighted material other than motion pictures, audiovisual works and dramatic works.

Their concern is with the high cost and difficulty in getting clearances and the fact that their budget does not permit them to do the clerical work or to pay extensive royalties.

The Senate subcommittee staff is now engaged in a series of meetings trying to resolve this issue. The signs are relatively hopeful and perhaps with certain amounts of good will and cooperation, you will not have to face what is known generally as the Mathias amendment, which would be the proposal for a compulsory license covering public broadcasting.

Related to this is another amendment put forward in the last Congress by Senator Bayh which would extend to an unlimited amount the number of recordings, tapes, that an instructional broadcaster could make of broadcasts for use in delayed broadcasts or throughout the whole complex of instructional broadcasting.

In my opinion, this is an important issue but it is not as important as the Mathias amendment, and I expect the two will be considered together whenever they get to you.

In the area of jukeboxes, a very difficult compromise was achieved in 1967 and, astonishingly, it has held up. This involved a compulsory license for jukebox performances with a payment of $8 by jukebox operators per box per year, the payments being made into the Copyright Office and then disbursed under the procedure provided.

As a result of the cable wars in the Senate, an amendment was added which establishes a copyright tribunal, chapter 8 of the bill, and gives it a double mandate. First, in certain cases, the tribunal would settle disputes with respect to the disbursement of fees. This does not seem objectionable to most people.

But in addition the tribunal would be called upon, through what in effect is a compulsory arbitration system, to review the rates of the compulsory licenses that are set under the bill, and recommended changes which would become effective unless Congress chose to wipe them out.

The jukebox operators objected to $8 being subjected to a review, and in the Senate consideration last September, Senator Hollings put forward an amendment that took the jukebox rate out from under the tribunal review. This is the form in which the bill now appears.

The jukebox rate is frozen at $8 and it is not subject to review. I am reasonably sure you will hear testimony on this issue in the days to come.

I believe that this is the only real issue remaining with respect to the jukebox problem which, without any question, was our biggest headache in the early sixties.

The other economic issue that you will hear testimony on is the amount of the rate for the old traditional compulsory license covering the making of sound recordings of musical compositions.

The 1909 law was a pioneer. It adopted the first compulsory license in any field. It established a system which is still in effect today that allows a record producer to make a record of a copyrighted musical composition without permission if he follows a compulsory licensing procedure and pays 2 cents per record per song.

One can wonder how 2 cents in 1909 could possibly still be viable today. The answer is probably that the LP resulted in the unit price going from 2 cents to about 20 cents or in some cases 24 cents as a ceiling.

But at the same time it has been argued very forcefully that the 2-cent rate is infinitely too low, even considering the LP and the other structural changes that have occurred in that industry. In the 1965 hearings, there was massive testimony of a statistical nature dealing with the validity of the 2-cent rate.

Your committee agreed to 2½ cents as a reasonable rate at which to peg the royalty.

The Senate, facing an inflationary curve which had only just started in 1965, raised the fee to 3 cents after considering at one point a 3½-cent rate. This is still a very, very sharp controversy and I think you better prepare yourself for quite a lot of statistics within the coming weeks.

Finally, and the seventh issue that I will mention, is the performance right for records which has the—as the chairman mentioned——

Mr. KASTENMEIER. May I interrupt? I have five: Cable TV, library photocopying, liability of public broadcasting, jukeboxes, public recording.

Ms. RINGER. I am sorry. I accidentally skipped one, the question of educational use other than broadcasting and it will be the subject of one of your days of testimony, if not more. In the 1965 hearings, you heard a good deal of testimony on the issue of classroom photocopying and other copying by teachers of copyrighted material.

This was put forward in the context of the fair use provision which is now section 107 of the bill and is a rather general statement of the doctrine of fair use.

The question was whether or not a vague provision of this was sufficient to give teachers guidance as to what they could and could not do with respect to copyrighted material, except when they had at their fingertips a good deal of electronic and other machinery for using copyrighted materials and making them available to their students and pupils. At the time, you sought to solve this problem by considering all of the arguments that had been made and attempting in the report to lay out what the committee regarded as fair use in this context.

There are about four closely packed pages still in the report, in the Senate version, that reflect your committee's actual drafting of what you considered the scope of fair use to be in this context of classroom teaching.

This has not, I think it is fair to say, satisfied the educational representatives. I believe you will hear proposals on this issue and I would list this as one of the seven major issues.

An adjunct to the seven is the copyright royalty tribunal which is an issue in itself but arises in the context of three of the other issues and also of a fourth, which is the seventh of the major issues, the performance right in records.

The testimony in 1965 on this issue was very interesting. The record producers put forward a very strong case for anti-piracy legislation and during the hearing, after testimony by performers and performers' representatives, they added to that a proposal for a performing right in recordings. That would mean payment under some

sort of system for playing records on disc jockey programs, for playing records on jukeboxes, and for playing records on cable television and music systems.

I draw a distinction at this point between the music on the record and the recording itself. The music is already protected against all of these uses except cable and jukebox and would be protected against all of them under the bill.

The stopgap legislation that you passed in 1971 effective in 1972, created a copyright in a sound recording that would extend to any creative elements present in the recording but limited it to the particular situation of so-called piracy, unauthorized duplication, usually on 8-track cartridges.

This legislation which was temporary in its 1971 form was standardized as permanent legislation in 1974 and is now part of the copyright law. I don't regard "piracy" as an issue. It may become one.

What is an issue, and the major issue in the Senate consideration of the bill in 1974, was the proposal that a performing right be added to the law that would allow the collection of royalties for the playing of records as such on radio, television, cable, jukeboxes, and so forth.

The sponsor of this legislation in the Senate was Senator Scott. The bill contained this provision when it went to the floor of the Senate and was knocked out in a rather heated debate during that consideration.

Senator Scott has reintroduced the proposal as a separate bill and Representative Danielson has introduced the same bill. In the Senate subcommittee I gather there will be hearings on the Scott bill and there is a possibility that it might be joined with the revision bill.

In any case it is not a piece of separate legislation in its real effect. I think it is something your subcommittee should consider as part of the overall picture of general revision.

I repeat, however, that the Danielson bill is a revision of the 1909 law, which is the approach that is being taken in the Senate by Senator Scott. I am not sure I have made that clear.

I should say on this point that I believe very strongly that sound recordings and the performances incorporated in them are creative works, that they are the writings of an author, and that they are subject to copyright protection under the Constitution.

There is no doubt about this in my mind and I believe that your action in passing legislation that recognizes sound recordings as copyrightable and protects them against piracy is consistent with that view. It is not whether they should be protected but how they should be protected, whether protection should go beyond piracy to include the payment of royalty for performances by various media. In principle, I support that, too.

I think that the ways of working it out need to be carefully considered. The proposal in the old section 114 in the Senate version in 1974 had problems of a practical nature, but I am not sure that they are insuperable.

These are the seven major issues and much of the testimony you will hear will be centered around them and will be economic in nature. In addition to this you will hear discussion at various points of the manufacturing clause, section 601 of the bill, and which is a disgraceful vestige, in my opinion, of 19th century protectionist thinking.

The manufacturing clause was added in the 1891 Copyright Act as the price the printers exacted for allowing copyright to be extended to foreign authors. They had been getting a free ride up to that point and they insisted that, as a price for allowing Dickens and Tolstoy to be protected in this country, the works could not be copyrighted unless they were printed here.

This provision, which was bad legislation to begin with, has become eroded over the years and in 1965 it was eroded some more. The Register's initial recommendation was that it be done away with. It became apparent that it could not be knocked out of the bill without a major fight.

As a result, it has been retained with a considerably narrowed scope. I believe that the principal arguments you will hear, perhaps tomorrow and in succeeding days, involve the fact that we are now equating Canada with the United States in terms of the place of manufacture, and this raises a host of technical questions which I won't go into. I think there has been accommodation among the parties and therefore it is unlikely you will find people attacking the manufacturing clause out of hand, as I have just done.

Yet personally I find it very, very bad legislation and would like to see it gone. It may not be practical to do that.

I believe you will also hear testimony from artists and their representatives with respect to the unsatisfactory situation of artists under the present law.

I think this is a valid argument. The revision bill would help artists but probably would not go as far as they would like it to.

Mr. KASTENMEIER. When you say "artists," whom do you have in mind?

Ms. RINGER. Painters, sculptors, graphic artists, and designers. I wanted to mention the design bill. Title II of the bill is a completely separate piece of legislation which was conjoined with the revision bill in the Senate more or less as legislative expediency at the time.

The two problems are related and I have no objection to them being addressed together. I think this is probably a good idea.

But you will find differences in approach between them, and a bridge provision in section 113 deserves your attention. I think the design bill is a good bill and it deserves to be passed whether as a title II of this overall omnibus revision or separately.

It is then unclear whether there will be a debate over it. There has not been in the Senate.

There are other issues. There is a proposal that would exempt a proprietor of a ballroom or similar place of entertainment from liability and place the liability on the performing organization.

There are undoubtedly dozens of other little or perhaps not so little issues that will arise during these hearings. But I have tried to give you the overall framework of what you will be hearing, and in my opinion you do not need to go back to ground zero.

I don't think you need to start at the beginning. I think you can consider many issues settled, thanks to your efforts in the sixties. Your problem is not a simple one but I think it is something that is solvable and I am extremely encouraged by the scheduling of hearings and the general atmosphere that I find here today.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Ms. Ringer, for a very comprehensive review historically of the issues involved in copyright law revision.

The Chair will state, that at our next hearing, we will have Government represented by three other entities, the Justice Department, the Commerce Department, and the State Department, and to some extent, other aspects will be more deeply explored with reference to the bill in terms of its administration from the governmental point of view.

I have at this point just a couple of questions and then I would like to yield to my colleagues. From time to time there have been arguments made that we could leave something out of the bill.

Indeed, from time to time, certain areas have not been covered in the bill. But is it not the case, this being a unified code, that the operation of the bill does apply whether or not we specifically deal with a subject or not? That is to say, all we have done in a sense is by our nonstatement, to leave the matter somewhat unresolved in terms of potential litigation?

Therefore, we can really not fail to deal with an issue. It will be dealt with one way or the other. The code, title 17, will cover it. So we have made a conscientious decision even by omission. Do you agree?

Ms. RINGER. I would agree. In 1909 there was probably no intention to protect sound recordings. I think the legislative history would bear this out although it is ambiguous. In the early 1970's there was an increase in record piracy because of the increasing popularity of 8-track cartridges. As a result, there was a major effort to get States to pass legislation or to enforce common law protection of what were clearly, in a layman's sense, published works because of the lacuna in the 1909 statute. There was no explicit protection. This issue went all the way to the Supreme Court and the Supreme Court upheld the validity of a State criminal statute against record piracy on the ground that Congress had not preempted that protection since it had failed to act.

You may not even be refraining deliberately from giving protection, which I think was the thrust of your question. You may, in fact, be handing them State protection which is variable and inconsistent in many cases and has a lot of undesirable features. These were the very undesirable features that Madison mentioned in the "Federalist Papers" when he was defending the copyright clause in the Constitution.

Mr. KASTENMEIER. By virtue of passing this bill, we will deal with every issue. Whether we deal with it completely or not for the purpose of resolving the issues involved is the only question, not whether it has dealt with the four corners of the bill because the four corners of the bill will presume to deal with everything in copyright.

Ms. RINGER. I quite agree, Mr. Chairman.

Mr. KASTENMEIER. One of the apprehensions that, as we develop this bill and probably future amendments to it, is that by creating rights and extending rights, we might make the law very complicated given the present state and future state of society, that the business of getting clearances and knowing what levels of rights are really being accorded may get extraordinarily difficult, particularly for users.

What is your comment to that?

Ms. RINGER. This has been a concern to us in the Copyright Office, too. There are some situations—and I think cable is one of the best examples I have ever seen—that are so intrinsically complicated that you cannot deal with them in a broad-brush way.

I think that your efforts to deal with the CATV problem in 1965 which were attacked as being terribly complicated are extraordinarily clear and simple compared to the FCC regulations which in effect did the same thing.

At the same time, I am very disturbed about the increasing reliance on compulsory licensing to resolve difficult conflicts. The law is so out of date that there are now areas in which authors are simply not being protected at all. In these areas there have built up user interests that are so strong and so deeply embedded that to impose outright copyright liability, with no if's, and's or but's, would create very serious problems.

Because the 1909 law has been allowed to become hopelessly out of date, you have to compromise, and the obvious compromise in many of these cases is compulsory licensing.

When you begin this game in areas now protected under copyright, where the protection already exists and licensing arrangements have already been made, then I think you are doing something very drastic, and the ultimate result could be substantial changes in the character of copyrights that might actually make it harmful to the author rather than helpful.

Mr. KASTENMEIER. Now, I would like to yield to the gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Following you will be many witnesses who will reflect their economic interests and you may be one of the few witnesses who do not have an obvious economic stake in this bill.

Can you help me with some of the problem policy issues which may pervade all of these sections of the bill? I think I can understand a person's economic ax. I respect their points of view. But, I am not sure I really understand the public policy issues involved and I would like your assistance.

Ms. RINGER. The 1909 Joint Congressional Committee, in its report No. 2222, made a statement which has been quoted many times and which I agreed with at one time, but which I have ceased to agree with.

I will paraphrase it. It was that copyright is not for the protection of the author, but for the public and that where the author's interests and the public's interests conflict, the author must yield.

This sounds great and for a long time, I felt that this was probably correct. But, the more I have looked upon the status of authors in this country and the fact that the public interest is badly served when authors are badly served, I have felt that too often the public interest has been identified with economic users rather than with authors.

In recent years, partly as a result of this whole revision exercise, I have been trying to gage individual issues in terms of their impact upon creativity and authorship, which I consider the ultimate public interest.

The Constitution speaks of the desirability of promoting the progress of science and useful arts, science in the broad sense of learning or knowledge, by offering protection for limited times to authors and inventors.

It seems to me that it is this protection, the exclusive rights that are supposed to be granted to authors, that is the ultimate public interest that the Constitution and its drafters were thinking about.

I do not think that this has ever been fully or even partly realized in any copyright law we have had in our entire history.

Mr. WIGGINS. I was wondering if you would place the dissemination for the benefit of the public—and I might add for the profit of the disseminators—on an equal plane with the protection of the authors and inventors?

Ms. RINGER. Yes. I think that the system that we have had has been based on the desire to induce dissemination, make works available to the public by offering protection to authors.

I think that this system is now subject to some difficulty because of the fact that the new technology has made it an absolute detriment to disseminate. In other words, an author in certain situations who lets the bird out of the cage, finds that there is no way to regain it, that once he has made a tape and it has been played over the radio or television, he finds suddenly it is being pirated or made in duplicates all over the country.

It is very, very difficult in that situation for him to realize any economic gain or reward for his creation and there may be situations in which he would prefer to keep his bird in its cage, so to speak.

I am speaking in terms of music, but I think the example is better in some areas where there is a more realistic possibility of exercising complete control.

The task of your committee, as I see it, is to try in some way to evaluate the impact of the new dissemination media on the basic task of giving authors a reasonable return and inducing them to let the work go out to the public.

We are in really big trouble on this, in my opinion, at the moment.

Mr. WIGGINS. Thank you.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson?

Mr. DANIELSON. I wish to thank Ms. Ringer, Mr. Lorenz, and Mr. Kaminstein for their contribution this morning. It was most helpful.

Will Ms. Ringer be back again? I have a couple of questions.

Mr. KASTENMEIER. As a matter of fact, yes. We will have Ms. Ringer back perhaps at an earlier time than later because it is obvious today we will not have time for extended examination on a number of issues which have been raised.

Mr. DANIELSON. All right.

Beyond that, I want to thank my colleague, Mr. Wiggins, for raising the point he just did raise and for your response to it. It was directly responsive to one question in my mind. As I read the Constitution, the justification for copyright in the first place—and the only one in the Constitution—is to promote the progress of science and useful arts.

So far as I am concerned, any legislation which I will support will have to be calculated to achieve that end, to promote the progress of science and useful arts.

The copyright is the means through which that end is accomplished and that will be, I believe, the general rule that I am going to follow here.

I wish to thank Mr. Kaminstein and commend him for the magnificent perception of the legislative process which is set forth in the next

to the last paragraph of his statement, and of the responsibility of the Congress in meeting that process.

I wish every legislator would include that as part of his morning devotions or ablutions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan?

Mr. DRINAN. I want to welcome Ms. Ringer back. I am sorry I had another subcommittee. That subcommittee was about bankruptcy, and the Congress has been even more apathetic about bankruptcy than about copyright laws.

I thank you for your appearance here today and I wish to thank the other two witnesses.

Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison?

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. I am astounded. [Laughter.]

Probably it is the better part of wisdom, since the House is in session, to terminate at this period and to thank all three witnesses, Mr. Lorenz, Mr. Kaminstein, and Ms. Ringer, for illuminating the subcommittee and updating it on the subject of copyright.

Particularly what Ms. Ringer has contributed this morning will raise a number of other issues, other questions, with which I am in entire agreement with the gentleman from California, Mr. Danielson, on and suggest further colloquy.

Rather than get into those thickets at this hour, I think we will let the morning testimony stand. It does sound not only hopeful, but gives us the frame of reference for now proceeding hopefully to a successful end.

In conclusion the Chair desires to again thank our witnesses this morning.

Mr. DANIELSON. Is there any chance of getting a larger room for tomorrow? There are a lot of people standing up back there that would rather sit.

Mr. KASTENMEIER. We will do what we can do in that regard. The committee is very impressed by the public interest. We will try to bring additional chairs in and accommodate those standing today.

Tomorrow we will have representatives of the Justice Department, Commerce Department, and the State Department on the question of general copyright revision. Until then, the subcommittee stands adjourned.

[Whereupon, at 12:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, May 8, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, MAY 8, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, and Railsback.

Also present: Herbert Fuchs, counsel; Bruce A. Lehman, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order. This morning is the second morning devoted to hearings on the subject of H.R. 2223 and other bills relating to the general revision of the copyright law.

We are pleased to have as our first witness this morning, representing the State Department, Deputy Assistant Secretary for Commercial Affairs and Business Activities, the Honorable Joel W. Biller. Mr. Biller is accompanied by Philip R. Trimble, Assistant Legal Adviser for Economic and Business Affairs.

Is Mr. Biller here?

Mr. BILLER. Yes.

Mr. KASTENMEIER. We will be happy to hear what you have to say.

TESTIMONY OF JOEL W. BILLER, SECRETARY FOR COMMERCIAL AFFAIRS AND BUSINESS ACTIVITIES, DEPARTMENT OF STATE

Mr. BILLER. Thank you, Mr. Chairman. Mr. Trimble is sitting on my right and Mr. Bushnell is on my left.

I greatly appreciate having the opportunity to present the views of the State Department on H.R. 2223, for the General Revision of the Copyright Law, title 17 of the United States Code, and for other purposes. Although we take exception to one section in this bill, the Department otherwise supports the enactment of this important legislation.

As the committee knows, the present U.S. copyright law is essentially the same as the act of 1909. Since that date, great advances have been made in technology and techniques for communicating printed matter, visual images, and recorded sounds. These advances have created new industries and methods for the reproduction and dissemination of copyrighted works.

The State Department believes that a modernization of the copyright law to take into account the important technical advances in the copyright field is in the interest of both the authors and the users.

My comment will be directed to those sections of H.R. 2223 which relate to the conduct of our foreign relations and therefore are of special interest to the Department of State. These sections are the following: Section 104 regarding subject matters of copyright and national origin; section 302 on the duration of protection; and section 601 on restrictions against importation of certain copyrighted materials from other countries.

Section 104 is relevant to our international interests in that it specifies the occasions when foreign works, that is, works produced by nationals of countries other than the United States, will be granted U.S. copyright protection. Essentially, section 104 continues the reciprocity approach contained in the present law with respect to published works; that is, the United States gives foreign citizens protection equal to that given by the foreign country to U.S. citizens. It is thus consistent with generally accepted international practice in most countries and has the support of the Department.

Of particular relevance to the Department's interests is section 104 (c) ("Subject Matter of Copyright: National Origin") which deals with the possibility that a foreign government might take action in the U.S. courts to divest its citizens or authors of rights to their works or to block publication of their works within the United States. We do not have any evidence that an action of this nature is likely to occur. But if it did, it would represent undesirable official interference with the freedom of individual expression, and we therefore believe that it should be guarded against.

It is important to note that the international copyright system embodied in the Universal Copyright Convention is intended to "insure the respect for the rights of the individual and encourage the development of literature, the sciences, and the arts." These convention obligations should be kept in mind with respect to any action to suppress free communication in the United States of ideas and literature unacceptable to authorities of another member state of the convention.

We understand that other U.S. Government agencies are drafting language to accomplish the purpose of section 104(c) in a technically different manner. We have not reviewed these proposals and therefore are unable to express our opinion on them. However, we support the aim of appropriately drafted legislation that would deny effect in U.S. courts of a foreign nation's laws or practices designed to deprive the authors of that country of the rights to publish and protect their literary and artistic works in the United States.

Section 302 deals with the duration of copyright, that is, term of protection. It is one of the most important, if not the most important provision in the copyright revision bill. Essentially, section 302(a) provides for a copyright term of the life of the author plus 50 years after his death. Such a term of protection would be more in line with the practice of most countries of the international copyright community and would also remove a major obstacle to the possible adherence of the United States to the Berne Convention for the Protection of Literary and Artistic Works. Our membership in the

Berne Convention would facilitate and simplify international copyright protection for U.S. nationals. Therefore, we strongly support the term of copyright protection proposed in section 302.

Section 601 concerns the so-called "manufacturing clause" which is designed basically to protect the U.S. printing industry. As you know, this section prohibits the importation into or the distribution within the United States of English language books authored by U.S. nationals living in the United States, or domiciliaries, unless the copies are produced in, or are made from type set in, or plates made in, the United States or Canada.

We are pleased that section 601 would, on the whole, move in the direction of liberalizing the present manufacturing clause. For example, a violation of the manufacturing clause as regards a book would not affect the right of the copyright proprietor to authorize a motion picture version or other use of the book. It would merely affect enforcement of copyrights with respect to publication as a book. Further, the number of copies manufactured abroad that may be imported has been increased from 1,500 to 2,000.

Despite this liberalization, however, section 601 would continue the protectionist features of the manufacturing clause. This kind of protection is fundamentally inconsistent with basic U.S. policy in international trade. For several decades we have pursued a policy of reducing tariffs and nontariff barriers in the interest of promoting an open international economic system. We believe that the broad trading interests of the United States and its people continue to be the best served by a general reduction of trade barriers including nontariff barriers. This is the policy we are carrying forward in the current multilateral trade negotiations being undertaken in Geneva under the authority of the recently enacted Trade Act.

During this round of negotiations attention will be focused particularly on nontariff barriers, and one of our major negotiating objectives will be to reduce or eliminate nontariff barriers of other countries which restrict U.S. trade. We believe that it is important to note this inconsistency in considering the continuation of the manufacturing clause.

Furthermore, the exception for Canada introduced by this bill into the manufacturing clause would violate our obligations under the GATT and various bilateral treaties. The United Kingdom has protested and we expect that other foreign countries which are being discriminated against by this measure will protest, thereby introducing an element of discord and potential retaliation into our relations with those countries.

Specifically, Mr. Chairman, the exception would violate our obligations under article XIII of the GATT which requires nondiscriminatory application of quantitative restrictions, and the United States would be obligated to seek a special waiver from the GATT contracting parties to permit this exception. This procedure would be particularly undesirable at this time in view of the opening of the new round of multilateral trade negotiations at Geneva. The exception would also violate commitments in various FCN treaties, which we have concluded with most of the other industrialized nations.

These treaties normally impose obligations on the United States to notify and consult before it introduces nontariff barriers on important

products of the other country, and forbids the prohibition of the other country's products unless the product of third countries are similarly prohibited.

In conclusion, the Department of State believes that the updating of the U.S. copyright law is most desirable, and we support the enactment of H.R. 2223. A modernization of the copyright law to take into account the important technological advances in the copyright field is in the interest of all members of the copyright community. It is also important in bringing the United States in step in copyright with the other principal countries of the world. We hope, Mr. Chairman, that the objections to the bill that I have noted will be given serious consideration by your committee.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Biller. I appreciate your statement and your appearance. In the past, we have had Mr. Harvey Winter from time to time representing the Department and we know him well.

May I ask as to what extent does your Department coordinate its view with respect to the legislation under consideration with either the Copyright Office, the Department of Commerce or the Department of Justice?

Is there any particular coordination of views with respect to, say, representing the view of the Administration on the bill?

Mr. BILLER. Yes, Mr. Chairman, I think there is. We maintain daily contact with other agencies on the international aspects of the bill. We are aware of the views of the other agencies and certainly on an informal basis there is a great deal of consultation.

Mr. KASTENMEIER. You indicated you opposed one section, referring to the manufacturing clause section.

Mr. BILLER. Yes, sir.

Mr. KASTENMEIER. But, you indicated a reservation about section 104(c). I wonder whether you could, by using a hypothetical, demonstrate precisely the effect of that in terms that we would understand.

For example, if country *x* would insist that copyrights within its nation were, in fact, state held or state owned it could move in our forums to represent that state as the holder of a copyright, notwithstanding the fact that the author we would normally recognize him to be a different entity than the state. Is that what you're driving at?

Mr. BILLER. No; our position is that we favor the enactment of that section in order to promote to the maximum the individual freedom of authors. If a particular author lived in a country whose domestic system required that the government of that country hold the copyright and that author managed to publish his work in the United States, even though the government of his country was the legal holder of the copyright, we would favor the enactment of this legislation to prevent that government from suing in the U.S. courts to prevent the publication.

Mr. KASTENMEIER. I can understand the policy reasons on both sides of that one. It would be very difficult. I understand the basic motivation.

How could you expect to have some continued comity with that government with respect to the field of its endeavor?

Mr. BILLER. Well, there are two points I would like to make. First, we believe that the importance of promoting freedom of thought and

the importance of communication across international borders is more important than some of the other considerations involved. Second, with regard to some of the countries which have this kind of system, we have no indication whatsoever that they have any intention of bringing suit in American courts.

So, we don't believe it is a real problem that we would have. In the case of the government of the Soviet Union, for example, which has such a system, we have no indication that they will bring suit in American courts to prevent the publication in the United States of works of dissident Soviet authors.

Mr. KASTENMEIER. I see. It is the policy of the State Department, notwithstanding the success of the Universal Copyright Convention and its membership, that we should be in a position to adhere to the Berne Convention nonetheless; is that correct?

Mr. BILLER. Yes.

Mr. KASTENMEIER. In your view, does the passage of this bill, in its present form, qualify us for entry, for adherence to the Berne Convention?

Mr. BILLER. What it would do, Mr. Chairman, is remove one of the principal obstacles that now exists to our adherence, that being the term of protection, by extending the term of protection to the lifetime of the author plus 50 years. That would remove that obstacle because that is the term provided for in the Berne Convention. There are some other obstacles which would have to be overcome, but I think it would be quite possible to work them out.

Mr. KASTENMEIER. Are those obstacles outside of the perimeter of what the statutes provide for?

Mr. BILLER. Yes, sir.

Mr. KASTENMEIER. You have discussed the term in that connection? Is it not the fact that there are one or more countries moving away from life plus 50; is there not at least one major European country that has moved to a longer term than that?

Mr. BILLER. I am not aware of it, Mr. Chairman.

Mr. KASTENMEIER. As far as you are aware, all the Western European countries have life plus 50?

Mr. BILLER. I believe so.

Mr. KASTENMEIER. Perhaps I ought to put it this way, what countries in the world other than ourselves have a term other than life plus 50?

Mr. BILLER. I don't have a list of them with me. If you would like, I can submit such a list for the record.

Mr. KASTENMEIER. Thank you. We would appreciate that.

Thank you very much, for your testimony.

[The material referred to follows:]

A COMPILATION OF NATIONAL COPYRIGHT DURATION STANDARDS FOR LITERARY, MUSICAL, AND ARTISTIC WORKS

BACKGROUND

The copyright duration of life of the author plus 50 years was first advanced as an international standard in the 1908 revision of the Berne Union. Although this term was not made obligatory at that time, in 1948 the Berne Convention was amended to make life of the author plus 50 years the minimum term of duration for members of the Convention. Today the "life plus fifty" standard is the most widely accepted standard for the duration of copyright protection.

The following list of national copyright durations was compiled from *Copyright Laws and Treaties of the World* or from other more recent sources.

Life of the Author plus 50 years (74 countries)

Argentina; Australia; Austria; Belgium; Bulgaria; Burundi; Cameroon; Canada; Central African Republic; Ceylon (Sri Lanka); Chad; China, Republic of; Congo (Brazzaville); Costa Rica; Cyprus; Czechoslovakia; Dahomey; Denmark; Ecuador; Egypt, Arab Republic of; El Salvador, Republic of; Ethiopia, Empire of; Fiji; Finland; France; Gabon; German Democratic Republic; Greece; Guatemala; Holy See; Hungary; Iceland; India; Indonesia; Republic of Ireland; Israel; Italy; Ivory Coast; Japan; Laos; Lebanon; Liechtenstein; Luxembourg; Madagascar; Mali; Monaco; Morocco; Nepal; Netherlands; New Zealand; Niger; Norway; Pakistan; Paraguay; Peru; Philippines; Portugal; Rwanda; San Marino; Senegal; Sierra Leone; Singapore; South Africa, Republic of; Sweden; Switzerland; Syrian Arab Republic; Togo; Tunisia; Turkey; Uganda; United Kingdom; Venezuela; Yugoslavia; and Zaire.

Life of Author plus 20 years

Poland.

Life of the Author plus 25 years (13 countries)

Ghana; Iraq; Kenya; Liberia; Libya; Malawi; Malaysia; Malta; Mauritius; Nigeria; Tanzania, United Republic of; Union of Soviet Socialist Republics; and Zambia.

Life of the Author plus 30 years (9 countries)

Bolivia; Chile; Dominican Republic; Iran; Jordan, Hashemite Kingdom of; Korea; Mexico; Nicaragua; and Thailand.

Life of the Author plus 40 years

Uruguay.

Life of the Author plus 60 years

Brazil.

Life of the Author plus 70 years

Germany, Federal Republic of.

Life of the Author plus 80 years (4 countries)

Colombia; Cuba; Panama; and Spain.

Variable Copyright Term

In the following countries the duration will vary depending on the category of the author's heirs. In all the countries listed below, an author enjoys copyright protection during his lifetime. The term beyond the author's life, however, is controlled by the nature of the author's heirs. (3 countries)—Albania; Haiti; and Romania.

Miscellaneous Categories (Unrelated to life of the Author)

Afghanistan—20 years; Burma, Union of—10 years; Honduras—10, 15 or 20 years; and United States—28 years, renewable for 28 years.

Countries without copyright laws, or for which accurate information is unavailable

Algeria; Andorra; Bahrain; Barbados; Botswana; Cambodia; China, Peoples Republic of; Equatorial Guinea; Gambia; Guinea, Republic of; Guyana; Jamaica; Kuwait; Lesotho; Maldive Islands; Mauritania; Mongolia; Nauru, Republic of; Saudi Arabia; Somalia; Southern Yemen; Sudan; Swaziland; Trinidad and Tobago; Upper Volta; Viet-Nam, Republic of; Western Samoa; and Yemen.

Mr. KASTENMEIER. I would like to yield to the gentleman from Illinois.

Mr. RAILSBACK. How serious is the Canadian exception you have alluded to on page 6; what effect could that have as far as preventing us from joining the Berne Convention?

Mr. BILLER. I think the effect on our general trade policy and the negotiations we are engaged in in Geneva are more serious than the effect on our joining the Berne Convention.

What the provision does, Mr. Congressman, is introduce a new element of discrimination, which is quite clear and is patently discriminatory, in our legislation.

Mr. RAILSBACK. The Canadian exception?

Mr. BILLER. Yes, sir. This would occur at a period in time where we are engaged in major initiatives to have other countries reduce or, hopefully, eliminate their discrimination and nontariff barriers. This would be adding a discriminatory character to a continuing nontariff barrier.

Mr. RAILSBACK. So, now your authors publish not only in this country, but also in Canada within a 30-day period in order to derive some benefits that they otherwise would not have?

Mr. BILLER. The Canadian exception does not exist now.

Mr. RAILSBACK. The exception does not exist now?

Mr. BILLER. It would be introduced by the legislation.

Mr. RAILSBACK. I guess I am referring to something else; I am a novice in this.

Mr. BILLER. The 30-day provision is, if a work is published within 30 days of its first publication in the United States, it is deemed to be published simultaneously in other countries.

Mr. RAILSBACK. Thank you. I yield my time.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. In your statement you used the acronym GATT; what does that mean?

Mr. BILLER. That is the General Agreement on Tariffs and Trade.

Mr. DANIELSON. I assume that is a treaty of some sort, is that correct?

Mr. BILLER. The General Agreement on Tariffs and Trade, Mr. Danielson, is a multilateral treaty which we entered into with most of the major trading countries of the world in late 1948 by which we established the rules that establish international trade.

Mr. DANIELSON. It is a treaty?

Mr. BILLER. It is an executive agreement, Mr. Danielson, I am told.

Mr. DANIELSON. What is an FCN?

Mr. BILLER. FCN stands for Friendship, Commerce, and Navigation. Treaties of Friendship, Commerce, and Navigation and the standard types of bilateral treaties which we enter into with other countries to assure them we will not discriminate against them or their nationals.

Mr. DANIELSON. Are they uniformly a two-party agreement?

Mr. BILLER. Yes, they are always bilateral, and they follow the same nondiscriminatory pattern.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. I have no questions but I want to thank Mr. Biller. I would just like to say that I commend him for his testimony and it is nice to be in agreement with the Department of State from time to time.

Mr. KASTENMEIER. The gentleman from New York.

Mr. BADILLO. I just wonder what is the Department's feeling about other U.S. agencies that are drafting language of their own. Who is drafting language; I understand there are other agencies drafting their own language?

Mr. BILLER. The Copyright Office, I believe, has some language of its own. It is not our intent to cause bureaucratic problems. We want to make clear that we agree with the language.

Mr. DRINAN. But the present language is not acceptable?

Mr. BILLER. No; it is acceptable. But, we would support any alternative language if it were to achieve the same objective.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. I have just one. You devoted quite a bit of your statement to the manufacturing clause. Really, 8 to 10 years ago we tried to limit the effect of it on the theory that eventually it might well be phased out consistent with national policy.

I am not sanguine about how it presently appears in H.R. 2223. I rather agree with the thrust of your statement and wonder it if might be useful for our purposes internationally to place a further restriction on that section which would limit the effect of, actually limit the effect of the manufacturing clause to a term certain, for example, 6 years from date or some other such specific period of time whereinafter it would no longer have any force or effect? Would that not be helpful to the State Department with respect to its dealings with Great Britain and other countries?

Mr. BILLER. Yes, sir, I think it would. We fully realize that there could be a difficulty posed for some American manufacturers if protection like this, which has existed in legislation for many years, were suddenly terminated.

If the Congress should decide that in order to achieve a desirable transition that some sort of phaseout period is necessary, we would support such a position.

Mr. KASTENMEIER. I thank you, Mr. Biller and your colleagues this morning.

Mr. DANIELSON. May I ask an additional question?

Mr. KASTENMEIER. Certainly.

Mr. DANIELSON. Concerning section 104(c) I have been puzzling here. Maybe you can give me a short cut. Does a foreign state have standing in the U.S. courts to bring the kind of an action contemplated, on the communities referred to in 104(c)?

Mr. BILLER. At the present time?

Mr. DANIELSON. Yes.

Mr. BILLER. Yes, sir.

Mr. DANIELSON. In another sub of this committee—Mr. Railsback was on it, I believe—we have been considering the advisability or the lack thereof permitting foreign states to bring action in the United States and you feel it does have that?

Mr. BILLER. I don't know, I just wanted to try and clarify it for you.

Mr. KASTENMEIER. We appreciate your appearance here this morning and that of your colleagues. Thank you.

[Witness excused.]

Mr. KASTENMEIER. The Chair would like to call upon Deputy Assistant Attorney General Irwin Goldbloom of the Civil Division of the Department of Justice. Would you please identify your colleagues for the committee.

Mr. GOLDBLOOM. On my left is John Murphy and on his left is Miles Ryan. On my right is Michael Werth. All of these gentlemen are from the Justice Department.

Mr. KASTENMEIER. I notice that you have a 36-page statement which you may deliver in its entirety or if you care to, you may summarize.

Mr. GOLDBLOOM. Thank you.

TESTIMONY OF IRWIN GOLDBLOOM, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. GOLDBLOOM. Mr. Chairman, I am pleased to respond to the committee's invitation to present the views of the Department of Justice on H.R. 2223, a bill for the general revision of the copyright law, title 17 of the United States Code, and for other purposes.

We are in sympathy with the general purpose of title I of the bill, to provide a thorough revision and updating of the copyright law, title 17, United States Code. However, as set out below, we recommend certain modifications in the proposed revision. We oppose title II of the bill which creates a new type of intellectual property, a hybrid between a copyright and a design patent.

H.R. 2223 and its companion bill, S. 22, are nearly identical with S. 1361 as passed by the Senate in the 93d Congress on September 9, 1974. There are, however, technical and perfecting amendments and changes required by the enactment of Public Law 93-573, providing for interim copyright extension and increased penalties for tape piracy.

A section-by-section analysis of S. 1361 is part of Senate Report No. 93-983, 93d Congress, at pages 102 to 228. Further details as to the history of this copyright revision bill appear in the same report at pages 101 to 103. The summary below is specifically directed to features of the Bill of particular concern to this Department.

Section 107 relates to the "fair use" doctrine. This is fully discussed in Senate Report No. 93-983, pages 115 to 120. The scope of fair use in copying is illustrated to include reproduction by a teacher or a student of a small part of work to illustrate a lesson (S. Report 93-983, p. 115).

This example, therefore, does not include reproduction of the entire work to illustrate a lesson. In determining whether the use made of a work in a particular case is a fair use, a court is to consider as factors the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work.

As to the reproduction of entire works for classroom use, the doctrine of fair use would be applied "strictly" (S. Report, 93-983, p. 117).

Sections 108, 110, and 111 cover exemption from liability for copyright infringement in the fields of library and [illegible] reproduction (section 108), the exemption of certain performances and displays, such as in classrooms in face-to-face teaching activities of a nonprofit educational institution (section 110) and the retransmission of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a "cable system" outside defined geographic areas ("secondary transmissions" of section 111).

Section 302 establishes a new term for the duration of copyright. Generally, this is for a term consisting of the life of the author and 50 years after his death. In the case of joint works, the period of 50 years commences upon the death of the last surviving author. For anonymous works, pseudonymous works, and works made for hire, the copyright period is for a term of 75 years from the year of its

first publication, or a term of 100 years from the year of its creation, whichever expires first.

Where one or more authors are identified for an anonymous or pseudonymous work before the end of the copyright term, the longer period of copyright terminating 50 years after the death of the author then applies.

Section 405 deals with the effect of the omission of the copyright notice. Section 411 covers infringement actions in certain situations.

Section 506 contains special provisions applying to persons who infringe willfully and for purposes of commercial advantage. With respect to copyright in a sound recording, for the first such offense, a person is fined not more than $25,000 or imprisoned not more than 1 year, or both.

For any subsequent offense, a person is fined not more than $50,000 or imprisoned not more than 2 years, or both. Section 507 provides a 3-year statute of limitations for both criminal proceedings pursuant to provisions of the bill after the cause of action arose, under the provisions of Section 116 and 506 and for civil actions after the claim accrued.

Section 601 affords preferential protection to publishers and printers of the United States and Canada, Report 93-983, pp. 195-200.

Sections 801-809 are concerned with the Register's duties to collect royalties and make determinations concerning the adjustment of copyright royalty rates for certain uses where compulsory licenses are provided by the bill.

They also relate to his duties to determine in certain circumstances the distribution of these royalties deposited with the Register of Copyrights. Section 803 provides for selection of membership of the tribunal to make necessary determinations with respect to royalty matters, to be on the basis of a list of names furnished by the American Arbitration Association to the Register of Copyrights. Section 804 provides for procedures to be followed by the tribunal in making its determinations. Subsection (e) of section 804 directs that the tribunal shall render a final decision in each proceeding within 1 year from the certification of the panel, certified by the Register of Copyrights on the basis of the names furnished by the American Arbitration Association. This subsection further provides that the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary, upon showing of good cause, may waive this requirement of the rendering of a final decision within 1 year from the certification of the panel in a particular proceeding.

The judicial review for tribunal final determinations, provided in section 809 (concerning the distribution of royalty fees), is limited. A court may vacate, modify or correct such a determination if it was procured by corruption, fraud or undue means, where a member of the panel was guilty of misconduct by which the rights of any party were prejudiced

Provisions for the protection of ornamental designs of useful articles appear in title II of the bill. Section 201 provides that authors or proprietors of an original ornamental design of a useful article may secure a period of protection, except for certain subject areas set out in section 202, for a period provided in section 205. Section 201 con-

tains definitions of the terms "useful article", "design of a useful article", "ornamental" and "original" as needed for purposes of the particular protection provided by this title. Section 204 provides that protection commences on the date when the design is first made public, either by being exhibited, publicly distributed, or offered for sale or sold to the public. Section 205 provides that the term of protection extends for 5 years, subject to being renewed for an additional 5 years prior to the expiration of the initial term. Section 206 provides for certain design notices to be applied to the products protected, and section 207 limits recovery for infringement if the design notice requirement of section 206 have been omitted.

However, actual notice of design protection to a particular person can take the place of the design notice requirement of section 206.

Section 209 of title II provides for loss of protection if registration of the design is not made within 6 months after the date on which the design was first made public, who may make application for renewal registration of a design protected under the bill, how and under what conditions and with what supporting papers a design protected under the bill can be renewed.

Section 212 of title II deals with the examination of the design application and provides for cancellation of registrations on application of a person who believes he is or will be damaged by a registration under this title. Grounds for cancellation are that the design is not subject to protection under the provisions of the title.

Section 220 of title II provides remedies for infringement of a design protected under this title. It provides for a civil action to have judicial review of a final refusal of the Administrator to register the design as for infringement if commenced within a time period specified by the Administrator of the title, but not less than 60 days after the decision, and permits simultaneous remedy for infringement by the same action if the court adjudges the design subject to protection under this title. This would appear to mean that the infringer would have to be joined as a party defendant with the Administrator of this title. The requirements for such an action are that the design proprietor has filed and prosecuted to final refusal an application for registration of the design, a copy of the complaint in the action is delivered to the Administrator within 10 days after commencement of the action, and the defendant has committed acts which would constitute infringement of the design.

Section 221 of title II gives courts jurisdiction of actions under this title and authority to grant injunctions to prevent infringement, including temporary restraining orders and preliminary injunctions.

Section 222 of title II relates to recovery of infringement, setting maximum amounts of recovery per infringing copy by way of compensation and provides for the delivery for destruction or other disposition of any infringing articles.

Section 223 of title II provides for cancellation of a registration of a design by a court and certification by the court of such order to the Administrator.

Section 227 of title II provides that copyright protection under title I, when utilized in an original ornamental design of a useful article, may still be a design work eligible for protection under the provisions of this title.

The issuance of a design patent for an ornamental design for an article of manufacture under the patent laws, title 35 United States Code, terminates any protection of the design under this title.

Section 229 of title II provides that nothing in this title annuls or limits common law or other rights or remedies available to a person with respect to a design which has not been made public as provided in this title or any trademark right or right to be protected against unfair competition.

Section 232 of title II amends various other statutes. Of particular importance to the Department is the revision proposed for title 28, United States Code, § 1498 (a) to provide that whenever a registered design or invention is used or manufactured by or for the United States without license of the owner thereof, the owner's remedy shall be by action against the United States in the Court of Claims for recovery of reasonable and entire compensation. Use or manufacture of a registered design or invention by a contractor, subcontractor or any person, firm or corporation for the Government and with the authorization or consent of the Government is to be construed as use or manufacture by or for the United States.

Use or manufacture by or for the United States of any article owned, leased, used by or in the possession of the United States prior to, in the case of an invention, July 1, 1918, and for registered designs, prior to July 1, 1978, is not to be the basis of an award under this section. Government employees have the right to sue the Government under this section except when in the position to order, influence or induce use of the registered design or invention by the Government.

Further excluded as a basis for claim under this section are claims by a registrant or patentee or assignee thereof when the design or invention was related to the official functions of the employee, in cases in which such functions included research and development, or in making of which Government time, materials or facilities were used.

Section 233 provides that title II of the bill shall take effect 1 year after enactment of this act.

Section 234 precludes a retroactive effect for the provisions of the design protection of the bill.

Section 106 states generally the basic rights of copyright owners. Following sections of the same chapter set forth limitations and exceptions to those rights. The public interest in the promotion of education and scholarly pursuits calls for a careful consideration of such circumstances as may impede the dissemination of knowledge. In this regard, section 107 of the bill, dealing with "fair use" of copyrighted information, leaves unclear the extent to which librarians can reproduce works for use in libraries.

It would seem in the public interest to work an accommodation between the copyright and such reproduction. But, as a doctrine applied on a case-by-case basis, "fair use" renders it uncertain whether, without infringement, librarians or library patrons can make copies of library materials for the patrons' use. Because of the advantages of the economical and speedy means of reproduction now available in libraries, it would be socially desirable not to discourage use thereof by uncertainty over the extent of the "fair use" doctrine.

Thus, we strongly believe that a definition in the bill of the doctrine as applied to such reproduction in libraries is definitely needed.

Moreover, defining the meaning of "fair use" in this connection also could serve to reduce uncompensated infringement. To carry out our suggestion to give maximum certainty as to "what is a fair use," and give more meaningful scope to the exemptions from copyright liability of section 108 discussed below, we suggest the following changes: Section 107, last line, p. 9, line 9, change "work" to——

"work; provided that nothing contained in this section shall be construed to limit the use by reproduction in whole or in part in copies or phonorecords or by other means specified in section 106 whenever used in nonprofit educational activities."

Reason: Clarity of scope of fair use for educational activities.

Section 108(d), lines 5–6, p. 10, lines 1, 2, delete "of a small part".

Reason: Libraries should be able to reproduce entire work for scholarship.

Section 108(e), lines 4–7, p. 10, lines 13–16, delete "if the library or archives has * * * at a fair price,"

Reason: Too difficult and cumbersome to make purchase investigation; discourages use.

Section 108, in subsection (a), provides that it shall not infringe a copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work under conditions specified in subsequent parts of the section. These conditions require, among other things, that the reproduction or distribution be made without any purpose of commercial advantage and that the collections of the library or archives involved be open to the public or available to specialized researchers, whether or not affiliated with the library or archives involved or with the institution of which the library or archives is a part. Under subsection (b), the rights of reproduction and distribution free from liability would apply to a copy or phonorecord of an unpublished work duplicated in facsimile solely for preservation and security or for deposit for research use in a library or archives of the type covered by the section.

Under subsection (c), the exemption from infringement would apply to a duplication in facsimile of a published work solely for replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if after reasonable effort it has been determined that an unused replacement cannot be obtained at a fair price.

The rights of reproduction and distribution under section 108 extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of either a published or unpublished work on separate occasions unless the library or archives is aware or has substantial reason to believe that it is engaging in a related or concerted reproduction or distribution or engages in a systematic reproduction or distribution of a copy of an item forming part of a copyrighted collection or periodical issue or of a copy or phonorecord of a small part of any other copyrighted work.

As we read this provision, it will not prevent libraries and archives from reproducing works in machine-readable language in connection with the storage and use of computerized information systems. We hope that the House legislative history of the bill will clearly support this construction, for the storage and use of data in such systems is of great importance to repositories and sources of scholarly research material. To impose copyright liability impeding the storage of such

data would be socially undesirable. If our interpretation of section 108 is wrong, we recommend that the section be changed to extend the applicable exemption to reproduction in machine-readable language for storage and use in information systems.

The ease of transfer of computerized data is another area in which H.R. 2223 raises a problem. Universities, research agencies, government, and private industry are developing information networks using computers and other electronic equipment to speed the transfer of information from source to user.

H.R. 2223 does not provide a method by means of which information systems users can easily obtain the permission of copyright owners for use of their material. The difficulty and loss of time entailed in many cases in contacting owners may inhibit users from including material in their systems. Or users may be unable to employ material in their systems in sufficient time in situations where speed is essential. It would appear in the public interest for the bill to contain some guarantee that information systems which are willing to pay royalties for material used can obtain easier access to copyrighted information, at least in high-priority areas such as scientific and technological works.

The proposed legislation also leaves unclear at what point in the use of computerized copyrighted material the liability for royalty payment attaches. Under H.R. 2223, it would seem that placing copyrighted data into a computer (which may form part of an information system) might infringe the copyright. Since the use of computers for storage and retrieval of information to some extent may replace the sale of books, in most cases the payment of royalties should be required. However, just where in the process the royalty payment should be assessed, is open to question. We believe it unwise to levy a "toll" at the "input" stage in the process. Levying on the "input" into computers could impede the development of information systems and may render meaningless any exemption for the use of computerized information for educational purposes which may be read into H.R. 2223.

The subject of the application of copyright to community antenna television has presented considerable difficulty in previous drafts of proposed revisions of the Copyright Code. H.R. 2223 attempts a compromise between the extreme positions of complete liability for infringement of copyright by secondary transmission by CATV on one hand and almost complete freedom from liability on the other hand. While we support the imposition of a degree of liability upon CATV, we believe that H.R. 2223 should provide an area of free use for such systems within the local service area.

The first part of subsection (c) of section 111 provides for compulsory licensing of secondary transmissions of a primary transmission by an FCC-licensed broadcast station upon compliance with the notice of ownership and the payment provisions of subsection (d), and (A) the signals of the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations, or authorizations of the FCC; (B) where the CATV system is, in whole or in part, within the local service area of the primary transmitter; or (C) where carriage of the signals comprising the secondary transmission is permissible under the FCC rules, regulations, or authorizations. We strongly urge, with respect to (B), that the secondary

transmittal should be completely free of liability; hence, royalty-free or no licensing would be in order. The secondary transmission in such a situation, where the CATV system is, in whole, or in part, within the local service area of the primary transmitter, finds the cable system only filling gaps or improving reception in the service area of the primary transmitter, supplementing the primary transmission. Such transmission does not impair the primary transmitter's market; in fact, it enhances it. The copyright holder is helped and not hurt by such activity.

Section 203 and section 304(c)(6)(D) concern the termination of transfers and licenses. These sections would permit the author or his heirs to terminate the original transfer of his rights at any time during a period of 5 years beginning at the end of a specified time. However, section 203(b)(4) and parallel section 304(c)(6)(D), relating to transfers of copyrights subsisting after January 1, 1977, provide that an agreement to transfer rights subsequent to the termination of a prior transfer will not be valid unless made after the effective date of that termination or unless made to the original grantee or his successor in title.

We do not believe that the grantee or his successor should be in a preferred position to enter into an agreement for transfer prior to termination of the original transfer. We see no reason why all potential transferees should not have an equal opportunity to enter into such an agreement. It is therefore suggested that subparagraph (4) of section 203(b) and subparagraph (D) of section 304(c)(6) be deleted.

Section 302 substantially lengthens the time of copyright protection when compared with the duration of copyright in works under the present copyright law. At the present time, protection is granted for 28 years from the date of publication and may be renewed for a second 28 years, making a total potential term of 56 years in all cases. U.S. patents for any new and useful process, machine, manufacture or composition of matter or improvement thereof, are granted for a term of 17 years (35 U.S.C. 154). Patents for new, original, and ornamental designs of articles of manufacture are granted for a period up to 14 years (35 U.S.C. 173).

Patents for plants are granted for the same length of term as for new and useful processes, machines, manufacture or composition of matter (35 U.S.C. 161). Under the proposed bill, an author would receive a copyright for his life and 50 years after his death. Considering the average life expectancy of people today, this will double the length of copyright when compared with the present one for many works.

For anonymous works, pseudonymous works, and works made for hire, the term is somewhat less, but still significantly greater than provided by the present statute.

Senate report No. 93-983, pages 167-173, discusses various considerations for the duration of copyright in works. A major argument for increasing the term of copyright appears to be that the extension conforms with foreign laws which provide for longer terms of copyright than the present U.S. law. This argument is presented in the Senate today.

However, we do not believe that this should be the criterion for the proper length of copyright protection in the United States.

Under the Constitution, article 1, section 8, the purpose of a copyright is to promote the progress of science and useful arts by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries. While it may be urged that a copyright term of 28 years plus an additional 28 years might be insufficient to protect the interests of an author in his writings in view of the lengthening of the ordinary lifespan in modern times, the proposed bill, by its extended duration of the copyright term, appears to carry the protection far beyond the contemplation of the framers of the Constitution.

As an alternative, we propose to provide for the lengthening of the term of the copyright duration to be at least coextensive with the lifetime of the author. In this way, the author will be insured protection of his work for at least as long as he may live. Thus, we propose the substitution of an alternative provision to section 302(a), as follows:

(*a*) In general, copyright in a work created on or after January 1, 1977, subsists from its creation, and except as provided by the following subsections, endures for a term consisting of 56 years or the life of the author, whichever is greater.

A conforming amendment should also be made in section 302(b). The provisions of section 302(c) should be modified to limit the duration of anonymous works, pseudonymous works, and works made for hire, to a period of 56 years from the year of their creation or first publication.

Our proposal would carry out the constitutional concept of promoting the progress of science and useful arts. A 56-year copyright term, as may be extended by the lifetime of the author, is believed more than adequate to promote this constitutional purpose.

It has also been urged that growth in communications media has lengthened the commercial life of many works. This does not justify lengthening the term of a copyright beyond 56 years or the lifetime of the author because a lengthened commercial life is not necessarily consistent with the basic constitutional purpose.

The basic question with respect to copyright duration to be answered by the Congress is whether a doubling of the present copyright term for many works is desirable to promote the progress of science and useful arts. Other forms of Federal protection for creative works, such as patents for useful devices, plants, and designs, are all for periods of no more than 17 years. Copyrights in writings are already in a preferred position. We do not believe that the promotion of the progress of science and useful arts requires a doubling of the possible 56-year copyright period. Our alternative proposal would accommodate such valid concerns as may exist regarding the present law and, at the same time, carry out constitutional goals.

Section 405 deals with the effect of omission of the copyright notice. Under the present act, omission of notice on published copies of a work ordinarily places the work in the public domain (17 U.S.C. § 21). However, if such notice is accidentally omitted from a particular copy or copies, copyright is not lost; but innocent infringers who are misled by the accidental omission are not liable for infringement.

Under section 405 of the bill, omission of notice from "a relatively small number" of copies or phonorecords publicly distributed will not invalidate the copyright whether or not such omission was accidental.

Moreover, the omission of notice will not invalidate the copyright in a work if registration for the work is made within 5 years after the publication without notice and a reasonable effort is made to add notice to all copies or phonorecords distributed to the public in the United States after the omission is discovered.

As under the present law, innocent infringers who are misled by the omission of notice would not be liable in actual or statutory damages for infringement. But under H.R. 2223, they might have to surrender profits gained through the infringement and be subject to injunction or payment of a reasonable license fee for continuing their activity (section 405 (b)). These provisions would delete from 17 U.S.C. § 21 the provision that no permanent injunction shall be had unless the proprietor of the copyright shall reimburse the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

A copyright should be protected from invalidation only when the failure to provide notice was the result of an accident or mistake or in violation of the copyright owner's written requirement that, as a condition of authorization of public distribution, the copies or phonorecords bear the prescribed notice, and distribution of only a small number of such items has been made to the public. To permit, as proposed in section 405, a copyright owner to issue an entire publication of his work without notice and yet enforce the copyright tends to negate the purpose of notice. Although innocent infringers would incur no liability, they would still have to establish their innocence even where the omission was deliberate in many cases. We suggest that the section specifically be limited to the effect of omission of the copyright notice by accident or mistake.

We also believe it advisable that the words "particular copy or copies," contained in the present statute, be used instead of the broader and more general words "a relatively small number," found in section 405, to designate the limits within which notice may be omitted without loss of copyright. And we think the discretion in the court to order reimbursement to the innocent infringer should be retained.

Subject to specified exceptions, section 601 provides that the importation into or public distribution in the United States of more than 2,000 copies of a work consisting preponderantly of nondramatic literary material in English by an American or resident alien author and protected under the Copyright Code is prohibited, unless the portions consisting of such material have been manufactured in the United States or Canada.

This section would reenact in modified form a previous, highly protectionist nontariff trade barrier (17 U.S.C. §§ 16, 197). We do not believe that there is either a necessity or desirability for such a provision which creates an absolute bar to certain books published abroad.

Section 601 is entirely unrelated to questions of copyright. It does not protect authors at all. On the contrary, section 601 decreases the value of copyrights by preventing an American author from granting worldwide publication rights to an English publisher who offers more favorable compensation than an American publisher. Whatever the merits of the original "infant industry" justificaton for the manufacturing clause, the restriction is clearly unnecessary and inappropriate today in light of the strength and success of our industry and in

light of our Nation's commitment to eliminate nontariff barriers to international trade and insure vigorous competition.

For these reasons, section 601 should be stricken from the bill, and the manufacturing clause should be eliminated from our copyright law.

With respect to the Department's antipiracy program in the sound recording field, we note the following as areas where amendments are desirable:

Section 506 should be amended to provide for forfeiture of infringing articles in criminal cases resulting in convictions, and a new section should be added to provide for summary and judicial forfeitures in criminal cases.

At present, the Government has no clear-cut authority to destroy infringing articles which have been seized or otherwise obtained in the investigation or prosecution of a tape piracy case or, for that matter, any criminal copyright infringement case. This lack of specific authority has resulted in critical storage problems for many FBI and U.S. marshals' offices throughout the country and poses the embarrassing possibility that the Government may be ordered to return known infringing articles to a convicted defendant.

With proper amendments, H.R. 2223 could eliminate this most serious problem. We strongly urge the following revisions:

1. There should be added to section 506 a new subsection which should be designated as:

(b) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, equipment or other articles of whatever kind used or intended to be used in the manufacture, use, or sale of such infringing copies or phonorecords.

Present subsections (b), (c), and (d) need to be redesignated as subsections (c), (d), and (e), respectively.

A conforming amendment should be made to title 18, United States Code, section 2318, so that it reads as follows:

2318.

(a) (present section 2318)

(b) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed.

(c) Except to the extent they are inconsistent with the provisions of this title, all provisions of section (new forfeiture section decribed below), title 17, United States Code, are applicable to violations of subsection (a).

2. A new section should be added reading as follows:

(a) All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced; and all electronic, mechanical, or other devices for manufacturing, reproducing, assembling,

using, transporting, distributing, or selling such copies or phonorecords may be seized and forfeited to the United States.

(b) All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in title 19, United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in title 19 of the United States Code shall be performed with respect to seizure and forfeiture of all articles described in subsection (a) by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Proposed section 114 should be amended to provide for the copyright owner of a sound recording to have the right to make derivative works or it should be amended to clarify that persons other than the copyright owner do not have such a right absent consent of the copyright owner, notwithstanding the fact that the sound recording copyright owner would have no such right.

Section 114 limits the specific rights of a sound recording copyright owner to those granted to copyright owners by parts (1) and (3) of section 106. That is, sound recording copyright owners have the right:

(1) To reproduce the copyrighted work in copies or phonorecords; and

(3) To distribute copies, et cetera.

The right to prepare derivative works based on the copyrighted work (part (2) of section 106) is withheld from a sound recording copyright owner despite section 103 which states that such works are copyrightable and despite the fact that sound recording copyright owners are entitled to make and copyright derivative works under present law, 17 U.S.C. § 7. There is a real possibility that an unauthorized duplicator who made a "derivative" work by slightly altering the original copyrighted sound recording would claim that he did so legally since the copyright owner is given no exclusive right to make derivative works.

This potential legal problem could be eliminated by including part (2) of section 106 in the list in section 114 of exclusive rights granted to a sound recording copyright owner—an action which would grant to sound recording copyright owners no more rights than they presently possess.

Section 506 should be amended accordingly to include part (2) of section 106.

A third area for concern is proposed section 301 (pages 32–33), subparagraph (b), which states:

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

(3) Activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright * * * including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices * * *

We believe this language could be read as abrogating the antipiracy laws now existing in 29 States relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights "equivalent to * * * the exclusive rights within the general scope of copyright * * *."

Certainly such a result cannot have been intended for it would likely affect the immediate resurgence of piracy of pre-February 15, 1972, sound recordings. [Note: In any event, there would be no effect on sound recordings produced after February 15, 1972, since it would appear that the States cannot constitutionally enforce their antipiracy laws against the unauthorized duplication of these later recordings.]

We therefore urge that section 301(b) be amended to include a new subsection (4) as follows:

(4) Sound recordings fixed prior to February 15, 1972.

Proposed section 506(a) should be amended to correct the disparity of sanctions between second-time infringers of sound recording and motion picture copyrights and second-time infringers of other copyrights.

As written, section 506(a) provides for a maximum $10,000 fine and 3 years imprisonment for second-time infringers of all copyrights but sound recording and motion picture copyrights. Infringers of these latter two categories are subject, upon conviction of a second offense, to a maximum fine of $50,000 and 2 years imprisonment. We suggest that these latter infringements are sufficiently serious to warrant at least the same maximum imprisonment for second offenders as is applicable to second-time infringers of other copyrights, as well as the larger fine. The term of imprisonment prescribed should therefore be at least 3 years.

We support the substitution of "for purposes of commercial advantage or private financial gain" for the present requirement in 17 U.S.C. 104 that, to be criminal, infringements must be done "for profit." The provision in present section 104 for aiders and abettors has been removed, but these individuals will be liable to prosecution under 18 U.S.C. 2.

From the standpoint of making deterrents meaningful beyond the financial deterrent and provide a penalty for those who can "take" financial losses as a cost of business, it is recommended that a maximum 1-year term of imprisonment be included in the sanctions under proposed sections 116(d) and 506(b), (c), and (d), all of which are provisions the Department supports.

We also note that section 115, subparagraph (a)(1), states explicitly and with clarity what four courts of appeals have ruled is the scope of compulsory licensing under present law, namely, that absent authorization by the owner of a composition copyright, the duplication of a sound recording embodying a copyrighted musical composition is an infringement of the composition copyright even though the duplicator tenders royalty payments and otherwise attempts to comply with present compulsory licensing provisions. This is contained in the final sentence of subparagraph (a)(1), which reads:

A person may not obtain a compulsory license for use of the (nondramatic musical) work in the duplication of a sound recording made by another.

Since this prohibition is not limited to copyrighted sound recordings, the effect is to prevent the operation of the compulsory license mechanism for making copies of any sound recordings embodying copyrighted musical compositions. The Department wholeheartedly supports this provision.

Section 804 deals with procedures before the tribunal which determine adjustment of copyright royalties and their distribution under specified sections of the bill. We object to the provision in subsection (e) of this section that the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary may waive a requirement that a final decision in each proceeding be rendered by the tribunal within 1 year from the certification of the panel by the Register of Copyrights.

The constitutional division of duties among the three principal branches of the Government places in the Congress the legislative responsibilities. However, once a law has been enacted, it is for the executive branch to carry out the intents and purposes of the law as directed by the Congress. In our view, legislation, once enacted, should not be modified or waived by actions of a committee of the Congress. It is suggested that if waiver of the 1-year requirement is desirable under particular circumstances, these circumstances be generally outlined in the bill and that the tribunal be given authority upon good cause shown to extend the period of time for rendering decisions.

Of particular concern to this Department is the new form of copyright protection provided by title II of the bill.

This new form of protection is a hybrid between design patents, 35 U.S.C. 171–173, issued for a period of up to 14 years by the Patent Office for new, original and ornamental designs of articles of manufacture and the copyright laws which provide for registration and issuance of certificates of copyrights for the writings of authors. The new protection that is provided under the bill is not presently available under the copyright laws and can only be obtained through a design patent after an examination procedure which determines whether the ornamental design meets the criteria of patentability, including unobviousness in view of the prior art, as provided by 35 U.S.C. 102, 103.

While the protection period as proposed for the new type of ornamental design protection is only a maximum of 10 years as compared with the maximum of 14 years available for a design patent, it is granted without the need of meeting the novelty and unobviousness requirements of the patent statute.

A threshold consideration before finding that the needs are such that this new type of protection should be available is whether the benefits to the public of such protection outweigh the burdens. We believe that insufficient need has been shown to date to justify removing from the public domain and possible use by others of the rights and benefits proposed under the present bill for such ornamental designs. We believe that design patents, as are granted today, are as far as the public should go to grant exclusive rights for ornamental designs of useful articles in the absence of an adequate showing that the new

protection will provide substantial benefits to the general public which outweigh removing such designs from free public use.

While it has been said that the examination procedure in the Patent Office results in serious delays in the issuance of a design patent so as to be a significant problem and damaging to "inventors" of ornamental designs of useful articles, the desirable free use of designs which do not rise to patentable invention of ornamental designs of useful articles are believed to be paramount.

If the contribution made to the public by the creation of an ornamental design of a useful article is insufficient to rise to patentable novelty, the design should not be protected by the law. The Department of Justice has consistently opposed legislation of this character.

To omit Federal statutory protection for the form of a useful object is not to deny the originator of that form any remedy whatsoever. If he can prove that competitors are passing off their goods as the originator's by copying the product's design, he may bring an unfair competition action against such copyists. *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 Fed. 299 (C. A. 2 1917). See, also, *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

Quite apart from our opposition to the merits of title II, we also oppose enactment of the design protection provisions of this bill which would provide a new class of actions against the United States since the bill proposes to amend section 1498(a) to add the new type of design copyrights to the remedies available to inventors against the United States who have been issued U.S. patents when they are used by the United States without authorization of the owner.

For example, by amending section 1498(a) in this way, the Congress will be creating a completely new problem area fraught with difficulties for Government procurement.

Government contractors who "reverse engineer" alleged trade secrets in bidding competitively for Government contracts would now be faced with the necessity of designing around the "packaging looks" of a product covered by a design copyright which may not rise to the stature of patentable novelty under the patent laws. Thus, the "non-utilitarian looks" of a vehicle which may not be protectable as a design patent would be given copyright-type protection under the bill.

We, therefore, strongly oppose the new type of protection proposed by title II of the bill.

Section 1498(a) is also amended to provide for the first time for suits against the United States for unauthorized use of inventions, whether patented or unpatented.

Thus, it would appear to permit a suit based on a trade secret containing an unpatented invention. This also, we strongly oppose as inconsistent with limiting claims against the United States in 28 U.S.C. 1498 to those recognized by the patent and copyright laws. No adequate showing has been made that this type of protection, on balance, is in the public interest.

The provision in section 220 whereby simultaneous suit can be filed against the Administrator who carries out the provisions of title II, section 230, and an alleged infringer of the design in that it subjects an alleged infringer to suit in the same action even though the threshold question whether a certificate can issue under the provisions of

the law has not been decided as between the Administrator and the applicant for registration is believed undesirable. While it is not likely that the issuance of certificates of registration will be frequently refused if certain basic requisites of applications are met, nevertheless, if a situation should arise of a refusal of issuance of a certificate of registration by an Administrator, this should require a separate and distinctive action to secure issuance thereof, especially since governmental functions should not normally be mixed with the proprietary enforcement functions of courts in adjudicating private rights and remedies.

Certain technical corrections appear indicated in title II as follows:

Page 66, lines 22 and 23 appear reversed.

Page 73, line 22, "Section 311" should read "Section 211."

Page 73, line 26, "mortgage" should read "mortgagee."

Mr. KASTENMEIER. Thank you. I had difficulty understanding this. What you are referring to by using the term fair use is a proposal that we remove the uncertainty in connection with the present language in the bill; your suggestion does not substantively change the construction of the bill, but is more or less a clarification of it, in an attempt to remove the uncertainty?

Mr. GOLDBLOOM. I believe that is right.

Mr. KASTENMEIER. With respect to the term, of course, you clearly opposed the term proposed in the legislation. Why did the Department of Justice propose to change the term of 50 years to 56 or life? In other words, you perceive that there was an inequity on the part of authors who might seek terms for life or some other terms other than what is present in the law?

Mr. GOLDBLOOM. To the extent that it may be urged that the present term does not fully protect an author who may live a long life and has created a copyrighter's work in his early years. We believe that in constitutional concept, furnishing this protection to authors for their creations, that the present law may very well not be sufficient to protect that interest. We feel, however, that the bill as drafted goes far beyond the requirement or the need to protect authors or their creations. For that reason we would lengthen the 56-year term to the extent that it may last during the duration of the lifetime of the particular author.

Mr. KASTENMEIER. Had you wondered or determined why the rest of the world had gone to a life plus 50 at some point during the codification of their copyright laws?

Mr. GOLDBLOOM. We know they have gone that way. They have, we believe, different considerations that they pursue in furnishing this type of protection.

Mr. KASTENMEIER. How would theirs be different from our own? It is a very important point.

Mr. GOLDBLOOM. Well, we think that our own considerations flow from constitutional provisions of the concept of thereby protecting authors and to promote and advance science and useful arts for a limited time under the concept as expressed in the constitution.

In our view a term which extends for 56 years or the lifetime of the author, whichever is greater, would serve those constitutional goals of a limited time, which is a very clear constitutional concept Certainly, 150 years in our view is an extended period of time considerably above the authority granted.

Mr. KASTENMEIER. Do you have any jurisdiction or a single authority that says the contemplation of the framers of the Constitution is contrary to what the bill proposes?

Mr. GOLDBLOOM. It is only our reading of the Constitution.

Mr. KASTENMEIER. Would you answer the question of whether you found or looked for an authority?

Mr. GOLDBLOOM. We have looked, but haven't found any.

Mr. KASTENMEIER. It's all on the other side?

Mr. GOLDBLOOM. I don't know that it's there either.

Mr. KASTENMEIER. We have concluded that the State Department and most nations of the Earth are out of tune with the contemplation of the Founding Fathers?

Mr. GOLDBLOOM. I don't believe that most nations of the world are enacting legislation on the basis of the Constitution of the United States.

Mr. KASTENMEIER. In describing the effect of the term, I think you said it has the effect of doubling the present term, the present term being 50 years. It would make it 112 if you subtract the 50. It means that you are suggesting that after creation, the average author lives 62 years; is that correct?

Mr. GOLDBLOOM. I don't believe we intended to be precise in mathematics: it was an approximate figure that we were trying to get.

Mr. KASTENMEIER. To me it doesn't even seem approximate. I don't mean to nitpick, but I think the effect is somewhat overdescribed in saying that it doubled the term. Perhaps it might increase it by a probable figure of 50 percent but it scarcely doubles it.

I think you are entitled to take whatever point of view the Department desires to in that connection and I would say that the burden is on those proposing to change, to justify the change. I think that is the case and to that extent you are probably not to be criticized.

In title II, which covers ornamental design, is it your point of view that what is done is appropriate or is it your point of view that nothing should be done with respect to that which is proposed to be covered in title II?

Mr. GOLDBLOOM. It is our point of view that nothing should be done.

Mr. KASTENMEIER. I'm going to yield to the gentleman from New York, Mr. Pattison. I caught you by surprise that time, didn't I?

Mr. PATTISON. You surely did. I am interested also in his opinion on the term and I also respect your opinion that it should be something other than life plus 50, but I do wonder if you are serious about that, being that we are somehow constitutionally constrained for some period of time?

It is limited as opposed to unlimited. Certainly, it could be life plus 50 or 1,000. Constitutionally, couldn't we do anything we want?

Mr. GOLDBLOOM. Sure. My statement is not to say that there is any limitation but the provision is to promote and advance science and the useful arts and for the protection of authors.

Mr. PATTISON. You can protect them. We generally operate with notions against having rights fixed in perpetuity. Property rights certainly are not fixed that way. In other words, after our death we can enjoy still those rights in essence.

Mr. GOLDBLOOM. There are limitations on that generally in the law but we have here other considerations. Those considerations are, as I say, the promotion of science and the useful arts and the protection

of authors. If we focus on these, we find in the Constitution a sense of not having it for a very extensive term.

Mr. PATTISON. But, is there not any kind of definitional problem; you don't think it defines anything else than what is proposed in this bill?

Mr. GOLDBLOOM. No.

Mr. PATTISON. I'm interested in the fair-use provision that you have remarked on. It seems to me you are proposing as to nonprofit institutions that there be limited use of reproduction. In other words, schools, libraries, and things like that can reproduce without any consideration. If you want 50 copies for your class, then without having to buy 50 copies of the journal, you can go ahead and reproduce it and that is OK?

Mr. GOLDBLOOM. Yes.

Mr. PATTISON. And that is related to nonprofit organizations?

Mr. GOLDBLOOM. Yes, educational activities.

Mr. PATTISON. When I think in terms of the fact that many things are written for that market, how do you respond to that; in other words, if something is designed to be used in an educational institution which is normally nonprofit, how do you protect that author?

Mr. GOLDBLOOM. This is not designed to make unlimited reproductions of copyrighted material, but it is designed to expand and broaden.

Mr. PATTISON. Doesn't it make it unlimited when it is used in nonprofit institutions?

Suppose I am writing a school book and they are the only people that are going to use it. I am not going to sell my book in the local drugstore. The book I am writing is for the use of schools which are almost always theoretically nonprofit. How do I protect that author?

Isn't it true that under your remarks you would eliminate that protection?

Mr. GOLDBLOOM. Well, we think it could be protected perhaps by contractual rights between the publisher and the user. It is not our purpose to support unlimited copying of textbooks.

Mr. PATTISON. But, I think your remarks would do that; I think your suggestion would actually do that, wouldn't it? You exempt the fair-use provisions for educational use by nonprofit institutions. Therefore, if somebody reproduces a textbook and distributes it to their class, even 1,000 copies, that would not be prohibited under the act as changed by your suggestion?

Mr. GOLDBLOOM. I do not believe that we would want this construed to allow unlimited reproduction of textbooks where textbooks are written for purposes of education.

Mr. PATTISON. On the area of CATV, I take it your suggestion as to the CATV system within the normal grade B or normal viewing area where the signal reaches users, that the system would not have to pay anybody for that. As for importation of signals from outside that contour you would approve of them paying something?

Mr. GOLDBLOOM. Yes. It is only where there is reproduction of the signal within the local service area.

Mr. PATTISON. They then would not have to pay for that.

Mr. GOLDBLOOM. Yes, the importation into that area or exportation outside of that area would have to be compensated for.

Mr. PATTISON. Thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. No questions.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman.

May I ask you, sir, by what process does the Department of Justice come to these conclusions and, who is the "we" you keep referring to?

Mr. GOLDBLOOM. In our statement, broadly, we consulted various segments of the Department's divisions that have interests concerning this bill.

Mr. DRINAN. From what premise did you operate; why are you inferring something that is all within a legislative judgment? Is it your premise that the first amendment of the Constitution will provide that protection, or what?

Mr. GOLDBLOOM. We have different divisions within the Department that have an interest in this. The Antitrust Division has broad interests in the administration of the antitrust laws. The Criminal Division has an interest in the bill to the extent that there are criminal provisions.

Mr. DRINAN. An interest; what do you mean by that? From what premise do you operate; why are you here? In other words, do you want a law that is easy to execute or what is your major premise?

Mr. GOLDBLOOM. The Antitrust Division administers the antitrust laws and, to the extent they feel that the provisions in the copyright law have an effect upon their broad interest in the economy of our country, they have set forth their interests in this.

Mr. DRINAN. Did you testify in the Senate?

Mr. GOLDBLOOM. I personally did not testify.

Mr. DRINAN. On page 24 of your statement, I have been very interested in the fact that you mentioned here that:

> At present, the government has no clear-cut authority to destroy infringing articles which have been seized or otherwise obtained in the investigation or prosecution of a tape piracy case or, for that matter, any criminal copyright infringement case. This lack of specific authority has resulted in critical storage problems for many FBI and U.S. Marshal's offices throughout the country and poses the embarrassing possibility that the government may be ordered to return known infringing articles to a convicted defendant.

Do you have the power to seize them?

Mr. MURPHY. We have the power to seize them as evidence for violations of the law pursuant to a warrant, either pursuant to a warrant of arrest or to a search warrant. The problem arises when we seize substantial quantities of these things that are possessed with the intent to violate the law, and what to do with them. There is no clear-cut authority, and we stress the clear cut because there is provision in the copyright law for the destruction of materials that are infringement oriented.

Frankly, of course, until the enactment of Public Law 92-140, the privilege of seeking the destruction of those materials alluded only to the copyright owner. We think by the enactment of Public Law 92-140 the Federal Government has been vested with the authority for forfeiture and destruction of such infringing materials. But, in order to make it absolutely clear that that right exists in the Federal Government, we propose this forfeiture provision.

Mr. DRINAN. You suggest on page 24 that the FBI and U.S. marshal's office are posed with the embarrassing possibility that the Government may be ordered to return known infringing articles to a convicted defendant. Tell me more about that; can anyone sue?

Mr. MURPHY. Yes, sir, some have sought orders from the court.

Mr. DRINAN. Why would that be embarrassing if you are just doing what the law gives you authority to do?

Mr. MURPHY. We don't say it is embarrassing to do what the law provides for, but that there are erroneous judgments on the part of courts that have resulted in the return of materials to the violator.

Mr. DRINAN. But you want the authority over all of the equipment to be able to destroy it and never return it and not give any compensation for it when some of that could be used——

Mr. MURPHY. May I point out that the copyright owner has that authority right now, to seize the infringing materials.

Mr. DRINAN. That is an entirely different question.

Mr. MURPHY. Well, it is similar, it seems to me. These are materials that are used and possessed with the intent to violate the law.

Mr. DRINAN. Once again you are telling me, you are stating that the Government is continuing to possess these things when the owners may well come under the law, have the right to take possession of the infringing articles.

Is there anything here, sir, any policy position you take on the question of performance royalties?

As you know, the Senate is deeply divided on this. Is there anything in your statement as to any position that the Department of Justice takes on that?

Mr. GOLDBLOOM. No.

Mr. DRINAN. You have taken a position on other questions here. How come you missed this very fundamental one that this committee has to decide?

Mr. GOLDBLOOM. We attempted to limit our position to those areas of interest that the Department of Justice administers or represents, insofar as it represents other Federal agencies and departments.

Mr. DRINAN. I yield back.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Could you tell me, sir, what is the nature of the property rights in copyrighting, in this context. Is my copyright and my property right subject to execution and sale under a valid judgment of a court?

Mr. GOLDBLOOM. I believe it is.

Mr. DANIELSON. Could it be pledged as security and subsequently my security interest be foreclosed?

Mr. GOLDBLOOM. I believe it could be.

Mr. DANIELSON. In other words, it could be taken from me by law?

Mr. GOLDBLOOM. Yes; depending on the State law.

Mr. DANIELSON. Under section 104(c) the State Department representative pointed out that it favored section 104(c) which would tend to prohibit the enforcement of the valid judgment of a foreign court as to the copyright of one of its nationals within the United States; are you willing to comment on that?

Mr. GOLDBLOOM. I would prefer, if I might, to supplement the record on that. We have not had an opportunity before today to see the State

Department's position on that and the Department of State may very well have a position on that.

Mr. DANIELSON. I only make a request. I don't know some of the answers, but I am seeking them and any help that you could provide I would appreciate. I personally have a problem; I don't see how we can hang on to our comity with other nations if we refuse to recognize the judgment of their courts whether we agree or not. That poses a problem for me and I would appreciate any information you can get for me.

Mr. GOLDBLOOM. I will try.

Mr. DANIELSON. On the subject of cable television, you stated on page 16 that you feel that secondary transmission should be completely royalty free and free of liability so long as it is within the local service actually, because they are just filling in blind spots and improving transmission?

Mr. GOLDBLOOM. Yes.

Mr DANIELSON. And then you conclude that such transmission does not impair the primary transmitter's market and, in talking about the broadcasting stations, in fact you say it enhances it and I concur.

Then you say the copyright holder is helped and not hurt by such activity. What is the rationale for that?

Mr. GOLDBLOOM. To the extent that there might be an agreement between a copyright holder and the broadcaster concerning the use of the material, that the ability to enhance the viewing and the numbers of viewers within the local service area, would seem to be some consideration between the parties. If it is demonstrable, more people would have access to this.

Mr. DANIELSON. Are you saying in effect that when a copyright owner enters into a royalty agreement with a broadcaster, usually a TV broadcaster, that the amount of royalty which is paid is based at least in part upon the number of viewers which the station can demonstrate watch the program at time 7 p.m., for example?

Mr. GOLDBLOOM. It may be something other than royalties for the copyright; it may just be advertising ability, the possibility of advertising a copyrighted work.

Mr. DANIELSON. It is something of value to the copyright owner whether it is money or prestige or whatever, his sense of value is entirely subjective. I understand that, but the point is that the compensation in my money or money's worth to the copyright owner is based in part on the numbers of viewers?

Mr. GOLDBLOOM. That is correct.

Mr. DANIELSON. That is my understanding. All right, for that reason I will once again state your conclusion in the last sentence of paragraph 1 on page 17 of your statement, "the copyright holder is helped and not hurt by such activity."

What the copyright owner gets at this consideration is greater or less depending upon the rated viewing of the program at the time of the publication?

Mr. GOLDBLOOM. Yes.

Mr. DANIELSON. We are talking about a secondary transmission within the primary viewing area. Let us take for an example southern California which has our largest metropolitan area, Los Angeles. That area is a basin surrounded by a wall of mountains. It is a lovely area,

but you cannot get a primary transmission from Los Angeles because of the mountains. Suppose I have a cable system and I pick up the Los Angeles broadcast and take it by cable into the valley and the desert and distribute it. I'm going to call that, for our purposes a primary transmission to dispose of the secondary transmission you are talking about. Do you feel there should be an additional fee there?

Mr. GOLDBLOOM. Yes.

Mr. DANIELSON. Why?

Mr. GOLDBLOOM. Of course, the whole subject of these copyright laws has been debated long and hard to the extent that the Congress has attempted through this bill to accommodate these various interests. We feel that it has accomplished beneficially a great deal because there are competing interests here. Cable television does have the ability to extend beyond the mountainous area that you described, something which other systems are not naturally or not normally able to do.

Mr. DANIELSON. Is there anything natural or normal about the primary transmission; it is a mechanical device, an electronic device, a creation of man which has been out in these areas. Seriously, your rationale to support your statement that the copyright holder is helped and not hurt by such activity within the primary viewing area, does it not apply equally to the viewing over the mountains?

Mr. GOLDBLOOM. Well, it does, but in the context of the world of communications there is a need we feel to accommodate the interests of both the cable as well as the copyright owners.

Mr. DANIELSON. How would they not be accommodated? Is it not a fact that the royalty agreement between the copyright holder and the broadcasting station is based in part on the number of viewers and, in calculating the number of them, the broadcasting station includes those who are reached through the cable transmission on the other side of the mountain?

Mr. GOLDBLOOM. I don't know that that is necessarily correct.

Mr. DANIELSON. Do you have any documentation or authority for that?

Mr. GOLDBLOOM. ould have to look into that.

Mr. DANIELSON. I don't expect you to know answers on a multitude of problems, but I think you are going to find in the advertising business the rates that the broadcaster receives for advertisements—and that is what keeps him alive—are based on the viewers; the rate he pays the copyright holder is based on the viewers.

So, if you expand the number of viewers, you are going to expand the advertising rates and the amount he pays for his royalties. I think you will find that to be the case. Assuming that is true, then would not that be your rationale on secondary transmission whether it be over the mountain or inside the mountain, if you are applying that rationale?

Mr. GOLDBLOOM. I think it would.

Mr. DANIELSON. On fair use, Mr. Pattison has brought out the analogy of making textbooks for a school. This poses a real problem in my mind yet, I am hoping it will be cleared up. I am sure we agree that if the school were to go through a first-class printing operation and reprint, set plates, and type, print and bind a copy of a book, you would have an infringement and there would be royalties.

Then back down one step instead of doing the traditional photo-offset job, but it be otherwise the same, I think you would agree you still have a copyright violation. So, if you back down to a mimeograph and suppose you typed on a stencil and then bound it with a nice, hardboard cover, et cetera, I think you would still contend, and many of us would, that you would still have a violation.

You take the same mimeograph, but you don't bind it and have just loose sheets now you are confronted with whether or not it is a copyright violation and, if you go to Xerox, now you have two questions; what do you do with that?

I have gone through this step by step on purpose. I wonder if we are coming to grips with the real issue? Should we basically copyright on the type of mechanical reproduction used or upon the number of copies; is it valid to say it is the use to which they are put, whether they go to a nonprofit school? I don't know if there is a valid way of determining this and I am seeking help because I don't understand it.

Are we saying when we talk about schools and churches, are we saying we must be good to the nonprofit organizations? There certainly isn't this consideration on brooms and buckets and typewriters and the people who sell printed books to the schools make a profit. I don't know the answer and I want to find out. Thank you.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. On page 16 of your statement, you indicate that secondary transmission within the local service area of the primary transmitter finds the cable system only filling gaps or improving reception in the service area of the primary transmitter and supplementing the primary transmission. Of course, the primary transmitter has sponsors; when the secondary transmitter within this area picks up the program does he not also run the commercials and wouldn't that have an adverse effect on possibly discouraging a prospective sponsor?

In other words, I don't see how that wouldn't really dilute the effectiveness of a sponsored program.

Mr. GOLDBLOOM. I am not certain specifically how the FCC rules operate, but I believe they would have to reproduce the program in its entirety with the sponsored portions.

Mr. DANIELSON. I am willing to be corrected, but it is my understanding that when a cable system is picked up by a broadcaster that it is transmitted in its entirety and they do not excise the commercials. Therefore, the sponsor gets the advertising over the mountain as well as inside of the mountain.

Mr. RAILSBACK. I see. First of all in respect to Father Drinan's question, and comments, I certainly do welcome you; we invited you to testify. Secondly, with respect to forfeiture, aren't we talking about record pirates who have actually stolen somebody's work?

Mr. GOLDBLOOM. Yes.

Mr. RAILSBACK. I just want to conclude by saying that I do not find that particular recommendation draconian. I disagree with some others, but I thank you.

Mr. KASTENMEIER. The Chair will state that indeed you were invited along with the Justice Department, along with the Departments of Commerce, and State. As a matter of fact, your predecessor appeared

in this room 10 years ago on a similar bill and you are aware of that I am sure.

Mr. GOLDBLOOM. Yes.

Mr. KASTENMEIER. In that connection, what was being considered was a similar bill and any of the issues you spoke to this morning were expressed then. Had the views of the Department of Justice, the Antitrust Division and any other parts of that, changed or are they the same as they were 10 years ago with respect to this bill?

Mr. GOLDBLOOM. I believe to the extent that issues were then in existence, our position is close to what they were then. I don't know because we have not examined each position we took then in light of the position we have taken today, but I think there is a similarity and identity.

Mr. KASTENMEIER. Do I understand that you regard as the most important issues, the issue of ornamental design in title II, term and the manufacturing clause; those are among the more important positions, issues as far as the Department of Justice is concerned?

Mr. GOLDBLOOM. Yes, Mr. Chairman, and CATV.

Mr. KASTENMEIER. If the bill is reported in its present form, will it be the disposition of the Justice Department to oppose it, to recommend that the President veto the bill?

Mr. GOLDBLOOM. I cannot really speak to that at the moment. I think there is a different function when one is recommending to the President, what he should do with legislation from when one appears before the Congress while it is contemplating.

Mr. KASTENMEIER. It is your stance then that you are making certain recommendations and stating your positions on whether the bill should be passed or not passed; that is your reason for being here?

Mr. GOLDBLOOM. Yes.

Mr. KASTENMEIER. Thank you for your appearance.

[The prepared statement of Mr. Goldbloom follows:]

STATEMENT OF IRWIN GOLDBLOOM, DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION, DEPARTMENT OF JUSTICE

Mr. Chairman: I am pleased to respond to the Committee's invitation to present the views of the Department of Justice on H.R. 2223, A Bill for the General Revision of the Copyright Law, Title 17 of the United States Code, and for other purposes.

We are in sympathy with the general purpose of Title I of the Bill, to provide a thorough revision and updating of the Copyright Law, Title 17, United States Code. However, as set out below, we recommend certain modifications in the proposed revision. We oppose Title II of the Bill which creates a new type of intellectual property, a hybrid between a copyright and a design patent.

H.R. 2223 and its companion bill, S. 22, are nearly identical with S. 1361 as passed by the Senate in the 93d Congress on September 9, 1974. There are, however, technical and perfecting amendments and changes required by the enactment of Public Law 93-573, providing for interim copyright extension and increased penalties for tape piracy. A section-by-section analysis of S. 1361 is part of Senate Report No. 93-983, 93d Cong., at pages 102-228. Further details as to the history of this copyright revision bill appear in the same Report at pages 101-103. The summary below is specificially directed to features of the Bill of particular concern to this Department.

Section 107 relates to the "fair use" doctrine. This is fully discussed in Senate Report No. 93-983, pages 115-120. The scope of fair use in copying is illustrated to include reproduction by a teacher or a student of a *small part of a work* to illustrate a lesson (S. Report 93-983, p. 115). This example, therefore, does not include reproduction of the entire work to illustrate a lesson. In determining

whether the use made of a work in a particular case is a fair use, a court is to consider as factors the purpose and character of the use, the nature of the copyrighted work, the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and the effect of the use upon the potential market for or value of the copyrighted work. As to the reproduction of entire works for classroom use, the doctrine of fair use would be applied "strictly" (S. Rept. 93-983, p. 117).

Sections 108, 110, and 111 cover exemptions from liability for copyright infringement in the fields of library and archive reproduction (Section 108), the exemption of certain performances and displays, such as in classrooms in face-to-face teaching activities of a nonprofit educational institution (Section 110) and the retransmission of a primary transmission simultaneously with the primary transmission or nonsimultaneously with the primary transmission if by a "cable system" outside defined geographic areas ("secondary transmissions" of Section 111).

Section 302 establishes a new term for the duration of copyright. Generally, this is for a term consisting of the life of the author and fifty years after his death. In the case of joint works, the period of fifty years commences upon the death of the last surviving author. For anonymous works, pseudonymous works, and works made for hire, the copyright period is 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. Where one or more authors are identified for an anonymous or pseudonymous work before the end of the copyright term, the longer period of copyright terminating fifty years after the death of the author then applies.

Section 405 deals with the effect of the omission of the copyright notice. Section 411 covers infringement actions in certain situations.

Section 506 contains special provisions applying to persons who infringe willfully and for purposes of commercal advantage. With respect to copyright in a sound recording, for the first such offense, a person is fined not more than $25,000 or imprisoned for not more than one year, or both. For any subsequent offense a person is fined not more than $50,000 or imprisoned not more than two years, or both. Section 507 provides a three-year statute of limitations for both criminal proceedings pursuant to provisions of the Bill after the cause of action arose (under the provisions of Sections 116 and 506) and for civil actions after the claim accrued.

Section 601 affords preferential protection to publishers and printers of the United States and Canada (Report 93-983, pp. 195-200).

Sections 801-809 are concerned with the Register's duties to collect royalties and make determinations concerning the adjustment of copyright royalty rates for certain uses where compulsory licenses are provided by the Bill. They also relate to his duties to determine in certain circumstances the distribution of these royalties deposited with the Register of Copyrights. Section 803 provides for selection of membership of the tribunal to make necessary determinations with respect to royalty matters, to be on the basis of a list of names furnished by the American Arbitration Association to the Register of Copyrights. Section 804 provides for procedures to be followed by the tribunal in making its determinations. Subsection (e) of Section 804 directs that the tribunal shall render a final decision in each proceeding within one year from the certification of the panel, certified by the Register of Copyrights on the basis of the names furnished by the American Arbitration Association. This subsection further provides that the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary, upon a showing of good cause, may waive this requirement of the rendering of a final decision within one year from the certification of the panel in a particular proceeding. The judicial review for tribunal final determinations, provided in Section 809 (concerning the distribution of royalty fees), is limited. A court may vacate, modify or correct such a determination if it was procured by corruption, fraud or undue means, where a member of the panel was partial or corrupt, and where any member of the panel was guilty of misconduct by which the rights of any party were prejudiced.

Provisions for the protection of ornamental designs of useful articles appear in Title II of the Bill. Section 201 provides that authors or proprietors of an original ornamental design of a useful article may secure a period of protection, except for certain subject areas set out in Section 202, for a period provided in Section 205. Section 201 contains definitions of the terms "useful article", "design of a useful article", "ornamental", and "original" as needed for purposes of

the particular protection provided by this Title. Section 204 provides that protection commences on the date when the design is first made public, either by being exhibited, publicly distributed, or offered for sale or sold to the public. Section 205 provides that the term of protection extends for five years, subject to being renewed for an additional five years prior to the expiration of the initial term. Section 206 provides for certain design notices to be applied to the products protected, and Section 207 limits recovery for infringement if the design notice requirements of Section 206 have been omitted. However, actual notice of design protection to a particular person can take the place of the design notice requirement of Section 206.

Section 209 of Title II provides for loss of protection if registration of the design is not made within six months after the date on which the design was first made public, who may make application for renewal registration of a design protected under the Bill, how and under what conditions and with what supporting papers a design protected under the Bill can be renewed.

Section 212 of Title II deals with the examination of the design application and provides for cancellation of registrations on application of a person who believes he is or will be damaged by a registration under this Title. Grounds for cancellation are that the design is not subject to protection under the provisions of the Title.

Section 220 of Title II provides remedies for infringement of a design protected under this Title. It provides for a civil action to have judicial review of a final refusal of the Administrator to register the design as for infringement if commenced within a time period specified by the Administrator of the Title, but not less than sixty days after the decision, and permits simultaneous remedy for infringement *by the same action* if the court adjudges the design subject to protection under this Title. This would appear to mean that the infringer would have to be joined as a party defendant with the Administrator of this Title. The requirements for such an action are that the design proprietor has filed and prosecuted to final refusal an application for registration of the design, a copy of the complaint in the action is delivered to the Administrator within ten days after commencement of the action, and the defendant has committed acts which would constitute infringement of the design.

Section 221 of Title II gives courts jurisdiction of actions under this Title and authority to grant injunctions to prevent infringement, including temporary restraining orders and preliminary injunctions.

Section 222 of Title II relates to recovery of infringement, setting maximum amounts of recovery per infringing copy by way of compensation and provides for the delivery for destruction or other disposition of any infringing articles.

Section 223 of Title II provides for cancellation of a registration of a design by a court and certification by the court of such order to the Administrator.

Section 227 of Title II provides that copyright protection under Title I, when utilized in an original ornamental design of a useful article, may still be a design work eligible for protection under the provisions of this Title.

The issuance of a design patent for an ornamental design for an article of manufacture under the patent laws, Title 35 U.S.C., terminates any protection of the design under this Title.

Section 229 of Title II provides that nothing in this Title annuls or limits common law or other rights or remedies available to a person with respect to a design which has not been made public as provided in this Title or any trademark right or right to be protected against unfair competition.

Section 232 of Title II amends various other statutes. Of particular importance to the Department is the revision proposed for Title 28 U.S.C. § 1498(a) to provide that whenever a registered design or invention is used or manufactured by or for the United States without license of the owner thereof, the owner's remedy shall be by action against the United States in the Court of Claims for recovery of reasonable and entire compensation. Use or manufacture of a registered design or invention by a contractor, subcontractor or any person, firm or corporation for the government and with the authorization or consent of the government is to be construed as use or manufacture for the United States. Use or manufacture by or for the United States of any article owned, leased, used by or in the possession of the United States prior to, in the case of an invention, July 1, 1918, and for registered designs, prior to July 1, 1978, is not to be the basis of an award under this Section. Government employees have the right to sue the government under this Section except when in a position to order, influence or induce use of the registered design or invention by the government. Further excluded as a basis for claim under this Section are claims by a regis-

trant or patentee or assignee thereof when the design or invention was related to the official functions of the employee, in cases in which such functions included research and development, or in making of which government time, materials or facilities were used.

Section 233 provides that Title II of the Bill shall take effect one year after enactment of this Act.

Section 234 precludes a retroactive effect for the provisions of the design protection of the Bill.

Section 106 states generally the basic rights of copyright owners. Following sections of the same chapter set forth limitations and exceptions to those rights. The public interest in the promotion of education and scholarly pursuits calls for a careful consideration of such circumstances as may impede the dissemination of knowledge. In this regard, Section 107 of the Bill, dealing with "fair use" of copyrighted information, leaves unclear the extent to which librarians can reproduce works for use in libraries. It would seem in the public interest to work an accommodation between the copyright and such reproduction. But, as a doctrine applied on a case-by-case basis, "fair use" renders it uncertain whether, without infringement, librarians or library patrons can make copies of library materials for the patrons' use. Because of the advantages of the economical and speedy means of reproduction now available in libraries, it would be socially desirable not to discourage use thereof by uncertainty over the extent of the "fair use" doctrine. Thus, we strongly believe that a definition in the Bill of the doctrine as applied to such reproduction in libraries is definitely needed. Moreover, defining the meaning of "fair use" in this connection also could serve to reduce uncompensated infringement. To carry out our suggestion to give maximum certainty as to "what is a fair use," and give more meaningful scope to the exemptions from copyright liability of Section 108 discussed below, we suggest the following changes: Section 107, last line (p. 9, line 9), change "work." to—

> "work; provided that nothing contained in this Section shall be construed to limit the use by reproduction in whole or in part in copies or phonorecords or by other means specified in Section 106 whenever used in nonprofit educational activities."
>
> Reason: Clarity of scope of fair use for educational activities.
>
> Section 108(d), lines 5–6 (p. 10, lines 1, 2), delete "of a small part".
>
> Reason: Libraries should be able to reproduce entire work for scholarship.
>
> Section 108(e), lines 4–7 (p. 10, lines 13–16), delete "if the library or archive has * * * at a fair price,"
>
> Reason: Too difficult and cumbersome to make purchase investigation; discourages use.

Section 108, in subsection (a), provides that it shall not infringe a copyright for a library or archives to reproduce or distribute no more than one copy or phonorecord of a work under conditions specified in subsequent parts of the Section. These conditions require, among other things, that the reproduction or distribution be made without any purpose of commercial advantage and that the collections of the library or archives be open to the public or available to specialized researchers, whether or not affiliated with the library or archives involved or with the institution of which the library or archives is a part. Under subsection (b), the rights of reproduction and distribution free from liability would apply to a copy or phonorecord of an unpublished work duplicated in facsimile solely for preservation and security or for deposit for research use in a library or archives of the type covered by the Section. Under subsection (c), the exemption from infringement would apply to a duplication in facsimile of a published work solely for replacement of a copy or phonorecord that is damaged, deteriorating, lost or stolen, if after reasonable effort it has been determined that an unused replacement cannot be obtained at a fair price.

The rights of reproduction and distribution under Section 108 extend to the isolated and unrelated reproduction or distribution of a single copy or phonorecord of either a published or unpublished work on separate occasions unless the library or archives is aware or has substantial reason to believe that it is engaging in a related or concerted reproduction or distribution or engages in a systematic reproduction or distribution of a copy of an item forming part of a copyrighted collection or periodical issue or of a copy or phonorecord of a small part of any other copyrighted work.

As we read this provision, it will not prevent libraries and archives from reproducing works in machine-readable language in connection with the storage

and use of computerized information systems. We hope that the House legislative history of the Bill will clearly support this construction, for the storage and use of data in such systems is of great importance to repositories and sources of scholarly research material. To impose copyright liability impeding the storage of such data would be socially undesirable. If our interpretation of Section 108 is wrong, we recommend that the Section be changed to extend the applicable exemption to reproduction in machine-readable language for storage and use in information systems.

The ease of transfer of computerized data is another area in which H.R. 2223 raises a problem. Universities, research agencies, government, and private industry are developing information networks using computers and other electronic equipment to speed the transfer of information from source to user. H.R. 2223 does not provide a method by means of which information systems users can easily obtain the permission of copyright owners for use of their material. The difficulty and loss of time entailed in many cases in contacting owners may inhibit users from including material in their systems. Or users may be unable to employ material in their systems in sufficient time in situations where speed is essential. It would appear in the public interest for the Bill to contain some guarantee that information systems which are willing to pay royalties for material used can obtain easier access to copyrighted information, at least in high-priority areas such as scientific and technological works.

The proposed legislation also leaves unclear at what point in the use of computerized copyrighted material the liability for royalty payment attaches. Under H.R. 2223, it would seem that placing copyrighted data into a computer (which may form part of an information system) might infringe the copyright. Since the use of computers for storage and retrieval of information to some extent may replace the sale of books, in most cases the payment of royalties should be required. However, just where in the process the royalty payment should be assessed, is open to question. We believe it unwise to levy a "toll" at the "input" stage in the process. Levying on the "input" into computers could impede the development of information systems and may render meaningless any exemption for the use of computerized information for educational purposes which may be read into H.R. 2223.

The subject of the application of copyright to community antenna television has presented considerable difficulty in previous drafts of proposed revisions of the Copyright Code. H.R. 2223 attempts a compromise between the extreme positions of complete liability for infringement of copyright by secondary transmission by CATV on one hand and almost complete freedom from liability on the other hand. While we support the imposition of a degree of liability upon CATV, we believe that H.R. 2223 should provide an area of free use for such systems within the local service area.

The first part of subsection (c) of Section 111 provides for compulsory licensing of secondary transmissions of a primary transmission by an FCC licensed broadcast station upon compliance with the notice of ownership and the payment provisions of subsection (d), and (A) the signals of the primary transmission are exclusively aural and the secondary transmission is permissible under the rules, regulations or authorizations of the FCC; (B) where the CATV system is, in whole or in part, within the local service area of the primary transmitter; or (C) where carriage of the signals comprising the secondary transmission is permissible under the FCC rules, regulations or authorizations. We strongly urge, with respect to (B), that the secondary transmittal should be completely free of liability; hence, royalty-free or no licensing would be in order. The secondary transmission in such a situation, where the CATV system is, in whole or in part, within the local service area of the primary transmitter, finds the cable system only filling gaps or improving reception in the service area of the primary transmitter, supplementing the primary transmission. Such transmission does not impair the primary transmitter's market; in fact, it enhances it. The copyright holder is helped and not hurt by such activity.

Section 203 and Section 304(c)(6)(D) concern the termination of transfers and licenses. These Sections would permit the author or his heirs to terminate the original transfer of his rights at any time during a period of five years beginning at the end of a specified time. However, Section 203(b)(4) and parallel Section 304(c)(6)(D) (relating to transfers of copyrights subsisting after January 1, 1977) provide that an agreement to transfer rights subsequent to the termination of a prior transfer will not be valid unless made after the effective date of that termination or unless made to the original grantee or his

successor in title. We do not believe that the grantee or his successor should be in a preferred position to enter into an agreement for transfer prior to termination of the original transfer. We see no reason why all potential transferees should not have an equal opportunity to enter into such an agreement. It is therefore suggested that subparagraph (4) of Section 203(b) and subparagraph (D) of Section 304(c)(6) be deleted.

Section 302 substantially lengthens the time of copyright protection when compared with the duration of copyright in works under the present copyright law. At the presnt time, protection is granted for 28 years from the date of publication and may be renewed for a second 28 years, making a total potential term of 56 years in all cases. United States patents for any new and useful process, machine, manufacture or composition of matter or improvement thereof, are granted for a term of 17 years. 35 U.S.C. 154. Patents for new, original, and ornamental designs of articles of manufacture are granted for a period up to 14 years. 35 U.S.C. 173.

Patents for plants are granted for the same length of term as for new and useful processes, machines, manufacture or compositions of matter. 35 U.S.C. 161. Under the proposed Bill, an author would receive a copyright for his life and 50 years after his death. Considering the average life expectancy of people today, this will double the length of copyright when compared with the present one for many works. For anonymous works, pseudonymous works, and works made for hire, the term is somewhat less but still significantly greater than provided by the present statute.

Senate Report No. 93-983, pages 167-173, discusses various considerations for the duration of copyright in works. A major argument for increasing the term of copyright appears to be that the extension conforms with foreign laws which provide for longer terms of copyright than the present United States law. This argument is presented in the Senate study. However, we do not believe that this should be the criterion for the proper length of copyright protection in the United States.

Under the Constitution, Article 1, Section 8, the purpose of a copyright is to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries. While it may be urged that a copyright term of 28 years plus an additional 28 years might be insufficient to protect the interests of an author in his writings in view of the lengthening of the ordinary life span in modern times, the proposed Bill, by its extended duration of the copyright term, appears to carry the protection far beyond the contemplation of the framers of the Constitution. As an alternative, we propose to provide for the lengthening of the term of the copyright duration to be at least coextensive with the lifetime of the author. In this way, the author will be insured protection of his work for at least as long as he may live. Thus, we propose the substitution of an alternative provision to Section 302(a) as follows:

> (a) IN GENERAL.—Copyright in a work created on or after January 1, 1977, subsists from its creation and, except as provided by the following subsections, endures for a term consisting of 56 years or the life of the author, whichever is greater.

A conforming amendment should also be made in Section 302(b). The provisions of Section 302(c) should be modified to limit the duration of anonymous works, pseudonymous works, and works made for hire, to a period of 56 years from the year of their creation or first publication.

Our proposal would carry out the constitutional concept of promoting the progress of science and useful arts. A 56-year copyright term, as may be extended by the lifetime of the author, is believed more than adequate to promote this constitutional purpose.

It has also been urged that growth in communications media has lengthened the commercial life of many works. This does not justify lengthening the term of a copyright beyond 56 years or the lifetime of the author because a lengthened commercial life is not necessarily consistent with the basic constitutional purpose.

The basic question with respect to copyright duration to be answered by the Congress is whether a doubling of the present copyright term for many works is desirable to promote the progress of science and useful arts. Other forms of federal protection for creative works, such as patents for useful devices, plants, and designs, are all for periods of no more than 17 years. Copyrights in writings are already in a preferred position. We do not believe that the

promotion of the progress of science and useful arts requires a doubling of the possible 56-year copyright period. Our alternative proposal would accommodate such valid concerns as may exist regarding the present law and, at the same time, carry out constitutional goals.

Section 405 deals with the effect of omission of the copyright notice. Under the present Act, omission of notice on published copies of a work ordinarily places the work in the public domain (17 U.S.C. § 21). However, if such notice is accidentally omitted from a particular copy or copies, copyright is not lost; but innocent infringers who are misled by the accidental omission are not liable for infringement. Under Section 405 of the Bill, omission of notice from "a relatively small number" of copies or phonorecords publicly distributed will not invalidate the copyright whether or not such omission was accidental. Moreover, the omission of notice will not invalidate the copyright in a work if registration for the work is made within five years after the publication without notice and a reasonable effort is made to add notice to all copies or phonorecords distributed to the public in the United States after the omission is discovered. As under the present law, innocent infringers who are misled by the omission of notice would not be liable in actual or statutory damages for infringement. But under H.R. 2223, they might have to surrender profits gained through the infringement and be subject to injunction or payment of a reasonable license fee for continuing their activity (Section 405(b)). These provisions would delete from 17 U.S.C. § 21 the provision that no permanent injunction shall be had unless the proprietor of the copyright shall reimburse the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

A copyright should be protected from invalidation only when the failure to provide notice was the result of an accident or mistake or in violation of the copyright owner's written requirement that, as a condition of authorization of public distribution, the copies or phonorecords bear the prescribed notice, and distribution of only a small number of such items has been made to the public. To permit, as proposed in Section 405, a copyright owner to issue an entire publication of his work without notice and yet enforce the copyright tends to negate the purpose of notice. Although innocent infringers would incur no liability, they would still have to establish their innocence even where the omission was deliberate in many cases. We suggest that the Section specifically be limited to the effect of omission of the copyright notice by accident or mistake. We also believe it advisable that the words "particular copy or copies", contained in the present statute, be used instead of the broader and more general words "a relatively small number," found in Section 405, to designate the limits within which notice may be omitted without loss of copyright. And we think the discretion in the court to order reimbursement to the innocent infringer should be retained.

Subject to specified exceptions, Section 601 provides that the importation into or public distribution in the United States of more than 2,000 copies of a work consisting preponderantly of nondramatic literary material in English by an American or resident alien author and protected under the Copyright Code is prohibited, unless the portions consisting of such material have been manufactured in the United States or Canada. This Section would reenact in modified form a previous, highly protectionist nontariff trade barrier (17 U.S.C. 16, 107). We do not believe that there is either a necessity or desirability for such a provision which creates an absolute bar to certain books published abroad.

Section 601 is entirely unrelated to questions of copyright. It does not protect authors at all. On the contrary, Section 601 decreases the value of copyrights by preventing an American author from granting worldwide publication rights to an English publisher who offers more favorable compensation than an American publisher. Whatever the merits of the original "infant industry" justification for the manufacturing clause, the restriction is clearly unnecessary and inappropriate today in light of the strength and success of our industry and in light of our nation's commitment to eliminate nontariff barriers to international trade and ensure vigorous competition.

For these reasons, Section 601 should be stricken from the Bill, and the "manufacturing clause" should be eliminated from our copyright law.

With respect to the Department's anti-piracy program in the sound recording field, we note the following as areas where amendments are desirable:

Section 506 should be amended to provide for forfeiture of infringing articles in criminal cases resulting in convictions, and a new section should be added to provide for summary and judicial forfeitures in criminal cases.

At present, the government has no clear cut authority to destroy infringing articles which have been seized or otherwise obtained in the investigation or prosecution of a tape piracy case or, for that matter, any criminal copyright infringement case. This lack of specific authority has resulted in critical storage problems for many F.B.I. and U.S. Marshals' offices throughout the country and poses the embarrassing possibility that the government may be ordered to return known infringing articles to a convicted defendant.

With proper amendments, H.R. 2223 could eliminate this most serious problem. We strongly urge the following revisions:

1. There should be added to Section 506 a new subsection which should be designated as:

(b) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all infringing copies or phonorecords and all implements, devices, equipment or other articles of whatever kind used or intended to be used in the manufacture, use, or sale of such infringing copies or phonorecords.

Present subsections (b), (c), and (d) need to be redesignated as subsections (c), (d), and (e), respectively.

A conforming amendment should be made to Title 18, United States Code, Section 2318, so that it reads as follows:

Section 2318:

(a) (present Section 2318).

(b) When any person is convicted of any violation of subsection (a), the court in its judgment of conviction shall, in addition to the penalty therein prescribed, order the forfeiture and destruction or other disposition of all counterfeit labels and all articles to which counterfeit labels have been affixed or which were intended to have had such labels affixed.

(c) Except to the extent they are inconsistent with the provisions of this title, all provisions of section [new forfeiture section described below] Title 17, United States Code, are applicable to violations of subsection (a).

2. A new section should be added reading as follows:

(a) All copies or phonorecords manufactured, reproduced, distributed, sold, or otherwise used, intended for use, or possessed with intent to use in violation of section 506(a), and all plates, molds, matrices, masters, tapes, film negatives, or other articles by means of which such copies or phonorecords may be reproduced, and all electronic, mechanical, or other devices for manufacturing, reproducing, assembling, using, transporting, distributing, or selling such copies or phonorecords may be seized and forfeited to the United States.

(b) All provisions of law relating to (1) the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violations of the customs laws contained in Title 19, United States Code, (2) the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof, (3) the remission or mitigation of such forfeiture, (4) the compromise of claims, and (5) the award of compensation to informers in respect of such forfeitures, shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions of this section; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the provisions of the customs laws contained in Title 19 of the United States Code shall be performed with respect to seizure and forfeiture of all articles described in subsection (a) by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

Proposed Section 114 should be amended to provide for the copyright owner of a sound recording to have the right to make derivative works or it should be amended to clarify that persons other than the copyright owner do not have such a right absent consent of the copyright owner, notwithstanding the fact that the sound recording copyright owner would have no such right.

Section 114 limits the specific rights of a sound recording copyright owner to those granted to copyright owners by parts (1) and (3) of Section 106. That is, sound recording copyright owners have the right:

(1) to reproduce the copyrighted work in copies or phonorecords; and

* * * * * * *

(3) to distribute copies, etc.

The right to prepare derivative works based on the copyrighted work (part 2 of Section 106) is withheld from a sound recording copyright owner despite Section 103 which states that such works are copyrightable and despite the fact that sound recording copyright owners are entitled to make and copyright derivative works under present law, 17 U.S.C. § 7. There is a real possibility that an unauthorized duplicator who made a "derivative" work by slightly altering the original copyrighted sound recording would claim that he did so legally since the copyright owner is given no exclusive right to make derivative works.

This potential legal problem could be eliminated by including part (2) of Section 106 in the list in Section 114 of exclusive rights granted to a sound recording copyright owner—an action which would grant to sound recording copyright owners no more rights than they presently possess. Section 506 should be amended accordingly to include part (2) of Section 106.

A third area for concern is proposed Section 301 (pages 32-33), subparagraph (b), which states:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any state with respect to:
>
> * * * * * * *
>
> (3) activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright . . . including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices. . . .

We believe this language could be read as abrogating the anti-piracy laws now existing in 29 states relating to pre-February 15, 1972, sound recordings on the grounds that these statutes proscribe activities violating rights "equivalent to . . . the exclusive rights within the general scope of copyright. . . ." Certainly such a result cannot have been intended for it would likely effect the immediate resurgence of piracy of pre-February 15, 1972 sound recordings. (Note: in any event, there would be no effect on sound recordings produced after February 15, 1972, since it would appear that the states cannot constitutionally enforce their anti-piracy laws against the unauthorized duplication of these later recordings.) We therefore urge that Section 301(b) be amended to include a new subsection (4) as follows:

> (4) Sound recordings fixed prior to February 15, 1972.

Proposed Section 506(a) should be amended to correct the disparity of sanctions between second-time infringers of sound recording and motion picture copyrights and second-time infringers of other copyrights. As written, Section 506(a) provides for a maximum $10,000 fine and three years imprisonment for second-time infringers of all copyrights but sound recording and motion picture copyrights. Infringers of these latter two categories are subject, upon conviction of a second offense, to a maximum fine of $50,000 and two years imprisonment. We suggest that these latter infringements are sufficiently serious to warrant at least the same maximum imprisonment for second offenders as is applicable to second-time infringers of other copyrights, as well as the larger fine. The term of imprisonment prescribed should therefore be at least three years.

We support the substitution of "for purposes of commercial advantage or private financial gain" for the present requirement in 17 U.S.C. § 104 that, to be criminal, infringements must be done "for profit". The provision in present Section 104 for aiders and abettors has been removed, but these individuals will be liable to prosecution under 18 U.S.C. § 2.

From the standpoint of making deterrents meaningful beyond the financial deterrent and provide a penalty for those who can "take" financial losses as a cost of business, it is recommended that a maximum one-year term of imprisonment be included in the sanctions under proposed Sections 116(d) and 506 (b), (c), and (d), all of which are provisions the Department supports.

We also note that Section 115, subparagraph (a)(1), states explicitly and with clarity what four courts of appeals[1] have ruled is the scope of compulsory licensing under present law, namely, that absent authorization by the owner of a composition copyright, the duplication of a sound recording embodying a copy-

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[1] *Jondora Music Publishing Co.* v. *Melody Recordings, Inc.*, 506 F. 2d 393 (C.A. 3, December 27, 1974); *Fame Publishing Co., Inc.* v. *Alabama Custom Tape, Inc.*, 507 F. 2d 667 (C.A. 5, January 31, 1975); *Duchess Music Corp.* v. *Stern* 458 F. 2d 1305 (C.A. 9), *certiorari denied, sub nom. Rosner* v. *Duchess Music Corp.*, 409 U.S. 847; and *Edward B. Marks Music Corp.* v. *Colorado Magnetics, Inc.*, 497 F. 2d 289 (C.A. 10), *certiorari denied, sub nom. Colorado Magnetics, Inc.* v. *Edward Marks Music Corp.*, 419 U.S. 1120.

righted musical composition is an infringement of the composition copyright even though the duplicator tenders royalty payments and otherwise attempts to comply with present compulsory licensing provisions. This is contained in the final sentence of subpargraph (a) (1), which reads:

> A person may not obtain a compulsory license for use of the [nondramatic musical] work in the duplication of a sound recording made by another.

Since this prohibition is not limited to copyrighted sound recordings, the effect is to prevent the operation of the compulsory license mechanism for making copies of *any* sound recordings embodying copyrighted musical compositions. The Department wholeheartedly supports this provision.

Section 804 deals with procedures before the tribunal which determines adjustment of copyright royalties and their distribution under specified sections of the Bill. We object to the provision in subsection (e) of this Section that the Senate Committee on the Judiciary and the House of Representatives Committee on the Judiciary may waive a requirement that a final decision in each proceeding be rendered by the tribunal within one year from the certification of the panel by the Register of Copyrights. The constitutional division of duties among the three principal branches of the government places in the Congress the legislative responsibilities. However, once a law has been enacted, it is for the Executive Branch to carry out the intents and purposes of the law as directed by the Congress. In our view, legislation, once enacted, should not be modified or waived by actions of a committee of the Congress. It is suggested that if waiver of the one-year requirement is desirable under particular circumstances, these circumstances be generally outlined in the Bill and that the tribunal be given authority upon good cause shown to extend the period of time for rendering decisions.

Of particular concern to this Department is the new form of copyright protection provided by Title II of the Bill. This new form of protection is a hybrid between design patents (35 U.S.C. § 171-173) issued for a period of up to 14 years by the Patent Office for new, original and ornamental designs of articles of manufacture and the copyright laws which provide for registration and issuance of certificates of copyrights for the writings of authors. The new protection that is provided under the Bill is not presently available under the copyright laws and can only be obtained through a design patent after an examination procedure which determines whether the ornamental design meets the criteria of patentability, including unobviousness in view of the prior art, as provided by 35 U.S.C. 102, 103. While the protection period as proposed for the new type of ornamental design protection is only a maximum of ten years as compared with the maximum of 14 years available for a design patent, it is granted without the need of meeting the novelty and unobviousness requirements of the patent statute.

A threshold consideration before finding that the needs are such that this new type of protection should be available is whether the benefits to the public of such protection outweigh the burdens. We believe that insufficient need has been shown to date to justify removing from the public domain and possible use by others of the rights and benefits proposed under the present Bill for such ornamental designs. We believe that design patents, as are granted today, are as far as the public should go to grant exclusive rights for ornamental designs of useful articles in the absence of an adequate showing that the new protection will provide substantial benefits to the general public which outweigh removing such designs from free public use. While it has been said that the examination procedure in the Patent Office results in serious delays in the issuance of a design patent so as to be a significant problem and damaging to "inventors" of ornamental designs of useful articles, the desirable free use of designs which do not rise to patentable invention of ornamental designs of useful articles are believed to be paramount. If the contribution made to the public by the creation of an ornamental design of a useful article is insufficient to rise to patentable novelty, the design should not be protected by law. The Department of Justice has consistently opposed legislation of this character.

To omit federal statutory protection for the form of a useful object is not to deny the originator of that form any remedy whatsoever. If he can prove that competitors are passing off their goods as the originator's by copying the product's design, he may bring an unfair competition action against such copyists. *Crescent Tool Co.* v. *Kilborn & Bishop Co.*, 247 Fed. 299 (C.A. 2 1917). See, also, *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

Quite apart from our opposition to the merits of Title II, we also oppose enactment of the design protection provisions of this Bill which would provide a new class of actions against the United States since the Bill proposes to amend Section 1498(a) to add the new type of design copyrights to the remedies available to inventors against the United States who have been issued United States patents when they are used by the United States without authorization of the owner. For example, by amending Section 1498(a) in this way, the Congress will be creating a completely new problem area fraught with difficulties for government procurement. Government contractors who "reverse engineer" alleged trade secrets in bidding competitively for government contracts would now be faced with the necessity of designing around the "packaging looks" of a product covered by a design copyright which may not rise to the stature of patentable novelty under the patent laws. Thus, the "non-utilitarian looks" of a vehicle which may not be protectable as a design patent would be given copyright-type protection under the Bill. We, therefore, strongly oppose the new type of protection proposed by Title II of the Bill.

Section 1498(a) is also amended to provide for the first time for suits against the United States for unauthorized use of inventions, whether patented or unpatented. Thus, it would appear to permit a suit based on a trade secret containing an unpatented invention. This, also, we strongly oppose as inconsistent with limiting claims against the United States in 28 U.S.C. 1498 to those recognized by the patent and copyright laws. No adequate showing has been made that this type of protection, on balance, is in the public interest.

The provision in Section 220 whereby simultaneous suit can be filed against the Administrator who carries out the provisions of Title II (§ 230) *and* an alleged infringer of the design in that it subjects an alleged infringer to suit in the same action even though the threshold question whether a certificate can issue under the provisions of the law has not been decided as between the Administrator and the applicant for registration is believed undesirable. While it is not likely that the issuance of certificates of registration will be frequently refused if certain basic requisites of applications are met, nevertheless, if a situation should arise of a refusal of issuance of a certificate of registration by an Administrator; this should require a separate and distinctive action to secure issuance thereof, especially since governmental functions should not normally be mixed with the proprietary enforcement functions of courts in adjudicating private rights and remedies.

Certain technical corrections appear indicated in Title II as follows:

P. 66, lines 22 and 23 appear reversed.

P. 73, line 22, "Section 311" should read—"Section 211".

P. 73, line 26, "mortgage" should read—"mortgagee".

Mr. KASTENMEIER. We would next like to call Mr. Rene D. Tegtmeyer, an Assistant Commissioner for Patents, representing the U.S. Department of Commerce. Would you please identify your colleagues.

Mr. TEGTMEYER. Thank you, Mr. Chairman. With me today are David Allen and Rosemary Bowie, both of whom are from the Commerce Department and in particular from Patents.

Mr. KASTENMEIER. I notice you have a prepared statement. You may proceed.

[The prepared statement of Mr. Tegtmeyer follows:]

STATEMENT OF RENE D. TEGTMEYER, ASSISTANT COMMISSIONER FOR PATENTS, U.S. DEPARTMENT OF COMMERCE

Mr. CHAIRMAN: I appreciate this opportunity to appear before your subcommittee to express the views of the Department of Commerce and its support for H.R. 2223 with certain modifications which I shall explain.

H.R. 2223 is the result of 20 years of extensive effort by the Copyright Office of the Library of Congress and the Congress to revise the copyright law. I understand that the testimony of the Register of Copyrights included a discussion of the background concerning this effort and an outline of the principal provisions of the bill. I will not attempt to be repetitive in this respect.

H.R. 2223 is divided into two titles; Title I, General Revision of the Copyright Law and Title II, Protection of Original Ornamental Designs. As the Department views each title from a slightly different perspective, I would like to comment on them separately this morning.

The Department of Commerce would like to highlight three specific areas in our comments on Title I:

1. The lack of protection in U.S. government works,
2. Preemption of state law with respect to unfair competition, and
3. The inclusion of Canada in the manufacturing requirement.

PROTECTION OF GOVERNMENT WORKS

First, proposed section 105, in prohibiting copyright protection for government works, creates a special problem for the Department of Commerce. Under Title 15, United States Code, Chapter 23, the Secretary is required to establish and maintain a clearinghouse for the collection and dissemination of scientific, technical and engineering information. This is done through the Department's National Technical Information Service, called NTIS.

As a matter of policy, Chapter 23 requires that each of the services and functions provided be self-sustaining and self-liquidating, as much as possible, consistent with its objectives. The Chapter specifically states its policy that the general public shall not bear the cost of publications and other services which are for the special use and benefit of private groups and individuals.

With the increased use of reprography, the difficulty of meeting the requirement to disseminate technical information on a basis that pays its own way has increased. It is cheaper for a purchaser to buy one copy of an expensive technological publication and photocopy it rather than to buy the number of copies that are actually needed. The lack of copyright protection for most periodicals made available by NTIS makes this practice legal. However, if NTIS cannot recoup the cost of preparing and handling its publications, the dissemination of this material cannot be maintained on a self-sustaining and self-liquidating basis.

An example of the potential harm which could arise from this lack of copyright can be seen in the publication, "Directory of Computerized Data Files and Related Software Available from Federal Agencies—1974". This document was prepared in response to the large number of requests received for this information. It was prepared at NTIS expense. The approximately $150,000 cost of surveying Federal agencies to gather the information and publishing the directory was not reimbursed from appropriations. In order to recoup NTIS expenses, a price of $60 per copy was set for this 150-page directory. Anyone choosing to make and sell competing photocopies could do so for a fraction of this price. Thus, it was necessary for NTIS to risk substantial moneys to produce such a product in the absence of copyright protection.

Unauthorized photocopying is especially serious in connection with foreign sales; out of the eight largest customers of NTIS, seven are foreign entities which engage in such copying practices. It has also caused NTIS to be limited in pricing its periodicals due to the much lower costs of duplication done by resale marketers and potential customers of government works which are not copyrighted.

For these reasons, we believe that copyright protection should be provided works distributed under Chapter 23, Title 15 of the United States Code, similar to that provided under § 290(e), Chapter 7(a), Title 15, for standard reference data prepared by the Department of Commerce under the provisions of that Chapter, or in the alternative that the Congress reconsider the statutory requirement that the services and functions provided under Chapter 23 be self-sustaining and self-liquidating.

PREEMPTION

Second, we agree with the preemption of State copyright laws pursuant to section 301(a), and with the principle embodied in that section that there should be a single, federal system for copyright. However, the language of subsection (b)(3) of section 301 should, in our view, be modified to make it clear that the phrase "all rights *in the nature of* copyright" (italics added) will not be construed to preempt parts of the State law of unfair competition which are now codified in statute or established by Federal and State Court decisions applying the common law.

Section 301(b) (3) is intended to exempt State unfair competition law from the preemptive effect of section 301(a). Among the rights and remedies not preempted are those arising from the violation of rights "not equivalent to any exclusive rights within the general scope of copyright". These "not equivalent" rights are said to include "breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation." The problem we have is that the listing is incomplete and the language is more limited than that which would describe the present scope of established State unfair competition law.

As a solution, we propose a more comprehensive and inclusive listing of unfair competition torts in subsection (b) (3). The proposed amendment:

"(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] *acts, trade practices, or courses of conduct which cause or are likely to cause confusion, mistake or deception, or which are likely to result in passing off, false or misleading representations, disparagement, wrongful disclosure or misappropriation of a trade secret or confidential information, or activities which otherwise constitute unfair competition by misrepresentation or misappropriation.*" (Deletions bracketed; additions italicized)

In our opinion, this proposed amendment would more accurately state the range of unfair competition torts which are now regulated by the states, so that the examples listed will not be limiting.

It should be noted that the phrase "unfair competition by . . . misappropriation" is included in our amendment. Obviously, the "misappropriation" of *all* of the words of a literary work would be in the nature of copyright and State laws in this area should be preempted. However, we do not believe that the entire body of State unfair competition law based upon the landmark Supreme Court decision in *International News Service* v. *Associated Press* (248 US 215 (1918)) should be preempted. While some State decisions relying on the *INS* case may be held inapplicable under section 301(a), we believe that such a remedy should continue to be available for the type of conduct proscribed in the *INS* case.

MANUFACTURING CLAUSE

Third, proposed section 601, known as the "manufacturing clause", essentially requires that English language, nondramatic literary works by American domiciled authors must be printed in the United States or Canada. The present copyright statute does not include such a reference to Canada. The rationale for including Canada appears to be that wage standards in the U.S. and Canada are comparable.

We are opposed to the inclusion of Canada in this provision. Such an inclusion would be a unilateral concession which we believe should be withheld for possible use by the United States as negotiating leverage in seeing compensating benefits during multilateral trade negotiations. We note that both houses of Congress indicated forcibly that United States negotiators should obtain reciprocity for United States concessions when they enacted the Trade Act of 1974.

Additionally, including Canada in this provision would raise problems in our relations with other nations, in view of the "most favored nation" obligations in the General Agreement on Tariff and Trade (GATT) and other treaties. Thus, enactment of the bill containing this provision might bring about the possibility of retaliation against the United States from countries other than Canada and might otherwise hamper our efforts to eliminate non-tariff trade barriers in the interest of our overall international trade objectives.

TITLE II

Title II of H.R. 2223 would provide a new system for the protection of original ornamental designs of useful articles.

Designs eligible for protection under this title would have to be original. They cannot be staple or commonplace, or elements commonly used in the relevant trade, or dictated solely by utilitarian functions, or three dimensional features of wearing apparel. However, there would be no requirements that the design be new, and therefore no search of prior designs would be necessary in order to grant protection.

Title II would provide protection only against copying by others and would not give an exclusive right in the design itself. The term of protection would be for five years, renewable for one additional five-year term.

Infringement would include making, importing, selling or distributing for sale an article having a design copied from a protected design. Importantly however, an innocent seller or distributor would be an infringer only if he failed to reveal his source and then reordered the article after having received a personal written notice of the design protection. This is a greatly reduced level of liability when compared with that contained in Title I where a seller or distributor is liable as an infringer for the sale of a single unauthorized copyrighted work.

Design patent protection would continue to be available but a design patent and design protection under this title could not be maintained concurrently. Also, copyright protection for designs would be continued, except that if copyright protection and a design registration were obtained, the copyright protection would not extend to utilization of the design in the useful article protected by the design registration.

Today, original ornamental designs for useful articles may be eligible for federal protection under the patent laws or in some instances, under the copyright law. In recent years, however, it has been generally agreed that the design patent laws do not provide adequate protection against design piracy. Because of the relatively short-lived popularity of many designs, a patent in some cases cannot be secured quickly enough to provide any useful protection.

The expense in obtaining a design patent today results primarily from the fact that the Patent and Trademark Office must examine an application to determine whether it is "new, original, and ornamental". At the present time it takes almost two years to obtain a design patent. Until the patent is granted, the designer or manufacturer markets the designs at his own peril, subject to it being freely copied. The alternative of withholding the design from the market until the patent issues is impractical in many industries where styles change rapidly and may even be seasonal.

Since the Supreme Court decision in *Mazer* v. *Stein* in 1954, the Copyright Office has accepted an increasing variety of registrations for designs embodied in useful articles so long as they meet the criteria of being artistic. However, there are still many types of designs for which copyright protection is unavailable, for instance, furniture and appliances. Moreover, the term of protection in the proposed copyright law, life of the author plus fifty years, is much too long for industrial designs which have a relatively short commercial life.

To exemplify the problems that exist under current practice we note complaints from domestic manufacturers that their designs have been copied in certain foreign areas, particularly in the far east. The imitations are then imported into and sold in the United States where they often enjoy a considerable price advantage over the article produced in the United States. We believe that Title II fills the need for more effective protection for design originators from this type of unfair competition because it provides quick, inexpensive and short term protection for original designs.

The Department of Commerce favors this legislation. However, we would like to highlight some of our specific recommendations which will bring title II of the bill more in line with other intellectual property protection both nationally and internationally and will generally improve the protection offered.

Section 204(a) provides that protection for a design shall begin on the date when the design is first made public. In subsequent sections it is made clear that the design must be made public before an application for protection can be filed. This provision will put U.S. residents at a disadvantage if they desire to obtain protection of their design in foreign countries, many of which, for example Japan, refuse protection for a design which has been made public prior to the filing of an application for registration.

In order to prevent the possible loss of protection in foreign countries, it should not be required that the design be made public prior to registration. Instead, protection should commence on the date that the registration is published in the United States as provided for in section 212(a) of the bill. Protection which begins when the registration is published would provide notice to the public and would not penalize the person desiring to protect his design outside of the United States. This would also make Title II consistent with Title I which has eliminated the prior publication requirement for copyright protection.

Specific statutory language to effect this change will be submitted to the Congress at a later date.

Section 209 appears to limit an application to a single design. This limitation appears to be unnecessary. An application containing ten or twenty designs would be no more difficult to process than an application containing one design because no search of prior designs is necessary. A multiple design application would save the applicant paperwork, thus, save him time and money. It would also save the Administrator processing time over an equal number of single applications. This might result in a lower fee per design. As long as a separate fee is paid for each design contained in the application there would be no loss of revenue and both the applicant and the Administrator would benefit. We have therefore recommended that multiple design applications be permitted under this title.

Title II requires that the application be accompanied by a statement setting forth facts about the design, and that such statement must be under oath. Similar requirements in Title 35, United States Code, covering patent and trademark practices permit such required statements to be submitted with a written declaration in accordance with 18 U.S.C. 1001 making a false statement punishable by a fine or imprisonment and jeopardizing the validity of the document. We believe that such a provision should be applicable to the application for design registration. Therefore, such declaration should be permitted in lieu of an oath.

The present fee provisions of section 215 of this title are unacceptable to the Department of Commerce. In our opinion, the design registration system should be completely self-supporting because the benefits of the design registration system only accrue to the individual recipient of the registration. Thus, the public should not be expected to bear any portion of the expense of a design registration system.

In a study done in 1964, the $15 fee for the design registration under a bill similar to the present one, was found to be inadequate to provide 100% cost recovery. The $15 application fee would be even more inadequate today.

Rather than propose different fee levels for each of the functions specified in section 215(a), the Department of Commerce proposes that section 215 be amended in its entirety to give the Administrator the discretion to establish charges sufficient to recover 100% of the cost of operation of the design registration system. A similar approach is currently being considered by Congress in various bills to revise the patent laws.

TESTIMONY OF RENE D. TEGTMEYER, ASSISTANT COMMISSIONER FOR PATENTS, DEPARTMENT OF COMMERCE

Mr. TEGTMEYER. Mr. Chairman, I appreciate this opportunity to appear before your subcommittee to express the views of the Department of Commerce and its support for H.R. 2223 with certain modifications which I shall explain.

H.R. 2223 is the result of 20 years of extensive effort by the Copyright Office of the Library of Congress and the Congress itself to revise the copyright law. I understand that the testimony of the Register of Copyrights included a discussion of the background concerning this effort and an outline of the principal provisions of the bill. I will attempt not to be repetitive in this respect.

H.R. 2223 is divided into two titles: Title I, General Revision of the Copyright Law; and Title II, Protection of Original Ornamental Designs. As the Department views each title from a slightly different perspective, I would like to comment on them separately.

The Department of Commerce would like to highlight three specific areas in our comments on title I:

1. The lack of protection in U.S. Government works and the effect on one function of the Department of Commerce,
2. Preemption of State law with respect to unfair competition, and
3. The inclusion of an exemption for Canada in the manufacturing requirements.

First, proposed section 105, in prohibiting copyright protection for Government works, creates a special problem for the Department of Commerce. Under title 15, United States Code, chapter 23, the Secretary is required to establish and maintain a clearinghouse for the collection and dissemination of scientific, technical, and engineering information. This is done through the Department's National Technical Information Service, called NTIS.

As a matter of policy, chapter 23 in section 1153 requires that each of the services and functions provided be self-sustaining and self-liquidating, as much as possible, consistent with its objectives. The chapter specifically states its policy that the general public shall not bear the cost of publications and other services which are for the special use and benefit of private groups and individuals.

With the increased use of reprography, the difficulty of meeting the requirement to disseminate technical information on a basis that pays its own way has also increased. It is cheaper for a purchaser to buy one copy of an expensive technological publication and photocopy it rather than to buy the number of copies that are actually needed. The lack of copyright protection for most periodicals made available by NTIS makes this practice legal. If NTIS cannot recoup the cost of preparing and handling its publications, the dissemination of this material cannot be maintained on a self-sustaining and self-liquidating basis.

An example of the potential harm which could arise from this lack of copyright can be seen in the publication, "Directory of Computerized Data Files and Related Software Available from Federal Agencies—1974."

This document was prepared in response to the large number of requests received for this information. It was prepared at NTIS expense. The approximately $150,000 cost of surveying Federal agencies to gather the information and publishing the directory was not reimbursed from appropriations. In order to recoup NTIS expenses, a price of $60 per copy was set for this 150-page directory. Anyone choosing to make and sell competing photocopies could do so for a fraction of this price. Thus, it was necessary for NTIS to risk substantial moneys to produce such a product in the absence of copyright protection.

Unauthorized photocopying is especially serious in connection with foreign sales; out of the eight largest customers of NTIS, seven are foreign entities which engage in such copying practices. It has also caused NTIS to be limited in pricing periodicals due to the much lower cost of duplication done by resale marketers and potential customers of Government works which are not copyrighted.

For these reasons, we believe that copyright protection should be provided for works distributed under chapter 23, title 15, similar to that provided under § 290(e), chapter 7(a), title 15, for standard reference data prepared by the Department of Commerce under the provisions of that chapter, or in the alternative that the Congress reconsider the statutory requirement that the services and functions provided under chapter 23 by NTIS be self-sustaining and self-liquidating.

Turning to the question of preemption, we agree with the preemption of State copyright laws pursuant to section 301(a), and with

the principle embodied in that section that there should be a single, Federal system for copyright. However, the language of subsection (b) (3) of section 301 should, in our view, be modified to make it clear that the phrase "all rights in the nature of copyright" will not be construed to preempt parts of the State law of unfair competition which are now codified in statute or established by Federal and State court decisions applying the common law.

Section 301(b)(3) is intended to exempt State unfair competition law from the preemptive effect of section 301(a). Among the rights and remedies not preempted are those arising from the violation of rights "not equivalent to any exclusive rights within the general scope of copyright." These "not equivalent" rights are said by the bill to include "breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation." The problem we have is that this listing is incomplete, and the language is more limited than that which would describe the present scope of established State unfair competition law.

As a solution, we propose a more comprehensive and inclusive listing of unfair competition torts in subsection (b) (3). The proposed amendment:

(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 acts, trade practices, or courses of conduct which cause or are likely to cause confusion, mistake or deception, or which are likely to result in passing off, false or misleading representations, disparagement, wrongful disclosure or misappropriation of a trade secret or confidential information, or activities which otherwise constitute unfair competition by misrepresentation or misappropriation.

In our opinion, this proposed amendment would more accurately state the range of unfair competition torts which are now regulated by the States, so that the examples listed will not be limiting.

It should be noted that the phrase "unfair competition by * * * misappropriation" is included in our amendment. Obviously, the "misappropriation" of all of the words of a literary work would be in the nature of copyright, and State laws in this area should be preempted. However, we do not believe that the entire body of State unfair competition law based upon the landmark Supreme Court decision in *International News Service* v. *Associated Press* (248 U.S. 215 (1918)) should be preempted. While some State decisions relying on the *INS* case may be held inapplicable under section 301(a), we believe that such a remedy should continue to be available for the type of conduct proscribed in the *INS* case.

Turning to the third point in title I, the proposed section 601, known as the "manufacturing clause," essentially requires that English language, nondramatic literary works by American domiciled authors must be printed in the United States or Canada. The present copyright statute does not include such a reference to Canada. The rationale for including Canada appears to be that wage standards in the United States and Canada are comparable.

We are opposed to the inclusion of Canada in this provision. Such an inclusion would be a unilateral concession which we believe should be withheld for possible use by the United States as negotiating leverage in seeking compensating benefits during multilateral trade negotiations. We note that both Houses of Congress indicated forcibly that

U.S. negotiators should obtain reciprocity for U.S. concessions when they enacted the Trade Act of 1974, at the end of the last Congress.

Additionally, including Canada in this provision would raise problems in our relations with other nations, in view of the "most favored nation" obligations in the General Agreement on Tariff and Trade (GATT) and other treaties. Thus, enactment of the bill containing this provision might bring about the possibility of retaliation against the United States from countries other than Canada and might otherwise hamper our efforts to eliminate nontariff trade barriers in the interest of our overall international trade objectives.

If I may turn to title II of H.R. 2223, that would provide a new system for the protection of original ornamental designs of useful articles.

Designs eligible for protection under this title would have to be original. They cannot be staple or commonplace, or elements commonly used in the relevant trade, or dictated by utilitarian functions, or three dimensional features of wearing apparel. However, there would be no requirements that the design be new, and therefore no search of prior designs would be necessary in order to grant protection.

Title II would provide protection only against copying by others and would not give an exclusive right in the design itself. The term of protection would be for 5 years, renewable for one additional 5-year term.

Infringement would include making, importing, selling, or distributing for sale an article having a design copied from a protected design. Importantly however, an innocent seller or distributor would be an infringer only if he failed to reveal his source and then reordered the article after having received a personal written notice of the design protection.

This is a greatly reduced level of liability when compared with that contained in title I where a seller or distributor is liable as an infringer for the sale of a single unauthorized copyrighted work.

Design patent protection would continue to be available, but a design patent and design protection under this title could not be maintained concurrently. Also, copyright protection for designs would be continued, except that if copyright protection and a design registration were obtained, the copyright protection would not extend to utilization of the design in the useful article protected by the design registration.

Today, original ornamental designs for useful articles may be eligible for Federal protection under the patent laws or in some instances, under the copyright law. In recent years, however, it has been generally agreed that the design patent laws do not provide adequate protection against design piracy. Because of the relatively short-lived popularity of many designs, a patent in some cases cannot be secured [illegible]ly enough to provide any useful protection.

The expense in obtaining a design patent today results primarily from the fact that the Patent and Trademark Office must examine an application to determine whether it is "new, original, and ornamental." At the present time it takes almost 2 years to obtain a design patent. Until the patent is granted, the designer or manufacturer markets the design at his own peril, subject to it being freely copied. The alternative of withholding the design from the market until the patent issues

is impractical in many industries where styles change rapidly and may even be seasonal.

Since the Supreme Court decision in *Mazer* v. *Stein* in 1954, the Copyright Office has accepted an increasing variety of registrations for designs embodied in useful articles so long as they meet the criteria of being artistic. However, there are still many types of designs for which copyright protection is unavailable, for instance, furniture and appliances. Moreover, the term of protection in the proposed copyright law, life of the author plus 50 years, or even the present law, 28 years, is much too long for industrial designs which have a relatively short commercial life.

To exemplify the problems that exist under current practice we note complaints from domestic manufacturers that their designs have been copied in certain foreign areas, particularly in the Far East. The imitations are then imported into and sold in the United States where they often enjoy a considerable price advantage over the article produced here. We believe that title II fills the need for more effective protection for design originators from this type of unfair competition because it provides quick, inexpensive, and short-term protection for original designs.

The Department of Commerce favors this legislation. However, we would like to highlight some of our specific recommendations which will bring title II of the bill more in line with other intellectual property protection both nationally and internationally and will generally improve the protection offered.

Section 204(a) provides that protection for a design shall begin on the date when the design is first made public. In subsequent sections it is made clear that the design must be made public before an application for protection can be filed. This provision will put U.S. residents at a disadvantage if they desire to obtain protection of their design in foreign countries, many of which, for example, Japan, refuse protection for a design which has been made public prior to the filing of an application for registration.

In order to prevent the possible loss of protection in foreign countries, it should not be required that the design be made public prior to registration. Instead, protection should commence on the date that the registration is published in the United States as provided for in section 212(a) of the bill. Protection which begins when the registration is published would provide notice to the public and would not penalize the person desiring to protect his design outside of the United States. This would also make title II consistent with title I which has eliminated the prior publication requirement for copyright protection.

Specific statutory language to effect this change will be submitted to the Congress at a later date.

Section 209 appears to limit an application to a single design. This limitation appears to be unnecessary. An application containing 10 or 20 designs would be no more difficult to process than an application containing 1 design because no search of prior designs is necessary. A multiple design application would save the applicant paperwork, thus, save him time and money. It would also save the Administrator processing time over an equal number of single applications. This might result in a lower fee per design. As long as a separate fee is paid

for each design contained in the application there would be no loss of revenue and both the applicant and the Administrator would benefit. We have therefore recommended that multiple design applications be permitted under this title.

Title II requires that the application be accompanied by a statement setting forth facts about the design, and that such statement be under oath. Similar requirements in title 35, United States Code, covering patent and trademark practices, permit such required statements to be submitted with a written declaration in accordance with 18 U.S.C. 1001 making a false statement punishable by a fine or imprisonment and jeopardizing the validity of the document. We believe that such a provision should be applicable to the application for design registration. Therefore, such declaration should be permitted in lieu of an oath.

The present fee provisions of section 215 of this title are unacceptable to the Department of Commerce. In our opinion, the design registration system should be completely self-supporting because the benefits of the design registration system only accrue to the individual recipient of the registration. Thus, the public should not be expected to bear any portion of the expense of a design registration system. Their benefits are too remote.

In a study done in 1964, the $15 fee for the design registration under a bill similar to the present one, was found to be inadequate to provide 100-percent cost recovery. The $15 application fee would be even more inadequate today.

Rather than propose different fee levels for each of the functions specified, the Department of Commerce proposes that section 215 be amended in its entirety to give the Administrator the discretion to establish charges sufficient to recover 100 percent of the cost of operation of the design registration system. A similar approach is currently being considered by Congress in various bills to revise the patent laws.

Mr. KASTENMEIER. Thank you, Mr. Tegtmeyer. Who is the administrator under this particular provision?

Mr. TEGTMEYER. The administrator would be designated by the President if the bill were passed in the form it is.

Mr. KASTENMEIER. Is it presumed that such an administrator would be separate or part of the Copyright Office or the Patent Office or what?

Mr. TEGTMEYER. The assumption is that the administrator would be with the Patent and Trademark Office in the Department of Commerce.

Mr. KASTENMEIER. Why are we unable to modify the patent laws to otherwise effect more reasonable treatment of design applications so that this whole title would be unnecessary, so it could be handled under the present law?

Mr. TEGTMEYER. We presently have that objective, to reduce that pendency for utility and design patents to 18 months. Even though that time is lagging a little bit we expect that that wait will be reduced to 18 months in the very near future. The reason for requiring that length of time is the fact that we must examine the application to determine if it meets the criteria set forth in the present statute and this cannot be done during the short period in which you can register a design.

Mr. KASTENMEIER. Would the administrator be under the Commissioner of Trademarks and Patents for the purpose of direction?

Mr. TEGTMEYER. I'm not attempting to presume that the President would in fact designate the Patent and Trademark Office as administrator but it would presumably be placed there, under the Commissioner of Patents and Trademarks, if it was placed there at all.

Mr. KASTENMEIER. Are you satisfied that title II is to be considered a part of the general revision of the copyright law or do you think it more appropriate that it ought to be considered by itself?

Mr. TEGTMEYER. We are satisfied that it is to be considered as a general part of the copyright laws.

Mr. KASTENMEIER. Do I understand that the revisions that you suggest are unlike patents in that you would go by first to file criteria rather than a first to invent?

Mr. TEGTMEYER. We're talking about a requirement in order to obtain protection as to origination, the party that originates the design and filed and application therefore could obtain the protection; nothing would prevent someone else from initiating the same design and also obtaining the same protection.

Mr. KASTENMEIER. I read your statement which says that instead protection should commence on the day that the registration is published as a deviation from the theory that a copyright patent protection is other than the rest of the world, it is in essence a first to file protection or, in this situation, publication rather than the first use of a design?

Mr. TEGTMEYER. Yes, in some respects.

Mr. KASTENMEIER. This is a matter of understanding, I guess. You state that the designs to be eligible would have to be original, however, there are no requirements that the design be new. What is the distinction, the practical distinction, for our purposes?

Mr. TEGTMEYER. The distinction would be that if you originated a design that somebody else originated in the past or created in the past, then you may still obtain protection so long as you were not copying the former individual's design and you developed it totally independently through your own originality.

Mr. KASTENMEIER. I see. The other part of your testimony, do I understand, that unlike others who have testified, you support retention of the manufacturing clause basically so it can be used essentially as a negotiating factor?

Mr. TEGTMEYER. I think our views are very similar to those of the Department of State. There is an opportunity here to use exceptions to the manufacturing clause for the purposes of negotiation in multilateral trade negotiations when they take place. Such negotiations are beginning to take place now and will begin on a more formal basis later in the year.

Mr. KASTENMEIER. Maybe I misunderstood. I understood them to suggest that the existence of the manufacturing clause causes us a great deal of difficulty. I did not understand that they wanted it retained to use as leverage for future negotiations.

Mr. TEGTMEYER. We would agree with the elimination of the manufacturing clause over possibly a period of time as they indicated in response to your question. Our point about negotiations was primarily that, if the manufacturing clause was to stay and if Canada was to be placed in it, we ought to obtain some compensation for adding the exemption for Canada in multilateral trade negotiations.

Mr. KASTENMEIER. Do you not understand those who have thus far designed the copyright bill to specifically exclude State unfair competition laws for a reason?

Mr. TEGTMEYER. I mentioned in the testimony that we agree with the preemption of the State laws as to copyright-type protection but feel that the bill should not upset the present protection that is available under State statutes and the common law of unfair competition. We specifically mentioned the *International News* case in this connection. That case represents an example of one area which we particularly feel should not be preempted by the copyright law because the copyright law does not provide the same nature of protection that the *International News* case decision does.

That is, the content of the news was protected in that case as opposed to the wording or manner of expression of the news.

Mr. KASTENMEIER. On that point, have you conferred with the Copyright Office or any other Federal agencies? Do you find them in agreement with your position?

Mr. TEGTMEYER. We have been in contact with some other Federal agencies and in contact with the Copyright Office, as well. We have not found agreement with our position on all points.

Mr. KASTENMEIER. Thank you. I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Tegtmeyer, I find myself in somewhat of a dilemma; who actually speaks for the administration?

There seem to be disagreements with virtually everybody. We have the Department of State disagreeing with everybody except on the manufacturing clause and now we have the Department of Commerce that takes a different view. Does anyone purport to speak for the administration?

Mr. TEGTMEYER. Our testimony only purports to speak for the Department of Commerce.

Mr. RAILSBACK. The Justice Department testified with respect to title II that they were concerned that this title would afford some new protection, but it would not include a finding of novelty or obviousness; what do you think of that?

Mr. TEGTMEYER. Copyright law presently, and as proposed in title I, does not require a test of novelty or unobviousness for protection. The test applied in the design legislation is one of originality. Infringement is accomplished by copying the design literally rather than by separate origination. So the protection provided by title II is more in the nature of copyright protection rather than patent.

Mr. RAILSBACK. So, you would disagree that a finding by the Government of unobviousness is needed?

Mr. TEGTMEYER. Yes; we do. The bill provides protection in one area that would not be protected by the present patent laws and where there is design piracy occurring. Protection under title II is desirable because of the requirement of novelty and unobviousness in the patent law and because of the fact that the copyright laws as they exist today have not been extended to cover all of the designs that are covered in the proposed legislation in title II.

Mr. RAILSBACK. You are not, I presume, suggesting that your Department favors section 601? I think Mr. Kastenmeier asked you and

you appeared to indicate primary concern, about the inclusion of Canada but, you don't favor a manufacturing clause, or do you?

Mr. TEGTMEYER. We do not favor a manufacturing clause aside from the question as to whether or not Canada should be exempted.

Mr. RAILSBACK. So in that respect your testimony is not at variance with the other agencies?

Mr. TEGTMEYER. No.

Mr. RAILSBACK. If you can keep track of all of that differing testimony.

Mr. TEGTMEYER. We did make the additional point of saying that if Canada was to be included as an exception in the manufacturing clause that it be done by the use of its exception in negotiations with other countries as leverage to get something in return.

Mr. RAILSBACK. You do favor, do you not, the prepared expansion of the duration of a copyright?

Mr. TEGTMEYER. Yes; we do. In that respect, I might point out that we have reviewed the reasons for extending the copyright term that were set forth in one of the earlier reports on copyright revision legislation. I might note, in particular, Report No. 83 from the 90th Congress first session. It is a report of the chairman, Mr. Kastenmeier, for the Committee on the Judiciary. On pages 100 through 103 there are a number of what we feel are well-justified reasons for extending the term of copyright to life of the author plus 50 years. In the report, there are some seven such reasons listed. The committee at that time stated, and I quote from page 102 of the report, "The committee concluded that the need for a longer total term of copyright had been conclusively demonstrated."

Later in the report it stated, "The committee has concluded that an author's copyright should extend beyond his lifetime and, judged by this standard, the present term of 56 years is too short." There are some seven reasons set forth which we feel are consistent with the purpose of the copyright law, that is to further creativity in writings and so forth under the Constitution.

Mr. RAILSBACK. I think you've been very helpful.

Mr. KASTENMEIER. Mr. Danielson.

Mr. DANIELSON. Do you know whether foreign states have a comparable provision to our title II to protect original ornamental designs?

Mr. TEGTMEYER. Most foreign countries have a provision similar generally, at least, to title II and there is an international convention, The Hague Agreement for the International Deposit of Industrial Designs. I am not sure of the number of countries involved.

Mr. DANIELSON. Are we a party?

Mr. TEGTMEYER. No. I am not sure whether we would want to be because of certain provisions in the convention.

Mr. DANIELSON. One problem I have, one of the provision qualifiers is that it be ornamental; isn't that almost entirely subjective?

Mr. TEGTMEYER. Essentially, it is the type of test as applied under the copyright law presently with respect to designs.

Mr. DANIELSON. But beauty is still in the eye of the beholder and I have a problem with this. I don't know. I need an answer to this, I need convincing. Thank you.

Mr. TEGTMEYER. If I may add one point that may be helpful, one thing you can do is to compare the fact that it must be ornamental as opposed to functional.

Mr. DANIELSON. Yes; but it is also, as I read the Code provisions, I think it relates to prettiness or beauty; I have a problem with this.

Mr. TEGTMEYER. That's not the intent of the provision as we understand it.

Mr. DRINAN. I wonder if I might ask one question. If you would just give us an example. How many of these fundamental things you have described could or would get a copyright or patent?

Mr. TEGTMEYER. That would be difficult to predict because you don't know whether or not they would meet the test of novelty for patent protection.

Mr. DRINAN. In your testimony you suggest only two areas and they are furniture and appliances. But, you give us a for instance on what type of things might come under title II?

Mr. TEGTMEYER. Linoleum and wall coverings, which I believe are covered under the present copyright law as it is interpreted, as well as furniture designs, appliances and other household goods which would have a design, an original design.

Mr. DRINAN. Do you fear any possibility of restraining trade or even monopoly?

Mr. TEGTMEYER. We feel the protection is in the nature of a copyright provision and is only against copying. If you compare it to piracy of tapes and records, we find it very similar. We are talking about someone who has pirated or copied a design, not somebody who has independently originated it himself.

Mr. DRINAN. I tend to agree with Mr. Railsback that there is too much confusion, but your testimony has been helpful. I wish we had longer.

Mr. KASKENMEIER. On behalf of the committee, we appreciate your appearance again before us on a slightly different type of bill than you normally appear before us with and we wish to thank your colleagues. This concludes the testimony this morning on the subject of the revision of copyright laws. We shall next meet as a subcommittee on May 14, Wednesday at 10 a.m. in room 2226 for further hearings.

[Reports on H.R. 2223 were received by the subcommittee from the Department of State, the Acting Librarian of Congress, and the National Aeronautics and Space Administration, as follows:]

DEPARTMENT OF STATE,
Washington, D.C., May 7, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: The Secretary has asked that I respond to your letter of February 10, 1975, requesting the Department of State's views on H.R. 2223, for the general revision of the Copyright Law, Title 17 of the United States Code, and for other purposes.

The first copyright law of the United States was enacted by the First Congress in 1790, with comprehensive revisions being enacted at intervals of about 40 years, in 1831, 1870 and 1909. The present U.S. copyright law, title 17 of the United States Code, is basically the same as the Act of 1909. During the ensuing years tremendous strides have been made in technology and techniques for communicating printed matter, visual images, and recorded sounds. These technical advances have generated new industries and methods for the reproduction

and dissemination of copyrighted works and new business relationships have developed between authors and users. Although these two groups have differed on various issues, both recognize the 1909 statute does not stimulate authors to create or reward them for their efforts and fails to consider present or future technological developments in communications.

Although we take exception to one section of H.R. 2223, the Department otherwise supports the enactment of this important legislation. Our comments on H.R. 2223 are directed to those sections which relate to the conduct of our foreign relations and therefore are of interest to the Department. These sections are the following: Section 104 concerning subject matter of copyright and national origin; Section 302 on the duration of protection, and Section 601 relative to restrictions against importation of certain copyrighted materials from other countries.

Section 104. Subject Matter of Copyright: National Origin—(c).

The Department supports the aim of this section which is to deal with the possibility that action may be instituted in United States courts by a foreign government to divest its citizens or authors of rights to their works or block publication of their works within the United States. We do not have any evidence that an action of this nature is likely to occur. If it did, however, it would represent undesirable official interference with the freedom of expression, and we therefore believe that it should be guarded against. The international copyright system embodied in the Universal Copyright Convention is intended to "insure the respect for the rights of the individual and encourage the development of literature, the sciences and the arts". The obligations contained in the Convention should not become the vehicle to suppress free communication in the United States of ideas and literature unacceptable to authorities of some signatories to the Convention.

Were such a provision to be enacted, it would be necessary to avoid language which might inadvertently interfere with legitimate governmental acquisition of copyright. We understand that other U.S. Government agencies are drafting language to meet the purpose of Section 104(c) in a technically different manner. We have not reviewed these proposals and are unable to express our opinion as to their merits. However, we support the aim of appropriately drafted legislation that would deny effect in United States courts of a foreign nation's laws or practices designed to deprive the authors of that country of the rights to publish and protect their literary and artistic works in the United States.

Section 302. Duration of Copyright: Works Created on or after January 1, 1975.

Section 302 concerns the duration of copyright (i.e. term of protection) and is one of the most important provisions, if not the most important in the revision bill. Basically, Section 302(a) provides for a copyright term consisting of the life of the author and 50 years after his death. The importance of the provision is borne out by the fact that the Register of Copyrights regards a "life-plus-50 term" as the "foundation of the entire bill". Such a term of protection would be more consistent with the practice of a very large majority of other countries that are members of the international copyright community. This provision would also remove a major obstacle to the possible adherence to the Berne Convention for the Protection of Literary and Artistic Works by the United States, Article 7 of which requires states party to the convention to provide such a term of protection. Such a change would facilitate and simplify international copyright protection for U.S. nationals. Therefore, the Department of State strongly supports the duration of copyright protection as proposed in Section 302.

Section 601. Manufacture, Importation and Public Distribution of Certain Copies.

Section 601 relates to the so-called "manufacturing clause" which is designed essentially to protect the U.S. printing industry. Under Section 601 the importation into or the distribution within the U.S. of English language copies of certain works whose authors are U.S. nationals (livi ; in the United States) or domiciliaries would be prohibited unless the copies are produced in, or made from type set in, or plates made in, the United States or Canada. Also compliance with the manufacturing requirements no longer would constitute a condition of copyright protection; the effects of noncompliance would be limited to rights with respect to reproduction and distribution of copies. Section 601(d) provides a complete defense in any civil action or criminal proceeding for infringement of the exclusive rights of reproduction or distribution of copies where,

under certain circumstances, the defendant proves violation of the manufacturing requirements.

The Department notes with satisfaction that, on the whole, there has been a liberalization of the manufacturing clause as it exists today. For example, a violation of the manufacturing clause as regards a book would not affect the right of the copyright proprietor to authorize a motion picture version or other use of the book. It would merely affect enforcement of copyright with respect to publication as a book. Further, the number of copies manufactured abroad that may be imported has been increased from 1,500 to 2,000.

Despite this liberalization, Section 601 would continue the protectionist features of the manufacturing clause. This kind of protection is fundamentally inconsistent with basic U.S. policy in international trade. For several decades we have pursued a policy of reducing tariffs and other trade barriers in the interest of promoting an open international economic system. We believe that the broad trading interests of the U.S. and its people continue to be best served by a general reduction of trade barriers including non-tariff barriers. This is the policy we are carrying forward in the current multilateral trade negotiations being undertaken in Geneva under the authority of the recently enacted Trade Act. During this round of negotiations attention will be focused particularly on non-tariff barriers, and one of our major negotiating objectives will be to reduce or eliminate non-tariff barriers of other countries which restrict U.S. trade. We believe that it is important to note this inconsistency in considering the continuation of the manufacturing clause.

Furthermore, the exception for Canada introduced by this bill into the manufacturing clause would violate our obligations under the GATT and various bilateral treaties. The United Kingdom has protested and we expect that other foreign countries which are being discriminated against by this measure will protest, thereby introducing another element of discord and potential retaliation into our relations with those countries. Specifically, the exception would violate our obligation under Article XIII of the GATT which requires non-discriminatory application of quantitative restrictions. Although the U.S. could seek a special waiver from the GATT Contracting Parties to permit this exception, this procedure would be particularly undesirable at this time in view of the opening of the new round of multilateral trade negotiations at Geneva. The exception would also violate commitments in various Friendship, Commerce and Navigation treaties, which we have concluded with most of the other industrialized nations.

These treaties normally impose obligations on the U.S. before it introduces non-tariff barriers on important products of the other country, and forbids the prohibition of the other country's products unless the product of third countries are similarly prohibited.

In conclusion, the Department of State believes that the updating of the U.S. copyright law is most desirable and supports the enactment of H.R. 2223. A modernization of the copyright law to take into account the important technological advances in the copyright field is in the interest of all members of the copyright community. It is also important in bringing the United States in step in copyright with the other principal countries of the world.

The Office of Management and Budget advises that there is no objection to the submission of this report.

Sincerely yours,

ROBERT J. MCCLOSKEY,
Assistant Secretary for Congressional Relations.

THE LIBRARIAN OF CONGRESS,
Washington, D.C., August 26, 1975.

HON. PETER W. RODINO,
Chairman, Committee on the Judiciary,
U.S. House of Representatives, Washington, D.C.

DEAR MR. RODINO: This refers to your request for the views of the Library of Congress and the Copyright Office on H.R. 2223, a bill for the general revision of the Copyright Code, title 17 U.S.C., for the establishment of protection of ornamental designs of useful articles in the form of the Design Protection Act, and for other purposes.

The current bill is the latest in a series of bills pending in Congress since 1965 to effect a general revision of the Copyright Code. H.R. 2223, except for technical

amendments, is the same as the bill that passed the Senate in the 93rd Congress, S. 1361, 93rd Congress, 2d Session (1974), by a vote of 70 to 1. The Kastenmeier bill (H.R. 2223) is also substantially identical, except for Chapter 1, to the bill passed by the House of Representatives in 1967, H.R. 2512, 90th Congress, 1st Session.

The Register of Copyrights, Barbara Ringer, and I testified on May 7, 1975 before the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice and urged enactment of the revision bill in this Congress. We reiterate the strong support of the Library of Congress and the Copyright Office for this bill. As Ms. Ringer remarked in her testimony before the Subcommittee: "A Twentieth-Century copyright statute is long overdue in the United States, and the present need for a revised law that will anticipate the Twenty-First Century is so obvious as to be undeniable."

The Register of Copyrights has submitted to the House Subcommittee chaired by Mr. Kastenmeier a series of brief, objective analyses of the key provisions of the bill. She is also preparing a supplemental report on the revision bill and plans to submit this to the Committee on the Judiciary in early fall. I shall therefore confine my comments to general support of the copyright revision bill, reference to the recent changes by the Senate Subcommittee on Patents, Trademarks, and Copyrights, specific mention of a few recommended changes in title I, and general support for title II.

1. GENERAL COMMENTS ON TITLE I

The current copyright revision effort began twenty years ago. The basic bill has been under legislative consideration for more than ten years. However, active consideration of the bill has peaked at different times in each house, and the House of Representatives has not considered the bill thoroughly since H.R 2512 passed the House in 1967. The exceedingly careful preparation of the study and drafting phases of the revision program is reflected in the strength of the "basic bill," which has remained intact since the House last considered it. For example, the following fundamental provisions of the bill have stood the test of time: a single national system for copyright protection under the Federal copyright statute; provisions governing the term of new works and subsisting copyrights; limitations on the assignment of an author's right; copyright formalities, including notice, deposit, and registration; copyright infringement provisions; and housekeeping provisions affecting the Copyright Office and the registration system.

Enactment has been delayed because of a few issues concerning the scope of the exclusive rights granted under the bill and limitations to those rights. For many years, the key issue was the limitations on the exclusive rights affecting secondary transmissions, principally cable television. Other issues, such as library photocopying, computer uses of copyrighted works, public broadcasting, and educational uses of copyrighted works in general have waxed and waned.

Now that cable television litigation seems to have run its course, this issue is ripe for a legislative solution. The *Williams & Wilkins* v. *United States*, 487 F.2d 1315 (Ct. of Claims 1973 aff'd by equally divided court, 420 U.S. 376 (1975)) litigation over library photocopying has ended inconclusively. In both instances, the courts have urged legislative solutions for the complex problems caused by the impact of new technology on an antiquated copyright law.

The Library of Congress and the Copyright Office are ready to provide whatever assistance the Committees or Members of Congress wish in presenting balanced explanations of the provisions of the bill or of additional proposals. Without endorsing particular solutions, we do endorse wholeheartedly the general concept of reasoned discourse and debate on the issues and good faith attempts to reach compromise positions, followed by a Congressional decision on the particular proposals. We genuinely believe that these problems are capable of solution. We also believe that an effective copyright system is not likely to survive further delay in enacting a revision of the 1909 law.

2. SENATE ACTION ON S. 22

The Senate Subcommittee on Patents, Trademarks and Copyrights reported a companion bill, S. 22, to the Senate Judiciary Committee on June 13, 1975. We should like to bring to your attention the substantive changes in the Senate bill.

Royalty Tribunal.—The Senate Subcommittee has restored the provision in sections 801 and 802 for periodic review of the royalty rate for jukebox uses of copyrighted works.

Federal pre-emption.—The Subcommittee has accepted an amendment to section 301 specifically reserving state law protection for misappropriation of copyright subject matter provided the relief is not equivalent to any of the exclusive rights within the general scope of copyright.

Prohibition against involuntary transfers.—The Subcommittee has replaced the provision prohibiting expropriation of copyrighted works in section 104(c) with a new provision in section 201(e) prohibiting involuntary transfers.

Single registration for several contributions to periodicals.—Two new subparagraphs have been added to section 408(c) authorizing a single registration for contributions to a periodical by the same individual author under certain conditions.

Fee schedule.—A new schedule of fees has been added to section 708.

Voluntary licenses for use of copyrighted works by the blind and physically handicapped.—A new section 710 has been added directing the Register of Copyrights to establish by regulation standardized procedures under which the copyright owner grants voluntary licenses to the Library of Congress for the reproduction of certain nondramatic literary works for use by the blind and physically handicapped.

Noncommercial broadcasts to handicapped audience.—A new clause (8) has been added to section 110 exempting the performance of a literary work on noncommercial radio and television stations to a "print or aural handicapped audience."

Derivative work right for sound recordings.—Section 114 has been amended to include among the rights granted to the copyright owner of a sound recording the right to prepare derivative works.

Criminal penalties.—Several amendments proposed by the Justice Department were adopted. The punishment for criminal infringement of a sound recording or motion picture copyright has been increased from one year to 3 years for the first offense, and from two years to seven years for subsequent offenses, section 506(a). A new subsection has been added to section 506 adding forfeiture and destruction of copies as possible penalties for conviction of copyright infringement, within the discretion of the court. A new section 509 has been added providing for possible seizure and forfeiture by the United States Government of infringing copies or phonorecords, including articles or devices used to carry out the criminal infringement.

Title II.—The Subcommittee adopted a series of changes recommended by the Department of Commerce with respect to sections 203–206, 209, 211–213, 227, and 229 of the Design Protection Act.

3. RECOMMENDED CHANGES IN TITLE I

Several of the amendments adopted by the Senate Subcommittee on Patents, Trademarks, and Copyrights were either recommended by the Library of Congress and the Copyright Office, or have been endorsed by us. We specifically urge adoption of the following amendments.

Prohibition against involuntary transfers.—We recommend the language adopted by the Senate Subcommittee in section 201(e) in lieu of the present section 104(c) of H.R. 2223. The new language is intended to establish on a statutory basis the principle that an involuntary transfer of the copyright interest will not be recognized under our law. Of course, traditional legal actions such as bankruptcy proceedings and mortgage foreclosures are not within the scope of the recommended language since the author has, in one way or another, consented to these legal processes by his actions. The provision is no longer directed against foreign governments since the same principle applies to the United States Government. While our courts have not addressed the precise issue of involuntary transfer, we believe the principle of the proposed section 201(e) would be followed by the courts in construing the present law.

Federal pre-emption.—We endorse the change in section 301 adopted by the Senate Subcommittee which is intended to clarify that misappropriation relief may be provided under state law as long as the protection conferred is not equivalent to the exclusive rights granted by the copyright law.

Single registration for several contributions to periodicals.—The basic principle of this provision was originally suggested by Irwin Karp, Counsel for the Authors' League. The Library of Congress and the Copyright Office recommended it to the Senate Subcommittee, and the provision also appears in H.R. 7149 (by Mr. Kastenmeier), which would amend the existing title 17 U.S.C. apart from the

effort to effect a general revision of the copyright law. Separate original and renewal term registration is a substantial financial burden on individual authors and artists who contribute small or short works to a variety of daily newspapers and other periodicals. The proposed amendment to section 408(c) would specifically authorize the Register, without prejudice to her general authority, to establish regulations permitting grouping of contributions by the same individual author for registration purposes.

Fee schedule—section 708.—The new fee schedule adopted by the Senate Subcommittee also appears in H.R. 7149, introduced by Mr. Robert W. Kastenmeier on May 20, 1975 at the request of the Library of Congress and the Copyright Office. We found it necessary to propose general increases in the fee schedule in view of the low ratio of recovery of the costs of the copyright registration system by cash receipts for services performed. We strongly urge inclusion of the new fee schedule in H.R. 2223. We also take this opportunity to urge separate enactment of H.R. 7149 without awaiting general revision of the copyright law. The revision bill cannot become effective immediately upon enactment because of the administrative preparation required to implement its provisions. Hence, we favor enactment of H.R. 7149 as soon as possible.

Voluntary licenses for use of copyrighted works by the blind and physically handicapped—new section 710.—This provision also originated with the Library of Congress and the Copyright Office, and we urge its addition to the revision bill. It has the support of the American Association of Publishers.

Universal Copyright Convention.—We propose a technical amendment to section 104(b)(2) in view of the 1971 revision of the Universal Copyright Convention. Line 25 of page 7 should read "1952 or 1971 Universal Copyright Convention; or".

4. GENERAL COMMENTS ON TITLE II

Design legislation has been pending before Congress even longer than the current efforts at omnibus copyright revision. Title II of H.R. 2223, the Design Protection Act, represents the current version of design legislation. The proposal has been refined through years of study, debate, consideration, and amendment. The Library of Congress and the Copyright Office have supported this legislation in the past, and we reiterate our strong endorsement of the present bill, especially since the present version appears to resolve many issues that delayed enactment of separate design legislation.

The Design Protection Act would create a new form of protection for designs based upon modified copyright principles and would bridge the gap between existing design patent and copyright protection for ornamental designs of useful articles. This new form of protection is needed to correct deficiencies in the protection accorded by existing law. For example, although the Copyright Office registers certain ornamental designs of useful articles which qualify as "works of art," it must refuse registration for numerous equally attractive or meritorious designs, because they do not display separate work of art authorship apart from the utilitarian aspects of the article. On the other hand, design patents are judged by the high patent standards of novelty and non-obviousness. The patent is difficult and expensive to obtain, and most designs do not survive a court test.

The Design Protection Act avoids these pitfalls. It is specifically tailored to meet the demonstrated need for protection of ornamental designs of useful articles with due regard for the interests of consumers and their representatives, the product retailers. The bill adopts the copyright standard of originality, but the term of protection is short in consideration of the public interest in free competition among product designs.

We accept in general the amendments adopted by the Senate Subcommittee with respect to title II. However, we have some hesitation about the amendment to section 203, adding the requirement that protection may be accorded to a revision, adaptation, or rearrangement of design subject matter only if the changes are substantial. We agree with the amendment provided the substantiality of the revision is judged by traditional copyright standards of originality. We would not support the change if there is any possibility that it would be construed to establish a stricter standard of originality than that established in section 201(b)(4). If the House Judiciary Committee adopts this language, we recommend a clarification in the report that the amendment in no way derogates from the section 201(b)(4) standard of originality.

Finally, we point out that the bill presently does not indicate which agency will administer the Design Protection Act. Under section 230, the Administrator will

be designated by the President. In order to assure administrative preparation for implementation of the Design Protection Act, the Congress may wish to designate the Administrator directly in the bill. The Copyright Office would be willing to assume this responsibility, as the Congress or, under the present bill, the President directs.

Sincerely,

JOHN G. LORENZ.
Acting Librarian of Congress.

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION,
Washington, D.C., September 5, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Committee on the Judiciary,
House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: This is in further reply to your request for the views of the National Aeronautics and Space Administration on the bill H.R. 2223, "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes."

Title I of the bill provides for a general revision of the United States Copyright Law, title 17 of the United States Code. Title II establishes a new type of protection for original ornamental designs of useful articles. Set forth below are comments on specific provisions of the bill which would have a direct impact on NASA's activities and liability.

TITLE I

Government Works

The proposed legislation obviates some of the ambiguities present in the current copyright law with respect to Government works. Sec. 105 of the bill prohibits copyright in any "work of the United States Government," which is defined in Sec. 101 as "a work prepared by an officer or employee of the United States Government as part of his official duties." The present law prohibits copyright in a "publication of the United States Government" (Sec. 8), but does not define the latter term. The proposed legislation adequately reflects case law and customary practice within the executive branch, which have established that works prepared by Government officers or employees as part of their official duties are "Government publications" within the copyright prohibition.

Some previous copyright revision bills have defined a Government work as one prepared by an officer or employee "within the scope of his official duties or employment." The latter was considered objectionable because it was ambiguous and subject to a much broader interpretation. For example, it could be construed as prohibiting copyright even where an officer or employee voluntarily wrote a book on his own time which was somehow related to his employment.

Sec. 105 also clarifies the right of the Government to receive and hold copyrights transferred to it by assignment, bequest, or otherwise, thus obviating another uncertainty in the current law.

Since H.R. 2223 abolishes common law copyright protection and extends statutory copyright protection to published and unpublished works (Sec. 104 and Sec. 301), in our view the copyright prohibition of Sec. 105 would apply to both published and unpublished Government works as this term is defined in Sec. 101.

NASA is still of the view, expressed in comments submitted to the Committee on previously proposed legislation (e.g., H.R. 4347, 89th Congress, 1st Session, 1965), that copyright protection should be available for Government works in exceptional circumstances. This would give NASA the opportunity to enter into competitive negotiations with private publishing firms in exceptional cases so that selected NASA publications could receive the widest possible distribution as required by Section 203(a) of the National Aeronautics and Space Act of 1958. The negotiating position of the Government depends on its ability to provide copyright protection for a period of time to the publisher in exchange for distribution and related services. If necessary, the rights of the Government to copyright in such exceptional cases can be limited to a shorter period of time, for example, 5 years (rather than the full term), which may be sufficient time for the publisher to regain his initial publishing costs. Accordingly, it is recommended that the following subsection be inserted in Sec. 105:

"In exceptional cases, copyright may be secured in a published work of the United States Government where, because of the special nature of the work or the circumstances of its preparation, it is determined that copyright protection would result in more effective dissemination of the work or for other reasons would be in the public interest. The head of the Government agency for which the work was

prepared shall make the determination in each case in accordance with regulations established by an administrative officer designated by the President, and shall publish a statement of the basis for its determination in each case in the manner specified by such regulations."

It is strongly urged that Sec. 105 be amended to specify that the copyright prohibition for Government works apply only to domestic copyright protection. This could be done by inserting the phrase "within the United States" after the word "available" in line 1 of Sec. 105. It is a commonly held opinion, although not established by case law, that the prohibition against obtaining copyright by the Government applies to domestic copyrights only. Thus, in this view, the Government may copyright abroad when that serves its best interests. While we feel that many foreign signatories to the Universal Copyright Convention would honor the copyright of the U.S. Government in their respective countries under the Convention, some nations might take the position that a U.S. Government work cannot receive copyright protection anywhere.

The basic rationale for prohibiting copyright protection for U.S. Government works is that American taxpayers have paid for these works through tax assessments and should have access to them free of copyright restrictions. This rationale does not require a giveaway of U.S. Government works to foreign nationals and foreign governments. Most foreign countries provide domestic copyright protection for publications of their governments, and publications of foreign governments are accepted for copyright registration in the United States, except for statutes, court opinions, and similar official documents which are considered inherently uncopyrightable. Among the benefits which would accrue from asserting copyright abroad in selected U.S. Government works are: (a) improvements of our negotiating position with certain countries; (b) royalties could be collected, thereby aiding our balance of payments; (c) protection of the integrity of U.S. Government works; and (d) greater dissemination if American publishers were licensed to distribute U.S. Government works through established distribution outlets abroad.

It is also recommended that a subsection similar to that appearing in the current law, 17 U.S.C. 8, be inserted in Sec. 105 of H.R. 2223, that is:

"Publication or other use by the United States Government of any material in which copyright is existing does not impair the copyright or authorize any further use or appropriation of the material without the consent of the copyright owner."

It is believed desirable to retain such a provision in the statute to provide assurances to authors and to preclude the argument that deletion of this provision from the present statute implies that such protection is no longer available.

Pre-emption With Respect to Other Laws

A key provision of Title I of H.R. 2223 is Sec. 301, which would establish a single system of statutory protection for virtually all copyrightable works whether published or unpublished. Under Sec. 301, a work would obtain statutory protection as soon as it is "created" or, as the term is defined in Sec. 101, when it is "fixed in a copy or phonorecord for the first time."

Sec. 301(b) provides that nothing in the title annuls or limits any rights or remedies under the common law or statutes of any state that are not equivalent to any of the exclusive rights within the general scope of copyright, such as breaches of contract. No mention is made of Federal statutes such as the Tucker Act, 28 U.S.C. 1491, which permits suit against the Government for breach of an express or implied contract. Undoubtedly, it was not intended that such a Federal statute be preempted by the copyright revision. It is recommended, therefore, for clarification purposes, that Sec. 301(b) be amended by inserting the phrase "under Federal statutes or" after the word "remedies" on line 1.

A similar omission occurs in Sec. 117 and it is suggested that the phrase "title 17" be replaced by "this or other title of the United States Code."

Sec. 502(a) provides that any court having jurisdiction of a civil action arising under the title may, *subject to the provisions of* section 1498(b) of title 28, grant injunctions to prevent or restrain infringement (emphasis added). It is recommended that the phrase "subject to the provisions of" be replaced by "except in actions against the Government under" to clarify the exclusive jurisdiction of the Court of Claims under 28 U.S.C. 1498(b).

Unpublished Works

28 U.S.C. 1498(b) provides for a cause of action against the Government for infringement of "copyright in any work protected under the copyright laws of the United States." This waiver of sovereign immunity has been construed not

to embrace common law copyright, i.e., unpublished works. See e.g., Porter et al. v. United States, 473 F 2d 1329, 117 USPQ 238 (CA 5 1973). Since H.R. 2223 protects unpublished as well as published works, the Government's liability will be extended. It is urged that 28 U.S.C. 1498(b) be amended so that it continues to restrict the Government's liability for copyright infringement to "published" works only. Government agencies receive a voluminous amount of material from private sources which does not bear a copyright notice and which is reproduced, distributed, etc. in its day-to-day business activities, for example, under the Freedom of Information Act. It would be extremely difficult, if not impossible, to ascertain whether the material submitted has been published with no intent to claim copyright, or whether it is unpublished and the owner intends to claim copyright protection.

The effect of compliance with the Freedom of Information Act (FOIA) on the Government's liability for copyright infringement also needs clarification. If a document requested under the FOIA bears a copyright notice, the requester can be so advised and will usually be able to secure a copy elsewhere. Where the document requested contains no copyright notice, it may be an unpublished work subject to protection under the proposed copyright revision; and providing access or a copy may very well frustrate the copyright owner's desires and subject the Government to liability. We are concerned whether the furnishing of a copy of a document by the Government under the FOIA will be considered excusable, or a form of fair use. Of course, if a document is released under FOIA, the Government may not itself restrict its use by others. For clarification purposes, it is recommended that language be inserted in H.R. 2223 explaining the fair use doctrine's applicability to unpublished works and the Government's release of documents under the FOIA.

Innocent Infringers

Under Sec. 405(b) an innocent infringer who acts in reliance upon an *authorized* copy or phonorecord from which the copyright notice has been omitted, and who proves that he was misled by the omission, is shielded from liability for actual or statutory damages with respect to any infringing acts committed before receiving actual notice of registration. No protection is spelled out in the proposed legislation for an innocent infringer who relies on an *unauthorized* copy or phonorecord of a published work from which the copyright notice has been omitted; or for an innocent infringer of an unpublished work, i.e., one who relies on a copy or phonorecord which has been published without authority of the owner.

Publications Incorporating Works in the Public Domain

Sec. 403 of H.R. 2223 provides that when a work is published in copies or phonorecords consisting preponderantly of one or more Government works, the notice of copyright shall also include a statement identifying the portions embodying work protected under Title 17. It is NASA's opinion that Sec. 403 is too limited and that it would be in the public interest to require such a statement also where a work consists preponderantly of any material that is in the public domain. We recommend that Sec. 403 be amended by adding the phrase "or works in the public domain" after the word "works" in the heading and before the words "the notice" in line 3 of the body of the section.

TITLE II

Our remaining comments are directed to Title II of H.R. 2223. It is assumed that the word "title" in the various sections refers only to Title II dealing with ornamental designs. It is not apparent where Title II will appear in the United States Code. If Title II is placed under Title 17, difficulties in construction may ensue. For example, the definitions set forth in Title I of H.R. 2223 dealing with copyrights might be construed as being applicable to Title II also.

It is suggested that paragraph (b) of 28 U.S.C. 1498 be amended to include registered designs rather than paragraph (a). (See Sec. 232.) The process for creating rights in registered designs is more closely analogous to copyrights. Furthermore, the specific authorization for the administrative settlement of copyright infringement claims set forth in paragraph (b) [and not present in paragraph (a)] would be made applicable to registered designs, which in our opinion is highly desirable.

In the event 28 U.S.C. 1498(a) is amended as set forth in Sec. 232, it is recommended that the phrase "described in and covered by a patent of the United States" be inserted after the word "invention" in the first line. This will reinstate the language present in the current law with respect to patented inventions and which was probably inadvertently omitted. Omitting this language might be interpreted as a broadening of the Government's liability to cover unpatented inventions.

Subject to the foregoing, the National Aeronautics and Space Administration would have no objection to the enactment of H.R. 2223.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report to the Congress.

Sincerely,

JOSEPH P. ALLEN,
Assistant Administrator
for Legislative Affairs.

[Whereupon, at 12:20 p.m. the hearing adjourned to reconvene at 10 a.m. on May 14, 1974.]

COPYRIGHT LAW REVISION

WEDNESDAY, MAY 14, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE OF THE
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Pattison, and Mazzoli.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The hearing will come to order on the third morning of hearings on copyright law revision. The issue under discussion lends itself into equal division of time between those in favor and those opposed; each side will be invited to divide 30 minutes of testimony among its members, and you will be expected to stay within that time frame.

This morning six national library associations have given their entire half-hour to Mr. Edmon Low. Thereafter four representatives of writers and publishers will share their 30 minutes in arguing the other side of the library photocopying issue.

Furthermore, the Chair will announce that the chairman and perhaps another member of the committee will have to excuse themselves for the purpose of appearing before the Rules Committee on the question of the Parole Reorganization Act this morning, and the gentleman from California, Mr. Danielson, will preside during that period of absence of the Chair.

Before introducing the first witness, I would like to yield to our Judiciary Committee colleague from Kentucky, Mr. Mazzoli, for the introduction of one of the witnesses.

Mr. MAZZOLI. Mr. Chairman, thank you very much, I appreciate your willingness to yield today. I would like to just take this chance to introduce to you and your distinguished subcommittee a lady who is from my district and with whom I spend many hours on airplanes, flying back and forth from the District of Columbia to Louisville, our home.

Mrs. Joan Titley Adams, Mr. Chairman, is testifying in your first panel today, and without taking any more of your valuable time, I would just like to commend her testimony because she is a professor at the University of Louisville, as well as being the librarian of the

Sciences Library. She has been in the Medical Library Association in virtually all of its positions, including the board of directors. She likewise holds positions in the University of Louisville on its faculty senate. And without necessarily knowing all the nuances of the bill before you, which is very complicated, I would like to commend her testimony.

Thank you very much, Mr. Chairman.

Mr. KASTENMEIER. Thank you for this introduction. I say to my colleague I am sorry we can't introduce all our witnesses as fully in terms of their biographies.

The Chair would like to welcome Mrs. Adams and Mr. Low. I understand Mr. Low this morning will make the major presentation on behalf of the libraries. Mr. Low, you may want to introduce your other colleagues. You may proceed as you wish.

TESTIMONY OF EDMON LOW, REPRESENTATIVE OF SIX LIBRARY ASSOCIATIONS

Mr. Low. Thank you, Mr. Chairman. I am Edmon Low, and I will today present the views of the American library community as represented through six major library associations. With me are representatives of each of the six associations. I am happy to present to you Mr. Julius Marke, representing the law libraries and chairman of their copyright committee. Mr. McDonald, at my right, is the executive director of the Association of Research Libraries. At my left Mrs. Adams—and Mr. Mazzoli, we share your enthusiasm for Mrs. Adams and her work in our library community. Next is Mrs. Sommer, who is representing the Music Library Association, and who is the chairman of their copyright committee; and Mr. Frank McKenna, who is the executive director of the Special Libraries Association. And then with us we have the members of counsel, sitting behind us here, Mr. Sharaf, who represents the Harvard University Library; Mr. William North, representing the American Library Association, and Mr. Philip Brown, representing the Association of Research Libraries.

Mr. KASTENMEIER. Thank you.

Mr. Low. Because of our time limitation, with your permission, Mr. Chairman, I shall omit some of my testimony and ask that this statement be admitted into the record.

Mr. KASTENMEIER. Without objection, your statement in its entirety will be received in the record. You may proceed, sir.

Mr. Low. Thank you.

We are here today to talk about library copying and the provisions of the copyright revision bill, H.R. 2223. I shall be presenting, so far as I am able, the concerns of all these various library groups. However, each of these organizations will also be filing a statement of its own, setting forth in greater detail its individual concerns about provisions of the bill. All of the representatives will assist me in answering particular questions you may have concerning our testimony and the issues raised.

Although our testimony today is limited to library photocopying which is the subject of this hearing, there are other provisions of the bill which concern us, and about which we may be making further statements as other hearings are scheduled.

I would like first to point out that, although this copyright revision bill has been under consideration for 10 years, the library photocopying issue is still an important unresolved subject. In brief, as we see it, a question which Congress and this committee must decide is whether libraries will be permitted—at no additional expense—to continue to serve the public by the long-standing practice of providing single copies of copyrighted material for users' research or study. It is an issue with direct and widespread impact on the general public and involves both the right of access to library materials and the cost of that access.

In the past year there have been two major developments affecting this question. In the first case ever brought by a publisher, the Williams & Wilkins Co., against a library the courts have upheld the photocopying of single copies of copyrighted medical journal articles as being within the doctrine of fair use, and not constituting infringement of copyright. It is in part because this case consumed 7 years and major financial outlay that libraries are concerned about the second major development, which is the introduction last year into the Senate bill, without any hearing, of a new and undefined limitation on the rights of libraries; namely, the concept of "systematic reproduction" of either single or multiple copies of copyrighted material.

Now when we talk about library copying, we are not talking about something for the benefit of libraries or librarians, we are talking about something that is carried on for the benefit of users of libraries who include citizens from all walks of life throughout the country.

When we are talking about library copying practices, we are talking about the schoolboy in California who may need a copy of an article in the Los Angeles Times for a project he is working on in his ninth-grade class, or about a judge in the county court in Middlesex County, Mass., who may find he needs a copy of a law review article which bears directly upon a difficult question of law which has arisen in the course of his work. Or about the doctor in downstate Illinois who has a patient with an unusual and rare disease and the only recent material to be found is contained in an obscure journal published in Sweden, and available only through the Regional Medical Library system, but which article may aid him in saving his patient's life. And we are talking about, even, a member of this committee asking the Congressional Reference Service of the Library of Congress for an article dealing with copyright. Or, we are talking about a musician who is preparing a scholarly article on the music of Mozart and needs to take with him to study a copy of a portion of a recently edited score of one of Mozart's works with which he is concerned.

The list is endless, but I wish to emphasize that we are talking about an issue that very broadly affects the ability of people in this country to make use of their libraries which are the repository and storehouse of man's knowledge.

I should note here that copyright is not a constitutional right, such as trial by jury of one's peers. The Constitution simply authorizes the Congress to create such a right. It is therefore a statutory right, one created by law, which may be changed, enlarged, narrowed or abolished altogether by the Congress here assembled. It is a law enacted not for the benefit of an individual or a corporation, but for

the public good and with the purpose, as the Constitution expresses it, "to promote the progress of science and useful arts."

Consequently, in revising the copyright law the problem for Congress is to design provisions which both encourage the creation of original works and permit the widest possible access and dissemination of information to the public; and, where these goals compete, to strike a balance which best serves the fundamental objective of promoting learning, scholarship, and the arts.

I should like to go on to the top of page 5. At present I am director of the New College Library at Sarasota, Fla. New College is a small, but very fine, private college and its problems in this connection are typical of the two thousand small and medium-sized colleges throughout the country. While our library is liberally supported and spends every cent it can afford on periodical subscriptions, we cannot possibly have the large resources of a university like the one at Gainesville or at Tallahassee. Yet, our faculty members, if they maintain a good quality of teaching and do the research which contributes to it, must have access by random photocopying at times to the larger collections in the State and elsewhere.

It is the general experience of the library community that interlibrary loan encourages the entering of additional subscriptions by the library, rather than reducing the number, as is often charged by the publishers. It is a truism that a librarian would prefer to have a title at hand, rather than to have to borrow, even under the most convenient circumstances. Consequently, when the time comes around each year to consider the list of periodical subscriptions, the record of interlibrary loans is scanned and titles are included from which articles have been requested with some frequency during the year. While the situation varies, in our library the number is two; if we have had two or more requests for articles from the same title during the year, we enter a subscription. This not only indicates how the procedure can help the periodical publishers, but also indicates that if only one article, or none was copied from a title during a year, the journal could not have been damaged materially in the process.

It is not only the small schools which would suffer if such photocopying were eliminated, however; the scholars at Wisconsin or Michigan would also be severely put to it to continue their research in the same way, and it is these scholars who account for the major writing for the scholarly journals. The journals themselves, therefore, have a stake in seeing this procedure continued in a reasonable way.

The courts have long recognized that some reproduction of portions of a copyrighted work for purposes of criticism, teaching, scholarship or research is desirable, and this judicial concept was incorporated in section 107 of the revision bill. Libraries have operated all these years under this principle, but it does lack the assurance of freedom of liability from harassing suits. This fair use concept is necessarily expressed in general language in section 107 of the bill. So a librarian is not able to feel sure until a court decides a particular case whether his actions, undertaken with the best of intentions, is or is not an infringement.

This is pointedly illustrated by the recently decided and prior mentioned case of *Williams & Wilkins*. This suit was instituted in 1968 and now, only now, after years of litigation and expenditures of many

thousands of dollars on each side, has it been determined that the defendant was properly obeying the law after all.

Fair use, then, is not really a right to copy any given thing, but only a defense to be invoked if one is sued. This threat of suit, even if one is able to maintain his innocence in court, is very real because suits are costly in proportion to the amount for which one is sued. This revision bill provides not only for a demand for actual damages, but also one can be sued, in extreme cases, for statutory damages up to a limit of $50,000 for each imagined infringement. Thus, harassing but unjustifiable suits are really invited by this provision.

In light of the above we librarians believe that in addition to section 107, delineating fair use, further protection is needed to assure that it is permissible to make a single copy as an aid in teaching and research, including a single copy as part of an interlibrary loan transaction, and that such activity on behalf of the public good is not subject to possible suit.

Now, I want to emphasize here that in 108, the provisions that we want to see maintained are not additions to 107 in the sense of providing further opportunity for copying, but simply a more precise explanation of what, in relation to libraries, "fair use" means. That is, you can be sued, regardless of whether you are guilty or not, under 107. We would like to see the photocopying practices involving single journal articles be permitted without threats of suits.

That assurance is now being largely provided in section 108, (a) through (f), for which we are very appreciative. However, we are greatly concerned with the addition of subsections 108(g) (1) and (2) which take back the very right set forth in 108 (a) through (f) in the most part. These are provisions which came into the bill in the Senate after hearings were concluded in 1973, without the opportunity for discussions by library representatives with Senator McClellan's committee. Today's hearings are the first opportunity we have to express publicly our very deep concern.

Before discussing subsections (g) and (h) I would like to note there is also a particular problem in the interpretation of section 108 (a) which can affect the specialized libraries in business, industry, and commerce. This is discussed in Mr. McKenna's individual statement for the Special Library Association, and he can also answer questions in this regard.

Subsection (g) (1) gives us concern because often there is no basis—this is one that says if an assignment was made and then people came in, you would have to recognize whether it was isolated, or essentially multiple copies. This gives us concern because there is no way for a library employee to judge whether a request for a copy represents an isolated, unrelated reproduction, as specified in 108(g)(1). For example, if a college instructor in a graduate seminar in English were to recommend to his students, some 10 men and women sitting around a table, that they read an article on Milton's poetry that appeared 10 years ago in publications of the Modern Language Association, and if two of them over the next week were to go to that college's library and look at that article and decide that they wanted to take copies back to their dormitory for further study, we don't see how there is any practical way in which a library can prevent that kind of reproduction of a single copy on separate occasions, and we don't think they should

have to. Also, we do not think that the publication will be damaged in such a process. And yet, the Senate committee in its report on S. 1361 cites such a particular instance.

Section 108(g)(2) says that the rights of reproduction and distribution do not extend to a library which "engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d)." The materials referred to in (d) are journal articles or small portions of other copyrighted works.

This gives us a great deal of concern because the question immediately arises as to what constitutes "systematic reproduction." To the extent that we are able to puzzle it out, it appears to have been aimed at practices of the kind which were upheld as fair use by the Court of Claims in the *Williams & Wilkins* case. In listening to my publisher and author friends, the preeminent example which they give of systematic reproduction has always been the regional medical library system, with the National Library of Medicine at its apex. Those practices of the National Library of Medicine were, of course, upheld by the Court of Claims in *Williams & Wilkins* in a decision which was affirmed this year by the U.S. Supreme Court.

Now, the rest of this page goes on describing how the regional medical library system works, and in the interest of time I will omit reading that. But Mrs. Adams works with this all the time and is sure to answer any questions you may have concerning this, and also talks about it in the particular statement she filed.

Going to the top of page 9. Another large and highly important type of system for which this systematic reproduction poses problems is that of the county and multicounty library systems throughout the whole country. These libraries came into being largely through the opportunity provided by the Federal Library Services and Construction Act. This was, and still is, an effort to bring books and other library materials to the millions of people, often in rural areas, who had not heretofore had library services available.

To get counties to join together, vote the necessary taxes, agree on a common governing board, and gain consensus on the sites for a central library and for the smaller satellite libraries in the system is a difficult task. It is often made possible only by the promise to the citizens of much broader areas of information which will be made available to them not only from their small but growing collection in each neighborhood, but also through loans from the central library and through it from larger collections elsewhere. In this, some copying of periodical articles is occasionally involved, but it does not result in fewer subscriptions—in fact, before the founding of many of these libraries, there were no periodical subscriptions at all in the area.

Because interlibrary loan is one of the vital elements in this concept which has been so mutually beneficial to all, it is urged that no restrictions be imposed which would diminish the effectiveness of the program. Such a diminution, if it occurred, would be as much against the interest of the publishers as against the citizens the libraries serve.

I should like to give you an illustration from my home State of Oklahoma, which I know well. I am in Florida now, but Oklahoma is my native State. A few years ago, the Western Plains library system was established consisting of four counties in western Oklahoma. At

the time of its organization, there was a single library in each of two counties. The other two had no libraries. Now there are seven libraries in the four counties and two bookmobiles are operating regularly. At the beginning, the 2 original libraries subscribed to 20 periodicals between them. The 7 libraries now subscribe to over 300. The combined annual book budget of the two original libraries was under $2,500; the annual book budget for the seven is now $42,000.

In addition, they have encouraged school libraries to develop collections of periodicals and books and are now promoting with success the creation of home collections of books and periodicals. This tremendous increase in acquisition of materials has obviously benefited the publishers of materials as well as the citizens the libraries serve.

This kind of multicounty library is now found in every State in the Union, and over the 2 decades the Library Services and Construction Act has been in existence millions of dollars of Federal money and matching local funds have been expended for this kind of service. The importance of this activity was recognized in the Senate report last summer, accompanying S. 1361, in the portion discussing systematic reproduction by saying, "The photocopying needs of such operations as multicounty regional systems must be met," but no provision was made in the law to specifically provide for these needs. Section 108(g)(2) would prohibit their copying activity, and I believe would do much mischief indeed.

If I may drop to the last paragraph on the page. We are also concerned with section 108(h) which would limit the rights otherwise granted under section 108 by excluding a musical work, pictorial, graphic, and other audiovisual works. These exclusions are illogical. The need of the scholar doing research in music for a copy of a portion of a score is as legitimate and proper as that of the scholar doing any other kind of research. Likewise, the copying of one map from an atlas or a page of diagrams and plans from a technical journal may be just as important as any other kind of material for research. I will skip the next paragraph.

Mrs. Susan Sommer of the Music Library Association is with us today and can provide further information about the problems posed by this section of the bill in relation to music. Dr. Frank McKenna, of the Special Libraries Association, is also here and can discuss the problems in relation to atlas or other graphic materials in books and periodicals.

If I may go to the top of page 12. The paragraphs following what I was reading describe the formation of a study group between the libraries and the publishers to see if there were agreements we could reach in this area of photocopying; and we have had several meetings in this regard.

There are, of course, different views of the significance of the work performed to date by the conference and its working group. The work has focused upon the mechanics and the feasibility of possible mechanisms for collecting payments for photocopying of copyrighted materials. But I should like to emphasize here that there has been no agreement as to whether such a payment mechanism is acceptable to libraries even if it is workable, and also, I may say, no seemingly workable mechanism has yet been advanced in that it still appears it would take dollars to collect dimes. There has also been no agreement

as to the categories of publications to which such a mechanism should be applied and no change in the position of libraries that their current photocopying practices are entirely lawful and within the fair use holding of the *Williams & Wilkins* case, and should not in any respect be treated as infringing rights of the copyright proprietor in the provisions of any new legislation.

I should like to point out some reasons why we think licensing and payment of royalties by libraries for the photocopying they do is not justified. First, many publishers already have variable pricing for journals; that is, they charge a considerably higher price for the same journal for a library subscription than for an individual subscription. These prices to libraries often run quite high, subscriptions of $100 to $300 a year are not uncommon; a few run $1,000 or more; and the $50 to $100 price is quite commonplace in the scientific field. These higher subscription prices to libraries presumably are designed in many cases to include charges for anticipated copying. Some journal publishers have also received substantial Federal assistance in modernizing their editorial and manufacturing procedures. Other journals, and also some of those just mentioned, have already had major contributions of public funds in the nature of per-page charges, usually in the range of $50 to $100 per printed page paid by the author or by a Federal grant which is financing his work.

The author, on the other hand, is usually not paid by the publisher for his work in writing the article, but the library or the institution where the author is located often spends a sizable amount for interlibrary loan postage and handling to aid him in preparation of his article which the periodical then receives without cost. As an example, my own small library spent during this past year over $100 on interlibrary loan expense for books to enable a professor to write an article for a historical journal, but the journal did not pay him anything for the article.

In the light of these contributions which the libraries and the public already make to the publication of these works, it seems to us unreasonable for journal publishers to demand still further payment from libraries, and eventually the public, for the occasional photocopying of individual articles for library users. It seems even more unreasonable in view of the fact that by making the information concerned available to those with current, specific needs for it, library photocopying fosters the basic purpose of the authors of such articles. But when it also is noted that there is no evidence that the libraries' policies have caused publishers any harm whatsoever, and may actually increase their subscriptions, it is clear that such demands are completely unjustified and the public interest requires that they be rejected by Congress.

For the reasons we have advanced, we urge that sections 108(g)(1), and (2), and (h) be deleted from the bill, since these sections are taking away the advantages for the most part granted in 108 (a) through (f). This would also be in accord with the *Williams & Wilkins* case decision and would permit libraries to continue the long established library service of providing a single photocopy of a single article or excerpt from a copyrighted periodical or book for a patron's use without incurring liability for copyright royalties.

It has been a pleasure to appear before you today, Mr. Chairman, and I assure you that we are ready to be of assistance in any way we

can toward a satisfactory resolution of this very difficult but important problem to us.

Mr. KASTENMEIER. Thank you, Mr. Low, for a very informative statement, a very useful statement.

Off the record.

[Discussion off the record.]

Mr. KASTENMEIER. Mr. Low, you indicated this morning that you and your colleagues would address the question of photocopying, but that there were a number of other provisions in the bill with which librarians were concerned, and you would hope to testify later on those areas; is that correct?

Mr. LOW. Yes.

Mr. KASTENMEIER. Will it be your panel, or will it be a different set of witnesses we might have with respect to other questions?

Mr. LOW. I think it would be this panel, but since their judgment may have been in question for selecting me, I can't be sure that I will be speaking again.

Mr. KASTENMEIER. At what point in time did the photocopying that takes place in libraries, really originate, 10 years ago, 15 years ago; can you place that point in time for us?

Mr. LOW. The electrostatic photocopying—Xeroxing, as it is often called—really came to the fore about 1960, and became widely used in the ensuing years thereafter. However, it has not become a matter of enough concern, apparently—I wasn't working with the committee at that time—when testimony was taken before your committee in 1965 and 1966, along there, to have been a major problem.

It has come to the fore in recent years, particularly because there has been a considerable amount of photocopying because of the increase in the amount of recorded knowledge, and the impossibility of any library being able to have a major portion of it; and also because of the information of library systems, so-called, many of which were not designed for or concerned with photocopying, but were concerned with promoting better library arrangements in the area of centralized cataloging, and so on.

But the creation of systems seems to have concerned particularly our publisher friends—and we would consider the publishers our friends because we have many things in common, much more than our differences, in spite of those differences that appear before you today. So, we believe that these systems as yet do not pose any threats of damage to the publishers because they were not primarily created for the purpose of promoting photocopying in the sense of trying to get one periodical here, and let it serve for a large group in the surrounding area, and discourage subscriptions by the surrounding libraries.

Mr. KASTENMEIER. I take it the provisions of the bill passed by the House in 1967, they also would not have been adequate, or at least acceptable, for libraries in terms of photocopying; is that correct?

Mr. LOW. Yes. In regard to prior use, you made the statement that you are not attempting to encourage or narrow, but simply put in legal form, the judicial concept of fair use.

Now, particularly with the suit of *Williams & Wilkins*—and I don't want to belabor that too much—where they think that some copying is damaging their livelihood, they can bring a suit—that's the weakness of 107 that we have been greatly concerned with since that time. This cannot be controlled if you have a periodical publisher that felt

that, well, his subscriptions were diminishing and the reason why is very hard to determine; photocopying is often singled out and he becomes convinced that, if it weren't for photocopying, he would be in much better shape, so, the only thing to do is to use the library. And that may not be the reason for diminishing subscriptions at all. It may be a reduction in funds, and the library cannot afford to subscribe to all the journals as in the past; and that becomes an increasing problem as money for higher education is becoming more limited these days than it was in the late 1960's and the last few years, and periodical subscriptions have to be discontinued.

Mr. KASTENMEIER. Is it your position that photocopying does not affect in the final analysis, in neutral terms, the number of copies that could be sold by the publisher of a given periodical or magazine?

Mr. LOW. We believe that, and in my experience over quite a long time, I found no evidence otherwise. I would like to have Mr. McDonald, who is the director of the Association of Research Libraries, and represents the large research libraries who do more copying than the smaller libraries, but often in response to requests that come in from them, to comment on that, too.

Mr. McDONALD. I would be happy to. What evidence there is suggests that subscriptions are not diminished. That the practice of interlibrary loans in fact tends to advertise journals and to increase sales. We know less about this than we would like to know, but we look to Britain for a model. As you may know, the British Government has established a national library service. The British Library Lending Division has evidence that its loans of periodicals and photocopies of journals promote subscriptions. Very often from the field they get a request for any issue of a given journal. The obvious intent of that request is to inspect that issue with the thought of entering a subscription. They have done a little checking on this and have determined that this advertising effect has, in fact, resulted in subscriptions.

I would go on to say that our friends on the publishing side have never really entered any evidence of economic damage. Certainly in the *Williams & Wilkins* case, no such evidence was presented.

Many libraries feel that interlibrary loan practice is a stimulus to publication and research, and that rather than resulting in damage, quite the opposite is true.

Mr. KASTENMEIER. Of course, I think it could be predicted that many publishers would be sensitive because there are many publications which are, in terms of interest and specialty, very narrow indeed—medical publications, for example—and therefore there is a limited opportunity to develop subscriptions. And if that is in any way diminished, it would probably be terribly harmful to that publication. But, it is difficult to judge, as you say, what the cause may be.

Now, in terms of your working group, I take it you are considering this is an ongoing enterprise, and you are considering a number of alternatives; one would be what the language should be in terms of limitation of the construction of "fair use," or whether copying should be permitted with some sort of royalty which you suggested, talking about dollars and dimes. Which would you prefer? Would you prefer a wider, a broader availability in terms of photocopying with smaller fees attached, or a somewhat more restricted statutory permission to copy?

Mr. LOW. As I indicated, we feel at the present time that no fee should be charged. When we started out in the working group, the first thing we attacked was the systematic copying; that is, what constituted systematic copying. And we were totally unable to reach agreement on that. Some of our publishers insisted that the existence of a union list of serials and State and regional list of periodicals that shows where the periodicals can be located, the existence of these lists constituted a system in itself, and consequently all interlibrary loans became systematic and prohibited.

Others felt that at least the large research libraries which did much copying, simply by the amount of copying they did it must be systematic automatically because of the amount they did.

I tried to point out that often this amount done by the large research libraries was smaller libraries like mine turning to them for copies of articles, and so on, which seemed that it would be acceptable in a way. So, we were not able to reach any consensus on systematic copying.

The work we have done on the mechanism was simply to see whether there was any mechanism that was feasible, in case it was desirable. We didn't agree that any mechanism that involved royalty payments was desirable at this time. But we have been investigating as to whether or not it was feasible; if not. there wasn't much point in considering further whether it was desirable or not.

We have not yet come up with a feasible mechanism that seems at least to me workable.

Mr. KASTENMEIER. One last question. In terms of the bill before this committee, H.R. 2223, the recommendation that you make in the language on behalf of the library users with respect to photocopying is that sections 108(g) (1), (2), and subsection (h) be deleted from the bill. This is the only recommendation you would make with reference to 108?

Mr. LOW. Yes; well, we have a little concern with 108(a) (2), which affects the Special Libraries Association in which Mr. McKenna——

Mr. MCKENNA. May I correct that? That is section 108(a) (1).

Mr. LOW. Yes.

Mr. MCKENNA. The present language is, "The reproduction or distribution is made without any purpose of direct or indirect commercial advantage."

Now, the question arises, what is the interpretation to be placed on "direct or indirect commercial advantage"? The majority of the specialized libraries exist in business and commerce, and their parent organizations have a direct or indirect commercial interest and commercial advantage, profit, or lower prices, hopefully.

It has occurred to us that the existing language of section 108(a) (1) may have been intended to prohibit a commercial advantage to an unauthorized reprinter, or republisher, without thinking, or realizing that special libraries existed in American business.

So that in the statement of the Special Libraries Association we have recommended two possible alternatives. One is to add the existing words so that it will read, "Without any purpose of direct or indirect commercial advantage to a reprinter, or republisher."

The alternate suggestion is that, through appropriate commentary in the legislative history, it indicates that the provision is not intended for special libraries.

Mr. KASTENMEIER. I will now yield to the gentleman from California, Mr. Danielson.

Mr. DANIELSON. Will you tell me, please, what procedures the libraries used for copying prior to the advent of the quick copying machines?

Mr. LOW. The photographic method had been used for a long time, dating back even prior to the first Copyright Act. It was a different photographic process, photographing the page instead of Xeroxing.

Mr. DANIELSON. You are talking about a large, somewhat cumbersome photostat machine, and it made usually a white copy on black paper.

Mr. LOW. That is correct.

Mr. DANIELSON. And that was fairly expensive to operate, was it not?

Mr. LOW. Yes; it was.

Mr. DANIELSON. And per page the product was maybe something like 50 cents, something like that?

Mr. LOW. Yes. And also, as a result of that and the inconvenience, we shipped much more material, sent the whole volume.

Mr. DANIELSON. Just sent them the book, let them look at it, and send it back.

Mr. LOW. That's right.

Mr. DANIELSON. Now, under those circumstances, did you have many complaints--I'm going to use the word in the very broad sense—from the publishers of the journals and books?

Mr. LOW. Not that I know of. Of course, sending the material was completely legal.

Mr. DANIELSON. I have a very narrow area of inquiry. You did not have complaints at that time.

Mr. LOW. No; we did not; I believe that's correct.

Mr. DANIELSON. In other words, it was the advent of the quick copying, and low-cost copying that brought on that problem.

Mr. LOW. That's correct.

Mr. DANIELSON. You mentioned in your statement that with some technical journals, at least, there is a different subscription rate for the library than for, I guess you would call it, the individual subscriber.

Mr. LOW. Yes.

Mr. DANIELSON. Would you give me some examples of that, please?

Mr. LOW. I have a list of examples, but when I looked in my folder——

Mr. DANIELSON. Just a few off the top of your head.

Mr. LOW. Well, the American Behavioral Sciences is one, I remember making the list.

Mr. DANIELSON. Sir, I'm not that interested in the title, but do you mean it's $1 for the private citizen, and $100 for the library? Give me some examples of the difference, please.

Mr. LOW. Not that spread. I went through my own library, went through the A's, and found about 40 just in the A's alone, and that is a small collection. It is a going practice.

Mr. DANIELSON. Would you give me an example, please?

Mr. Low. Of the price?

Mr. DANIELSON. Yes, please.

Mr. Low. The price will run from $12 for the individual and $30 for the library. It's often double the individual price, to the library; sometimes the spread is much wider than that.

Mr. DANIELSON. Is that a published practice? By that I mean, does it appear within the publication that the subscription for a library is three x dollars, and for the individual one and a half x, maybe.

Mr. LOW. That is correct.

Mr. DANIELSON. You are confident that is a prevailing practice. I see five heads nodding affirmatively, and one is rather unmoving, here. [Laughter.]

Mr. LOW. Yes, that is an established practice.

Mr. DANIELSON. All right, that's good enough.

Last, on these technical journals, what is the practice in the trade as to this one respect, are they sold by subscription exclusively, or are they sold by subscription and also sold through retail outlets, as we pick up a magazine at a newsstand, for example?

Mr. LOW. Most of these are not sold, you do not find them in the newsstand; I believe I'm correct on that.

Mr. DANIELSON. Well, I used the words "retail outlets" to differentiate from newsstand, because I imagine there is some place besides newsstands where you can buy them.

Mr. LOW. I don't believe you can buy them—of course you have subscription agents where you can place your subscription, most libraries do in order to get the list all on one bill. But not the retail outlets, in any way, shape, or form.

Mr. DANIELSON. You don't run out and get one like you get last month's copy of—whatever.

Mr. LOW. No; you do not.

Mr. DANIELSON. You subscribe for a year, or a period of time.

Mr. LOW. Yes.

Mr. DANIELSON. The gentleman on the end has a comment, please.

Mr. MARKE. My name is Marke. I think it should be recognized that many of these publications are out of print within a period of 2 months, or 3 months after the issue has been made available to the public. So, it is not even possible to buy it through any source.

Mr. DANIELSON. Well, that's my third question. Once they are out of print, the subscriptions have all been sent out through the mail, suppose you want to pick up a copy of, let us say, May 1970—that's 5 years ago—issue of Journal XYZ, a technical journal, where do you get it?

Mr. MARKE. It's a rare occasion when this is available through the publisher.

Mr. DANIELSON. In other words, you write to the publisher, you inquire of the publisher, does he have a spare copy; is that the way it is done?

Mr. MARKE. Yes.

Mr. DANIELSON. The second gentleman has an answer for us. What is your name, please?

Mr. MCDONALD. McDonald. Mr. Danielson, people subscribe to the periodicals, but they have neither the space nor the money to keep and

bind these periodicals, except the large libraries, such as represented by the Association of Research Libraries, which are the libraries of record. They do assume the responsibility of keeping and binding back files of periodicals.

So, when a request comes to us, it may well come from an individual or library which once subscribed to that periodical, paid the subscription price, but did not choose to keep and bind it.

Mr. DANIELSON. Well, suppose I'm doing some research and I find through the Library of Congress there is an article in a 4- or 5-year-old issue of a technical journal—forget that I have access to the Library of Congress—where would I get it?

Mr. MARKE. Well, on occasion some libraries might have accumulated some extra copies in what is called the "dup. list," and librarians very carefully go through these dup. lists—duplicate lists—to see whether any of these issues are available through that list. But otherwise there is no formal structure.

Mr. DANIELSON. I, an individual citizen, how would I find it? I didn't know there was a dup. list, how would I find it?

Mr. MARKE. You couldn't.

Mr. DANIELSON. That's the question.

I have no further questions, I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman.

I might just as an aside say of the use of the word "Xeroxing," that if the general counsel of Xerox reads that in the testimony, he will lose whatever little hair he has left.

Mr. DANIELSON. That's a real hazard. [Laughter.]

Mr. PATTISON. To you, maybe. [Laughter.]

Mr. PATTISON. I would like to point out a few things. You refer to the *Williams & Wilkins* case as being "affirmed" by the Supreme Court. In fact, the Supreme Court's was a 4-to-4 decision, I believe. I don't believe it can be said it was "affirmed." I think then it was a 4-to-3 decision in the Circuit Court of Claims. I think that kind of indicates the problem that we will be having, that you have. Yes, sir?

Mr. MCDONALD. With all respect, Mr. Pattison, I believe that the language of the decision passed down by the court says, "By reason of a divided court the decision of the lower court is affirmed"; those are the words that the Supreme Court used.

Mr. PATTISON. OK. I was trying to point out that was not one of those decisions where reasonable men would not disagree. [Laughter.] Like yourself, some of my best friends are publishers also. [Laughter.]

Mr. MCDONALD. We are trying to be very scrupulous about this and resisted the temptation to say that the decision was "upheld" because the Supreme Court avoided using that word itself.

Mr. PATTISON. The thing that I see here, this whole dispute, is not so different from that, for instance, with the CATV dispute. Everybody seems to say, we are helping the other guy more than he has been hurt. The CATV people said the same thing about broadcasting. Broadcasting was delighted to have CATV out there when there was nobody competing with them; it increased their market. Then, all of a sudden when you get the overlapping signals, and duplication, you've got a different thing. That kind of competing interest, I think, is well pointed out in your statement that, indeed, there must be some sort of

a reasonable compromise that will probably be acceptable to no one, but will probably be arrived at somewhere along the line, or we won't get a bill passed at all.

I just have one minor question about your statement on page 12. You referred to something that I'm not familiar with, and I'm just curious about it, where it says, "Some journal publishers have received substantial Federal assistance in modernizing their editorial and manufacturing procedures," and I don't know what you are referring to there; I'm just curious as to what that is.

Mr. LOW. John, would you care to comment on that?

Mr. MCDONALD. I'll try, but I believe Mr. McKenna knows more about it than I. Many of the scholarly societies, the American Chemical Society, have had assistance from Federal agencies, such as the National Science Foundation, in one or another of their pursuits. The nature and extent of these subsidies is not something I am an expert on by any means, but there are further subsidies that might be cited.

Often the authors who publish in these journals have conducted their research with Federal support. As Mr. Low's testimony points out, the publishers are paid page charges to get this information distributed through these periodicals. The subscription prices themselves have risen, I believe, in excess of the cost of living. So, it seems that these subscriptions have been bought and paid for quite adequately, and the notion of some further charge, or surcharge in the form of a royalty or licensing payment, I think, would be excessive.

Mr. LOW. I believe Mr. McKenna has some additional examples.

Mr. MCKENNA. Mr. McDonald mentioned professional societies. I am aware of subsidies that have been paid by the National Science Foundation to a commercial publisher to acquire cold typesetting equipment, so that he has been able to establish a relatively large printing plant, on the basis that his publications were of national interest, covered translations of Soviet periodicals.

Mr. PATTISON. I see. The other item that I think will be examined by us further is that by other testimony I know that in the *Williams & Wilkins* case, that firm has developed statistics, demonstrating—to the extent it can be demonstrated, it is obviously so full of other factors that it is difficult to demonstrate—demonstrating a loss of subscriptions.

That is a point of dispute, whether they lose, or don't lose. But if in fact the publishers were convinced that they didn't lose, and if in fact they were convinced that they increased their subscriptions, we wouldn't be having this discussion right now. So, I think that probably is a point of dispute and something I would like to hear some more about.

Mrs. ADAMS. May I speak to that, sir?

Mr. PATTISON. Certainly.

Mrs. ADAMS. I am a medical librarian. We were very much involved in this suit. If you notice the rate of increased numbers of subscriptions from the early 1960's up to, say, 1969 or 1970, this is during the period, as was mentioned, when the rapid, efficient reproduction of materials became available, you will see that there was a constant rise in the number of subscriptions that were taken by publishers, including Williams & Wilkins.

So, from the period, say, of the late 1960's to now, there has been a definite decline. My own library has had to cut back on subscriptions, and that has nothing to do with the photocopies, it is simply a reality of frozen budgets within universities, and having to examine highly specialized journals; it has nothing to do with photocopying.

Our photocopying has increased because of our involvement with the regional medical library program. That supplies copies of highly specialized articles to physicians and health professionals in rural areas, some 50 to 150 miles from us, and we supplied over 600 items in just 1 year. There is no way that they could, in their small hospital libraries, have such collections.

But the answer goes back to, there is a correlation between decreasing amounts of money available to education and research, and the decrease in number of subscriptions. We don't find that relates to photocopies.

Mr. DANIELSON. Which of course demonstrates the difficulty of the problem. If you convince the publishers of that, we will have no problem.

Mrs. ADAMS. We have been trying.

Mr. MARKE. You may recall that the Court of Claims actually stated in its opinion that there was inadequate reason to believe that it—the publisher—was being harmed specifically——

Mr. PATTISON. I'm aware of that holding. The figures that have been developed by Williams & Wilkins are quite extensive, since that time.

Mr. LOW. I wanted to say, in regard to saying the publishers felt they would be for the copying if they felt it would increase their publications, I feel that the copying now is not affecting the number of subscriptions, and I think they pretty much realize that too.

I think they are concerned about what may come in the future—without putting words in their mouths—but we found that in discussion with them. Here it has been now over 60 years since we have had a copyright law; they see systems increasing, networks being established——

Mr. DANIELSON. I would like to urge that we conclude expeditiously, we have four more witnesses. I don't want to cut you off, but could you make your answers as precise as possible?

Mr. PATTISON. I think I understand that problem. I think I can understand, and I am sure you can, too, some of the concerns the publishers may have. If in fact people do decide that there is no protection at all, then all the lawyers in the town can get together, for instance, and subscribe to the legal journals and just send them around. I'm not saying that lawyers could ever agree to that, they can't agree on anything, but that kind of thing could happen. I suppose that is the answer, the prospective problem is worse than the current one.

Mr. MARKE. I'm sorry, just in this context, there is also an obligation on the publishers, perhaps, to change their practices, they haven't been changed since Gutenberg. They ought to look into this area and see what they can provide in the way of services, which would increase their profit as well. We want to cooperate with them, we want to give them every opportunity to make a profit.

Mr. PATTISON. That is a very good point.

Mr. DANIELSON. Will someone give me a very concise definition of "page charges", what are they, and who pays them to whom?

Mrs. ADAMS. Authors pay publishers of scientific and technical journals. These charges are based on the length of the article.

Mr. DANIELSON. In other words, if I have written a scintillating article on something I must pay the publisher to have it published.

Mrs. ADAMS. That's right.

Mr. DANIELSON. Thank you.

Thank you, ladies and gentlemen for a very informative discussion here. We will move along rather quickly because we have four more witnesses who will, I know, help us solve this simple little problem.

[The prepared statement of Edmon Low is as follows:]

STATEMENT OF EDMON LOW, REPRESENTING AMERICAN ASSOCIATION OF LAW LIBRARIES, AMERICAN LIBRARY ASSOCIATION, ASSOCIATION OF RESEARCH LIBRARIES, MEDICAL LIBRARY ASSOCIATION, MUSIC LIBRARY ASSOCIATION, SPECIAL LIBRARIES ASSOCIATION

I am Edmon Low, Director of the Library of New College, Sarasota, Florida. Today I will present the views of the American library community as represented through six major library associations. With me are representatives of each of the six associations, and three attorneys. These individuals are here to answer questions of particular concern to the members of their associations, if Members of the Subcommittee so desire.

I am happy to introduce them to the Subcommittee at this time. The individuals at the witness table are from my right (the Committee's left), American Association of Law Librarians, Julius J. Marke, Chairman of the AALL Copyright Committee; Association of Research Libraries, John P. McDonald, Executive Director. Sitting behind Mr. McDonald is the ARL counsel, Philip B. Brown of the law firm Cox, Langford, and Brown, Washington, D.C.; American Library Association—I am representing ALA as Chairman of its Copyright Subcommittee, as well as presenting the unified testimony. Sitting behind me is the ALA counsel, William D. North of Kirkland and Ellis law firm in Chicago; Medical Library Association—Mrs. Joan Titley Adams, Chairman of the MLA Copyright Committee; Music Library Association, Mrs. Susan Sommer, a member of the Association's Board of Directors and Chairman of its Copyright Subcommittee; Special Libraries Association—Dr. Frank E. McKenna, Executive Director. Sitting behind Dr. McKenna is James A. Sharaf, Counsel of the Harvard University Library.

We are here today to talk about library copying and the provisions of the copyright revision bill (H.R. 2223). Because our time for presentation of testimony is very limited, I shall be presenting so far as I am able in the time allotted the concerns of all these various groups. However, each of these organizations will also be filing a statement of its own setting forth in greater detail its individual concerns about provisions of the bill, and all of these representatives will assist me in answering particular questions you may have concerning our testimony and the issues raised. Although our testimony today is limited to library photocopying which is the subject of this hearing, there are other provisions of the bill which concern us and about which we may be making further statements as other hearings are scheduled.

I would like first to point out that, although this copyright revision bill has been under consideration for ten years, the library photocopying issue is still an important unresolved subject. In brief, the question which Congress must decide is whether libraries will be permitted—at no additional expense—to continue to serve the public by the long-standing practice of providing single copies of copyrighted material for a user's research or study. It is an issue with direct and widespread impact on the general public. It involves both the right of access to library materials and the cost of that access.

In the past year there have been two major developments affecting this question. In the first case ever brought by a publisher, the Williams & Wilkins Company, the courts have upheld the photocopying of single copies of copyrighted medical journal articles as being within the doctrine of fair use and not consti-

tuting infringement of copyright. It is in part because this case consumed seven years and major financial outlay that libraries are concerned about the second major development, which is the introduction last year into the Senate bill, without any hearing, of a new and undefined limitation on the rights of libraries, namely, the concept of "systematic reproduction" of either single or multiple copies of copyrighted material.

Now, when we talk about library copying we are not talking about something for the benefit of libraries or librarians, we are talking about something that is carried on for the benefit of users of libraries who include citizens from all walks of life throughout the country. When we talk about library copying practices, we are talking about the schoolboy in California who may need a copy of an article in the Los Angeles Times for a project he is working on in his ninth-grade class; we are talking about a judge in a county court in Middlesex County, Massachusetts, who may find he needs a copy of a law review article which bears directly upon a difficult question of law which has arisen in the course of his work; we are talking about a doctor in downstate Illinois who has a patient with an unusual and rare disease and the only recent material to be found is contained in an obscure journal published in Sweden and available only through the Regional Medical Library System, but which article may aid him in saving his patient's life; we are talking about a Member of this Committee asking the Congressional Reference Service of the Library of Congress for an article dealing with copyright; and we are talking about a musician who is preparing a scholarly article on the music of Mozart and needs to take with him to his study a copy of a portion of a recently edited score of one of Mozart's works with which he is concerned. The list is endless, but I wish to emphasize that we are talking about an issue that very broadly affects the ability of people in this country to make use of their libraries which are the repository and storehouse of man's knowledge.

It should be noted here that copyright is not a constitutional right, such as trial by jury of one's peers. The Constitution simply authorizes Congress to create the right. It is therefore a statutory right—one created by law—and may be changed, enlarged, narrowed, or abolished altogether by the Congress here assembled. It is a law enacted not for the benefit of an individual or a corporation but for the public good and with the purpose, as the Constitution expresses it, "to promote the progress of science and useful arts." Consequently, in revising the copyright law the problem for Congress is to design provisions which both encourage the creation of original works and permit the widest possible access to and dissemination of information to the public; and, where these goals compete, to strike a balance which best serves the fundamental objective of promoting learning, scholarship, and the arts.

It is now generally understood that a single collection of books or other recorded forms of thought as represented by any library can contain only a fraction of the total amount of material in existence. Even the Library of Congress, possibly the largest single collection of materials in the world, does not have many thousands of titles which exist in the United States, to say nothing of those elsewhere in the world, while on the other hand even a relatively small library will often have titles not found anywhere else in the country. The location and cataloging of these titles, and of articles and journals, and the making of some available readily through photocopying or loan—the dissemination of knowledge—is indispensable to education and research and often involves the reproduction by photocopying of a portion of a monograph or a journal article protected by copyright.

Library photocopying may be roughly divided into two groups, the first being that done either by a member of a library staff or by the user himself from material in the library for immediate use on the premises or nearby; the second, that done by one library for and at the request of another library, often some distance away, for use by one of its patrons there. The first is often designated "in-house" copying, while the second we usually refer to as "interlibrary loan." The first is often necessary if a patron is to compare and study several articles from large bound referer [illegible] lumes as for instance a student writing a term paper in the library. Th [illegible] cond is of vital importance in that the scholar or other user does not have [illegible] document in hand and therefore it is his only practical access to what m [illegible] highly important material for information or research.

At present I am Director of the New College Library at Sarasota, Florida. New College is a small, but very fine, private college and its problems in this con-

nection are typical of the two thousand small and medium-sized colleges throughout the country. While our library is liberally supported and spends every cent it can afford on periodical subscriptions, we cannot possibly have the large resources of a university like the one at Gainesville or at Tallahassee. Yet our faculty members, if they maintain a good quality of teaching and do the research which contributes to it, must have access by random photocopying at times to the larger collections in the state and elsewhere.

It is usually not known that the interlibrary loan arrangement often encourages the entering of additional subscriptions by the library rather than reducing the number as is often charged. It is a truism that a librarian would prefer to have a title at hand rather than to have to borrow even under the most convenient circumstances. Consequently, when the time comes around each year to consider the list of periodical subscriptions, the record of interlibrary loans is scanned and titles are included from which articles have been requested with some frequency during the year. While the situation varies, in our library the number is two; if we have had two or more requests for articles from the same title during the year, we enter a subscription. This not only indicates how the procedure can help the periodical publishers, but also indicates that if only one article or none was copied from a title during a year, the journal could not have been damaged materially in the process. It is not only the small schools which would suffer if such photocopying were eliminated, however; the scholars at Wisconsin or Michigan would also be severely put to it to continue their research in the same way, and it is these scholars who account for the major writing for the scholarly journals. The journals themselves, therefore, have a stake in seeing this procedure continued in a reasonable way.

Courts have long recognized that some reproduction of portions of a copyrighted work for purposes of criticism, teaching, scholarship or research is desirable and this judicial concept, known as "fair use," is incorporated in section 107 of the revision bill. Libraries have operated all these years under this principle, but it does lack the assurance of freedom of liability from harassing suits which the librarian needs in his work. This fair use concept is necessarily expressed in general language in the bill, so a librarian will not be able to be sure, until a court decides a particular case, whether his action, undertaken with the best of intentions to aid a patron, is or is not an infringement. This is pointedly illustrated by the recently decided, previously mentioned case of Williams & Wilkins vs. the National Library of Medicine and the National Institutes of Health for photocopying. This suit was instituted in 1968 and only now after years of litigation and expenditures of many thousands of dollars on each side has it been determined that the defendants were properly obeying the law after all. Fair use, then, is not really a right to copy any given thing, but only a defense to be invoked if one is sued. This threat of suit, even if one is able to maintain his innocence in court, is very real because suits are costly in proportion to the amount for which one is sued. This revision bill provides not only for demand for actual damages, but also one can be sued for statutory damages up to limit of $50,000 for each imagined infringement. Thus, harassing but unjustifiable suits are really invited by this bill.

In light of the above, we librarians believe that in addition to Section 107 delineating fair use, further protection is needed to assure that it is permissible to make a single copy as an aid in teaching and research, including a single copy as part of an interlibrary loan transaction, and that such activity, in behalf of the public good, is not subject to possible suit. This assurance has now been largely provided in parts of section 108 (a) through (f), for which we are very appreciative. However, we are greatly concerned with the addition of subsections 108 (g)(1) and (2), and (h), which take back the very rights set forth in 108 (a) through (f). These are provisions which came into the bill in the Senate after hearings were concluded in 1973, without the opportunity for discussion by library representatives with Senator McClellan's Subcommittee. Today's hearings are the first opportunity we have had to express publicly our very deep concern.

Before discussing subsections (g) and (h), I would like to note there is also a particular problem in the interpretation of section 108(a) which can affect specialized libraries in business, industry, and commerce. This is discussed in the individual statement of the Special Libraries Association.

Subsection (g)(1) gives us concern because often there is no basis for a library employee to judge whether a request for a copy represents "isolated and unrelated reproduction" as specified in sec. 108(g)(1). For example, if a college instructor in a graduate seminar in English were to recommend to his students,

some ten men and women sitting around a table, that they read an article on Milton's poetry that appeared ten years ago in Publications of the Modern Language Association, and if two of them over the next week were to go to that college's library and look at that article and decide that they wanted to take copies back to their dormitory for further study, we don't see how there is any practical way in which a library can prevent that kind of reproduction of a single copy on separate occasions, and we don't think they should have to. And yet, the Senate Committee report on S. 1361 (S. Rept. 93-983) cites such an instance.

Section 108(g)(2) says that the rights of reproduction and distribution do not extend to a library which "engages in the systematic reproduction or distribution of single or multiple copies or phonorecords of material described in subsection (d)." The materials referred to in (d) are journal articles or small portions of other copyrighted works.

The question immediately arises as to what constitutes systematic reproduction. To the extent that we are able to puzzle it out, it appears to have been aimed at practices of the kind which were upheld as fair use by the Court of Claims in the *Williams & Wilkins* case. In listening to my publisher and author friends, the preeminent example which they give of systematic reproduction has always been the Regional Medical Library System, with the National Library of Medicine at its apex. Those practices of the National Library of Medicine were, of course, upheld by the Court of Claims in *Williams & Wilkins* in a decision which was affirmed this year by the United States Supreme Court.

Now, how does the Regional Medical Library system really work? Well, it starts off with the user, who discovers that he needs access to some particular information, often found in an article in a professional journal in the biomedical field. He usually starts off by going to the library in the hospital with which his practice is affiliated, and may find it there. If it is one of the most important journals, the hospital may well have it. But, since there are thousands of journals in the medical and health sciences field, the chances are that the hospital library may not have this, particularly if it is older material. The request would then go to one of the eleven Regional Medical Libraries over the country which are supported by Congress, and from there as a last resort to the top of the pyramid which is the National Library of Medicine and which now has over 25,000 different journals, the biggest medical collection in the world. It is obviously not possible for the smaller hospital library, or sometimes even the Regional Medical Library, to have a sizable portion of this vast amount of material, so some kind of access, such as photocopying, must be relied upon to get the information to the doctor or the other health professional when urgently needed. This kind of organization of access to scientific and technical knowledge seems to us to be the intelligent way of doing things. It should be noted also that the Regional Medical Libraries are not only striving to augment their collections as rapidly as possible but likewise are urging the smaller hospital libraries to upgrade theirs, thus providing all along the line an ever-increasing number of subscriptions with accompanying increased financial gain for the publishers. Mrs. Joan Titley Adams, of the Medical Library Association, who is with us here today, can provide for any of the Committee members who are interested further details about this highly significant work in the medical and health fields.

Another large and highly important type of system for which this systematic reproduction poses problems is that of the county and multi-county library systems throughout the whole country. These libraries came into being largely through the opportunity provided by the federal Library Services and Construction Act. This was and still is an effort to bring books and other library materials to the millions of people, often in rural areas, who had not heretofore had library service available. To get counties to join together, vote the necessary taxes, agree on a common governing board, and gain consensus on the sites for a central library and for the smaller satellite libraries in the system is a difficult task. It is often made possible only by the promise to the citizens of much broader areas of information which will be made available to them not only from their small but growing collection in each neighborhood, but also through loans from the central library and through it from larger collections elsewhere. In this, some copying of periodical articles is occasionally involved, but it does not result in fewer subscriptions—in fact, before the founding of many of these libraries there were no periodical subscriptions at all in the area.

Because interlibrary loan is one of the vital elements in this concept which has been so mutually beneficial to all, it is urgent that no restrictions be imposed

which would diminish the effectiveness of the program. Such a diminution, if it occurred, would be as much against the interest of the publishers as against the citizens the libraries serve. Let me give you an illustration from my home state of Oklahoma which I know well. A few years ago, the Western Plains Library System was established consisting of four counties in Western Oklahoma. At the time of its organization, there was a single library in each of two counties. The other two had no libraries. Now there are seven libraries in the four counties and two bookmobiles are operating regularly. At the beginning the two original libraries subscribed to 20 periodicals between them. The seven libraries now subscribe to over 300. The combined annual book budget of the two original libraries was under $2500. The annual book budget for the seven is now $42,000. In addition, they have encouraged school libraries to develop collections of periodicals and books and are now promoting with success the creation of home collections of books and periodicals. This tremendous increase in acquisition of materials has obviously benefited the publishers of materials as well as the citizens the libraries serve.

This kind of multi-county library is now found in every State in the Union, and over the two decades the Library Services and Construction Act has been in existence millions of dollars of federal money and matching local funds have been expended for this kind of service. The importance of this activity was recognized in the Senate report last summer accompanying S. 1361 (S. Rept. 93-983) in the portion discussing systematic reproduction by saying, "The photocopying needs of such operations as multi-county regional systems must be met," but no provision was made in the law to specifically provide for these needs. Section 108(g)(2) would prohibit their copying activity and do much mischief indeed.

It was also pointed out to our publisher friends that many systems are not organized for the purpose of copying materials of any kind. For example, one of the large "systems" is SOLINET, an acronym for Southeastern Library Network. This is a group of about 100 libraries in the Southeastern States devoted solely to providing centralized cataloging and catalog card preparation and distribution to member libraries. Other systems have the purpose of encouraging the building of better library collections and the bringing to the area more journals, sets and bibliographies not now represented in the areas. To say that a library merely because it happens to belong to such a "system" is prohibited from photocopying where if it did not belong, it would be permitted to do so, seems to us farfetched indeed.

We are also concerned with section 108(h) which would limit the rights otherwise granted under section 108 by excluding a musical work, pictorial, graphic and other audiovisual works. These exclusions are illogical. The need of the scholar doing research in music for a copy of a portion of a score is as legitimate and proper as that of the scholar doing any other kind of research. Likewise, the copying of one map from an atlas or a page of diagrams and plans from a technical journal may be just as important as any other kind of material for research.

It seems to us that libraries ought to be encouraged to collect and preserve all the forms in which knowledge is published and distributed, and that it should be possible for users of libraries to have access for their study and scholarship to all of these forms, not just some of them. If a student of the cinema asks a library to make a copy for him of a few selected frames of some famous motion picture which is being studied, so that he may consider at his leisure a certain key point which is made in an article he is reading, we think the library ought to be able to do that.

Mrs. Susan Sommer of the Music Library Association is with us today and can provide further information about the problems posed by this section of the bill in relation to music. Dr. Frank McKenna, of the Special Libraries Association, is also here and can discuss the problems in relation to atlas or other graphic materials in books and periodicals.

In reporting S. 1361 last July, the Senate Judiciary Committee recommended that "representatives of authors, book, and periodical publishers and other owners of coprighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees." And concerning library photocopying practices not authorized by the reported bill, the Committee recommended "that workable clearance and licensing procedures be developed."

In response to this request by the Senate Judiciary Committee, representatives

of the different views on this subject were convened in November 1974 by invitation of the Register of Copyrights and the Chairman of the National Commission on Libraries and Information Science. The resulting "Conference on Resolution of Copyright Issues" established a smaller working group to carry out preliminary discussions. The working group and several subcommittees have since met on frequent occasions to consider and prepare papers on a variety of technical and procedural matters.

There are, of course, different views of the significance of the work performed to date by the Conference and its working group. The work has focused upon the mechanics and the feasibility of possible mechanisms for collecting payments for photocopying of copyrighted materials. It must be emphasized, however, that there has been no agreement as to whether such a payment mechanism is acceptable to libraries even if it is workable, and also I may say no seemingly workable mechanism has yet been advanced in that it still appears it would take dollars to collect dimes. There has also been no agreement as to the categories of publications to which such a mechanism should be applied and no change in the position of libraries that their current photocopying practices are entirely lawful and within the fair use holding of the *Williams & Wilkins* case, and should not in any respect be treated as infringing rights of the copyright proprietor in the provisions of any new legislation.

The publishers will probably tell you that they, too, are for photocopying but they want money for it without any outlay or trouble on their part. I should like to point out some reasons why licensing and payment of royalties by libraries for the photocopying they do is not justified. First, many publishers already have variable pricing for journals; that is, they charge a considerably higher price for the same journal for a library subscription than for an individual subscription. These prices to libraries often run quite high—subscriptions of $100 to $300 per year are not uncommon; a few run $1,000 or more; and the $50 to $100 price is quite commonplace in the scientific field. These higher subscription prices to libraries presumably are designed in many cases to include charges for anticipated copying. Some journal publishers have received substantial federal assistance in modernizing their editorial and manufacturing procedures. Other journals, and also some of those just mentioned, have already had major contributions of public funds in the nature of per-page charges, usually in the range of $50 to $100 per printed page paid by the author or by a federal grant which is financing his work. The author is usually not paid by the publisher for his work in writing the article but the library or the institution where the author is located often spends a sizable amount for interlibrary loan postage and handling to aid him in preparation of his article which the periodical then receives without cost. As an example, my own small library spent during this past year over $100 on interlibrary loan expense for books to enable a professor to write an article for an historical journal, but the journal did not pay him anything for the article.

In light of these contributions which the libraries and the public already make to the publication of these works, it seems unreasonable for journal publishers to demand still further payment from libraries, and eventually the public, for the occasional photocopying of individual articles for library users. It seems even more unreasonable in view of the fact that by making the information concerned available to those with current, specific needs for it, library photocopying fosters the basic purpose of the authors of such articles. But when it is also noted that there is no evidence that the libraries' policies have caused publishers any harm whatsoever and may actually increase their subscriptions, it is clear that such demands are completely unjustified and the public interest requires that they be rejected by Congress.

For the reasons we have advanced above, we urge that sections 108(g)(1) and (2) and (h) be deleted from the bill. This would also be in accord with the *Williams & Wilkins* decision and would permit libraries to continue the long established library service of providing a single photocopy of a single article or excerpt from a copyrighted periodical or book for a patron's use without incurring liability for copyright royalties.

It has been a pleasure to appear before you today, Mr. Chairman, and I assure you that we are ready to be of assistance in any way we can toward a satisfactory resolution of this very difficult but important problem.

[The following prepared statements and correspondence were received for the record:]

STATEMENT OF JOHN P. MCDONALD, EXECUTIVE DIRECTOR, ASSOCIATION OF RESEARCH LIBRARIES

The Association of Research Libraries, an organization of the principal university and research libraries in the country, believes that the copyright revision bill ultimately approved by the Courts, Civil Liberties and the Administration of Justice Subcommittee must include provisions which will ensure that the customary, long-established library service of providing a single photocopy of a single article or excerpt from a copyrighted periodical or book for a patron's private use may be continued without incurring liability for copyright royalties.

The bill adopted by the Senate last year, and reintroduced in the 94th Congress as H.R. 2223, gives explicit recognition to and protection for library photocopying. However, that bill also incorporates provisions in Section 108(g) which encumber and confuse the expressly recognized right to an extent that would severely hamper libraries' service to the public and exclude practices which are presently lawful. It is imperative that the bill be amended to restore to libraries and the public the rights which they presently enjoy to make limited photocopies of copyrighted works. Section 108(g) (2) should be removed from the bill because: 1. It restricts practices which are reasonable, customary and lawful under the decision in the Williams & Wilkins case. 2. Copyright owners (*e.g.*, publishers) have advanced no evidence showing that such practices in any way injure their economic interests, much less evidence that it is in the public interest to forbid them. 3. The cost of the libraries and ultimately the public of prohibiting or imposing a royalty requirement upon such practices will be extremely high. 4. The primary purpose of the authors of the sorts of articles most frequently copied is to disseminate the results of their research, not to earn royalties.

At issue is the making, whether at the request of a patron or at the request of another library, of single copies of copyrighted matter for private use of a scholar or other reader. Such copies may be of articles from law reviews, medical journals or scientific or technical periodicals, or they may be passages from other published works. They are made in response to individual requests for single copies, although more than one individual may request a copy of a particular part of a work in a library's collection. In providing this service, a library may make a copy from a work located on its premises, or in the case of a work not in its own collection, it may request the copy from another library, just as it might obtain the original work itself on an inter-library loan for a patron who wished to borrow it. The right to make a single copy for personal use is important to a wide variety of scholars and other library users, from the high school student who wants a copy of an article in a issue of a magazine for a debate or science project to the physician requiring the material for research work or patient care. In the overwhelming number of cases it is the only way in which a researcher can obtain a copy of an article from a issue of a periodical for reference.

Both libraries and the public have traditionally considered the making of such copies to be a natural and necessary part of libraries' services to their users. It is simply one way in which published material is made accessible. Such copies have been made by photographic and other reprographic techniques since before the enactment of the 1909 Copyright Act. No court has ever held that these traditional practices result in liability under the copyright law, and in the test case brought by publishers, *Williams & Wilkins* v. *United States*, the U.S. Court of Claims held that the libraries' practices were a fair use of the published materials. That holding was recently affirmed by the United States Supreme Court.

It is vital that the copyright revision bill recognize the right of libraries to make single photocopies of works for the private use of patrons without incurring liability under the copyright law. Although Williams & Wilkins is authority that traditional library photocopying is within the doctrine of "fair use", express statutory treatment is necessary to remove the threat of suit against libraries arising from varying judicial interpretations of what is or is not "fair use". Failure to include such provisions would abandon this area of major public interest to judicial "legislation", and could lead to further costly litigation.

Section 108 of H.R. 2223 extends the necessary recognition, but limitations written into its provisions, principally in Subsection 108(g)—and particularly clause (2) of that subsection—seriously erode the rights which it intends to recognize.

Clause (g)(2) excludes from the library photocopying permitted under Section 108 any instance of "systematic reproduction and distribution". Because this restriction was written into the bill by the Senate Patents, Trademarks and

Copyrights Subcommittee at the last minute (after public hearings had been held) and is only vaguely and confusingly explained in the committee report, it is impossible to determine exactly what it means. Such cursory explanation of the limitation as was offered by publishing interests before this Subcommittee seems to confuse it with "related or concerted" reproduction—which is separately treated by Section 108(g)(1) of the bill—and merely disguises the real import of the restriction. It appears, however, to be potentially applicable whenever a library makes a photocopy of an article or other portion of a published work in the context of a "system". There are, of course, many such systems of libraries, from city or county branch library systems to the university with branch campuses to regional library consortia. When it applies, Section 108(g)(2) would reach the making of a single copy for a single requester, of any part, however small, of a copyrighted work. It is precisely the right to make such copies which Section 108 was intended to confirm.

The Senate Judiciary Committee report states that systematic reproduction or distribution within the intent of Subsection 108(g)(2) occurs "when a library makes copies of such materials available to other libraries or groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material." An example which seems to fit this description would be arrangements under which the Legislative Research Service of the Library of Congress provides copies of materials, such as articles from economic or business periodicals, at the request of Members of Congress. An example listed by the Senate committee's report is the case in which a branch of a library system obtains at a user's request a copy of an article which it does not carry in its own collection. The example most frequently cited by publishers is the regional medical library system, by which local hospital and medical school libraries have access upon request to seldom-read and highly specialized periodicals carried by regional medical libraries or the National Library of Medicine. Each of these examples involves practices which are traditional and obviously reasonable. Just such photocopying practices of the NLM were at issue in the Williams & Wilkins case and were held to be lawful.

The sole rationale offered for the new restrictions is an assertion that they are necessary in order to prevent present and potential subscribers from relying on library photocopying machines in the place of journal subscriptions. That assertion is simply and clearly not valid. The argument has a certain surface plausibility, but in spite of the many opportunities presented to them, notably in the Williams & Wilkins case and most recently at the hearings before this Subcommittee, publishing interests have never offered any evidence to substantiate their claims of damage or to show that their fears for the future have any basis in fact within the context of the limited library photocopying which would be recognized under subsections (a) through (f) of Section 108. In Williams & Wilkins such an inference of injury mistakenly indulged in by the presiding Commissioner was overruled by the Court of Claims which held instead that "this record . . . fails to show a significant detriment to plaintiff but does demonstrate injury to medical and scientific research if photocopying of this kind is held unlawful." The publishers' reference to practices by the University Microfilms subsidiary of the Xerox Corporation has no relevance to library photocopying, and the firm's profit-making (and royalty paying) enterprise geared to the reprinting of multiple copies of articles and entire journal issues would clearly be outside the provisions of Section 108 in the absence of Subsection 108(g).

What evidence is available strongly suggests that traditional library photocopying does not injure publishers, and in many instances may actually increase subscriptions. It is reasonable to suppose that libraries which have frequent requests for particular works will purchase those works, if they are available, to better serve their users and avoid the delay and administrative expense necessarily involved in inter-library loan transactions. Results of ARL's examination of one inter-library loan network showed a very low rate of coincidence among requests. Rarely was the same article requested by the libraries. It also revealed that 54 percent of all requests were for foreign periodicals and domestic pub-

lications not covered by copyright, and that of the remaining 46 percent, 29 percent of the requests were for publications more than 5 years old, and only 17 percent of all requests were for materials five years old or less. In view of the facts that the overwhelming volume of photocopying involved neither current publications nor multiple copying of the same publications, it is manifest that the photocopying by the libraries was not taking the place of subscriptions. Indeed, library photocopying services may actually help to increase subscriptions, by providing a kind of advertising for the periodicals in which requesters find articles of value.

While there is no evidence that prohibiting traditional library photocopying, or compelling libraries—and ultimately the public—to pay copyright royalties for such photocopying will make any contribution to the promotion of science or the arts, or that there would be any other benefit to the public, it is manifest that the direct and indirect costs of the prohibition will be great. Simply to ascertain that a royalty is payable and to collect, account for and remit the royalty will involve heavy administrative costs. If these accounting charges are passed on to library patrons, they will magnify the direct cost impact on the public, and discourage use. If the cost is charged to the libraries' periodicals budget, it will mean reduced subscriptions, resulting in a decrease in the periodicals available to library users and loss of subscription income to publishers. Another cost will be increased theft and mutilation of publications; and the more libraries have to spend for repair and replacement of mutilated material, the less they will have to spend on new books and journals. But perhaps the heaviest cost of all will be the intangible cost to scholarship, research and education resulting from the deterrent effect which imposition of a royalty fee will presumably have on students and other researchers whose work is assisted and simplified by ready access to photocopies for reference.

The question which this Subcommittee is called upon to answer may be simply put. Should a library be prohibited from making, at a user's request, a single copy of a journal article or of an excerpt from another published work, or liable for a royalty fee simply because it obtains the copy from, or supplies it to a branch library, a library member of a county or regional library system, or other consortium of libraries? Because it is clear that such customary copying by libraries is responsive to specific, specialized needs of library users provides the public access to materials which would otherwise be unavailable and does not in fact serve as a substitute for subscription to the publications concerned, the answer must be that libraries should not be so prohibited or so liable. It is clear that the publishers' insistence on a provision which would limit libraries in this regard has little or nothing to do with concerns over actual or potential subscription losses. For the most part subscriptions have increased, with temporary reductions being due to heavy competition from other publishers or to increases in subscription rates which in recent years have outpaced consumer price indexes. The real reason for the conflict over library photocopying lies in its apparent potential as a lucrative new source of royalty income. Indeed it is the publishers' insistence that the libraries agree to pay royalties on their fair use copying which has been responsible for the breakdown of the many attempts to bring the parties together to resolve photocopying issues.

The Association of Research Libraries submits that the direct and indirect cost to the public of imposing the restrictions on traditional library photocopying contemplated by Subsection 108(g)(2) far outweigh any foreseeable benefit. We submit that Subsection (g)(2) is totally inconsistent with the constitutionally-mandated objective of copyright legislation—to promote the Progress of Science and useful Arts—and should be deleted from H.R. 2223.

STATEMENT OF CLARA STEUERMANN, PRESIDENT, MUSIC LIBRARY ASSOCIATION

On behalf of the Music Library Association, I should like to offer a statement on the proposed bill for the revision of copyright (H.R. 2223) and request that

this statement be included in the record of the hearings held May 14, 1975 by Representative Robert W. Kastenmeier.

The Music Library Association, on behalf of the public which its members serve, wishes to take exception to the exclusion of music from the library copying privileges specified in section 108 of H.R. 2223. We feel that patrons of music libraries should be granted the same rights of access to information as are extended to library users in other fields. We maintain that failure to recognize this equal right of access is discriminatory and contrary to the public interest.

Although music may occupy a special position in the concert hall or on the air, music in the library is not substantially different from any other subject collection in the library. Music is widely studied in schools and universities not only as a performing art but as a humanistic discipline equivalent to English literature or history, and music libraries are constituted to serve these studies.

Most music libraries are located in large universities, liberal arts colleges, conservatories and large public libraries with extensive research collections. Music libraries are the repository for one thousand years of Western culture, the period for which we have notated readable records of our musical heritage. Scholars and students come to music libraries to examine and study these works. Such study is a demanding discipline and serious students need to study, analyze, and compare portions of complex musical scores in the same way that advanced students of medieval history, French, or biology need access to data in their respective fields. Just as the plays of Shakespeare represent more than a vehicle for actors to a specialist in English literature, so the symphonies of Beethoven are of intellectual and aesthetic concern to students and scholars of music.

Perhaps the committee is unaware that the exclusion of music in clause (h) of section 108 would restrict the works of Bach, Beethoven and Mozart as well as those of living composers. Edited versions of music from any century may be registered for Class E (musical composition) copyright. It is, in fact, almost impossible to find a score of any kind published in this century which does not bear a copyright notice, and this notice makes no distinction between editorial and authorship copyright. Thus the exclusion of music works in clause (h) will affect study not only of the music of Bela Bartok who died in 1945 but of works by Wolfgang Amadeus Mozart (d. 1791) and Guillaume de Machaut (d. 1377). Such restriction may not be the intent of the legislature, but it will be the effect of the statute as it now stands.

Another characterization of music is the practice of issuing scholarly editions in large multi-volume anthologies and collected works. Such sets are customarily found only in libraries. Many of them have been out of print for years. Because of their value, volumes of such sets are rarely available for circulation. Restriction of photocopying from such editions as included in 108 (h) would relegate their contents to library shelves where only those with time and the ability to use the scores in the reading room could benefit from them.

By way of contrast, most music libraries are not concerned with ephemera. For instance, the multitudinous lead sheets and guitar arrangements which constitute the bulk of copyright registrations do not find their way into the regular collection of the Library of Congress, much less into smaller libraries. Economics alone makes it impractical for libraries to house and care for material which does not have some social significance or enduring aesthetic value. Music publishers are apparently most concerned about the protection of current, salable, comparatively simple compositions. Restriction of library copying is not a very practical way to go about this. First, as we have pointed out, such works are not necessarily likely to be found in libraries. Secondly, any musician bound on infringement of such work, a popular song for example, could certainly take a melody and harmony down by ear from a recording or the radio more easily than he could locate a copy in a library.

Even professional performers of serious music do not use library copies to study and perform from. A pianist or a singer would rather have his own score if possible, one he can mark for his personal use and one he can keep forever. Even

photocopies do not have the convenience of the publisher's binding which is vital to the life of a well used score. Of course serious performers use libraries but it is chiefly to enlarge their horizons and understanding that they do so.

In any case we would like to remind the committee that the privileges granted in section 108 only apply to material which cannot be obtained through current trade sources. Presumably publishers will respond to popular demand by supplying materials to fill this need. On the other hand the library is frequently the only source for obscure, the out of print, the archaic work which is not in great demand but access to which is urgently needed by a very few.

Apparently the words "a musical work" were included in the exclusions to section 108 at the instigation of the Music Publishers Association, an organization of comparatively narrow economic interest whose chief function is the management of copyright royalties. We feel that we, not they, represent the public interest. The copying privileges extended in section 108 are not in the personal interest of librarians except insofar as the librarians are concerned for the public whom they serve. Photocopying certainly means more wear and tear on the books, and probably means more work for the librarian. The Music Library Association here speaks not for its members' convenience, but on behalf of the students and scholars who use our collections.

The existence of section 108 in H.R. 2223 recognizes the enrichment to our culture which scholarly study and its encouragement through libraries provide. Music is a vital part of our cultural heritage and its study as such is recognized as a legitimate scholarly discipline. There is no valid distinction between the scholarly use of music in a library and the similar use of scholarly materials in other disciplines. The exclusion of music from the privileges granted in section 108 would unfairly cripple musical scholarship, including research on music of the past as well as that of the present. Such an action would discriminate against musical scholars and would be contrary to the best interest of the public who are the ultimate beneficiaries of scholarship in general. Therefore, we respectfully request that the House Subcommittee on Patents, Trademarks, and Copyrights eliminate the words "a musical work" from section 108(h) of H.R. 2223.

STATEMENT OF FRANK MCKENNA, EXECUTIVE DIRECTOR, SPECIAL LIBRARIES ASSOCIATION, MAY 14 1975

Special Libraries Association wishes to record its substantial agreement with the provisions of §§ 106, 107 & 108 relating to library photocopying in H.R. 2223 (Revision of the Copyright Law). We wish, however, to make two specific comments and to urge that two specific changes be made:

(*a*) To comment on one item in § *107. Fair use;*

(*b*) To comment on one item in § 108(a) (1); and

(*c*) To urge vigorously for changes in two items, in § *108(g) (1)* and *(g) (2). Reproduction by libraries and archives.*

Our comments are presented in the sequence:

1. Identification of Special Libraries Association and Its Interests.
2. Comments on § 107. Fair Use.
3. Comments on §108. Reproduction by Libraries and Archives: 3.1 § 109(a) (1); 3.2 § 108(g) (1) & (g) (2); 3.3 § 108(h).
4. Conclusion.

1. Identification of Special Libraries Association and Its Interests.—Special Libraries Association, with 9,000 members, is the second largest library- and information-oriented organization in the United States, and the third largest in the world. It is estimated that there are more than 10,000 special libraries in the U.S. The concept of special libraries—or in better words—the concept of specialized libraries is not well known among the general public or even in some segments of the library community itself. The interests and activities of specialized libraries are described briefly in this document and in the annexed brochure.[1] SLA is an association of individuals and organizations with educational,

[1] Annex. *Special Library Sketchbook.* S.L.A., N.Y. 1972. 45 p.

scientific and technical interests in library and information science and technology—especially as these are applied in the selection, recording, retrieval and effective utilization of man's knowledge for the general welfare and the advancement of mankind.

Special Libraries Association was organized in 1909 to develop library and information resources for special segments of our communities which were not adequately served by public libraries or by libraries in educational institutions. At first the emphasis was on special subject coverage in each special library as it related to the interests and business of its parent organization, for example: sources of statistical data for both corporations and the agencies of the national government and state governments; business data for banks and investment firms; chemical information for the then developing chemical industry; engineering information for the emerging complexes of engineering and construction companies, etc.

During the past 66 years—and with particular growing needs for rapid information delivery since World War II—specialized libraries and information centers have been established in all segments of our nation's affairs. They exist in for-profit enterprises and not-for-profit organizations, as well as in government agencies. Some are open to public use, and others have restricted access (because of security classified materials) or are part of a for-profit organization (because of proprietary information). During this period of accelerated growth, the original emphasis on special subjects has been replaced more and more by the concept of *specialized information services for a specialized clientele.* An example of such a specialized information service for a specialized clientele is the Legislative Reference Service of the Library of Congress. Although the Library of Congress (as a whole) is often called a "national library," the entire Library of Congress itself is, perhaps, an outstanding example of a definition of service to a specialized clientele: The Congress of the United States of America.

The specialized clients are normally the employees of the parent organization. The specialized information services are based on the speedy availability of information, both for current projects and for management determination of decisions regarding future efforts of the parent organization. To these ends, the members of SLA include not only librarians, but also persons who are subject specialists—so that they can evaluate and screen out the irrelevant, the redundant and the too often useless portions of the voluminous published literature. The totality of the literature includes not only the publications of commercial publishers of copyrighted books and periodicals, but also the avalanche output of government agencies (often with security handling requirements) plus the parent organization's own internal corporate documents (with the obvious need to protect proprietary or competitive information).

As a parenthetical observation, it should be noted that the pioneering work in machine use for information storage and retrieval (now computerized) took place in specialized libraries and information centers in the 1940's and 1950's. Similarly, the need for miniaturization of the bulk of the literature in microforms occurred through the influence of S.L.A.'s liaison with designers and manufacturers of microreading equipment.

Last, but not least, S.L.A. pioneered the concept of information networks—long before computers and other communication devices had been developed. S.L.A. has facilitated communications among its members through the Association's unique information network of Chapters and Divisions. Initiated more than 60 years ago, the network has been frequently updated in response to the needs of new informational requirements.

S.L.A. is organized in 26 Divisions which represent broad fields of specialization or information-handling techniques. These fields range alphabetically from Advertising, Aerospace, and Biological Sciences through Military Librarians, Museums, and Natural Resources, and on to Transportation, and Urban Affairs.

S.L.A. is also organized in 47 regional Chapters which range geographically from Hawaii across the continental United States (plus two Chapters in Canada) and on to a European Chapter (which encompasses geographically all the non-Socialist countries of Europe).

Special Libraries Association in its own right is a publisher of three periodicals and an average of six books per year. Therefore the Association has its own interests as a publisher to conserve its sales income and royalty income. The Association's publications are needed by special groups, but they are in such areas of specialization that commercial publishers (or even vanity presses) would not touch them because of the small sales potential. Our subscription lists range from 12,000 as a high to 1,000 as a low. Our book sales average about 1,000

copies for each title with a range from 500 to our top category of "best sellers" at a level of about 3,000 copies sold per title.

2. Comments on § 107. Fair Use.—The Association is in agreement with the delineation of "fair use" as stated in § 107. We feel, however, that it is necessary to comment specifically on one phrase in Item (4):

> (4) the effect of the use *upon the potential market for or value* of the copyrighted work. [Emphasis indicated.]

We recognize that there may be some validity in the claims of some publishers of periodicals that they may have some loss of income due to multiple photocopying of a single article from an issue of the periodical that is *still available in-print.* If the issue is *out-of-print* (that is, if the publisher has not maintained his stock in-print or in-stock), it is difficult to conceive how a photocopy of *out-of-print* material can cause any loss of income to the publisher.

Further, the slow delivery by publishers to fulfill an order for a single in-print issue is totally unacceptable to the needs of our specialized users who are responsible for fast management decisions. There is little question that it is an administrative impossibility to secure publisher permissions to permit interlibrary response within any reasonable time. Moreover, the costs and delays in seeking such permissions would be prohibitive.

It is also necessary to note that the preparation of photocopies of periodical articles in libraries can not cause a loss of income to the authors. Authors are rarely paid by publishers of learned or trade periodicals (either as a one-time payment or as royalty payments). Indeed, the opposite direction of payment has become prevalent in recent years: a "page charge" is to be paid by the author or his employer to the publisher. These page charges are usually in the range of $50–$100 per printed page.

3. Comments on § 108. Reproduction by Libraries and Archives.—

3.1 *Section 108(a)(1).*—The Association is concerned with a possible interpretation of § 108(a)(1):

> (1) The reproduction or distribution is *made without any purpose of direct or indirect commercial advantage;* [Emphasis added.]

Clarification of the meaning of the existing language is necessary because a majority of special library operations are conducted for purposes of "indirect commercial advantage" when the library's parent organization is in the business, industrial, or financial communities thru its products and services. It occurs to us that the existing language of § 108(a)(1) may have been intended to prohibit a "commercial advantage" to an authorized or unauthorized reprinter or republisher of copyrighted materials.

We feel that our concerns can be alleviated by either of two actions:

(a) by adding to § 108(a)(1) a phrase such as

> The reproduction or distribution is made without any purpose of direct or indirect commercial advantage *to a reprinter or a republisher* [Suggested addition italicized.]; or

(b) through appropriate commentary in the legislative history of H.R. 2223 without any change in § 108(a)(1) as now written.

Legislation to be enacted must not prevent or penalize the preparation of photocopies by any library. S.L.A. is, of course, particularly concerned about the status of specialized libraries—especially those in for-profit organizations. There will be immeasurable damage to the total economy and welfare of the nation if such intent were to be contained in the enacted version of H.R. 2223, or if such interpretation is possible after enactment of the law. The rapid transmission of man's knowledge—either to not-for-profit or to for-profit organizations—must not be impeded by law.

Whether libraries request or produce photocopies, the libraries are acting solely as the agents for the individual and distinct users of libraries who in their totality represent *all* strata of our American society.

3.2 *Sections 108(g)(1) and 108 (g)(2).*—Major concerns are raised by § 108(g) which was inserted *after* Senate hearings on § 1361 (93rd Congress). We wish to submit emphatic comments first on § 108(g)(2) and then to return to § 108(g)(1).

> (2) Engages in the *systematic reproduction or distribution of single or multiple copies* or phonorecords of material described in subsection (d). [Emphasis added.]

The Report accompanying § 1361 (93rd Congress) indicated that it had not been possible to formulate specific positive examples of "systematic copying." If

only negative examples can be developed, can there be any logical basis for the insertion of § 108(g) (2)?

The Association urges that § 108(g) (2) be:

(*a*) *Deleted entirely*, or

(*b*) That it be *amended* by adding a concluding clause to read:

". . . of material described in subsection (d) *so as to impair the potential market for a copyrighted work.*" [Suggested addition italicized.]

The Association is concerned that the inclusion of § 108(g) (2)—as now stated—in any final Act will seriously impede the spontaneity of research and the research capability of organizations that maintain special libraries and information centers whose purpose is to provide access to learned, technical, or specialized publications.

We are particularly concerned about any future construction that could be placed on allegations of "systematic reproduction or distribution" in § 108(g) (2). The single word "systematic" has been shown to have an almost endless number of interpretations during the discussions of the "Conference on the Resolution of Copyright Issues" (Nov 1974-Apr 1975). The Conference was jointly convened by the Register of Copyrights and the chairman of the National Commission on Libraries and Information Science.

It is important to recognize that all libraries act only as agents for their clients who request and receive the photocopies. Inclusion of the word "systematic" does not seem to comprehend the operations of libraries—or the nature of the requests from clients of libraries. Libraries provide photocopies of current or past publications in response to single, spontaneous requests from the library's clients. Research workers are often thought to be isolated individuals, but research itself is not an isolated activity. Therefore, spontaneous, isolated—yet single—requests for photocopies of the same article or segment in a copyrighted publication may be received from more than one requestor—each acting independently and spontaneously.

The word "systematic" has also been suggested to mean "within a library system." Library systems have been in existence for many years; public library systems in cities or in counties or multiple special libraries within a corporation or within a government agency. In more recent years, the concept of broader library systems (regional or statewide) has grown. Such systems have many other meaningful functions other than the preparation of photocopies so as to achieve economies in library functions (for example, shared cataloging, the acquisition of foreign publications or of rare and unusual materials, and the improved access of all citizens to informational materials of all kinds). Although publisher representatives have made claims that the number of subscribers has been diminished because of the existence of library systems, no evidence has been presented that any loss of subscription income has occurred.

The above comments regarding § 108(g) (2) are also applicable to §108(g) (1):

> (1) is aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies . . . *whether made on one occasion or over a period of time*, and [*whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group*; . . .] [Emphasis added.]

If a number of single, isolated, spontaneous requests are received over a period of time (italic emphasis above), a library cannot become aware of such a series of events without instituting an extensive and costly system of records of past transactions.

In the case of multiple copy requests (bracketed italic emphasis above), payment of a *per page* copying fee to the publisher may be thought to provide an equitable solution provided that the costs to libra s for such reporting and payment mechanisms not be disproportionately great in relation to the copying fees to be paid. However, the two possible mechanisms proposed for payment of such copying fees completely negate the concept of "fair use" as stated in §107. The two mechanisms proposed are:

(*a*) A variable subscription pricing structure with a higher cost to libraries than to individuals. Thus the library would have paid a fee even if no photocopy is requested.

(*b*) A transaction fee per page would result in the payment of a fee even for the first photocopy of an item prepared unless the library were to set up a costly record keeping operation of all past photocopy requests.

Discussions in past years had suggested a range of fees from $0.01 to $0.10 per page. In the immediate past months, publisher representatives at meetings of the Conference (referred to above) have indicated that they wish to receive a higher fee which they will determine individually for each article in each periodical rather than a per page charge. It must be noted that many photocopy requests are for only one page or a few pages of an article. Thus, this proposal also would be unduly costly to libraries and their users.

Should the final result of the proposed legislation be a copying fee payment, the price level of the copying fee must be subject to determination by legislative or regulatory action. Otherwise it is conceivable that a publisher might choose to set the level of a copying fee—whether for multiple copies or single copies—at such a high level that access to some areas of published information could be effectively prevented.

3.3 Section 108(h).—The Association feels that there is a real need to distinguish between two formats of "musical works":

(*a*) Printed musical works, and

(*b*) Sound reproductions of musical works.

To achieve this distinction, we suggest two possible amendments to §108(h):

(1) Delete the words "a musical work" because performances are included in the subsequent phrase, "or other audio-visual work," or

(2) Add a modifying statement so that § 108(h) will read:

"The rights of reproduction and distribution under this section do not apply to a musical work *other than a printed copy* . . ." [Suggested words are italicized.]

It is important that research workers and students of musicology be allowed "fair use" access to portions of printed music just as § 108(a) (2) permits "fair use" access to textual materials. In § 108(h) a clear distinction must be made between performances or sound recordings and music in printed form.

4. Conclusion.—Public libraries have been historically a fundamental development by and for the people of the United States. The initiation and growth of specialized libraries represent a unique development in the United States beginning with the Library of the Carpenters' Company of Philadelphia before the American Revolution; and also a concept which has spread throughout the world.

Whether the main function of a library is public, school, university or specialized, all libraries strive to improve and increase ready access by the library's clients to information that will enrich the personal aspirations of the library users, the quality of our communities (whether urban, suburban or rural), and the improvement of the economic standards of all segments of our nation's citizens (minority groups and the disadvantaged as well as the advantaged).

We recognize the importance of the legislative protection of copyright for publishers to prevent improper or unfair diversions from their rightful profits. We also recognize the importance of copyright protection for creative authors to prevent diversions from their rightful earnings.

Apparently, publishers feel that their profit patterns will be improved by receiving photocopying fees. However, the establishment of library photocopying fees will result in the subsidization of the publishing community at the expense of all taxpayers. Public libraries and those in tax-supported schools and universities would have to seek increased public funds annually. Special libraries in business and industry would have to seek increased budget allotments within their corporation. As the expenses of a corporation increase, such expenses can lead only to increased costs to the ultimate consumers of new products or of improved old products.

We ask that the Subcommittee consider the distinction between the photocopying practices *in and by* libraries on behalf of library users, which we deem to be proper, and the practices *outside* of libraries which are improper and which preempt the legitimate property rights of copyright owners.

Special Libraries Association is grateful to the Subcommittee for the opportunity to present our views. The Association will be pleased to submit additional comments if the Subcommittee desires so to assist the Congress in reaching an ultimate and equitable solution to an issue that has values for all citizens.

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C., October 2, 1975.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, Rayburn House Office Building, House of Representatives, Washington, D.C.

DEAR BOB: I am concerned over current legislation in your Subcommittee, H.R. 2223, to revise the copyright law. If Section 108(g)(2) is retained in this bill, the only major biomedical source library in the State of Alaska will be in violation of the United States Copyright Law.

The Alaska Health Sciences Information Center serves as the source library for most of the material required by institutions and over 4,000 health-related personnel in the entire State of Alaska. This service makes it possible for doctors, nurses and physician assistants in the most remote Alaskan villages to receive the information they need to provide optimum health care. Because of poor communications, lack of transportation and other related problems common to rural areas in which a small number of people are scattered over vast distances, community health aides, private practicing physicians, Public Health Service personnel, hospitals and universities depend heavily upon the freedom to copy medical journals and texts for use in the bush areas.

Section 108(g)(2) will affect not only Alaska, but other sparsely populated areas of the United States as well. I urge you to consider the elimination of this Section of H.R. 2223, so that the current efforts of Congress to upgrade existing health facilities in these remote areas of the country will not be further hindered.

I have received over one hundred letters from physicians, nurses, hospitals, clinics, universities and state health personnel who protest inclusion of this Section of the bill. I have chosen a number of letters from each group of health personnel for your perusal. I request that these letters, as well as my own, be included in the testimony of the hearings on H.R. 2223.

Sincerely,

DON YOUNG,
Congressman for all Alaska.

ALASKA METHODIST UNIVERSITY,
COLLEGE OF NURSING,
August 12, 1975.

Representative DON YOUNG,
U.S. House of Representatives,
Washington D.C.

DEAR REPRESENTATIVE DON YOUNG: I am writing to express opposition to the section on photocopying in H.R. 2223, section 108(g)(2) regarding Revision of the Copyright Law.

Photocopying of books and articles is extremely helpful to both students and faculty. It provides an inexpensive and rapid way to acquire, read and synthesize new materials, thus greatly enhancing the quality of education in schools and universities.

Regarding the need of nurses and other health professionals, I feel sure that you know it is impossible for nurses and health facilities to subscribe to all the journals they need to keep abreast of the vast volume of current information.

Therefore, I believe that health care of patients in Alaska may be compromised if the Alaska Health Sciences Information Center is no longer permitted to photocopy valuable articles for nurses and other health professionals.

Very truly yours,

MONA RAVIN, R.N., MSN,
Instructor Coordinator of R.N. Programs and Outreach.

PROVIDENCE HOSPITAL,
Anchorage, Alaska, July 9, 1975.

Hon. PETER W. RODINO, Jr.,
Chairman, Judiciary Committee, House of Representatives, Room 2462, Rayburn House Building, Washington, D.C.

DEAR CONGRESSMAN RODINO: I am writing to express my opposition to HR 2223 (A Bill For the General Revision of the Copyright Law Title 17 of the United States).

If this takes effect, the effect upon quality medical care nationwide will be adverse, and in Alaska will be even more significant, due to our relative isolation, there being no nearby university centers.

To pass this resolution would be a significant step backward in medical care.

Sincerely,

MAURICE J. COYLE, M.D.,
Department of Radiology.

WRANGELL GENERAL HOSPITAL,
Wrangell, Alaska, July 22, 1975.

Hon. DONALD YOUNG,
House of Representatives, 1210 Longworth House Office Building, Washington, D.C.

DEAR CONGRESSMAN YOUNG: I am writing to you regarding HR 2223. (A Bill for the General Revision of the Copyright Law Title 17 of the United States.)

The passing of this bill would terminate all major medical library services presently provided by the Alaska Health Sciences Information Center in Anchorage. This library is the only biomedical source in Alaska and without this service to help small hospitals like ours, the quality of health care will surely suffer.

Your help regarding this bill would be greatly appreciated.

Sincerely,

(Mrs.) EMMA G. IVY, R.N.,
Administrator.

THE WISCONSIN INTERLIBRARY LOAN SERVICE,
Madison, Wis., May 6, 1975.

Re Deletion of Section 108(g)(2) of the copyright revision bill (H.R. 2223).

To: Robert W. Kastenmeier (D-Wis.), Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice.

From: Nancy H. Marshall, Director of WILS.

As one of your constituents, I have always been grateful for your support of libraries and federal library programs, including your recent positive vote on the Roybal-Obey-Stokes amendment to the Education Appropriations Bill (HR 5901).

I have written to you several times in the past on what I believed to be important issues and was gratified that you, also, shared my concerns. The issue in question is of such immediate importance that as a citizen of Madison, Wisconsin, and the nation, as well as a librarian, I must speak out.

Your concern over the past fifteen years or more with copyright revision makes you a recognized expert in Congress on this complex issue. You have heard the pros and cons and have had before you voluminous written arguments and testimony, with more to come. HR 2223 is a "good" bill, much needed and long overdue. My concern, however, is whether it is the intent of the Congress to severely limit or restrict altogether the public's access to library and information resources via library photocopying. I cannot believe this is the intent of the public's elected representatives. The nation's library collections are one of its greatest resources, and libraries maintain as a constant goal the widest possible access to those collections by the nation's citizens.

Although I am aware of the fact that national library organizations, and the publishing industry will be giving testimony to the Subcommittee on May 14, I am deeply concerned that the interests of the consumers of library and information resources be represented. Too often the user is overshadowed and not heard and remains the silent majority, even though s/he is the ultimate recipient for good or ill in many legislative actions. Thus, it may be in this case, and on behalf of the users I submit the following for your consideration.

Specifically, my greatest concern is with the language of Section 108(g)(2) of HR 2223. This Section prohibits ". . . systematic reproduction or distribution of single or multiple copies or phonorecords of material . . ." by libraries. Section 107 appears to appropriately define "fair use", an historical privilege of libraries; and then effectively snatches it away under 108(g)(2).

Of particular concern is the fact that systematic reproduction is not defined, and is, therefore, dangerously ambiguous, but if retained in the Bill could be interpreted to effectively discontinue the traditional right of libraries of making a single copy of a copyrighted journal for a single user, even when the number of users and the volume of single copies is substantial. Again, I cannot believe that the Congress wishes to deny, under the new copyright revision, this historically proper access to library resources.

On behalf of the Wisconsin Interlibrary Loan Service, its member libraries and, most importantly, its patrons, I urge the Subcommittee to delete Section 108(g)(2) from the Bill. As the Director of the WILS Network, which serves all of the citizens of the state of Wisconsin in providing access to library materials for research and other educational purposes, it is inconceivable that this access will be cut off and that the taxpayers of this state will be prohibited from obtaining materials by photocopy, materials which their tax dollars have been instrumental in purchasing. Wisconsin is not alone in this concern. It is important to note, also, that the National Commission on Libraries and Information Science, in its final draft issued on March 10, 1975, restates its philosophy of greater, not less, access to library and information resources by all the citizens of the United States.

I have witnessed your concern for the citizens of Wisconsin and the nation, and the concern of the other respected members of the Subcommittee for their constituencies. Because of your collective past commitments, I respectfully request that you give serious consideration to the deletion of Section 108(g)(2) when you report HR 2223 out of committee.

Mr. DANIELSON. First of all, I will call Mr. Irwin Karp, who is counsel for the Authors League of America, Inc. You gentlemen make yourselves comfortable, and ladies. I note you are all here together, which is fine.

Our little schedule calls for Mr. Karp first, then Mr. Lieb, Dr. Cairns, and Mr. Hoopes. Mr. Karp, it's yours for 7 minutes.

TESTIMONY OF IRWIN KARP, COUNSEL FOR THE AUTHORS LEAGUE OF AMERICA, INC.

Mr. KARP. Thank you, Mr. Chairman. My prepared statement reflects that we are here by prearrangement at the table together. Unlike the librarians I am not one to say that publishers are my best friends because I represent professional authors, and publishers are not our best friends; and that's true of librarians, too.

I would like to introduce Dr. Robert Cairns—on my right—executive director of the American Chemical Society. On my left, Mr. Charles Lieb, counsel, and Mr. Townsend Hoopes, president of the Association of American Publishers. They will discuss the issue of library photocopying in relation to sections 107 and 108 of the bill.

Let me set, if I may, the stage for their discussions. The Xerox and other reprographic machines have established a new method of reprint publishing sometimes called "on-demand publishing," "one-at-a-time reprinting," or "single-copying." Perhaps it's most starkly reflected in the statement of the Special Libraries Association, which wants to increase the library copying exemption to cover the "reprinter" and "republisher," and they are correct in characterizing libraries as such. This is a new medium for disseminating articles, chapters from books, or entire works for individual users by reproduc-

ing a single reprint to fill each order, as it is received. One-at-a-time reprinting well established, it has been used for several years by reprint publishers such as University Microfilms to supply books, journals, articles, and doctoral theses to individual customers.

Here, for example, is a copy of a 429-page book, entitled Teaching Primary Reading, produced on a Xerox Copy-flo machine by University Microfilms. The label reads, "Published on demand by University Microfilms," and that means very simply that each time an order is received for this book, one copy is reproduced separately on that machine to fill that order. I would like to leave a copy with the committee.

Mr. DANIELSON. Without objection, we will accept it in our files, though it will not be included in the record.

Mr. KARP. I understand that.

Mr. DANIELSON. We don't want to be violating any rules on printing copies. [Laughter.]

Mr. KARP. We are prepared to secure a license for you to use the book. [Laughter.]

In fact, that is one of the points. This book was produced under a license granted by the author and publisher. I know it because I approved the license, which is on a simple form, for a client of mine whose late husband wrote the book, and a royalty is paid each time one copy of that book is produced.

The process of one-at-a-time reproduction also is used to reproduce journal articles; and here is, for example, a journal article that was produced by the Xerox Corp., by permission of the copyright owner. I would like to leave that, too, not to include in the record, but for study by the committee.

Mr. DANIELSON. I want to point out, I do appreciate having the material so that we know what you are talking about.

Mr. KARP. And last, to complete the demonstrative evidence, this volume—which is quite heavy—covers a listing of 10,000 separate journals which are placed on microfilm by the Xerox Corp. under license from the copyright owner, within the system of copyright, and sold to libraries. From those microfilms are produced copies like this (indicating). We are not talking about the old-fashioned 50-cents-a-page photostat, as you pointed out in your question; we are talking about new technology, and methods of reproducing copyrighted materials that are still in various stages of technological development.

I have one more item, this is called a microfiche card. This is even more sophisticated, and at the same time more simple to use, and much less costly, than microfilm. From this little card a library can reproduce copies of pages of an article in this form (indicating). I will leave this for the committee's study as well.

The process of one-at-a-time reproduction is employed by several libraries, some of which serve as reprint centers for the patrons of other libraries, as well as their own users. There have been studies which indicate that at the present time American libraries may be filling as many as 7 or 8 million requests a year for this type of copying. And we would like to, at the conclusion of this hearing, submit to you a compendium of reports, as well as statements directed to the specific proposals of the American Library Association, which unfortunately were not available to us in advance to respond to as concretely as we would have liked.

Mr. DANIELSON. Without objection, we will receive your referred to comments.

Mr. KARP. Much of this library-copying activity is devoted to articles from essential, copyrighted scientific and technical journals. Copies produced of these on demand of individual readers are given to them in lieu of the journal itself, which is published to serve this very audience. In *Williams & Wilkins* the chief judge in the Court of Claims pointed this out in his three-man dissenting opinion, supporting the opinion of the trial judge. Actually, if you add up the figures you have a complete Mexican standoff, you have four Court of Claims judges going one way, and four the other.

Mr. DANIELSON. That's what we call a congressional standoff, and when you have that, nothing passes.

Mr. KARP. He pointed out the argument that damage was not proven was utterly without basis in the record because the majority hadn't disproved the damages, they simply ignored the trial judge's findings.

The chief judge also pointed out in his opinion that the National Institutes of Health at the present time purchased only two subscriptions to the plaintiff's journals, and if nothing else, it certainly needs more than the two copies to meet the requests of the large in-house staff. And that the whole purpose of what everybody really concedes was wholesale systematic reprinting, was to do away with the necessity of paying for any more subscription copies of these journals. The literature of the library community is full of predictions of the state of the future which may resolve itself into a few libraries that in some instances, for certain types of publications, serve, as what Mr. McKenna quite accurately referred to as "reprinters" and "republishers."

I should point out that librarians' semantics have been a problem with us throughout this discussion. They like to talk about "interlibrary loans." When they make a copy of something like this (indicating an article) they don't lend it to anybody. At the Government's, or the local community's considerable expense—the figures sometimes estimated at $5 to $12 a copy to do this—do all the work involved. They produce a copy which is delivered to a patron of their own, or another library, and it's his, not a loan.

I should at this time clarify—on the top of page 3 I should not overlook one distinction. I pointed out when University Microfilms reproduces a copy of copyrighted work it pays a royalty. When the librarians reproduce it, they do not pay a royalty, and that's the crux of the issue, reasonable compensation for systematic library reproduction.

Most of the examples that Professor Low gave you are examples of "fair use" and that's not what we are quarreling about. Fair use is not paid for, it is not charged for; that is preserved very clearly in the revision bill.

As my colleagues will demonstrate, section 108 of this bill also gives the libraries broad copying privileges that we don't think they had under the present law. Moreover, authors and publishers do not seek to halt systematic library reproduction. We simply say that reasonable payment should be made when copying goes to this extent, and that workable systems can be established.

The discussions which have been described to you, on the one hand, have a wonderful Rashomon flavor. I can't believe I was there, when I hear Professor Low and his colleagues describing what transpired. To say that we, any of us, have a position that the mere existence of a union list of serials in a library system establishes "systematic copying" is simply not the case. In fact, asked twice, I twice answered that, "No, we were not saying that." We were merely pointing out the various characteristics of certain library systems in whose operations one of the functions was to eliminate what they euphemistically called duplication of periodicals. That means, why should all six or seven libraries subscribe to a journal when one can subscribe and make copies for the others?

The uncompensated reproduction, uncompensated reproduction of copyrighted work is bound to have a damaging effect on American publishers and authors.

I would just like to talk briefly about the purposes of copyright. The economic purpose of copyright is, in the Supreme Court's quotation—on top of my page 5—"to give valuable, enforceable rights to authors and publishers, to afford greater encouragement to the production of literary works of lasting benefit to the world."

And the economic philosophy underlying the copyright clause, as the Supreme Court explains it "is the conviction that the encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors."

Thus, the instrument chosen by the Constitution to serve the public interest—that interest is the securing of literary and scientific works of lasting value—is an independent, entrepreneurial property-rights system of writing and publishing. The Copyright Act establishes the rights which prevent others from depriving authors and publishers of the fruits of their labor. But, it guarantees no reward at all. The reward must come, as in any private, profit-motivated operation, from the income that the author and publisher can derive from the uses of their books and journals. They have to take the risk that every entrepreneur does, that the books and journals may fail financially, although they make a valuable intellectual contribution—and journals have failed——

Mr. DANIELSON. Let me interrupt just briefly. I don't like to interrupt you, I have practiced law for a long time myself, but you've got to share time here with three more of you gentlemen. If they want you to speak for them, I'm delighted, but otherwise I am going to have to let No. 2 go ahead.

Mr. KARP. I'm at the end of my statement.

Mr. DANIELSON. With the permission of Mr. Pattison we will hear from all the witnesses, and then commence with the questioning; thereby we will enhance the opportunity to hear you.

Mr. KARP. I simply want to conclude with the statement, Mr. Danielson, that we urge Congress not to disrupt the delicate balance of this system. Many compromises have been made by us already in order to accommodate librarians. We don't think any more are possible without inflicting very serious damage on those who create those journals.

I have also included in my statement responses to Professor Low's almost ritualistic attack on copyright. It is not a monopoly, not a special privilege: it doesn't restrict the dissemination of informa-

tion. I submit to you the only provision in the U.S. Constitution which implements the freedoms of the first amendment is the copyright law because that is the only provision that establishes a legal, economic foundation under which people can actually go about exercising those rights, by setting up publishing enterprises, or engaging in writing. Destroy the copyright clause—and the librarians are asking for partial destruction—and you are also threatening seriously that private enterprise system of exercising freedom of expression.

Thank you.

[The prepared statement of Irwin Karp follows:]

STATEMENT OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA

Mr. Chairman, my name is Irwin Karp. I am counsel for The Authors League of America, the national society of professional writers and dramatists. I would like to introduce Dr. Robert W. Cairns, Executive Director of The American Chemical Society; and Mr. Townsend Hoopes and Mr. Charles Lieb, President and Copyright Counsel of the Association of American Publishers. They will discuss sections 107 and 108 of the Copyright Revision Bill and the issue of "library photocopying".

The Xerox and other reprographic machines have established a new method of reprint publishing sometimes called "on-demand publishing," "one-at-a-time reprinting", or "single-copying" (the blander phrase favored by library spokesmen). However labelled, the process disseminates articles, chapters from books or entire works to individual users—by reproducing a single reprint to fill each order, as it is received. Each copy, made by Xerox or other machine, is an exact reprint of the original—letter by letter, line by line as initially set in type. One-at-a-time reprinting is well established. It has been used for several years by reprint publishers such as University Microfilms to supply books, journals, articles and doctoral theses to individual customers, "on demand". Here, for example, is a copy of a 429 page book, entitled *Teaching Primary Reading*, produced on a Xerox Copy-flo machine by University Microfilms. The label reads "Published on demand from University Microfilms."—i.e., when an order is received, one copy is reproduced separately on the Xerox machine to fill it.

The process of one-at-a-time reproduction is employed by several libraries to make copies of journal articles or portions of books; some of these institutions serve as reprint centers for patrons of other libraries as well as their own users. Much of this activity is devoted to articles from essential, copyrighted scientific and technical journals, many of which have modest circulations and are published by nonprofit learned societies. Copies of these articles, produced on demand of individual readers, are given to them in lieu of lending the journal, which is published to serve this very audience. My colleagues will explain the serious injury to publishers from this uncompensated, systematic reproduction; and from its increasing use by groups and networks of libraries, in which one institution reproduces copies of articles from journals it subscribes to, for patrons of other libraries which do not subscribe to them.

With one-at-a-time reproduction ("single-copying", in library parlance), a library could make *many* copies of the same article or work. It produces a "single" copy for each order; but it produces as many copies of the article as there are orders for it. Under the exemption previously sought by library organizations in the Senate, any library could thus make many copies of the same article, so long as it produced one copy per order. (In the peculiar semantics of library organizations, copies produced for patrons of other libraries are called "interlibrary loans." Actually, no "loan" is made. The copy is delivered to the patron and becomes his property.

There is one significant difference I should not overlook. When University Microfilms reproduces a single copy of a copyrighted work, it pays the owner a royalty—having previously obtained a license. However, libraries claim, and demand Congress give them, the privilege of systematically reproducing copyrighted journal articles and other works without payment of compensation. [As this Committee and the Copyright Office have stressed, the copyright owner's right to reproduce copies of his work is not subject to a "non-profit" exemption].

Reasonable compensation for systematic library reproduction is the real

issue. Library photocopying which is "fair use" (Sec. 107) does not require payment. And as my colleagues will explain, Secs. 108 (d) and (e) give libraries broad copying privileges, without charge. Moreover, authors and publishers do not seek to halt systematic library reproduction, i.e. that which exceeds these sections. They are willing to authorize such uses. But they believe that when libraries systematically reproduce copyrighted articles or other works, reasonable compensation should be paid, as Sec. 108(g) contemplates. They also believe that "workable clearance and licensing conditions" can be developed mutually by librarians and copyright owners, the solution prescribed by this Committee. My colleagues will relate the continuing efforts to accomplish that result. It is a result that must be achieved. For uncompensated systematic reproduction of copyrighted works by libraries will inflict heavy damage on publishers of scientific and technical journals, authors (see App. I) and other publishers; on the copyright system; and on the public interest it was designed to serve.

THE PURPOSES OF COPYRIGHT

The library photocopying issue should be considered in the appropriate context—in the context of copyright's constitutional purposes and the manner in which it was designed to serve the public interest. I will address that subject before Mr. Lieb, Dr. Cairns and Mr. Hoopes speak to the specific photocopying issues.

As the Supreme Court has explained, the Copyright Clause of the Constitution was intended to establish independent, entrepreneurial, self-sustaining authorship and publishing as the means of serving the public interest in securing the production of valuable literary and scientific works. In so doing, the Copyright Clause serves a second purpose—it implements the First Amendment's freedoms to express and publish ideas, information, opinions and all manner of literary, scientific and artistic works. The First Amendment protects against restraints on these freedoms. But the Copyright Clause is the only constitutional provision which establishes a legal-economic foundation for exercising them. The Copyright Clause thus frees authors from the need for subsidization by the state or other powerful, institutional "patrons", and from the restraints such support often imposes. And it was intended to sustain the existence of a diversity of independent publishers, who would give a wide range of viewpoints access to the market place of ideas.

THE "ECONOMIC PHILOSOPHY" OF THE COPYRIGHT CLAUSE

The Supreme Court has emphasized that the Copyright Clause of the Constitution

"was intended to grant valuable, enforceable rights to authors, publishers, etc. without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.'"

The Court said that the "economic philosophy" underlying the Copyright Clause

"is the conviction that the encouragement of individual efforts by personal gain is the best way to advance public welfare through the talents of authors . . ."

(*Mazer* v. *Stein*, 347 U.S. 201, 219)

Thus, the instrument chosen by the Constitution to serve the public interest—i.e., the securing of literary and scientific works of lasting value—is an independent, entrepreneurial property-rights system of writing and publishing. The Copyright Act establishes the rights which prevent others from depriving authors and publishers of the fruits of their labor. But it does not guarantee a fair reward, or any reward. For authors and publishers, both commercial and nonprofit, must depend on income derived from uses of their books and journals to compensate for the talent, labor and money expended in creating them, and provide working capital for further publications. And as entrepreneurs, they must assume the ever-present risk that books and journals produced by substantial labor and cash outlays will fail financially although they make valuable intellectual contributions to the public interest.

We urge that Congress should not disrupt the delicate balance of this essential system. Carving exemptions out of the "enforceable rights" of authors and publishers does not serve the public interest. For although the resulting uncompensated uses may further the convenience or ambitious plans of some "user" group,

they diminish or destroy the ability of authors and publishers to serve the ultimate public interest—to continue producing new works of lasting benefit. The publication of scientific and technical journals, for example, richly serves the public interest—but it is at best a marginal economic operation. Learned societies and others who publish them do not grow fat on their profits. Squeezed by ever-increasing costs and static circulations, publishers will be forced to close down some journals or not start new ones if they are denied reasonable compensation for uses of their articles in the new medium of systematic, library one-at-a-time reproduction. Periodicals and journals are neither immortal nor immune from the laws of economics. The process of attrition may not be apparent to library spokesmen, but it is nonetheless inevitable. Yet, while they are willing to make substantial payments to the Xerox Corporation, suppliers and library employees to provide users with hundreds of thousands of copies of copyrighted articles, they demand of Congress the privilege of denying the journal's publishers any compensation. [Ironically, libraries pay the Xerox Corporation a per-page fee—a royalty, if you will—for each page of each article they reproduce].

THE ANTI-COPYRIGHT ARGUMENTS

It has become ritual for library organization and Ad Hoc Committee spokesmen to accompany their demands for new exemptions with a series of attacks on copyright, calculated to suggest that the author has no legitimate claim to reasonable protection for the work he creates.

THE "ANTITRUST ARGUMENT"

Library and Ad Hoc Committee spokesmen charge that a copyright is a "monopoly", suggesting it offends the Sherman Act. This is not so. The copyright in a book is not a "monopoly" in the antitrust sense. It does not give the author control over the market in books, or the business of publishing them. His book must compete in the market place with the 40,000 other titles published that year and the hundreds of thousands still in print from prior years, including many that deal with the same subject. His copyright only gives him certain rights to use the book he created. The owner of a copyright only has a "monopoly" in the innocuous sense that all property owners do—each owns a collection of rights, granted by law, to use that which he has created, purchased or inherited.

THE "RESTRAINT OF INFORMATION" ARGUMENT

Library and Ad Hoc Committee spokesmen charge that a copyright places a restraint on information. This is not so. A patent prevents others from using the ideas it protects. A copyright does not impose such restraints. Anyone is free to use the ideas, facts or information presented in a copyrighted book or article. The copyright only protects the author's expression, not the ideas, facts or information. Other writers can draw on them. Other writers are free to independently create similar (indeed closely similar) works; the copyright only prevents substantial copying of the author's expression.

In Progress and Poverty, Henry George made this trenchant observation about copyright:

"Copyright . . . does not prevent any one from using for himself the facts, the knowledge, the laws or combinations for a similar production, but only from using the identical form of the particular book or other production—the actual labor which has in short been expended in producing it. It rests therefore upon the natural, moral right of each one to enjoy the products of his own exertion, and involves no interference with the similar right of any one else to do likewise . . ."

The Copyright is therefore in accordance with the moral law— (p. 411)

THE "MERE PRIVILEGE" ARGUMENT

To Library and Ad Hoc Committee spokesmen, it smacks of immorality to suggest that the author has a moral claim to copyright protection in a work that he created, that would not have existed but for his talent, labor and creative efforts. They charge that copyright is not "property" because the rights are created by statute, and that Congress is not required to pass copyright laws since Art. I, Sec. 8 "merely" says that it "shall have the power" to do so. But the phrase "Congress shall have the power" does not precede the copyright clause of Sec. 8—it prefaces the enumeration of all powers granted to Congress, including the powers to collect

taxes, borrow money, raise armies and regulate commerce. Obviously Sec. 8 intended that Congress would enact copyright laws as well as exercise these other vital functions.

Of course a copyright is property. Like all other property, it is "a creature and creation of law . . ." (73 C.J.S. Sec. 1, p. 145). Like all property, it is a bundle of rights granted by the state, through legislation or court decision Copyright is hardly the only form of property created by statute. Property rights in billions of dollars worth of land, minerals and other natural resources have been created by acts of Congress.

But there is one basic distinction. These other statutes grant individuals perpetual, exclusive rights in resources that belonged to the Nation; they take property from the public domain and give it to private citizens. The Copyright Act grants the author rights in something he created and that already belonged to him at common law; and within a short time, the Act takes his creation from him or his heirs and places it in the public domain. Henry George was right in saying the author's claim to adequate copyright protection rests on "natural, moral right". The common law recognized that right, holding that an author "has an absolute property right in his production which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it." (*Ferris* v. *Frohman*). And as the Register noted, these exclusive common law rights "continue with no limit even though the work is used commercially and widely disseminated."

Library and Ad Hoc Committee spokesmen have not asked Congress to grant them an exemption from the property rights of the Xerox Corporation which would permit them to use its machines without charge to reproduce "single copies" of journal articles or other copyrighted works. Property rights in machinery is something that apparently wins their respect. But the copyright owner's right to compensation for systematic library reproduction stands on equally firm moral and legal footing. And his contribution to the libraries' copying operations is indispensable. Unless the American Chemical Society and other publishers can afford to continue producing their journals, the Xerox machines and libraries will not have articles to reproduce.

"WORKABLE CLEARANCE AND LICENSING CONDITIONS" CAN BE ESTABLISHED

The Xerox machine, one-at-a-time reprinting and other reprographic processes are not the first technological changes to confront authors, publishers and the copyright system. Motion pictures, radio, long-playing records, television, and the inexpensive mass-market paperback book all produced enormous transformations in disseminating copyrighted works. Some new media destroyed prior ones. Others, such as the mass-market paperback, reached millions who do not use its still-surviving predecessor, the traditional "hard-cover" book. Motion pictures, radio and television were not even mentioned in the 1909 Act. Yet it has protected the rights of authors and publishers to these new uses, and they are entitled to receive compensation when their works are reproduced or disseminated in these recently arrived media.

Moreover, the concept of copyright has enabled authors and publishers, and users, to evolve workable licensing arrangements. "Workable clearance and licensing conditions" also can be established for systematic library photocopying, through the joint efforts of librarians and copyright owners. But that solution will be aborted if Congress revises Sec. 108 to deprive authors and publishers of the right to compensation when libraries systematically reproduce copies of journal articles and other copyrighted works. Destruction of that right would be totally unfair to those who produce these works; it would frustrate the purpose of the copyright clause; and it soon would be harmful to the public interest and to those very patrons the libraries wish to serve by systematic reproduction.

APPENDIX I

Uncompensated systematic library reproduction would also damage authors of poetry, fiction, and books and articles on political and social problems, biography, history and a wide range of other subjects. After these works first appear in a book

or periodical, they are often reprinted—with the author's permission—in anthologies, text books, periodicals, collections of the author's work, etc.

Many authors earn a substantial part of their income from such reprinting of their works. Indeed, many earn the major part of their compensation in this manner. Poets, essayists and short story writers, for example, receive very little when a work is first published in a hard-cover book or periodical. But over the years that follow, they may license several different publishers to reprint the poem, short story or essay in anthologies or collections or textbooks. Although each fee is small, the accumulation of fees produces a modest compensation for work of substantial literary and educational value. As testimony before your Subcommittee indicated, many of these writers earn from 50% to 75% of their income from these reprint fees.

Authors of books also earn a significant part of their compensation, in many instances, from authorizing the *reprinting* of portions of a work—of similar size to periodical articles—in anthologies, textbooks and other collections. Testifying before the Senate Subcommittee, John Dos Passos noted that a considerable part of his income from writing, in recent years, consisted of royalties from licenses to *reprint* portions of his books in this way. And the Xerox machine has developed a new, *authorized* method of reprinting poetry, articles, etc. Certain reprint publishers now prepare customized anthologies, on demand, for college and university classes. Articles or other works are selected by the professor, the reprint publisher obtains permission from the copyright owner, and produces just enough copies of each piece, bound together, to serve the needs of the class or classes. Royalties are paid to the author.

If libraries—including college and university libraries—were given the power to systematically reproduce single copies of poems, articles and sections of books without compensation, authors would be severely damaged. The process of supplying these copies—e.g. one to each student in a college class in literature or political science—can replace several copies of an anthology or book in the library or several copies of a paperback collection or text in the college book store. It is not necessary for the copies to be bound, so long as they are provided, they replace the *authorized* copies for which the author would have been paid—the anthology, customized anthology, textbook, etc. Unless authors are compensated for uses of their works by audiences reached by the medium of systematic library one-at-a-time reprinting, they will be deprived of a substantial part of their income.

Various reports have documented the enormous increase in unauthorized systematic library one-at-a-time reprinting of journal articles and other copyrighted works (e.g. the Sophar & Heilprin Report for Office of Education, in 1967). And it is common knowledge that the amount of copying in large libraries, library groups and networks, and in university and college libraries has increased tremendously since the report made by Sophar and Heilprin 9 years ago. Moreover, the provisions of the Revision Bill must deal with the amount of such copying that will occur next year, 10 years from now, and 20 years from now.

Library spokesmen could hardly guarantee that an exemption permitting them to engage in systematic reproduction would not seriously injure authors, journal publishers and other publishers. Furthermore, an exemption for systematic library reproduction could not draw a line—specifying that if an author or publisher suffered a prescribed degree of injury from library reproduction of his articles, poems or stories, libraries must cease one-at-a-time reprinting of his works. The only rational solution is that proposed by this Subcommittee, workable licensing arrangements which would provide authorization for libraries to copy, and provide reasonable compensation for authors and publishers.

In the light of copyright history, it would be dangerous to assume that uncompensated systematic library reproduction will not inflict substantial damage. Starting with the phonograph record, every new process of dissemination has been greeted with the same "it's not a threat" attitude the library spokesmen have expressed toward systematic one-at-a-time reprinting. Had authors been deprived of compensation for uses of their works in motion pictures, radio, television and mass-market paperbacks, few could today earn any reasonable compensation from their writing.

It should be emphasized that library reproduction of articles is not "note taking" or a substitute for copying by individual readers. Persons who obtain copies of articles from a library or publisher are not receiving handwritten notes—they are acquiring reprints of printed articles or other works, several pages long—just as they buy or acquire other printed materials to avoid the dozens of hours it would take to copy that much by hand. Each copy costs money to produce. Nor could users reproduce the copies themselves. Many patronize libraries that do not

have the journals. The copies are reproduced for them in libraries dozens or hundreds of miles away. And where the user's library subscribes to the journal, it will produce and give him a reprint of the article he wants, rather than lend the journal—so that it can keep the journal itself available to reproduce copies of articles for other patrons, and avoid losing this reprint master through wear and tear, a user's negligence or theft.

Mr DANIELSON. Mr. Lieb, counsel for the Association of American Publishers.

TESTIMONY OF CHARLES H. LIEB, COUNSEL FOR THE ASSOCIATION OF AMERICAN PUBLISHERS

Mr. LIEB. I would like to preface the reading of excerpts from my statement to remark that, judging from the testimony this morning from our friends representing the libraries, I think that today, sadly, we are further from a reasonable compromise on the photocopying problem than we have been for the last 4 or 5 years.

Today, for the first time in recent years the libraries say that they oppose the provision against multiple copying, a section with which they have been in agreement since it appeared in the 1969 Senate bill. Today, also, for the first time they say they want the elimination of the inhibition against reproduction of audiovisual, musical, and other materials.

Similarly, for the first time in recent years this kind of hard-line position is taken not by some but by all the libraries, and that is a regressive, not a compromising position.

They say today in answer to the question that was asked them about damage to the publishers, that they don't think the publishers are being damaged. The publishers, of course, have no way of knowing how much library copying is being done, but their own operating statements tell them that their results are not what they expected.

But, Mr. Anthony Ottinger from Harvard University, from which my friend, Mr. Sharaf, operates as well, submitted on February 26 of this year a report under contract of the National Commission on Libraries and Information Sciences, a report entitled "Elements of Information Resources Policy," which had this to say, at page 105:

> The practice of photocopying by interlibrary loans adds another dimension to the problem. Significant proportions of interlibrary loans are met by what are called non-returnable [illegible]. Unfortunately trend data on this score are not available. Data on this score disappear altogether from the 1969 report on library statistics of colleges and universities, and reappear in the 1971 data only by number of participating institutions, without transaction volume being given.

And Professor Ottinger from Harvard finishes this paragraph with the following, "It is hard to avoid the suspicion that these important data were suppressed as sensitive intelligence in the war over the Copyright Revision Bill."

The position of the Publishers Association in brief is that we support the provisions of section 107 of H.R. 2223 with respect to fair use and we support the provisions of section 108(f)(3), which make clear that libraries are entitled to the benefit of this doctrine. We support, also, the additional copying privileges extended to libraries in section 108, but we are opposed to any further limitations on the rights of authors and other copyright owners; and we are opposed in particular to the elimination of what we thought was being challenged today

namely, the section with respect to systematic copying. And we are also opposed to modification of what we learned this morning is being challenged, namely the preceding subsection, which inhibits multiple copying.

Much of the copying that Professor Low spoke about this morning, his poor boy in Arkansas who wants to copy a page, is permitted under the principles of fair use. In addition, much duplication over and above these permissible limits would be permitted under 108. And the American Library Association's Subcommittee on Copyright, of which Professor Low, I believe, was chairman, was more candid in its committee report which was submitted last July to the Library Association than, I think, he was with you this morning.

He said in that report—and I'm quoting—"We now have provisions under section 108 permitting photocopying of archival material; copying for preservation; freedom of liability for copying done by users on coin-operated machines on library premises, and the highly important provision permitting the making of single copies for normal interlibrary loan work."

"On the other hand," the report continues, "we have not been able as yet to reach agreement on 'systematic copying' a term used to describe copying in a system or network where one library agrees to discontinue its subscription to a journal and depend on another library in the network to make photocopies of articles from this journal when needed."

"Copyright proprietors, rightly or wrongly, believe that such systems or networks constitute a potential threat to their rights and want to prohibit such copying without license. We, of course, would like to see as few restrictions as possible."

Agreement has not been reached on systematic copying. It has not been reached, because the libraries, as Professor Low intimated to you this morning, walked away three times from us—and Mr. Hoopes will elaborate on that—in our efforts to put flesh on a statutory design which by a series of guidelines would establish what kind of copying is permissible, and what is not permissible.

We stand ready to work out agreements with respect to these guidelines. We stand ready to establish a clearance and payment system at our expense—not the libraries'. But so far the libraries have not been forthcoming in this regard.

Mr. DANIELSON. Well, you actually have a minute left. [Laughter].

Mr. LIEB. My friend was rushing me, I think he'd rather hear from Dr. Cairns. I will yield to him. Thank you.

[The prepared statement of Charles H. Lieb follows:]

STATEMENT OF CHARLES H. LIEB, COPYRIGHT COUNSEL FOR THE ASSOCIATION OF AMERICAN PUBLISHERS, INC.

I am Charles H. Lieb. I am a member of the law firm of Paskus, Gordon and Hyman of New York City. I appear in behalf of the Association of American Publishers, Inc. for whom I am copyright counsel. Appearing with me are Townsend Hoopes, President of the Association, from whom you will hear later; Alexander C. Hoffman of Doubleday and Company, Inc., who is chairman of the Association's Copyright Committee; and Susan Engelhart, the Association's staff director for copyright.

The Association of American Publishers is a trade association of book publishers in the United States. Its 265 member companies and subsidiaries are believed to produce 85 per cent or more of the dollar volume of books published

in the United States. Among its members are publishers of scientific and technical journals; some of its members are religious or educational not-for-profit organizations. We are grateful for the opportunity to testify at the hearing today which, we understand, is limited to the issue of library photocopying, and we request permission to file at a later date our formal statement as part of the record of today's proceedings.

The following, in brief, is our position:

1. We believe that section 107 of H.R. 2223 is a helpful statement of the principles of fair use, and we support section 108(f)(3) which makes it clear that libraries receive the benefit of that doctrine.

2. Although in some respects harmful to the interests of copyright proprietors, we support the copying privileges extended to libraries by Section 108.

3. We are opposed, however to any further limitations on the rights of authors and other copyright owners, and we are opposed in particular to the elimination of section 108(g)(2) with respect to "systematic copying."

Much of the copying done by libraries would be permitted under the principles of fair use which would be clarified by Section 107. In addition, much library duplication over and above the permissible limits of fair use would be permitted under the provisions of section 108. This freedom to conduct normal library operations was candidly described in a July 1974 report of the American Library Association copyright subcommittee, a copy of which we offer as an exhibit. It reads in part:

"We now have provisions [under Sec. 108] permitting photocopying of archival material, copying of material for preservation, freedom of liability for copying done by users on coin-operated machines on library premises, and *the highly important provision permitting the making of single copies for normal interlibrary loan work.* [Underscoring and bracketed material supplied.] On the other hand, we have not been able as yet to reach agreement on "systematic copying," a term used to describe copying in a system or network where one library agrees to discontinue its subscription to a journal and depend on another library in the network to supply photocopies of articles from this journal when needed. Copyright proprietors, rightly or wrongly, believe such systems or networks constitute a potential threat to their rights and want to prohibit such copying by them without some sort of license. We, of course, would like to see as few restrictions as possible placed on dissemination of information through cooperative effort."

Agreement has not been reached on systematic copying; instead, librarians are now urging the elimination of section 108(g)(2) so that they will be free to make copies not only for normal use but for library system and network operations as well.

"Systematic copying" as the term is used in section 108 should be distinguished from copying done pursuant to "isolated single spontaneous requests" such as takes place in normal library procedures. Systematic copying occurs when a library makes copies of materials available to users, either directly or through other libraries, under formal or informal arrangements "whose purpose or effect" is to have the reproducing library serve as the prime source of such material. (Senate Report 93-983, 122)

Systematic copying, in other words, substitutes the copying for the original which otherwise would have been purchased from the publisher. The library world appears to be divided on whether or not licensing procedures should be worked out for systematic copying. Some insist that no distinction should be admitted between unauthorized systematic copying and copying pursuant to isolated requests, and that payment should be made for neither. Others concede the difference in principle, but say that the kind of copying that should be paid for is too imprecisely defined in section 108, and that no practicable procedures have been established by which clearance can be obtained and payments made.

We think it unnecessary to belabor the point that unauthorized systematic copying—the kind of copying that is done at a research center, or at a central resource point for use in a library network—is the functional equivalent of piratical reprint publication. Certainly, this kind of copying must be paid for if, as the National Commission on Libraries and Information Science puts it, "the economic viability and continuing creativity of authorship and publishing" are to be protected. (Synopsis of second draft proposal, June 1974.)

It is equally meretricious to complain that the "systematic copying" that is to be paid for is too imprecisely defined, or that payment cannot be made because payment systems have not been established.

Section 108(g) excludes from library copying privileges not only "systematic copying" but also the related or concerted reproduction or distribution of "multiple" copies. Systematic copying and multiple copying are general concepts; both are illustrated by examples in the Senate committee report (which closely follows the discussion of fair use in your 1967 committee report), and neither is more imprecise than many other statutory or common law doctrines with which we are all familiar. The libraries do not claim an inability to understand the multiple copying concept; the systematic copying concept is no less viable or understandable.

What is missing of course is agreement among the parties to flesh out the statute—not only to formulate photocopying guidelines for the assistance of library patrons and employees, but to establish workable clearance and licensing procedures as well.

This is what your committee recommended in 1967 and this is what the Senate committee recommended in 1974. Had this been accomplished, we would not be here today. It has not been accomplished, and Mr. Hoopes in his testimony will place the blame squarely where it belongs.

REPORT TO THE COUNCIL OF THE AMERICAN LIBRARY ASSOCIATION FROM THE COPYRIGHT SUBCOMMITTEE

The Copyright Revision bill, S. 1361, which, due chiefly to the cable TV controversy, has resided in the Senate Judiciary Subcommittee during all of last year and up to this date in this year, now gives evidence of beginning to move. The full Senate Judiciary Committee reported it out on July 3 and this last Monday issued the accompanying Senate Report (S. Rept. 93-983) explaining the legislative intent in its passage. It will now probably come to the floor of the Senate and be passed within the next month to six weeks.

We have had many conversations with the members of the Senate Subcommittee in the past several months about provisions in the bill affecting photocopying in libraries. We now have provisions permitting photocopying of archival material, copying of material for preservation, freedom of liability for copying done by users on coin-operated machines on library premises, and the highly important provision permitting the making of single copies for normal interlibrary loan work. On the other hand, we have not been able as yet to reach agreement on "systematic copying," a term used to describe copying in a system or network where one library agrees to discontinue its subscription to a journal and depend on another library in the network to supply photocopies of articles from this journal when needed. Copyright proprietors, rightly or wrongly, believe such systems or networks constitute a potential threat to their rights and want to prohibit such copying by them without some sort of license. We, of course, would like to see as few restrictions as possible placed on dissemination of information through cooperative effort.

In its report, the Judiciary Committee, in an effort to remove this impasse, recommended that "representatives of authors, book and periodical publishers and other owners of copyrighted material meet with the library community to formulate photocopying guidelines to assist library patrons and employees." We believe that such conferences can be promoted best through the office of some interested but impartial individual and believe that Miss Barbara Ringer, as Register of Copyrights, would be an ideal person for this. Not only does she have the confidence of both librarians and publishers in her fairness and impartiality, but she is also far and away the most experienced of anyone in the country in the area of both domestic and foreign copyright.

In trying thus to meet the recommendations of the Senate Committee in this regard and to accomplish what we hope will be of benefit to all, we ask Council to transmit the following request to the Register of Copyrights.

The American Library Association urges the Register of Copyrights to arrange in such ways as deemed feasible and appropriate conferences between representatives of authors and book and periodical publishers and of the library community to resolve so far as possible the different interests in copyright legislation, to

institute studies of related problems, and to promote understanding on the part of the general public of the many complexities inherent in the copyright problem.
Presented to American Library Association Council, July 12, 1974.

TESTIMONY OF ROBERT W. CAIRNS, EXECUTIVE DIRECTOR, AMERICAN CHEMICAL SOCIETY

Dr. CAIRNS. I'm Robert Cairns, and I have a very lengthy statement, which I will obviously not have time to present; I would like to submit it for the record.

Mr. DANIELSON. Without objection, it will be received in the record. I would appreciate it if you would give us a "once over lightly," I am sure you know the contents.

Dr. CAIRNS. I will do so. I have a summary, and I'll even have to summarize the summary.

Mr. DANIELSON. Fine.

Dr. CAIRNS. First of all, I would like to introduce my colleagues here, on my right, Dr. Richard Kenyon, who is director of our division of communications. And behind me is Dr. Stephen Quigley, who is director of our department of chemistry and public affairs, and Mr. William Butler, representing Mr. Arthur Hanson, general counsel of our society.

Perhaps the main objective of the American Chemical Society is the increase and diffusion of chemical knowledge——

Mr. DANIELSON. Your objection?

Dr. CAIRNS. Our principal objective.

Mr. DANIELSON. Thank goodness.

[Laughter.]

Dr. CAIRNS [continuing]. That lays emphasis on the fact that we are interested very strongly in the dissemination of scientific knowledge.

Mr. DANIELSON. That is the only basis under which we can have a copyright law, as I read the Constitution.

Dr. CAIRNS. Throughout the past 99 years, the American Chemical Society approach to achieving this objective has been to gather, to evaluate, to organize, and to control new scientific information into a form useful for publication, then to publish journals—16 in number, I believe—and deliver it to the scientific world, that is our position.

In providing a record of new scientific knowledge and maintaining the basis upon which it is gathered, evaluated, and organized for publication, the journals provide a constantly updated authoritative consensus of universally accepted knowledge in the fields concerned. We can speak, I think, on this theme for a great many scientific societies, although we are one of the largest.

The integral part played by scientific journals and scientific research renders them indispensible for our way of life. These journals provide the knowledge base for technical development, for answers to urgent problems faced in the United States and the rest of the world, such as the energy crisis, the world food problem, the delivery of adequate health service, and pollution abatement.

It is critically important that this system of organizing, evaluating, and providing scientific information remain healthy, that is our main contention.

Now, the central argument focusing on photocopying is essentially an economic one. I wish to call your attention particularly to the critical problem provided by the cost of bringing the research journal through the process of editing, collecting and evaluation, composition, and other production steps, up to the point of being ready to print the first copy. These costs are what we call "first-copy costs." In our system in making scientific information broadly available is to continue, we must continue to find ways to support these first-copy costs. as well as to pay the costs of the journals actually printed and delivered.

We are finding that subscriptions to our journals are decreasing. Since 1969, subscriptions have decreased from 12 to 18 percent. For example, the Journal of the American Chemical Society, which is our prestige journal, has dropped from almost 20,000 down to a little below 16,000 subscribers as of the end of 1974.

The Journal of Organic Chemistry has dropped from 10,500 to 9,500; the Journal of Physical Chemistry from 6,500 to 5,500; others have declined comparably.

If users are allowed, without paying for the journal, to receive copies of the journal papers, it is not likely that they will subscribe to the journal. Under such conditions, paid subscriptions can be expected to continue to drop rapidly.

While replacement of actual printed copies of the journal by photocopies would reduce the cost to the [illegible] the large costs referred to as "first-copy costs" would remain uncompensated, it would have to be distributed over a decreasing number of journal subscriptions, and the result would be very expensive journals. This would mean that the cost would fall on the relatively small number of individual organizations which would continue to subscribe to the journal. Obviously, a continuous trend in that direction would threaten the economic stability of the journal system.

If, on the other hand, the copyright law is designed to require payment for photocopying of papers from journals of an adequate and equitable charge for the copy, this would distribute the cost of the system more equitably over those who benefit from it. The objective is not to prevent such photocopying, but, rather, to provide support for the basic costs of developing scientific information for distribution, thus keeping the journal system viable [illegible] a base from which the improving technologies for improved dissemination can draw; the result would be a more effective and more lasting total information system.

Now, there are a couple of studies to which I make reference in my main report. One, that the interlibrary loan requests—by their own studies—grew from 859,000 requests in 1965 to double that figure in 1969, with projections as high as 2.6 million in 1974–75. So, we are getting up into millions, and millions, and millions of interlibrary loans, to give you an order of magnitude; and that is from their own data.

In another study the author discussed service by possibly a national periodical resources center. They estimated that from the collection of 10,000 titles the demand will start growing in the range of 58,000 to 75,000 in the 1st year, to a range from 2¾ to 5 million in the 10th year. Yet, 90 percent of these would be filled by photocopies. These figures give you some indication of the increase in capacity of the

network and system of improving the dissemination of scientific information.

However, it is reasonable to expect that the number of journal subscriptions from which those will be provided will be much smaller than at the present.

There have been objections that any system of licensing or fees for photocopies would encourage excessive administrative costs. However, a study of the elements and possible systems for licensing and collection of fees for photocopies has been developed by a working group of librarians and publishers of the Conference on the Resolution of Copyright Issues under the chairmanship of the National Commission on Libraries and Information Science—plans are now being developed for testing such proposed systems as a means of learning just how the process may be carried out in an economically sound fashion.

I have here Dr. Kenyon who is a member of that working group and he will be glad to answer specific questions on that system.

Despite reservations on some segments of this bill, the American Chemical Society recommends passage of the sections of H.R. 2223 related to library photocopying. This recommendation is made with the belief, based on work with the Conference on the Resolution of Copyright Issues, that a practicable system for licensing and fee collection for photocopies of copyrighted works can be developed, which will render fair and equitable charges for systematic photocopying in the interest of an improved and economically viable system for the dissemination of scientific information.

Mr. DANIELSON. Thank you very much. You have 2½ minutes left. I'm watching the clock in the back of the room. Would you like to yield to your associate?

Dr. CAIRNS. Yes.

Mr. DANIELSON. Your name, sir?

Dr. KENYON. Richard Kenyon. I would like to make a comment on the working group of the Conference on the Resolution of Copyright Issues, which has been mentioned in earlier testimony here. The work of this group now has been announced in a release by the Library of Congress, and in our most recent meeting on April 24, we agreed the documents were public documents. In the interest of providing information to the record I would like to offer the report of our working group for the record.

Mr. DANIELSON. Without objection we can receive it in our files. I think we will withhold just how much we want to print in the record until the staff and members have had a chance to go over it. I do thank you for making it available, though. [See app. 3.]

Dr. CAIRNS. I think I can summarize by saying that I think we can work out a system which is economically viable, and continue to support authors, users, editors, and members of the scientific community at large.

Mr. DANIELSON. Thank you very much, Dr. Cairns.

[The prepared statement of Dr. Robert W. Cairns follows:]

STATEMENT OF DR. ROBERT W. CAIRNS, EXECUTIVE DIRECTOR, AMERICAN CHEMICAL SOCIETY

Mr. Chairman and members of the Subcommittee: My name is Robert W. Cairns. I am the Executive Director of the American Chemical Society and, with the authorization of its Board of Directors, I appear before you today to present

the Society's statement. I have spent 37 years in industry and retired as Vice President of Hercules Incorporated on July 1, 1971, to accept the position of Deputy Assistant Secretary of Commerce for Science and Technology. I resigned from that position on December 1, 1972, on acceptance of my present appointment. Accompanying me today are Dr. Richard L. Kenyon, Director of the Public, Professional and International Communication Division, Dr. Stephen T. Quigley, Director of the Department of Chemistry and Public Affairs, and Mr. William B. Butler, representing Mr. Arthur B. Hanson, General Counsel of the Society.

We appreciate being given this opportunity to comment on certain features of the Copyright Revision Bill, H.R. 2223. The issues addressed by this legislation are both fundamental to the formulation of national science policy, and of vital significance with respect to the ability of our Society to resolve many of the problems which confront it. These issues have been under discussion for some time now by the Committee on Copyrights of the Board of Directors and Council of the American Chemical Society, as well as by other similar scientific societies, and a general consensus on them has been under development. This consensus has been developed in the context that the protection of copyrighted material will "promote the Progress of Science and Useful Arts", as specified in Article I, Section 8, Clause 8 of the Constitution of the United States. The viewpoint which we attempt to express is that of the chemical, scientific and technological community, as represented by the American Chemical Society.

The American Chemical Society is incorporated by the Federal Congress as a non-profit, membership, scientific, educational society composed of chemists and chemical engineers, and is exempt from the payment of Federal income taxes under section 501(c)(3) of the Internal Revenue Code of 1954, as amended.

The American Chemical Society consists of more than 107,000 such above described members. Its Federal Charter was granted by an Act of the Congress in Public Law 358, 75th Congress, 1st Session, Chapter 762, H.R. 7709, signed into law by President Franklin D. Roosevelt on August 25, 1937, to become effective from the first day of January, 1938.

Section 2 of the Act is as follows:

"Sec. 2. That the objects of the incorporation shall be to encourage in the broadest and most liberal manner the advancement of chemistry in all its branches; the promotion of research in chemical science and industry; the improvement of the qualifications and usefulness of chemists through high standards of professional ethics, education, and attainments; the increase and diffusion of chemical knowledge; and by its meetings, professional contacts, reports, papers, discussions, and publications, to promote scientific interests and inquiry, thereby fostering public welfare and education, aiding the development of our country's industries, and adding to the material prosperity and happiness of our people."

Its Federal incorporation replaced a New York State Charter, which had been effective since November 9, 1877.

One of the principal objects of the Society, as set forth in its Charter, is the dissemination of chemical knowledge through its publications program. The budget for the Society for the year 1975 exceeds $39,000,000 of which more than $30,000,000 is devoted to its publications program.

The Society's publication program now includes three magazines and seventeen journals, largely scholarly journals that contain reports of original research from such fields as medicinal chemistry, biochemistry, and agricultural and food chemistry, as well as a weekly newsmagazine designed to keep chemists and chemical engineers abreast of the latest developments affecting their science and related industries. In addition, the Society is the publisher of Chemical Abstracts, one of the world's most comprehensive abstracting and indexing services. The funds to support these publications are derived chiefly from subscriptions.

The journals and other published writings of the Society serve a very important function, namely: they accomplish the increase and diffusion of chemical knowledge from basic science to applied technology. In so doing, they must generate revenue, without which the Society could not support and continue its publications program in furtherance of its Congressional Charter to serve the science and technology of chemistry. The protection of copyright has proved an essential factor in the growth and development of the scientific-publishing program of the Society.

The twenty periodical publications of the Society produce more than 40,000 pages a year and subscriptions in 1974 totalled 323,000. Chemical Abstracts annually produces more than 140,000 pages which go to 5,500 subscribers. Its

abstracts number in excess of 361,000 yearly and its documents indexed in excess of 425,000. The single greatest source of income for all ACS publications is subscription revenue.

As is indicated by the objectives of the American Chemical Society, we believe that the effective dissemination of scientific and technical information is critical to the development, not only of the society and economy of the U.S.A., but also of modern society worldwide.

These journals provide the knowledge base for technical development of answers to urgent problems facing the United States and the rest of the world, such as the energy crisis, the world food problem, the delivery of adequate health services, and pollution abatement. It is critically important that this system for organizing, evaluating, and providing scientific information remain healthy.

Scholarly journals are the major instruments for dissemination and recording of scientific and technical information. These journals are expensive to produce. If the costs are not supported financially by those who make use of them they cannot continue. There is no adequate substitute in sight.

The scholarly scientific or technical journal is more than merely a repository of information. The scientific paper is the block with which is built our understanding of the workings of the world around us. In his papers, each scientist records his important findings for the permanent record. His successors then have that knowledge precisely recorded and readily available as a base from which they may start. So the process continues in a step-by-step fashion from scientific generation to scientific generation, each worker having available to him or her the totality of the knowledge developed up to that time. Each scientist stands upon the shoulders of his predecessors.

But this analogy of simple physical structure is inadequate, for at least of equal importance is the continuous refinement that takes place. Before new knowledge is added to the record, it is reviewed, criticized and edited by authoritative scholars; then, once published, it is available in the record for continued use, criticism, and refinement. New findings make possible the revelation of weaknesses in the earlier arguments and conclusions, so that as the structure of scientific knowledge is built higher it is also made stronger by the elimination of flaws. While it has been said that mankind is doomed to repeat its mistakes, the system of scientific recording in journals is designed to prevent the repetition of such mistakes and to avoid building upon erroneous conclusions. The scholarly journal record is the instrument for insuring this refining process.

In addition, journal papers form an important part of the basis upon which a scientist's standing among his peers is judged. For this reason, scientific scholars are willing to give their time and effort to help produce these evaluated records and are also willing to leave the management of the copyright on their papers in the hands of the scientific societies. These scholars are rarely concerned with private income from their published papers, but they are vitally concerned with the preservation of the intrinsic value of the scientific publishing system.

Publishing costs have risen and are rising continuously, making the continuation of the scientific-journal system increasingly difficult. This has been recognized by the U.S. Government in acknowledging the philosophy that scientific-research work is not complete until its results are published, and in establishing a policy which makes it proper that money may be used from federal support of research projects to help to pay the cost of journal publication. It is this policy which provides most of the funds for paying page charges, charges originally designed to pay the cost of bringing the research journal through the editing, composition, and other production steps, up to the point of being ready to print. However, publishing costs are now so high that these page charges no longer pay even for these initial parts of the publishing process. American Chemical Society records in 1974 show that page charges supported one-third or more of those costs for fewer than 30% of ACS journals.

Publishing costs *must* be shared by the users. If these users are allowed, without payment to the journal, to make or to receive from others copies of the journal papers they may wish to read, it is not likely they will be willing to pay for subscriptions to these journals. If and as free photocopying of journals proceeds, the number of subscribers will shrink, and subscription prices will have to rise. The reduction of subscription income may continue to the point of financial destruction of these journals.

The problems of the commercial publishers of many good scientific journals are often more severe, because these publishers do not have the moderate assistance of page charges.

The doctrine of fair use, developed judicially but not legislatively, has long been useful to the scholar, for it has allowed him to make excerpts to a limited extent for purposes of the files used in his research. However, the modern technology of reprography has offered such mechanical efficiency and capacity for copying that it is presently endangering the protection given the foundations of the scholarly journal by copyright. "Excerpts," instead of being notes, sentences, or paragraphs, are being interpreted to mean full scientific papers, the aforementioned building blocks.

As the copyrighted journal system developed, it was agreed long ago that the scholar should be allowed to hand-copy excerpts for use as background information. As a further step, authors became accustomed to ordering the reprints of their papers to send to their colleagues as a means of assuring a good record of the progress of work in the field concerned. This was followed, 20–30 years ago, by some minor use of the old "Photostat" machine. While that process strained a little the proprieties of copyright, it was fairly generally agreed that the mechanics of the practice were such as to help the research scientist while difficult and costly enough not to undermine the basic structure of the journal system.

We hold no objection to a scholar himself occasionally making a single copy in a non-systematic fashion for use in his own research. However, in the past decade the techniques of reprography have advanced to such an extent that third parties, human and mechanical, are beginning to be involved in a substantial way. It now is practical to build what amounts to a private library through rapid copying of virtually anything the scholar thinks he might like to have at hand. While this process has obviously personal advantages, it is now being done extensively and increasingly, without any contribution from these scholars—or the libraries which copy for them—to the cost of developing and maintaining the basic information system that makes it possible. Even conservative projections of the development of reprographic techniques within the next decade make it clear that the economic self-destruction of the system within the next decade is a real possibility. Overly permissive legislation could make this destruction a certainty.

Use of a journal by an individual for extracting from it with his own hands, by hand-copying the material specifically needed and directly applicable to his research, is one thing. A practice in which an agent, human or mechanical, acts as copier for an individual or group of individuals wishing to have readily available, without cost, copies of extensive material more or less directly related to his or their studies and research, is quite a different matter. The latter is certainly beyond justification on the mere grounds that technology has made it convenient, or that the purposes are socially beneficial.

Documented evidence of the increase in photocopying is found in "A Study of the Characteristics, Costs, and Magnitude of Inter Library Loans in Academic Libraries," published in 1972 by the Association of Research Libraries. There we find that in 1969–70 the material from periodicals sent out in response to requests for "interlibrary loans" filled by the academic libraries surveyed was 83.2 percent in photocopy form as compared with 15.2 percent in original form and 1.4 percent in microform.

In that same report the volume of interlibrary loan activities from academic libraries is traced. It grew from 859,000 requests received by academic lending libraries in 1965–66 to 1,754,000 in 1969–70, and is projected to reach 2,646,000 in 1974–75.

Much thinking and study are being devoted to systems for improving access to periodicals resources through networks. These networks would make the scientific information available widely and rapidly from a relatively small number of original journal copies. In "Access to Periodical Resources: A National Plan", by Vernon E. Palmour, Marcia C. Bellassai, and Lucy M. Gray, a report prepared at the request of the Association of Research Libraries, it is stated that a number of advantages accrue to the provision of photocopies instead of originals. "Supply of photocopies," the report states, "is more essentially a 'mail order' or merchandising rather than a lending operations." It

is also noted that "A single copy, or in some cases a few copies, at a center can meet, without undue delay, the needs of a large number of users."

In viewing the possible growth of service by a National Periodical Resources Center, the authors estimated that from a collection of ten thousand titles, the demand would grow starting in the range of 58,000 to 75,000 in the first year to a range of 2,281,000 to 5,462,000 in the tenth year, with 90 percent of the request being filled by photocopies.

Such estimates as these show expectations of a great growth in use of photocopied material. Obviously the direct uses of the printed journal would be very small.

These data give some indication of the trends in use made of the published literature without contribution of any share of the very considerable cost of evaluating, organizing, and publishing it.

In another report, "Methods of Financing Interlibrary Loan Services," by Vernon E. Palmour, Edwin E. Olson, and Nancy K. Roderer, a fee system is suggested as a practical possibility with the fee initially set at $3.50, about half the full cost recovery, and gradually increasing toward providing the full cost. No consideration is given in this suggestion to payment of a fee to the publishers from whose periodicals the copies are made. An adequate additional fee, paid into a clearinghouse and distributed to the appropriate publishers, could spread the full cost of support of a journals system equitably over the users.

It is desirable that use be made of modern technology in developing optimum dissemination. This technology includes the use of modern reprography, but as technology inherently includes economics the means of financial support of the system must be a part of its design. Therefore, photocopying systems must include an adequate means of control and payment to compensate publishers for their basic editorial and composition costs. Otherwise, "fair use" or library-photocopying loopholes, or any other exemptions from the copyright control for either profit or non-profit use, will ultimately destroy the viability of scientific and technical publications or other elements of information dissemination systems.

The copyright law is directed to the interest of the public welfare. It is not in the interest of the public welfare to modify the copyright laws so as to allow the economic destruction of the scientific and technical information system.

The American Chemical Society is properly concerned with the clarity and vitality of the copyright laws of the United States and of the world. These laws have provided a sound basis for the continuity of scientific communication programs, including at present the primary and secondary journals, microforms, and computerized information systems.

The Society recognizes that its members and others concerned with its publications are both "authors" and "users" of information, and that it is the Society's objective to serve their needs as fully as possible. It recognizes the functions and problems of such vital information channels as libraries, information centers, and information systems and networks. It further recognizes the challenges offered by technological advances in communication techniques.

However, scientific communication programs cannot continue without proper funding, and in the immediate future this funding must continue to come from "authors" and "users." "Page charges" are an acceptance of the philosophy that "authors" (or their employers) must share in the funding of the communication process, and that publication of findings is the final step in the completion of a significant study. "Users" have traditionally paid their share through personal and employer (library) subscriptions to printed publications, but "technology" and "networks" are changing the need for multiple or even local copies, making it all the more vital that revenue be obtained in relation to direct use, wherever and however provided.

Because law is the basis for order among individuals, organizations, and nations, the Society believes that the laws which affect communicaton—information transfer—must be equitable and clear, and that they must be periodically reviewed to maintain these qualities. The copyright law of the United States has not been seriously updated since 1909, and it is badly in need of revision. Its antiquity is the direct cause for present ethical and judicial arguments over what is "fair" or "free" as regards communication—arguments which obscure the basic rights of authorship; the "value added" factors in reviewing, editing, publishing, and information-base creation; and the fact that the real problem

is inadequate funding at most stages of the communication process (including libraries).

The Society has repeatedly and clearly stated its need for copyright protection against continuation and growth of "uncontrolled dissemination of scientific information"—the unauthorized regular or systematic or concerted single-copy republishing of Society papers by libraries or networks of libraries. The Society is opposed to copyright-law revisions relating to "copying" that would destroy the copyright protection for its publication programs.

Until communication issues can be further clarified, the Society would prefer that "fair use" remain a judicial rather than a legislative concept. The Society is specifically opposed to any definition of "fair use" that could be further interpreted as permitting unauthorized, concerted "single copying" (photocopying, electronic copying, etc.).

The Society recognizes the need to develop total systems for information transfer; therefore, it specifically opposes any broadening or interpretation of the definition of or the right to prepare a "derivative work" that would reserve to "authors" (primary publications) the right to control the writing of original informative abstracts that are not complete "abridgments" or "condensations." However, the latter are accepted as being fully protected derivative works; they are of significance to the Society's future primary publication of "short papers."

The Society advocates immediate copyright-law revisions that will more completely and explicitly define and continue to protect such technological developments as computerized information bases, computerized data bases, computer programs, and microforms, i.e., that will define and specify these as "Exclusive Rights in Copyrighted Works." Because the scope and importance of these technological developments are already extensive, the Society no longer advocates deferring related copyright-law revisions until after the studies and recommendations of the National Commission on New Technological Uses of Copyrighted Works. In particular, the Society firmly advocates revisions which clarify and continue the protection of copyrighted computer bases at time of input, on the basis that copyright control at output only might be limited severely by broad interpretations of "fair use."

The Society opposes most of the specific additional limitations on the exclusive rights of authors and their publishers to provide copies of copyrighted publications that are contained in recent legislative bills. As proposed, these limitations do not really meet the needs of "users" and libraries for uncomplicated copying.

The Society recognizes that these and other limitations on exclusive rights to provide copies are based on the very real desire of "users," and libraries in their behalf, to avail themselves of such "new technology" as photocopying to prepare or obtain copies of copyrighted documents quickly and easily. The Society has repeatedly declared its readiness to cooperate in the development of a clearinghouse that can grant such permissions in an equitable and simple manner and is presently working actively toward this goal through the Conference on the Resolution of Copyright Issues under the chairmanship of Barbara Ringer, Register of Copyrights, and Fred Burkhardt, Chairman of the National Commission on Libraries and Information Science. The Society also advocates the development of "document-access networks" that will quickly supply actual copies in an equitable manner. The Society therefore advocates copyright-law provisions that will equitably authorize and regulate such important services to "users."

Despite reservations on some segments of this bill, the American Chemical Society recommends passage of the sections of H.R. 2223 related to the library photocopying. This recommendation is made with the belief, based on work with the Conference on the Resolution of Copyright Issues, that a practicable system for licensing and fee collection for photocopies of copyrighted works can be developed which will render fair and equitable charges for systematic photocopying in the interest of an improved and economically viable system for the dissemination of scientific information. Plans now are being developed for testing such a mechanism.

Mr. DANIELSON. I believe the next gentleman is Mr. Hoopes, president of the Association of American Publishers.

TESTIMONY OF TOWNSEND HOOPES, PRESIDENT, ASSOCIATION OF AMERICAN PUBLISHERS

Mr. HOOPES. Thank you, Mr. Chairman. I am the president of an association of 265 members who are responsible for the publication of perhaps 85 percent of all the books published in this country.

On behalf of our association and speaking to some extent for the other copyright owners, my purpose is to reinforce support for the present sections 107 and 108, which Mr. Lieb has addressed in some detail. Mainly I will summarize our recent experience with the library community in seeking to be responsive to pointed suggestions from both the House and Senate Judiciary Committees.

The Senate report accompanying S. 1361, which passed the Senate last September, expressed the belief that section 108 provides "an appropriate balancing of the rights of creators and the needs of users." At the same time, recognizing the complexities, the report urged the parties—in this instance authors, publishers, and librarians—to meet together directly in order to develop more precise photocopying guidelines for fair use; and also to develop workable clearance and license arrangements for copying beyond fair use.

This urging by the Senate committee repeated a similar proposal by the House Judiciary Committee in 1967. Responsive to that earlier proposal, publishers and authors met with librarians in 1972 and again in 1973 for discussions that became known, somewhat grandiloquently, as the "Cosmos Club and Dumbarton Oaks talks."

The formula evolved at the Cosmos Club was that, if reprints of journal articles were readily available from the publisher or his agent, then the library would refrain from photocopying of its own. The formula evolved at Dumbarton Oaks was that a journal publisher would encode the front page of each journal article with a serial number and a reprint price, and that a library making a copy thereof would so advise a clearinghouse operated by the publisher. At quarterly, or semi-annual intervals the clearinghouse would bill the library for the aggregate royalty charges, and would then distribute the proceeds to individual publishers. While both the Cosmos and Dumbarton efforts were deemed feasible by the library participants, they were later both shot down by officials of the various associations.

Since November, 1974, publishers have again been negotiating with the librarians under the joint sponsorship of the Register of Copyrights and the Chairman of the National Commission on Libraries and Information Science. Eight meetings of a 12-man working group were held between early December 1974 and mid-April of this year.

I regret to say, Mr. Chairman, that there has not been much progress to date, chiefly because the librarians have refused to accept either the Senate bill, or the guidances suggested by the Library Commission chairman and Miss Ringer, as in any way a limiting frame of reference. We have asked them, for example, to join with us in defining typical situations of two kinds: (a) Those which would clearly involve fair use copying, and (b) those which would clearly involve systematic copying beyond fair use, thereby requiring permission and royalty payment.

Their consistent reply has been that they know of no copying done by libraries which extends beyond fair use. Mr. Low in his statement

this morning complained about the practical difficulties of distinguishing single copying from systematic copying, but it is a matter of record that his group has refused even to discuss guidelines designed to establish just such practical distinctions.

Having thus failed to come to grips with the substantive issue here involved, the two sides have recently agreed to conduct a survey of actual photocopying practices in libraries, and a test of a payments mechanism modeled along the lines of the Dumbarton Oaks proposal. But the library community has made clear that its participation in this exercise in no way implies an obligation to pay royalties under any circumstances.

I suggest, Mr. Chairman, two possible explanations for this unforthcoming attitude. Either the library community as a whole is still attempting to secure total exemption from copyrights and expects to get its way with the Congress; or the attitude here expressed reflects a minority view of the library community and is not, therefore, representative of the whole. In this latter connection, I must say that we are struck by the difference in the attitude we have found among local librarians, and those expressed by the official spokesman of the library associations in Washington. In the field, we have encountered widespread sympathy for and understanding of the basic concept of copyright, and of the need for copyright protection, accompanied by a felt need for guidelines that will more precisely determine the dividing line between fair use and infringement.

I would like to make brief mention in this same context of the Commission on New Technological Uses of Copyrighted Works which was established by law on December 31, 1974. Our association has supported and does support this commission. But we believe it would be a serious mistake if Congress should seek to avoid coming to its own finite conclusions on key copyright issues on the grounds that such questions ought logically to be referred to the new commission. In our judgment such a course would represent a serious abdication of congressional responsibility, and would increase rather than decrease the ensuing confusion. In a true sense it would merely shift the debate to another forum, and one not nearly so well placed as the Congress for bringing the controversial questions to clear resolution.

In the nature of things, Mr. Chairman, the ramifications of the copyright issue in the context of rapid technological change will assure that the new commission has a great many questions to debate and resolve. But the commission's work will proceed on a far more hopeful basis if the Congress accepts its own responsibility for setting workable guidelines in the new law. In our judgment congressional endorsement of the existing language of sections 107 and 108 would constitute the necessary guidelines for print media.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Hoopes follows:]

STATEMENT OF TOWNSEND HOOPES, PRESIDENT, THE ASSOCIATION OF AMERICAN PUBLISHERS

Mr. Chairman. My name is Townsend Hoopes. I am President of the Association of American Publishers, the extent and influence of whose membership Mr. Lieb has described. I should add parenthetically that, in addition to representing publishers, I have written two books and intend to write more, so that my convictions about the need for copyright protection are based on authorship as well as publishing. I agree with Ms. Ringer that protection of authors' rights is at the

very core of the Constitutional provision for copyright protection, and that the need for such protection is a direct consequence of the need to assure continuance of intellectual creativity, a function which cannot be performed by a committee but only by an individual.

On behalf of the Association, and also speaking to some extent for the other proprietary owners here assembled, my purpose is to reinforce support for the present language of Sections 107 and 108 of H.R. 2223, which Mr. Lieb has addressed in some detail. Mainly I will summarize our recent experience with the library community in seeking to be responsive to pointed suggestions from both the House and Senate Judiciary Committees.

The Senate report accompanying S. 1361 expressed the belief that Section 108 provides "an appropriate balancing of the rights of creators and the needs of users"; at the same time, recognizing the complexities, the report urged the parties—in this instance authors, publishers and librarians—to meet together directly in order to develop more precise photocopying guidelines for "fair use", and also to develop workable clearance and license arrangements for copying beyond fair use. This urging by the Senate Committee repeated a similar proposal by the House Judiciary Committee in 1967. Responsive to that earlier proposal, publishers and authors met with librarians in 1972 and again in 1973 for discussions that became known, somewhat grandiloquently, as the Cosmos Club and Dumbarton Oaks talks. The formula evolved at the Cosmos Club was that, if reprints of a journal article were readily available from the publisher or his agent, the library would refrain from photocopying of its own. The formula evolved at Dumbarton Oaks was that a journal publisher would encode the front page of each journal article with a serial number and a reprint price, and that a library making a copy thereof would so advise a clearinghouse operated by the publishers. At quarterly or semiannual intervals, the clearinghouse would bill the library for the aggregate royalty charges and would then distribute the proceeds to individual publishers. While both the Cosmos and Dumbarton efforts were deemed feasible by the library participants, they were later both shot down by officials of the several library associations.

Since November 1974, the publishers have again been negotiating with the librarians under the joint sponsorship of the Register of Copyrights and the Chairman of the National Commission on Libraries and Information Science. Eight meetings of a twelve-man working group were held between early December 1974 and mid-April of this year. I regret to say, Mr. Chairman, that there has not been much progress to date, chiefly because the librarians have refused to accept either the Senate bill or the guidances suggested by NCLIS and Ms. Ringer as in any way a limiting frame of reference. We have asked them, for example, to join with us in defining typical situations of two kinds: (a) those that would clearly involve fair use copying, and (b) those that would clearly involve systematic copying beyond fair use thereby requiring permission and royalty payment. Their consistent reply has been that they know of no copying done by libraries which extends beyond fair use.

I suggest, Mr. Chairman, there are two possible explanations for this unforthcoming attitude. Either the library community as a whole is still attempting to secure total exemption from copyright, and expects to get its way with the Congress; or the attitude here expressed reflects a minority view within the library community and is not therefore representative of the whole. In this latter connection, I must say that we are struck by the difference in the attitudes we have found among local librarians and those expressed by the official spokesmen of library associations in Washington. In the field, we have encountered widespread sympathy for and understanding of the basic concept of copyright and of the need for copyright protection, accompanied by a felt need for guidelines that will more precisely determine the dividing line between fair use and infringement.

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to another forum and one not so well placed as the Congress for bringing the controversial questions to clear resolution.

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Mr. DANIELSON. You have some more time, if you like—Mr. Lieb has a comment to make.

Mr. LIEB. May I respond as one of the many lawyers who was involved in the wonderful case of *Williams & Wilkins*, in view of the questions that were raised this morning about it?

First of all, Mr. Pattison, although it is true that the Supreme Court decision said the judgment of the Court of Claims is affirmed on a four to four vote, the established law is that such a decision by the Supreme Court lacks any precedential value whatsoever as far as the Supreme Court is concerned.

Second, I would like to point out to those who are not intimately familiar with the briefing in the case, that the Solicitor General in his brief to the Supreme Court defended the practices as shown by the record on appeal, and there was a very limited, narrow record of only copying of eight articles of at most three times of one, the other twice of one.

The Solicitor General defended the practices that appeared in the record as not systematic and said in two places in his argument that had the case had before it facts involving a library consortium, such as was recently established by New York Public Library, and Harvard, and others; had it had before it a case of true systematic copying the argument would not be made.

So, the *Williams & Wilkins* decision, such as it is, resting on a four to three decision of the Court of Claims, is to be read most narrowly not only because of the narrow facts in the record, but because of the reservation and doubts of the Solicitor General with respect to the principle involved.

Mr. DANIELSON. Thank you. Mr. Pattison? I think we can safely say we have about 10 minutes between us, you take the first 5.

Mr. PATTISON. I guess I'm just primarily concerned in terms of the mechanical problems once some satisfactory or otherwise agreement is worked out by Congress, and the mechanical problems of preclearance, what is an adequate charge, how the proceeds are distributed, recordkeeping with all the varieties of libraries that we have—tiny ones and great big ones—I would like to have some of your comments. I think Mr. Hoopes has been very helpful on that, but it seems to me some kind of agreement has to be worked out, some complicated mechanism undoubtedly will have to be worked out to resolve those questions.

Mr. HOOPES. If I may, Mr. Pattison, I would like to refer that question to one of the gentlemen who participated in the working group.

Mr. KARP. Mr. Pattison, may I start by pointing out, the papers that Dr. Kenyon submitted contain a description of a prototype, a prototype in which the mechanics are described. They start in part from the device of a code printed on the first page of every article, indicating the price, the identification of the publisher, and so forth.

The next step would be the Xeroxing of an extra copy of that page. In other words, when the article is Xeroxed, the first page will be Xeroxed twice. Those first pages will then be shipped in bulk to the clearance center which would process them. The processing could be done in various ways in which I don't want to get bogged down, including optical scanning.

Beyond that, I also should point out, that is only one possibility. The study group was involved, and hopefully will continue to be involved in developing that system. And, as Mr. Hoopes pointed out, one of the purposes of the study to be undertaken by the National Commission on Libraries and Information Science is to test the system and refine it.

One more thing, and I will turn it over to Dr. Kenyon. The history of copyright is full of technological revolutions, this is not the first one by far. Phonographs, motion pictures, television, radio all developed during the 1909 act; and frankly, some of them are much more complicated and more devastating in their impact on prior methods of distribution. The jump from printing journals to photocopying, quantitatively, is nothing compared to the jump from publishing sheet music to performing music on long-playing phonographs and radio and television. That was a tremendous jump, economically. Yet, copyright owners and users were able to work out systems for licensing, facing problems much more complex than what we have here. It's poppycock to talk about the complexity of these problems, compared to the complexities that face the performing rights societies.

And our problems can be handled much more easily, I think, in the long run. But the important thing is to at least try, and not come up to the author and back away; and come up to the author and back away in the manner Mr. Low described. If you go through the process of trying you don't take away other people's property just by lightly saying, "I, a librarian who has worked in the public field and public funds for 40 years know that you businessmen can't cope with this problem, so our solution is to take your rights away from you", that just isn't something we can lightly accept.

I think that if the attempt is made to work it out—that may also eliminate other complications. Here are 10,000 journals placed on microfilm by copyright owners' permission. Other journals would be in here if their proprietors were not fearful of the fact that once the journals were photocopied by University Microfilms and sold to libraries, the consequences on a photocopying exemption would be devastating.

Mr. DANIELSON. I think that the gentleman is referring to the rather large catalog of microfilm work that is put out by Xerox.

Mr. KARP. University Microfilms, which is a subsidiary of Xerox Co. Thank you, I have taken too much time. I'll turn it over to Dr. Kenyon.

Dr. KENYON. I don't think you have gone into a detailed description of the mechanisms. The elements of such mechanism are included in our report here. It is our view that the publishers said they believed that a kind of system could be developed with the elements of this mechanism, could be effective in receiving payment for photocopies. Library people have said they doubt it.

But at least we have developed elements for such a system which have been presented to the Conference on the Resolution of Copyright Issues. And in the press release from the Library of Congress that was issued in very recent days, it states that the National Commission on

Libraries and Information Sciences is prepared to assume responsibility for financing and to cosponsor with the Conference a project to compile library statistics on photocopying, including testing a payment mechanism. As had been indicated, the interlibrary loan is a very important instrument in providing information, and the added matter of recording the photocopying that is done, and fitting that information into a central clearinghouse, we believe, can be developed in a relatively low-cost system, especially in view of the existing electronic mechanisms and continuing advancement with such mechanism.

Mr. PATTISON. I just have one more question. On page 6, Mr. Karp, you referred to a Xerox per page fee as a royalty, and I am wondering if that is accurate. In other words, is that the charge Xerox makes when they lend a machine to you, whether you are taking pictures of your hand, or some copyrighted material, there is still a fee.

Mr. KARP. You copy a page, the library copies a page on the Xerox machine—I think this is useful to illustrate that point—and Xerox gets paid for every page they copy for the use of its property, 2 cents a page, or whatever the arrangement is. The material on the page to the librarians is of lesser significance, so they say it shouldn't be paid for.

If I may, Mr. Chairman, Mrs. Linden who has been prominent in the deliberations on photocopying and represents several publishers wishes to make a comment.

Mr. DANIELSON. Go right ahead, ma'am. You know we are on borrowed time because the House is in session.

Mrs. LINDEN. I'll try, 2 minutes, thank you very much. The discussion this morning, its major portion centered on the photocopying and duplication of scientific and technical journals. If you would be good enough to look at sections 107 and 108, they deal—section 107—with fair use of all copyrighted material, sheet music, and the library photocopying issue, the most immediate one by consensus of all, relates to scientific and technical journals. But that is not to say that the language promulgated in section 108 relates only to scientific and technical journals. Focusing too narrowly on the most immediate element expressed this morning it is my fear—and I hope unfounded—that the larger and fundamental issue might be overlooked, and that is a change in the express language of 108, and the elimination of the subsections requested by the library group would affect all intellectual copyright, books, scientific books, encyclopedias of all kinds, children's books, all literature that we are discussing. And it does so not only retroactively where we are dealing with legislation, but proposes to regulate prospective uses of all intellectual property.

And therefore I urge strongly that we not look so closely to the minute of Professor Low's illustrations which we all concede are fair use, and forget the basic issues that sections 107 and 108 relate to. Thank you.

Mr. DANIELSON. Thank you, ma'am. For the record, will you give us your name and your affiliation?

Mrs. LINDEN. My name is Bella Linden; I'm partner in the firm of Linden & Deutsch and represent some of the major educational publishers.

Mr. DANIELSON. I understand we are going to have you back tomorrow, so, this is sort of an advance showing, is that right? No; you are welcome back——

[Laughter.]

Thank you. We don't have a quorum call, we are in session, but I have a couple of quick questions and comments I would like to make.

Dr. Cairns, you produced some interesting figures relative to circulation. It would be helpful to me at least, and I think to the other members of the committee, if you could provide us with some data on that. And I hope you will be good enough in doing so, to be very conservative in your computations, so that we will have good, hard figures to deal with. If you would comply with that request, we would appreciate it.

Dr. CAIRNS. We will give you those.

[The material referred to follows:]

AMERICAN CHEMICAL SOCIETY,
Washington, D.C., June 25, 1975

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, U.S. House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: During the hearings held in May 1975 on H.R. 2223, Congressman Danielson requested supplemental information of the American Chemical Society for inclusion in the record of those hearings. Therefore, I have enclosed for your information and that of the Subcommittee a chart comparing circulation of scholarly journals published by the American Chemical Society during 1969 and 1974. The request for supplemental information, which indicates the magnitude of the decline in circulation of these journals, was made during the discussion of the potential effects of continued photocopying on circulation of scientific journals.

I have also taken the liberty of providing you with a copy of "Copyrighting Physics Journals" by Dr. H. William Koch, Director of the American Institute of Physics. Please note that the article has been reprinted from *Physics Today*—not photocopied by us. I believe you will find that the article further indicates that the decline in journal circulation is a result of widespread photocopying of single articles.

On behalf of the Society, I wish to thank you again for the opportunity of presenting our views on copyright revision as it relates to the issue of photocopying. The Society would be pleased to cooperate in any way with you and the Subcommittee on Courts, Civil Liberties, and the Administration of Justice in resolving this issue.

Sincerely yours,

ROBERT W. CAIRNS.

Enclosures.

AMERICAN CHEMICAL SOCIETY

SCHOLARLY JOURNALS—CIRCULATION COMPARISONS 1969 AND 1974

	1969	1974
Accounts of Chemical Research	18,787	11,430
Analytical Chemistry	34,947	32,367
Biochemistry	6,497	6,964
Chemical Reviews	6,349	5,709
Industrial and Engineering Chemistry, Fundamentals	9,998	6,349
Industrial and Engineering Chemistry, Process Design and Development	9,998	6,428
Industrial and Engineering Chemistry, Product Research and Development	10,258	6,427
Inorganic Chemistry	5,756	5,074
Journal of Agricultural and Food Chemistry	4,857	5,013
Journal of the American Chemical Society	19,419	15,659
Journal of Chemical Information and Computer Sciences	2,063	1,948
Journal of Chemical and Engineering Data	2,619	2,143
Journal of Medicinal Chemistry	3,743	4,043
Journal of Organic Chemistry	10,557	9,440
Journal of Physical Chemistry	6,448	5,271
Macromolecules	2,478	2,432
Total	154,774	126,697

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Copyrighting physics journals

Unauthorized photocopying and republishing by other institutions threatens the wide dissemination of research results and the financial stability of our publishing program.

H. William Koch

Changes in the manner of publishing and disseminating physics information have been coming faster and faster during the last decade or so, and with them they have brought an increasingly urgent need for changes in copyrighting procedures and practices. Every user of American Institute of Physics and its member societies' journals is bound to be affected in some way, as will be the authors contributing to the journals, when journal copyright ambiguities and inconsistencies are clarified. Will the individual physicist, or his library, be able to continue purchasing primary journals and secondary-information products at fair market prices—or will he be subsidizing the commercial use of these products in some other form, or in some other country? Will the one quarter of all AIP society members who (according to one count) themselves contribute, as authors, to the physics literature at some time or other be completely clear as to their rights to protect the scientific integrity of their own published works? Or will they find that questions concerning the re use of their works dissolve into a fog of international disagreements?

The issues involved in journal copyrights have scientific as well as financial significance, they are also fundamental and critical at this time. Society officers are concerning themselves more and more with the issues and feel the need for involving society members in the problems and the resolution of these problems.

The scientific issues are at times subtle, relating to rewritten abstracts that attempt to duplicate authors' original abstracts, uncorrected pages that propagate inadvertent errors, and inaccurate translations into another language. But the financial implications are clear. I shall present here some estimate of the substantial reduction in AIP and member-society income represented by subscriptions lost as a result of unlicensed publication of complete issues of our journals in foreign markets, of unlicensed use of abstracts, and of increased photocopying—all matters related to the copyright questions. The sum could be as high as $1 million per year, compare this to the total subscription income of AIP and its societies, in 1973, of $4 million (from primary journals) and $275 000 (from secondary services), and you will see why AIP and its member societies cannot afford to neglect copyright issues. In fact, if the balance becomes very much worse, one can see how the entire physics publishing operations of AIP and its societies would become imperiled with repercussions that would extend far beyond the AIP society membership.

I should point out at this stage that there is no intention of attempting to limit the photocopying or reproduction of single journal articles by individual physicists for their own use. Indeed, we take a favorable attitude to the increasing use of the primary journal material, such as in abstract journals or in translations by foreign publishers. This is, after all, in keeping with the Institute's stated aim, the advancement and diffusion of the knowledge of physics ..." But satisfactory agreements must be worked out between the copyright owner and the republisher to protect the scientific interests of the authors and the financial investments of the publisher. Unless agreements are completed, problems are bound to develop. Typical of the existing problems are those, discussed in this article, that arise from wholesale cover-to-cover copying of all, or parts of, AIP and member-society journals by foreign institutions, other publishers and libraries.

The problems

All of the primary and secondary journals of the AIP and its member societies are copyrighted—see figure 1 for the complete list. The copyright owner (AIP or member society) thereby enjoys, according to one definition,[1] "the exclusive right, granted by law for a certain number of years, to make and dispose of and otherwise to control copies" of the journals. But this protection has disadvantages as well as advantages arising from the fundamental limitation of statutary copyright generally to the "expression of ideas in a published work."[2] The copyright protects against outright copying, or paraphrasing, but not against a subsequent original work that utilizes the same idea.[3]

There is a marked contrast between copyright and patent issuing practices. Patents are thoroughly researched and eventually granted to protect the ideas themselves, copyright is perfunctorily registered, without research, when the published work and its copyright notice are presented at the Copyright Office and a $6.00 fee is paid. Also, to establish proof of violation of copyright one must prove actual copying of the work, proof of patent violation, on the other hand, may be found irrespective of whether the defendant's work is indeed a copy or is an independent creation. Incidentally, there is common-law protection against copying of unpublished works.

In seeking adequate copyright protection for the journals, AIP and its so-

H. William Koch is director of the American Institute of Physics.

cieties are naturally trying to protect their financial investment. Currently an $8 million per year enterprise, this physics-publishing business is worth more than $30 million when integrated over the past five years. However, there is another aspect that must also be considered. AIP and society journals contain almost 90% of all the physics research and education results published in the US. The journals provide a means for establishing scientific standards; they are the public record of research performed by members of AIP societies, and they are the basic resource embodying the knowledge of physics that AIP and its member societies are chartered to advance and diffuse.

So what is wrong with copyright as far as we are concerned? The three basic reasons for its inadequacy are:

- The antiquated copyright law of 1909, which could not anticipate new copying technologies such as computerized information systems, photocopying and micropublishing
- Rapid expansion in the applications of these techniques, without regard for copyright protection and, therefore, without recompense for lost subscriptions
- Inconsistent, uncoordinated application by AIP and its societies of the values and rights represented by the journal properties.

Here I will be dealing with the second and third of these three points, the reader is referred elsewhere[3] for several excellent summaries of the present copyright laws and attempts at their revision.

New copying technologies

Individual physicists have traditionally approved of the rapid and wide dissemination of science information made possible by the photocopying of journal articles. Their attitude could be summed up as "It's great, who cares about the financial and legal details?" This kind of emphasis on easy copying and dissemination may have been appropriate ten years ago before other significant considerations became as compelling as they are today. But we must now recognize that a means has to be developed for obtaining recompense for the production costs of the journals, despite the elusiveness and pervasiveness of the new copying technologies. Otherwise society dues, member subscription rates and page charges for physicists will have to increase, or the journals and the societies will have to stop their operations.

Although AIP and its societies have been actively developing techniques for accomplishing and stimulating wide dissemination of physics results,[4] these developments must be coupled with an appropriate sharing of expenses by institutional users, such as libraries, universities and research laboratories both in the US and abroad. Not only does inadequate sharing exist in the US today, but the situation is being aggravated by the rapid growth in the tendencies of various nations to reproduce and disseminate, within their boundaries, scientific and technical information originating in other countries without recompense to the original publishers for the resulting losses in subscription income. Because 55% of the 300 000 subscriptions sold by AIP for itself and its member societies each year are to foreign readers and institutions, the significance to AIP and societies of these international developments is enormous, representing several m on dollars per year.

Three examples

To be more specific about these developments let me give in some detail three examples, these are cases where AIP and society journals are reproduced by others on an inclusive, cover-to-cover basis. They concern the photocopying, for sale, of our journals by the USSR, the copying of abstracts by the Institution of Electrical Engineers in London for use in *Physics Abstracts*, and the reproduction of articles by the National Lending Library in England for its customers in the UK. These three examples are typical of the problems we are beginning to face on many fronts as massive operations threaten to displace the roles of AIP and its societies as publishers.

Last year the USSR signed the Universal Copyright Convention (effective 27 May 1973), and one result has been that we now have some details of the extent of cover-to-cover photocopying of journals in the Soviet Union. The data in Table I, provided by the USSR, show that some 15 AIP and society journals are currently being photocopied and sold—every page of every issue—in the USSR. The number of copies of each issue is put at an average of 400, and sales are made at artificially set subscription prices to USSR and east European customers. The additional income AIP would have received had it sold these copies amounts to more than $300 000 per year.

We have other data relating to complete translations of AIP and society journals made in the USSR, but no detailed information on the books of collected papers, either photocopied or translated from our journals, that we know in some instances are being produced in quantities of about 50 000 copies each.

With the signing of the Universal Copyright Convention by the USSR there is some hope that we can develop equitable agreements with them covering:

- dollar payments to AIP for lost subscriptions for some journals
- royalty-free permission for AIP and the Optical Society of America to continue their translations from Russian into English of 15 Soviet physics journals, including about half of the Soviet physics published in journals, in return for:
- reproduction privileges in the USSR for some of our journals
- reductions in the number of complete copies of AIP and society journals produced in the USSR, competing with our own sales in Asia and both western and eastern Europe.

Negotiations now in progress are expected to set up a similar pattern for future agreements with China, India and other countries.

My second specific example concerns *Physics Abstracts*, produced in London by the Institution of Electrical Engineers. This publication uses, verbatim, every abstract from every journal published by AIP and its societies. Abstracts taken from AIP and society journals represent a large fraction—more than 25%—of the total numbers of journal abstracts in *Physics Abstracts*.

In recent times, increases in the amount of physics literature to be covered and in the unit cost of including each abstract combined to force up the subscription prices to *Physics Abstracts*, the key IEE service (now at $380 per year compared to $12 per year in 1967). The result was the virtual elimination of the individual physicist subscriber from the market for comprehensive abstracts services and the concentration of IEE on institutional subscribers. On the other hand, AIP's obligation to attempt to serve individual members with useful abstract services continued.

In order to meet that obligation, AIP has negotiated with IEE to supply AIP's abstracts in computer-readable form and to be recompensed equitably for the substantial savings accruing to IEE as a result. Part of the agreement would result in income to assist in the improvement in secondary services of the sort listed in Table 2 and supplied by AIP to individuals. Thus the agreement would have financial as well as scientific implications and would provide IEE with licensed use of AIP's copyrighted abstracts. Abstracts written by authors and reviewed by editors are just as much a part of the journal article as are figures, tables, and individual paragraphs, all of which are protected by copyrights.

We hope that negotiations with IEE will lead to the continued use of our author-produced abstracts together with some arrangements for sharing of the financial return from the institutional sale of physics secondary services. Thus AIP could support the development of this kind of service for its

PUBLICATIONS OF THE AMERICAN INSTITUTE OF PHYSICS AND MEMBER SOCIETIES

Owned and published by AIP

Primary Journals and Proceedings
- Applied Physics Letters
- Journal of Applied Physics
- Journal of Chemical Physics
- Journal of Mathematical Physics
- Physics of Fluids
- Physics Today
- Review of Scientific Instruments
- AIP Conference Proceedings
- Journal of Physical and Chemical Reference Data*

Translation Journals
- Soviet Astronomy—AJ
- Soviet Journal of Nuclear Physics
- Soviet Journal of Particles and Nuclei
- Soviet Journal of Quantum Electronics
- Soviet Physics—Acoustics
- Soviet Physics—Crystallography
- Soviet Physics—Doklady
- Soviet Physics—JETP
- JETP Letters
- Soviet Physics—Semiconductors
- Soviet Physics—Solid State
- Soviet Physics—Technical Physics
- Soviet Physics—Uspekhi

Secondary Publications
- Searchable Physics Information Notices (tape)
- Current Physics Microform (microfilm)
- Current Physics Advance Abstracts
- Current Physics Titles

Owned by the American Physical Society

Primary Journals
- Physical Review, A; B, C; D
- Reviews of Modern Physics
- • Physical Review Letters

Secondary Publications
- Bulletin of the American Physical Society
- • Physical Review Abstracts
- • Physical Review Index

Owned by the American Association of Physics Teachers
- American Journal of Physics
- The Physics Teacher
- • AAPT Announcer (bulletin)†

Owned by the Optical Society of America
- Journal of the Optical Society of America
- Program of the OSA (bulletin)
- • Applied Optics
- • Optics and Spectroscopy (translation)
- Soviet Journal of Optical Technology (translation)

Owned by the Acoustical Society of America
- Journal of the Acoustical Society of America
- Program of ASA (bulletin)

Owned by the Society of Rheology
- • Transactions of the Society of Rheology
- • Rheology Bulletin†

Owned by the American Astronomical Society
- Astronomical Journal
- Bulletin of the AAS

Owned by the American Crystallographic Association
- • ACA Newsletter†

Owned by the American Association of Physicists in Medicine
- Medical Physics

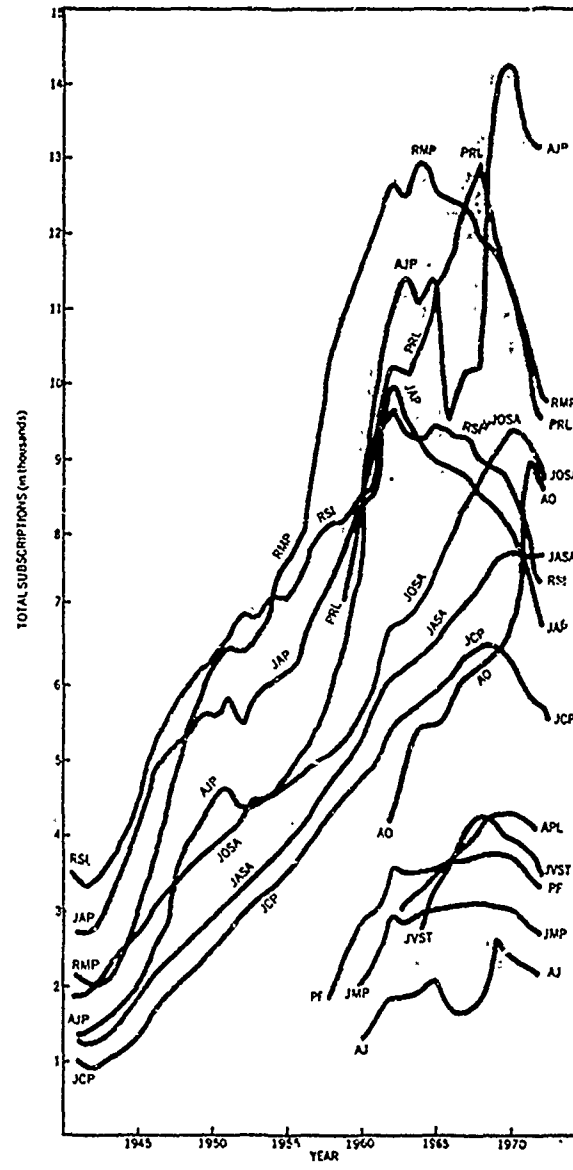
Owned by the American Vacuum Society (affiliated)
- The Journal of Vacuum Science and Technology

All journals are copyrighted by the owner except where shown otherwise

* *Jointly copyrighted by AIP and the American Chemical Society*

† *Not copyrighted*

• *Journals shown with this bullet are published by the owning society, the remainder are published by AIP for the society.*



AIP and society publications are listed at left, arranged according to owner. The graph above shows total subscriptions (member plus nonmember) since 1941. Figure 1

memberships at reasonable subscription prices, in analogy to the way institutional income from the primary journals allows AIP and its societies to provide members with primary services at low subscription prices.

Other abstracting and indexing services, such as Chemical Abstracts Service, Engineering Index, *Bulletin Signaletique* and *Referativni Zhurnal*, should recognize that we encourage them to use the abstracts from AIP and society copyrighted journals, so long as they do not produce English-language, secondary services in the science of physics that detract from services AIP could produce for its own society memberships with its own copyrighted material. Therefore, we plan to institute procedures for licensing the use of our copyrighted material by other services, and we expect that in most cases these licenses will be readily granted.

The services offered by the National Lending Library, Boston Spa, UK, provide me with my third example of new copying techniques that affect our operations here at AIP. This library has developed an overnight mail service through which copies of articles from any journal can be supplied to customers in the UK at low cost. Such an operation is the forerunner of future similar services in every major country of the world. The major English-language abstracting and indexing service in the science of biology is eagerly awaiting[5] the arrival of such services in the US, and in that same field an investigation is in progress "to discover whether there is not a large number of journals for which one copy could adequately serve US, British and Canadian users."[6]

The position AIP and its societies takes on developments such as these, intended to provide better access services to the journals, is, of course, favorable. Indeed, we are eager to see such services growing, and plan to support them with the products and services that are their raw materials. However, just as with the Soviet photocopies and the use of copyrighted abstracts mentioned earlier, we should be recompensed for subscriptions lost because of these services if we are to maintain financial viability.

The financial situation

How much money is involved in lost subscriptions from, say, just the three examples cited above?

From the information supplied by the USSR on their photocopied-journal sales, we know we have lost $300 000 each year from that category alone. Add another estimated $100 000 for losses due to their translation journals and book collections made up of AIP-published articles, and we find a total loss to AIP from the Soviet operations of more than $400 000 per year. For the loss of income to AIP and societies resulting from the lack of a licensing agreement with IEE for *Physics Abstracts* we can look at the conclusions of IEE's negotiating team as they were stated during the summer of 1973. That team agreed with the concept of AIP receiving $190 000 per year for the use of the computer tape, and we can therefore assume this to be a minimum estimate of the annual loss in AIP income from this source.

My third example above, cover-to-cover reproduction of articles from AIP and society journals, gives rise to a loss of income that is much harder to figure than it was for the first two examples. The loss of subscriptions that the AIP and its member societies have suffered over the last five years has been substantial—see figure 1. We have lost about 20% of the total number of subscriptions we had in 1966. Domestic non-member and member subscription losses account for most of this decline, while foreign subscriptions and total society membership have been relatively stable. We therefore make the assumption that the subscription loss is attributable largely to wholesale copying of single articles by institutions in the US. An estimate of the dollar value of the subscriptions lost for this reason is about $400 000 per year.

The total estimated losses for these three effects is thus about $1 million per year, an estimate that is admittedly crude. If this money were available to AIP and the member societies, page charges to authors and subscription prices to readers could both be decreased, with obvious benefits for the

Table 1. Reproduction of AIP and society journals in the USSR

Journal	Subscription rates (in rubles) USSR	Subscription rates (in rubles) AIP-Society	No. of copies produced by USSR	No. of copies sold by USSR to eastern European countries	No. of subscriptions purchased through AIP
American Journal of Physics	11.76	17.25	425	90	2
Applied Optics	27.00	41.25	474	71	4
Applied Physics Letters	12.76	21.40	233	30	19
The Journal of the Acoustical Society of America	29.40	35.00	462	114	2
Journal of Applied Physics	53.88	46.90	695	120	7
The Journal of Chemical Physics	99.36	92.25	425	91	12
Journal of Mathematical Physics	24.60	38.25	253	57	2
Journal of the Optical Society of America	16.08	34.50	495	74	2
The Journal of Vacuum Science and Technology	5.40	29.25	276	69	4
Physical Review, A, B	85.20	92.25	436	57	28
Physical Review C, D	127.80	103 40	338	51	72
Reviews of Modern Physics	7.48	9.75	469	74	15
Physical Review Letters	31.72	47.25	424	60	20
The Physics of Fluids	26.16	38.25	314	60	3
Physics Today	12.36	10.15	251	47	15
Bulletin of the American Physical Society	11.60	13.15	248	35	5

$1.00 = 0.74 rubles

Data obtained from Yuri K. Melnik, Assistant Science Attache, Soviet Embassy, Washington D.C.

"advancement and diffusion of the knowledge of physics."

Copyright principles

To protect the financial viability of AIP and society publishing operations, the appropriate principles involved in the copyright process need to be presented and understood in some detail. We should remember that the particulars of the copyright claimed for a given physics article will affect four different individuals or groups: the author of the article, his employer, the publisher of the journal and individual users and republishers. Let us consider each in turn.

First, the author of the article. He originates the material that is published and usually makes the decision on where it should first appear (with either active or tacit agreement of his employer). He decides whether the subject matter of the article should be patented, whether it should be supplied to a publisher for a fee, or to a publisher (such as AIP) who expects a fee in the form of page charges. Once he makes this decision, the author should comply with the conditions of the publisher—normally stated in the journal or by a separate letter.

If the author decides to publish with AIP or one of the member societies, he should be asked by the publisher to assign, in writing, full publication and republication rights to the publisher. This request should be made at the time the editor accepts the manuscript for publication.

Should the article be subsequently republished, either by itself or as part of a collection of articles, the original publisher should give the author the opportunity to register errata or corrections to the material as first published. Thereafter, the publisher should serve for the articles in his trust as the scientific and financial negotiator with republishers.

The author should have the right to make nonprofit or noncommercial use of his work, provided he affixes to each copy, in the position legally required, the copyright notice used by the AIP or society publisher when the article was first published. To make or authorize commercial use, for profit, of his work the author must first obtain the written consent of the AIP or society.

I mentioned earlier that the copyright protection is limited to the expression of ideas in the published work and protects against outright copying of the work but not against copying of the ideas. The author must be aware of this limitation.

The author should be given the opportunity to write his own abstract, and also to assign the appropriate classification and indexing terms required when the article is inserted into the data base of an information-retrieval system. He can thus be assured of the scientific validity of both abstract and classification. This author-written abstract then becomes as much a part of the copyrighted material of his article as the individual paragraphs of the main text, or the figures, tables, and so on.[7]

Table 2. Secondary services

- Meeting programs of abstracts (for example, BAPS, PASA, etc)
- Physical Review Abstracts
- Annual journal indexes
- Cumulative journal indexes
- Current Physics Titles
- Current Physics Advance Abstracts
- SPIN computer tape of abstracts from journal articles
- Bibliographies (lists of articles) on a given subject
- Journal tables of contents

The second individual affected by copyrighting procedures is the author's employer. He normally helps to defray the cost of publication of his employee's manuscript, if it is to appear in an AIP or member-society journal, by making a page-charge contribution, in return he may want to retain some rights over the published material. For example, the employer might give permission for first publication only, reserving to himself the rights for republication if such conditions are accepted by the publisher. If no conditions are stated when the manuscript is submitted, the publisher must assume that there are none—except those dictated by custom or tradition.

When the employer is the US Government we have a special case. Articles written by US Government employees as part of their official duties are in the public domain and are not covered by copyright.

The publisher is the third individual for whom copyright interpretation is important. He may elect to publish only that material for which he has full publication rights, both for initial and republication. AIP owned journals operate under the principle that unless otherwise stated, submission of a manuscript is a representation that it has not been copyrighted, published, or currently submitted for publication elsewhere.

When a publisher such as the AIP or a member society copyrights an issue of one of its journals, the rights apply to the whole issue. Such a copyright gives the publisher, as against third parties, "the same rights as if he had secured a separate copyright on each individual piece."[8] This statement applies equally to the copyright protection of each individual abstract of a copyrighted issue of *Physics Abstracts*, for example, as it does to the protection of each individual abstract in an AIP or society copyright journal. For this reason, abstract services (such as Chemical Abstracts Service) have insisted that their copyright notice appear on copies made, under license and for a fee, of pages and abstracts from their abstracts journals—even when these abstracts are taken verbatim from copyrighted journals.

Lastly, we should consider the rights of individual users and republishers. An individual scientist has an accepted right to copy a copyrighted article for his own use under the traditional copyright concept of "fair use." Republishers, as in the three examples in this article, will at times use the argument that they are operating under the "fair use" concept. Clearly, when a republisher uses *every* page or *every* abstract in a systematic, production manner, whether for commercial or noncommercial purposes, he is doing something more than "fair use" and is in infringement of copyright if he does so without permission of the copyright owner.

What are the prospects?

Our examination of the copyright issues that face AIP and its member societies has shown how complex are the problems that arise under US copyright laws, then how much more complex must be the international implications! The examples quoted earlier in this article demonstrate in some degree how the AIP and member societies' publishing program interacts with the programs of foreign publishers, libraries, and so on, each operating under the copyright law of his own country. These other nations too are taking a hard look at copyright legislation in the light of modern developments, with the result that we can expect a shifting pattern of interrelating national copyright laws to affect our physics journals for some time to come.

One example of the kind of change we might expect is the licensing scheme, varieties of which are being tried out in at least three countries—Sweden, France and Canada. The Swedish scheme permits multicopying of work, *protected by Swedish copyright only* on payment of a small fee. Surveys indicate that 150 million page-copies are made in Sweden each year, rough estimates for the US suggest that several billion page-copies are made here per year. Even if the new scheme works in Sweden (and it is still too new for conclusions to be drawn) we cannot be sure that a similar plan would be appropriate here.

While we are monitoring possible US developments in the national copyright

laws, AIP and its member societies have to keep in mind the framework of the entire US publishing business and be aware of how they fit into that framework. We would deceive ourselves if we believed that new copyright laws will be drawn up solely for the benefit of this institute and its societies—or even for the entire scientific publishing effort.

The problems of the scientific journals are quite dissimilar from the problems faced by the publishing industry as a whole; in the area of photocopying, for example, where according to one estimate an average physics article is of special interest to only six readers and would be copied by an equally small number.

Any conceivable new copyright law in the US would be directed primarily to the larger needs of the general publishing industry. One could imagine circumstances in which rules framed for this community would wipe out the specialized scientific journals.

Currently changes in the law are less important as a day-to-day threat than changes in reprographic technology, which is moving very fast in the US and indeed over the whole world. Each new advance in copying technology is potentially a new area where AIP and society copyright protection might be eroded yet further.

The institute and its societies must establish clear and complete copyrights on all their publications, protect these rights once established, and continuously and closely monitor all developments that could endanger their own financial investments and the scientific accuracy of their members' published works.

* * *

Important contributions to this article were made by various members of the AIP staff and committees and, particularly, by Morton David Goldberg of Schwab and Goldberg, New York City. Their assistance is gratefully acknowledged.

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4. H. W. Koch, "Support the Communications Revolution," editorial in PHYSICS TODAY, February 1973, page 88.
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7. Reference 2, page 90.
8. Reference 2, page 161. □

Mr. DANIELSON. Thank you. Now, Mr. Lieb and Mr. Hoopes, you both referred to an item that troubles me here, the definition of "systematic reproduction," what do you mean by that? And please give it to me kind of quickly, if you could.

Mr. LIEB. When a library, whether it is the large central research library, or the mother library in the network, when by plan or effect it regularly produces copies—regularly as distinguished from sporadically or on occasional instances—regularly produces copies which are provided to the user in lieu of the original, the book or the journal——

Mr. DANIELSON. You are talking about a continuing operation, as opposed to an intermittent or sporadic one.

Mr. LIEB. Correct, and the Senate report makes that clear.

Mr. DANIELSON. Is that what you have in mind, also?

Mr. KARP. I would quickly refer you to the Senate report; it gives the general definition as an example.

Mr. DANIELSON. You are adopting the definition, then, in the Senate report.

Mr. KARP. And I would point out that the Senate then urged the parties to sit down and work out more detailed guidelines.

Mr. DANIELSON. Funny they should have that foresight because I'm on the verge of making that same request. [Laughter.]

So, could you consider that request as having been renewed?

Mr. Lieb, was copying of the type we were discussing today a significant problem before the advent of the quick copying equipment?

Mr. LIEB. I don't think so, sir.

Mr. DANIELSON. I am going to make an observation, then. Quick copying is here to stay; in fact, it is going to get quicker, and easier, and better; it is bound to. So, I think what we have to do, instead of fighting the inevitable like the motion pictures fought television for a long time—we just have to find a way where we can accommodate this thing, and live with it. Copying is not going to go away.

Mr. HOOPES. That's right, Mr. Chairman, and that is precisely our position. The publishers are in no way opposed to wide dissemination; we would simply like a reasonable licensing arrangement to cover works that are going to be copied in very large quantities; that is to say, under systematic copying arrangements.

Mr. DANIELSON. I was glad to hear that other people don't worry about the first amendment because I find it quite a problem in this committee.

One other item I had here. What about page charges, Dr. Cairns?

Dr. CAIRNS. The page charge came to the fore in about 1962 and applied, I think, almost entirely to the publication of technical societies, which was honored by a Government policy, which was first enunciated in 1964 by the Federal Council on Science and Technology, which allowed the page charges which were in the order of $20 to $50 a page, printed page, of a publication, allowed this as a valid charge against research grants of Federal agencies. It was subsequently then reissued in slightly modified form by Dr. Guy Stevers within the past year. That charge was studied by the technical societies, and generally speaking it is not mandatory; in other words, publication proceeds, even though page charges are not honored. But it is a source of income.

Mr. DANIELSON. To whom?

Mr. LIEB. To the societies who are publishing journals, and is entered into the budget of the general publication.

Mr. DANIELSON. What does the author of these articles derive in the way of monetary or other valuable considerations?

Mr. LIEB. He gets fame and prestige.

Mr. DANIELSON. That's what I thought.

Dr. CAIRNS. That is the name of the game.

Mr. DANIELSON. Oh, I have written a few, and I received exactly the same amount. [Laughter.]

Mr. KARP. Speaking for the authors, let me make this point. First of all, I should point out Mr. DeCassey who sits behind me represents the—association, no, page charges are not available from Government grants to commercial publishers, for profit.

Mr. DANIELSON. By "society" you are talking about a so-called nonprofit organization.

Mr. KARP. The point I would make is this. First of all, the amendments and exemptions proposed by the library associations apply to all single copying, a tremendous amount of which is done of literary and artistic material, short stories, essays, the works; those authors write for money. As Dr. Cairns has pointed out, there is a very definite monetary motive for authors to write.

Mr. DANIELSON. One last question. In the type of copying that we are talking about, technical journals and the like, as opposed to the ones Mrs. Linden will tell us about tomorrow, which cover the whole gamut of intellectual products, who are the users in the sense of—are they something scandalous like "The Scarlet Letter" or are they truly technical books? Who uses them, in the sense of what category of person uses those copies?

Dr. CAIRNS. I didn't hear what you said.

Mr. DANIELSON. Are we talking about fiction here, or are we talking about strictly technical types of information?

In the Constitution it says here, "To promote the progress of science and the useful arts"; now, are we talking about "Gone With the Wind," or are we talking only about——

Dr. CAIRNS. What we are talking about are the general terms of science. I think Mrs. Linden spoke about the useful arts.

Mr. DANIELSON. We have a quorum call on. Thank you very much for your patience. You know, by holding over for 12 minutes you got exactly your allocated amount of time. I appreciate your help very much; I'm sorry we couldn't give you more time.

Just winding up, tomorrow we will meet again, at 10 o'clock, and for the record, we have statements from the American Business Press, the Federal Librarians Association, the Special Libraries Association, the Wisconsin Interlibrary Loan Service, Music Library Association, Association of Research Libraries, Williams & Wilkins Co., American Institute of Chemical Engineers, Advocates for the Arts, Department of Health, Education, and Welfare, Dr. Ray Woodriff, Montana State University, and the American Association of Law Libraries.

[The following statements were received for the record:]

STATEMENT OF AMERICAN BUSINESS PRESS, INC.

The American Business Press, which is composed of some 400 specialized business publications published from coast to coast, is extremely concerned about the growing practice of unrestricted photocopying which has been evidenced in recent years, and only compounded by the Williams and Wilkins decision.

Unless a way can be found to protect the ability of periodical publishers to spend the money to gather, edit and produce technical and scientific information, and then distribute it throughout the nation, the flow of that information can be seriously curtailed.

Some American Business Press member publications, like *Oil and Gas Journal*, are sent to paid subscribers. Others, like *Iron Age*, are sent via the controlled circulation route to readers who specifically request the receipt of that publication. In the first instance, both the reader and the advertiser supply the funds, through the publisher, to permit the gathering and editing of technical and scientific articles, which are then copyrighted. In the second instance, the publication's primary income comes from advertisers. In both cases, necessary information is distributed to people employed in every phase of the technical and economic activity.

If the information and the articles gathered by editors are photocopied without the consent of the copyright owner, we will have situations arising like the one dramatized in the attached Exhibit A. We have deleted the name of the company which sent the memorandum out, but we present for the consideration of the Committe what is happening.

The only effect of curtailed subscriptions or curtailed circulation which this practice will cause is a severe restriction upon the securing and circulation of important editorial information because scientific and technical publications will not have the wherewithall to gather and edit the information to be photocopied. If this happens, the important news and scientific and technical information gathering function performed by the specialized business press will be seriously impaired, and there will be considerably less information to photocopy for those who do not respect copyrights.

We think the attached example tells the story better than we can. Hopefully the Committe and the Commission established in the last Congress will come up with solutions to this most serious problem. The American Business Press stands ready to be of whatever assistance it can in this effort.

Attachment: Exhibit A.

EXHIBIT A

To: All Home office executives. APRIL 10, 1975.

Re: Market Research Library Periodical Service.

A service provided by the Market Research Library primarily for Market Research personnel is being expanded and offered to all home office executives.

The Library presently receives the 79 publications on the attached list. Check off the ones that interest you and return them. You will receive the monthly tables of contents of your choices.

From these tables of contents, choose the articles you want, circle the titles and return them to the Library. Xerox copies of the articles will be sent to you.

Please use this service to help supplement your current reading and to eliminate or cut back on your present subscription costs.

H.R.

MARKET RESEARCH LIBRARY PERIODICAL LIST

(Table of contents service)

1. Aspo Planning Advisory Service (Monthly).
2. Aspo Planning Magazine (Monthly).
3. Aspo TAB Bulletin (Semi-Monthly).
4. Advertising Age (Weekly).
5. American Book Publishing Record (Monthly).
6. The American Statistician (5-Year).
7. Annals of Economic and Social Measurement (Quarterly).
8. Atlantic Monthly (Monthly).
9. Banking (Monthly).
10. Bank Marketing (Monthly).

11. Barrons (Weekly).
12. Boardroom Reports (Semi-Monthly).
13. Bureau of Census Catalog (Quarterly).
14. Business Conditions Digest (Monthly).
15. Business Periodical Index (Monthly).
16. Business Statistics (sheet of paper) (Weekly).
17. Business Week (Weekly).
18. CSA-Coops and Voluntaries (Monthly).
19. CSA-General Merchandising-Variety Executive Edition (Monthly).
20. CSA-Supermarket Stores Edition (Monthly).
21. Changing Times (Monthly).
22. Conference Board Record (Monthly).
23. Consumer News (Bi-Weekly).
24. Consumer Reports (Monthly).
25. Direct Marketing (Monthly).
26. Discount Merchandiser (Monthly).
27. Discount Store News (Bi-Monthly).
28. Drug Topics (2xMonth).
29. Dun's Review (Monthly).
30. Editor & Publisher (Weekly).
31. Funk & Scott Index (Weekly).
32. Financial Trend (Weekly).
33. Food Advocate (Monthly).
34. Forbes (2xMonth).
35. Fortune (Monthly).
36. Fund Raising Management (Monthly).
37. Gasoline News (Monthly).
38. Harvard Business Review (Bi-Monthly).
39. Home and Auto (Monthly).
40. Housewares (Monthly).
41. Incentive Marketing (Monthly).
42. Industrial Marketing (Monthly).
43. Journal of Contemporary Business (Quarterly).
44. Journal of Marketing (Quarterly).
45. Journal of Marketing Research (Quarterly).
46. Journal of the American Statistical Association (Quarterly).
47. Journal of Retailing (Quarterly).
48. Kiplinger Washington Letter (Weekly).
49. Library Journal (2xMonth).
50. Majors Composite Market Survey (Weekly).
51. Marketing Information Guide (Monthly).
52. Marketing News (2xMonth).
53. Marketing Review (10xYear).
54. Mass Retailing Merchandiser (Monthly).
55. Merchandising Week (Weekly).
56. Modern Grocer (Weekly).
57. Money (Monthly).
58. Monthly Labor Review (Monthly).
59. National Geographic (Monthly).
60. National Mall Monitor (Monthly).
61. National Observer (Weekly).
62. NPN (Monthly).
63. Nation's Business (Monthly).
64. Newsweek (Weekly).
65. New York Magazine (Weekly).
66. Progressive Grocer (Monthly).
67. Psychology Today (Monthly).
68. Restaurant Business (Monthly).
69. Salesman (Monthly).
70. Sales Manager (2xMonth).
71. Shopping Center World (Monthly).
72. Smithsonian (Monthly).
73. Stores (Monthly).
74. Supermarketing (Monthly).
75. Supermarket News (Weekly).

76. Survey of Current Business (Monthly).
77. Time (Weekly).
78. Travel and Leisure (Monthly).
79. Wall Street Transcript (Weekly).

STATEMENT OF JULIUS J. MARKE, ON BEHALF OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES

Mr. Chairman, and members of the Committee, I am Julius J. Marke, Law Librarian and Professor of Law, New York University. I am Chairman of the Copyright Committee of the American Association of Law Libraries, and am appearing on its behalf.

The American Association of Law Libraries (A.A.L.L.) was established in 1906 and presently has a membership of approximately 2,000 law librarians servicing University Law School libraries, Bar Association libraries, County Law Libraries, Court libraries, State Law Libraries, and Practitioners Libraries throughout the nation. Its Headquarters is located at 53 West Jackson Boulevard, Chicago, Illinois, 60604.

The A.A.L.L. is established for educational and scientific purposes and is conducted as a non-profit corporation to promote librarianship, to develop and increase the usefulness of law libraries, to cultivate the science of law librarianship and to foster a spirit of cooperation among the members of the profession. It has twelve regional chapters, known as Association of Law Libraries of Upstate New York, Chicago Association of Law Libraries, Greater Philadelphian Law Library Association, Law Librarians of New England, Law Librarians' Society of Washington, D.C., Law Library Association of Greater New York, Minnesota Chapter of A.A.L.L., Ohio Regional Association of Law Librarians, Southeastern Chapter of AALL, Southern California Association of Law Libraries, Southwestern Chapter of AALL and Western Pacific Chapter of AALL. Foreign Law Librarians, residing in the following countries, are also members of the American Association of Law Libraries: Canada, Australia, Belgium, Colombia, England, Ethiopia, West Germany, Finland, France, Israel, Italy, Jamaica, W.I., Japan, Korea, Netherlands, New Zealand, Nigeria, Northern Ireland, Republic of the Philippines, Singapore, Sudan, Sweden, Switzerland, Tanzania and Turkey.

The American Association of Law Libraries is also a publisher of scholarly and technical publications. It publishes *The Law Library Journal*, The *Index to Foreign Legal Publications*, the *A.A.L.L. Publications Series*, *Current Publications in Legal and Related Fields* and the *A.A.L.L. Newsletter*. In addition the *Index to Legal Publications* is published by the H. W. Wilson Co. with the cooperation of the A.A. L.L.

Although the A.A.L.L. has reservations about other parts of H.R. 2223, I shall address my comments to those sections of the bill affecting library photocopying.

The A.A.L.L. joins other national library associations in recommending legislative safeguards and exemptions for those library uses of copyrighted works necessary to guarantee the public access to library resources for educational, scientific and scholarly purposes.

The major concern of the A.A.L.L. is that sections 108(g)(1) and 108(g)(2) negate the grant to libraries in section 108 to make single photocopies of copyrighted materials.

I. LEGISLATIVE SAFEGUARDS AND EXEMPTIONS

Section 108(g)(1) limits the right of reproduction and distribution under section 108 only to "the isolated and unrelated reproduction or distribution of a single copy of library materials on "separate occasions". It does not extend, however, to cases where the library, or its employee is "aware or has substantial reason to believe that it is engaging in the related or concerted reproduction or distribution of multiple copies . . . whether made on one occasion or over a period of time and whether intended for aggregate use by one or more individuals or for separate use by the individual members of a group."

Section 108(g)(2) denies to libraries the "systematic reproduction or distribution of single or multiple copies" of material described in section 108(d).

The AALL is concerned that library systems are evolving in many forms and as a result not ev . librarians have enough information on library networks all over the country to arrive at an acceptable understanding of the situation. Therefore, it is impracticable at this point of time to define "systematic" with reference to these "systems". Actually, librarians are only attempting to use available resources adequately and maximize their collections rather than economize at the expense of the publishers by promoting photocopying of their library materials. An example of one of these "systems" is multi-county libraries organized to support a single library system. In this context, librarians are concerned about foreclosing interests by definition. Legislative restrictions with reference to "systems" when read into the copyright revision law, could create problems in the future as technological developments in this . are so uncertain and unforseeable at present. They also are in direct t with the express Congressional intent as a matter of public policy r urage the creation and promotion of such "systems" as set forth in th . . Education Act referred to under I(d) *supra.*

The AALL also insists that "systematic" library photocopying restrictions under section 108(g)(1) and 108(g)(2) must be relaxed to reflect a recognition of a library's right to make single photocopies of materials in its collection and the applicability of the "fair use" doctrine. Librarians are concerned that "systematic" can be used to whipsaw them. Sections 108(g)(1) and (g)(2) depart from "single" and "multiple". If "systematic" swallows up "single' and the applicability of the Fair Use doctrine then librarians protest. "Systematic" can only refer to "multiple" copying.

The AALL also protests that the concept of library single photocopying as "fair use" is now limited under section 108(g)(1) to "isolated" and "unrelated" single photocopying.

Then again, what is meant by words and phrases in Section 108(g) such as "period of time"? One day, one week, one month, one year? What is meant by the library or its staff "know or has reason to know", of "multiple copying"? At what point and under what circumstances is the library administration put on constructive notice of multiple photocopying? What kind of records must be kept by the library of these activities, or type of consultation required of staff members involved to prevent such "related or concerted" reproduction? What is meant by "distribution" in the section? "What is a branch library? Is the Law Library on a university campus a branch library of the University Library System?

Librarians cannot depend on the courts applying "rule of reason" construction to these nebulous words and phrases in section 108(g). Librarians have serious reservations about this approach and must insist on specific guidelines to prevent "prior restraint".

"Systematic" library photocopying as set forth in section 108(g)(2) allows for a construction depending on "availability" as the key factor in determining when a "system" exists for this purpose. Therefore, any system which provides the comfort of availability of a publication to a library, which therefore does not have to provide for it in its budget, would be "systematic". As a result, a listing of library holdings of serials, such as to be found in the Union List of Serials (which has been on the open market for more than 40 years), even though not prepared for commercial advantage, or for the purpose of interlibrary loan, still provides this availability, and therefore becomes a "system". Hence, any identifiable source of books in print plus knowledge of it by librarians to identify materials they lack for interlibrary loans would amount to a "system". This pervasive effect is considered intolerable by librarians as it could have serious adverse consequences for research and the dissemination and flow of information, especially as services by libraries. Then again, it must be recognized that merely because a library "system" exists, it does not necessarily follow that all photocopying within the system is "systematic".

The A.A.L.L. also protests that as there is no objection to interlibrary borrowing of specific hard copy materials under these so-called "systems", why should librarians not be able to make a single photocopy of these materials when randomly requested on interlibrary loan as a substitute for hard copy, especially as permitted in sect. 108(d) of the Copyright Revision Bill.

In a sense these criticisms of section 108 of the revision bill were reflected and implied in the Register of Copyrights' testimony on S. 3976 before this

Committee on November 26, 1974 (93rd Cong. 2d Sess, Serial No. 59, 1975) when she stated:

"*Ms. Ringer.*" . . . Section 108 of the revision bill (dealing with the making of single photocopies by libraries) is by no means sufficient to solve the larger problems of reprography, especially in libraries . . . Neither the enactment of the revision bill in the form in which it passed the Senate nor a definitive decision of the Supreme Court in the *Williams and Wilkins* Case is going to settle the larger issues here. . .

"Discussions are under way in the private sector, now on this subject, in recognition that nothing the Congress does . . . is going to solve this issue for the future, and that it is an issue that very desperately needs solving. But both of these important issues, namely, computer uses and reprography urgently need to be studied in depth by recognized experts". (p. 6–7).

The AALL recommends that "these important issues" be submitted for solution to the recently created *National Commission on New Technological Uses of Copyrighted Works* inasmuch as P.L. 93–573, 88 Stat. 1873, enacted into law on December 31, 1974 charges this Commission to study and compile data on the use of copyrighted works" in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information, and . . . by *various forms of machine reproduction* . . .". In the interim period sections 108 should be redrafted to meet the objections set forth above.

II. LIBRARY PHOTOCOPYING ISSUES AND THE COPYRIGHT REVISION BILL

A. Purpose of copyright protection and the public interest

Generally, the purpose of copyright protection is to encourage and reward authors of intellectual works and other creative artists to produce such works for the benefit of society, by granting them the exclusive right during a specific period of time to copy, or otherwise multiply, publish, sell or distribute them, as well as to prepare derivative works based upon the copyrighted work. They are also given the exclusive privilege to perform and record these works and to license their production or sale by others during the term of the copyright protection. Basically, the purpose of copyright, as is tested in Article 1, Section 8, Clause 8 of the U.S. Constitution is "to promote the progress of science and the useful arts". This necessarily implies that the copyright holder's rights are never absolute for the monopoly granted serves the added purposes of stimulating the development of scientific and other types of knowledge and to encourage the dissemination of this knowledge to the public.

To avoid frustrating this purpose, the courts have adopted the concept of a "fair use" doctrine which permits individuals and institutions, other than the copyright owner, to use the copyrighted material in a reasonable manner without the owner's consent. In essence, the "fair use" doctrine attempts to balance the rights of the owners of copyrighted works to their just economic rewards against the rights of scholars and researchers to use these works conveniently in their scholarly endeavors. As the "fair use" doctrine is an equitable rule, each case is determined on its own facts. The courts in the U.S. generally apply the following guidelines laid down initially by Mr. Justice Story in 1841 in *Folsom v. Marsh*, 9 Fed. Cas. 342 (CCD Mass.) in deciding whether an infringement or fair use has occurred: "We must . . . in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects of the original work."

On the issue of public interest, it is relevant to note a question raised by Professor John C. Stedman. What are the rights of an author and those in privity with him? He suggests that it is a policy question of "more or less", not a legal question of what are his rights in the educational process. "How much it is necessary and desirable to give to the author in order to stimulate and encourage him to write and publish in the educational field!" Look at the "effects" of granting or denying copyright protection rather than refer generally to the "interests" of the author. Educational activity, in practical effect and in terms of public interest, must be distinguished from other activities with reference to copyright protection. Consideration must be given to the strong public purpose behind educational activity. "Beware!!" he cautions authors and publishers, if the copyright toll becomes too onerous for educational activi-

ties to absorb, the result may be foregoing use of the material completely. (See AAUP Bulletin, 53:129 (June 1967)).

B. Library photocopying and copyright protection

Replication of copyright works is daily taking place in libraries as part of the research and educational process. At present it is primarily reflected in reprographic reproduction (reproduction by photographic methods or processes analogous to photography), and is an established and recognized practice in library administration, teaching and research.

Reprography in libraries and for educational purposes should not be confused, however, with computerized retrieval of data and information, which in its present state of development is hardly a serious threat to owners of intellectual property but which could eventually become so. Researchers, librarians and educators in the future will then become involved with new techniques of electronic document-storage and computerized information-retrieval systems just as they are presently learning about the tremendous potential of miniaturization and remote transmission of data.

Currently, the most pressing problems facing owners and users of copyrighted works lie in the reprography area as distinguished from electronic systems.

Scholars, researchers and librarians, relying on the doctine of fair use, have always felt free to copy by hand the works of others for their own research and study needs. When copying machines become available, it was a simple transition for these scholars, etc., to extend their note-taking to photocopying from copyrighted material. Publishers maintain that the new machine-copiers made replication of their copyrighted materials so easy and inexpensive that their sales are being detrimentally affected to the point that if allowed to continue they will be forced out of business. As a result, the creator of information would lack the income from his ideas to maintain a degree of independence. Educators particularly object to any limitation of their right to make machine-copies on the grounds that they, like librarians, are not doing so for profit; nor for any direct or indirect commercial advantage, but rather to promote the educational process.

The traditional library position on reprography in libraries is to the effect that not only under the Fair Use doctrine, but also as a natural extension of customary library service, a library may make a single copy of copyrighted material it has purchased, for the scholarly use of any of its readers or another library, requesting such service, if done without profit. Such service, employing modern copying methods has become essential. The present demand can be satisfied without inflicting measurable damage on publishers and copyright owners. Improved copying processes will not materially affect the demand for single-copy library duplication for research purposes. Librarians also argue, no matter who is involved, whether it be the librarian, the publisher, or the creator of information, the main concern should be the public interest in access to information. Copyright protection should not be an impediment to transferring information.

C. The economics of library photocopying and the public interest

Publishers allege that although libraries are not in the business of photocopying for profit, still by doing so, they are depriving publishers of the opportunity to sell additional copies and even to maintain their current subscriptions. In the *Williams & Wilkins* case, however, involving a U.S. government library's unauthorized photocopying of copyrighted medical periodicals for and at the request of medical researchers and practitioners, the U.S. Court of Claims not only held this practice constituted "fair use", but that "there is inadequate reason to believe, that it (the publisher) is being or will be harmed substantially by these specific practices." Actually, this conclusion is borne out by the realization that if most of the users in libraries who photocopy copyrighted materials would be deprived of this opportunity, they would not purchase the original material. Then again, researchers, scholars and academicians rarely purchase all or even a few of the books and/or journals they use in their research. They receive complimentary copies and reprints of articles or they borrow library copies. Only if these sources fail to provide the materials sought, do they resort to photocopying. The publishers' complaint that photocopying is depriving them of profits because of lost sales is therefore not a completely valid conclusion. Many of the potential sales the publishers envision are not of the type that ordinarily occur. It appears to be, that the publishers, despite all this library photocopying, are no worse off than before.

While libraries and large industrial organizations are principally involved in replication of copyrighted materials (also there is much private and casual copying by students, faculty and others in college and university libraries) still they continue to purchase many new titles and journal subscriptions, as well as maintaining the older subscriptions. It should be also recognized in this context that these institutions cannot physically shelve more than a few copies of a journal, etc., due to lack of space and therefore would never purchase a great number of subscriptions to a journal merely because at one time there was a demand for additional copies of a given article.

In this context, we should also review the economics of publishing. It is an established fact that publishers of scientific and technical journals, publish limited editions of their issues so that they often are unable to sell additional copies on demand as early as two months after publication. They do not invest in maintaining stock of back issues of their publications, and hardly ever reprint them. Thus, depriving themselves of the opportunity to sell their back issues on demand. Still they are insisting on the payment of fees additional to the subscription price of the publications, for photocopying rights of these back issues. Then again, publishers, especially in the areas of scientific and technical reference works do market research before publishing new titles and publish them only when assured that libraries will purchase them in addition to specialists in the field. When they determine that the sale of a particular work will be limited, the list price established is increased to reflect this in order to insure a profit.

Surveys have also established that as many as 80% of authors of scientific articles are more interested in dissemination of their articles than in receiving royalties. In the scientific field, it should also be noted, authors not only do not receive remuneration for their articles, but often are required to pay for the cost of having them published or absorb the cost by purchasing a stated number of reprints. It has also been noted that subjects dealt with in scientific literature and some of the other disciplines such as law have become so specialized that most researchers in those fields are interested sometimes only in one article out of the many published in a particular journal. Reprography in libraries and documentation centers appears to be the only obvious way today for researchers to have access to the many scholarly resources of their field.

Publishers complain, however, that they are bearing the economic brunt of this development. The hardware and paper used for reprography are bought and paid for by libraries, etc., why shouldn't publishers be given additional income for the right to make copies of their copyrighted works! They also add that even though scientists, etc., etc., pay for publication of their research papers, they should be interested in the survival of the scientific journals which give them an opportunity to disseminate their findings and research reports.

Librarians respond to this copyright confrontation as follows: Non-profit library institutions are not in business and have nothing to gain by photocopying for others. Their purpose is only to promote research in the sciences and humanities in the public interest. They are involved with access to knowledge and its bibliographical control so that scholars, educators, scientists, etc., can use such data in their research and in the process create new information and materials. Why should librarians, under these circumstances be caught in the middle of the conflict between owners and users of copyrighted materials, and be required to take sides? When we become concerned with technology and economics, we must realize that they are not material to the library's ulterior purpose of information dissemination.

Library institutions do have an interest in the reproduction of copyrighted materials for their own internal, nonprofit purposes. They have a vital concern in conserving copies of periodicals and of works in their collection which are out of print, under certain circumstances. They also have an interest in reproducing multilated or missing pages of works in their collection. Then again, in order to conserve their collection, they recognize the need to photocopy materials in their collection for other libraries, requesting them on inter-library loan. Ground rules should be negotiated for these purposes but not at the expense of limiting the free flow of information, and certainly not with the added cost to libraries for administering a system involving payment of fees, licensing, etc., for the benefit of owners of copyrighted works.

D. *The new technology and the copyright revision bill*

What position should this committee take with reference to computer technology and related copyright problems? When the integrity of a basic collection of materials, copyrighted and otherwise, compacted and stored in electronic

information-center computers, will be preserved by Xerographic printers providing facsimile reproduction by remote transmission in hard-copy form, or by video scanning of ephemeral copy on a closed-circuit TV monitor elsewhere; when the library collection will remain intact because the computer, in essence, will assume the role of a duplicating rather than a circulating library; when one copy of a book fed into such a system will service all simultaneous demands for it; when microfiche and computer print-outs will replace copyrighted hard-copy publication of research reports, as well as of scientific and technical materials currently appearing in journals, monographs and books, and when audio-visual dial-access teaching machines, operated by remote control, will provide hundreds and even thousands of students with simultaneous audio and visual access to a journal article or excerpts from a book, it is obvious that the publishers' traditional market will be affected by these developments and the copyright laws will have to respond to this "non-book" production.

Merely on the issue as to when an infringement will occur with reference to input, storage and retrieval of a copyrighted work fed into a computer without permission of the copyright owner remains still to be resolved. Output or retrieval of the copyrighted work may be in the form of abstracts, excerpts, or the work as a whole. It may be delivered to the user in tangible form such as a photo-duplication or in ephemeral form such as the temporary projection of an image on the screen. Should the output of an information storage and retrieval system be considered a copyright infringement or derivative work if such output is an index, abstract, limited quotation or analysis of the copyrighted work? "No," reply some copyright experts, except to the extent that the output is likely to diminish the demand for a copyrighted work, because then the doctrine of fair use should govern. Some experts note that the term "copy" is a word of art construed by the courts in the U.S. to mean a copy which is "visually perceivable" and in "tangible form" and therefore when we are concerned with computer output of punch cards or tape, we are "copying". Thus, the experts cannot agree when a computer system has infringed on a copyright owner's works or for that matter to what extent. Professor Benjamin Kaplan, contends that infringement should not turn on input conversion but rather on output conversion—on what is subsequently done with the stored work.

There are other copyright problems brought out by the new technology, e.g., notice of copyright and deposit, whether doctrine of fair use is applicable. The state of the art today, however, is not sufficient to warrant the acceptance of rules and regulations governing the use of copyrighted materials. When "non-book" production will predominate, the role of the commercial publisher will probably change, especially in his relationship with authors and readers. Publishers may also decide to play a different role with reference to regional, national and international information networks. Libraries will also have to readjust their concepts of reader's services and technical operations and may even become eventually part of projected government information networks. Thus, it is possible that the new technology will change the concept of author protection and that copyright protection will be of little help to the author of scholarly works. Rather than depending on royalties, these authors and/or their publishers will sell directly to the information-system operator either as a complete sale or upon an accounting based on use. The computer could easily be programmed not only to incorporate the new "work" into the existing data but also arrange for accountability of its use in the system. Subscribers to the system will pay for its maintenance.

As a result, many other problems will arise, e.g., the amount of control government will have over these information systems, rates to be established and international agreement and treaties will have to be negotiated to reflect the needs of the system.

In light of all these possibilities, it is my thought that this Committee cannot take a position at present affecting copyright and computer based information storage and retrieval systems. We must await developments in this field to the point where we will be aware of the implications of our decisions.

I would respectfully recommend that this is a problem for the newly created *National Commission on New Technological Uses of Copyrighted Works* to resolve.

The long range problems resulting from the effects of this new technology on copyright must first be identified by the Commission and then it should "make recommendations as to such changes in copyright law or procedures that may be necessary to assure for such purposes access to copyrighted works and to provide recognition of the rights of copyrighted owners" as it has been charged by the U.S. Congress to do.

Mr. Chairman, I appreciate the opportunity of appearing here to present the point of view of the American Association of Law Libraries.

STATEMENT OF WILLIAM M. PASSANO, CHAIRMAN OF THE BOARD, WILLIAMS & WILKINS CO.

I thoroughly enjoyed meeting with you on May 13, and I appreciate the opportunity to review with you the subscription figures for the 27 Journals published by The Williams & Wilkins Company. You may recall that a compelling reason given by the four judges of the Court of Claims for finding library photocopying of our Journals to be "fair use" was that we had not convinced them that this practice was doing harm to the financial condition of the Journals. It is true that in 1973, when the Court of Claims decision was handed down, we had no statistical proof of damage.

However, the figures now available, which compare 1973 with 1974 and which I showed you when I was in your office, do to my mind show that the library networks are, in fact, doing just what they were designed to do; namely, reducing the number of Journals which the libraries subscribe to, since the needs of library patrons can be served by obtaining photocopies of requested articles as interlibrary loans through the network systems.

You will notice that the individual subscriptions to the 27 Journals which we publish have increased nearly 17%, comparing 1974 with 1973. Foreign subscriptions of all kinds have increased approximately 13%. Furthermore, there has been a healthy increase in the number of hospital subscriptions, due primarily we believe to the ever-growing number of community hospitals. This record indicates that the Journals as a group are in demand as purveyors of scientific knowledge and are highly respected by the scientific community. Furthermore, we credit much of the increase to the effectiveness of the very substantial direct marketing efforts which we have made during the past year.

The record of individual and foreign subscriptions, however is in sharp contrast with the institutional subscriptions which in the same period of time have fallen off by 3%. I think it is safe to say that this decrease in institutional subscriptions, at a time when individual and foreign subscriptions have substantially increased, is not due to lack of popularity on the part of the Journals in question, but is because of the ease with which interlibrary loans (photocopies) are obtained through membership in library network systems, and that these photocopies can and do replace the necessity for institutions subscribing to the Journals in question. Certainly The American Chemical Society subscription figures confirm this with even larger declines.

We do not quarrel with photocopying, nor do we object to the network systems. They are effective means of efficiently disseminating scientific knowledge. We do believe, however, that those who use the Journals by photocopying them should share in their support and not leave the entire burden on the shoulders of the subscribers, the authors and the advertisers, as is the case at present. It is for this reason that Section 108(g)(2) of the proposed Copyright Bill must be retained if the scientific press is to remain viable and free from governmental subsidy and control.

It should be borne in mind that fully 65% of the cost of producing the typical scientific periodical is incurred before the first copy comes off the press. This means that only a comparatively small erosion of the subscription list can greatly affect the unit cost and therefore jeopardize the financial security of the Journal.

Again, many thanks for permitting me as a member of the Proprietary Rights Committee of the Information Association to place these facts before you.

STATUS OF SUBSCRIBERS TO 27 WILLIAMS & WILKINS JOURNALS COMPARING 1973 WITH 1974

Type of subscriber	Number of subscribers		Change in percent
	1973	1974	
Individual domestic	28,405	33,137	+16.8
Foreign individual and institutional	36,430	41,147	+12.9
Hospitals	8,796	9,562	+8.75
All other domestic institutions	15,369	14,909	−3.0
Breakdown of domestic institutional subscribers:			
Medical schools	3,262	3,361	+3.3
Universities and colleges	5,198	5,149	−.95
Public libraries	489	413	−15.6
Corporations (drug manufacturers)	1,112	1,149	+5.3
U.S. Government libraries and departments	3,644	3,523	−3.3
Associations, foundations, laboratories	1,674	1,314	−21.7

STATEMENT OF HON. DAVID MATHEWS, SECRETARY, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

There is now pending before your Committee H.R. 2223, a bill "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes."

In brief, the bill as presently worded contains a provision [Subsection 108(g)] which would severely hamper the flow of biomedical information between the National Library of Medicine and the nation's medical libraries and thereby reduce the information available to researchers and practitioners. Deletion of Subsection 108(g) would remove this restriction. However, if deletion of this Subsection is not possible modification of the language contained therein would accomplish the same goal.

We transmit herewith a brief technical report which contains an analysis of select provisions of the bill under consideration and the effects which they might have on the programs of the National Library of Medicine, a bureau of the Department of Health, Education and Welfare.

We are advised by the Office of Management and Budget that there is no objection to the presentation of this legislative proposal from the standpoint of the Administration's program:

AN ANALYSIS OF THE POSSIBLE EFFECTS OF SECTION 108 OF H.R. 2223, GENERAL REVISION OF THE COPYRIGHT LAW

House of Representatives bill, H.R. 2223 "For the general revision of the Copyright Law, title 17 of the United States Code, and for other purposes," now pending before the Committee on The Judiciary in the House of Representatives, would provide for the first general revision of the copyright law since its passage in 1909. Section 108, "Limitations on exclusive rights: Reproduction by libraries and archives" provides that it is not an infringement of copyright for a library or archives to reproduce no more than one copy of a work for non-commercial purposes in order to preserve deteriorating materials, replace a damaged or lost copy that can not be purchased at a fair price, or provide a copy for the use of an individual library patron for scholarship and research. However, Subsection 108(g) prohibits "the related or concerted reproduction or distribution of multiple copies or phonorecords of the same material, whether made on one occasion or over a period of time whether intended for the use of one individual or a group. It also prohibits "the systematic reproduction or distribution of single or multiple copies" of a copyrighted work.

Subsection 108(g) in its present form, depending on the interpretation of "systematic reproduction," could possibly make operation of the current interlibrary loan program of the National Library of Medicine and its Regional Medical Library network an infringement of copyright, thereby seriously impairing the nation's health research and scholarship.

The NLM is a "library's library" serving as the back-up source of materials requested by patrons of local medical libraries but which are at that time absent from their collections. There are many reasons for the non-availability of literature which necessitates that a local library request an interlibrary loan; among the common reasons are that the material requested are out of the local library on loan or at the bindery.

To provide more rapid dissemination of biomedical information, the Library has developed a network arrangement through which biomedical literature

can be shared more efficiently by medical libraries throughout the nation. Eleven major institutions have been designated Regional Medical Libraries to provide interlibrary loan services to other libraries in their regions.

The interlibrary loan program provides to requestors photocopies of articles from periodicals and brief excerpts from monographs for the purposes of private study, scholarship and research. Single photocopies are provided in lieu of loaning the original literature as a means of safeguarding NLM's archival collection and of assuring uninterrupted availability of the literature of NLM and the resource libraries of the Regional Medical Library network.

The term "systematic reproduction" as used in Section 108(g)(2) is not defined in the bill, but if it is to be used to describe that reproduction carried out in connection with interlibrary cooperation, such as in the Biomedical Library Network, it will mean the end of this orderly and efficient medical literature exchange.

Section 108 in H.R. 2223 is identical to Section 108 of S. 1361 which was passed by the Senate in 1974. It is important to note that the Senate report which accompanied S. 1361 dealt with this issue of systematic reproduction.

The report indicated that Subsection (g)(2) stipulates that Section 108 does not authorize the systematic reproduction or distribution of copies of articles in periodicals or of small parts of other copyrighted works whether or not multiple copies are reproduced or distributed. Systematic reproduction or distribution occurs when a library makes copies of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. The report states that such systematic reproduction and distribution enable the receiving libraries or users to substitute the copies reproduced by the source library for subscriptions or reprints or other copies which they might otherwise have purchased for themselves, from the publisher or the licensed reproducing agencies.

The potential effects of Section 108(g) are unsure; however, as the Senate Subcommittee interpreted "systematic reproduction" in 1974, NLM's present interlibrary loan program might be found to be an infringement of the copyright law if amended as proposed in this legislation.

Although Section 108(a)-(f) appears to allow for the photocopying of journal articles, Subsection 108(g)(2) threatens to destroy the effectiveness of the biomedical library network and to seriously undermine the ability of local medical libraries to provide medical literature and information requested and needed by the health community. It could in effect eliminate the present practice of interlibrary loans which would seriously impair the dissemination of medical information throughout the nation.

Deletion of Subsection 108(g)(2) would permit the continuation of an unrestricted flow of medical information among libraries. If deletion is not possible, another approach which might accomplish the goal would be to amend Subsection 108(g)(2) by adding the language underlined below:

> (2) engages in the systematic *and unlimited* reproduction or distribution of single or multiple copies or phonorecords of the same material described in Subsection (d) *so as to substantially impair the market for, or value of, the copyrighted work.*

For purposes of avoiding ambiguity the bill should include explicit definitions of "systematic reproduction" and "fair use."

STATEMENT OF KEVIN J. KEANEY, GENERAL COUNSEL FOR THE FEDERAL LIBRARIANS ASSOCIATION

The Federal Librarians Association, incorporated in the District of Columbia, is an organization of professional librarians who work in the libraries and documentation centers of the U.S. Government throughout the world. This statement is submitted to express the view of the association relative to the proposed copyright legislation, particularly Section 108(g)(2).

Section 108 permits the reproduction of single copies of certain materials, in certain circumstances, and under certain conditions, by libraries and archives; but paragraph (g)(2) withholds that permission or right in ". . . cases where the library or archives, or its employee: . . . engages in the systematic reproduction or distribution of single or multiple copies of phonorecords of materials described in subsection (d)."

It is the view of this association that this paragraph will, on the one hand, subject the library and the librarian to a liability so serious as to inhibit the

primary purpose of Article I, Section 8, of the U.S. Constitution; and on the other hand, provoke by the vagueness of the term "systematic" endless and unprofitable litigation.

Federal librarians and Federal libraries have the duty to serve the public by providing whatever documents are available. We contend that the public interest is best served when the documents are provided subject to the primary purpose of the constitutional provision (". . . to promote the progress of Science and the useful Arts. . .") and subject to no more than other parts of Sections 107 and 108. We believe that the "fair use" provisions of Section 107 are sufficient protection to the holder of copyright, buttressed by the more specific provisions of Section 108, but excluding paragraph (g) (2). Librarians do not believe that the public interest is served by unrestricted and unconditional photocopying, but we do believe that the restrictions and conditions contained in other parts of the legislation are sufficient to safeguard the legitimate rights of the holder of copyright. When Congress provided that constitutional protection to holders, we believe Congress intended a "quid pro quo", viz. the fair use of that protected material by the public. We are highly concerned that there seems to be no government defender of that public interest. On the contrary, the National Commission on Libraries and Information Science latest report indicates to us an acceptance of the inevitability of royalties or a licensing agreement. It is no comfort to us that the Register of Copyrights, and the former Register, testified last week before this subcommittee that their first concern is for the "beneficiaries" of the Copyright Office, i.e. authors and publishers. And we are certainly not prepared to agree with the Register that the authors' interest is necessarily the public interest.

Our apprehension about the vagueness of the term "systematic" is confirmed by the report on S. 1361 (no. 93-983) which said ". . . neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of 'single copies' as distinguished from "systematic reproduction' ". The report's recommendation that meetings of opposing parties be held to resolve the conflict reminds us that these meetings have already been held many times, without success.

But surely, one asks, "systematic" is a term on which reasonable men can reach an understanding? Aside from the fact that one man's reason is another's intransigence, there is the fact that economics is at the root of the matter. Holders of copyright understandably want more money, and libraries are faced with rising costs in serving the public. The economic damage to holders of copyright is at best speculative, in regard to photocopying, and we share the view of the U.S. Court of Claims that, in regard to medical journals at least, the argument is an "untested hypothesis".[1]

Every organization, and hopefully, every library, tries to operate in a "systematic" manner, i.e. according to standard operating principles or uniform principles for each task, and must operate thus out of sheer common sense and business necessity. When your office rents and uses a photocopy machine, you are subscribing to a "system": even the production of single copies, no less multiple copies, are part of a "system". In this respect, *all* library photocopying is "systematic" and thus subject to the restrictions of paragraph (g) (2).

As members of a profession, and employees of government agencies, devoted to public service and the public interest, we ask you to strike from this proposed legislation paragraph (g) (2) of Section 108, on grounds that this paragraph:

(a) contains a term so vague as lead to fruitless litigation,

(b) is against the public interest and the primary purpose of Article I, Section 8, of the U.S. Constitution, and

(c) is superfluous in the light of the remaining parts of Sections 107 and 108.

STATEMENT OF JOHN B. HIGHTOWER, CHAIRMAN, ADVOCATES FOR THE ARTS/ ASSOCIATED COUNCILS OF THE ARTS

Mr. Chairman and members of the Committee: I am presenting this statement on behalf of Advocates for the Arts, a program of Associated Councils of the Arts, Inc. (ACA). ACA is a national service membership organization of state and community arts agencies devoted to the protection and advancement of the arts and artists. It represents several hundred widely diverse organizations, ranging from The Metropolitan Opera, to the Alaska State Council on the Arts,

[1] Annex. *Special Library Sketchbook*. S.L.A., N.Y. 1972. 45 p.

to the Fine Arts Council of Florida, to the Siouxland Arts Council of Sioux City, Iowa. Through Advocates for the Arts, ACA is concerned with all of the problems that affect artists, art institutions, and the general public's enjoyment of artistic and cultural works.

ACA acts as a service agency for its members, providing information and assistance to arts councils and arts organizations throughout the United States. ACA member organizations reflect all artistic disciplines and ACA speaks for the management and financial sides of the art world, as well as the creative and innovative artists themselves. Finally, ACA's Advocates program speaks for the arts consumers—those who enjoy art, buy art, view art, and attend the performing arts—in short all who are concerned and affected by the cultural environment of this country.

Advocates for the Arts, through factual and legal research, identifies areas in which action might have a material impact on the rights of arts institutions and individual artists, and areas in which public action might contribute to the enhancement of the cultural life of the community. Advocates intends to act with respect to these areas through public education, drafting of model legislation and litigation. Advocates seeks to accomplish the sharpening of public consciousness of the way in which law affects our cultural life and determines the aesthetic character of our surroundings.

Advocates have identified several areas of immediate concern. One of these areas relates to the economic rights of the creative artists. My statement to you today urges this Committee to take full cognizance of the significant adverse impact on the arts which would result from copyright legislation which fails to place reasonable restrictions on the permissible scope of photocopying copyright material.

The recent conclusion of the United States Supreme Court case of Williams and Wilkins Company vs. The United States where the Supreme Court by a four to four deadlock let stand a lower court decision permitting rather wide spread photocopying of copyright works, makes more immediate the need for reasonable controls. Unfortunately, judging from the commentaries following the United States Supreme Court decision, institutions feel they have an expanding license to make widespread photocopy use of copyright works. While we do not believe such license was necessarily created by the recent court decision, it being limited to the specific facts presented, the climate is such that action by this Committee is urgent and necessary.

We are concerned about the formulation of legislation which would formalize the concept of "fair use" so as to encourage wholesale library reproduction and distribution of copyrighted works.

Those who create artistic works are necessarily threatened. Without copyright protection against unauthorized distribution of photocopies of their created works, creative artists can have no assurance of being paid for their efforts.

The language of HR 2223 (and S. 22 in the Senate) governing the "fair use" of copyrighted material, if adopted, would be a major step toward the economic protection for originators and creators of work from excessive reproduction. We heartily endorse the provisions of Section 108 and urge its adoption by the 94th Congress. Any attempt to erode or undermine the limitations on "systematic reproduction" of copyrighted works, will, in our opinion, greatly reduce the effectiveness of the entire bill. We join the Authors League, and other interested parties, in urging the committee to resist any efforts to delete Section 108(g) from HR 2223.

Unfortunately, the potential for harm to the creative artist from an overly liberal photocopying provision is very real. Under the law as developed by the Williams and Wilkins case, it appears that complete articles may be photocopied from a magazine and distributed on a widespread basis without any royalty payment to the copyright owner. However, without specific limitations, we are fearful that institutions will conclude if an article from a scientific journal can be reproduced and distributed, why cannot a short story or a poem from a literary magazine also be reproduced and distributed? Why not a musical composition from a workbook of musical scores? Indeed, why not a photographic magazine or a magazine anthology of art reproductions or lithographs? Why should the copier be limited to magazines? Why should it not be permitted to reproduce the same poem, short story, musical composition, photograph, drawing, or lithograph from a paperback book or a hardcover book? Further, in the mind of the photocopier, it might seem to be of no significance that the literary or artistic work is extracted

from a collection of works by a single poet, short story writer, composer, photographer, painter, or lithographer, or from an anthology of works by many artists. In either case, an entire creative work would seem to be just as subject as an entire article from a scientific journal to photocopying and mailing to members of the general public. Instead of coming to the library personally to borrow and read the work, the library will give to the "borrower" a permanent personal copy.

However, the composer, poet and short story writer are directly economically dependent on royalty income, based on the sale of their works to those who desire permanent personal copies. The photographer, the painter, and the lithographer jealously reserve reproduction rights to their works and expect to be paid when they authorize reproduction by or for those who desire permanent personal copies.

If institutions will provide copies of specific works by creative artists upon request, why should anybody buy the entire magazine or paperback or hardcover book containing that specific work? Necessarily, publishers will sell fewer magazines and books, artists will receive less royalty income, and their works will be widely reproduced and distributed without authorization from them or compensation to them.

Again, for emphasis, we are not saying that the Williams and Wilkins case created such a broad license. However, that decision was the last authoritative word on the subject of photocopying and has, we are fearful, created an atmosphere of photocopying promiscuousness.

In summary, we believe that an overly broad photocopying provision in the copyright law would be inconsistent with the philosophy of the Constitutional provision authorizing Congress to secure for authors copyright protection in order to "promote the progress of science and useful arts." We therefore recommend that adequate controls be placed on widespread photocopying of copyrighted works so that we retain the incentive for the creative artists to produce the art that is so necessary to the cultural environment of our country.

STATEMENT OF DR. RAY WOODRIFF, DEPARTMENT OF CHEMISTRY, MONTANA STATE UNIVERSITY

Enclosed is a letter I received from the Mosby Publishing Company concerning HR 2223 and S 22, in particular sections 107 and 108, "Fair Use," and "School and Library Photocopying." As an author, professor, analytical chemist and user of duplicated copyright materials, I was very much alarmed at the effort and money that is being spent to get an unworkable copyright law passed. Duplicating machines will only become more numerous and available in the future and trying to prevent copying of material will serve more to create disrespect for law than it will to force people to buy books from publishers. If the publishers cannot produce books cheaper than they can be duplicated on these machines, book producers should improve their efficiency, not force people to buy their books by working to get a new copyright law passed.

In modern times, not to be able to duplicate a paragraph or a figure for class use without going through a hopelessly complicated release or remuneration system would stifle education and research in this country.

In closing, I very strongly urge you to amend or discard sections 107 and 108 of HR 2223 and S 22.

THE C. V. MOSBY CO.,
St. Louis, Mo., August 8, 1975.

DR. RAY ALAN WOODRIFF,
Department of Chemistry,
Montana State College, Bozeman, Mon.

DEAR DR. WOODRIFF: Authors and editors are creative people; the manner in which you use knowledge and information to inform others is truly a creative process. It is our opinion that these creative talents deserve to be protected. The Copyright Law of 1909 has provided this protection, and as a consequence your contributions when published have essentially not been used elsewhere without permission.

The advent of copying machines has made it possible to reproduce virtually everything in print. Because of this, and certain outmoded provisions of the Copyright Law of 1909, the United States House of Representatives and Senate Judiciary Committees are currently studying Copyright Revision Bills H.R. 2223 and S. 22. Action on these identical bills will be taken shortly.

Of particular concern to us, and hopefully to you, are Sections 107 and 108, "Fair Use," and "School and Library Photocopying."

It is our opinion that these sections of the proposed new law, as written, protect your creative efforts and our investment. These sections will restrict the activities of those who feel that anything in print may be copied and distributed as the copier sees fit—without the permission of, or compensation to, author and publisher alike. We are strongly convinced that your creativity and our investment must be protected. The new law will provide this protection and yet allow wide information dissemination.

Well organized efforts are presently attempting to amend Sections 107 and 108. Such amendments will not provide safeguards against photocopying excesses as outlined above. I am writing to ask your assistance in protecting what I believe to be the correct position, one which truly serves everyone's best interests.

Attached is a list of House and Senate Judiciary Committee members. I am asking you to contact these Committee members as well as your own Congress persons. Your message need not be lengthy, but should emphasize these two points:

1. Much time and effort are expended in producing manuscripts for publication. Sections 107 and 108 represent the result of delicate compromises worked out by a number of groups, and if they are not tampered with, they will meet the "fair use" needs of educators and librarians. If broadened to allow uncontrolled and unrestricted use of copyrighted materials, they will discourage authors, writers, and editors.

2. It is essential that we encourage, sustain, and reward the competitive interplay of ideas. If broader exemptions were to be added to Sections 107 and 108, creative initiative would be stifled. The ultimate sufferer would be the intellectual and imaginative life of the community.

In short, we believe Sections 107 and 108 of H.R. 2223 and S. 22 should be adopted *without change!*

I would appreciate receiving a copy of your letter. If you wish additional information, I will be happy to supply it by return mail.

With thanks and best wishes, I remain

Cordially,

JAMES B. FINN, Ph. D.,
Senior Vice President,
Research and Development.

We will now stand adjourned.

[Whereupon, at 12:10 p.m., the subcommittee adjourned, to reconvene at 10 a.m., Thursday, May 15, 1975.]

COPYRIGHT LAW REVISION

THURSDAY, MAY 15, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m. in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs and Bruce A. Lehman, counsels; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order for the purpose of continuing the hearings on H.R. 2223, on copyright law revision.

The Chair wishes to express gratitude to the gentleman from California, Mr. Danielson, who presided yesterday, while Mr. Wiggins and I were at the Rules Committee in connection with getting a bill out of the committee.

Also, the Chair would like to say that it continues to be amazed at the public interest in this question, as demonstrated by the number attending the hearing. I am sorry that everybody cannot be seated.

This morning, we are interested in the question of educational uses, other than public broadcasting. In this connection, we have divided this morning's time, more or less, between advocates of educational uses—let us call them educators for this simple purpose—and the other half, by authors and publishers of materials used by educators.

I will also suggest that the House is in session; regretfully, we may be interrupted for a brief period of time—10 or 15 minutes—we may have to recess for the purpose of making calls to the House for votes or otherwise. We apologize, but this is an unusual circumstance, and we trust that all present will bear with us.

This morning I would like to first greet as witnesses the following: Mr. Sheldon Steinbach, staff counsel, American Council on Education, and chairman, Ad Hoc Committee on Copyright Law Revision; Mr. Leo J. Raskind, professor of law, University of Minnesota; and Dr. Howard B. Hitchens, executive director, Association for Educational Communications and Technology; Robert F. Hogan, executive secretary, National Council of Teachers of English; Mr. Harry N. Rosenfield, counsel, Ad Hoc Committee on Copyright Law Revision—and who testified, as I recall, extensively in hearings 10 years ago; and Mr. Bernard Freitag, Council Rock High School, New Town, Pa.

He is accompanied by Dr. Harold Wigren, on behalf of the National Education Association—and Dr. Wigren is remembered for his testimony 10 years ago, in more or less the same field.

Gentlemen, you are all welcome.

May I, therefore, ask Mr. Steinbach to proceed first.

TESTIMONY OF SHELDON E. STEINBACH, STAFF COUNSEL, AMERICAN COUNCIL ON EDUCATION; CHAIRMAN, AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Mr. STEINBACH. Mr. Chairman, members of the subcommittee, I am Sheldon Elliot Steinbach, staff counsel and assistant director of governmental relations of the American Council on Education I appear before you today, however, representing the Ad Hoc Committee of Education Organizations on Copyright Law Revision, a consortium covering a wide spectrum of 39 organizations within the educational community with interest in the revision of the copyright law. Most especially, we represent the interests of teachers, professors, school and college administrators, subject matter specialists, educational broadcasters, librarians, and indirectly, students themselves. A list of our members is attached to this statement. In addition, we support the testimony given by the library associations yesterday. These groups are also members of the ad hoc committee.

Our testimony today will be presented by four individuals representing several organizations within the ad hoc committee. Although there is a fundamental ad hoc position, the interests of each constituent group varies, and as such, they will emphasize in their testimony today those matters of greatest concern to them. Furthermore, each group under the ad hoc umbrella has reserved the right to determine its own posture with regard to particular issues.

[List of members follows:]

AD HOC COMMITTEE ON COPYRIGHT LAW REVISION

Agency for Instructional Television.
American Association of Colleges for Teacher Education.
American Association of Community and Junior Colleges.
American Association of Law Libraries.
American Association of School Administators.
American Association of School Librarians.
American Association of University Women.
American Council on Education.
American Educational Theatre Association, Inc.
American Library Association.
Associated Colleges of the Midwest.
Association for Childhood Education International.
Association for Computing Machinery.
Association for Educational Comunications and Technology.
Association of Research Libraries.
Baltimore County Schools.
Corporation for Public Broadcasting.
Council on Library Resources.
International Reading Association.
Joint Council on Educational Telecommunications, Inc.
Medical Library Association.
Modern Language Association.
Music Educators National Conference.
Music Teachers National Association.
National Art Education Association.
National Association of Educational Broadcasters.

National Association of Elementary School Principals.
National Association of Schools of Music.
National Catholic Educational Association.
National Catholic Welfare Conference.
National Commission for Libraries and Information Science.
National Contemporary Theatre Conference.
National Council for the Social Studies.
National Council of Teachers of English.
National Education Association of the United States.
National Public Radio.
National School Boards Association.
Public Broadcasting Service.
Speech Communication Association.

OBSERVERS

American Association of University Professors.
American Home Economics Association.
American Personnel and Guidance Association.
Association of American Law Schools.
Association for Supervision and Curriculum Development.
Federal Communications Commission.
National Congress of Parents and Teachers.

Mr. STEINBACH. I would like to add that the ad hoc committee will not address itself today to the question of instructional broadcasting because we have been assured that this matter will be considered at a later date, at which time we will be given an opportunity to speak to those issues.

It is my pleasure now to introduce Prof. Leo J. Raskind, professor of law, University of Minnesota, representing the Association of American Law Schools, the American Association of University Professors, and the American Council on Education—the Joint Copyright Committee for those three organizations.

[The prepared statement of Leo J. Raskind follows:]

STATEMENT OF LEO J. RASKIND, MADE OF BEHALF OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, AMERICAN ASSOCIATON OF UNIVERSITY PROFESSORS, AND THE AMERICAN COUNCIL ON EDUCATION

Mr. Chairman and members of the subcommittee, I am Leo J. Raskind, professor of law at the University of Minnesota. I am chairman of the Special Committee on Copyright Law of the Association of American Law Schools; I appear here today on behalf of the Association of American Law Schools, the American Association of University Professors, and the American Council on Education. Among these three organizations, we account for some [illegible] law teachers and some 75,000 other university professors. The American Council on Education is an association of national and regional education organizations and nearly 1,400 institutions of higher education.

We strongly urge that the doctrine of fair use be preserved and given formal recognition by Congress, both by express statutory provision and by appropriate language in the final Committee report.

Our position is grounded on the Constitutional directive to Congress contained in Article I, Section 8, Clause 8, which provides:

The Congress shall have Power to promote the Progress of Science and useful Arts, by securing for Limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

The higher education community is the principal institution in our society charged with the task of transmitting and advancing knowledge. It is our concern with discharging this basic function of teaching and research that moves us to ask for an effective statutory expression of the doctrine of fair use.

In making this proposal, I wish to emphasize that we do not seek to remove protected material from the ambit of the Copyright statute. We are neither adverse nor hostile to the basic premise that legitimate rights in intellectual property merit protection and compensation. Indeed, we accept this premise as

a matter of principle, as a matter of public policy, as well as a matter of self-interest. There are among our membership authors whose works command high prices in the commercial book market; many of our authors write for technical journals without compensation.

Our main concern is to stress before this Committee the soundness of the traditional, judicially constructed doctrine of fair use and to illustrate its instrumental significance in the process of higher education.

As has been recognized throughout this extended process of revising the Copyright Law, a statutory recognition of the doctrine of fair use is preferable to continued reliance upon case law development. As the Senate Report has recently put it, ". . . there are few if any judicial guidelines. . . ." bearing directly on the usage of teachers and libraries in the educational and research context which is our concern. See, S. Rept. No. 93-983, 93rd Cong., 2d Sess. 116 (1974). Given the paucity of decided cases in this area, it is necessary to recognize the difficulty of leaving the resolution of this important problem solely to the limited framework of existing decisions. We urge, therefore, the enactment of § 107, as it now appears in H. 2223, 94th Cong., 1st Sess., as supported by adequate legislative history.

The recent decision of the Court of Claims in *Williams & Wilkins Co.* v. *United States*, 487 F. 2d 1345 (Ct. Cl. 1973), aff'd by an equally divided court, 43 U.S.L.W. 4314 (1975), underscores the significance of the fair use doctrine to the educational and research community. By its affirmance of this Court of Claims opinion, the Supreme Court has left the resolution of this problem to the Congress.

In seeking to have codified the traditional fair use doctrines, adequately supported by legislative history, we are moved by the primary importance of the availability of copyrighted material to our teaching and research duties. First and most basic is the fact that the higher education community on whose behalf we appear today, consists of those institutions in our society charged with the ultimate task of transmitting and advancing knowledge. I emphasize both research and teaching; each function is indispensable to and supportive of the other. Effective instruction of the next generation of citizens and professionals, requires that the current generation of teachers be involved as researchers on the frontiers of their own individual subject areas. If the individual teacher is to discharge this fundamental research obligation, that teacher must be kept abreast of the current developments within a given discipline. This necessarily requires the teacher to have available the work product of allied researchers.

The exponential rate of growth of knowledge expressed in tangible form during this generation, requires that this information be available to the teacher and the scholar. As the volume of published material has risen, the library budgets of colleges and universities are increasingly pressed. The typical library of a law school must expend a substantial portion of its annual budget merely to keep current its holdings of state and federal reports as well as statutes, treatises, and looseleaf services.

In its support of higher education, outside its concern with Copyright Law, the Congress has recognized this basic financial constraint. Thus, in its 1972 amendments to the Higher Education Act of 1965 (and related acts), Congress supported networks for the shared use of library materials (among other facilities). Section 1033(a) of Title 20 U.S.C.A. (1974) provides as follows:

The Commissioner shall carry out a program of encouraging institutions of higher education (including law and other graduate professional schools) to share, to the optimum extent through cooperative arrangements, their technical and other . . . resources. . . .

Subsection (b) designates such authorized projects of shared usages as follows:

(1)(A) joint use of facilities such as . . . libraries, including law libraries . . . including joint use of necessary books. . . .

Against the background of this clear, prior expression favoring shared use, we express our concern that § 108(g) of H.R. 2223 is inconsistent with, and hostile to, this stated desire of Congress.

We therefore urge this Committee to delete § 108(g) (1) and (2) from the present measure because we believe it improperly limits and is inconsistent with, the expression of the fair use doctrine contained in § 107 and the legislative history thereto. It is our recommendation that a period be placed after the phrase, ". . . separate occasions" in the first sentence of § 108(g) and that all language subsequent thereto be deleted.

We oppose the enactment of § 108(g)(1) as presently proposed, because it introduces an inarticulate and troublesome concept of "concerted reproduction"; we consider the reference to "systematic reproduction" in § 108(g)(2) to be equally vague and troublesome.

It is significant that the Senate Report No. 93-983, 93d Cong., 2d Sess. 122 (1974), states of the identical text of § 108(g) which appeared in S. 1361:

However, neither a statute nor legislative history can specify precisely which library photocopying practices constitute the making of "single copies" as distinguished from "systematic reproduction." [At p. 122.]

We urge that the legislative history to § 108 reflect this concern with unduly limiting § 107. We object to the examples of permissible shared library usage under § 108 offered in the above Senate Report, in that they are misleading. To the extent that they would guide a court in the interpretation of the phrase "systematic reproduction," this statement of legislative intent does so without any reflection of the interest of the teacher and scholar to have basic material made available. Moreover, the present expression of legislative purpose underlying § 108 makes no mention of the considerations of the Higher Education Act's stated interest in shared usage.

It would be our preference that the text of the present § 108 be modified as we have indicated above and that the legislative history of this provision reflect the dual concerns of the teacher and scholar's need for the availability of published materials as well as the Education Act's directive for shared usage. It seems to us that the examples in the present Senate Report give little if any weight to these two basic considerations.

From the standpoint of the teacher and the researcher, the doctrine of fair use must be enacted free of effective limitations on library practices. Availability of library materials remains basic both to the teaching and research functions of the higher education community. A teacher in a small private or public university located in the Southeastern part of the United States, may find that a work essential to a current research interest is to be found only at a university at some distance to the Northeast. That teacher may need to obtain only one chapter of a book or a few pages of either a book or a periodical. Having such material available is essential to the scholar. Inter-library lending has become a means of making this information available. A definition of fair use which left uncertain the availability of such material, even if photocopied, would frustrate the purposes underlying both the fair use doctrine and the fundamental commitment to provide and advance knowledge by the university community.

Accordingly we would request that the legislative history of § 108 (a) through (f) clearly state the importance of the availability of library and archival material to the teacher and the scholar.

Turning to the teaching function, the need for reasonable availability of copyrighted material for classroom use is inextricably linked to the needs of the scholar. Often a current news item or periodical article will bear directly and immediately upon a topic scheduled for classroom discussion the next day. The quality of teaching is greatly improved by making available to the students the latest commentary about it while they are studying the topic. Denial of availability of such copyrighted material would not serve the interest of copyright proprietors. Students in the classroom situation are not potential subscribers to the Bureau of National Affairs, Antitrust & Trade Regulation Report, for example, or to the Prentice-Hall multi-volume Federal Income Tax Service, during their tenure as students. Indeed, it is likely that having the benefit of a brief extract from one of these services, complete with its full title, will advertise and acquaint the student with the utility of these loose-leaf services.

To deny the classroom teacher the availability of such material will mean only that the students will be without such current and timely material. Denial of the use of this material will mean simply that the educational process will be less well served and the copyright proprietor will be without even the benefit of having the availability of this material brought to the attention of students.

We reiterate that we do not seek the right to engage in multiple copying out of the context of research and teaching. We seek only the right of the scholar and teacher to have available, subject to the limitations of the statutory fair use doctrine, such copyrighted material as is germane to research and writing. And we seek this availability in the public interest in the promotion and dissemination of education and scholarly pursuits. In taking this position, we recognize that the effect on the potential market for the copyrighted material, is an appropriate factor to be considered in the determination of fair use. We also recognize that

in the overwhelming proportion of cases, any possible adverse effect on the economic interest of a proprietor will be nil or virtually so. On balance, such use of excerpts is likely to stimulate the sales of the material in the long run.

We should like to draw the Committee's attention to the forthcoming studies undertaken through the Copyright Office and the National Commission on Libraries and Information Science, of the library usage of copyrighted materials both in the inter-library loan context as well as in meeting requests of scholarly and research users. The feasibility of designing a "payments mechanism" for such library uses is one aspect of this study.

It is our concern that a determination of the feasibility of some means of compensation may serve to vacate the doctrine of fair use. We believe such a conclusion would do great harm to the public interest in the promotion of education and scholarly activities. Moreover, such an outcome would inflict irreparable harm on the educational community without conferring a derivative benefit on copyright proprietors.

We thus advocate that the House Report which accompanies this measure, be drafted to include an express reference to the effect that the doctrine of fair use would be applicable to copyrighted materials which might subsequently be designated as compensable, if photocopied for other uses. By clearly establishing that teaching and research uses are significant to the doctrine of fair use, subsequent uncertainty as to the treatment of library materials which might require compensation if copied for other purposes, would be avoided.

We consider that Chapter 5 of H. 2223 sets out definitions of infringement and remedies therefor, which are unduly restrictive of the doctrine of fair use in the educational context.

Accordingly we urge modification of the present measure, as follows. First, we urge that § 502(a) be modified by the addition of the following sentence, "No temporary or final injunction shall be available against any library or user covered by § 108 or § 110."

In its present form, we believe § 502(a) of the proposed measure would permit the use of the injunction to undercut the effective access by teachers and scholars to the fair use provisions. We would point to the withdrawal by Congress of injunctive relief against collective organizational activity in the labor relations arena by the Norris-LaGuardia Act, 47 Stat. 70 (1932); 29 U.S.C.A. § 101 (1973). It is our position that the parallel should carry over here. The sole statutory framework controlling labor relations is the Labor Relations statutes themselves. We urge that the fair use doctrines of the proposed measure be enacted as the sole framework for governing the use of copyrighted materials in the educational context by teachers and scholars.

Secondly, we consider that the damages provision of § 504(c)(2) also encroaches upon the fair use doctrine of § 107. We urge a change in the last sentence of this provision beginning at line 13 on page 49. In line 18, we would prefer that the reference to § 107 be deleted in favor of the phrase, "§§ 107 through 117." Then we would urge that all language on line 18 after the phrase, "§ 107", in the current version, be deleted. In its place we would urge the following final language as follows: "there shall be neither statutory damages, nor costs, nor attorneys fees."

TESTIMONY OF LEO J. RASKIND, PROFESSOR OF LAW, UNIVERSITY OF MINNESOTA, REPRESENTING THE ASSOCIATION OF AMERICAN LAW SCHOOLS, THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AND THE AMERICAN COUNCIL ON EDUCATION

Mr. RASKIND. As Mr. Steinbach has said, Mr. Chairman and members of the subcommittee, I am professor of law at the University of Minnesota. I appear before you today on behalf of these organizations: The Association of American Law Schools, the American Association of University Professors, and the American Council on Education. We account, as a law school association, for some 6,000 law teachers. The American Association of University Professors comprises some 75,000 other university professors. The American Council

on Education is an association of national and regional education organizations, and nearly 1,400 institutions of higher education.

We appear before you because of our concern over the revision of the doctrine of fair use in relation to our function. May I draw to your attention, on page 2 of my statement, to the second paragraph; we note above the constitutional directive contained in article I, section 8, clause 8, of Congress' concern in this area of assuring to authors and others the rights to their writings.

As the higher education community, we are the principal institution concerned in this society with the task of transmitting and advancing knowledge. It is for that use that we deem the problem of fair use of copyrighted material as crucial to the discharge of this function.

As a classroom teacher with some 20 years' experience in law schools and departments of economics, I am here to assert to you that without the doctrine of fair use, adequately described in the statute, and supported by articulate legislative history, what we do would be greatly impeded without any derivative benefit to publishers and others.

We use this material—and examples of our use suggests that the students, who are the ultimate consumers of our concern as teachers, are not, at the time that they are students, potential subscribers to the journals for which protection is sought. Many of the journals—Time magazine, for example—recognize the students' status by offering student subscriptions. Many learned journals offer subscriptions. We are only asking through the doctrine of fair use, as researchers and scholars, to advance knowledge by having made available to us, in the library context, materials which our libraries do not have, no matter how good they are. The University of Minnesota has a fine law library, but we do not have everything. On occasion it is necessary for me, if I am writing an article, to have information from other libraries. That is the main rub of our concern with the doctrine of fair use. We think it is crucial for the discharge of our teaching and research. We do not see that it infringes on the economic rights of others.

I draw your attention, on page 2, in the third paragraph, that we expressly recognize that we do not seek to have removed from copyright protection basic material under the statute. We accept this premise as a matter of principle and a matter of public policy and a matter of self-interest. As lawyers, we recognize case law and I draw your attention, now, to the next-to-the-last paragraph on page 2—that the existing state of case law in this area is not articulate, sufficiently articulate, to deal with fair use and describe it.

Therefore, we urge that this revision process produce a statutory doctrine of fair use and it be described by legislative history that will aid the interpretation of it.

I point out to you further—I will not read this statement; I will summarize it and make myself available to your questions—that Congress has, itself, as I point out on the bottom of page 3, enacted legislation suggesting such shared usage and recognizing that, as researchers, our libraries do not have adequate resources and cannot have adequate resources for every library to have a total collection of all the material that is needed for teaching and research.

I draw your attention to Congress' joint- and shared-use provisions in the Higher Education Act, section 1033.

Against this background, we have reviewed the proposed H.R. 2223 and found, as was pointed out to you yesterday, that, for example, section 108(g) trenches and undermines the interpretation of section 107 that we would seek. The details of that, I leave to my statement.

I would draw your attention now to page 6 of my statement, and to the second paragraph; the first and second paragraphs.

Our position is that to deny the classroom teacher the availability of such copyrighted material, in the context of teaching and research, would be to make the teaching and research process less fruitful, less meaningful and less important to scholars; and to do so would not benefit the economic interest of copyrights. We would simply do without, if it were necessary, if we could not have access to this material.

We reiterate, as I say in the second paragraph on page 6, we do not seek the right to engage in multiple copying outside the context of research and teaching. We seek only the right of the scholar and teacher to have available subject matter, subject to the limitations of the statutory doctrine of fair use.

I will close now, and make myself available to your questions.

Mr. KASTENMEIER. Unless members are strongly disposed to do so, I would urge they defer questions until each of the witnesses has concluded; then you may ask questions of any of the witnesses who have testified.

Mr. STEINBACH. I next would like to introduce Bernard J. Freitag, Council Rock High School, New Town, Pa., on behalf of the National Education Association; accompanied by Dr. Harold E. Wigren.

[The prepared statement of the National Education Association follows:]

STATEMENT OF JAMES A. HARRIS, PRESIDENT, NATIONAL EDUCATION ASSOCIATION

I am James A. Harris, President of the National Education Association. The NEA represents almost 1.7 million teachers in every state across the nation and is the largest professional association in the United States. Its members are active at all levels of education from early childhood through postsecondary and adult. Thus, our interests cover the whole spectrum of educational programs. We appreciate the opportunity to present our views regarding the need to reform copyright law and retain certain positive aspects of the present law, and to comment on H.R. 2223.

The National Education Association is in favor of reform of the U.S. Copyright Law of 1909, but NEA will not support a law which deprives educators of rights derived through long established practice and which denies teachers and students the right of reasonable access to both print and non print materials for purposes of teaching, scholarship, and research.

The NEA therefore opposes H.R. 2223 in its present form. It is a regressive bill that curtails or repeals existing rights for education—rights which have been established through the years. We object to H.R. 2223 on a number of grounds.

(A) *The language of H.R. 2223 severely curtails the applicability of the "not-for-profit" concept in the present law and substitutes restrictive language that is not acceptable in meeting the needs of education consumers.* Under the not-for-profit principle, a distinction is made between commercial and noncommercial uses of materials—a distinction which we feel is valid and defensible and which should be preserved in the new law. Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them. They work for people—not for profit. They do not use materials for their own gain but for the benefit of the children of all of our citizens, including those of authors and publishers.

Teachers therefore need the assurance that the present law's not-for-profit principle, granting special exemptions for nonprofit uses of copyrighted materials, will become part of the new law.

Section 110(1) of H.R. 2223 limits permissible uses of copyrighted materials to face-to-face classroom teaching situations and would rule out closed-circuit in-school uses as well as uses over dial- or remote-access system in schools, all of which are designed to bring materials to learners rather than transport learners to materials. Section 110(2) would restrict the transmission of instructional television programs to "reception in classrooms or similar places normally devoted to instruction" and would rule out the use of such programs in open learning situations in community store front learning centers or for high school or postsecondary formal viewing situations in dormitories or at home. Education is rapidly moving in the direction of providing many alternatives and options in learning wherein school is becoming a *concept* rather than a *place*.

(B) *The bill also fails to clarify the meaning of "fair use" as applied to the uses of instructional materials by teachers and students.* The recent Supreme Court decision in the Williams & Wilkins case validates our position that fair use is unreliable at best and is, in the words of the Court of Claims, an "amorphous doctrine." The bill leaves it in that status. If eight Justices of the Supreme Court are unable to reach agreement on whether a given use of a work is a fair use, how can one expect a non-jurist to know? The language and rationale are just as applicable against teachers and schools as against libraries.

The NEA does not condone "under-the-table" uses. It simply wants teachers to have reasonable certainty that a given use of copyrighted work is permissible so that they won't be afraid to use a wide variety of materials and resources in the classroom.

The bill further fails to recognize custom and practice in education as a proper basis for "fair use," as was decided in the Williams & Wilkins case. For many years teachers have been accustomed to certain classroom uses of materials being unchallenged or unquestioned. For example:

A class is having difficulty understanding symbolism in literature, and the class text does not go far enough in its explanation. The teacher therefore makes multiple copies of a short poem or a short essay (from another book) that would help the class understand the concept.

A foreign language teacher tapes a portion of a modern French poem and asks students to verbalize the recorded portion and then tape it so they can see the improvement of their accent.

An economics teacher reproduces 30 copies of graphs and charts from the *Wall Street Journal* to study the stock market.

They consequently have assumed that such uses were legitimate. We argue that custom can become law when it isn't questioned! This is particularly true in cases where the law is ambiguous, as in the case of the fair use doctrine, where long-established and non-contested custom and practice has in fact established a meaning for the statutes.

In this regard, the NEA is also concerned the bill still places the burden of proof on the classroom teacher to prove that he or she has not infringed copyright. The NEA believes strongly that this burden of proof should be shifted to the alleger of the infringement, who has all the data involved in all the criteria for fair use which are specified in Section 107.

(C) *This legislation further reduces accessibility now permitted through the non-renewal of copyrights after 28 years.* It does this by eliminating the renewal requirement and by providing for duration of life plus 50 years. This is a curtailment of education's present rights of access because it unduly extends copyright monopoly from "28 years plus a 28-year renewal period" to approximately 75 years. Copyright Office records show that approximately 85 percent of copyrighted works have not been renewed after the initial 28-year period, but have passed instead into the public domain. The unwarranted extension of copyright in H.R. 2223 would protect the author's or creator's heirs more than it would the author or creator himself or herself. We ask, therefore, why the principle of free access to information so essential to a free society should be sacrificed, especially when the author or creator himself or herself has not seen fit to renew the copyright. Many teachers who are also authors tell us that they are as much—or even more—interested in seeing their works used and their ideas disseminated as they are in receiving remuneration each time their works are used. The profit motive is not the only motive that prompts an author or other creator to produce. There is also the

satisfaction that comes from getting one's ideas into the open for discussion and debate, with the hope of finally seeing them adopted and thereby creating a better life for others who follow.

In summary, the NEA will not be able to support a bill unless it—

Retains and clarifies an overall not-for-profit concept for educational, scholarly, and research uses and copying, whether couched as a limited educational exemption or in some other suitable comprehensive form;

Clarifies the meaning of fair use as applied to teachers and learners;

Shifts the burden of proof from the teacher to the alleger of the infringement.

NEA therefore urges the adoption of language by this committee that encompasses the above-stated concepts and makes copyright reform meaningful for the teachers, scholars, researchers, authors, and publishers who create, transmit, and perpetuate our heritage for future generations.

TESTIMONY OF BERNARD J. FREITAG, COUNCIL ROCK HIGH SCHOOL, NEW TOWN, PA., ACCOMPANIED BY HAROLD E. WIGREN, ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION

Mr. FREITAG. Mr. Chairman, members of the subcommittee, I am Bernard Freitag, teacher of German and foreign language department chairman at the Council Rock High School, New Town, Pa.

I am appearing on behalf of President James A. Harris, President of the National Education Association.

With your approval, I am skipping the first two paragraphs. I now request that the entire statement appear in the record.

The NEA opposes H.R. 2223 in its present form. It is a regressive bill that curtails or repeals existing rights for education—rights which have been established through the years. We object to H.R. 2223 on a number of grounds.

(A) The language of H.R. 2223 severely curtails the applicability of the not-for-profit concept in the present law and substitutes restrictive language that is not acceptable in meeting the needs of educational consumers. Under the not-for-profit principle, a distinction is made between commercial and noncommercial uses of materials—a distinction which we feel is valid and defensible and which should be preserved in the new law. Educational users need special protection over and above that provided commercial users because they have a public responsibility for teaching the children entrusted to them.

They work for people, not for profit. They do not use materials for their own gain, but for the benefit of the children of all of our citizens, including those of authors and publishers. Teachers therefore need the assurance that the present law's not-for-profit principle, granting special exemptions for nonprofit uses of copyrighted materials, will become part of the new law.

Section 110(1) of H.R. 2223 limits permissible uses of copyrighted materials to face-to-face classroom teaching situations and would rule out closed-circuit in-school uses as well as uses over dial- or remote-access systems in schools, all of which are designed to bring materials to learners rather than transport learners to materials. Section 110(2) would restrict the transmission of instructional television programs to reception in classrooms or similar places normally devoted to instruction and would rule out the use of such programs in open learning situations in community storefront learning centers or for high school or postsecondary formal viewing situations in

dormitories or at home. Education is rapidly moving in the direction of providing many alternatives and options to learning wherein school is becoming a concept rather than a place.

(B) The bill also fails to clarify the meaning of fair use as applied to the uses of instructional materials by teachers and students. The recent Supreme Court decision in the *Williams & Wilkins* case validates our position that fair use is unreliable at best and is, in the words of the Court of Claims, an amorphous doctrine. The bill leaves it in that status. If eight Justices of the Supreme Court are unable to reach agreement on whether a given use of a work is a fair use, how can one expect a nonjurist to know? The language and rationale are just as applicable against teachers and schools as against libraries.

The NEA does not condone "under the table" uses. It simply wants teachers to have reasonable certainty that a given use of copyrighted work is permissible so that they will not be afraid to use a wide variety of materials and resources in the classroom.

The bill further fails to recognize custom and practice in education as a proper basis for fair use, as was decided in the *Williams & Wilkins* case. For many years, teachers have been accustomed to certain classroom uses of materials being unchallenged or unquestioned. For example: A class is having difficulty understanding symbolism in literature, and the class text does not go far enough in its explanation. The teacher therefore makes multiple copies of a short poem or a short essay—from another book—that would help the class understand the concept.

Allow me to give some personal examples:

Teachers in my department make synchronized tape presentations for classroom use. The basis of those slide tape presentations are, by and large, their own materials: Pictures taken on their own trips. However, some specific items may not be available to the teacher, because you need special permission to get access to the area, or perhaps the pictures taken by the teacher did not turn out quite as well as could be desired. In such an instance, the teacher may prefer to take a picture from the available magazine, make a slide of it, incorporate it right into the slide tape program.

Another example, dealing with foreign exchange values, dealing with the currency of a given country: On the day that that topic may come up, the teacher would perhaps make copies, 30 copies, of the foreign exchange rates of the previous day in order to help the children make the decision on what the daily rate concerning the story at hand, or topic at hand, would be for, say, marks, shillings, or Swiss francs.

Teachers, consequently, have assumed that such uses were legitimate. We argue that custom can become law when it is not questioned. This is particularly true in cases where the law is ambiguous, as in the case of the fair use doctrine, where long-established and noncontested custom and practice has in fact established a meaning for the statutes.

In this regard, the NEA is also concerned that the bill still places the burden of proof on the classroom teacher to prove that he or she has not infringed copyright. The NEA believes strongly that this burden of proof should be shifted to the alleger of the infringement, who has all the data involved in all the criteria for fair use which are specified in section 107.

(C) This legislation further reduces accessibility now permitted through the nonrenewal of copyrights after 28 years. It does this by eliminating the renewal requirement and by providing for duration of life plus 50 years. This is a curtailment of education's present rights of access because it unduly extends copyright monopoly from 28 years plus a 28-year renewal period to approximately 75 years. Copyright Office records show that approximately 85 percent of copyrighted works have not been renewed after the initial 28-year period, but have passed instead into the public domain. The unwarranted extension of copyright in H.R. 2223 would protect the author's or creator's heirs more than it would the author or creator himself or herself. We ask, therefore, why the principle of free access to information so essential to a free society should be sacrificed, especially when the author or creator himself or herself has not seen fit to renew the copyright. Many teachers who are also authors tell us that they are as much—or even more—interested in seeing their works used and their ideas disseminated as they are in receiving remuneration each time their works are used. The profit motive is not the only motive that prompts an author or other creator to produce. There is also the satisfaction that comes from getting one's ideas into the open for discussion and debate, with the hope of finally seeing them adopted and thereby creating a better life for others who follow.

In summary, the NEA will not be able to support a bill unless it (1) retains and clarifies an overall not-for-profit concept for educational, scholarly, and research uses and copying, whether couched as a limited educational exemption or in some other suitable comprehensive form; (2) clarifies the meaning of fair use as applied to teachers and learners; and (3) shifts the burden of proof from the teacher to the alleger of the infringement.

NEA therefore urges the adoption of language by this committee that encompasses the above-stated concepts and makes copyright reform meaningful for the teachers, scholars, researchers, authors, and publishers who create, transmit, and perpetuate our heritage for future generations.

Mr. Chairman, I would like to submit for the record the ad hoc committee's proposal on the exemption.

Mr. KASTENMEIER. Without objection, that proposal will be received and be made part of the record.

[The material referred to follows:]

AD HOC COMMITTEE'S PROPOSAL FOR LIMITED EDUCATIONAL EXEMPTION; LIMITATIONS ON EXCLUSIVE RIGHTS: REPRODUCTION FOR TEACHING, SCHOLARSHIP AND RESEARCH

Notwithstanding other provisions of this Act, nonprofit use of a portion of a copyrighted work for noncommercial teaching, scholarship and research is not an infringement of copyright.

For purposes of this section:

(1) "Use" shall mean reproduction, copying and recording; storage and retrieval by automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process,

(2) "Portion" shall mean brief excerpts (which are not substantial in length in proportion to their source) from copyrighted works, except that it shall also include (a) the whole of short literary, pictorial and graphic works; (b) entire works reproduced for storage in automatic systems capable of storing, processing, retrieving, or transferring information or in conjunction with any similar device, machine or process, *provided* that

(i) A method of recording retrieval of the stored information is established at the time of reproduction for storage, and

(ii) The rules otherwise applicable under law to copyrighted works shall apply to informtion retrieved from such systems;

(c) Recording and retransmission of broadcasts within five school days after the recorded broadcast; provided that such recording is immediately destroyed after such 5-day period and that such retransmission is limited to immediate viewing in schools and colleges.

Provided that "portion" shall not include works which are

(a) Originally consumable upon use, such as workbook exercises, problems, or standardized tests and the answer sheets for such tests;

(b) Used for the purpose of compilation within the provisions of Section 103(a).

Mr. STEINBACH. I would next like to introduce Dr. Howard B. Hitchens, executive director, Association for Educational Communications and Technology.

[The prepared statement of Howard B. Hitchens follows:]

STATEMENT OF HOWARD B. HITCHENS, EXECUTIVE DIRECTOR, ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS & TECHNOLOGY

The Association for Educational Communications and Technology represents eight thousand educators whose professional commitment is directed at finding technological solutions for the wide range of educational problems. It is important to note here that we regard technology as far more than a collection of educational machines and materials. Technology represents a systematic approach to practical problems that emphasize the application of relevant research. Professionals in my field occupy any number of roles—whether it's directing media programs; developing specific instructional materials for classroom or individual use; assisting teachers or others in selecting materials to meet a specific educational objective; evaluating materials; identifying long-range educational objectives and developing long-range plans to meet these objectives. Our members with this wide variety of jobs are employed in schools and colleges; in the Armed Forces and industry, and in museums, libraries and hospitals throughout the country.

Because they are so involved in the use of technology and modern communications, AECT members have run head-on into the 1909 copyright law which provides few answers for them in how they can use copyrighted materials. And the problem becomes more difficult as media professionals find themselves placed increasingly in the role of "copyright expert" for their institution. Because media professionals play such a vital role in education planning and materials selection, school administrators are turning to them to answer the complex copyright questions that arise daily in modern educational settings.

So AECT, as an association, is vitally concerned with the future of the bill you are considering today. We have spent much time and energy trying to determine the needs of educati n in relation to a new copyright law, but have come to realize that we cannot look at the needs of education in isolation. Since we are dependent to a great extent on the output of producers of education materials, we must take their needs into consideration.

There is little doubt that the success of each group—educators and producers—depends upon the support of the other. If the educators do not utilize instructional materials, the producers surely cannot remain in business. The teacher, media professional, and the librarian create markets for an author's work and give them visibility. Likewise, in this day of individualized instruction, the open classroom, ungraded schools, and student self-evaluation, the successful educator—teacher, librarian, curriculum developer—wants to utilize a wide range of learning resources. Certainly, when producers and users can act in concert, the student reaps the benefits.

In considering the needs of both sides—educators and producers—AECT has adopted a position relative to copyright that we feel serves both groups. AECT endorses with one exception the fair use provisions outlined in Section 107 and the accompanying legislative history. The full text of our position paper follows. Particular attention should be paid to the third and fourth paragraphs, which deal with the issue of "fair use."

[H.R. 2223]

COPYRIGHT LAW REVISION: A POSITION PAPER BY THE ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY

The members of the Association for Educational Communications and Technology (AECT) believe that technology is an integral part of the teaching-learning process and helps to maximize the outcomes of interaction between teacher and pupil.

Regulations governing United States Copyright were originally developed to promote the public welfare and encourage authorship by giving authors certain controls over their work. It follows that revisions in Title 17 of the United States Code (Copyrights) should maintain the balance between providing for the compensation of authors and insuring that information remains available to the public. Some of the revisions proposed in S. 22 and H.R. 2223 lose sight of this balance between user and producer.

AECT endorses the criteria to be used in the determination of "fair use" as contained in Section 107 of the proposed bill:

> Section 107. Limitations on exclusive rights: Fair use
>
> * * * the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords, or by any other means specified by (Section 106), for purposes such as criticism, comment, news reporting, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include:
>
> (1) The purpose and character of the use;
>
> (2) The nature of the copyrighted work;
>
> (3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) The effect of the use upon the potential market for or value of the copyrighted work.

However, *we propose that the concept of "fair use" should apply equally to the classroom teacher and media professional—including specialists in audiovisual and library resources.* Media personnel are becoming increasingly important members of educational planning teams and must have the assurance that they may assist classroom teachers in the selection of daily instructional materials as well as with long range curriculum development. Classroom teachers do not always operate "individually and at (their) own volition." The fact that the media professional makes use of advance planning and has knowledge aforethought of the materials he prepares for the teacher should not invalidate the application of the "fair use" principle.

Concerning the use of copyrighted works in conjunction with television, AECT proposes that "fair use," as it has been outlined above, *should apply* to educational/instructional broadcast or closed-circuit transmission in a non-profit educational institution, but not to commercial broadcasting.

Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine. We believe that the enactment of the "fair use" concept into law prior to negotiations will guard against the erosion of the concept. Generally, a reasonable fee should be paid for uses that go beyond "fair use," but such fee arrangement should not delay or impede the use of the materials. Producers are urged to give free access (no-cost contracts) whenever possible.

We agree with the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision that duration of copyright should provide for an initial period of twenty-eight years, followed by a renewal period of forty-eight years, whereas the proposed bill sets duration at the "life of the author plus fifty years." It seems reasonable that provisions should be made to permit those materials which the copyright holder has no interest in protecting after the initial period to pass into the public domain.

Regarding the input of copyrighted materials into computers or other storage devices by non-profit educational institutions, we agree with the Ad Hoc Committee that the bill should clearly state that until the proposed National Commission on New Technological Uses of Copyrighted Works has completed its study, such input should not be considered infringement. The proposed bill states only that ". . . (Section 117) does not afford to the owner of copyright in a work any

greater or lesser rights with respect to the use of the work in conjunction with automatic systems..."

A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of "fair use," and reasonable fees to be paid for uses beyond "fair use." This dialogue will be especially important in the area of storage, retrieval, and/or transmission of materials during the time period prior to the issuance of the report of the National Commission on New Technological Uses of Copyrighted Works.

We feel that the above modifications of S. 22 and H.R. 2223 are needed to insure that the revised law assists rather than hinders teachers and media specialists in their work.

Our major concern with fair use is that in studying the legislative history of the doctrine, fair use does not seem to apply equally to media professionals as to teachers. The previous House and Senate reports identify "spontaneity" of the use as an important determinant as to whether a use is fair or not. Fair use is extended to a classroom teacher who "*acting individually and at his own volition* makes one or more copies for temporary use by himself or his pupils in the classroom." However, classroom teachers do not always act individually or at their own volition. They are frequently assisted by media professionals with the selection of daily instructional materials as well as long range curriculum development. The fact that a media professional is frequently not classified as a "classroom teacher" and is sometimes even classified as "administration" should not prevent him from continuing his role in the instructional process. *We are not suggesting that any rights beyond "fair use" be extended to media professionals, only that they be allowed as much freedom as other education professionals.* We are currently working with others interested in this problem and will present alternative language to this subcommittee in the near future.

Even though we support the enactment of Section 107 with suggested changes, we realize that it will not solve the daily dilemmas faced by media professionals, teachers, and librarians. AUDIOVISUAL INSTRUCTION, a magazine published by my association, features a monthly column entitled "Copyright Today" that demonstrates the confusion over the bounds of fair use. The column (several reprints are attached) features copyright questions posed by readers with answers suggested by copyright experts, usually including at least one educator and one producer. As you can see from the examples, there are frequently as many answers to a given question as there are copyright experts.

Take the following question from the November 1974 issue of *Audiovisual Instruction:*

Question. Two teachers in this district are preparing audio tutorial packages for the fifth grade botany unit. They found five pictures they need in a color film owned by the district. They want to make slide copies of the five frames. Two copies of each slide is required. Would this be a violation of the copyright law?

There are two opinions as to the legality of this action provided in the article—one by an educator, the other by a representative of the producers. The educator felt the situation cited may be beyond fair use because more than one copy would be made and the copying would be done by someone (the media professional) other than a classroom teacher. The producers' representative states that the situation would fall within "fair use."

As I said we realize the enactment of Section 107 will not solve our problems. Even with the guidelines provided in that Section it is still difficult to determine what is fair use and what is not. And if an educator is not able to determine if the proposed use is fair and feels that permission to copy should be obtained in order to remain safely within the bounds of the law, how does he or she get permission from a publisher or producer to use the material?

Requesting permission to use copyrighted materials is currently a long and frequently tedious process for educators. An attached article entitled "Copyright As It Affects Instructional Development" (Audiovisual Instruction, December 1974) demonstrates the problems of contacting numerous producers with no predetermined procedures. Perhaps this problem could be solved by establishment of a clearinghouse either governmental or privately operated. Certainly this would make it easier for an educator if he or she has to contact only one source for permission rather than trying to deal with

numerous producers all with different procedures. But even a clearinghouse arrangement will still result in much time spent in waiting for reply.

We feel this delay, even if it is only (ideally) a week or so, might be detrimental to the teaching/learning process. It doesn't allow the education professional to take advantage of the "teachable moment." For example, on the day following a speech by a noted individual, a teacher may want to use the copy of the speech that appears in the local paper for reproduction and distribution to a speech class for critique. Clearly, if the teacher had to wait several weeks for permission to use the text, the impact of involving students in current events would be lost. So in many instances, some means other than a clearinghouse must be used.

AECT has spent many hours working with producers in an attempt to work out guidelines that would assist educators in upholding the copyright law. We have come increasingly to the conclusion that the best means of solving the problem is by developing voluntary licensing agreements between educators and producers. Such agreements would allow a pre-determined amount of copying, kind of copying, or maybe even unlimited copying either for no charge or for a pre-determined fee. Such an agreement would set the bounds of fair use in advance and would also allow educators to take advantage of the "teachable moment."

We are not asking you, the Congress, to legislate a licensing agreement. It would be almost impossible to include every possible type of necessary agreement in legislation. We think we as educators must take the responsibility to work with producers of materials to develop such agreement. AECT has had and will continue to have dialogue with producers of materials in an attempt to satisfy the needs of both groups. We are asking only support and encouragement from the Congress to both sides to sit down and develop licensing agreements.

The AECT position which has been presented in this testimony has been well received by both educators and materials producers. Representatives of both these communities viewed the position as a realistic step toward resolving the issue of defining the limits of fair use. The statement is viewed by members of each group as offering protection to educators that is not offensive to the producers.

We think the incorporation of the AECT position into H.R. 2223 and its legislative history is essential to the development of a new copyright law that is equitable to educators and creators of materials alike.

I wish to thank the Subcommittee for this opportunity to present our views. I only hope we can impress upon you that we are as concerned as you are with the necessity for a new copyright law that will allow us as education professionals to continue the improvement of education through the application of new technology and communications.

[Reprinted from Audiovisual Instruction, published by the Association for Educational Communications and Technology, November 1974]

COPYRIGHT TODAY

(By Jerome K. Miller*)

This column is open to all readers of *Audiovisual Instruction*. News items and questions about copyright which are of general interest will be included as space permits. The identity of individuals submitting questions to this column will be held in the strictest confidence. Please send all news items and questions to Jerome K. Miller, Chairman, AECT Copyright Committee, 1025 Adams Circle, No. 2B, Boulder, Colorado 80303. It is impossible for the editor to respond directly to questions about copyright.

COPYRIGHT BILL IN THE SENATE

Preceding consideration of the Copyright Revision Bill (S. 1361) by the full Senate, it was considered and approved by the Senate Judiciary and Commerce Committees. The reports from these Committees (S. Rpt. #93-983 from the Judiciary Committee, and S. Rept. #93-1035 from the Commerce Committee)

*Jerome K. Miller is assistant professor of instructional media, Central Washington State College, Ellensburg. He is currently on leave to pursue doctoral studies at the University of Colorado.

are helpful in understanding the Congressional intent behind the bill. Copies of the reports are available, free of charge, from the Senate Documents Room, U.S. Capitol, Washington, D.C. 20510. Please include a self-addressed label with your request. Your Senator can also assist you in obtaining copies of the report. The text of the Senate bill is included in the report.

Educators will be especially interested in the bill's definition of "fair use" copying. The bill defines it to include: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and 4) the effect of the use upon the potential market for or value of the copyrighted work. The accompanying Judiciary Committee report states: "The fair use doctrine in the case of classroom copying would apply primarily to the situation of a teacher who, acting individually and at his own volition, makes one or more copies for temporary use by himself and his pupils in the classroom. A different result is indicated where the copying was done by the educational institution, school system or larger unit or where copying was required or suggested by the school administration, either in special instances or as part of a general plan."

AECT has opposed this interpretation and proposes that "fair use" should apply equally to the classroom teacher and media professional. AECT has also urged that the "fair use" principle should apply both to the selection and preparation of daily instructional materials as well as with long-range curriculum development.

Even if S. 1361 is approved by the Senate in the near future, there is little chance that the House will begin consideration of copyright revision until next year. However, any bill approved by one House of Congress this year could carry considerable weight in future consideration of the subject.

QUESTIONS & ANSWERS

Question. Two teachers in this district are preparing audio tutorial packages for a fifth grade botany unit. They found five pictures they need in a color film owned by the district. They want to make slide copies of the five frames, two copies of each slide are required. Would this be a violation of the copyright law?

Answer 1: If the "color film owned by the district" is a commercial copyrighted product, this could be interpreted as a violation unless permission were sought in advance from the copyright holder. Ownership of the prints by the district does not automatically include duplication rights. The danger points in this case which could be interpreted as a violation of fair use are: 1) the creation of more than one copy, and 2) by someone other than the classroom teacher.

EUGENE H. WHITE,
Director of Audio-Visual Services, Los Angeles City Schools.

Answer 2: In this situation there is illustrated a fairly good example of a practice falling within the doctrine of fair use. Taking into consideration the particular use to be made of the individual film frames, and the number of frames actually being copied. EMPC feels that this ought to be defined as fair use. The danger in this practice, however, could result if multiple copies of the frames are then reproduced for use in the classroom which will utilize the materials.

IVAN R. BENDER,
Chairman, Copyright Committee, Educational Media Producers Council.

Question. One of our teachers recently asked the district IMC staff to make 30 copies of a chapter of a book in the school library. The chapter describes the impeachment of President Andrew Johnson and was needed for a current events class. We were assured that the materials would only be used once. Is this a violation of the copyright law, and would it be a violation under the proposed law?

Answer 1: In this situation fair use would not apply because of the fact that 30 copies are being made of the chapter from this book. Multiple copying, even if it involves only excerpts from a work, is generally regarded as falling outside the scope of fair use. The question of the number of times that these copies would be used would relate only to the question of the amount of damages which might be granted to the copyright holder.

IVAN R. BENDER,
Chairman, Copyright Committee, Educational Media Producers Council.

Answer 2: This should not be considered fair use, and thus would be a violation of the present law. In effect, this sort of multiple copying tends to deprive the copyright holder of potential commercial benefit. The Williams and Wilkins case (487 F. 2nd 1345) decided by the U.S. Court of Claims last November, should not be considered a precedent in this case, since the decision there favored *governmental* libraries making large numbers of copies of copyrighted material. Under Sec. 108 of the proposed legislation, it is legal for a library (which would be interpreted as to include IMCs) "to produce no more than one copy . . . of a work . . ."; therefore, such reproduction would be illegal under the proposed law as well.

HAROLD E. HILL,
Professor of Communication, Head, Radio-TV-Film, University of Colorado.

Answer 3: The length of the copied chapter in relation to the entire book is an important criterion in determining fair use. But basically, the making of multiple copies of any length without permission of the copyright owner exceeds fair use and is thus a violation. If the teacher had computed the real cost of making photocopies, including the administrative time involved and the cost of paper, he (or she) probably would have concluded that it was cheaper to order reprints from the publishers.

SUSAN ENGELHART,
Staff Director, Copyright & International Trade,
Association of American Publishers, Inc.

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COPYRIGHT TODAY—COPYRIGHT AS IT AFFECTS INSTRUCTIONAL DEVELOPMENT

(Jeanne Masson Douglas*)

(Ms. Douglas' article appears here this month because of its appropriateness to the December theme, "Instructional Development." The regular "Copyright Today" column will resume with the January issue.)

One of the major responsibilities of the instructional developer is that of making instructional materials available in an appropriate medium. Materials are often not useful in their existing forms; they may have to be altered to fit specific course objectives, to accommodate a preferred instructional mode such as independent study or inter-active instruction, or simply to provide multiple copies. Whatever the reasons for wanting to modify commercial instructional media, the copyright issue is unavoidable, and obtaining copyright clearances often becomes the responsibility of the instructional developer.

Having been involved for the last five years in instructional development activities, either in a management role or as a consultant, I have accumulated considerable data related to acquiring copyright clearances. During this time, I have communicated with several publishers, producers, chairmen of national associations and organizations, and even with presidents of private corporations in attempts to obtain permissions to reproduce their materials. The results have been interesting, and at times, surprising.

In my early attempts as a copyright agent, I made use of a form letter. I soon learned that this technique was getting only delayed responses or no response at all. An original letter for each transaction was found to be much more successful. Every letter had two things in common, however: the specification that the media we produced would be used only within our own institution, and that the materials would be used by our students only. (Sometimes phone calls have been necessary to prompt a response but, since I never make a duplication permission agreement except in writing, a written document is ultimately needed.) To demonstrate good faith in complying with the "fair use" principle, I always explain the purpose and effect of the use of the reproduced material, the quantity needed, and the nature of the reproduction.

My respondents have been of an amazing variety. At times, I have been fortunate to deal with someone known as the Rights and Permissions Officer or the Contract and Copyright Officer, or even the Product Development Director. On other occasions, I have been directed to the Public Relations Officer or the

*Jeanne Masson Douglas is director, Educational Resources Center, Reading Area Community College, Reading, Pennsylvania.

Editor-in-Chief. Often, it has been necessary to negotiate with the Vice-President, Executive Vice-President, or the President of a firm. On one occasion, the producer concerned would not communicate except through his lawyer.

Another variation which keeps things interesting is what I have decided to call "passing-the-buck". For example, a New Jersey distributor referred me to a California producer who referred me to a New York photographer. And a midwestern publisher referred me to the copyright holder, who happened to be based in Japan. (Actually, this latter transaction took less time, in terms of number of mail days, than many more localized arrangements.)

As varied as the respondents are the responses themselves. These have ranged from the law firm's "no . . . and furthermore . . ." to the following: "I am happy to grant you permission . . . I will also be pleased to supply lists of other materials that you may wish to consider for your programs . . ." and "I appreciate your courtesy in requesting permission. Thank you for asking. I hope we have helped in designing and developing improvements in your curriculum." One producer scolded, via telephone, "Why did you ask? Why didn't you just go down behind the barn and *do* it?" In extreme contrast to this attitude, however, is that of the publisher who sends along a printed copy of the company's policy statement related to copyright. One New York film producer responded to my letter with a telephone call, explaining that he was willing to grant permission verbally but would not "put it in writing because of possible complications." Again in contrast, a New Jersey publisher responded with a Permission to Reprint form which I had to complete in triplicate. An Illinois media producer responded. "Enclosed is our duplication policy statement to accommodate those making legitimate requests and to inform those duplicating illegally that a policy does exist. Dealers are asked to make positive identification of known illegal duplicators."

A review of some specific examples of clearance policies is helpful. For the sake of clarity, I will categorize by media type.

PRINT MATERIALS

Print ------> Print

A New York publisher granted permission to make 500 copies of a short story for a $12 fee and use of a credit line on each copy.

A New Jersey publisher granted permission to reproduce a series of tests.

A Colorado publisher would not grant permission to duplicate an article because reprints were available at 50¢ each.

Print ------>Non-Print

An Ohio publisher granted permission to copy pages from a dictionary and a thesaurus as slides.

A New York publisher granted permission to convert all the illustrations of a book to slides and the text to tape.

An Illinois manufacturer granted permission to copy as slides all the illustrations in a textbook.

A New Jersey manufacturer granted permission to copy all the illustrations of three of their books.

A California manufacturer provided permission, or sources of permission, by chapter and page of every illustration in their book, a listing consisting of five pages of single-spaced typing.

A national organization granted permission to convert all the illustrations in their book to slides.

NON-PRINT MATERIALS—AUDIO

Disc ------> Cassette

A New York producer's vice-president would not grant permission. In response to a later inquiry, the company's vice-president for copyright granted permission.

A California producer permitted six copies each of 10 recordings.

A New York producer would not grant permission for reasons of "deprivation of royalty."

An Illinois producer allowed two copies only for independent study use.

A Colorado producer allowed one copy only, and that only to protect the original.

Reel ------> Cassette

A New York producer granted permission for a first copy, and charged 40 percent of the initial cost for each additional copy.

A Massachusetts producer of language tapes granted permission to convert an entire course from reel to cassette.

Cassette ------> Cassette

A New York science materials producer and a New York language materials producer allowed the making of one copy to protect the master tape.

An Illinois producer refused permission to duplicate, but agreed to replace damaged tapes for $1.00.

A university's audiovisual production facility allowed one copy of each cassette purchased.

NON-PRINT MATERIALS—VISUAL

Filmstrip ------> Slides

A New York producer granted permission to cut filmstrip and mount the frames as slides, but would not grant permission to duplicate photographically.

A New York producer would not grant permission to duplicate, but offered to produce slides from their filmstrips for $20 per set above the cost of the filmstrips.

A California producer replied that they could not grant permission because the material (regretfully) was in the public domain.

A California college audiovisual production facility would not grant permission.

A Massachusetts producer granted permission to make two slides only from each frame in a filmstrip.

Slides ------> Slides

Illinois, New York, New Jersey, and California producers would not grant permission. One producer did offer to provide multiple copies of sets at reduced cost.

A New York producer agreed to grant permission at 40 percent of the list price of the sets.

NON-PRINT MATERIALS—PROGRAMS

Filmstrip/Record ------> Slide/Cassette

A New York producer replied, "Since it is not for commercial use, do what is best for your purpose."

Slide/Cassette ------> Slide/Cassette

A California producer said "yes," no conditions.

NON-PRINT MATERIALS—TELEVISION

CBS Affiliate Station

Program Director replied, "Go ahead (videotaping off the tube, prime-time) since it is for one-time use and erase the tape after that use."

PBS Affiliate Station

Program Director replied, "Yes. We can't give you permission, but neither can we deny you the right to do it (!) O.K., for one-time use."

In many cases, I have found that permission depends on the type of media being converted. A New York producer, for example, would not allow the duplication of slides, but agreed to converting disc recordings and text to cassette recordings. In other cases, permission would be granted if you were willing to pay the price. In one case, the fee was equal to the cost of the material itself; in another, fees were set at $100 per tape, $100 per filmstrip, and $50 per booklet. Sometimes, on the other hand, arrangements seemed to be more reasonable, such as granting permission to convert transparencies to slides and text to cassette for an entire program, the only condition being that you adopt their text and cite publication information in your reproduction.

It is not easy to draw simple conclusions from these many experiences. Every situation has its unique set of circumstances, and constraints, and will differ as the educational institutions and the commercial suppliers differ. Every transaction must be worked out formally and diplomatically. It often becomes the responsibility of the instructional developer to assure that this is done. Faculty who do not fully understand the complexities of the problem should be provided with inservice programs or other means of becoming aware; the instructional developer will need all the sympathy he can get from his colleagues. Meantime, more publishers and producers are making their media available in a variety of formats. This fact, and new copyright legislation, should result in a less complicated and more satisfying task for the instructional developer charged with acquiring copyright clearances.

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COPYRIGHT TODAY

(Jerome K. Miller)

Authors have become increasingly concerned about the large-scale copying of their works, prompting them to place conspicuous copyright warnings in their books. Author-illustrator Jan Adkins recently added the following warning to one of his books:

We have gone to considerable difficulty and expense to assemble a staff of necromancers, sorcerers, shamans, conjurers, and lawyers to visit nettlesome and mystifying discomforts on any ninny who endeavors to reproduce or transmit this book in any form or by any means, electronic or mechanical, including information storage and retrieval systems without permission from the publisher. Watch yourself!

Toolchest. (Walker, 1973).

QUESTIONS AND ANSWERS

Question: Our school has some old sound filmstrips with the soundtrack on phonograph records. We would like to copy the sound onto cassettes and destroy the records. Is it necessary to seek permission from each producer to do this? If so, how can we get permission from producers who have gone out of business?

Answer 1: This situation frequently arises in discussions relative to copyright. The fact that filmstrips are "old" does not mean that the copyrights on those old filmstrips have expired. The present term of copyright is for an initial period of 28 years, and if renewed in the 28th year, copyright can be extended for an additional 28 years. The fact that a producer allows the filmstrips to go out of print does not detract from the copyright protection afforded them. It must be kept in mind that even if a producer allows materials to go out of print it does not mean that the producer has no need for those materials. For instance, pictures from an old filmstrip which are no longer being distributed might be utilized in a revision of that work. It would be advisable to contact the producer and seek permission to transfer the sound recordings from discs to tapes. Of course, if the producer has gone out of business, such an attempt would be quite difficult unless the copyrights have been assigned to another organization. Even then, that particular information might not be readily available. If an honest attempt is made to contact the producer and nothing results from it, it would seem as though the school has done all which could reasonably be expected of it.

IVAN R. BENDER,
Chairman, Copyright Committee,
Educational Media Producers Council.

Answer 2: Many of the producers of sound filmstrips have been very cooperative in permitting their customers to convert filmstrip soundtracks from phonograph records to cassettes. If the producer has an established policy on this matter, his or her sales representative should be able to answer your question. If there is any doubt about this matter, though, be sure to write for permission before copying.

JKM.

Question: A few years ago the faculty of this vocational-technical school developed an unusual course for our advanced students. We delayed introducing it until we found a suitable textbook. Last winter a new text was published which we considered appropriate to the course. We ordered 60 copies in March for August delivery; the publisher confirmed the order. Two weeks before school started, the publisher advised that the text was out of stock and would be ready in several months.

Since a textbook is essential for this course and no other was available, we either had to drop the course after 55 students had enrolled, or reproduce the book in the school print shop. We chose to honor our commitment to our students. We made offset plates from a sample copy of the book and several teachers worked over the Labor Day weekend to print and bind 60 copies. They were sold through the school bookstore for the cost of the materials.

When the publisher's representative learned of our action, he purchased a copy of the book we printed and advised that we might be sued for copyright violation. We aren't sure where we stand in relation to the law, but we feel morally justified in our action. Please comment on this case.

Answer 1: Because of potential litigation in this matter, the only conclusive decision would have to be a legal decision. However, using the doctrine of "fair use" as a guide, an informal opinion would be that an illegal act has taken place for these reasons: 1) The publisher's (proprietor's) permission was not obtained in advance. 2) Multiple copies were made. 3) The concept of "amount and substantiality" was clearly violated in that the entire work was reproduced. 4) The sales market for the work was somewhat affected.

EUGENE H. WHITE,
Director of Audio-Visual Services,
Los Angeles City Schools.

Answer 2: The action taken by this school was clearly in violation of copyright law, both existing and proposed. While the concern over the late delivery of the textbooks was understandable, there was another approach that might have satisfied both the need for the materials and the observance of the law. A phone call to the publisher, giving an explanation of the circumstances, would probably have resulted in permission to duplicate either the first few chapters or the entire work for a moderate fee. Publishers generally are anxious to rectify any inconvenience caused by late deliveries or out-of-stock orders. The problem is that no one thinks to ask them. The paper shortage, energy crisis, and slow delivery schedules will probably cause more problems of this type in the months to come. It would be well for educators to remember that there is an alternative to unauthorized duplication—ask for permission.

SUSAN ENGELHART,
Staff Director, Copyright and International Trade,
Association of American Publishers, Inc.

QUESTIONS NEEDED

The editor needs additional questions to be answered in this column. The identity of individuals submitting questions will be held in the strictest confidence. Please send all correspondence to Jerome K. Miller, Chairman, AECT Copyright Committee, 1025 Adams Circle, Apt. 2B, Boulder, Colorado 80303.

TESTIMONY OF HOWARD B. HITCHENS, EXECUTIVE DIRECTOR, ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY

Mr. HITCHENS. Thank you for the opportunity, Mr. Chairman.

I represent a relatively small organization but, we think, a key one in our concern with the copyright law that is under consideration. We are about 8,000 strong, and we are technologists, if you will. We are people who are concerned at all levels of education with the introduction of technology into the educational and instructional process. We regard technology, however, as something more than a collection of educational machines and materials. We believe it represents a systematic approach to practical problems that emphasize the application of relevant research in order to seek problem solutions.

The professional in our field can be found in the elementary and secondary schools, in the colleges and universities, in training institutions of all kinds. He is a guy who is perhaps developing instructional materials for accomplishing specific educational objectives for use by teachers in classroom settings or other settings. He may be producing instructional programs over, you might call it, a mass communications medium: Television production, this type of thing. He may be found assisting teachers in selecting materials to meet objec-

tives or evaluating materials or even identifying the long-range objectives, themselves.

Our people are quite concerned with two points in the copyright legislation. First, we have been dealing a great deal with the issue of fair use and how we can take the needs of both the producer of instructional materials and the consumer or user of instructional materials into account.

We feel that we find ourselves in the role of copyright experts quite frequently, in the institutional setting, because we are either a custodian of, or have responsibilities for, the logistical management of instructional materials.

We think that the teachers and media professionals and the librarians create markets for an author's work and give them visibility. Also, in this day of individualized instruction, the so-called open classroom, ungraded schools, and student self-evaluation, the successful educator has to have available a wide range of learning resources in order to be effective.

Therefore, we have adopted a position on what can be considered a relatively small point, which we think serves both groups, the producers and the users. That, in regard to section 107, is that we are concerned with spontaneity. We feel that the previous House and Senate reports which identified spontaneity as an important determinant as to whether or not a use is fair is unfortunate. We feel that the classroom teachers do not—we know they do not—always act individually or at their own volition. We are in an age of specialization now in education and in instruction management just as we are in other segments of our society. Frequently, a media professional is called upon to assist in that decisionmaking process. A teacher does not make the decision alone. A media professional is not classified as a classroom teacher, and sometimes is classified as an administrator. We feel this should not prevent him from playing his role in the effective management of instruction. We are not suggesting a different fair use to be extended to media professionals; we are suggesting that they be allowed at least as much freedom as the teachers and other educational professionals.

We are currently working with other interested groups on this problem and will be happy to try to come up with some language to substitute for that which is currently in the legislation.

The other issue I would like to address is the general question of how we resolve the argument between producers and consumers.

We have spent many hours working with producers in an attempt to work out guidelines that would assist educators in holding up the current copyright law and looking at the laws that are pending. We have come to the conclusion that the best means to solve the problem is developing voluntary licensing agreements between educators and producers. Such agreements would allow a predetermined amount of copying, a kind of copying, or maybe unlimited copying, either for no charge or a predetermined fee. Such an agreement would set the bounds of fair use in advance and would also allow educators to take advantage of the so-called teachable moment.

We are not asking you to establish in legislation a licensing agreement. We think that should be voluntary. We are asking for your

support and encouragement to both sides to sit down and develop licensing agreements.

The remainder of my testimony is submitted, of course, for the record. I hope it would be entered into the record, Mr. Chairman.

Mr. STEINBACH. Mr. Chairman, I next would like to introduce our final witness, Robert F. Hogan, executive secretary of the National Council of Teachers of English.

[The prepared statement of Mr. Hogan follows:]

STATEMENT OF ROBERT F. HOGAN, EXECUTIVE SECRETARY, NATIONAL COUNCIL OF TEACHERS OF ENGLISH

Mr. Chairman and members of the subcommittee: I am Robert F. Hogan, Executive Secretary of the National Council of Teachers of English. The National Council is the world's largest independent organization for teachers of one subject. Its 115 thousand individual, associate, and institutional members and subscribers are drawn from all levels of education, elementary through graduate school. For them, I express our appreciation for this opportunity to submit written and oral testimony to the subcommittee.

Although a substantial majority of this membership consists of classroom teachers, it also includes authors, editors, and publishers. The Council itself is a publisher of seven periodicals and about fifteen books and monographs each year, all protected by copyright. I stress those two facts, on the chance that someone might construe the remarks that follow as threatening to the interests of authors, publishers, and others who have a genuine stake in reasonable protection through copyright. The Council shares that stake.

What chiefly concerns us is, while ensuring the maintenance of reasonable copyright protection, to recognize fully the needs of more than a million elementary classroom teachers who spend up to half their teaching time and effort on language arts and reading, 175 thousand secondary school teachers of English, and, most of all, the 60 million children they teach.

I must confess that I prepared these remarks with a sense of *deja vu*. I've been here before; we've all been here before—teachers, publishers, authors, legislators, and legal counsels for all four groups. We have been locked into this confrontation for nearly as long as the United States was involved in Indochina. I can't be alone in thinking it's time we brought it to conclusion and in hoping we can.

But *deja vu* isn't quite an appropriate phrase. It captures the feeling but fails to describe the situation. It *seems* as though we've been here before, but where we are now is not, on close inspection, where we were in 1963, when the Ad Hoc Committee first gathered its strength.

The feeling of *deja vu* began with the first three paragraphs—lifted from my statement in 1973 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Judiciary Committee. There was no need to alter them. Nothing substantive had changed. Their substance is not greatly different from introductory statements by NCTE representatives at hearings of the Subcommittee of the House Committee on the Judiciary at hearings in late spring and summer, 1965.

Nevertheless, since 1965 we've gained ground and we've lost ground. Among the gains I would count the reduction in minimal statutory damages for an innocent infringement, and the impulse in the proposed statute, as well as in the accompanying report, to clarify the meaning of "fair use." The 1965 House Bill was the first effort to provide legislative sanction to that judicial principle, but it was in such skeletal outline as to scare anyone who trembles before skeletons: "Notwithstanding the provisions of section 106, the fair use of a copyrighted work is not an infringement of copyright" is the entire bone structure of that skeleton. I'm aware of how much the writers of that House Bill felt they were doing; but how little they actually did is revealed in their summary statement of "Highlights of the 1965 Bill for General Revision of the U.S. Copyright Law." Of *fair use* they say, "The bill would add a provision to the statute specifically recognizing the doctrine of fair use, but without any attempt to indicate the application or define the scope of the doctrine."

Granting the landmark nature of this step, I still had the feeling of the World War II Navy enlisted men who heard this announcement: "There will be liberty

for the liberty sections, but no liberty boat." To paraphrase for those who may have missed the "enlisted" experience of World War II, "those who are entitled to, may go ashore on liberty; but there is no way to get there." The present bill goes considerably farther:

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include:

(1) The purpose and character of the use;

(2) The nature of the copyrighted work;

(3) The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) The effect of the use upon the potential market for or value of the copyrighted work.

But while we were gaining ground in the statute, we were losing ground in the accompanying report. During the 1965 hearings, among those who testified on behalf of authors and publishers were two witnesses who presented interlocking testimony: John Hersey, on behalf of the Authors League of America, and Dan Lacy, managing director of the American Book Publishers Council.

Mr. Hersey referred to a hypothetical teacher in a small town in "Montana or Maine or Georgia" who wanted to share with her students Robert Frost's "Stopping By Woods on a Snowy Evening." Since copies were not otherwise available, she made a set for her class. Mr. Hersey went on to say that this was nothing new and that he saw nothing wrong with it. He added, "If there is a suit in the future, I can also assert to you that it will not be because of violation of what we would consider to be fair use, but only because of some abuse." Obviously, Mr. Hersey thought the actions of that teacher were not an abuse.

Later, Mr. Lacy stated,

"In the whole history of copyright law, in all the undoubtedly hundreds of millions of uses of copyrighted material by hundreds of thousands of teachers over many decades, I think it is true, and this is based on rather careful study, that no teacher has ever been sued by a publisher for copyright infringement. 'Fair use' covers an enormous area. Beyond fair use, there has existed a broad margin of safety in which the common good sense of publishers and good faith and good will of teachers have prevented copyright from being any limiting or oppressive factor.

"Teachers would continue under the new law to enjoy all the freedom under the old and have that freedom buttressed and reinforced by the specific authorization by statute of the doctrine of 'fair use' * * *. The present doctrine of fair use is, let the Montana school teacher go unimpeded without opening the door to the major abuse."

Mr. Lacy's concern was that to include in the legislation anything more would either restrict some teachers from making legitimate uses of materials or open the doors for others to make illegitimate uses. However, in the House report to accompany H.R. 4347 under the discussion of "Multiple copies of excerpts" the following statement appears:

"In general, and assuming the other necessary factors are present, the committee agrees that the copying for classroom purposes of extracts or portions, which are not self-contained and which are relatively 'not substantial in length' when compared to the larger, self-contained work from which they are taken, should be considered fair use. Depending on the circumstances, the same may also be true of very short self-contained works such as a four-line poem, a map in a newspaper. * * *"

This statement seems to be much more restrictive than the spirit of the remarks by Mr. Hersey and Mr. Lacy. I refer specifically to the word *very* and the phrase *four-line*. Even the example that Mr. Hersey offered and that Mr. Lacy picked up, Frost's poem, contained sixteen lines.

NCTE s[illegible]gly urges that the following wording be substituted:

"Depen[illegible] on the circumstances and in order to protect spontaneous, creative teaching, the same would also be true for temporary use of short self-contained works such as poems, maps in a newspaper, vocabulary builders from a monthly magazine, essays, and short stories. This should not be construed as permitting

a teacher to make multiple copies of the same work on a repetitive basis or for continued use."

Please understand that this is not a request for an unlimited hunting license for English teachers. Nor is it to say that everything every teacher has done till now with copyrighted materials would be adjudged fair use if it came to trial. We know there have been abuses and have listed examples in previous testimony. If, for example, a school or an entire school system were to manufacture collections of poetry for repeated use without securing permission and paying fees, I would deem that not fair and therefore illegal. Similarly, if schools duplicate consumable materials specifically intended for classroom use and protected by copyright (e.g., answer sheets for published tests or workbook drills), I would deem that not fair and therefore illegal. If either such practice came to suit, and if I were asked to testify because of my position in NCTE and the expertise some might attribute to it, my testimony would be on behalf of the copyright holder.

What we do seek and need is a clearer statement, either in the statute or in the accompanying report, reassuring us that in a spontaneous teaching situation, we may make for one-time use by our students in our classrooms, multiple copies of self-contained short works of literature.

In the absence of that assurance, we must either be less creative than we'd like to be or depend on the "good will, good sense, and good faith" that Mr. Lacy referred to and on the fact that no copyright holder has sued a teacher, so far. However, in 1961 the standard copyright notice for one major publisher was, "All rights reserved—no part of this book, may be reproduced in any form without permission in writing from the publisher, except by a reviewer who wishes to quote brief passages in connection with a review written for inclusion in magazine or newspaper." In 1975 the notice for the same publisher reads, "All rights reserved. No part of this book may be reproduced or transmitted in any form by any means, electronic or mechanical, including photocopying, recording, or any information storage and retrieval system, without permission in writing from the Publisher."

Apart from pointing out a much harder line on the part of at least this publisher, I am compelled to ask what has happened to even the narrowest construction of fair use? Beyond that, what happened to "good will, good sense, and good faith"?

I don't mean here to take unfair advantage of Mr. Hersey or Mr. Lacy. I don't know of any writers or publishers I respect more. I think my references to their statements are accurate and fair to the contexts which surround them.

But as all those parties with a stake in a new copyright law have expanded in number and grouped and regrouped, as lines of special interest have been drawn and redrawn, English teachers and, even more, their students, have lost—particularly if they're restricted to one-time copying of four-line poems, which is to say one line less than a single limerick, ten lines less than one sonnet.

The ironic thing in all this is that ten years of argument over the content and substance of a new copyright law may have moved us no closer to a satisfying law, but may also have made adversaries of three interdependent groups: teachers of language and literature, those who use language best, and those who publish the users of language for the teachers. Despite soothing reassurances that we are all still friends, English teachers cannot escape observing the erosion of relationships, the erosion of the earlier concepts of "good will, good sense, and good faith." We seek assurance in the statute or in the accompanying report that the best and most imaginative among us are not outlaws or bootleggers.

TESTIMONY OF ROBERT F. HOGAN, EXECUTIVE SECRETARY, NATIONAL COUNCIL OF TEACHERS OF ENGLISH

Mr. HOGAN. Mr. Chairman, members of the subcommittee, my name is Robert F. Hogan, executive secretary of the National Council of Teachers of English. There is an ironic justice in that, because in my written testimony on page 3, it is that the egregious typographical error occurs. I would be grateful if you would compensate for my failure and make substantially read substantiality; that is what I meant.

The focus of my attention is fair use, this morning. We are, of course,

interested in the entire statute and are pleased to have a seat on the ad hoc committee. We think, as classroom teachers of English, we have a particular stake in fair use.

And in my written remarks, I note an erosion of where we were 10 years ago, from both Mr. Hersey, on behalf of the Authors League, and Mr. Lacy, on behalf of the American Book Publishers Council—they told us we could do what we were doing all the time; it was all right. They used the example of a teacher who wanted to make a copy of Frost's Stopping By Woods on a Snowy Evening.

Mr. KASTENMEIER. I regret very much doing so; I am going to ask you to withhold making the balance of your statement. We do have a vote on at this very moment.

Accordingly, the subcommittee will recess for a period of about 10 to 15 minutes, at which time we will return to Mr. Hogan's statement, and then be able to have a colloquy with the rest of the witnesses. We will recess until approximately 10 minutes to 11.

[A brief recess is taken.]

Mr. KASTENMEIER. The committee will come to order.

When we recessed we were about to hear Mr. Robert F. Hogan, executive secretary, National Council of Teachers of English.

Mr. Hogan, have you had an opportunity to reconsider your statement?

Mr. HOGAN. Perhaps to shorten it. The nub of it I think is on page 5, and I am citing there the wording from the 1966 House report. The concluding sentence at the top—depending on the circumstances, the same may also be true of very short self-contained works, such as a four line poem, et cetera. It is the term very short, and the illustration of four lines that troubled me—one line less than a limerick; 10 lines less than a sonnet. The word "may" is interesting, too. As far as I know, based upon Mr. Lacy's testimony, no teacher has ever been tried under fair use. What it means I do not know.

We offered to substitute something like the longer paragraph, about a third of the way down the page.

If I could depart from these remarks entirely. I think through an anecdote I probably could tell you more than the prepared remarks tell you—I recall a meeting when we were going to Athens, Ga. 8 years ago. A friend of mine and a stranger got into a cab together, and driving into town, after introductions all around, "What do you do and where do you do it," there was a lull in the conversation. I said to the cab driver, "Tell me about the liquor laws in Athens." He said, "This is a dry county. You cannot get a drink any place." Then the stranger got out of the car. Then he said, "Of course, there are beer and wine places around. They are hard to find, but you can get to them." The second person got out and I was left alone in the cab. As we were pulling up to my motel, he said, "Of course there are bootleggers around here to." I said, "Really?" He said, "Yes." I said, "Who would know where they are." He said, "Any of the bellhops in the hotel would know." As we came to a full stop, he said, "or a cab driver would know."

It seems to me it was remarkable, the balance of forces in Athens, Ga.; the fundamentalists wanted a dry county, and they had one. The libertarians wanted a drink, and they could get one. Nobody bothered the bootleggers.

I guess what I would like under statutory protection is more protection and higher status than the bootlegger in Athens, Ga. And it ought to be statutory protection.

I dislike disagreeing with the previous speaker. I do not have a great deal of faith in voluntary agreements. What we would like is protection under the law.

Thank you.

Mr. STEINBACH. We would be happy to entertain any questions that you might have.

Mr. KASTENMEIER. In connection with the remarks just made by Mr. Hogan, I think as we had tried to do years ago, we should, whatever we finally want the law to state, the statutory language should presume enforcement, and resort to what is offered therein. We should not write a law which it is anticipated will not be enforced, and which part of the defense for it is that there will be forebearance on the part of those entitled to the rights under the law.

Rather, we should presume that the law, to the extent that it contains rights and rights of enforcement will be so enforced.

I have just a few questions, then I will yield to my colleagues

My first question is addressed to Mr. Raskind. I appreciate why you oppose the law, at least the bill as it is proposed in your statement.

In terms of your understanding of what the present law is, case law or present statute, do you find that it is acceptable to the educational user of copyrighted material, granted the many parts of the law in terms of its effect has not been obviously codified or made clear through case law? As you presently understand it, is it acceptable prior to considertion of this bill?

Mr. RASKIND. Mr. Chairman, my answer to that would be as follows. My understanding does not comport with much of the understanding of people in this room. That is the difficulty. So what I would say, the *Williams & Wilkins*' opinion as affirmed by an equally divided Supreme Court is a starting point. It is the recognition that fair use exists in this context. That should be the base line.

We ought to have a statute that would take away the pressure of this varying understanding among the various people in this room. So I, as a teacher, if something comes up in the classroom discussion, I might find that day or the next day that there is an article in a contemporary news magazine, as a colleague of mine did a month ago—he asked me, and I said to try to get permission from them. They wrote back and said $150. He was going to use it a month away, and it ended up he did not use it. The upshot of that is the educational classroom hour then was deprived of that material.

The publisher got zero revenue. If the classroom use had been permitted, the students would have gotten a photocopy showing that journal. They would then have known that the journal contains that material. For students, when they are students of law, materials are expensive. They would not be able to subscribe to a $200 or a $300 a year service. They do not need it.

We ask for a statutory definition of fair use that permits what exists. It is recognized—*Williams & Wilkins*—in 1909 it was recognized that scholars could sit in a library doing research and hand-copy, without violating the statute, could hand-copy an article.

All we ask is that contemporary technology permit the same thing.

Mr. ROSENFIELD. May I address myself to that?

Mr. KASTENMEIER. Indeed. To restate the question, it is to say to the extent that the present law is discernible, do you think it is a fair balancing of interest—the interest you represent, or the interest of proprietors?

Mr. ROSENFIELD. I would say "No" to both your original phrasing, and to your subsequent phrasing. It is not at all a fair balance.

Let me take the second first.

It is not a fair balance because our main point is that there is a basic difference between commercial and noncommercial, or nonprofit uses. Fair use has been developed 98 percent in the context of commercial uses—a perfectly wise and sound rule. By being put into the context of commercial rivalries and competition, the character of the nonprofit, educational, and library use is perverted.

To your first question. Think—here, in Mr. Freitag, you have a head of a department of a small high school. He is a sophisticated person. He has people on his staff who are less sophisticated. *Williams & Wilkins* represents the judgment of 14 judges, if you include the trial judge as one of them. They split exactly down the middle, seven to seven. If they could not make up their minds as to what fair use is, how can you get his teacher or for that matter the law school teacher to be able to make a judgment.

What we are saying, Mr. Chairman, is that your last report and the Senate committee report both say that there is no intention to change fair use. We do not know what it is, and nobody knows what it is. You get 5 lawyers in a room on fair use, and you have 15 answers.

We are saying that that does not make sense for a teacher.

Mr. KASTENMEIER. Both you and Mr. Raskind are calling for an explicit statutory definition of fair use, which will meet your needs.

Mr. ROSENFIELD. Yes, whether it is in terms of a limited educational exemption or some other form the committee can devise that is superior. The answer is "Yes."

Mr. KASTENMEIER. Yes?

Mr. RASKIND. If I may, the statutory definition, as in the present bills, section 107, should not be undercut, as it is, in my opinion, by section 108(g) (1) and (2), and by some of the damage provisions. We would urge that as well.

Mr. KASTENMEIER. I understand.

My second question is directed, I think, to Mr. Freitag. That is, you raise the question in the context of the present law, requiring reassertion of the right at the end of 28 years.

I would want you—my question is, why do you feel that that is useful to you? Are you making the point that there is an interest that educators have in finding material or having access to it in the public domain?

Mr. FREITAG. The original constitutional purpose was to get the material into the public domain. Anything that would serve to prohibit that, to further prolong the availability of material, it seems to us, does not advantage the public domain in any way.

If I may allow an extremely personal point of view, I would like to see 28 years reduced. I had some students that made their livelihood by designing covers for books, things of that nature, magazines and so

on. Their protection under law is far less than copyright provision at the present time. It seems to me their livelihood is very closely dependent upon their ability to develop their creativity and sell it. Their protection is far less. There is great inequity along the line as far as those kinds of protections—patent law, for one.

Our feeling that with the 28-year renewal, it has permitted 85 percent of the material to go into the public domain after the first 28 years. We would surely hold the line there.

Mr. KASTENMEIER. The purpose of the question is to determine whether there really is an interest in obtaining material—utility, a public interest in obtaining material earlier than the expiration of the life plus 50 or 75 years proposed in this bill. Whether there is a distinction between types of material, that which is valuable and for which a greater term or renewal term ought to be sought, and that which is not available to the original publisher, producer, creator, that also lapses into the public domain at an earlier time.

Mr. FREITAG. The 28 plus 28 is very cut and clean. The life of the author plus 50 is very difficult. It is hard to see how one could determine that the copyright guarantee has expired.

Mr. KASTENMEIER. Thank you.

The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you, Mr. Chairman.

I would like to address this question really to all of you or to any one of you.

Is the thrust of your remarks directed against the payments or your inability to get access to material? Which is more important? Do you object to making any payments, or unreasonable payments, or is it the difficulty in getting access?

Mr. RASKIND. I would say, Mr. Railsback, our position is, in principle, there is an area of usage where payments do not begin, and that has been recognized at the outset, for the scholar to hand-copy a work.

Our second point is, we cannot do, as teachers and researchers, what we must do if we are always under the threat or clout or have to bear the full burden of being the party defendant in an infringement action. We need availability with some clarity under the statute.

Mr. RAILSBACK. You would, I take it, differentiate between a noncommercial extensive reproduction and the making of a single copy.

In other words, you made a distinction between noncommercial and commercial. But I take it that you would not carry that to a point where you would have extensive, multiple noncommercial reproductions. Or would you?

Mr. ROSENFIELD. Mr. Railsback, the answer is fundamentally that you are correct as to our understanding, but let me back up immediately to the term "extensive." We do not, for example, think—in answer to Mr. Pattison's question to the Department of Justice—that we ought to have 1,000 copies. The Department of Justice went further than we. We do think if Mr. Freitag or Mr. Hogan or Mr. Raskind have a class of 30, 40, 60, or 100, the class ought to have the copies—thus, it is a limited copying.

Mr. RAILSBACK. Would you feel the same way if copies were to be available at a reasonable amount and easily accessible?

Mr. ROSENFIELD. No; because then you would be destroying fair use altogether. The thrust of your remark, if you would permit me to put

it this way goes to whether there is to be fair use at all, or whether you are to have a payment system which overrides everything and forbids any fair use. Our answer to that question is that to the extent that fair use or a limited educational exemption applies, there should be no payment. Beyond that, payment.

In other words, we do not believe, in Mr. Pattison's case, that we ought to have the right to make 1,000 copies, just for the purpose of copying, per se.

Mr. RAILSBACK. Especially if copies are available from the owner at a reasonable figure.

Mr. ROSENFIELD. Again, we are talking copies of what——

Mr. RAILSBACK. We are talking about educational materials.

Mr. ROSENFIELD. Let me be specific in the context.

Suppose the teacher reads something the night before class or 2 days before class. Getting copies is sometimes a 6-month job, assuming that you can get them, and rarely less than a month or two. By then the teachable moment would have disappeared. So there is no point in bringing it up.

Mr. RAILSBACK. You are directing your remarks, now, to accessibility.

Mr. ROSENFIELD. Accessibility in some respects without cost; in some respects beyond fair use or the limited educational exemption with cost. Accessibility is our principal objective.

Mr. RAILSBACK. Mr. Freitag, you objected, I think, to section (2), which might have been subsection (1).

How would you separate a community storefront reception, or a reception at a dormitory from general public viewing?

Mr. FREITAG. Maybe I can do it by alluding to something that is more real in my immediate situation, although I would be glad to get specific in your question.

We have a language lab in our school. Some years ago, when language labs became popular, they involved a $60,000 outlay, conduits underneath the floor, air-conditioning, and so on. Everything was very space-age. The headsets and tapes and all that sort of thing. We never bought into that in my district. We were far too pragmatic to be charmed by all that mechanism. What we bought was a wireless system. The sender goes out from a simple tape recorder or anything; the kid has a headset, wireless receiver on top. We are in business in a very few seconds. It is a small item. We use it 5 or 6 minutes, then you are done; put it aside.

We have now abandoned that to go to cassettes for several reasons. No. 1, we are a school of 2,800. Of those 2,800 totally elective programs, some 1,400 are taking French, German, and Spanish. We are now going to cassette usage in our library. We have what we call self-instruction rooms. The students sit down with a cassette, plug in the machine, listen to whatever they need, and go. Very few students can get to that library because of time constraints—all their sports involvements, things like that.

We dealt with a publisher in New York to get permission to copy the teacher tapes onto cassettes and use a rapid cassette duplicator. Students bring in their blanks, pop it on the machine, and in 1½ minutes they have an hour's worth of taped material which is coordinated to the text. They take it home and there use their machine.

Mr. RAILSBACK. You are not suggesting that we expand to really accomplish your purpose by also permitting general public viewing?

Mr. FREITAG. The thrust is to be able to allow the educational material to be where the student is. I frankly do not care if my students listen to tapes while they are washing dishes for mom at night.

Mr. RAILSBACK. Do you all feel the same way?

Mr. FREITAG. There is another part to your question. I would like to get at the paying part. Again, allow a personal example that is more close to me.

In Pennsylvania we have an act, 372, that says any field trips conducted by the public schools, the parochial schools in our district must be offered the same opportunity to participate in the field trip—not at the same time, necessarily, but an equal opportunity.

I do not wish to argue the merits, intent, or anything else. I just want to mention the effect. The effect is that we have eliminated field trips because of the cost factor being accordionlike in nature. There is no way to budget it. The budget is really the issue. Everything else I think is begging the question—in an age when we are saying we have to take the child out of the classroom, take him to the resources in the community that are immediately at hand, because if budgetary considerations are being expanded in a way that has been difficult to deal with, we have nothing. It could very well happen that the budget, which is one pie, would have to be sliced that many more ways. The result would be nothing. We would be back to the old Latin classroom where we have the book memorized, those couple of paragraphs, where the teacher would be frustrated in his attempt to bring in things that really turn on students.

Mr. RAILSBACK. Professor Raskind, may I ask you to elaborate a little on your objection to section 108(g).

Mr. RASKIND. Congressman Railsback, I would call your attention to page 4 of my statement, and our objections are with regard to (g)(1) of section 108—appears the phrase concerted reproduction; in (g)(2) there is systematic reproduction. As the Senate report recognized, our position is that the legislative history can give a precise definition to that. So we urge that the difficult rule of thrusting upon the courts a serious interpretive problem that would endlessly engage the usage that it not be enacted.

Mr. RAILSBACK. Thank you.

That is all I have, Mr. Chairman.

Mr. KASTENMEIER. Mr. Danielson.

Mr. DANIELSON. Mr. Steinbach, in your brief opening presentation, you included language to the effect, whether you read it or not, at the top of the second paragraph—although this is the fundamental ad hoc position, the interest of each constituent group varies.

I would like to ask you this. Are there any fundamental differences, any fundamental conflicts of interest that have not been resolved between your constituent groups. I realize there are some.

One of you like one aspect a little bit, and then the others. Is there any language you agreed on which would be acceptable to your entire group?

Mr. STEINBACH. I would like our counsel to respond to that.

Mr. ROSENFIELD. There are eight fundamental ad hoc positions. Eight positions have been articulated by the group as a whole.

Mr. DANIELSON. The group as joint.

Mr. ROSENFIELD. Joint, with some groups being less tied to any one than others. Perhaps it would be helpful to you and the committee very quickly to state those eight positions.

First: The limited educational exemption which has been discussed as an expansion of the not-for-profit.

Second: The clarification of fair use, as has been discussed.

Third: The opposition to life plus 50.

Fourth: The waiver of statutory damages for innocent infringers.

Fifth: The library photocopying situation, which was discussed yesterday and to which Mr. Railsback just referred, the opposition to 108(g).

Sixth: As Mr. Steinbach indicated earlier, that instructional television, not public broadcasting but instructional television, was to be treated as school activity.

Seventh: The opposition to a clearinghouse.

Eighth: That input into a computer not be infringement for the period of the study by the National Commission on Technological Uses, which this committee approved last time, but that output be paid for under the normal rules of the law.

Mr. DANIELSON. On those eight positions, all of your components of your ad hoc group are in accord. Is that correct?

Mr. ROSENFIELD. No. This is—a majority are in accord on that.

Mr. DANIELSON. I am asking this for a very specific reason. We are only in our fourth day of hearings. It is apparent that it is never going to be possible to bring all the different interests under consensus in a copyright bill, let alone under sections 107 and 108.

If your group working together with eight components is unable to come to agreement on your own, little, narrow interests of 107 and 108, why obviously we are going to have to render a Solomon's judgment pretty soon and jut cut it down the middle.

Mr. ROSENFIELD. Mr. Danielson, on 107 and 108, there is complete agreement.

Mr. DANIELSON. On these eight points, even your little group here, which is of common interest, could not seem to get together.

Mr. ROSENFIELD. I do not think that is so. I think some of the groups would give different priorities to different things. For example, there are some in our group who are not especially interested in one or another.

Mr. DANIELSON. I do not care about enthusiasm. I am wondering about fundamental differences.

Mr. ROSENFIELD. Fundamentally there is agreement within the group.

Mr. DANIELSON. Thank you.

The type of materials that you gentlemen have referred to, as I understand it, includes technical journals, but it also includes current periodicals, news magazines, literature, almost anything that comes under the heading of a copyright—any copyrightable material.

Am I right in that?

Mr. RASKIND. That is correct.

Mr. DANIELSON. You are concerned about items in which the incentive is the writing of the material and the sale of copies by the author as a profitmaking operation as well as those journals which apparently

are fundamentally interested in disseminating technical knowledge, the technical journals. You are interested in all of these fields.

What is limited about the limited educational use to which you referred?

Mr. ROSENFIELD. Mr. Chairman——

Mr. DANIELSON. Where does the limit come in?

Mr. ROSENFIELD. First of all, if you would be kind enough to look at the document——

Mr. DANIELSON. I will look at it.

Mr. ROSENFIELD. First of all, we are not asking for the right to publish whole copies of everything that is available in copyright. For example, we are not asking for the right to produce things which are destroyed in the use—as witness, workbook exercises, standardized tests.

Mr. DANIELSON. Consumables.

Mr. ROSENFIELD. That is right.

Second, we are not asking, and vigorously oppose, the right of any school or library or anybody else to copy for the purpose of compiling a new book. In other words, we do not want our people to go in competition by publishing a new book.

Mr. DANIELSON. On a duplicate of an old one.

Mr. ROSENFIELD. Except for a given use, no other use, and certainly not for sale.

Third, we are asking only for brief excerpts. We are not asking for the entire work. We are not asking, for example, for the right to copy "Gone With the Wind."

Mr. DANIELSON. Except there are exceptions that have been stated here today, such as a map, I believe.

Mr. ROSENFIELD. A short work.

In other words, what we are saying is a short, self-contained work.

Mr. RASKIND. In the context, if I may, Mr. Danielson, draw your attention respectfully to page 6 of my statement, second paragraph—we do not seek the right to engage in multiple copying out of the context of research and teaching; that is the protection.

Mr. ROSENFIELD. All for noncommercial use, for scholarship and teaching use.

Mr. DANIELSON. To keep it in the field of education and research?

Mr. ROSENFIELD. Precisely. That brings me back to Mr. Railsback's comment. We are not asking to make available things for the public as a whole. This is within the limited context of the teaching or research.

Mr. DANIELSON. Thank you very much. Yes, sir?

Mr. WIGREN. May I say for the record, I think one of the ways we may distinguish the two, in answer to both of your questions: If we use the word systematic instructional activities, just as we have done in the case of instructional television. We are not asking for the world, we are asking for materials in the context of systematic use for instructional activities.

Mr. DANIELSON. I yield back the balance of my time.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Thank you, Mr. Chairman. At the outset, I want to apologize to our distinguished witnesses concerning my own lack of knowledge with regard to this complicated field. At best, I am getting

my feet wet. If I ask questions which are overly simplistic, please bear with me.

I am still grappling with the concept of fair use. I think I can overcome that, and for purposes of my question, I assume that there is room in the law for some fair use of a copyrighted work. Now, I am beyond that, to the point of people in your business, educators or nonprofit institutions; and I understood that there is no difference in treatment between materials which are prepared essentially for your market. It is one thing to make a casual copy of a copyrighted work which is intended for general commercial distribution. I would regard that on a casual, one-time basis for instructional purposes to be fair. It is another matter to reproduce material which is copyrighted, and which was intended to be used and sold to nonprofit institutions for educational purposes. Is there any substance for that differentiation?

Mr. RASKIND. The paradox is the kind of people that are the users. If I am dealing with something in a course in Federal income taxation that has a narrow issue of income distribution, there may be a page in Samuelson's "Principles of Economics" that will illuminate that for the student. The law student is not about to buy a $12 or $14 or $16 book for one or two pages. The choice is that this material almost exclusively goes to consumers that are not potential subscribers or purchasers. This is how we see it.

Mr. WIGGINS. I understand the problem, although I would think perhaps that is what libraries are for; so that a student would not have to purchase a work if he wanted to refer to a citation.

Mr. RASKIND. On occasion, if more than a page or a short excerpt is used, I would ask the library to buy some copies and then put it on reserve. That is a universal practice.

Mr. WIGGINS. The draft language you have suggested, however, really does not distinguish between the kind of material I am talking about, that is instructional material, I am wondering about the wisdom of proceeding with that kind of a different treatment.

Mr. FREITAG. Congressman, we have school subscriptions to Time magazine at our high school that are ordered for the students in large quantity for the social studies class. Let us say, at the point that Der Spiegel magazine, which is its counterpart from Germany, and talks about a kidnaping in Germany, that I want to compare with my German 4 class the report, and the substance of the report, with that which was reported in Time. The likelihood is, the span of time is 4 or 5 weeks before I could put those two items together, and we subscribe to Der Spiegel from Germany. I have no access to those copies that were distributed to the students, and I could not go on the market to get that from the market stands. So I would take the article, which is likely a column and a half in that Time magazine, and put it together with copies of Der Spiegel, and put it out in front of the students and do that.

Mr. WIGGINS. You are drawing the line based upon the use—I am talking about the intended purpose. Spiegel and Time are not intended primarily for instructional purposes.

Mr. FREITAG. Those Time magazines that come to us are intended for student class use.

Mr. WIGGINS. Time publishes the magazine for purposes other than classroom purposes. Of course, it may be used for that purpose. I am

not talking about the use so much as the intent in the publication. You have casebooks for example, Professor, and it seems to me that those casebooks are prepared for your use almost exclusively; and that is the only market that the author has. If you erode that market, it is really immaterial whether you are profit or nonprofit, because he caters only to that market.

Mr. RASKIND. The students do buy the casebooks, and our membership of the 6,000 law teachers includes people who do get substantial royalties. There is recognition that the main purpose in publishing is to transmit one's ideas, and to get the nonpecuniary status of recognition, and so on. We do not undercut the casebook. Each of us assigns a casebook, and we use that. We are talking about the materials that are so broad and that are available outside the casebooks. We are not undercutting.

Mr. WIGGINS. You are recognizing, in a sense, that some published works are published with the purpose and intent of being used for instructional material. It does not matter whether it is used by a nonprofit institution or not. The fact is, it is intended to be instructional material. The only profit that the author makes is in the market.

Mr. ROSENFIELD. Mr. Wiggins, let me give you an example specifically so we can get to something in the nature of your law casebook. Let us take a biology textbook. It has a picture of a frog. Each one in the class has bought—either the school or the students—the book; they have it in front of them. They want to mark this picture to show certain things. There are a variety of ways of doing this. You can take a machine which does not reproduce this permanently, but puts it on the wall. Nobody can mark on that as the teacher is talking. You can make a Xerox or other kind of a copy—in deference to Xerox, we will say a photocopy.

Mr. WIGGINS. Of a frog?

Mr. ROSENFIELD. Of the picture of the frog in the biology textbook—and then, as the teacher is talking, the student will mark up some things so that he or she can understand it better and study it. Notice, our proposal says brief excerpts which are not substantial in length in proportion to their source. What good is it to the publisher to forbid that biology teacher in the laboratory from running off 25 copies of that diagram or that picture from books that everybody has, but they do not want to deface, so that they then can play with it as they work on it? And what we are suggesting to you is that we do not want to copy that whole book. It would be absurd for us to copy it. We may want to copy the diagram.

Mr. RAILSBACK. Would you yield?

Mr. WIGGINS. I yield.

Mr. RAILSBACK. Let me just ask you; does not section 107 protect you now?

Mr. ROSENFIELD. Frankly, we do not know. We do not know, and the answer is that the Supreme Court did not know, the Court of Claims did not know, and in part the difficulty is that the language of the fair use provision is couched in economic terms. We are not involved in an economic competitive picture.

Mr. RAILSBACK. Let me just suggest to you, after reading section 107, it does not just deal with economic use. The four factors to be considered: (1) The purposes and character of the use, (2) the nature of

the copyrighted work, (3) the amount and substantiality, and (4) then the effect upon the—what the fourth one does, the other three do not.

Mr. ROSENFIELD. The report of this committee said the fourth was the principal one.

Mr. RAILSBACK. That is not our report.

Mr. ROSENFIELD. This is the report of the Senate committee.

Mr. RAILSBACK. Do not pay any attention to the Senate.

Mr. ROSENFIELD. May I make one more, one more observation before I yield to my colleague? We have had meetings with the various other groups involved with this from the other side, and invariably they say to us, if the thing that you want to copy represents a major expenditure cost for us, then the answer is no; so that it is not quite as simple as looking at this. Our concern comes from the fact that we have been told in certain major instances that we cannot do it. If you tell them we can do it, it may make a difference.

Mr. WIGGINS. I am just trying to flush out the wisdom of an idea here. I gather from this interest that this is not a very good idea, to try to create a special rule with respect to instructional materials. Is that a fair consensus?

Mr. ROSENFIELD. In effect, that is what we are asking for. We are asking for a special rule for instructional materials, with research and scholarship included. We are saying that we think that we are in the public interest, different from the commercial community. That is why we have submitted to you a proposal that would make a different rule, precisely as you have said.

Mr. WIGGINS. To the authors of works intended for instructional use, you are the commercial community.

Mr. RASKIND. We really seek the function rather than the materials. It troubles me a bit, if I understand you correctly, Congressman Wiggins. We do not seek to label materials. For example, to get back to my example of copying a multi-volume service, say, in the tax field, in a tax course, that was designed for research purposes, it has interpretative materials. To take a copy and put it in the hand of a student may illuminate a class hour. By doing so, A, we are not taking instructional materials from copyright. We would not do that with a case book. By and large, the issue is not the material; it is the function for which it is used, and it is material that very frequently, if not always, is not designed for instructional use that we seek to enrich the classroom.

Mr. WIGGINS. You have been helpful to me. I will not abandon this entirely. But, I will want to think about it some more.

Mr. WIGREN. It would seem to me we are in the position of creating markets for that author. If we take the small excerpt and quote it for class use, and even duplicate it so youngsters may see this and read it and say, gee, I would like to read the whole book, we create interest in these kinds of materials. So I think we in a way are really advance men or salesmen, in a sense, for books of this kind that youngsters then would want to have in their own libraries as they grow older.

Mr. WIGGINS. You are the wrong one making the argument. The author of the book should be making that argument.

Mr. WIGREN. Many of them do. They are not as much interested in the money that they get from the work as they are in the idea that their ideas are being used.

Mr. WIGGINS. I will listen carefully when the authors come up.

Mr. ROSENFIELD. Some of the authors in *Williams & Wilkins* said they were more interested in distribution.

Mr. RASKIND. One of the large commercial publishers of the Federal Tax Service gives our law school, and any law school in the United States, that ask, one set for every 10 students, on the theory that if you allow the library to have these free, since we cannot afford to buy them, the students will get used to them while they are students. When they get out and practice, there is a recognition there.

Mr. WIGGINS. I understand that there is truth in what you say.

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Thank you, Mr. Chairman. I wonder if anyone who chooses would respond to the reproduction of music. We are going to have testimony here later on, and the Music Publishers Association says widespread unauthorized photoduplication of our music could sap the lifeblood of our business; making the familiar argument that multiple copies for a band or orchestra in its school erodes their business. Who would want to respond to that? There are a few people in this room that have a slight interest in this matter.

Mr. WIGREN. Unfortunately, the Music Educators National Conference are not here today, and I cannot respond. Let me say in general, I think their position would be that certainly, there ought to be some opportunity, in the case of music, for youngsters to be able to listen to themselves, to make a tape of their performance, so that they can listen for self-evaluation purposes. This certainly ought to be allowed. Certainly, they are not asking for permission to use materials and have them in an auditorium situation, where people are charged admission. I think they have some very unique kinds of concerns that they will be expressing to you. I know this whole matter is very important to school people right now; the business of being able to evaluate your own performance, listen to yourself.

Mr. DRINAN. That is not the point I was asking.

Mr. WIGREN. It is the use of music materials.

Mr. DRINAN. Under any exemption, you people are saying that a part or whole of short works can be produced; and it should seem to me that a teacher for a band, under an exemption here, could quite properly, I should think, reproduce that, and the band will play it, and the traditional royalty that goes to the composer simply will not be paid. What is the answer to it? Is that the ultimate intention or effect of the exemption that is being sought?

Mr. WIGREN. Again, I think the music educators would have to answer this. I think they would say they simply do not want to denigrate any concern of that type on the part of the music publisher. In fact, I think they have been very closely working with them.

Mr. DRINAN. Professor Raskind, did you want to comment?

Mr. RASKIND. I think that is outside the scope of what I would consider, and I think our group would consider, to be fair use. That is not educational if the band is playing in concert. They are not learning how to play, and I think that is an improper taking of the proprietor's rights, what we are talking about. If they are learning about fugues, and there is some music about the fugue that would be instructive for classroom purposes, some of that may be taken, but not for a performance.

Mr. DRINAN. If that is outside the scope, I am sure the music publishers will be happy to hear that.

Let me shift to authors. Several authors earn a major portion of their income by licensing the reproduction of their poems or articles or short stories for anthologies. They fear, and testimony will be given later this morning—they fear if a teacher, without paying the usual small fees that go toward anthology, if a teacher reproduces for learning purposes, then the market for such collections of short stories or poems will be eroded.

Mr. FREITAG. I would like to say, I perceive right away the use of that kind of thing for me, and I hope the exemption would include it. There is a time when some songs are also viewed as poems in one language or another, several that are used in class; and if I find an American version of that poem that strikes me as being insightful to the student, and make copies for them and put it alongside the German version, and we start to look at the adequacy of one language over another—which is more beautiful, which says something that the other cannot possibly say—I would hope that the exemption would continue to give me the right to do that for a short work.

Mr. DRINAN. How about the individual author who otherwise, except for the exemption, would be getting a small fee, and that is the basis of the copyright privilege; that it is in the Constitution, according to their argument that really you have not responded to? Their argument is, this little fee I get rewards my creativity; and this exemption, even for nonprofit or religious groups, should not take away that which the Constitution gives me.

Mr. FREITAG. I perceive two possibilities. Number one, the published item might occur in a cultural workbook, which I can buy for the department, and then do; or number two, I would have to go some kind of fee route, which in all likelihood I would suspect would mean I would have to decline using it.

Mr. DRINAN. That is no answer. You are saying, we will not give him any money. What does this copyright mean to him? You have just taken the copyright away.

Mr. FREITAG. I thought I was speaking to the exemption for educational purposes.

Mr. DRINAN. You keep asserting that it is good because it is good. It is not good for the owner of the copyright.

Mr. ROSENFIELD. The answer is it would not be used. The result is, that neither the students nor the author profit. That is the real explanation of this. When Mr. Frost read his poem at Mr. Kennedy's inauguration, the next day every school in America turned to Frost's poems. If they had had to buy the Frost poems first of all, they would have to buy the whole set. They do not sell one volume. If they had to buy them, they would not have used them. Mr. Frost would not have gotten anything. The students of America, would not have been enriched by the Frost poetry. Who would have gained in that instance? Neither Frost nor the students.

Mr. DRINAN. Are you telling me that they just went and reproduced the poems of Robert Frost without buying the book, and without giving him the copyright?

Mr. ROSENFIELD. That is right. Schools around the country took the poem and studied it the next day.

Mr. DRINAN. Just that one poem?

Mr. ROSENFIELD. Either that or one other poem, but not the Frost volumes. They may have taken another poem to show the beauty of the Frost style. I am trying to meet your point head on; I hope I am.

Mr. DRINAN. You are not doing very well.

Mr. ROSENFIELD. Let me try again. You are asking, what about the royalty to the author? The answer is, he would have gotten no royalty anyway. It would not have been used.

Mr. HOGAN. I recently had the chance to serve as an advisory editor for a high school/junior high school anthology series. There are a number of new poems in those anthologies. As I recall, the permission fees of those across the board were about a quarter of a million dollars. In most of the new poems that find themselves in anthologies, to be honest with you, Father, were probably Xeroxed and tried out in classes here and there, to see if they would be satisfactory. And having been found that they were, the authors are now making money they would not have otherwise.

Mr. DRINAN. If you carried your exemption through, that quarter of a million dollars would never get to the authors. You have trapped yourself. Come on—you are saying that schoolteachers advertise these poems. Pretty soon, people say, that is a nice poem; and under your logic, this poem now will make it into the anthology, but there will not be any royalty fee.

Mr. HOGAN. I think, if I recall correctly, we were saying one of the things we agreed on is not making domestic anthologies available.

Mr. DRINAN. I am all for the diffusion of knowledge. But there are a lot of authors and composers out there. They are going to testify. I just wanted you to meet the argument as head on as you can. You want the diffusion of knowledge. They want the same thing, but with their own particular, constitutionally protected rights guaranteed.

Mr. FREITAG. Mr. Drinan, I kind of sense the presumption that we really wanted to do all this duplication. As a teacher, I really do not.

Mr. DRINAN. I used to be in the business. I had that temptation all the time. Right, Professor Raskind? I did as much as I could.

Mr. FREITAG. Temptation aside, what I do not have is the time to go through all that, and I go to the Xerox and run it off, and have it all done. There is a lot of ticky-tacky I can do without. I also do get on the phone and talk to the publisher, and say, what is lacking in this edition is—cannot we do something about it? Sure enough, I can say with some success that revisions have incorporated our ideas, and we bought this edition and stopped having to go out and do it on our own. I think a very valid case can be made for trying out in the classroom what does work. Perhaps under an exemption, we can eventually effect its inclusion in the textbook which we really choose to buy, workbook or so on.

Mr. DRINAN. That is really no answer to say, let us try it out: maybe we will popularize it. One last point before my time runs out. I would suggest to you gentlemen, insofar as you can concentrate on the fundamentals, I do not think you all agree with the NEA-proposed statute here. I am not certain you would all agree with what Professor Raskind says. He says no injuctive relief whatsoever. In the eight things that are here, if you could somehow have a statute upon which

your 39 organizations agree. That certainly would give us a focus on how we are going to go on this thing. Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Thank you, Mr. Chairman.

I feel a little bit like Alice in Through the Looking Glass, when the Queen, as you will recall, said when I use a word, it shall mean exactly what I intend it to mean, nothing more or less. I think that is our problem here for the definition of the word, "fair" use. I would like to get to a couple of examples that were used. The one example that was used about the occasion where the law professor wanted to use a particular article, and asked the author for permission. The author said, that will be $150, and they decided not to use it. It seems to me that goes to the very basis of the copyright law. If the author says to you he does not want you to use it for anything less than $150, is that not his perhaps frustrating privilege to do that? Has it ever been in the copyright law that we say, we are going to determine what somebody is going to charge? Suppose somebody does not want it to be used at all? Suppose I have a poem I do not want anyone to use, to publish anywhere—I am ashamed of it?

Mr. RASKIND. That is a balance of interest. Society has an interest; Congress has in many instances legislated, as in the Higher Education Act, a shared resource use—as Father Drinan says, a balance of absolutes. Our position is, over the period of time, a fair use doctrine will (*a*) meet that interest by allowing the students to have the material, and (*b*) in the long run, some of them would become subscribers, or the library will become the purchaser of one more subscription. It is not a zero-gain situation for the people who have the proprietorship. We are mindful of it and sensitive to it.

Mr. PATTISON. When we get to the question of whether the price is fair, is not the alternative to that to say somebody fixed the price somewhere along the line? We either fix the price, as you say, or the author sets the price—in a ridiculous way, perhaps.

Mr. RASKIND. That raises a troublesome issue. If you allow full sweep as to price, the result you get is not socially desirable. That is the issue.

Mr. PATTISON. Let me get to another issue. In Mr. Freitag's statement, he talked about teachers, authors, to say they are as much interested in seeing their works used and their ideas disseminated, and I agree with that. As a politician, we do not get too many copyrights for things. We say our interest is in having those ideas disseminated, and we publish a lot of things. What is to stop an author who feels that way to simply insert a waiver into his work and say, permission to copy is granted; and that is done lots of times, is it not? Would that not solve the problem, is that let that author make up his mind about that?

Mr. WIGREN. Yes, it would. In fact, in many of our educational publications, we are putting on the verso page at the bottom that any part of this may be copied as needed for instructional purposes, but that we would appreciate being given at least credit as to the source. We are practicing what we preach in this particular instance here, because we think that is important. The dissemination of knowledge and the access of information, in a free society, is an all-important thing. It may be true, as you said before, that an author can say,

I do not want someone to use my work. Still, there is such a thing as having all kinds of materials available, source materials, in the public interest. It is whether or not you consider the copyright to be an intellectual property right as such. I know that is the case in British law. I am not so sure it is in our law. You may want to speak to that.

Mr. PATTISON. Is that not the fundamental decision you make, when you say you are going to create a monopoly interest on the part of a person who creates something, and allow him to give permission or not, or conditionally, or any other way he wants—and what the object of that will, in fact, result in more dissemination of information and more creative activity going on than if you give him no right at all or give him a limited right?

Mr. ROSENFIELD. The courts have answered that very clearly. The statutes until now, until this moment, give a presumptive exclusive monopoly. Presumably, you are not allowed to use one word. The courts have said that is silly. It is not in the constitutional objective, which is dissemination; and therefore, the courts have developed the doctrine of fair use, the purpose of which is dissemination. And what we are suggesting to you is that we are not talking about monopoly or no monopoly. We think that, with due respect, is not the issue that you yourself are proposing. The issue really is, what is the nature of the usable portion of the material, irrespective of the presumptive monopoly? And on that score, if an issue is couched in those terms, that it is not exclusive, then the author cannot refuse, no matter how much he wants. Once he has taken advantage of statutory copyright, he cannot refuse fair use, no matter how much he wants to.

Mr. PATTISON. We are adopting the concept of fair use in this statute. That is not the question. We have a situation here that I posed, where presumably someone thought that it was not fair use, or it probably was not fair use. They asked the author for permission. He said no.

Mr. ROSENFIELD. That is exactly what happened in *Williams & Wilkins*.

The thrust of your questions, if I may respectfully indicate, would be to put the burden on the copyright holder by saying let him settle the price. We are saying to the degree it is fair use or exemptible, the publisher has no control.

Mr. PATTISON. We agree completely on that concept, except no one seems to agree on what fair use is. I am posing the question—assuming it is not fair use and you ask the publisher, the author, if in fact you can use his piece, and it is not under the fair use doctrine, then the objection was made that his price was too high; he did not therefore benefit, and the students did not benefit.

I am presuming as a part of my question that it was not fair use.

Mr. ROSENFIELD. Let us go back.

If, under whatever the rules are, it is not fair use, we may fuss at you because it is not fair use.

Mr. PATTISON. Not under this question, because it is a given.

Mr. ROSENFIELD. If it is not fair use, the author has a right to control the price. We are not arguing about that.

Mr. PATTISON. Fine.

Mr. FREITAG. I would like to relate to you a question that brought up that point in terms of duration of a copyright—the concern that

I have that the life of the author plus 50 prevents the author from having a second choice to decide whether or not he wants to continue the material under copyright. Anybody from the minute they publish can freely grant the right to anyone to use it all along.

Let us say a copyright does exist. It is a valid copyright and must be respected. The 28 years, which must then be renewed, and which is renewed in only 15 percent of the cases, gives to the author, the copyright holder, a chance to decide whether this should go into the public domain or not. Life plus 50 really locks it up.

Mr. PATTISON. We could create that rather simply by saying that after a period of time a notification goes to the author; if you do not choose to renew it or wish to withdraw your copyright, let us know. That could be done very simply.

Mr. FREITAG. The pending legislation includes life plus 50.

Mr. PATTISON. It may be a good idea to require the author to state his age and state of health at that point.

One other question. Suppose someone is so foolish to decide they are going to open up a school on a profit basis, for a variety of reasons. Maybe they do not really expect to make a profit. Certainly they would not if they had any intelligence. Let us suppose they want to do it for a variety of reasons—they want that form of operation rather than having—having the kind of form of operation you have with a nonprofit corporation that has a lot of legal constraints in it. You want to open up a school for profit. There are many of course. What is the difference if we have the same school. We are two schools; one under one form—nonprofit with a board of directors, and tries to raise money from the public; the other profitmaking, which may or may not make a profit. Actually, what is a proprietary operation; what is the difference to the student?

Mr. WIGREN. We are not asking for this limited exemption for any commercial school whatsoever.

Mr. PATTISON. Why not?

Mr. WIGREN. We think the nature of the use is such that if they are a commercial operation, unlike a nonprofit institution, they therefore should pay. They get money from their students to operate the school.

Mr. PATTISON. So does Cornell.

Mr. WIGREN. In the other instance, these are public schools; for the most part they are parochial.

Mr. PATTISON. I have a hard time making that distinction. I may choose to send my child to a school which is very successfully being run by a profitmaking operation and cheaper, let us say, than the nonprofit school. Let us say that the tuition at the profit school is $500 a year, and at the nonprofit school the tuition is $6,000 a year. That is perfectly possible.

Mr. WIGREN. Do you not think tax law distinguishes between them?

Mr. PATTISON. For a variety of reasons, but not based upon what you do at the place.

I am just wondering—there are not many proprietary schools.

Mr. ROSENFIELD. Is that not why, exactly, the tax law distinguishes? The tax law distinguishes because in one the teacher does not make personal profit, and in the other the proprietor does depending upon whether or not his business is profitable.

In other words, in one you have a situation in which the copyrighted material is being used to make a buck; and in the other, you are not giving that kind of purposeful use. That is precisely why the tax law distinguishes—the tax law and the Congress. The Congress makes certain benefits available to nonprofit institutions of education which it does not make available to profitmaking institutions.

Mr. PATTISON. Are we not talking about the dissemination of information, and how it is disseminated; we do not really care, do we?

Mr. ROSENFIELD. Yes, we do.

We are saying for the purpose of this special exemption, just as Congress has said we are going to support nonprofit higher education or lower educational institutions and nonprofitmaking ones, we are saying that the Congress, in its wisdom, ought to make special rules for the nonprofit, noncommercial utilization of this copyright material and let the commercial one go on its own.

What we are trying to point out in a sense is that the ad hoc committee refuse membership to profitmaking schools that are excellent schools for this very reason. It is not that we are thinking of it as an afterthought. This was a fundamental distinction between the profit and the nonprofit in the character of the use involved.

As a matter of fact, Mr. Congressman, 107 itself speaks of the purpose and character of the use. The purpose of the use in a profitmaking institution is to make a buck. Sure you make a buck by disseminating education to the students. The purpose is to make a buck.

Mr. PATTISON. Maybe. I can form a number of corporations, not-for-profit corporations, with a small group of people involved, a not-for-profit corporation, and charge tuition, and not make a profit at all, because we just adjust our salary dependent upon what we make. There is no profit at all. It comes out to zero at the end of the year.

You can do the same thing with a for-profit corporation.

You are not going to tell me if a for-profit corporation incurs a loss, in the time that they incur the loss, you are not going to let them off the hook.

I think the distinction is based upon the use, not upon the nature of the institution. That is all.

Mr. ROSENFIELD. We thought we were asking for less than you were pushing us to.

Mr. KASTENMEIER. We thank those representing educators here this morning, and educational uses, and the copyright bill. We thank you for your very helpful testimony.

The Chair would now like to call those who represent publishers—Bella Linden, Paul Zurkowski, Ernest Farmer, Irwin Karp, and Edward Meell—to come forward.

The Chair would like to express regrets that it is so late in the morning in reaching you. There has been, evidently, a very profound interest in the subject from the questioning of those who preceded you.

Nonetheless, your testimony is equally valuable to us and sought after. I only regret that it is late. Perhaps hereafter we can make other adjustments.

Ms. Linden?

[The prepared statement of Ms. Bella Linden follows:]

STATEMENT OF BELLA L. LINDEN, ATTORNEY, NEW YORK, N.Y.

Mr. Chairman, I am Bella L. Linden, partner in the law firm of Linden and Deutsch, New York City. I was counsel for many years for the American Textbook Publishers Institute (until its merger with the American Book Publishers Council into the association known as Association of American Publishers), a member of the Panel of Experts appointed by the Register of Copyrights to consider revision of the Copyright Law, and a member of the Committee on Science and Technical Information (COSATI) of the Federal Council for Science and Technology and Chairman of the COSATI sub-panel on rights of access to computerized information systems. My firm represents Harcourt Brace Jovanovich, Inc. and Macmillan, Inc., two of the five largest American educational publishers. However, I appear here today not on behalf of Macmillian or Harcourt alone, nor solely on behalf of educational publishers. Rather, I am here in the interests of our system of educational authorship and publishing. representing the sum total of the combined creative efforts and investments of the authors and publishers of this country's educational materials.

This statement is respectfully submitted in opposition to the proposal for a general educational exemption to the rights of authors and publishers established in H.R. 2223. Eight years ago, in your Committee's analysis of the doctrine of fair use as established in the Revision Bill and, in particular, its application to educational and classroom use, your Committee concluded that " a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified." [H.R. Rep. No. 83, p. 31] At last week's hearings the Register of Copyrights stated that your report "still remains the basic legislative explanation of the content of the Bill, and the [basis from which] the reports succeeding it in both Houses have all been drawn * * *." During the intervening years, the only relevant fact to have changed is the further proliferation of devices for unauthorized, inexpensive and rapid duplication, use and transmission of copyrighted works.

Yet, we find ourselves still debating the request for the so-called "educational exemption."

At bottom, of course, this dispute is based on economic interests. Authors, publishers, educators, librarians, all must live on a budget. I will certainly concede that anything which may be acquired free of charge imposes no burden on a budget, so it is not totally unnatural for users of copyrighted materials to desire unpaid-for duplication privileges. Textbook budgets are extremely low, amounting, on a national average, to between two and three percent of a school's annual budget. Photocopying equipment and other reproduction, storage and retrieval devices are not part of a school's textbook budget, but come under the broad umbrella of "supplies." Thus, the natural and laudable tendency for good teachers is to seek supplementary material via the Xerox and tape machines. Less laudable however, is the insistence of some that authors and publishers should not be paid for such uses of their works.

Throughout the revision program the authors and publishers of educational materials have agreed with the principle of full and prompt access to copyrighted material for educational use. This is the very reason for their creative efforts and existence. Clearly, there is a significant difference between access to educational materials, which we wholeheartedly support, and unpaid-for duplication of these materials.

We hav. continually offered to work with the proponents of the educational exemption, as urged by your Committee in 1967, "to work out means by which permissions for uses beyond fair use can be obtained easily and quickly and at reasonable fees." [H.R. Rep. No. 83, p. 33] In fact, in my first appearance before your Committee in 1965, I offered a specific proposal for a clearing house system. However, for almost ten years—during which time many educators have loudly and justifiably voiced their demands for adequate compensation for their own services—the proponents of the educational exemption have sought a statutory basis for the replication of copyrighted educational materials without payment. Rather than accept our invitation, those in favor of the educational exemption offer a provision for sweeping appropriation of copyrighted works. They commonly illustrate their so-called plight by referring to the individual school child who wishes to copy an article from a newspaper for a homework assignment. We are, in effect, told that because the patient has a headache, the cure is to chop off his head.

Authorship of an educational work usually entails many thousands of hours over a period of several years doing library and other research, field testing and

consulting. The authors of educational works are not highly publicized personalities who write best sellers and appear on television talk shows. Many are practicing teachers. Few become rich as a result of their writings. To the extent that it is possible to describe a typical textbook author, he or she is a member of the faculty of a highly regarded college or university, enjoys an excellent reputation in his or her field, but is little known outside of it and counts on copyright royalties to pay for braces for the children's teeth, a second car for the family or a vacation or study year abroad or some similar expense. More often than not, royalties on educational works are split between several authors.

By and large, it is the publisher who discerns educational needs, searches out and selects the author (or, more commonly, group of authors) to create the books and materials to satisfy the requirements of schools and universities, and directs and supervises the planning, design and creation of the works. The publishing venture generally encompasses continuing review and evaluation by numerous teachers and curriculum specialists, supervisors and consultants and field testing throughout the country. The role of the American educational publisher combines and coordinates various functions of writing, artistic design and technical skills in applied research, packaging, consulting and training as well as manufacturing, marketing and distribution.

Educational materials today are commonly produced in sets or programs integrating various forms and media such as texts, teachers' manuals or editions, filmstrips, slides, sound recordings, cards, charts, puzzles, instructional games, duplicating masters, transparencies, testing materials and the like; similarly, these programs frequently represent the entire range of literary authorship including fiction, non-fiction, prose, poetry, music and drama. It is not at all uncommon for an educational publisher to invest more than one million dollars in pre-development costs alone for the creation of a program which will take five or ten years to reach the market and another three to five years to gain acceptance and even begin to pay off the investment. In the case of one elementary and junior high school science program with which I am familiar, a total of fourteen years elapsed between the time the program was conceived and the first textbooks were published. The program virtually revolutionized the format and content of elementary school science books. The efforts and investments of authors and educational publishers do not stop upon publication, as subsequent editions are continually revised in light of feed-back from the field and changes in publishing techniques.

Commonly, major portions of the expenses of educational publishing are attributable to payments made to other publishers and authors for the use and integration of portions of prior works in new programs. In the case of one recent elementary reading program, permissions fees paid by the publisher exceeded $100,000 and, it is estimated, comprised more than 30,000 permissions granted. The administrative "burden" of clearing the permissions did not impair the development of the program.

We cannot emphasize often enough that many of the products of educational publishing, such as treatises, texts, workbooks, tests, file cards, anthologies, encyclopedias and other reference works, are designed for use in *piecemeal fashion* rather than cover-to-cover reading. To permit unauthorized photoduplication of copyrighted works for the purposes of teaching, education and research is a request, in unalloyed English, to permit the educational community to engage in on-demand reprinting, on a daily basis, of those portions of copyrighted educational, scientific and technical works which they wish to use and to circumvent payment to authors and publishers whose entire market for such works is that same educational community.

In many respects educational publishing exists apart from other businesses. The authors and publishers of such works are in a very real and essential sense engaged in public service. For education itself to progress, educational authors and publishers must anticipate and effectively serve a broad range of instructional and scholarly needs. To continue to serve this function in today's society, they must be adequately remunerated for the duplication of their work product.

Although on a short term basis an "educational exemption" may appear desirable to some as aiding the budgetary ills of the educational community, it is clear that the longer term consequence would be to discourage authors and publishers from investing in the creation and distribution of educational materials. The only alternative which comes to mind is the nationalization of educational publishing. Among the ways our society has avoided suppression

of intellectual work-product are the system of economic incentive to writers provided by copyright and the free-enterprise publishing system which encompasses multiple outlets for distribution. Thus, authors are encouraged to publish their thoughts, and the views of an author which may be antithetical to one publisher (or be considered by him to be unpublishable for economic, competitive or other reasons) may still receive exposure through publication by another.

If applied to the free storage (input) of copyrighted materials in computerized information systems the proposed exemption would be in complete derogation of the judgment of both Houses of Congress as expressed in the recent passage of a law establishing a National Commission on New Technological Uses of Copyrighted Works. One of the stated purposes of that Commission is to study, compile data on, and make recommendations to Congress concerning "the reproduction and use of copyrighted works of authorship . . . in conjunction with automatic systems capable of storing, processing, retrieving, and transferring information * * *."

Proponents of the educational exemption have repeatedly emphasized their "educational" purpose and its relation to the public welfare. Of course education is in the public interest—but under our system this interest is served by a private and commercial enterprise which requires a profit to survive. The injury to this country's educational system, educators, scholars, and school children will be material under the erosion of copyright which will result from the proposed exemption. This was fully recognized by your Committee in 1967 when, after considering arguments for a specific educational exemption extending beyond fair use, it stated:

"The fullest possible use of the multitude of technical devices now available to education should be encouraged. But, bearing in mind that the basic constitutional purpose of granting copyright protection is the advancement of learning, the committee also recognizes that the potential destruction of incentives to authoriship presents a serious danger." [H.R. Rep. No. 83, at p. 31]

TESTIMONY OF BELLA L. LINDEN, REPRESENTING EDUCATIONAL PUBLISHERS

Ms. LINDEN. Thank you, Mr. Chairman.

I shall not read my statement at all, but submit it for the record, the reason being that everything that I am saying in my statement, and I dare say everything that the educators have said this morning, we have all been saying for the past 10 years, at least.

Consequently, in order to save time, all I would like to do is point out specifically five or six—actually it adds up to seven—statements that I would particularly like to draw to your attention.

One is that the position of the educational community, as represented by the people who testified here this morning, and by the librarians who testified yesterday, 10 years ago was that photocopying is done in a very limited way. Ten years ago they said that copying cost 50 cents a page; therefore it is cheaper to buy a book than to photocopy a book; therefore it is cheaper to buy a journal article or reprint, or buy the journal instead of doing the photocopying.

Nothing, with all due respect, has changed in the course of the 10 years with respect to the philosophy of the purpose of copyright. All that has changed is the rapid proliferation of technological devices for replication—tape, Xerox equipment, so on and so forth, and information storage and retrieval systems.

The proliferation of all this has met in the eyes of the educators—it would seem that because there is a more rapid technique of achieving the dissemination of information, the payment should be limited to the technology.

No one here has ever spoken to the Congress that they should insist that the Xerox equipment or tape equipment should be given to the nonprofit institutions gratis. What they have all insisted upon is that the intellectual material, without which the technological dissemination hardware would be relatively useless, should be given gratis.

Again, I say with great sadness, we see awe and respect for tangible property, and we see less than respect for intellectual creativity, which in my view, may I suggest—and I am sure it is shared by all here—is the cultural and most valued part of the heritage.

I would also like to point out that what you are doing is not evaluating a *Williams & Wilkins* case of past transgressions where the issue is limited to one publisher and certain specific issues. You are being asked to legislate exemptions with respect to all future creativity. You are being asked to suggest a system of modifying the creation and packaging of intellectual information for the educational and research community. You are being asked—there will be no cataclysmic disappearance of future creativity overnight. If you do pass these educational exemptions, what you will have created is the gradual but inexorable erosion of the competitive entrepreneurial production of intellectual material for the education and research community of this country at the very least.

One or two of you noted very aptly that the educational material—I will hand out some—that consist of 150 items in a children's reading program of all kinds of nonfiction, small portions included. That is the entire market for the educational producers and the duties of material. I will not dwell on that point.

I would merely like to add that yes, as the educators have said this morning, it is a question of budget. What they have reference to is the intellectual property budget, which is 2 or 3 percent, at the most, of the entire school budget. They are not talking about the teachers' salaries or carpeting or Xerox equipment. All they are talking about is the minuscule proportion of the budget that goes for intellectual property.

With respect to the problems of fair use, may I suggest, with all due respect intended, fair use, as I sat and listened to the great difficulties of defining fair use, it occurred to me—and I mean no disrespect to this committee or to anyone in this room—if the good Lord had promulgated the statement, love thy neighbor before this committee at the time of Genesis, you would still have people here defining what love is, seeking guidelines with respect to which neighbors are intended to come under the stricture to love thy neighbor, and there would be a rising clamor for exemption of certain neighborhoods from the statement of the good Lord, because it was in the public interest to exempt those neighborhoods.

May I suggest in all seriousness, there is no precise language in any statute of any kind that has ever been promulgated that is not subject to different interpretations. That is why, thank the Lord, there is a

legal profession, and thank the Lord that is why there are congresses, and that is why there is ongoing revision of statutes, just as the act of 1909.

Mr. KASTENMEIER. I would point out if the bill before us had been in effect at the time, and He had set it down already, the Lord would still have life plus 50.

Ms. LINDEN. That is true. We also gave it to Mary Baker Eddy, if you recall.

May I suggest, furthermore, that fair use, like all other statutory language, is susceptible to interpretation. We all know what love thy neighbor means, whether we obey it or not. We all know what fair use is, and we all know what the four criteria are.

May I also call to your attention that the bill now before you has a series of compromises of exemptions, which we have reluctantly accepted, because this is the era of compromise. This is the era where people have less regard for private intellectual enterprise than they did generations ago. We accept it. We are willing to live, survive, and struggle under it. We are asking for survival of the private intellectual authorship and publishing industry.

In conclusion, may I say that if any of you would be good enough to look at my testimony given before this very committee in 1965, we did in fact offer a clearinghouse. We made the point then—we make the point now—we have made it continually. We are agreeing that the copyright law is intended to grant the right of access. We are agreeing that access is the essence of intellectual information and is the whole purpose of publishing and production of audiovisual materials.

What we are saying, under our form of government, and our philosophy of free dissemination of competitive ideas, we do not wish to end up in a decade or so with a nationalized educational publishing system and with limited authorship under that kind of a budget.

I want to include my one statement—yes, we sympathize that the educators and librarians have problems balancing their budgets. We all do. And we know that if any of us could only get for free that which we in our society have to pay for, we would find it a much more easy task to balance our budgets. May I suggest that the librarians and teachers budgets should not be balanced at the expense of this intellectual property which is essential to their ongoing teaching process.

That, I submit, is in the public welfare.

Thank you.

Mr. KASTENMEIER. Thank you, Ms. Linden, for a very strong statement.

The Chair will personally say it is good to have you back after 10 years. Having seen you a number of times in the context of copyright, you have made enormous contributions in the field.

Next, Mr. Meell.

[The prepared statement of Mr. Meell follows:]

Statement of Edward Meell on H.R. 2223 on Behalf of the Educational Media Producers Council

My name is Edward Meell and I am Chairman of the Educational Media Producers Council (EMPC) and Editorial Director of the Film Division of McGraw-Hill Book Company. I am appearing here today on behalf of EMPC and with me is Ivan Bender, Chairman of the EMPC Copyright Committee and Assistant Secretary and Legal Counsel of the Encyclopaedia Britannica Educational Corporation.

We are here to present our views on H.R. 2223, the general copyright revision bill, and specifically on the issues involved in the educational use of copyrighted audio-visual materials. We support the bill as introduced and oppose amendments which would weaken the protection provided in the bill for audio-visual materials.

SECTION 107—FAIR USE

We specifically endorse Section 107, which writes into statutory law the main principles of "fair use" as that doctrine has been interpreted by the courts in individual cases over the years. We feel that Section 107 represents a fair compromise between the creators and users of copyrighted educational materials—a compromise which has been carefully negotiated over the past several years.

Our industry is pleased with the recent technological developments which promise to make ideas and information more accessible to scholars, teachers and learners. These developments promise also to expand the role and contribution of educational media producers to the educational process of which we are an integral part. But in order to maintain and increase the incentives for the creation and production of quality materials for our schools, we must not diminish the statutory protection for intellectual products to which any author, creator or artist is entitled.

NO NEED FOR AN "EDUCATIONAL EXEMPTION"

At the time that this testimony was prepared we were uncertain as to whether a broad educational exemption, to be added to the bill as it now stands, would be proposed by one or more organizations in the light of the positions taken by the Association for Educational Communications & Technology (see Attachment A). The language of previously-introduced amendments, however, in our view provided far more than a "limited" exemption. Among other things it would authorize use—for noncommercial teaching, scholarship and research—not only of "brief excerpts" from copyrighted works but also of the whole of short literary, pictorial and graphic works.

Let us take up these two concepts in order, as they would apply to educational audio-visual materials.

The concept of "brief excerpts" (which are not substantial in length in proportion to their source) is very difficult to apply to educational audio-visual materials. A half hour education nature or biology film, for example, may be built around an exceedingly difficult photographic sequence which may take months of work to capture, but may in the final product only take up a minute or two of time in the film. To permit this minute or two to be reproduced freely under an educational exemption would very likely destroy the economic viability of the product.

The concept of exempting use of "the whole of short, literary, pictorial and graphic works" presents difficulties equally great in relation to audio-visual materials. For example, is a short filmstrip a short work? Is a five minute audio cassette a short work? Is an eight minute 16mm film a short work? If so, it would very largely destroy the entire market for short filmstrips, cassettes or films, and they would be produced in extremely small numbers or not at all.

We trust that this subcommittee will not accept the idea of an educational exemption, if such an exemption should continue to be pressed by one or more organizations. If the exemption is adopted, few companies will be able to risk making the capital and time investments needed to produce educational materials and will turn their efforts to other kinds of products and markets. In such a situation, it might well happen that only with government subsidies could the producers in the private sector afford to finance the development and distribution of educational materials.

Such an exemption has no educational rationale. To the extent that school systems wish to reproduce educational audio-visual materials in whole or in part beyond the limits of "fair use," our members stand ready to discuss licensing arrangements which will permit authorized reproduction. Modern methods of reproduction for many types of audio-visual materials are such as to make such reproduction in whole or in part attractive to some school systems and many of our members have already entered into licensing arrangements which would permit duplication under a negotiated compensation formula.

ENDORSEMENT OF SECTION 107 BY AECT

We are pleased that the principal professional organization of educators directly concerned with the use of audio-visual materials in the educational process is also in support of Section 107, without weakening amendments. This support was expressed in a statement issued by the Executive Committee of the Association for Educational Communications and Technology (AECT) in May of 1975. (See Attachment A.) Some of the statements made by the AECT which were of greatest interest to us were the following:

1. "AECT endorses the criteria to be used in the determination of 'fair use' as contained in Section 107 of the proposed bill.

2. "Concerning the use of copyrighted works in conjunction with television, AECT proposes that 'fair use', as it has been outlined above, should apply to educational/instructional broadcast or closed-circuit transmission in a nonprofit educational institution, but not to commercial broadcasting.

3. "Once the doctrine of 'fair use' has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine.

4. "A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of 'fair use', and reasonable fees to be paid for uses beyond 'fair use.'"

LIMITED LIBRARY REPRODUCTION NOT APPLICABLE

After conducting hearings in 1973, the Senate added subsection (g) to Section 108 (Library Photocopying), to define and place limits on "systematic reproduction" which exceeds "fair use" or permissible use under other subsections of the bill. Subsection (h) was also added, exempting musical works; pictorial, graphic or sculptural works; or motion pictures or other audio-visual works from the reproduction rights granted in Section 108 except for providing archival copies or replacing a damaged work.

We feel both subsections are vitally important—(g) because it defines reasonable parameters for copying; and (h) because it is necessary to ensure the continued creation of the special kinds of works mentioned above. Because of the nature of audio-visual works—that is the manner in which they are used and the fact that one film, filmstrip or recording serves multiple numbers of users during each use—it is manifestly unfair to extend the rationale behind Section 108 to these materials. Each library traditionally buys only one or two copies of a film, filmstrip or sound recording. The library market is an important source of business to producers, though very limited. To permit copying of these audio-visual materials under Section 108 is wholly unnecessary to meet the librarians' need for some freedom to copy some literary works to effectively serve their users. Section 108 would, if extended to audio-visual materials, severely and irrevocably remove the library as a market for audio-visual producers.

LIAISON WITH OTHER EDUCATIONAL ORGANIZATIONS

EMPC has mounted a strong effort to establish and maintain dialogues with users of educational materials over the last three years. We have cosponsored over two dozen panels during state, regional and national meetings of educational groups to explain the producer's point of view and to listen to the educator's needs. Attachment B illustrates the format and content of these discussions. One of the most important results has been the development of licensing plans by major educational media companies to increase school districts' access to materials in an economical fashion.

Members of the Council have also worked with individual school systems to develop guidelines for observing fair copyright practices. Over one dozen short articles on copyright, as it applies to audio-visual media, have been prepared for educational journals. These articles have been reprinted and distributed free of charge by EMPC to all interested individuals, schools and school systems. Several examples are attached as Attachments C, D and E.

In cooperation with AECT, EMPC is now in the process of preparing a booklet explaining the procedures for obtaining permission to duplicate if the need exceeds the limits of "fair use."

We believe all these activities have been helpful to both educators and copyright proprietors in both clarifying general principles and in solving specific problems. EMPC pledges to continue these efforts irrespective of the passage of any revision of the copyright law.

THE EDUCATIONAL AUDIO-VISUAL MATERIALS INDUSTRY

In order to understand fully the unique nature of the educational audio-visual industry, and the importance of copyright protection to the continued development and distribution of high quality materials, a brief description of the industry is in order.

The Educational Media Producers Council (EMPC) is an organization within the National Audio-Visual Association made up of approximately 100 producers and distributors of audio-visual materials for use in schools, colleges and libraries. These member companies create, produce and market items such as motion picture films and video tapes, filmstrips, slides, transparencies, and sound recordings. We estimate that our members account for over 80% of the annual production of audio-visual materials for use in American education.

In 1974 total income from sales and rental of educational audio-visual materials amounted to $277 million. This volume was produced by some 200 companies; and thus, since the 100 EMPC members account for approximately 80% of annual production, the industry is clearly one of active competition among quite small firms. In fact, 50% of our member companies gross less than $1 million per year; 90% gross less than $5 million.

The relative volume of the various products sold in 1974 is shown in the following table:

1974 sales of educational A-V materials

[Millions of dollars]

16 mm. films and videotapes:	
16 mm. films	$63.3
Videotapes	1.6
Subtotal	64.9
Materials acquired for use and storage in individual schools:	
8 mm. films (silent)	7.7
8 mm. films (sound)	.6
Filmstrips (silent)	15.3
Filmstrips with records	23.2
Filmstrips with cassettes	36.0
Overhead transparencies	11.1
Slides	2.1
Records	5.5
Recorded tapes:	
Reel-to-reel	1.9
Cassette	15.6
Study prints	9.5
Multimedia kits	62.2
Games, manipulatives and realia	18.8
Subtotal	209.3
Grand total	274.2

It will be noted this list of products is divided into two principal categories: 16 millimeter educational *films and videotapes*, which are comparatively lengthy and expensive and thus usually bought by school district film libraries, stored

centrally, and circulated on demand to individual schools; and "building level materials"—*other types of materials* which tend to be used more often and more intensively in the individual schools and therefore are purchased and stored by them rather than by a district library. With the increasing use of audio-visual materials in the educational process, and with the recent trend toward the individualization of instruction, this second category has been growing much more rapidly than the first in the last few years, increasing from 66.5% of total audio-visual sales only six years ago to 75.6% of the total sales in 1974.

USE BY LEVEL OF EDUCATION

Equally important to an understanding of the educational audio-visual industry is the pattern of use at the several levels of education. Sales of 68 representative companies can be broken down as follows:

1974 educational A–V sales by type of institution

	Percent
Public schools	77.5
Private schools	4.4
Colleges and universities	7.6
Public libraries	3.9
Churches, government, business and industry, etc	6.6
Total	100.0

The percentage in these tables bring out two points quite graphically:

1. The *only market* for those materials is *the educational market*; they have no market among consumers in general or for general entertainment.

2. Sales to schools tend to be concentrated in the lower end of the grade level pyramid, with over 60% of total sales to the elementary schools, less than 30% to high schools, and less than 10% to higher education. Public libraries account for less than 4% of all sales and "all other" for 6.6%. Thus, the kinds of considerations which come into play in discussing library photocopying of highly sophisticated, original research materials are not pertinent here; our companies' materials are used for the instruction of students at *basic levels* of education.

SMALL VOLUME

The vast majority of audio-visual materials are not used in one-to-one situations as are textbooks. They are used generally in groups. This raises two points. First, the number of copies needed is quite limited. One or two copies of a 16 millimeter film may serve an entire school system of moderate size; a single copy of a filmstrip or sound recording will serve an entire school. Second, a typical audio-visual product will customarily sell relatively few copies over a period of five to ten years, as compared to the tens or hundreds of thousands of copies of a textbook. A 16 millimeter film may sell only several hundred copies over its useful life; a $50.00 set of filmstrips does well to sell four thousand. Thus the recapture of initial investment in research, development, editorial and production work—which costs as much for one copy as for thousands—is spread over the sale of a relatively limited number of copies. In addition to the substantial initial investments necessary for production of quality materials, there must be added operational expenses for the considerable period of time over which sales are made before a break-even point is reached. The combination of these factors—*limited market, small volume* and *sales over an extended period*—means that specific broadening of the "fair use" criteria could damage beyond repair the quality and diversity of materials available to our nation's students and teachers.

THE U.S. OFFICE OF EDUCATION EXPERIENCE

The U.S. Office of Education has granted millions of dollars over the years to government-funded educational research laboratories for developing innovative and more effective teaching methods and materials. Many good products were developed, but far too few ever were disseminated to the educational community. As a result, policies were developed by USOE which allowed commercial companies with marketing expertise to distribute the materials under protection of a limited (in time) copyright. Not until then did the educational community receive the benefit of the Federal research effort.

This points out very clearly the need to provide incentive to producers and protection for the rights of copyright holders. The Federally-funded materials which were developed and put on shelves now have a much better chance of being used by, and benefiting, the intended recipients—because those with the expertise necessary to make the materials available are given appropriate incentives.

WILLIAMS & WILKINS CASE

The 4–4 tie vote of the Supreme Court in the Williams & Wilkins case, leaves the issue of "fair use" in an unsettled state. We believe that Congress must act—clearly and explicitly—to outline the boundaries of this doctrine for all parties concerned. Once this is accomplished, EMPC commits itself to continue its efforts to work with educational institutions and organizations to establish guidelines to help resolve specific situations within the parameters set by Congress.

SUMMARY AND CONCLUSION

In summary let us repeat that we think that the bill which has been introduced as H.R. 2223 is a good bill and a workable bill, from the point of view both of the creators and the users of educational audio-visual materials, and we urge that it be expeditiously reported to the full House without amendments to Sections 107 and 108. If an educational exemption is added to Section 107, or the provisions of Section 108(g) and (h) are weakened, EMPC could not support the bill. It is universally recognized that revision of the 1909 copyright statute is imperative, and the sooner this is accomplished the better for all concerned.

We appreciate this opportunity to appear before your subcommittee. My colleagues and I will be glad to elaborate on any points in our testimony which the members of the subcommittee may wish to explore further.

ATTACHMENT A

COPYRIGHT LAW REVISION: A POSITION PAPER BY THE ASSOCIATION FOR EDUCATIONAL COMMUNICATIONS AND TECHNOLOGY, MAY 1975

The members of the Association for Educational Communications and Technology (AECT) believe that technology is an integral part of the teaching-learning process and helps to maximize the outcomes of interaction between teacher and pupil.

Regulations governing United States Copyright were originally developed to promote the public welfare and encourage authorship by giving authors certain controls over their work. It follows that revisions in Title 17 of the United States Code (Copyrights) should maintain the balance between providing for the compensation of authors and insuring that information remains available to the public. Some of the revisions proposed in S. 22 and H.R. 2223 lose sight of this balance between user and producer.

AECT endorses the criteria to be used in the determination of "fair use" as contained in Section 107 of the proposed bill:

Section 107. Limitations on exclusive rights: Fair use

. . . the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords, or by any other means specified by (Section 106), for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include:

(1) the purpose and character of the use;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

However, we propose that the concept of "fair use" should apply equally to the classroom teacher and media professional—including specialists in audiovisual and library resources. Media personnel are becoming increasingly important members of educational planning teams and must have the assurance that they may assist classroom teachers in the selection of daily instructional materials as well as with long range curriculum development. Classroom teachers do not always operate "individually and at (their) own volition." The fact that the media professional makes use of advance planning and has knowledge afore-

thought of the materials he prepares for the teacher should not invalidate the application of the "fair use" principle.

Concerning the use of copyrighted works in conjunction with television, AECT proposes that "fair use," as it has been outlined above, should apply to educational/instructional broadcast or closed-circuit transmission in a non-profit educational institution, but not to commercial broadcasting.

Once the doctrine of "fair use" has been established in the revised law, negotiations should be conducted between the proprietor and user prior to any use of copyrighted materials that goes beyond that doctrine. We believe that the enactment of the "fair use" concept into law prior to negotiations will guard against the erosion of the concept. Generally, a reasonable fee should be paid for uses that go beyond "fair use," but such fee arrangement should not delay or impede the use of the materials. Producers are urged to give free access (no-cost contracts) whenever possible.

We agree with the Ad Hoc Committee of Educational Organizations and Institutions on Copyright Law Revision that duration of copyright should provide for an initial period of twenty-eight years, followed by a renewal period of forty-eight years, whereas the proposed bill sets duration at the "life of the author plus fifty years." It seems reasonable that provisions should be made to permit those materials which the copyright holder has no interest in protecting after the initial period to pass into the public domain.

Regarding the input of copyrighted materials into computers or other storage devices by non-profit educational institutions, we agree with the Ad Hoc Commitee that the bill should clearly state that until the proposed National Commission on New Technological Uses of Copyrighted Works has completed its study, such input should not be considered infringement. The proposed bill states only that ". . . (Section 117) does not afford to the owner of copyright in a work any greater or lesser rights with respect to the use of the work in conjunction with automatic systems . . ."

A new copyright law that both users and producers can view as equitable depends upon the mutual understanding of each other's needs and the ability to effectively work out the differences. We will participate in the continuing dialogue with the Educational Media Producers Council and similar interest groups to establish mutually acceptable guidelines regarding the boundaries of "fair use," and reasonable fees to be paid for uses beyond "fair use." This dialogue will be especially important in the area of storage, retrieval, and/or transmission of materials during the time period prior to the issuance of the report of the National Commission on New Technological Uses of Copyrighted Works.

We feel that the above modifications of S. 22 and H.R. 2223 are needed to insure that the revised law assists rather than hinders teachers and media specialists in their work.

ATTACHMENT B

PREFACE BY THE CALIFORNIA ASSOCIATION FOR EDUCATIONAL MEDIA AND TECHNOLOGY AND EDUCATIONAL MEDIA PRODUCERS COUNCIL

The issue of copyright is an important one in our country today and is of special concern to everyone in the educational community. With the advent of recent technological developments, the ability to duplicate, store and transmit audio and visual materials has sharply increased. These developments promise to make ideas and information more accessible to all learners, teachers and scholars—and this is the goal we all seek.

But the transmission of these ideas and information must be handled in a way that encourages, stimulates and rewards the creation and production of intellectual products—and that is the basis for copyright protection.

The basic copyright laws in effect today were passed in 1909. In 1955, attempts to produce a general revision of these laws were begun but, with the exception of a bill passed in 1972 to extend protection to sound recordings, these efforts have not succeeded as of the time of this writing. Legislation is pending at the present time in the Senate and, if passed, must be considered and approved by the House of Representatives.

This filmstrip and discussion guide are not intended to answer technical questions about copyright law. Rather, they are designed to stimulate discussion about some common types of questions and to provoke thought about the basic issue of copyright protection—with its moral and ethical implications. Guidelines are presented for helping to determine conditions under which mate-

rials may or should be copied. Basic to such a determination is the concept of "fair use" which means the free and legal reproduction of copyrighted works for purposes such as criticism, comment, news reporting, teaching, scholarship or research. In the pending legislation, four criteria are set forth for establishing fair use:

1. the purpose and character of the use;
2. the nature of the copyrighted work;
3. the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4. the effect of the use upon the potential market for or value of the copyrighted work.

(These criteria are provided, on a detachable page, in Appendix B.)

The discussion guide which follows contains hypothetical examples of duplication of audio-visual media. It would be useful to keep three questions in mind as each of the situations in the guide is reviewed.

1. Is the theory of "copyright," as set forth in the Constitution, upheld? ("To promote the Progress of Science and Useful Arts by securing for limited Times to Authors and Inventors the exclusive right to their respective Writings and Discoveries.")
2. What are the economic implications to the publisher of copying?
3. How will they affect the availability of materials to the educational community?

Both educators and producers of educational media seek the widest and most effective dissemination of learning resources. It is hoped that this specific educational tool will assist in implementing our mutual objective with benefit to all.

Copyright and Audio-Visual Media

1. A school district buys one copy of a 16mm educational film and makes ten video cassette copies for individualized instruction at various school media centers.

This case illustrates a clear-cut example of copyright infringement resulting from utilization of new technology. The copyright laws forbid the reproduction of a copyright work by anyone except the copyright proprietor. The fact that the school district bought the copyrighted work does not mean it bought the rights to reproduce it.

2. A mobile media unit regularly travels from school to school in a district and converts phonograph records into audio cassettes for individual teachers.

Unauthorized duplication of sound recordings may subject the school district to legal liability. The United States Congress enacted the Sound Recording Amendment to the copyright laws, which protects recordings fixed subsequent to February 15, 1972 and prior to January 15, 1975. The proposed revision of the copyright laws now pending in the Congress of the United States provides for full protection of sound recordings. In addition, a decision by the U.S. Supreme Court (Goldstein v. U.S.) upholds the right of states to enforce their own record piracy laws in effect prior to the 1972 date.

3. A teacher makes excerpts in cassettes from various record albums owned by the school to illustrate comparisons among various musical forms.

In addition to the statements made in Case 2, another factor to be taken into consideration is copyright in the work which was recorded. However, the proposed revision to the copyright laws will give full protection to the record itself, not merely to the underlying work. Another factor involved in this case is the doctrine of fair use. One should consult the statutory provisions regarding fair use (see Appendix B) and discuss their ramifications for this case.

4. A school media center coordinator salvages some useful frames from discarded filmstrips and converts them into slides for student use.

Although technically copying is not involved in this situation, other factors must be taken into consideration. For example, the filmstrip producer may have only secured filmstrip rights for visuals which had to be procured outside of its own facilities. Another problem is co-mingling of these visuals with those from other sources so as to create a "derivative work"—which is one of the rights reserved exclusively to the copyright proprietor. The fact that the school has "discarded" the filmstrip does not mean that copyright protection has expired.

5. A student taping a report on new travel books in the school library used Around the World in Eighty Days as background music.

The issue presented here involves the appropriat[illegible] copyright musical composition. However, this situation might be comparable [illegible] an individual taping musical works in his own home for his own personal [illegible]e and might not be regarded as an infringement.

6. A school district occasionally makes a videotape of a preview print of a 16mm film in order to allow teachers to preview it over a longer period of time.

The issue being presented here is the unauthorized duplication of a copyright work. This is illegal, regardless of the fact that this particular use of the videotape may seem to be less harmful to the copyright proprietor than a situation in which the videotapes were used for student viewing. It would be advisable to seek permission from the copyright proprietor before proceeding.

7. A high school student uses an opaque projector to enlarge a map from his younger brother's geography book to help him draw a poster showing the location of Indian reservations.

This would seem to be a clear example of fair use as defined in the preface.

When Is It Legal To Duplicate Duplicate Duplicate?

(By Ivan Bender and David Engler[1])

"Making copies" has become almost a way of life for educators—as it has in most businesses and industries. However, conscientious teachers and administrators, recognizing the impact that widespread unauthorized duplication will have on the production, availability and cost of educational materials, are anxious to know what is or is not allowed by law.

The concern goes beyond a fear of "getting caught." It extends to the sense of fairness and respect for property that schools are striving to develop in their students. And when the material in question is the result of artistic effort—as is the case with most audio and visual materials—a special urgency exists to ensure that the creative process does not become a financial dead end.

More than appeals to morality and justice, educators need specific guidelines as to what can or cannot be legally duplicated. While a full explanation of the intricacies of copyright law is beyond the scope of *Media & Methods*, several important provisions of that law can be examined.

The U.S. Constitution (Article 1, Section 8, Clause 8, empowers Congress "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the *exclusive* right to their respective writings and discoveries."

Under a 1909 copyright law now in effect, and through subsequent interpretations, almost all intellectual products of a literary, artistic, or creative nature can be registered for protection with the Copyright Office of the Library of Congress. Thus, such diverse products as books, maps and poetry, magazines and newspapers, plays and choreographies, lectures and serm[illegible] melodies and lyrics, paintings and photographs, sculpture and architectura[illegible]ns, motion picture films, videotapes and sound recordings can be covered [illegible] exclusive copyright.

Once obtained, the copyright remains in effect for [illegible], and can be renewed for an additional 28 years. Beyond this total period of 56 [illegible]s, the work falls into the public domain and its use becomes unrestricted. An important exception applies to copyrights which would have expired beginning in 1962, the year when Congress undertook its still-uncompleted revision of the 1909 law. Since the new law will probably lengthen the period of copyright, Congress is extending, on a year-to-year basis, those copyrights that would have expired since 1962.

What protection does copyright provide? Basically, it reserves for the proprietor the exclusive right to print, reprint, publish, copy, and vend the copyrighted work, including any abridgements, arrangements, dramatizations, adaptations and translations. The right to vend in this case means the right to transfer by lease or sale; therefore, if someone copies the work without authorization and gives the copies away free, they may be infringing on the proprietor's opportunity to vend by taking away the exclusive right to do so.

Infringement on a proprietor's copyright can invoke specific statutory penalties, ranging from $100 to $10,000 per infringement. Although penalty monies go to the state, proprietors can recover damages in a civil suit if they can show economic loss.

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[1] Ivan Bender is Assistant Secretary and Legal Counsel for Encyclopaedia Britannica Educational Corp; David Engler is President of General Educational Media. They are also chairman and vice-chairman of the Copyright Committee, Educational Media Producers Council.

Referring back to the Constitution, it is clear that incentives for producing creative works are preserved by securing certain rights for the proprietor exclusively. Over the years, however, these exclusive rights have been tempered by a growing body of judicial decisions which have increasingly attempted to balance the authors' need for compensation with the public's need for access to creative works. The courts have based up on strict compliance with the law through a concept now known as the "Fair Use Doctrine." This doctrine is not yet delineated in statutory law, but Congress more than likely will include guidelines for the application of "fair use" in its revision bill.

Because present statutory law does not spell out specifically what constitutes copyright infringement, case law (i.e., judicial findings based on individual cases) has filled this void by recognizing certain uses as fair, even without permission of the copyright holder. Under case law, "fair use" applies only to reproduction for such purposes as criticism, comment, news reporting, teaching, scholarship or research. It encompasses four conditions, *all of which* must be met if duplicating or changing a product is to fall within the bounds of fair use. These standards are:

1. *The purpose and character of the use.*—The use must be for such purposes as teaching or scholarship, and must be non-profit. Fair use would probably allow teachers acting on their own to copy small portions of a work for the classroom, but would not allow a school system or institution to do so.

2. *The nature of the copyrighted work.*—Copying portions of a news article may fall under fair use, but not copying from a workbook designed for a course of study.

3. *The amount and substantiality of the portion used.*—Copying the whole of a work cannot be considered fair use; copying a small portion may be. At the same time, however, extracting a short sequence from a 16mm film may be far different than a short excerpt from a textbook, because two or three minutes out of a 20-minute film might be the very essence of that production, and thus outside fair use. Under normal circumstances, extracting small amounts out of an entire work would be fair use, but a quantitative test alone does not suffice.

4. *The effect of the use upon the potential market for or value of the copyrighted work.*—If resulting economic loss to the copyright holder can be shown, even making a single copy of certain materials is an infringement, and making multiple copies presents the danger of greater penalties.

To re-emphasize, the fair use doctrine applies only when all four of the above points have been satisfied. Even so, it is often difficult to reach a conclusion on the fair or unfair use of a product, particularly in the case of audio-visual materials. By posing a number of everyday examples which occur in schools and media centers around the country, and evaluating each in terms of what can and cannot be duplicated, perhaps additional light will be shed on the provisions of the copyright regulations.

Example.—A school district buys one copy of a 16mm film, and makes 10 videocassette copies for individualized instruction.

Evaluation.—Just making one copy of the film is a clear-cut violation of copyright; making 10 copies only aggravates the violation.

Example.—A mobile media unit which regularly travels from school to school in a district converts phonograph records into audiocassettes for individual teachers.

Evaluation.—In one sense the copyright question involved in this situation is simple and straightforward. Anyone who *regularly* converts copyrighted phonograph records into audiocassettes without the copyright owner's permission is violating the law. However, this situation may be complicated by the fact that copyright protection of sound recordings made before February 15, 1972 did not apply to the recording itself, but only to the underlying work, such as a song or poem. If this underlying work had no copyright protection and was therefore in the public domain, then a duplication made before 1972 is not a violation of copyright. Apart from this exception, converting a phonograph record into an audiocassette is a violation of copyright even if the person doing the copying owns the record. Also, since the entire work is being copied, fair use standards would not be met.

Example.—A student taping a report on new travel books in the school library uses the music from *Around the World in Eighty Days* as background.

Evaluation.—We cannot conceive of any copyright owner objection to this kind of use.

Example.—Upon the request of several schools, a district media center uses material appearing in an encyclopedia to prepare sets of color slides illustrating the evolution of the American flag.

Evaluation.—This is probably fair use, given the nature of the material's content and the relationship of this portion of the encyclopedia to the total work.

Example.—A school videotapes various educational and commercial telecasts off the air for playback at more convenient times during school hours.

Evaluation.—Videotaping copyrighted television programs off the air for any purpose is a violation of copyright. Permission of the copyright owners should be secured before such videotapes are made.

Example.—A school district occasionally makes a videotape of a 16mm preview print in order to allow teachers a longer period of time to preview it.

Evaluation.—This is illegal unless permission is granted in advance. Some educational producers are granting the right to make videotape copies for preview purposes only as long as the videotape is erased immediately after previewing and does not become a regular part of the school district's film collection.

Example.—The Department of Televised Instruction of a school district televises 16mm educational films from its library over its closed circuit system to every school within the district.

Evaluation.—The fundamental issue here is whether or not this practice constitutes a "performance" as defined under the present copyright laws. In all likelihood, it would be so considered. Since the right to perform a copyrighted work is granted exclusively to the copyrigh holder, appropriate permission must be obtained in advance of televising the material. Most educational film producers have television licensing policies which are easily obtained from each individual producer.

The producers of copyrighted materials are anxious to accommodate the needs of their customers in education. For this reason, many companies and individuals have developed licensing policies which permit limited reproduction of copyrighted materials. Each contract is worked out on the basis of user needs and producer fee schedules to permit duplication beyond "fair use." Already, some school districts—Granite School District in the suburbs of Salt Lake City, for example, and Fairfax County School District in Virginia—have entered into voluntary licensing arrangements.

This is a healthy trend. It enables the educational users to have greater flexibility and access, while at the same time providing producers with compensation and some degree of control over their materials. Additional information on licensing contracts can be obtained by writing: Educational Media Producers Council, 3150 Spring Street, Fairfax, Virginia 22030.

EDITORIAL

ACADEMIC RIP-OFF

(By Henry C. Ruark)

An unethical practice is underway in some educational circles. Educators, not "money-hungry commercial types," are responsible for this one.

The operation in question is worked quietly, with little open comment by either those engaged directly in the operation, or by those it is supposed to benefit. Neither group wants to think too clearly about it.

Those involved know, in their hearts, if not in their heads, that what they are doing is wrong, both morally and legally. There have been too many professional educational statements, too much open discussion and far too many articles and explanations in the educational press for anyone now to claim total ignorance of the issue.

Probably many of those involved would resent being categorized as "specialized thieves," right along with counterfeiters, short-change artists, second-story men, and pickpockets.

Yet too many persons do not hestitate to make use of the creative products of professional efforts by their own colleagues, without payment or credit.

Those paragraphs first appeared in the Blue Book Editorial for August, 1969, titled "If The Shoe Fits . . ." We were castigated then for calling educators "thieves" . . . a word which did appear in the Editorial . . . and "pirates" . . . a word which did not. We suggested that "If the shoe fits . . . we hope it pinches."

What we were really doing then was recognizing, realistically and openly, the early symptoms of a cancerous practice which now threatens learning media development much more dangerously than it did then.

Only now, instead of isolated (if alarming) incidents, the practice of unauthorized copying of learning media, greatly facilitated by technological develop-

ments, has grown to an amazing variety of physical formats, in alarming quantities of both copy-count and titles-involved.

This illegal practice—that's exactly what it is and there's no point in sugar-coating the't no matter who "pulls the job"—has become such a threat to the learning media producers that it is perhaps the hottest issue under discussion in the AV field today.

What is truly at stake is not simply the "profit" a producer makes from the sale of his product, but the great loss of legitimate reward for, first, creativity in developing effective and appealing new AV materials, and second, entrepreneurial effort and risk-taking to bring them, at economically feasible pricing, to educators and learners.

Within our free-enterprise system, despite all its drawbacks, controls, barriers, and pitfalls, there is literally no other way for effective learning media to be developed, tested, marketed, and disseminated.

Thus, copyright abuse and what must be done about it is an immediate and highly crucial problem, which must be solved before the learning media field can move ahead with basic distributing—be it through cable and satellite TV, touch-tone telephone networking and centralized computers for home and office reference and learning, or more immediately through videocassette and similar playback systems . . . in extension of or as replacement for the heavy current inventory of film formats.

How can any of these developments, touted for years as the rise of "educational technology," even begin to become a reality until and unless broad collections of learning materials can proceed towards immediate availability on a reasonable, practical, profitable return-on-investment basis?

Without that kind of return, how can producers create materials to supply current needs, and at the same time look ahead and plan for the kinds of business risk-taking which are inevitable, unavoidable procedures in any kind of business?

We believed in 1969, and we believe even more strongly now, that educators generally are not so stupid as to deny by their own actions the basic principles of morality and the practical and very pragmatic lessons of our flourishing free entrepreneurial system. That's what happens when any educator, at any level, condones or in any way assists in the simple theft of product, a commonplace result of questionable practices widespread today.

It doesn't take much effort to understand what is going on when $2,000 worth of AV materials are kept for a solid year, then returned, piecemeal and in very bad shape, most obviously used and re-used . . . with the explanation "we couldn't tell whose materials these were." There were defaced but still legible labels on every package, and company name and logo on every visual. That's substitution for purchase by abusing the previewing privilege.

It takes little effort to get the message when a preview print of each of a whole series of films is, first, circulated among every school in a district with no previewing reports turned in, and then, second, dubbed onto videocassettes before the preview prints are returned . . . with a straight-faced letter of thanks "for the preview service." Put your own label on that one . . . we have, already. It is simple theft of product.

Incidents such as these are well-known and discussed in many places; in fact, the problem is so acute in some places that the professional associations, either covertly or openly, have made their dismay and forebodings known by warnings to members who are believed to have participated in this "academic rip-off" activity.

It should be noted that the Educational Materials Producers Council has taken very positive action on this problem of copyright abuse, by formulating their Policy Statement which appears on page 10. We also carry in this issue an explanatory feature detailing the thinking which went into development of their policy statement. EMPC welcomes discussion, opinion, and a vital dialogue on the problem in all its facets.

It should also be noted that EMPC has publicly announced that a committee of industry leaders is working diligently towards solution of this painful situation in a variety of ways . . . with one way being to build what has been described elsewhere in the educational press as a "violations file."

Copyright and all its implications and interpretations is a very tortuous field, in and of itself; but there can be no doubt of the effect, nor of the legal standing, of those practices to which we are pointing herein, and much earlier in "If The Shoe Pinches . . ."—in 1969.

The most effective and least costly distribution-dissemination system may well wipe out both producers and AV services as we know them today.

BUT, whatever the substitute or development, there will still need to be creative, entreprenueurial development of effective materials.

Without reward there will be no such development, whether "commercial types" or "educator types" are involved. Theft denies reward.

He Who Comments Last

GOLDEN EGG PRODUCTION: THE GOOSE CRIES "FOUL"

(By Robert Churchill[1])

Publisher's Comment.—The development in recent years of high-speed, high efficiency duplication equipment in almost every mode unquestionably poses problems for producers. But I would like to suggest that it is a challenge for consumers as well, on another level. What *can* be copied? Almost anything in print, on film, tape or records. What *may* be copied? Almost nothing that is protected by copyright, because the right to make copies belongs to the author or the producer. Seems clear enough, doesn't it?

But—with *the kids'* real best interests at heart, doesn't the impoverished educator have the right to steal a loaf of media bread to feed his hungry horde? If you are tempted by this reasoning, what about another question—do the members of this same horde also have the right to satisfy their needs by acquiring without benefit of purchase procedures a book, a beer, a pack of cigarettes, a salami?

Teen-age pilferage is even more rampant than VD. I wonder whether for teachers to steal the works and rights of others by duplication without authorization is any more or less exemplary than teacher fornication in the cafeteria?

Today's sophisticated duplicating capacity can be duplicitous. Let's not be duped ourselves into breaking the law, especially when thousands of kids are observing us.

—Roger Damio.

I am a goose with tears in my eyes. People laugh at me in the street. Children stick out their tongues. A big grown up goose. Crying!

It's about these eggs that I lay. Our eggs . . . well, maybe golden is too strong a word, but with out-of-pocket production costs averaging about $20,000 a film, nobody is eating them for breakfast.

What's all this crying nonsense? It's about videotape duplication. It's about a very real concern of producer-distributors that they will be forced out of business if educators duplicate 16mm films without authorization.

This article isn't going to belabor the illegality of videotape duplication under the copyright law or even the ethics of a little benign larceny (after all, it's for the benefit of the children, isn't it?). Rather let's examine the economics of egg production and why there soon may be no more eggs.

I will have to speak, of course, from the experience of our own small company, but I believe that it is reasonably representative. Let us assume that we produce a film for $20,000 and sell prints for $200. About 65% of that $200, give or take a few percents, pays for print costs, distribution (including preview prints), and overhead. The 35% pays off the production cost. In our example, production cost would be recouped with the sale of 285 prints.

Sounds like a great little enterprise, you say. Only 285 prints before we begin to make a profit. Ah, but it will take us two and a half to three years before we have sold 285 prints. You thought that this was big business, that we sold thousands of prints? No, film companies will sell perhaps 500 to 600 prints during the life of an average film. That's all.

Further, most of that 35% "profit" after the first 285 prints is what we use to produce new films.

The educator's position is that 16mm prints are so expensive that they can afford only a fraction of their needs. Why then couldn't videotape duplication solve the problem of providing all those extra copies that schools so desperately need?

If a fee is paid to the producer for the right to make copies, it's quite possible that the producer can still make a living and the schools can at last

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[1] Robert Churchill is President of Churchill Films, 662 N. Robertson Blvd., L.A., Calif. 90069.

have as many copies of a film as they need. Personally, I profoundly hope that this will happen. Today films are too rare, too hard for the teacher to get. Availability will cause a great increase in use, understanding of the medium and consequent further demand. Eventually I suspect that the producer will benefit as more funds are channeled into a teaching medium that has finally come alive.

Let's leave the heady vision of tomorrow's cornucopia long enough to notice that the last paragraph begins with an if. If on the other hand, the producer's films are duplicated without compensation, soon there will be no films. The goose is dead.

It works this way. A producer counts on a number of purchasers who buy not just one print, but from two to ten or more. Also, after a few years many users will replace a print that has worn out. If he loses these sales, the producer is in trouble.

An even greater potential hazard comes from the tape-happy media director who doesn't buy even the first print. A person from our company saw this happen in the office of an unselfconscious media director in Northern California last spring. The director, who had on his desk a number of audio tapes sent in for a demonstration project from various producers, was calling across a partition to an assistant, conferring on the number of tapes of each title they thought they should run off on their high speed duplicator. These were not 16mm films, but they might have been.

An ingenious way to save the taxpayer's money, by George! Next year perhaps they can set up a plant and print all their own textbooks by facsimile.

Even if this last imaginative kind of larceny doesn't become the rage in film duplication, the goose will succumb if there is loss of duplicate print orders and replacement sales. Conservatively these will account for 25% of a company's sales. And there isn't a film producer in the country, whether it's EBE or little old us, who wouldn't be out of business before you could sa[illegible] ideo-tape-duplication" if its gross income dropped by 25%.

No duplication without compensation! Don't kill poor old granny goose! That's the word. Pass it on.

AUDIOVISUAL MANAGEMENT

"UNAUTHORIZED COPYING:" A BUBBLING ISSUE

Historically, most schoolmen thought it acceptable to make a single copy of a commercially produced educational program or of printed materials. Much happened in the past year to dispel that notion.

First, a U.S. court of claims commissioner awarded damages to a Baltimore publisher when a government-related medical library made photocopies of a number of articles from the publisher's journals. Next, the Educational Materials Producers Council, a group of companies that publish programs in various A-V formats, formed a copyright committee to push for revisions in existing copyright laws—revisions which Congress seems closer to passing than at any time in the pa[illegible] five years. Finally, news arrived that Utah's Granite School Distri[illegible] had reached a unique licensing agreement on film duplication with Encyclopaedia Britannica Educational Corp.

In order to clarify the new copyright issues, *Nation's Schools* conducted the following exclusive interview with Ivan Bender, general counsel of Encyclopaedia Britannica Educational Corp. and a member of EMPC's Copyright Committee.—*Philip Lewis, president, Instructional Dynamics, Inc., Chicago.*

Mr. Bender, we hear a lot these days about so-called "unauthorized copying" of films, filmstrips, videotapes, cassettes and other audiovisual programs. Can you give us an example of a school district with an "authorized" copying policy?

Yes. The Granite School District, in suburban Salt Lake City, has requested software producers to grant licenses to reproduce 16mm films in a videotape format. The district has 156 video cassette players and 21 player/recorders. Encyclopaedia Britannica Educational Corp. has proposed an experimental one-year contract (beginning Feb. 1) under which the district can copy, in unlimited fashion, any EBEC films they own or have leased—or may acquire during the term of the contract. The offer is based on a licensing fee of $56 per unit of equipment, or a total of $9,800 for the year.

This type of proposal lets Granite account only for the number of machines in use rather than keep track of student population, number of copies made, or other factors that could mean a lot of bookkeeping for schools. In essence, the Granite contract was negotiated on only two factors:

1) approximate number of films in use, and 2) units of equipment. If this arrangement proves successful, it will no doubt lead to similar licenses.

Is this kind of licensing likely to become a trend? Do you visualize similar agreements involving other kinds of media, such as audio cassettes or filmstrips?

The logic of the plan could extend to other kinds of media—provided that a workable formula could be arranged. If the Granite arrangement proves successful. I'd certainly say that's a distinct possibility.

What has prompted producers of audiovisual programs for education to be concerned over unauthorized duplicating now?

Principally, the improvement of copying hardware. Several years ago, photocopying reached a point of perfection; but only in the past year or so have duplication techniques been refined for such equipment as the videotape player/recorder.

In addition, the so-called "educational exemption" theory—a widespread feeling in the educational community that certain types of copying for classroom use are permissible as long as this copying is not on a for-profit basis—has been growing. The copyright law does not provide for such an "educational exemption," and I'm sure you can see what the problems of such an exemption might be.

Can you spell out the problems?

I'm principally concerned about widespread copying, even if it's on a sporadic or occasional basis. Producers aren't opposed to having their materials copied, but they cannot accept the notion that their materials should be copied in a fashion which would exceed the doctrine of "fair use" unless they receive just and fair compensation.

For producers of audiovisual materials this is a very crucial problem. The copying of even a few films by a school district could mean a severe economic loss to them because unlike texts, which are generally bought for each student in a class, A-V programs usually serve a number of students at any one time. Using numbers, a textbook may sell from 10,000 to 100,000 copies, while an A-V program's sales may not even reach 1,000.

Congress is at work on a new, revised copyright law. How does the existing law define "fair use," and what will the new law say about it?

Present copyright laws date back to 1909. The "fair use" doctrine has resulted from judicial interpretations over the years. Basically, it allows limited copying of small portions of a work without seeking prior permission—and without payment of a fee. For the first time, however, the proposed revision will make "fair use" a part of the law itself. A recent House committee report stated: "Where the unauthorized copying displaces what realistically might have been a sale, no matter how minor the amount of money involved, the interests of the copyright owner need protection." Some factors the user must consider: 1) the purpose and character of the use; 2) the nature of the copyrighted work; 3) the amount of material being copied as related to the work as a whole; and 4) the effect of the copying upon the potential market for the copyrighted work.

From these guidelines, it seems the proposed law will be asking schools themselves to make decisions as to what constitutes "fair use." Can you provide more specific rules-of-thumb?

First, let me say that it's easier to distinguish "fair use" in printed materials than in audiovisual materials. Take a motion picture film, for example. If you use only a quantitative test to determine "fair use," you may well be in a situation that is legally unacceptable because of the very nature of the copyrighted work. Copying one minute out of a film that runs for 20 minutes may not seem to be a violation, but that one minute may be the most expensive and important part of the film—especially if it depicts an event that was extremely difficult to photograph or relates to special kinds of photography.

In the case of filmstrips, however, it's my own feeling that copying one or two frames out of a 50 or 60-frame filmstrip may more easily be interpreted as "fair use." This is not a uniform guideline, though, and the user would still have to consider what these frames represent in terms of the work as a whole.

Can copying an entire program ever be defined as "fair use?"

No. This would apply even to print materials because of a recent case involving library photocopying of articles within periodicals.[1] If there's any doubt school officials should contact the firm.

[1] Williams & Wilkins Co. v. The United States. Decided by U.S. Court of Claims, Feb. 16, 1972.

Does it matter whether districts make single or multiple copies?

Not really. Even single copying of certain kinds of material may violate the "fair use" concept. And multiple copying may subject the violator to a greater amount of damages.

We understand that the Education Materials Producers Council has formed a copyright committee to seek changes in the copyright law. What other organizations are active in this area?

The National Education Association has an *ad hoc* committee on copyrights that seeks a limited educational exemption for the doctrine of "fair use." Basically, NEA would allow greater latitude in classroom copying than is presently permissible.

Another group, the American Library Association, wants libraries to have freer rights to copy single articles for research purposes and to have the right to supply a copy of an entire work if the library has determined that copyrighted work cannot be obtained from trade sources.

Why are we struggling so hard with the copyright laws when nobody thought about them much for 50 years or so?

For the first few decades of this century, we weren't faced with the copying technology that now exists. We now recognize that there are social values to be considered on both sides of the issue. The new copyright law will allow us to reach compromises so that there will be accessibility to educational materials at the same time that the commercial procedures of these materials are justly compensated for their creative efforts.

May I add that the new law envisions establishment of a commission on technological developments that will assess the effects technical developments will have on the copyright laws. The job of this commission will be to point out and inadequacies in the new laws to the President and to Congress.

Regardless of what happens to the revised copyright legislation, can we assume that educational materials producers will seek new arrangements with schools? If so, what are some alternative plans?

I think we can assume that the new technology will eventually result in some modification of present marketing procedures. We will see more frequent blanket licenses like the Granite arrangement. Or there may be a modification in price structures that will allow a built-in royalty to the copyright proprietor when he sells materials with the right to copy without permission.

So-called compulsory licensing agreements, such as that practiced by ASCAP (music publishers), might be possible; but under present antitrust laws, this would be very difficult to apply to any other industry. The ASCAP arrangement operates under a special government ruling which permits its existence.

Is it possible that educational program producers could come up with a double price structure—one price for normal use, and a higher price for unlimited copying privileges?

This might well happen, although I think its premature. Quite naturally, it will be up to individual companies to determine the kind of marketing techniques that are most suitable.

TESTIMONY OF EDWARD J. MEELL, CHAIRMAN, EDUCATIONAL MEDIA PRODUCERS COUNCIL

Mr. MEELL. Thank you, Mr. Chairman.

My name is Edward J. Meell, chairman of the Educational Media Producers Council of the National Audio-Visual Association. With me is the copyright chairman of that council.

I would like, before I get into my formal summary of our statement, to stress the first word in the title of our organization—Educational Media Producers Council. The 95 members of that organization produce almost exclusively for the educational market.

We are not interested in the general consumer market, or the entertainment market. We are producing for elementary, secondary, college, and university schools.

I would like to stress that 90 percent of our organization's members gross less than $5 million a year as a revenue under which they operate. That has to cover all sorts of things from marketing to development.

On behalf of my organization, I would like to say we support H.R. 2223 as it has been introduced, especially section 107, which writes into statutory law the main principles of fair use as that doctrine has been interpreted by the courts over the years. We would hope that fair use does not become free use.

We feel the language, especially in 107, represents an equitable compromise between the creators and users of copyrighted educational material, a compromise that has been painstakingly negotiated over the last several years. The technology which permits the easy duplication of audiovisual materials has been introduced only very recently—I am thinking here of motion pictures, sound filmstrips, and audio tapes—after hearings that your committee held in the sixties. It is a very significant development for our industry, one which has already had a great impact on the educational media industry, which merits careful consideration by your committee.

As a point of fact, our industry is very pleased with the progress in technology. It is not our intent to stop that march of progress of technology. It promises to make ideas and information more accessible to scholars, teachers, and learners. These developments promise also to expand the role and contribution of educational media producers to the educational process, which we consider an integral part.

In order to maintain increasing incentives for the creation and production of quality materials, we must not diminsh the statutory production for intellectual products to which any author, creator, or artist is entitled. We are therefore opposed to any amendment which would provide for an educational exemption. We solely distribute, as I mentioned, to the educational market, not to the consumer or the entertainment field.

An amendment which increases the amount of duplication permitted under fair use could significantly decrease potential sales, and therefore the production of instructional materials. Companies in this limited market are faced with two major factors.

First: The vast majority of audiovisual materials are not used in a one-to-one situation. They are used with large and small groups. Therefore, the number of copies made is quite limited—one or two copies of a 16 millimeter film may serve an entire school system of moderate size. A single copy of a filmstrip or a sound recording will serve an entire school.

Second: A typical audiovisual product will customarily sell relatively few copies over a period of 5 to 10 years. This is in comparison to textbooks or to journals which may sell thousands of copies. Sixteen-millimeter films may sell only 500 copies over 5 years. If we lose 50 or 60 of those copies in unauthorized duplication, we are immeasurably hurt.

Thus, the recapture of initial investment in research, development, editorial, and production work, which costs as much for one copy as for many, is spread over the sale of a relatively limited number of copies. In addition to the substantial initial investment required for these materials, there must be added operating expenses for the period of time over which sales are made.

The combination of these factors—limited market, small volume and sales over an extended period—means a specific broadening of the fair-use criteria could damage beyond repair the quality and diversity

of the material available for our students and teachers. We are particularly pleased to note that the principal professional organization of media educators, the Association for Educational Communication and Technology, is also supporting the language of 107, as it now stands.

For our part, we recognize the industry's responsibility to help educators utilize new technology as effectively as possible to improve the instructional process. We have made studies and developed a series of licensing arrangements over the past 2 years in cooperation with individual school systems. These accommodations allow schools for the first time to duplicate copies of purchased materials under agreed-upon formulas of compensation and provide access to needed materials.

We also have made a very strong and successful effort to establish and maintain dialogs with the users of educational media. This has taken several forms, with dozens of discussions with users of these materials, approximately a dozen articles in educational journals, reprints which have been made available free to educators, and individual efforts of members of our copyright committee to assist school systems to adopt viable copyright policies.

We are always ready to discuss with educational organizations guidelines to aid in determining parameters of fair use. The bill, as introduced, is good and workable, in our opinion, the product of many days of deliberation by the respective congressional committees and concerned parties. It is universally recognized that revision of the 1909 statute is imperative. The sooner this is accomplished, the better it will be for all concerned.

We appreciate this opportunity to appear before you.

I would like to close by summarizing our small industry. The gross dollar revenue per member company is small. Our unit sales are small. Anything that would take away from these sales would, in fact, hurt our industry and member companies. We do not want to stop technology. We want to accommodate technology and educators. We feel we have gone as far as we can go. That is why we support H.R. 2223, particularly section 107 as it stands.

Mr. KASTENMEIER. Thank you, Mr. Meell. We will now hear from Mr. Zurkowski.

[The prepared statements of Paul Zurkowski follow:]

STATEMENT OF PAUL G. ZURKOWSKI, PRESIDENT, INFORMATION INDUSTRY ASSOCIATION

Mr. Chairman, I am Paul G. Zurkowski, President of the Information Industry Association, 4720 Montgomery Lane, Bethesda, Md. 20014. As you know, the information industry has grown up in the years since 1967. The Association was formed in 1968. As an attorney with some publishing experience, I have served since February 1969 as its first principal paid employee. Prior to that time, of course, I served as legislative assistant in your office for approximately five years.

The Association presented testimony to the Senate Committee on these same issues in 1973. I refer you to that testimony for a detailed explanation of the industry. It begins at p. 266 in the July 31, Aug. 1, 1973 Hearings on S1361.

In her testimony last week the Register of Copyrights expressed grave concern about information technologies. She said that because of today's technologies once an author's idea is "out of the cage", he has no way to recapture it. He cannot receive compensation; he cannot control the context, in fact, he has lost his idea. She said that many authors are trying to determine if it is possible not to let their ideas out preferring to keep them to themselves.

In the absence of effective copyright rules for modern information technologies it is possible to devise methods to limit distribution and to limit access to au-

thor's ideas and concepts to the elite who can afford it and who will agree to protect it.

The objective of copyright is just the opposite, to encourage the author to permit the wide dissemination of his ideas in return for an exclusive right in the form in which they are expressed.

This is the objective of the information industry as well—to obtain the widest possible dissemination of information, fully utilizing all available information technologies while protecting the rights of authors. This is the industry's central function.

The business of information is a competitive and self-disciplining business. People in the business of information recognize that the materials in which they deal embody human creativity. They recognize that they must deal with it ethically. In addition, from a business standpoint they do not seek for themselves rights in the property of others which they would not be willing to grant to others in their property.

In anticipation of these Hearings, the information industry two years ago, undertook a study of the Revision Bill and the practices that have grown up in industry in dealing with the problems of new technologies.

As in traditional publishing areas the trade practices of the industry are built on the rights granted authors by the Constitution. Wide-spread industry practices were analyzed and recommendations were developed by which the practices that have grown up could be incorporated in the Copyright Revision Bill. Specific language changes were prepared which we submit to you. We choose today to synopsize them so that you will have the benefit of the industry's thinking while you evaluate the major change proposed by the educators.

We urge the Committee to add the issues relating to new technologies to the list of issues prepared by Ms. Ringer and to hold hearings on these issues. Ms. Ringer cited "present need for a revised law that will anticipate the 21st Century". Much of what relates to new technologies can be dealt with in the context of the present Revision Bill. The work of the National Commission on New Technological Uses of Copyrighted Works can be greatly aided by this Committee's serious analysis of the issues to determine what can be resolved now and what needs to be deferred for further study by that Commission.

Before addressing the education amendment the following amendments have been developed by our committee and are offered as detailed suggestions for extending copyright protection to works of authorship in the new information technologies.

Proposed amendments to § 101. Definitions:

Add the following:

A "data base" is a literary work which is a compilation expressed in a form intrinsically intended for use in conjunction with a computer.

A "search" of a data base is the examination or analysis of a data base by a computer for particular information relevant to an inquiry, whether or not the examination or analysis results in any display, copy or performance of all or part of the data base, and whether or not the inquirer received it in the same place or in separate places or at the same or at different times.

A "computer program" is a literary work consisting of a series of instructions of statements which are in a form acceptable to a computer and which are prepared in order to achieve a certain result, regardless of the nature of the material objects, such as documents, punched cards, magnetic tapes or discs, or computer storage elements, in which the works are embodied. A computer program may be a derivative work of a flow chart and either may be a derivative work of a literary work.

A "computer" is any automatic system capable of storing, processing, retrieving or transferring information, or any similar device, machine or process.

A "microform composition" is a literary work that results from the fixation of a series of images regardless of the nature of the material objects, such as fiche, film, opaque or otherwise in which they are embodied.

"Direct or indirect commercial advantage" includes, but is not limited to sale of products or services regardless of the tax status or organizational nature of the vendor, or method of payment be it on a per unit, membership fee or otherwise.

An amendment in the nature of a technical amendment is also offered with regard to the definition for "a work is fixed." To wit:

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 non-

evanescent and sufficiently permanent or stable to permit it repeatedly to be perceived, reproduced, or otherwise communicated. 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.

EXPLANATORY LANGUAGE

Because there has been some comment in the literature that the copying of a copyrighted work into the main storage element of a computer might not be an infringement, and because the recorded state of a copyrighted program in main memory (and some other computer storage elements) might only obtain for a few microseconds, it is thought desirable to amend the definition for "a work is fixed". As presently written it is believed that the definition intends, among other things, for an immediately self-decaying embodiment not to be a fixation. Storage in main memory is not self decaying in a whole element sense though the recordings in the components of some computer storage elements are automatically refreshed internally. Storage in main memory is normally erased or replaced on specific instruction only. Such recordation in main memory is, thus, *non-evanescent* and sufficiently permanent or stable to permit it repeatedly to be perceived, reproduced or otherwise communicated. Thus, the definition for "a work is fixed" would be more suitable and accurate if amended. It is believed such amendment does not change the basic intent of the definition while making clear that recordation in the main storage element of a computer would be the making of a copy.

Proposed amendments to § 102. Subject matter of copyright: In general,

Add the following as separate categories of works of authorship:

"(8) Data bases.

"(9) Computer Programs.

"(10) Microform compositions."

EXPLANATORY LANGUAGE

Consistent with the first complete paragraph on page 107 of Senate Report No. 93-983, it is noted in connection with the inclusion of "data bases" and "microform composition" that they may, though not always, involve "authorship" both on the part of those whose ideas and concepts are captured and on the part of the data base and microform composition producers responsible for conceptualizing the data base or microform composition, capturing and processing the data or images, and compiling and editing them to make the final product. There may be cases where the producer's contribution is so minimal that the ideas and concepts embodied in the data base or microform composition are the only copyrightable element in the work and there may be cases (for example, public domain materials) where only the data base or microform composition producer's contribution is copyrightable.

With regard to data bases and microform composition, it is not the intention of this amendment to preclude others from reconstituting the original source materials and ideas into their own independent work, but rather to assure that society has the choice of choosing from amongst a variety of data bases and microform compositions already in being and available readily in the marketplace by virtue of the operation and application of copyright concepts to these intellectual properties.

It is proposed that 102 (b) also be amended, by adding the following:

"However, copyright protection may exist in a collection of ideas or abstractions arbitrarily selected from a plurality of alternative ideas or abstractions or in a discretionary pattern of events or processes."

EXPLANATORY LANGUAGE

This amendment is directed at the copyrightability of computer software. Computer programming is a very flexible art. Given a single problem and a basic plan for its solution, two independent programmers could, and likely would, write two different computer programs.

Thus the proposed amendment would ensure that the computer program developer will have copyright protection in the discretionary elements of his sequence of operations and particular processes. Typically, the sequence of operations and particular processes are set forth on a flow chart. A program, as a derivative work of a flow chart, would be protected in that aspect of the developer's creativity effort, too.

Considerable effort is spent in working out the sequence of events or steps (operations) that a program will follow and in selecting the processes to carry out the various individual steps. It is believed that this effort involves the elements of assembly, selecting, arranging, editing, and literary expression, and thus is the work of an author. Section 102(b) appears to be included in the bill to ensure that the copyrighting of programs does not result in the equivalent of patenting its system concepts. As written, Section 102(b) goes further than necessary. Even the Supreme Court in the case of *Baker v. Selden*, 101 U.S. 99, 26 Lawyers Ed 841 (1879) did not go that far. Thus, that decision reads:

"And where the art it teaches cannot be used without employing the methods and diagrams used to illustrate the book, or such as are similar to them, such methods and diagrams are to be considered as necessary incidents to the art, and given therewith the public; not given for purposes of publication in other works explanatory of the art, but for the purpose of practical application."

Therefore, the holding in *Baker v. Selden* is limited to situations where alternative processes and sequences are not available. Where such are available, it would seem that the Copyright Law should apply and the program developer protected against copying of the discretionary elements of his particular development. Others would still be free to use the methods of operation dictated by the results to be accomplished and to flesh out their own versions of how to achieve those results.

It is proposed that § 106, Exclusive Rights in Copyrighted Works be amended as follows:

"(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, *data bases and computer programs*, to display the copyrighted work publicly."

and add the following:

"(6) to read, to store or to reproduce for storage in a computer;

"(7) to search or use a data base in conjunction with a computer."

It is also proposed that Section 117: scope of exclusive rights: Use in conjunction with computers and similar information systems, *be deleted*.

A concomitant proposed amendment to the amendments to Section 106 is the deletion of Section 117. By specifically addressing the reading into, storage or reproduction for storage in a computer as an exclusive right of the owner of copyright under this title, this language would explicitly resolve a major question left open by the language of Section 117 in favor of the producer of the copyrighted work. Provision of the search and use rights assures the proprietor of a data base copyright with his basic rights and completes resolution of the main question concerning use of copyrighted works in computers. The word search is included among the proposed amendments to the definitions section of the bill. The output of a search of a data base would be protectible as a derivative work.

A new Section is proposed: § 11_. Scope of exclusive rights in computer programs:

NEW section 11.—Scope of exclusive rights: Computer Programs.

"In the case of computer programs, notwithstanding the provisions of subsections (a) and (b) of Section 109, it is an infringement of copyright for the possessor of a computer program to make a copy thereof by reproducing it in a computer unless authorized by the copyright owner.

"The copyright status of the result of the execution of a program will be that of a derivative work of the information (which may be a program) processed or modified by the executing program and its ancillary programs."

Explanatory language:

This amendment is necessary if the marketing of programs is to be facilitated by sale and not limited to lease/license arrangements. The amendment would ensure that the repurchaser, or the like, of a machine-readable media copy of a program is not automatically entitled to reproduce the program in his computer. It may be that the first purchaser of a program would have an implied right to reproduce it in his computer. However, if this is an inalienable right of a succeeding holder of a machine-readable media embodying a program, then it may be that the market for the program author is exceedingly limited. This would come about because the first purchaser of a program could read it into his computer, and once having entered it into permanent storage therein, could pass the machine-readable media on to a second computer owner. In this way, the theoretical market for a program might basically be reduced to one. This would not facilitate cost recovery on the part of the author and would undoubtedly stifle development activity. This amendment would also make clear that it is a

copyright infringement where a person borrows a computer storage element (disc machine) containing a program from a friend and transfers the program to another host machine without permission of the copyright owner.

A new Section is proposed: § 11—: Scope of exclusive rights: Microform Compositions.

NEW Section 11—. Scope of exclusive rights: Microform Compositions.

"(a) Limitations on Exclusive Rights. The exclusive rights of the owner of a copyright in a microform composition are limited to the rights specified in clauses (1), (3) and (5) of section 106. The exclusive rights of the owner of copyright in a microform composition to reproduce and display it are limited to the rights to duplicate the microform composition in the form of the microfiche, microfilm, opaques or other microforms that directly or indirectly recapture the actual images in the composition, and to display these actual images. These rights do not extend to the making or duplication of another microform composition that is a fixation of other images, or to the display of other images even though such images derive from the same or similar subject matter to those included in the copyrighted microform composition.

"(b) Right of copy distinct; the exclusive right to copy or to display copyrighted literary or dramatic work, and the right to copy or display a copyrighted microform composition are separate and independent rights under this title."

Explanatory language:

This section is modeled after the language of the tape piracy statute and calls for a recognition of two separate rights.

The intent of this amendment is to create what has been a format copyright in the work of a creator of a microform composition. There are variations in the nature of the contribution different creators will bring to the creation of a microform composition. A simple reproduction of a pre-existing document might not qualify for copyright as a microform composition. The collection, selection, organization, editing and creating of a large set of materials represents a major contribution of the nature copyright protection was intended. This amendment would provide such protection. It should be noted, however, that the protection provided is limited to the specific composition created and does not preclude anyone else, with independent effort and creativity from microfilming those same materials and, perhaps, qualifying for a separate copyright for his efforts.

By way of a technical amendment to § 301. Pre-emption with respect to other laws, the following amendment is proposed:

"§ 301. Pre-emption with respect to other laws.

"(a) On and after January 1, 1977, 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, 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 deceptive trade practices such as passing off and false representation.

"(c) Nothing in this title annuls or limits any rights or remedies under any other Federal Statute.

"(d) Compliance with the deposit requirements of this title shall not be destructive of any such "not equivalent" rights."

An amendment to Section 407. Deposit copies of phonorecords for Library of Congress is offered as follows:

"(b) The required copies or phonorecords shall be deposited in the Copyright Office for the purpose of reference within the Library of Congress. The Register

of Copyrights shall, when requested by the depositor and upon payment of the fee prescribed by section 708, issue a receipt for the deposit."

Subsection (b) is amended to limit the use that might be made by the Library of Congress of deposited works. Items such as data bases, computer programs and microform compositions are costly and the use thereof for purposes other than reference within the Library of Congress would substantially impact the opportunities for authors to recover their costs, particularly considering the limited quantities in which they are marketed.

An amendment to Section 408. Copyright Registration in General is offered as follows:

Add a new section (f):

"(f) In the case of microform compositions deposit copies are required only where the retail price of the composition is $1,000 or less. In cases where microform compositions are created in editions, deposit copies are required only when the total number of copies in a particular edition exceeds 200 in number."

The creation of a microfilm composition often is an expensive process and results in very small unit sales. Many microform compositions sell only 20 or 30 copies and a total sale of 50 is usually considered quite a successful work. To require the creator of a microform composition to deposit two copies out of perhaps a total of 20, represents a disproportionate burden. The manufacture of each copy, in addition, is a costly effort. The purpose of this amendment is to limit the impact of the deposit requirement on the overall objective of the copyright system, to obtain the widest possible dissemination of information useful to science and the useful arts.

An amendment to 704, Retention and Disposition of articles of deposit in Copyright Office is proposed as follows:

"(a) Upon their deposit in the Copyright Office under sections 407 and 408, all copies, phonorecords, and identifying material, including those deposited in connection with claims that have been refused registration, are in the custody of the United States Government."

Subsection (a) would be amended to specify that deposit copies are in the custody of, rather than the property of, the United States Government, Title would thus be left in the author and the Library of Congress' rights of utilization and disposition limited to that of a bailee. Again the intention, in the light of vastly expanded library networking concepts, is to limit the use that may be made of expensive deposit copies by others than the Library of Congress. A replication and redistribution effort by the Library of Congress could severely affect the rights of authors otherwise granted in this legislation.

We believe these amendments deserve consideration in this revision cycle. They represent the results of day-to-day experience of authors, information companies, and users seeking to work out within existing copyright concepts workable relations for the dissemination of information through these technologies. We recognize the great pressure on the Committee to act on this legislation, particularly in view of the immense effort you have already devoted to it. These are no small matters, however; the present and future methods for sharing the works of authors with world-wide audiences are to be found in this complex mix of constitutional, economic and social issues.

Whether you are able to take the time to understand these new technology issues now and to act on those which deserve immediate attention or are constrained to defer to the National Commission on New Technological Uses of Copyrighted Works on all of them, it should be clear that the constitutional rights of authors will not be protected by exemptions that essentially free large computer systems to have free access to all works of authorship.

One of the major features of the computer age is the fact that state after state has created large university-based computer facilities and have given these facilities extensive authority to serve not only educational users, students, but industry, libraries of all kinds and government, state and federal, as well.

The result of granting such facilities an exemption to input into computers copyrighted works of authorship without infringing the copyright would be the creation of a whole new information distribution system in the United States. The system would not be based on author's rights as the present system is based. Rather it would be based on state bureaucratic decisions. Only those authors which the state-owned networks chose to respect would be granted anything approaching the rights of authors enjoyer in inkprint publications. The works of authors could be freely installed in computers without the authors' approval or even knowledge. The authors ideas could be used, re-documented and even distorted as to source, meaning and context. One area served by one system would

have access to that systems version of the facts and another area would have access to another state-subsidized version. How would we as a nation sort out the truth without equal access to the same unabridged works of authorship. If the author's control over his work product through copyright is denied him by exemptions which free his works to be input, piecemeal or in total, accurately or inaccurately, it is difficult to see how the nation can stimulate and reward authors for writing the insightful and critical commentaries essential to the functioning of a democracy.

An exemption of input from copyright infringement would have other effects as well:

By implication such an amendment to the present legislation acknowledges that to input copyrighted materials into a computer is an infringement under present law. A need for such a change in the law has not been proved.

The small printouts resulting from most computer searches would by their size alone be argued to constitute "fair use" of the information. Having inserted in the computer the Encyclopaedia Britannica, brief extracts would be printed out. Notwithstanding the fact that this is the only way to use encyclopedic information, many would seek to treat it as fair use. Since there is no provision for any payment system in the proposal, this apparently is the intended result.

If entire works are free to be input, such materials as the *Reader's Guide to Periodical Literature* could be keypunched and installed in a computer system. Such publications are used simply to find a specific article citation. Without specific provision for controlling uses, the protection offered by copyright would be minimal. Little would be published in the open literature and authors would attempt to protect themselves by limiting by contract what uses could be made of their works.

The stress on exemptions would have the effect of eliminating publishing media which did not have exemptions because the basis for creation and investment in dissemination efforts, a minimal proprietary position, would be eliminated. The result would be reduced creation and distribution of works of authorship. The elimination of risk capital and the reliance on state capital would seriously retard development in many areas of science and the useful arts.

The proliferation of non-profit uses, particularly in information, today are legend. Government funding of research in information systems work, for example, is essentially limited to grants to non-profit organizations. This has led to the development of a whole generation of organizations performing this research on a non-profit basis. Separate non-profit groups have grown up to do similar research in education. We raise these questions not to challenge the purposes of these groups, but to suggest that the amendment is unduly broad as drafted and would serve, if enacted, to stimulate even further the development of subsidy-based information dissemination activities.

Finally, we believe there are several basic legislative drafting objections to the exemption proposal:

The amendment conflicts wi the purpose of Section 117 to maintain the status quo in the law vis-a-v.. copyright at input. If the committee is to consider seriously this exemption, similar serious consideration must be given to the author's-rights-based amendments offered above. It should be clear from a brief reading of the amendments we have suggested that this is an exceedingly complex area and that it cannot be dealt with simplistically.

The amendment, if coupled with the library photocopying exemption, appears to destroy the economic base of publishing. What the education exemption would allow to be input without infringing copyright, the library exemption would permit the copying of. The result would be the elimination of meaningful copyright protection for authors.

The amendment would preempt much of the work of the National Commission on New Technological Uses of Copyrighted Works. By granting such an exemption, the amendment would not only prejudge a large segment of the Commission's responsibilities, but it would also create a situation where there would be no experience for the Commission to draw on in evaluating how authors and users can resolve problems and develop workable relations within an economic framework.

In summary, the information industry position on H.R. 2223 is that, subject to some technical amendments, the bill should be enacted in its present form and that the library and education exemptions should be rejected. In the event that serious consideration is given to any such amendments, of a nature to deprive authors of significant rights in the new information technologies, we respectfully

request that the recommendations of our committee be given full and equal consideration including the calling of witnesses with first-hand experience in the day-to-day resolution of the problems encountered. While many of these issues should be referred to the National Commission, some questions could be resolved now on the basis of existing knowledge, expertise and understanding. We, accordingly, urge the Committee to hold hearings with regard to developments in the new technology area. It is in this area of the law that the copyright concept will be most challenged in the months and years immediately ahead. An effective copyright law, "that will anticipate the 21st Century" will need to deal with these issues.

We thank you for your courtesy in providing us this opportunity to share our views with you and we wish you the best of good fortune in this and all other areas requiring your legislative skills.

STATEMENT OF PAUL G. ZURKOWSKI, PRESIDENT, INFORMATION INDUSTRY ASSOCIATION

Mr. Chairman and Members of the Committee. My name is Paul G. Zurkowski, President of the Information Industry Association. I have prepared a formal statement which I will not read but which I ask be submitted for the record.

The Information Industry Association is composed of more than 70 commercial firms. Some create data bases and computer programs. Others specialize in marketing access to such machine readable information sources. Others are microform publishers, traditional book and journal publishers, consultants, information-on-demand companies, suppliers of services to libraries, indexing and abstracting companies, information systems designers, information facilities managers, and others engage in the creation and marketing of information products, services and systems, world-wide.

Many of these companies have a decade or more of experience in disseminating works of authorship through the use of all varieties of advanced information technologies, alone and in combination with traditional ink-print technologies. Our Proprietary Rights Committee spent the past two years matching this practical experience with the provisions of the revision bill. You will find in the statement the results of that effort. We think that before your committee makes or the National Commission on New Technological Uses of Copyrighted Works recommends, any changes in H.R. 2223 affecting the use of works of authorship in these new technologies these recommendations and the experience of this industry should be considered. People in the industry dealing with the opportunities for wider dissemination of information offered by the new technologies are ready and willing to assist you in these matters in any way they can.

The objective of copyright is to encourage the author to permit the wide dissemination of his ideas in return for an exclusive right in the form in which they are expressed. This is the objective of the information industry as well—to obtain the widest possible dissemination of information, fully utilizing all available information technologies while protecting the rights of authors.

We appear to add our support for enactment of H.R. 2223 and to register our opposition to the amendments proposed to sections 107 and 108.

We feel most strongly that a single-copy photocopying exemption combined with an exemption permitting the input of copyrighted works of authorship into a computerized information system would eliminate meaningful copyright for authors. Copyrighted works of authorship which the education exemption would permit to be input without infringing copyright could be copied on a single-copy basis under the library exemption. Stripped of these copyright protections, authors could publish little in the open literature without being subjected to such exempt uses. Authors, in turn, would seek to protect their works, as the Register fears and the Justice Department recommended, by limiting by contract what uses could be made of their works. The end result for both libraries and educators would be less access rather than the free access they initially expect would result from their amendments.

Further objections to the proposals include:

1. No need for such an exemption has been proved. An industry is emerging to provide the widest possible dissemination while respecting the constitutional mandate to protect author's rights.

2. Small printouts from data banks of encyclopedic information would be argued to constitute "fair use", notwithstanding that this is precisely the use intended. These kinds of resources would be denied to research, education and

libraries on an open copyrighted basis and would have to be provided under contractual arrangements.

3. By exempting certain activities, and thereby exempting them from costs others have to pay, these exempt activities would tend to replace privately funded publishing and information activities. The elimination of private risk capital from the creation and information distribution functions would seriously retard development in many areas of science and the useful arts.

Finally, the proposal to exempt input conflicts with the provisions of section 117 to maintain the status quo in the law *vis a vis* questions of copyrighted works and computers. This is an exceedingly complex area involving not only author's rights, but also major social policy questions with far-reaching economic implications. Section 117 was originally included in the bill in recognition that neither this Committee nor the Senate Judiciary Committee has explored these issues adequately. The National Commission on New Technological Uses of Copyrighted Works was established to do that investigation for the Congress.

If these exemptions are written into the law the study expected of the Commission would be seriously prejudiced. By granting exemptions at the expense of author's rights and the economic interests of publishers and information companies, the arena within which all parties now are developing workable relations would be destroyed. The Commission would be deprived of the necessary experience in the marketplace on which to base meaningful recommendations for future copyright legislation.

CONCLUSION

While our committee of people who work with these technologies day in and day out were able after lengthy meetings and detailed discussions to agree on some basic definitions and on an approach to the technologies based on author's rights, there also emerged unanimity that these were just the beginning in understanding the whole complex of dynamic technical, esoteric, legal, social and economic relationships which ultimately will form the base for our emerging information society.

It promises to be an exciting and long journey. We recognize as an industry that the serious attention you are giving these matters represents for our society that first step by which any journey must begin.

TESTIMONY OF PAUL G. ZURKOWSKI, PRESIDENT, INFORMATION INDUSTRY ASSOCIATION

Mr. ZURKOWSKI. I have submitted two statements. I will read part of the four-page summary statement.

My name is Paul Zurkowski; I am president of the Information Industry Association. Donald Johnston, counsel, Xerox education group and member of our Proprietary Rights Committee is with me. The association is composed of more than 70 commercial firms, all of which are involved in one way or the other in applying the modern in-information technologies to the dissemination of information.

Many of these companies have a decade or more of experience in disseminating works of authorship through the use of all varieties of advanced information technologies, alone and in combination with traditional ink-print technologies.

Our proprietary rights committee spent the past 2 years matching this practical experience with the provisions of the revision bill. You will find in the statement the results of that effort. We think that before your committee makes, or the National Commission on New Technological Uses of Copyrighted Works recommends, any changes in H.R. 2223 affecting the use of works of authorship in these new technologies, these recommendations and the experience of this industry should be considered.

People in the industry dealing with the opportunities for wider dissemination of information offered by the new technologies are ready and willing to assist you in these matters in any way they can.

The objective of copyright is to encourage the author to permit the wide dissemination of his ideas in return for an exclusive right in the form in which they are expressed. This is the objective of the information industry as well—to obtain the widest possible dissemination of information, fully utilizing all available information technologies, while protecting the rights of authors.

We appear to add our support for enactment of H.R. 2223 and to register our opposition to the amendments proposed to sections 107 and 108.

We feel most strongly that a single copy photocopying exemption, combined with an exemption permitting the input of copyrighted works of authorship into a computerized information system would eliminate meaningful copyright for authors. Copyrighted works of authorship which the education exemption would permit to be input without infringing copyright could be copied on a single copy basis under the library exemption.

Stripped of these copyright protections, authors could publish little in the open literature without being subjected to such exempt uses. Authors, in turn, would seek to protect their works, as the Register fears and the Justice Department recommended, by limiting by contract what uses could be made of their works.

The end result for both libraries and educators would be less access rather than the free access they initially expect would result from their amendments. Further objections to the proposals include:

Small printouts from data banks of encyclopedic information would be argued to constitute fair use, notwithstanding that this is precisely the use intended. These kinds of resources would be denied to research, education, and libraries on an open copyrighted basis, and would have to be provided under contractual arrangements.

By exempting certain activities, and thereby exempting them from costs others have to pay, these exempt activities would tend to replace privately funded publishing and information activities. The elimination of private risk capital from the creation and information distribution functions would seriously retard development in many areas of science and the useful arts.

Finally, the proposal to exempt input conflicts with the provisions of section 117 to maintain the status quo in the law vis-a-vis questions of copyrighted works and computers. This is an exceedingly complex area involving not only authors' rights, but also, major social policy questions with far-reaching economic implications.

Section 117 was originally included in the bill in recognition that neither this committee, nor the Senate Judiciary Committee, has explored these issues adequately. The National Commission on New Technological Uses of Copyrighted Works was established to do that investigation for the Congress.

If these exemptions are written into the law, the study expected of the commission would be seriously prejudiced. We think we are entering the information age. The work you are doing in this area is very important to the system of freedom of expression this country enjoys.

We certainly appreciate the dedicated efforts you have given it. Thank you very much.

Mr. KASTENMEIER. Thank you very much, Mr. Zurkowski.

[The prepared statement of Ernest R. Farmer follows:]

STATEMENT OF ERNEST R. FARMER ON BEHALF OF THE MUSIC PUBLISHERS ASSOCIATION OF THE U.S., INC., AND THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC.

Mr. Chairman, my name is Ernest R. Farmer, President of Shawnee Press, Inc., a music publisher located in Delaware Water Gap, Pa. I appear before this Committee today on behalf of the Music Publishers Association of the U.S., Inc., the trade association of the publishers of educational, concert and sacred music, of which I am a past president. I also appear on behalf of the National Music Publishers' Association, Inc., the trade association of publishers of popular, motion picture and theater music. I might add that I am also past president of the Music Industry Council, an auxiliary organization of the Music Educators National Conference which creates a liaison between that organization of music teachers and various components of the music industry.

The provisions of Section 107 are of vital concern to those members of the music publishing business who depend upon the sale of music in printed form as the basis upon which their particular businesses depend. The graphic representation of the creations of composers and authors—printed music—represents a substantial part of such businesses—in many cases almost all of it.

It may be helpful to an understanding of this function to know that the prime markets for printed music are schools and churches for use by their choruses and bands and orchestras. In this sense we are "group music" specialists. For this reason, the unit price of our publications is relatively modest and we look to the purchase of multiple copies of a given publication to make it commercially feasible.

As an illustration, I have here a single copy of one of our choral publications that is widely sung in our Nation's schools. The retail selling price is 35 cents. You will note that in a technical sense it is a relatively simple publication. Two sheets of paper 10½ by 13½ inches in size, printed and folded together unbound. Obviously, once the initial music engraving and typography has been done and the initial copies printed, further reproduction by any one of a number of means readily available in today's schools becomes a simple matter.

While I have used a choral publication as an example, the same situation exists relative to band and orchestra works.

This simple matter of unauthorized reproduction by schools or churches is vitally important to our authors and composers and to us as publishers. Widespread, unauthorized photoduplication of our music could sap the lifeblood of our business, deprive authors and composers of their royalties and publishers of their basic source of income. Such a situation does indeed exist under the current U.S. Copyright Law due to misconceptions and misunderstanding and misinformation and in the absence of clear and workable guidelines.

Let me state categorically that my colleagues and I have the highest regard for the music teachers of America. Moreover, the relationship between the music publishers associations and the Music Educators National Conference whose membership of over 50,000 includes most teachers of music in the schools of America serves as a model of understanding and cooperation between educational users of copyrighted materials and the authors, composers and publishers of those works.

As a matter of fact, the Executive Board of the MENC in June of 1973 unanimously supported the following statement of policy:

I. MENC Policy on the Use of Copyrighted Material.

The MENC National Executive Board establishes as the policy of the Music Educators National Conference that the copyright law shall be observed and that improper and unauthorized use of music and other printed materials protected under that law shall be prohibited in all conference activities. Further, all MENC national and state affiliates are urged to adopt a similar position as official policy.

II. Implementation of MENC Copyright Policy.

The MENC National Executive Board directs that official MENC policy on the use of copyrighted materials be implemented in the following ways:

(1) When a director accepts an invitation to appear on a convention program he shall sign a declaration stating that he has read the MENC policy and will not use unauthorized copies of copyrighted materials.

(2) Any participants in an MENC program violating this policy position will be subject to suspension from the program.

(3) The action of the National Executive Board shall be communicated as a matter of general information to all participants in MENC-sponsored activities.

Moreover, a number of state organizations of music educators have undertaken similar and in some cases stronger statements on behalf of respect for and observance of copyright.

It is important to recognize that the term "teaching" as it relates to music ultimately carries with it the implication of rendering, interpreting or performing. Although there are certain academic and theoretical aspects of the art that do not require re-creation in the form of sound, the teaching of music as it is generally understood in the schools requires the learning of skills necessary to accurately convert abstract symbols printed on a piece of paper into a given sound within a given time by means of instruments or the human voice. Therefore, copies of printed music such as this are regularly used for the purpose of teaching. In simple, realistic terms duplication of printed music for teaching inevitably means reproduction of multiple copies with disastrous consequences to authors and composers and their publishers.

We are in favor of and support Section 107 as it is set forth in H.R. 2223, but in order that users of music interpret the Section correctly and equitably and avoid inadvertent or intentional misinterpretation of the provisions of Section 107, we believe that repetition of the excellent explanation and interpretation which was included in your predecessor's Subcommittee's Report (Report #2237, 89th Congress, 2d Session) is absolutely essential.

Let me suggest how Section 107 without the support of a comprehensive exposition in an accompanying report might be interpreted by our present customers. Imagine ourselves in the position of a public school music teacher any place in the United States when confronted with the new guidelines. And let us further assume that we are attracted to this particular piece of music and want to teach our classes to sing it.

Subject to the criteria in the proposed wording of Section 107 alone, would it not be reasonable to assume that to a person engaged in "teaching" it would be perfectly proper to make whatever number of "copies" may be necessary to "teach" our singers?

In determining the particulars of this example with respect to guideline (1) in Section 107, the purpose and character of our hypothetical use is for "teaching." And that is proposed to be recognized as a fair use.

As to the second guideline, what is the nature of the copyrighted work? Our hypothetical teacher might well say, "Why, it's a simple little song and there are thousands published every year. As a teacher, I just happen to like this one."

In dealing with the third criterion, I must point out that it is not unusual for certain individual songs to be published in collected form. For instance, our previous example is also found as part of the contents of this choral collection which I have here.

If the teacher chooses to reproduce his copies for the purpose of teaching from this collection rather than the separate publication, would it not be reasonable for him to assume that he has satisfied the third requirement: that in selecting one song from 40 the "amount and substantiality of the portion used" is relatively insignificant in relation to this choral collection. Yet in fact, our hypothetical teacher has reproduced a complete work * * * words, music, melody, harmony, and accompaniment essentially as they appear in the separate edition previously shown.

As to the fourth guideline and "the effect of the use upon the potential markets for or value of the copyrighted work," our teacher might well say, "Why I'm just one teacher who wants to teach a nice song to some youngsters. How could this possibly hurt anyone?"

Now I fully realize that such reasoning as we have outlined in our hypothetical case might not stand up in a court of law. But why must the copyright owner be put in the position of policing such an open-end statute in order to survive in the major market available to him?

In the past the music publishers associations have undertaken to inform music educators on copyright matters as indeed have the educator's national organization's publication and statements of policy. We have confidence that the Music Educators National Conference would join us in a massive undertaking after the passage of a new Copyright Law to inform music educators

what they may and what they may not do under the Copyright Law through circulation of the relevant portions of the Law and the Report.

On June 2, 1965 (pp 399 et seq. of the transcript of Hearings on H.R. 4347—89th Congress) Mr. Charles Gary, Executive Secretary of MENC, testified on the Copyright Revision Bill (H.R. 4347) which then contained only the following section concerning fair use . . . "Notwithstanding the provisions of Section 106 the fair use of a copyrighted work is not an infringement of copyright." We believe that the problems cited by Mr. Gary in his testimony on that day concerning educators' use of printed music would all be fully resolved by Section 107 as it appears in H.R. 2223 when accompanied and interpreted by and with the Report referred to above.

The members of the Music Publishers' Association and the National Music Publishers' Association are daily and actively involved in attempting to persuade and encourage the best creative individuals to use their imaginations and special talents for the creation of more and better music for America's school children with a resulting improvement in the general cultural climate of our country. As the late, great composer, humanitarian and internationally renowned music educator, Zoltan Kodaly, stated. "We must put an end to the pedagogic superstition which demands that teaching material shall be constituted exclusively by a diluted substitution of art. It is necessary to reverse this thesis: for the child, only true artistic value is good enough. No one is too great to write for children."

If authors and composers and publishers are to work toward the creation of a body of music for schools and indeed for churches with such a purpose as Mr. Kodaly enunciates, they can do so only with the clear assurance that their work will be protected and their efforts will be rewarded and not thwarted. We respectfully urge this Subcommittee to make this possible.

Mr. Chairman, we wish to express our appreciation to you and the members of the Subcommittee for this opportunity to appear before you on this matter, the importance of which I cannot overemphasize. Thank you.

TESTIMONY OF ERNEST R. FARMER, PRESIDENT, SHAWNEE PRESS, INC., DELAWARE WATER GAP, PA.

Mr. FARMER. Mr. Chairman, my name is Ernest R. Farmer, president of Shawnee Press, Inc., a music publisher. I appear before this committee on behalf of the Music Publishers Association of the U.S., Inc., the trade association of the publishers of educational, concert, and sacred music, of which I am a past president.

In opening my remarks, I would like to thank Father Drinan for some of the questions he put to the educator group, which, in my opinion, did an excellent job of pointing out the unique problems of printed music.

For those reasons, the provisions of section 107 are of vital concern to those in the music publishing business who depend on the sale of music in the printed form as the basis for staying in business. The graphic representation of the creations of composers and authors—printed music—represents a substantial part of such businesses—in many cases, almost all of it.

The prime markets for printed music are schools and churches for use by their choruses and bands and orchestras. In this sense, we are group-music specialists, and the unit price of our publications is relatively modest. Therefore, we look to the purchase of multiple copies of a publication to make it commercially feasible.

As an illustration, I have here a single copy of one of our choral publications widely sung in our Nation's schools. The retail selling price is 35 cents. Obviously, once the initial music engraving and typography has been done, and the initial copies printed—at the sole expense of the publisher—further reproduction by any one of a num-

ber of means readily available in today's schools becomes a simple matter.

This technologically simple matter of unauthorized reproduction by schools or churches is vitally important to our authors and composers and to us as publishers. Widespread, unauthorized photoduplication of our music could sap the lifeblood of our business, deprive authors and composers of their royalties, and publishers of their basic source of income. Such a situation does indeed exist under the current U.S. copyright law due to misconceptions and misunderstanding and misinformation, and the absence of clear and workable guidelines.

Let me state categorically that my colleagues and I have the highest regard for the music teachers of America. Moreover, the relationship between the music publishers' associations and the Music Educators National Conference serves as a model of understanding and cooperation between educational users of copyrighted materials and the authors, composers, and publishers of those works.

As a matter of fact, the executive board of the MENC, in June of 1973, unanimously issued a statement on use of copyrighted material, and the full text of their statement appears in my prepared remarks.

With this relationship with our primary customer group as a background, it is important to recognize that the term "teaching" as it relates to music ultimately carries with it the implication of rendering, interpreting, or performing.

The teaching of music, as it is generally understood in the schools, requires the learning of skills necessary to accurately convert abstract symbols printed on a piece of paper into a given sound within a given time by means of instruments or the human voice. Therefore, copies of printed music, such as this, are regularly used for the purposes of teaching.

In simple, realistic terms, unauthorized duplication of printed music for teaching inevitably means reproduction of multiple copies with disastrous consequences to authors, composers, and publishers.

We are in favor of, and support, section 107 as it is set forth in H.R. 2223, but in order that users of music interpret this section correctly, we believe that the explanation and interpretation which was included in your predecessor's subcommittee report—Report No. 2237 of the 89th Congerss, 2d Session—is absolutely essential.

In my prepared statement I have attempted to demonstrate how the proposed criteria of 107 can be susceptible to all sorts of misinterpretations, particularly with respect to the so-called criteria.

I must point out that it is not unusual for individual songs to be published in collected form. For instance, our previous example is also found as part of the contents of this choral collection.

If a teacher chooses to reproduce his copies for the purpose of teaching from this collection, rather than from the separate publication, would it not be reasonable for him to assume that he has satisfied the third requirement—that is, in selecting one song from 40, the amount and substantiality of the portion used is relatively insignificant in relation to this choral collection. In fact, our hypothetical teacher has reproduced a complete work—words, music, melody, harmony and accompaniment, essentially as they appear in the separate publication previously shown.

The members of the Music Publishers' Association and the National Music Publishers' Association are daily and actively involved in attempting to persuade and encourage the best creative individuals they know to use their imaginations and special talents for the creation of more and better music for America's schoolchildren, with a resulting improvement in the general cultural climate of our country.

If the authors and composers and publishers are to work toward the creation of a body of music for schools, and indeed for churches with such a purpose in mind, they can do so only with the clear assurance that their work will be protected and their efforts will be rewarded and not thwarted.

We respectfully urge this subcommittee to make this possible.

Mr. Chairman, I thank you for the opportunity to present this point of view. If I may add one further observation regarding section 108.

It is my understanding there was testimony given yesterday attacking the exemption given to musical works in the proposed language of 108. May I say, this was news to us due to the fact this language has been on the record presumably without prior objection for some years. Therefore, we would like to respectfully request the opportunity to prepare, and file for the records, a statement in rebuttal to the remarks made yesterday concerning 108(h).

Mr. KASTENMEIER. Such additional comment with respect to that question, Mr. Farmer, without objection, will be received.

Mr. FARMER. Thank you.

[Subsequent to the hearing the following statement was received:]

SUPPLEMENTAL STATEMENT OF ERNEST R. FARMER ON BEHALF OF THE MUSIC PUBLISHERS ASSOCIATION OF THE U.S., INC. AND THE NATIONAL MUSIC PUBLISHERS' ASSOCIATION, INC. RELATIVE TO SECTION 108 OF H.R. 2223

This statement is submitted pursuant to permission granted me by the Chairman of the Subcommittee on Courts, Civil Liberties and the Administration of Justice, on May 14, 1975, when I testified with regard to Section 107.

The purpose of this statement is to rebut that portion of the testimony of Dr. Edmon Low testifying on behalf of various library associations in which he urged the deletion of subsection (h) of Section 108 from H.R. 2223.

Subsequent to the oral testimony we received a copy of a letter dated May 1st, 1975, to your Subcommittee from the Music Library Association (MLA) which also urged the deletion of "musical works" from that section of the Bill.

We are certain that it was not an arbitrary decision nor an accident which led to the inclusion of subsection (h) of Section 108 in the Bill as passed by the Senate last September. The decision, we are convinced, is based upon recognition of the fact that musical works differ materially from most other types of works in library collections. A musical work is created *primarily* for performance by an instrument or instruments or the human voice or voices.

To paraphrase language included in my statement before your Subcommittee on May 15th relative to Section 107 of H.R. 2223, music consists of abstract symbols printed on a piece of paper which are to be converted accurately into a given sound within a given time by means of instruments or the human voice. Thus, as I emphasized, the *primary purpose of music is performance.*

In its letter of May 1st, the MLA emphasizes the uses of musical works in scholarship and sets down in considerable detail the nature of the works which might be used for scholarship and the manner in which they are used for scholarship.

We submit that there is a further special peculiarity of music which is that the same works which are used for scholarly purposes may be and indeed are used for the purposes of performance. Thus, there is no distinction which could be made as to the use to which a photocopy would be made. And it is our belief and contention that those copies made for the purposes of performance would be overwhelmingly more numerous than those copies which might be made for scholarship or similar purposes. Moreover, even in scholarly works prepared and

published at great expense, separate individual selections included in the collected works would indeed be useable for performance and we suggest that it is this use for which photocopies would be made in most instances rather than for scholarship.

Research and study involving a musical work are usually in connection with doctoral theses where short excerpts of those works might be used for illustrative purposes.

Such uses, provided they meet the four criteria set forth in Section 107 of H.R. 2223, would be considered fair use. In other respects, a musical work is not the type of copyright that can be subdivided and dissected as is the case with medical journals, books, periodicals and compendiums of scientific writings, information and articles.

Particularly in view of Section 107, we do not believe that Section 108(h) presents a burden nor in fact an inconvenience on those who would make use of works in library collections for research and scholarship. If works of music are not in print, the Music Publishers Association of the U.S. together with the National Music Publishers Association and the Music Library Association by joint agreement in 1968 prepared a library requisition for out-of-print music. A copy of this form is attached hereto.

The joint creation of this form should indicate with clarity the intent of all parties to make access to out-of-print works simple and expeditious.

The MLA's letter of May 1st emphasizes the nature of works which might be used for scholarship such as the collected works of various composers. Should they be out of print, the permissions form to which we have referred above would easily trigger permission for photocopying.

In its letter the MLA has tended to minimize the breadth and variety of its members' collections—for every collected work of Guillaume de Machaut there are undoubtedly dozens of vocal scores of operas and other stage works. For example, we would believe that every member library of the MLA would include a vocal score of the complete music of "*West Side Story*" by Leonard Bernstein in which there are many individual songs frequently performed as recital solos. The same is true of innumerable other vocal scores of operas and of larger piano works of which single selections are by themselves performance material not only by concert artists but even more frequently in student recitals.

There are many compilations containing individual selections by a number of different composers. The songs and piano works of many composers are published in collected form. When published separately, many of these works for voice or for piano or chorus will probably range from two to six pages and are accordingly easily reproducible and vulnerable to unauthorized copying. Therefore, they require special protection and safeguarding.

Although all musical works universally consist of musical notes and symbols, accompanied or unaccompanied by words depending upon whether the musical work is intended for instrumental or vocal rendition, musical compositions differ and vary over a broad spectrum, and treatment of all musical works in the same manner is not warranted. As an example, the vocal score of *Porgy and Bess* by George and Ira Gershwin and DuBose Heyward is a single musical work consisting of 560 pages, but includes a number of separate musical compositions, the most popular of which is "*Summertime*" on pages 15, 16 and 17.

The extraction of the musical composition "*Summertime*" from the vocal score of *Porgy and Bess* and the making of multiple copies thereof would never qualify as a fair use under Section 107; no greater right should be granted by Section 108. As Section 108 is now worded, it would not afford libraries or users such greater right but if Section 108 is changed as requested by Dr. Low and the Music Library Association by deletion of 108 (g) (1) and (2) and (h) such right would be available and would cloud the intent of Section 107. Thus, "*Summertime*" could be susceptible to economic destruction by unbridled copying.

We submit that to remove from Section 108 the exclusion and protection of music provided by subsection (h) for the convenience for the comparatively few who do music research would jeopardize the many authors, composers and publishers who depend upon music for their livelihoods. Such a result is not warranted by any argument asserted by Dr. Low or set forth in the MLA letter of May 1st.

We feel confident that the Congress will continue to agree that Section 108(h) as it pertains to music librarians does indeed achieve a proper balance between the needs of the music librarians and the proper consideration of the rights and interests of authors, composers and their publishers.

LIBRARY REQUISITION FOR OUT-OF-PRINT COPYRIGHTED MUSIC

This form approved by Music Library Association ("MLA"), Music Publishers' Association ("MPA") and National Music Publishers' Association ("NMPA").

To ——————————————Date——————————————
(Name of publisher)

We require, for library use, the work(s) entitled:

——————————————————————————————

——————————————————————————————

1. If in print, please send us ———— copies of the work(s) and bill us.
2. If permanently out of print, please sign the duplicate of this form, which shall constitute permission by you to us to make or procure the making of ——— copies of the work(s), but only on the following conditions:
(a) The copyright notice shall be shown on all copies.
(b) All copies shall be used for library use only.
(c) No recording use or performance for profit use or use other than library use shall be made of any copy unless such use shall be expressly licensed by you or an agent or organization acting on your behalf.
(d) We shall pay ————— for the right to copy pursuant to this permission but not otherwise.
(e) We (do) (no not) own a copying machine.
3. If any work referred to above is unpublished and available on loan to us, please advise the terms and conditions of such loan. If not available to us, please insert an X here ——— and return the duplicate of this form to us promptly.
4. If any work referred to above is not in your catalog, please insert an X here ——— and return the duplicate of this form to us promptly.

Very truly yours,
Agreed to:

——————————————— ——————————————
(Name of publisher) (Name of library)

By ——————————————By ——————————————

This form should be prepared in duplicate. Additional copies may be secured from MLA or MPA, 609 Fifth Avenue, N.Y., N.Y. 10017, 4th floor, or NMPA. 460 Park Avenue, N.Y., N.Y. 10022.

Mr. KASTENMEIER. The next witness is Irwin Karp.
[The prepared statement of Irwin Karp follows:]

STATEMENT OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA

Mr. Chairman, my name is Irwin Karp. I am counsel for the Authors League of America, the national society of professional writers and dramatists. The League's 6,500 members include authors of biographies, histories and non-fiction books on every subject, novels, plays, poetry, childrens' books, musical plays, magazine articles, textbooks and other works. Several also write for motion pictures, television and radio. And, of course, the works of many members are adapted for use in these media. Copyright is a matter of paramount concern for our members, the full-time professionals and those who also work as teachers or in other fields, for their compensation as writers depends on the Copyright Act, as does their ability to provide for their immediate families after death. I should stress at the outset that most of our members own the copyrights in the works they create.

My testimony this morning addresses two subjects: (1) the "Educational exemption" proposed by members of the Ad Hoc Committee; and (2) demands that your Subcommittee reject the copyright term provided in Sec. 302 (H.R. 2223); i.e. the author's life-plus-50 years after his death. The Authors League supports the term of life-plus 50 years, as it did in previous testimony to your Subcommittee by Rex Stout (then its president), Elizabeth Janeway, John Hersey (its current president), Herman Wouk and myself. [*Hearings Before Subcommittee No. 3;* 89th Cong., 1st Sess.; Part I, Part III]. In the Senate, testimony supporting the life-plus-50 term was given by Mrs. Janeway, Mr. Wouk and the late John Dos Passos. As it has in the past, The Authors League opposes the "educational exemption" which previously has been rejected by both Judiciary Committees and therefore was not included in the Revision Bills passed by the House of Representatives in 1967 and the Senate in 1974.

PRIOR REJECTION OF THE EDUCATIONAL EXEMPTION

As your Committee's Report noted, members of the Ad Hoc Committee had requested the insertion of "a specific, limited exemption for educational copying" into the Revision Bill. The reasons why your Committee and the Senate Committee refused the exemption are as valid today as they were when the Report was issued.

Your Report stated that "photocopying and other reproducing devices were constantly proliferating and becoming easier and cheaper to use" (as indeed they have). It also noted the contentions of authors and publishers that "education is the textbook publisher's only market, and that many authors receive their main income from licensing reprints in anthologies and textbooks; if an unlimited number of teachers could prepare and reproduce their own anthologies, the cumulative effect would be disastrous." (H. Rep. No. 83, p. 31).

THE CONSTRUCTIVE SOLUTIONS ACHIEVED BY THE SUBCOMMITTEE

Your Report noted that "several productive meetings" were held between representatives of authors, publishers and educators, and that "while no final agreements were reached, the meetings were generally successful in clarifying the issues and in pointing the way to constructive solutions." These solutions were reflected in your Committee's Report, and it is fair to say they were—for a time at least—accepted by the parties. The solutions were:

(i) The Committee's rejection of the "educational exemption", because "After full consideration, the committee believes that a specific exemption freeing certain reproductions of copyrighted works for educational and scholarly purposes from copyright control is not justified."

(ii) The Committee's explicit affirmation that "any educational uses that are fair today would be fair use under the bill."

(iii) Amendment of Sec. 504 (c) to insulate teachers from excessive liability for statutory damages.

(iv) Amendment of Sec. 107 to indicate that fair use may include reproductions in copies or phonorecords, and may be for such purposes as "teaching, scholarship or research."

(v) A careful analysis by the Committee of the four criteria of fair use "*in the context of typical classroom situations arising today.*" The Committee noted that although its analysis had to be broad and illustrative, "it may provide educators with the basis of establishing workable practices and policies." (pp 32–36)

Actually, the Committee was modest in characterizing its analysis—it is an extremely clear and useful set of guidelines for educators, authors and publishers. Moreover, the Committee's analysis of fair use amply supported its judgment that "the doctrine of fair use as properly applied is broad enough to permit reasonable educational use, and education has something to gain in the enactment of a bill which clarifies what may now be a problematical situation."

The Committee also urged educators, authors and publishers to "join together in an effort to establish a *continuing* understanding as to what constitutes mutually acceptable practices." The Authors League is willing, as it has stated before, to sit down with educators and publishers periodically to establish and review these practices, to fill out workable guidelines of fair use. This must be done in meetings, with the parties working together. And there should be periodic meetings so that the parties could revise guidelines in light of changing conditions. This would enable them to deal reasonably with current practices, without fear of creating immutable rules that could become damaging if technology or other conditions changed in the future. The Judiciary Committee also urged the parties to join together "to work out means by which permissions for uses beyond fair use can be obtained easily, quickly and at reasonable fees." Again the Authors League is willing, as it stated in the past, to sit down with educators and publishers to work out these methods.

THE PROPOSED EDUCATIONAL EXEMPTION WOULD INJURE AUTHORS

If the proposed exemption, as it bears on copying, is only intended to permit educational copying that would be fair use under this Committee's analysis it would be unnecessary. If the Ad Hoc groups contend that the purpose is to provide clarity then certainly the amendment should be rejected. For as we testified before Senator McClellan, your Committee's analysis of fair use, with

its explicit examples and illustrations, is far more precise and instructive to teachers, than the completely vague amendment offered by the Ad Hoc groups.

Actually the purpose of the amendment is to legalize uncompensated educational reproduction of copies that goes far beyond the limits of fair use. The privilege of making copies of portions of a work which are not substantial in proportion to its total size would be absolute, regardless of the circumstances of the reproduction; although some of these would clearly involve infringement under your Committee's analysis. Under the Amendment, many copies could be produced on an organized basis, rather than by one teacher acting spontaneously. Multiple copies could be reproduced for many individuals and circulated beyond the classroom. And most important, under the Amendment copies could be reproduced even though they had a serious adverse effect on the work's potential market or value, and even though it would supplant some part of its normal market. Moreover, the proposed exemption would permit educators and institutions to reproduce copies of *entire short* works. How short is short? Would a poem 2 pages long be fair game for educational reprinting? or 4 pages? or 6 pages? Would the Amendment allow a story or article 5 pages long to be reproduced in multiple copies? or 10 pages? or 15 pages? Moreover, as with excerpts, the exemption would allow educators to reproduce these copies under a variety of circumstances that would make them an infringement under your committee's analysis of the four criteria of fair use.

As we noted in our statement on library photocopying yesterday, and in our previous testimony, many authors earn a major portion of their income by licensing the reprinting of poems, articles, short stories and portions of longer works in anthologies, textbooks, collections and similar books. The same poem or story may be reprinted in several of these, and the accumulation of small fees produce a modest income—often the largest part of the income authors of valuable literary works earn from their writings. These anthologies and other collections are sold primarily to high schools, colleges and universities, and their libraries and book stores. Their students are a primary audience for eminent poets, essayists and short story writers.

The proposed educational exemption would allow educators and institutions to produce copies of an author's short works and portions of longer works, thus displacing the sale of the anthologies textbooks and other collections that previously brought these works to educational institutions. Many authors would thus be deprived of a substantial or major portion of their income, even though their works would still be widely used by educational audiences, disseminated by uncompensated educational reproduction that far exceeded the limits of fair use. [Although some educational spokesmen have said they do not intend to "anthologize", it should be noted that the effects are the same whether several short works are provided at one time between covers, or are produced and distributed by the school seriatim.]

THE WILLIAMS & WILKINS DECISION

The Ad Hoc Committee's excuse for requesting the exemption in the Senate was that the Trial Judge's decision in *Williams & Wilkins* created uncertainties as to fair use. As we there pointed out, this was a feeble excuse for disrupting the constructive solutions reflected in your Committee's prior report. It would be an even feebler excuse now, considering the majority opinion in the full Court of Claims. As your report correctly stated, fair use—in the case of library copying as in other instances—depends on the four criteria "*and the facts of the particular case.*" (Emphasis ours). The trial judge confined his decision to the facts of that case, stressing that the large scale reproduction of copies involved "was wholesale copying." The facts before him bore no resemblance to the various fact situations involving educational copying and other uses which your Committee considered in spelling out its guidelines and analysis of fair use vis-a-vis educational copying. Nothing in the trial court's opinion cast any doubt on your Report's analysis of guidelines. And there is even less reason for Ad Hoc Committee spokesmen to contend that any doubts have been cast upon them by the majority opinion in the Court of Claims which reversed the judgment below and dismissed Williams & Wilkens complaint. The majority opinion did not imperil fair use in education or detract from your conclusions, nor did the minority opinion.

THE "OTHER" ARGUMENTS

As we noted in our testimony on library photocopying, Ad Hoc Committee spokesmen are wont to accompany their demands for an "educational exemption"

with a variety of attacks on copyright. Some of these we discussed yesterday: the "monopoly", "restraint of information" and "mere privilege" claims. As to the others:

Ad Hoc spokesmen contend that uncompensated educational copying beyond the limits of fair use must be legislated because it allegedly "promotes" the progress of science and art. This misses the very point of the Constitution's copyright clause, which intended that authors be granted "valuable, enforceable rights" to encourage them to produce works of lasting value. Granting rights, not destroying them, was how the Constitution intended to promote the progress of science and art. Compensating authors for uses of their work, not depriving them of remuneration, was the method chosen by the Constitution. Authors whose works are used in schools make a positive contribution to the educational process, and for reproduction beyond fair use, they are entitled to compensation.

As your Report noted, "the educational groups are mistaken in their argument that a 'for profit' limitation is applicable to educational copying under the present law."

Ad Hoc Committee spokesmen have argued that any copyright limitation on uncompensated educational copying beyond fair use restrains "freedom" to read under the First Amendment. This utterly fallacious argument was made by them in the Williams & Wilkins case, and was completely ignored by majority and minority opinions. The First Amendment was fashioned to assure unfettered interchange of ideas (Sullivan v. N.Y. Times) and it is axiomatic that an author's copyright does not prevent anyone from discussing or repeating his ideas (Rosemont v. Random House). The Supreme Court has never interpreted the "freedom to read" under the First Amendment to mean that copyrighted works must be provided free of charge; and it has frequently emphasized that there is no conflict between publication for profit and the First Amendment. Under the Ad Hoc theory of "freedom to read", teachers and librarians should work without pay, colleges should cease charging tuition and the Xerox Corporation should be denied copying fees when its machines reproduce "educational" materials.

Our discussion has focused on the copying aspects of the Ad Hoc Committee's proposed exemption, but the Authors League opposes its other provisions as well. It would be highly dangerous to add an "input" exemption with respect to computers. And the educational community is not entitled to further additions to an already too-broad television exemption.

LIFE-PLUS-50 YEARS

The Revision Bill would establish a single term of copyright for new works, lasting for the author's life and 50 years after his or her death. This is the copyright term employed by most other countries. Existing copyrights would continue under the present system: a first term of 28 years which can be renewed for a second term, that would be enlarged from 28 to 47 years. [Secs. 302, 304]

As in prior hearings, the Authors League strongly supports these provisions. We urge your Subcommittee to retain them and to reject demands by Ad Hoc Committee spokesmen to turn back to the present two term system, and proposals for a single term of shorter or different duration. Your Committee's Report noted there "was overwhelming support for a life-plus-50 system", and this was based on sound reasons which are analyzed in the Report.

THE "INCREASE" IN TERM

The Report cited findings by the Register of Copyright that a life-plus-50 term would, on the average, add no more than 20 years to the present 56 years. It would add very few years, sometimes none, to a work published later in an author's life.

On the other hand, life-plus-50 would *drastically reduce* the period of protection now available to unpublished works and those published long after an author's death. Under our dual system, a work is protected absolutely until it is published. 200 year-old diaries, 150 year-old letters cannot be used by historians or scholars because their owners have absolute property rights under common law. And when any unpublished work, no matter how old, is published—it receives another 56 years of protection under the present Act. Mark Twain's Letters From the Earth was published decades after he returned to it. The memoirs of a Civil War reporter, who wrote here in Washington, was first published in the 1960's. Both received 56 years of statutory protection on publication. Under the proposed life-plus-50 term, copyright would have terminated 50 years after the

author's death, as it would for all unpublished (as well as published) journals, books, letters and other works. Authors like Ernest Hemingway would no longer be able to provide for their families by leaving unpublished novels to be issued years after their death.

THE NEED FOR MORE ADEQUATE PROTECTION

With an increasing lifespan, authors outlive their copyrights. Many are unable to provide for their immediate families since their renewal copyrights expire soon after their death. Their wives, husbands and children are denied any share of the income their works continue to produce for others—compensation their families would have under a life-plus-50 term.

Widows of illustrious American authors have outlived their husbands by several decades. In their advancing years, the only income which permits some of these widows to live in dignity and a semblance of comfort are the royalties from great works written by their husbands. This income is taken from them when the renewal copyright expires. Under life plus-50 they would continue to receive this desperately-needed income. Ours is the only western country which denies aging authors or their surviving families this income. All the others have a copyright term of live-plus-50 (or more) years.

It should be remembered that life-plus 50 years benefits only those authors who created books, plays and music of sufficient value to survive. And I should stress that it is authors, and the families of deceased authors, who will benefit from the longer term. They would receive at least 50%, and often all, of the copyright income from their books, poetry or plays during the extended period of protection—because of the "reversion" provision, and the nature of publishing arrangements most professional authors make. Life-plus-50 years would *not* provide windfalls for book publishers, and is not a matter of grave concern to them.

LIFE-PLUS-50 IS JUSTIFIED BY THE ECONOMIC/LEGAL REALITIES OF THE COPYRIGHT SYSTEM

As we stressed in our testimony yesterday, the instrument chosen by the Constitution to serve the public interest—to secure literary and scientific works of lasting value—is an independent, entrepreneurial, property rights system of writing and publishing. The free-lance author must earn his living from income produced by the books, plays, articles, poems, etc. he creates. He must look for his income to the payments made for their various uses—so long as he retains his copyright.

Whether or not copyright is "property" (and it is), the author is required to survive as a property owner. He is not paid an annual salary. He writes at his own risk. Some of the greatest literary, dramatic and musical works contributed to our society and posterity would not, even under life-plus-50, provide their authors with adequate compensation for the value of their contributions to society. But these authors are entitled to at least that much for themselves and their families. In this connection, it should be stressed that an author's compensation consists of an accumulation of royalties, often small, for uses of his work over a period of many years. These uses are made by reprint publishers, book clubs, anthologists, periodicals and others, as well as by his initial publisher. Once his copyright is lost, all of these other users are free to produce income from his books or other works without paying any compensation to him or his family.

Often an author's works do not commence to earn income for him until years after they are published, when he has finally won recognition. Often a book is discovered or rediscovered thirty years or more after it was originally published—and for the first time becomes a commercial success. Its useful copyright life under our present system may be only 15 or 20 years near the end of the term—not 56 years.

Moreover, the author faces the constant risk that two or three years of work may go down the drain—his book or play may be a literary success but a financial failure. Throughout his career, only two or three works may produce substantial income for him. These must compensate him for a lifetime of writing—which may have produced several works which, although financially unsuccessful, are of lasting value to society.

Under these circumstances, the Authors League does not believe a term of copyright ending 50 years after the author's death is "too long". The author must produce his works under the risks and hazards of an entrepreneurial system. He is entitled to receive a small measure of the protection accorded to other, often less

productive, entrepreneurs who are entitled to hold property rights not merely for life-plus-50 years, but for 5, 10 or 20 generations.

THE PUBLIC INTEREST

A life-plus-50 term does not damage the public interest. Opponents argue that it would sharply curtail availability of works; and that it increases prices too much. Neither argument has substance.

Copyright does not diminish the availability of books, plays, music etc. Indeed, as this Committee's report noted, the loss of copyright is often likely to have that effect. Actually availability of copyrighted works has increased in recent years. Mass-market and "quality" paperbacks offer a myriad of titles. University Microfilms and similar organizations now fill orders, on demand, for countless books that formerly were out-of-print; under licenses from authors and publishers. We approach the point when a few copyrighted books will be out of print. And these companies also provide entire back issues of countless journals and other publications on microfilm and microfiche. These techniques are also used, increasingly, to keep technical, scientific and other books available.

If works were protected for life-plus-50 years rather than 56 years, their cost to the public would not increase substantially, if at all. As the Committee report stated: "The public frequently pays the same price for works in the public domain as it does for copyrighted works, and the only result (of copyright termination after 56 years) is a commercial windfall for certain users at the author's expense." The price of a paperback book is not reduced, for example, when the author's copyright expires. But the share of the income it produces, previously paid to the author or his family, can now be pocketed by the publisher or other users.

Moreover, this "cost" argument should be put in true perspective. Copyright opponents do not propose that when a work goes out of copyright, a publisher who reprints it must sell it at a lesser profit, or at a price fixed to assure that the public will be able to buy it more cheaply than copyrighted works; or that broadcasters or theatres be required to charge the public less for performances of works whose copyrights have expired; or that actors, teachers or musicians work at a lower salary when performing or teaching works which have fallen into the public domain—to reduce the cost to the public.

DETERMINATION OF COPYRIGHT STATUS

For many reasons, copyright status is not easy to determine under the present two-term system. It is simpler to determine under life-plus-50. We have discussed this issue in our previous testimony and beg leave to refer to it. As your Committee's report noted, the system of life-plus-50 years "has worked well in all other countries, and on the whole it would appear to make computation of (copyright) terms simpler and easier."

THE RENEWAL CLAUSE

Life-plus-50 years would eliminate our present renewal system which has caused several authors to lose copyright after the first term through failure, due to ignorance or inadvertence, to file renewal applications. The "reversion" clause in the new Bill would give authors protection against long-term assignments of their rights—the purpose for which the renewal system was chosen by Congress in 1909 over life-plus-50. And a purpose which was largely frustrated by the Supreme Court's decision in *Fisher* v. *Witmark*, and subsequent decisions.

While the renewal clause puts material into the public domain after 28 years if the proprietor does not renew, most of this is actually worthless—catalogs, advertisements, labels and the like. As your Report mentioned statistical studies by the Copyright Office indicate that "most material which is considered to be of continuing or potential commercial value is renewed."

OTHER ADVANTAGES OF LIFE-PLUS-50

Life-plus-50 would establish a single copyright system in the United States, replacing the present dual common law-statutory system. It would also provide uniformity with the laws of other countries, a matter of increasing importance as many classes of works are disseminated, often simultaneously, in several nations. The advantages of both consequences have been reviewed in our previous testi-

mony and undoubtedly will be described to you by the Copyright Office. Several of these benefit users.

For the reasons discussed above, the Authors League respectfully urges that the adoption of a life-plus-50 copyright term is completely consistent with the letter and spirit of the Constitution's copyright clause. The first, most important and indispensable contribution to the public interest—i.e. securing the production of works of lasting value—is made by the author. Until he creates his book, play, music or poem, no one can disseminate it, exploit it, teach it, or systematically copy it—without paying him. The Constitution intended that he have "valuable enforceable rights" to encourage him to serve this public interest and to permit him to be compensated for his talent and labor. The period of protection provided by life-plus-50 is a reasonable and necessary method of accomplishing that Constitutional purpose. And until some author discovers the secret of immortality life and 50 will be a limited term of protection, much more limited than the 100 or 200 or more years of protection possible under our present common law-plus-56 years of protection.

TESTIMONY OF IRWIN KARP, COUNSEL, THE AUTHORS LEAGUE OF AMERICA

Mr. KARP. Mr. Chairman, thank you very much.

My name is Irwin Karp; I am counsel for the Authors League of America which is a national society of professional writers and dramatists.

In my prepared statement, which I respectfully submit for the record, I mention briefly at the outset the types of works that our members write. It covers the whole range of creativity.

In my testimony this morning, I address the educational exemption as it has been offered to the House and Senate, and has been rejected, for the sound reasons in your previous report and in the Senate's report. I would also like to speak, in the very limited time available, to the problem of the life-and-50-years term of copyright, unless that is to be discussed at some later date.

I think perhaps I should put something into the record at this point on that. It is a much-abused concept, and as was pointed out when the educators were propounding their opposition to life-and-50, and placing their opposition on grounds that have no basis in reality, or even in decency or common sense.

First of all, Professor Raskind told us we are talking about the scholar copying by hand. That is not so. We are talking about exemption and what has been proposed to you in the light of a technological revolution that created, as I described yesterday, and as Mr. McKenna of the Special Library Association named, a medium of one-at-a-time reprinting or one-at-a-time publishing.

I put into the committee's hands, some semblance of what the technology has accomplished, including an entire book that is reproduced on demand by the Xerox machine.

When we get to multiple copy, unless there is some prodigious penman out at the University of Minnesota law school, I do not know how anybody is going to copy by hand 40 or 50 copies of a short story or a poem. The technology has also armed the educational system of this country with various ways to very cheaply copy various works of instruction.

Your committee, in its report, and the Senate committee, using that work—I am talking about the work you did so well—said the case for an educational exemption had not been made. Under the doctrine of

fair use as expounded very specifically in your report, guidelines were set up for what was and was not fair use.

If you examine the guidelines, and examine the proposed amendment, your guidelines are much more explicit and useful than the amendment proposed by the educators. If clarity is the objective, they have certainly failed miserably. Certainly their amendment does not teach us how short a short story, or how short a poem, can be copied.

Teachers will be coming back to you in a short time, asking you to write into law, the lengths of particular works.

What you then suggested to us, and something we have sought to do in the interim, is to sit down with the educators and work out guidelines of fair use. This is the only useful way of dealing with this problem. Practically every example given to you today, from the picture of the frog, up or down, is fair use. And the people who give you the examples know it is fair use. They know that we think it is fair use.

If we sat with them periodically, as you propose, reviewing in the context of current condition of education, the current condition of publishing and writing, the problems of fair use, we could work out guidelines that would be helpful and direct and useful to everybody.

If we sat down periodically, none of us would be frozen with fear that what we conceded or opposed as fair use today would be a dangerous precedent to plague us forever.

In other words, an ongoing review that would consume much less time than our colleagues who testified before us and we now have consumed on the problem of copyright revision would be much more useful.

You also propose that where copying exceeds the bounds of fair use, as it often does, and as our educator colleagues would like to have it do, that reasonable clearance arrangements be worked out for the payment of reasonable compensation. That is a suggestion picked up by one of the witnesses in the preceding panel. I think it is one that is easily workable.

The alternatives are not, as Professor Raskind said, either copy the copyrighted work without payment or not use it at all.

There is a third alternative. That is where it exceeds fair use to obtain permission and pay a reasonable fee for it, as I will point out, and not something extravagant. May I also point out in elaboration of the point Mr. Pattison made, it is the author's right, where the work is being used beyond the limits of fair use, to say what his compensation will be.

Our educational brethren turn their backs on the open market, the free market, and ignore the play of economic force. The Constitution wrote for us a copyright clause that according to the Supreme Court was to establish authorship and publishing on a profit motivated basis.

As expected, what actually has happened, when an author of a short story or poem or publisher grants a right to use it in an anthology, is that he grants a nonexclusive right to use that work that may appear in 30 anthologies. The price is a competitive price. The competition in the marketplace actually produce fees that are very reasonable. Sometimes, $25, sometimes $50, sometimes less per use, sometimes more.

Let me point out that the American author, most American authors, do intend to make income when they write a work, whether they are full-time professionals or not. The use of their work in anthologies is a major source of income to them. For poets and short story writers, as we testified before, and many of our author members have testified,

this is a principal form of compensation. Most poets do not make money from the publication of a collection of their verse in the hard cover edition. It is from the fees derived from nonexclusive licenses to a number of anthology publishers to reprint copies of these works.

John Dos Passos testified before the Senate that 20 percent or more of his income in the latter years of his life was derived from this source. Robert Frost, Carl Sandberg—many American poets—have earned a good portion of their income from these anthologies. These are published primarily to be used in schools, universities, and similar institutions.

I give you two current examples; the evidence is all around us. Just recently, a young lady named Joanna Kaplan published a book of short stories that received great critical acclaim. In an interview in the New York Post she said it took her, after writing the first short story, another 5 years to turn out the other stories in the collection, one of the reasons being the rest of the time she worked as a teacher of retarded children.

The only real income that an author like Miss Kaplan will derive from her work over the years are the fees that will be paid as that short story is duplicated in anthologies.

I have another clipping from a local newspaper up in Westchester about an author named Frank Rooney. "Since 1925," says Rooney, "I have been a fulltime writer. I have put in 40 hours a week.

"I have done that for 25 years." And he is most widely known for the much anthologized story, "The Cyclist" which his two sons and daughter, much to their amusement, had to read in English class in Rye Neck High School—to their amusement and his small profit, I might add. It sold to the movies, it was named "The Wild One" and it was a motion picture by Marlon Brando.

Two simple examples of what this means in dollars and cents.

What the educational exemption means, in a practical sense, is educators all over the country would be entitled to reproduce multiple copies of short stories. It could be these short stories as far as we know, because they have not defined the length of short stories for us. Short, shorter, or longer.

What it means is that the use of these works will replace the sale of those anthologies on which Mr. Rooney and Mr. Dos Passos, and other distinguished American authors, have relied to derive some kind of compensation from a lifetime of professional writing.

I should point out that the damaging effect will be the same whether the school or the school system reproduces these stories and puts them together in what is called an anthology, or whether they are reproduced one copy at a time. As far as profit motivation is concerned, I followed with interest, Mr. Pattison's colloquy with—I should not say friends; in this context we are not friends—my acquaintances in the earlier panel. I think it is useful to remember that everybody is motivated by profit to some extent. I cannot believe that the teachers who go on strike in a city school system, close down the schools, denying access to the students for 3 or 4 or 6 weeks, do not have some sense of profit motivation. They want to earn a reasonable living, and they are entitled to it.

On behalf of the Authors League, I take no position on teacher's strikes. As an individual, I do not dare to take a position because I do

not know how the members of this panel feel. My point is, teachers are profit motivated. It is nonsense for them to sit before you and make believe that they all go to work everyday for the sheer joy of it without expecting to be compensated. Of course they do, as do the rest of us.

All that authors are asking for is that you do not write into this law exemptions which would seriously injure their right to derive some reasonable compensation for their work. You have been told that there is an educational exemption based upon a "for profit" concept; that for some reason, those uses which are made by nonprofit institutions are exempt and those by profit institutions are not.

That is not true. It is not true because as your committee pointed out, it is clearly the law in the present act that there is no such thing as a nonprofit exemption for reprinting copies of library or musical works. The Copyright Office concluded that on the basis of a study which it made at your request, and you reaffirmed it in your report.

I would like to turn briefly to life and 50 years. I hope I am not using the word "briefly" loosely.

The report of this committee recited findings by the Register of Copyrights that a life-plus-50 term on the average would add 20 years to the present 56 years of copyright. It would not double it, as I gather some Government agency told you. On the average it would add 20 years; in some cases it would provide a shorter term than authors now get for works published at the end of their careers, under the present law.

On the other hand, life plus 50 would drastically reduce the period of protection now available to unpublished works and those published long after an author's death. Under our dual system of common law copyright, followed by statutory copyright, a 200-year-old diary of a Revolutionary War hero, a 150 year old letter, or any unpublished work—no matter how old—receives another 56 years of protection under the present act after it is published.

Mark Twain's "Letters From the Earth," published decades after he wrote it, were given 56 years of copyright. The Memoirs of a Civil War Reporter, written here in Washington during the war, was first published in the 1960's. They were protected from the Civil War to the 1960's under common law, and then had another 56 years under the statute.

For goodness sakes, I cannot understand how educational spokesmen will sit here and tell you that replacing that system by a term of life plus 50 years denies access. It increases it and expands it enormously.

Fifty years after the author's death, everything he wrote will go into the public domain—published or unpublished—and access would be complete for historians, scholars, and others. Authors like Ernest Hemingway would no longer be able to provide for their families by leaving unpublished novels to be issued years after their death.

Many authors have outlived copyrights. Even more important, many are unable to provide for their immediate families since their renewal copyrights expire soon after their death. Widows of illustrious American authors have outlived their husbands by decades, and in their advancing years, the only income that permits some of these widows to live in dignity and a semblance of comfort are the royalties from great works written by their husbands.

This income is taken from them when the renewal copyright expires; after 56 years. It does not benefit education one whit to deprive them of that income. It does not have anything to do with access. Under life plus 50, these widows, and the other survivors—the immediate survivors of an author—would continue to receive such desperately needed income. Ours is the only Western country that denies aging authors, or their surviving families this income. Every other country has life and 50.

The educators and the scholars of other countries have had no difficulty in proceeding with their work, despite what is claimed to be this heavy burden of life plus 50. I doubt that that is a serious problem for American education. If it is, we are in a sad way. They have much more serious problems to cope with than this. The problems of teaching the young of this country are not affected one whit by a term of life and 50 years for a novel by Ernest Hemingway, or a composition by Aaron Copland, or Irving Berlin for that matter.

It should be remembered that life and 50 benefits only those authors that create plays and books and music that have the quality or the merit to survive. The others have long since gone.

If educators are running around photocopying 40-year-old works nobody wants to read, I doubt anybody would pay attention to them anyway. Why they would want to do it they have not explained to you.

I should also point out, under the entrepreneurial system, which the copyright clause of the Constitution provided, the freelance author must function as a property owner whether or not he is. I think he is as a matter of law. The fact is, he must survive that way. He is not guaranteed a salary by the government, thank God, and the libraries and schools do not support him on some sort of an annual guaranteed wage. All he has is the income produced by uses of the books and plays he writes. That compensation, which often is an accumulation of small fees over a period of many years, can be received by him only as long as his copyright survives, and his family can only receive income for a reasonable period after his death if the copyright survives.

Often an author's works do not commence to earn income until years after they are published. Many American composers have produced music for 10, 30, 40 years before they have achieved recognition. The same is true of poets and many novelists. Only at the end of their lifetime does their work really have any sort of value under the present 56 years system. The usable term is really 15 or 20 years at most.

Under life plus 50 there would be a reasonable opportunity for the authors of the great works that survive to receive some income in their last years, and provide for their families.

On top of that, the copyright system requires the author to risk—that is why we keep referring to it as entrepreneurial. He spends 2 or 3 years on a book or play; it may fail financially even though it is a great artistic or literary success. He may only, in a whole lifetime, write two or three works that produce income of any significance. He has to look to that for his livelihood for the whole period. He is entitled to some sort of reasonable protection for his work for a reasonable period of time.

I remind you, we do not impose a life plus 50 on any other property. There are enough people holding property that their great, great

grandfathers got under land grant acts and other grants of Congress. They did not create anything, they were merely given something out of the public domain. That property right continues forever.

I think it was Shaw that said the argument is not why an author's right should last for life and 50, but why the other forms of property should last a longer period of time.

We are not asking you to abolish our present system of tenure for any other kind of property. All we are asking is for a reasonable period of time for authors.

Life plus 50 does not curtail the availability of books. It is ironic that that argument should be made in the age of technology which will keep everything in print. I gave you as one small example, the book produced by Xerox Co. on demand. A 429-page book by an author, a professor, actually, of English teaching at the University of Illinois. That book will be available forever.

The Xerox Co., and similar companies, are accumulating, with the permission of authors and their publishers, under license arrangements, an enormous library of books and journals which will be reproduced on demand.

In addition, the mass paperback revolution has provided us with a myriad of works in copyright, many that have been copyrighted for many years. If there is a demand for works, they will be produced. On top of that, as your committee recommended, where education wants access to the copyright material beyond the access of fair use, licensing arrangements can be made for them.

In this connection, I might note that no one had come before your committee to propose that when a work falls out of copyright and goes into the public domain, someone who wants to reprint it should be required to do so at a lesser price so the public will benefit from the loss of copyright. Usually the price stays the same. The only difference to the public is the money the author would have gotten now goes into the publisher's pocket, or the producer's pocket.

Teachers do not teach for less when they are teaching public domain materials, and actors and musicians do not receive a lower salary for performing an opera or play in the public domain than for one which is still in copyright.

As far as the renewal argument is concerned, I am afraid you have been treated to a slightly out of context reading. You were told that the copyright office studies established that 85 percent of all material was not renewed. What you were not told is that the same study said that catalogs, advertisements, labels, and the like, made up the bulk of that 85 percent.

The Copyright Office went on to say, "Most material which is considered to be of continuing or potential commercial value is renewed." I know of no author who has failed to renew a book or a poem or a piece of music deliberately. The difficulty with the renewal clause for authors is it becomes a trap for those who do not remember, or have never known, that in that act—which is supposed to protect them—is a clause that says, if you forget to file a piece of paper in the 28th year of your first term of copyright, you lose it.

All that education gets in the way of valuable material are those few works that are lost through inadvertance. I have personally known of the widows of authors, and some other people, who have lost

income because of this. And it was not by any desire of their husbands to deprive them of this income.

Life plus 50 would also establish a single copyright system in this country, as I pointed out, and would make uniformity with the laws of the rest of the civilized world much easier. The Copyright Office undoubtedly will speak to these.

I would close, and I thank you for giving me the time to say this, with the observation that the most important and indispensable contribution to the public interest in copyright, which is the securing of the production of works of lasting value, is made by the author. Until he creates his book or play or music or poem, no one can disseminate it, no one can exploit it, no one can teach it, and no one can systematically copy it with or without paying. It will not be there to use.

The Constitution intended that he have "valuable, enforceable rights" to encourage him to serve this public interest and to permit him to be compensated for his talent and labor.

I respectfully submit to the committee that the life plus 50 years is a reasonable method of accomplishing this purpose. Until some author discovers the secret of immortality, life plus 50 will be a limited term within the constitutional meaning, much more limited than the 100 or 200 or more years of protection possible under our present system of common law plus 56 years.

Mr. Chairman, I thank you for your forbearance and the opportunity to make this statement.

Mr. KASTENMEIER. Thank you very much.

Let me ask all the panel—I take it there is general acceptance, particularly as it concerns educational uses, sections 107 and 108 of H.R. 2223 in its present form. To the extent that that is not the case, would any of you care to elaborate?

Ms. LINDEN. Mr. Kastenmeier, as I said earlier, yes, that is the case. We have had substantial rights curtailed. We recognize that modern technology leaves us no alternative; however, we urge that any Solomonesque decision not cut us in half. Leave enough of us alive to proceed and create, package, and disseminate intellectual property. I think that is the consensus.

Mr. KARP. The answer of the Authors League is yes.

Mr. FARMER. With regard to music, our answer would be yes—with the hope that the prior report would be included as a part of it.

Mr. ZURKOWSKI. We would be, yes.

Mr. KASTENMEIER. Of course, there are other aspects which one or more of you may return to testify on, in terms of the bill; so I will not ask you about other aspects of the bill, but let me ask you, did you sympathize at all with the educators, in terms of what appears to be a persistent theme, that there is substantial uncertainty, lack of clarity, of fair use, either under this bill or present law—or that this uncertainty leaves teachers and educators generally in a very difficult position with respect to what they can reasonably anticipate is infringement?

Mr. KARP. Mr. Kastenmeier, I want to answer very briefly, and then turn to Mr. Lieb.

I do not sympathize for this reason: There is a solution to their dilemma which they have steadfastly not wanted to attempt. That is to

follow your advice and sit down and work out guidelines for fair use. That is a practical, sensible, reasonable, fair way of resolving this.

As other witnesses have pointed out to you, a statute could never deal adequately with a concept of fair use. It would read like the Internal Revenue Code and then you would have to have four volumes of regulations to supplement. I use hyperbole. It would take about six pages to do it, really. But working out guidelines enables both sides to cope with the problem directly and practically; and also, if they do it on a continuing basis, it does not freeze them into the very result you are seeing now. Both sides are coming to you, bargaining for the best bargain. I think we really have gotten the poorest part of it so far.

Actually, this bill does not give authors of books a windfall. Life and 50 will help those few great works that survive, and I think they are entitled to it. There is not a provision in this bill that is going to add a nickel to the income that any author is going to be able to get on his work the day after it is passed. This bill makes very basic and needed adjustments in the system of copyright notice and registration and other mechanical matters that benefit everybody, educators and librarians as much or more than us. This is not a bill that permits authors of books to make more money. There will be a modest adjustment in the compulsory license clause on music which is long overdue, and a far from adequate payment to composers under the jukebox clause. But as for our urging you to put money in the authors' pockets—nothing could be further from the case.

Under present law, which has some defects, but which has protected authors, by and large, except for cable television, they have been able to survive very well under it, as have publishers. I think that the right answer to your question is, you cannot deal with this fear of educators beyond what you have done. The report you had prepared in 1966 and 1967 was a reasonable solution and would have worked, had we spent our energy since then working out the guidelines you proposed.

Mr. Lieb.

Mr. Lieb. I would like to supplement that by saying, for the last 5 years or more, we jointly—publishers, authors, and others interested in the copyright side—have steadfastly attempted to bring the librarians, as we told you yesterday, and the educators, whom you heard today, to the table to talk with us about the formulation of guidelines.

There is no way, no way by statute, as Mr. Karp just said, that this can be solved. We are not only ready, we have been ready; and we desire to work out guidelines which will be of assistance to the classroom teacher.

I sympathize with the classroom teacher. I do not think they have been well served by the people who speak for them. If guidelines ample enough to help the teacher in his classwork were prepared, most of the problems that were discussed today would disappear.

Mr. Meell. I would like to add to that, that the audiovisual publishers have taken a very active campaign of seminars, journal articles, and face-to-face meeting with professional groups and school people to help them come to grips with what is fair use and what

is not in fair use—National, State, and regional meetings. We will continue that activity.

Mr. BENDER. Another example of that: I was personally requested by the Minneapolis public schools, about 3 months ago, to participate with them and their attorneys in drafting a copyright rule of thumb, if you want to call it that, or a code of conduct where a group made up of representatives from throughout the Minneapolis school district, plus their attorneys, sat down with me, as a representative of the media producers, to work out a feasible way in which we could cooperate in this very difficult area. These things are being done by those who wish to cooperate with us. We continue to do this as time goes on.

Ms. LINDEN. May I add one comment?

As we listened this morning, every time, whether it was Mr. Railsback or Father Drinan or anyone else, or Mr. Pattison, try to distinguish—Mr. Wiggins did, too, at one point—between the right of access, the right to use, and the desire not to pay, we were always moved back by the educator's representatives into the confusing examples of the most obvious, limited kinds of uses, and they never would say, except for one or two people, that they did intend to pay, except where fair use was applicable.

I remember Dr. Wigren, specifically, and counsel, Mr. Rosenfield, when it came to payment, they feel that nonprofit educational institutions ought to get intellectual property gratis, piecemeal, a piece at a time, which is the way you teach. You do not teach the whole book in one day. That is their intention, and that is why we have not been able to get together to establish guidelines. They will not accept the principle that authors and publishers need to be paid, just as their salaries are paid.

Mr. KARP. Mr. Chairman, I would like to point out there are two separate problems, as far as fair use is concerned, that can be attacked whether or not they are willing to accept the requirement of payment by the passage of this bill.

We are ready to sit down and talk now about what is fair use and does not have to be compensated for. We will leave to the higher authorities the resolution of the problem of who pays when you go beyond fair use and whether there should be payment, which we obviously, in all these statements, believe there should be.

Mr. MEELL. If you eliminate the protection provided by 108(g)(1) and (2), there is no urging, then, to consider these guidelines. The exemption of copyright input is another example of the erosion. Just give us input, now, and we will worry about how to protect the author's rights subsequently. If you adopt those exemptions, you eliminate the framework within which discussions on guidelines can proceed.

Mr. KASTENMEIER. Thank you.

I just have one more question, Mr. Karp, in reference to Mr. Pattison's question—whether the renewal clause ought to be retained.

You indicate that the 85 percent not renewed, most of which is actually worthless—catalogs, advertisements, labels, and the like—is it your point of view that this category, this worthless category, as you suggest, should have 75, or life and 50, coverage, along with the rest?

Mr. KARP. The only problem you face in answering that question is who sits in esthetic judgment over what is worthless or not. From a practical viewpoint, the worthless material which falls into the public domain under the renewal clause is material that no one would copy anyway, unless some place, somewhere, there is a teacher who wants to copy the label on a beer can manufactured in 1930; who would want to do it. And if he wants to do it, are we going to change the copyright law for him? The rest of the copyright community of the world has found that life and 50 works. It is going to be hard to tailor a renewel clause to that. You might; it is not inconceivable; it is technically possible. The burden would not be worth it.

Basically, I think the problem is protecting those works who survive for life and 50 years.

Mr. KASTENMEIER. It may be an additional problem, but a question you raised is who would make that determination. The answer is quite simple: The owner of the copyright.

Mr. KARP. If, for example, authors could renew without the burdensome fees that they pay today, and if they could renew, not at the risk of forgetting the 1 year, but having a much more flexible system—or, as Mr. Pattison suggested, that there be notice to the author—you may be able to work something out.

Mr. KASTENMEIER. I yield to the ntleman from Massachusetts.

Mr. DRINAN. Thank you very much, .ır. Chairman.

I will just make a couple of comments and maybe a question.

I feel a little bit like Dr. Kissinger trying to preside over two people that cannot get together and negotiate. All I can say is, you better try harder. I am not saying who is at fault over the last 8 years in not being able to negotiate and have some bill of rights, some means of professional code. I will tell you what is likely to happen if the two opposing parties that we have seen here this morning do not have some rapprochement.

I have received already some 300 or 400 letters from educators and librarians, and they are pouring in. And other Members of Congress have received them, too. One Member, not a member of the Judiciary Committee, said, "What is this feud all about?" I told him, in brief, what it is about. He said, "Well, they are my educators and librarians; I had better go with them."

If it comes to the floor and the posture is that, that might even change, I do not know. In any event, it would be very helpful for the committee—I am asking you to help us do our work—if somehow some professional understanding could be arrived at in the immediate future.

I have one simple question of anybody who would answer it.

Is there any analog in the copyright law of other nations for what the educators are asking for?

Mr. KARP. There are, in some countries, various types of exemptions. I would not want to risk telling you precisely what they are, but we can provide them. I am sure the educators will, too.

Mr. DRINAN. I am sure it is a universal, worldwide problem, and I am sure educators and librarians in other countries have other problems, and they have probably gone to rights. That would be very informative to me.

I thank you very much for a very fine presentation.

Mr. KASTENMEIER. The gentleman from New York.

Mr. PATTISON. It appears to me that this limited exemption, the fair use exemption, really arises—what you do not find a correlation to with other property rights. There is limited fair use exemption for trespassers or a variety of other things. The reason that even arises is because there was a problem of access, primarily. Unlike other property that is tangible, you usually can find out who owns it; it is there, somewhere; but whereas, with copyright, sometimes you cannot. The problem of access, I think, is a real problem. How do you find out, fairly quickly, whether the author is still alive? How do you find out, fairly quickly, whether you can get permission? Who do you write to when you have a book that is published by someone other than Macmillan, some obscure publisher, and it just says Jones & Co., Dallas, Tex.? How do you resolve those problems so we can get access as quickly as possible?

Mr. KARP. I would like to answer the question in two parts.

The fair use doctrine really arose because of the unique nature of copyright. That is, it does not protect ideas; it does not protect facts. Therefore, others can freely use them. One of the great attributes of copyright is that it is not a restrictive form of property. So much for that aspect of it.

In answer to your question, this is one of the things that we propose to deal with in cooperation with the education community and the library community, in terms of setting up what we call an information or processing clearinghouse. It is not hard to find wher an author has died; that is easier to find out than if the work is in copyright. One of the great arguments made by the other side—and it is absolutely without basis—is you can tell when a work is in copyright. I can give you 10 examples of how difficult that is, and they are in the record of prior hearings.

What you can do with a little help, if you do not know it, find out quickly how to locate both the author and the publisher. For example, most publishers are listed in Literary Marketplace, which is a book published every year.

We have discussed setting up a clearinghouse that would field questions just like that, and would set up a very simple permission form which we asked everybody to work on, which would even deal with permissions that would be given without fee.

Mr. PATTISON. Is there any place, would there be any place in the law for a sort of a good try exemption?

Mr. KARP. I know what you mean.

Mr. PATTISON. I want to quote from a book, I want to use a book; I cannot find that information out. I write some letters; I make some telephone calls; I cannot get any information and the time is going by. I have to make my speech or whatever it is I have to do. Should there be some kind of a time limit? I cannot find out if the author is alive or not. You cannot always find those things out.

Mr. KARP. I think you run into difficulty of proof, for one thing.

Mr. PATTISON. As a defense, for instance.

Mr. KARP. Then you are getting back to the point you raised before, Mr. Pattison. When you get deep down to the basis of copyright, you are talking about certain fundamental rights—the Constitution said exclusive rights, for that matter.

Mr. PATTISON. It does not say exclusive unless the Congress wants to give exclusive.

Mr. KARP. I am not arguing you cannot create exemptions. It has been too many years to start that argument now. It still comes down to the point, if it is not fair use, the author has the right to say yes or no—I guess the right to be negligent, too. It does not happen all that often. It would happen much less often if we sat down to work out a very simple system of notification—not of notification, but arranging for people to write to the places they should write or call the places they should call.

Ms. LINDEN. First of all, right of access is created by publishing in the first instance. The big question is right of additional access, piecemeal, when and as you want it. The clearinghouse, as I said earlier, we have offered to them since 1965. The concept of a penalty—in other words, they can use it freely if they do not get a response quickly enough—has inherent in it various problems. Not all copyrighted work is of the same character, the same nature, the same usefulness. Some scientific and technical treatises and major reference works are under revision. We want to encourage revision, updating. We will not have revision and updating unless the author and/or publisher is permitted a period of time in which they say, no, you cannot disseminate that particular article; we are going to redo it. You run into all sorts of philosophical and technical problems.

Mr. PATTISON. I understand that, but when a person tries to get access and cannot get access—maybe it does not happen that much—but he makes the effort to get to the author, the owner of the copyright, and he is unable to do that. He makes a good faith effort, et cetera. You have a bankrupt publisher——

Mr. LIEB. May I answer that question, please?

In the first place it is almost a moot question, if we are talking in the context of educators who were here this morning, as distinguished from other publishers or other authors who plan to be published. I do not know of any instance, short of instances of actual piracy of anthologies and collected works, where, for a particular classroom use, a publisher or author has complained. He is kind of inured to this. If it is transitory, if it happens once, he probably does not hear about it. If it persists, there may be correspondence, and the school will say, yes, we were wrong. I have had lots of correspondence with school districts who say, yes, now we understand what you are talking about.

But on permissions, The Publishers Association has recently circulated this little pamphlet that I would like to offer, which is a guide to get permission for noncommercial use.

As Mr. Karp said, we have been discussing recently, with those who are willing to talk to us, of the possibility we might set up some sort of copyright expediting clearance agency.

Mr. PATTISON. There is no rule that you have to be a big publisher to be in the publishing business. I can publish something. I can become a publisher by using my typewriter, if I want to. I do not have to be in business very long; I can move from here to California or something. No one can find me. That is why you simply cannot find the publisher. You have no information on the document.

Mr. LIEB. I would like to make a horseback answer.

If what you are talking of is an educator making an effort, when he makes his teaching plan, to say 2 months from now, I will make 30

copies for my class of this poem that so-and-so wrote, that was published by Jones in Dallas and he makes an effort to communicate with the publisher or the author and he cannot find them and he produces his 30 copies for the use of the class 2 months hence—in the first place, like yesterday's snow, it will have disappeared. In the second place, there is no one that I know of on the copyright-owning side who would think it worthwhile to go to a lawyer and make a complaint against a hypothetical misuse of copyright; and if anyone were foolish enough, it would seem to me, to attempt to make that a test case, I would think it might very well be one of the elements of defense of fair use that it never was made to obtain clearance and it was not possible to do so.

Mr. PATTISON. I have an information gap here.

When you talk about computers, input and output, could you run through that in some way that I could understand it? I just do not understand it.

Mr. ZURKOWSKI. I am not sure I can give you an explanation of it in short order. In answer to your question, it is a position of our industry that the creation of a data base is a work of authorship. It involves all the things that an author goes through in creating.

Mr. PATTISON. What does a data base consist of?

Mr. ZURKOWSKI. A data base can take any embodiment. The Encyclopaedia Britannica could be considered a data base. It is a collection of separate pieces of information that are organized so as to be retrievable. You can do that in microfilm. You can do that in a computerized data base. For example if you keypunch every word in the Encyclopaedia Britannica and converted the keypunch cards to magnetic tape, you would have a machine-readable data base. Doing that is what the educators are talking about. They want to be able to make an input copy of the Encyclopaedia Britannica to their data base free of copyright infringement.

I must say that the real basis of our objection is that educational university computer centers are serving a wide range of users, in addition to the educational community. Once this major investment is made in creating that data base, they are under pressure to find as many uses as possible.

We ask the committee not to grant such a broad exemption because it will destroy the ability of the industry which is accommodating author's right in marketing such products. We think that before such an amendment is considered, the committee should either hold more hearings on this, to be better informed on the subject, or defer the question to the National Commission.

We did submit a lengthy set of amendments in our long statement which illustrate the detailed questions that are involved, and they are just another set of questions just like these you have been hearing for the past 2 days.

The point of our testimony was in effect that the committee really has not considered these aspects and has not taken testimony from people who create data bases and market data bases. It is a whole other world. The purpose of section 117 in the legislation was to preserve the status quo on those questions—simply by virtue of the fact that the committee did not have enough information. We face in the educator's ad hoc proposed amendment, a proposal to exempt input. I am just trying to call to the attention of the committee that before you get into that, you have to consider all the experience that has been had on

that. It would be better if you reserved that for the National Commission's study, or hold another day of hearings on that subject.

That is the position of our statement.

Mr. LIEB. Congressman Pattison, the approach of 2223 is to leave the law, whatever it is with respect to computer usage, as it is and ask to turn the question over to the new National Commission.

Ms. LINDEN. I would like to add a couple of words, if I may.

I was on the Committee of Science and Technology, Executive Office of the White House, for 3½ years. We debated this issue and we prepared voluminous reports on exactly this problem. The fact is that the cost in time, energy, and money, the millions and millions of dollars it costs to create input, to create the storage and the memory core of the computerized information storage and retrieval system, is such that if we, in the interim, prior to the resolution of the problem by the National Commission, permit free input, the cost of reverting to the old system and protecting input, I submit, will, for practical purposes and realistically, be impossible. Once you free the geese, they fly away. It is impossible to recapture them again.

This is a short-form urging of what is an extremely complex concept of computerized uses and processing of information.

One of the basic issues which this committee has not averted to—and rightly so, because it is being left to the National Commission—is the problem of censorship. I would simply whet your appetite by using that word. The serious problem in censorship that computerized information storage and retrieval systems would cause if input were left, as I say, as the freed geese. This is a subject that warrants not only the attention of this committee, but serious study of the National Commission and careful reporting back for your consideration.

Mr. KASTENMEIER. On behalf of the committee, I thank you for your appearance this morning—I should now say this afternoon. We will see you again in the context of this particular issue, perhaps, or others, on June 4; the committee will be exposed to the jukebox issue and the tribunal issue. And we will have as witnesses the American Society of Composers, Authors & Publishers; Broadcast Music, Inc.; Music Operators of America; and the manufacturers of jukeboxes.

Until that time, on June 4, at 10 o'clock in the morning, the subcommittee stands adjourned.

[Whereupon, at 1:30 p.m., the subcommittee adjourned.]

[The following statements were received for the record.]

STATEMENT OF ALBERT WARREN, CHAIRMAN, COPYRIGHT COMMITTEE, INDEPENDENT NEWSLETTER ASSOCIATION

My name is Albert Warren. I am chairman of the Copyright Committee of the Independent Newsletter Association. I am publisher of Television Digest with Consumer Electronics. The other members of the Committee are Louis Rothschild, publisher of Food Chemical News, and David Swit, publisher of Product Safety Letter. All 3 newsletters are published in Washington.

We speak for newsletters which are true journalistic enterprises. We do not represent house organs, publicity devices and the like. We produce the publications of the type admitted to the Congressional Periodical Press Galleries under the rules of Congress which specify that the publications admitted are "published for profit and supported chiefly by advertising or by subscription, and owned and operated independently of any industry, business, association, or institution."

The newsletter industry is uniquely vulnerable to violations of copyright for the following reasons:

(1) The typical newsletter is very brief—comprising a few pages, often no more than 4—and is therefore susceptible to quick photocopying in its entirety.

(2) Since newsletters' income almost always comes from subscriptions alone, illegal reproduction and distribution have an immediate and devastating impact on the market for the publications.

(3) Newsletter publishing is small business in its truest sense. With very few exceptions, each of the thousands of newsletters published in the United States is the product of a few journalists—frequently only *one*—often assisted only by their families.

(4) A recent survey of the newsletter industry shows that 19% have 500 or fewer subscribers; 21.5%, 501-1,000; 21.5%, 1,001-2000; 28%, 2,001-5,000; 10%, more than 5,000. With the average subscription running about $50 yearly, it is starkly evident that the revenues of a typical newsletter constitute small business indeed.

Simple arithmetic demonstrates dramatically the drastic impact that even a limited amount of copying may have on the viability of a newsletter. A newsletter with 500 subscribers, charging $50 a year, has a gross revenue of $25,000. If illegal copying deprives the publisher of a mere 100 subscribers, he suffers a loss of $5,000—20% of his income.

Newsletter publishers simply do not have the economic strength to police and litigate violations of their copyrights. Indeed, many publishers do not even file their newsletters with the Register of Copyrights, believing that the cost of $300 per year isn't justified by the insignificant amount of protection provided under current law.

We recognize that no Act of Congress can provide complete and automatic freedom from jeopardy. However, we do believe that Congress can make it abundantly clear what constitutes a violation of our rights—so that we can quickly, without expensive and protracted litigation, prosecute violations when we discover them.

We believe that the intent of Congress in providing for "fair use" is eminently laudable. Our concern is that newsletters are peculiarly vulnerable to abuses of "fair use." The reproduction of even a single page of a newsletter—or frequent reproduction of even mere sentences or paragraphs on specific topics—can often provide a businessman with all he needs without cost, thus eliminating him as a source of revenue. In fact, many newsletters conduct surveys and analyses which result in a single critical number. The illegal copying of this single number can deprive the publisher of major revenues. For example, my own publication conducts a monthly survey of hundreds of retailers to determine sales of TV receivers and stereo instruments to the public; the results are shown in a brief tabulation. The theft of this tabulation or even a portion of it would vitiate the entire enterprise.

We recommend, therefore:

(1) Exclusion of newsletters from any "fair use" reproduction as provided in Sec. 107. However, since most of our subscribers are businessmen—and we have no desire to exclude students from access to our material—we believe that not-for-profit libraries should be allowed "fair use." We believe that corporate and other business-operated libraries should be excluded.

(2) Should your Committee conclude that no "fair use" exclusion be made for newsletters, we urge that copying of any portion of a newsletter be allowed only upon written permission of the publisher. Historically, most newsletter publishers are pleased to authorize such reproduction on an occasional basis.

(3) If your Committee finds neither of the foregoing warranted, we urge, at a minimum, that language such as the following be included, in referring to "fair use": "For newsletters, fair use shall include reproduction of 50% of any article or 150 words, whichever is less. Each tabulation or graph shall be considered a separate article. Persons reproducing portions of a newsletter, under this provision, shall furnish the publisher with copies of such reproductions. On request of the publisher, such person shall provide him with the names, affiliations, and addresses of the persons to whom such copies were distributed."

We suggest that, under "Definitions," the following appear:

"A 'Newsletter' is a periodical published for profit and supported chiefly by subscription, and owned and operated independently of any industry, business, association, or institution."

In addition, we suggest that the provisions covering newsletters, regarding "fair use," be incorporated in a new Sec. 118.

STATEMENT OF F. J. VANANTWERPEN, EXECUTIVE SECRETARY, AMERICAN INSTITUTE OF CHEMICAL ENGINEERS, AND PRESIDENT, COUNCIL OF ENGINEERING AND SCIENTIFIC SOCIETY EXECUTIVES, AND ALBERT BATKIN, CHAIRMAN OF COMMITTEE ON PUBLICATIONS, COUNCIL OF ENGINEERING AND SCIENTIFIC SOCIETY EXECUTIVES

Mr. Chairman: My name is F. J. VanAntwerpen, Executive Secretary of the American Institute of Chemical Engineers, and President of the Council of Engineering and Scientific Society Executives. This Council is composed of the leaders of 80 national engineering and scientific societies and numerous similar local and Canadian organizations. In the United States alone, the cumulative society membership exceeds one million engineers and scientists.

The membership of these societies constitutes not only the users of the material disseminated but are, in fact, the authors. Therefore, they have a vital interest in the use and misuse of their material. The Council acting on behalf of the member societies and their membership in turn ask that you consider this in your deliberations. We feel that the provisions incorporated in the bill as passed by the Senate last year are equitable, although not as strong as some Societies may wish. We can live with it.

I have with me my associate, Albert Batik, Deputy Managing Director of the American Society for Testing and Materials, and Chairman for the Committee on Publications of our Council, who can give you additional information on our position.

Mr. Chairman: To give the Committee some perspective, I have data that may be useful. Of all the original scientific and engineering information published in the United States between 70 and 75% is published through the non-profit engineering and scientific societies.

These Societies depend on the income derived from the subscriptions and sale of their publications in varying degrees ranging from 20 to 80% of their total income. Most of the income is plowed back into a continuing information dissemination program. Virtually all the Societies work essentially on a break-even basis. Therefore, they have a vital interest in copyright legislation which will affect their income.

We recognize the position of libraries and other information centers that have limited budgets. However, faced with rising costs, and losing subscriptions to the copy machines, the societies find themselves in a rather awkward position.

Subscription prices can be raised but this serves only to aggravate the situation and drives more subscribers to the copy machine. Keep in mind that the only beneficiaries in this troubled triangle are the manufacturers of the reproducing equipment. The true cost of this equipment is rarely recorded by the libraries and information centers, and the societies find their investments used free of charge to create income for a third party.

Societies can publish less. This would hinder the technical development of answers to the urgent problems facing the United States such as: solutions to the energy crisis, the abatement of pollution, and the delivery of adequate health services. The societies have a moral and ethical commitment to use their facilities to assist the nation in meeting its goals.

Societies can ask the Federal Government for subsidies to operate their publications and to make up for the loss of subscriptions. However, it is a well known fact that he who pays the piper calls the tune. In the technical field, vigorous debate and controversial positions are the keystone to arriving at adequate answers. A controlled technical press would be as regressive as a controlled social science press or a controlled news press. A number of other countries, at one time or another, have controlled their technical press much to their own detriment. Dissent in the technical sphere is essential, otherwise we would still be navigating on a flat world.

The Senate in the report accompanying the bill which was passed last year urged publishers and users to develop a system of reasonable royalties. I personally have participated in these negotiations and believe that a workable solution can be developed provided that no further exemptions be granted to users. As Mr. VanAntwerpen has stated, the Senate bill is viable and as is mandated in the accompanying report, a workable solution can go far to solving the problem at hand.

STATEMENT OF DAVID MCCURRACH ON BEHALF OF THE NATIONAL SCHOOL AND EQUIPMENT ASSOCIATION

Mr. Chairman and members of the subcommittee, my name is David McCurrach, and I am Executive Vice President of the National School Supply and Equipment Association (NSSEA), 1500 Wilson Boulevard, Arlington, Virginia. Our membership is comprised of upwards of 470 companies which are involved in manufacturing and distributing supplies and equipment to schools all across the United States.

One of the significant contributions which we make to the educational process is in the area of instructional materials. Instructional materials include a wide variety of nontext supplemental aids to teaching which range from printed materials such as workbooks, exercises, flashcards and learning cards of all types, to newer audio-visual materials such as transparencies for projection, films, and learning records. The development of these new materials has made it possible for teachers to make learning more varied, more interesting, and more effective.

Because of the great importance of copyright protection, we have viewed with interest and concern the efforts of Congress over the last ten years to revise the 1909 Copyright Law to reflect new technologies and developments. Since instructional materials are designed for use in the classroom, there are substantial research and development costs in addition to the standard costs of publication. There would have been little incentive for the creators of instructional materials to devote the requisite time, money and effort to this undertaking, had there been no restrictions on the right of teachers and school officials to duplicate instructional materials once they were published.

The advent of photocopying, however, has undermined the efficacy of the copyright protection provided by law. The duplication of educational and instructional materials occurs regularly on a large scale. In fact, many school officials and teachers believe that all such copying is legal because it has been done so consistently over such a long period of time. The practical problems in trying to monitor this activity combined with the lack of judicial guidelines in the area have made the enforcement of rights under the current law extremely difficult.

The future development and availability of these materials depends, in the large part, on the re-establishment and maintenance of adequate copyright protection. The interests of the people in the availability and wide dissemination of original works of authorship can best be assured where the author is reasonably compensated for his work. A recognition of this fact underlies copyright law. Without a clear statement of legislative policy on the right of the public to duplicate, the incentive to create instructional materials will disappear.

Two provisions of the pending Copyright Revision Bill (H.R. 2223) are of greatest concern to NSSEA. Section 107 permits the duplication of copyrighted materials where it constitutes a "fair use" of the work. Section 110 exempts from copyright liability certain performances and "displays" of copyrighted material in teaching contexts.

It is our understanding that § 107 is not intended to change existing law. To the extent that this provision simply codifies standards which have been developed by the courts to determine what is a "fair use" of copyrighted materials, NSSEA would have no concern. We oppose, however, the pending amendments to H.R. 2223 which would broaden the scope of "fair use" and, in particular, the proposal which would exempt from liability for copyright infringement virtually all duplication of copyrighted materials used for nonprofit teaching purposes. Such a change in copyright protection would, we believe, threaten the future of instructional materials. Since schools are the only purchasers of instructional materials, large scale duplication by schools would deprive the creators of those materials of the only market available to them. In the past, Congress has consistently refused to insulate educators from the obligation to pay royalties for duplicating copyrighted materials. NSSEA urges, Mr. Chairman, that you and the members of your Subcommittee not so insulate them now.

I would also like to take this opportunity to address my remarks to what may be some real problems in the bill as it is currently drafted. With reference to the section governing the "fair use" of copyright materials (§ 107), NSSEA is concerned that it will not adequately clarify the respective rights of creators and users in instructional materials. The standards set out in § 107 itself are extremely vague. Without further explanation, no teacher or school official would

be able to determine whether or not a given duplicating project would be permissible.

First, NSSEA believes that it is essential that explicit guidance be provided on what constitutes "fair use" with respect to the duplication of instructional materials. Guidelines which have been devised with printed textual materials in mind will not resolve the problem of instructional materials. Unlike textbooks, most instructional materials are designed expressly to be used in segments which relate to specific areas of study. For this reason, duplication of portions of an instructional material program is far more detrimental to the rights of their creators than comparable duplication of a portion of a textbook would be. We urge, therefore, that copying even small segments of such materials be deemed not to constitute a "fair use".

Secondly, the application of the doctrine of "fair use" to what have been termed "consumables" must be clarified. Unlike textbooks, many printed instructional materials, like workbooks and exercises, are consumed in use. Recognizing the particular problems raised by these materials, Congressional committees have consistently made clear that the privilege of "fair use" by teachers and students would have "little, *if any*, application" to "consumables".[1] A spokesman for the Ad Hoc Committee on Copyright Law Revision of the American Council on Education testified before this Committee that they were not asking for the right to reproduce writings that are destroyed in use. Supporting the virtual unanimity among Congressional committees, the educational community and the creators of instructional materials that duplication of instructional materials which are consumed in the classroom should not be permitted, NSSEA recommends that § 107 be amended accordingly.

Specific guidance is also needed on the application of § 107 to audio-visual materials. Due to the nature of audio-visual aids, no more than one set of a program is usually needed in any one classroom. And, often, a school will purchase only one of each program or set which will be rotated among the classrooms. Thus, even single duplications of these materials could have a significantly adverse impact on the audio-visual industry. NSSEA urges this committee to clarify § 107 and to set out express restrictions on the rights of educators to duplicate audio-visual materials.

The other section of H.R. 2223 which NSSEA finds particularly troubling is § 110, which exempts from liability certain displays of copyrighted materials in a teaching context. § 110(1) provides that the "display" of a copyrighted work in the course of "face-to-face teaching activities" in a classroom by teachers or pupils is not an infringement of copyright—and to "display" a work is defined as "to show a *copy* of it". Except for motion pictures and other "audio-visual" works, there is no requirement in the bill that such copy must be lawfully made in the first place. NSSEA believes that this provision is inconsistent with § 107 and could permit wholesale infringements of instructional material copyrights. Once the copy has been made of materials like sets of learning cards or slides, this exemption could allow teachers to use that copy freely thereafter without running any risk of copyright infringement. NSSEA believes that § 110 should be amended to restrict all the rights of "display" granted under this provision to copies which were lawfully made in the first instance. Clearly, your legislation should not create the circumstances whereby one section of the law permits people to do indirectly what another section forbids them to do directly.

In conclusion, Mr. Chairman, NSSEA commends the efforts of this committee to revise our existing copyright laws and to resolve the problems created by the rapid technological changes of the last few decades. The question of photocopying is clearly one of the most troublesome now facing your committee. The interests of educators and users, however, would be best protected in the long run by the maintenance of copyright protection which is sufficient to encourage and reward the further development of new educational methods and instructional materials.

[1] S. Rep. No. 93-983, 93rd Cong., 2d Sess., at p. 117 (1974); H.R. Rep. No. 83, 90th Cong., 1st Sess., at p. 34 (1967).

COPYRIGHT LAW REVISION

TUESDAY, JUNE 3, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee], presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, Mann, and Mazzoli.

Also present: Herbert Fuchs and Bruce A. Lehman, counsels; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The subcommittee will come to order.

We are meeting again this morning to continue our study of the general revision of copyright law. This morning we have witnesses representing varying interests on the question of performance rights in jukebox performances. This is a question that 10 years ago, when this subcommittee held hearings, was, as I would observe, somewhat more controversial than it is today. Since then there have been agreements and accommodations, and while the parties are not precisely in agreement on the issue in all aspects, the differences are less grave.

The committee policy in this set of hearings has been to call, as the first group of witnesses, those witnesses which have what appear to be a disagreement with the bill as introduced; that is to say, the bill as it passed the Senate late last year. In this case, it is not the proprietors of music, music composition, that are defending the bill in all particulars. Actually the performance rights societies have some disagreements with the bill as it passed, and consequently our first set of witnesses this morning represent the performance rights societies. They are a number of distinguished individuals. Ten years ago there were a different cast of people present. In addition to the general counsel of the American Society of Composers, Authors and Publishers, Mr. Bernard Korman, and the general counsel of Broadcast Music Inc., Mr. Chapin, and also counsel of SESAC, Inc., who will be a witness, Mr. Ciancimino, who was present 10 years ago, there are a number of distinguished American authors and composers.

And first, if it is the pleasure of the panel before us, I would call on the great name in American music, the distinguished author, and composer, Aaron Copland, to be followed by the others as may be present. I notice we have Mr. Sy Oliver. Chip Davis and others may be here, and perhaps I should call on either you, Mr. Korman, or someone else who is appropriate to introduce each of the witnesses.

But, first the Chair would like to greet and call on Mr. Copland to make his presentation.

TESTIMONY OF AARON COPLAND, COMPOSER AND AUTHOR, ACCOMPANIED BY BERNARD KORMAN, GENERAL COUNSEL, AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

Mr. KORMAN. Mr. Chairman, if I may, since you mentioned that there would be other witnesses, and we had listed Johhny Mercer as one of them, Mr. Mercer had intended to be here. His wife is recovering from an operation and she is out in California, and he is with her, and therefore, unfortunately not here.

We have arranged among ourselves a little different allotment of time than appears on your schedule. Sesac has graciously ceded 2 minutes of its time to us, and rather than Mr. Copland taking only 5 minutes, he will take 8 or 9, and I will try to briefly summarize the statement that Mr. Mercer would have made had he been here.

Mr. KASTENMEIER. And who will speak for Broadcast Music Inc., Mr. Sy Oliver?

Mr. CHAPIN. Mr. Chairman, Mr. Sy Oliver is here and will speak for Broadcast Music Inc. The other person, Mr. Frank Peewee King, has been delayed in transit, and we expect him at any moment. I would hope at your pleasure that he could be at the end. Somebody is at the airport waiting for him and he will bring him here just as soon as he arrives.

Mr. KASTENMEIER. In which case we will call on you, Aaron Copland.

Mr. COPLAND. Mr. Chairman and members of the committee. My name is Aaron Copland, and I reside in Peekskill, N.Y.

I appear today as a spokesman for the 23,000 members of the American Society of Composers, Authors and Publishers, on whose board of directors I have served since 1973. However, I believe I speak for all composers, authors, and publishers of music, and indeed, that the point of view I shall express is, in fact, the point of view of everyone who has looked at the jukebox question, with the sole exception, of course, of the jukebox industry.

First, Mr. Chairman, I would like to express my personal appreciation of your extraordinary efforts on behalf of authors and composers over the past dozen years. I believe all creators owe you a large debt.

I hope my statement will accomplish two things: First, to state succinctly ASCAP's position on the jukebox issue and, second, to set forth briefly some facts about the world of music which are not generally known.

The origin of the $8 per year provision in the present bill is well-known. In 1967, for the first time, the prospects for enactment of a general copyright revision bill were good, but there were two problems—the fee to be paid for jukebox performances and how cable television should be treated. To resolve the jukebox issue, we and other licensing organizations agreed with the jukebox industry that their fee would be $8 per box per year—substantially less than the $19 to $20 fee recommended by this subcommittee in 1966.

The bill, as so amended, passed the House—with the cable television provisions deleted—but the Senate failed to act. The $8 fee for the 500,000 jukeboxes then in use would have produced $4 million per year in license fees. That is a total of $28 million for the period 1968 through 1974. Because the bill was not enacted, not a penny has been paid for performance fees.

Your bill, Mr. Chairman, is the same as the bill passed by the Senate in September 1974. As a result of a last-minute amendment on the Senate floor, chapter 8 was changed so that the $8 fee would not be subject to periodic review and adjustment by the Copyright Royalty Tribunal.

ASCAP's position, then, is that we support H.R. 2223 with a single change: we urge that chapter 8 be amended and restored to the form in which it won Senate Judiciary Committee approval. The jukebox fee should not be frozen by statute. It should be treated the same as the other statutory fees—the mechanical fee, section 115; and the cable television fee, section 111. Congress is too busy to be burdened with periodic review and adjustment of copyright royalty rates as economic conditions change. Such adjustments are best left to the Copyright Royalty Tribunal.

Mr. Chairman, it would not surprise or disappoint me if, when my name was listed as a witness on this issue, you and the other members of the committee were puzzled as to why my fellow composers would call on me, or why I would agree, to speak for them when I am better known to concert audiences than to those who drop their quarters, half-dollars and, I am told, even their dollar bills, into jukeboxes.

The answer is that the world of serious music is much closer to, and more dependent on, the world of popular music than is generally realized. To appreciate why this is so—and how "serious" composers stand to share in royalties paid by jukebox operators—it is necessary to understand how ASCAP and similar licensing organizations function.

ASCAP licenses are valuable to users precisely because they cover many compositions—the works of all of ASCAP's members and the works of tens of thousands of music creators who belong to similar foreign societies with which ASCAP is affiliated in all parts of the world.

ASCAP members include composers of serious music, rock n' roll, the great American standards, music from Broadway shows, film music, religious music, jazz, country and western; indeed, all music.

ASCAP is not a corporation. We are an unincorporated, nonprofit membership association—really, a kind of cooperative.

Many of us who create music rely primarily on our copyright royalties for our livelihood. In addition to our performance royalties, we also receive record royalties. But it is important for you to realize that record sales benefit record companies and performers more than they benefit writers and publishers. Consider the mechanical royalty income earned by writers and publishers from a record that sells 1 million copies—there are not many—and remember that at the present maximum statutory fee of 2 cents per record, the publisher would receive $10,000 and $10,000 would be divided among the writers.

Other sources of income for composers, such as sheet music, are small. The fact is that careers in music would often be impossible without performance royalties. They are the mainstay for many composers.

In deciding how to apportion the writers' share of ASCAP's revenues, the most successful popular writers do something unique as far as I know—they encourage the development of other writers by a distribution system which channels money from those who earn most to those who earn less.

Specifically, the 100 or so writers who receive the most "performance credits" in the ASCAP survey of performances receive less than the amount they would receive if they were paid on the same basis as all other writers. These sums "flow down" to writers whose works do not enjoy equal commercial success.

Money, after all, is the essential encouragement one must have. It permits the writer, especially the beginner, to keep writing when, otherwise, he might have to give up his profession.

ASCAP's members have agreed to distribute 10 times as much to writers and publishers of serious music as this music earns from licensing performances in concerts and recitals. The money used for this purpose obviously comes from ASCAP's other licensees. These include "general" licensees, such as restaurants, hotels, and taverns, and would include receipts from jukebox operators. Accordingly, the fees ASCAP would receive for jukebox performances under the general revision bill are of vital interest to me and to other serious composers.

And there are other reasons. There is the international aspect—we Americans receive far more for foreign performances of our works than we pay to foreign creators for American performances. Jukebox performances abroad earn money for our composers; why should we do less for theirs?

Why, indeed, should we be parsimonious toward our creators in any aspect of our copyright law? As one who has devoted his life to the creation of music, I am deeply concerned about the term of copyright protection. I am told that some witnesses have appeared before this committee to argue against the term of life plus 50 years which you have proposed, Mr. Chairman, in your bill, and which is consistent with the terms in virtually all civilized countries.

My own first work was published in 1921. In the absence of enactment of this bill, or of a further extension bill, this work of mine will go into the public domain in the United States in 1977. Elsewhere in the world, its copyright term will run at least 50 years after my death. I submit that the United States should protect works of authorship at least as long as most other nations.

Mr. Chairman and members of the committee, the achievements of Americans in literature, painting, and music are measures of the greatness of our Nation. They are honored around the world and we can all be proud of them.

You have a rare opportunity: Most people are not in a position to offer more than lip service to the Nation's creators, men and women in every State, large and small. On this eve of our Bicentennial you can carry out the intention of the framers of our Constitution. In considering each of the solutions to the complex issues confronting you, the questions I should like you to repeat to yourself are: Is it fair to authors? Does it, in fact, carry out the famous constitutional mandate

"To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries?"

Thank you.

[The prepared statement of Mr. Copland follows:]

STATEMENT OF AARON COPLAND, COMPOSER, MADE ON BEHALF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Mr. Chairman and members of the committee. My name is Aaron Copland, and I reside in Peekskill, New York.

I am a composer, author, conductor, and teacher and a member of the National Institute of Arts and Letters and the American Academy of Arts and Letters.

I appear today as a spokesman for the 23,000 members of the American Society of Composers, Authors and Publishers, on whose Board of Directors I have served since 1973. However, I believe I speak for all composers, authors, and publishers of music and, indeed, that the point of view I shall express is, in fact, the point of view of everyone who has looked at the juke box question, with the sole exception, of course, of the juke box industry.

First, Mr. Chairman, I would like to express my personal appreciation of your extraordinary efforts on behalf of authors and composers over the past dozen years. I believe all creators owe you a large debt.

I hope my statement will accomplish two things: first, to state succinctly ASCAP's position on the juke box issue and, second, to set forth briefly some facts about the world of music which are not generally known.

For many years ASCAP and other organizations representing composers sought a change in the 1909 copyright law so that royalties would be earned when the public paid to hear our music played on juke boxes. Fortunately, we no longer have to concern ourselves with the basic question in dispute over those many years—whether juke box operators should pay any performance fees. They now agree to pay $8 per year per juke box.

Thus, the only question now is whether the $8 fee should be frozen by statute or subject to periodic review and adjustment, up or down, as the facts may warrant. Last year the Senate Judiciary Committee recommended such review by the Copyright Royalty Tribunal, subject to veto by either House of Congress. We favor that approach.

The origin of the $8 per year provision in the present bill is well-known. In 1967, for the first time, the prospects for enactment of a general Copyright Revision Bill were good, but there were two problems—the fee to be paid for juke box performances and how cable television should be treated. To resolve the juke box issue, we and other licensing organizations agreed with the juke box industry that their fee would be $8 per box per year—substantially less than the $19 to $20 fee recommended by this Subcommittee in 1966.

The bill, as so amended, passed the House—with the cable television provisions deleted—but the Senate failed to act. The $8 fee for the 500,000 juke boxes then in use would have produced $4 million per year in license fees. That's a total of $28 million for the period 1968 through 1974. Because the bill was not enacted, not a penny has been paid for performance fees.

Your bill, Mr. Chairman, is the same as the bill passed by the Senate in September, 1974. As a result of a last-minute amendment on the Senate floor, the juke box provision (§ 116) was changed so that the $8 fee would not be subject to periodic review and adjustment by the Copyright Royalty Tribunal.

ASCAP's position, then, is that we support H.R. 2223 with a single change: we urge that § 116 be amended and restored to the form in which it won Senate Judiciary Committee approval. The juke box fee should not be frozen by statute. It should be treated the same as the other statutory fees—the mechanical fee (§ 115) and the cable television fee (§ 111). Congress is too busy to be burdened with periodic review and adjustment of copyright royalty rates as economic conditions change. Such adjustments are best left to the Copyright Royalty Tribunal.

Mr. Chairman, it would not surprise or disappoint me if, when my name was listed as a witness on this issue, you and the other members of the committee were puzzled as to why my fellow composers would call on me, or why I would agree, to speak for them when I am better known to concert audiences than to

those who drop their quarters, half-dollars and, I am told, even their dollar bills, into juke boxes.

The answer is that the world of serious music is much closer to, and more dependent on, the world of popular music than is generally realized. To appreciate why this is so—and how "serious" composers stand to share in royalties paid by juke box operators—it is necessary to understand how ASCAP and similar licensing organizations function.

We must start with the reason for ASCAP's existence. Since 1914 ASCAP has provided an essential public service. It is a clearinghouse through which composers, authors and publishers, and users of copyrighted music, come together to issue or to obtain licenses for performance of music. ASCAP provides the mechanism through which performance rights can be marketed in bulk at enormous savings over the costs that individual negotiations would necessarily entail.

ASCAP's members grant the Society the nonexclusive right to license their works to all who perform them publicly for profit. ASCAP's licensing arrangements now extend to over 35,000 users of music, ranging from the tavern owner who may use records, tapes, a single instrumentalist or an orchestra, to the three television networks.

To ensure that the various license fees are fair, ASCAP has voluntarily entered into a Consent Judgment in *United States* v. *ASCAP* (Civ. 13-95, March 14, 1950, S.D.N.Y.), which provides for judicial determination of a reasonable license fee if ASCAP and any user fail to reach agreement. Our counsel, Mr. Bernard Korman, can give you details on how this provision has worked over the past twenty-five years.

ASCAP licenses are valuable to users precisely because they cover many compositions—the works of all of ASCAP's members and the works of tens of thousands of music creators who belong to similar foreign societies with which ASCAP is affiliated in all parts of the world.

ASCAP members include composers of serious music, rock n' roll, the great American standards, music from Broadway shows, film music, religious music, jazz, country and western—indeed, all music.

The wide diversity of ASCAP membership is reflected not only in the different types of music, but also in the different degrees of achievement: membership is open to any writer who has had one composition published or recorded, and to any publisher who assumes the normal financial risk of the business. Accordingly, the membership includes the most commercially successful, those who have only one or two successful works over their lifetimes, and those who never write a single successful work. The publishers, too, range from the most successful to the struggling operation which may never show a profit.

ASCAP is not a corporation. We are an unincorporated, nonprofit membership association—really, a kind of cooperative. After operating expenses are deducted, amounts are set aside for foreign societies to pay their members. All remaining revenues are distributed to the members, 50% to the writers and 50% to the publishers. The distributions are based on an objective survey of performances. Again, our Counsel can explain this distribution system in more detail if you wish.

Many of us who create music rely primarily on our copyright royalties for our livelihood. In addition to our performance royalties, we also receive record royalties. But it is important for you to realize that record sales benefit record companies and performers more than they benefit writers and publishers. Consider the mechanical royalty income earned by writers and publishers from a record that sells one million copies—there are not many—and remember that at the present maximum statutory fee of 2¢ per record, the publisher would receive $10,000 and $10,000 would be divided among the writers.

Other sources of income for composers, such as sheet music, are small. The fact is that careers in music would often be impossible without performance royalties. They are the mainstay for many composers.

I have mentioned the many different kinds of music in the ASCAP repertory. The Society has a complex distribution system whose purpose is to reward each member fairly for the contribution his works make to the repertory.

In deciding how to apportion the writers' share of ASCAP's revenues, the most successful popular writers do something unique as far as I know—they encourage the development of other writers by a distribution system which channels money from those who earn most to those who earn less.

Specifically, the one hundred or so writers who receive the most "performance credits" in the ASCAP survey of performances receive less than the amount they

would receive if they were paid on the same basis as all other writers. These sums "flow down" to writers whose works do not enjoy equal commercial success.

Money, after all, is the essential encouragement one must have. It permits the writer, especially the beginner, to keep writing when, otherwise, he might have to give up his profession.

ASCAP's writers also set aside up to 5% of their share for special awards to writers whose works have unique prestige value for which adequate compensation would not otherwise be received. These awards are made by special panels consisting of nonmembers who are music experts.

I have mentioned some aspects of the ASCAP distribution system which promote and encourage authorship. Writers of popular music have also decided that it is important to encourage writers in my area, usually spoken of as classical or serious music.

ASCAP's members have agreed to distribute ten times as much to writers and publishers of serious music as this music earns from licensing performances in concerts and recitals. The money used for this purpose obviously comes from ASCAP's other licensees. These include "general" licensees, such as restaurants, hotels and taverns, and would include receipts from juke box operators. Accordingly, the fees ASCAP would receive for juke box performances under the general revision bill are of vital interest to me and to other serious composers.

And there are other reasons. There is the international aspect—we Americans receive far more for foreign performances of our works than we pay to foreign creators for American performances. Juke box performances abroad earn money for our composers; why should we do less for theirs?

Why, indeed, should we be parsimonious toward our creators in any aspect of our copyright law? As one who has devoted his life to the creation of music, I am deeply concerned about the term of copyright protection. I am told that some witnesses have appeared before this Committee to argue against the term of life plus 50 years which you have proposed, Mr. Chairman, in your bill, and which is consistent with the terms in virtually all civilized countries.

My first work was published in 1921. In the absence of enactment of this bill, or of a further extension bill, this work will go into the public domain in the United States in 1977. Elsewhere in the world, its copyright term will run at least 50 years after my death. I submit that the United States should protect works of authorship at least as long as most other nations.

Mr. Chairman and Members of the Committee, the achievements of Americans in literature, painting and music are measures of the greatness of our nation. They are honored around the world and we can all be proud of them.

You have a rare opportunity: Most people are not in a position to offer more than lip service to the nation's creators, men and women in every state, large and small. On this eve of our bicentennial you can carry out the intention of the framers of our Constitution. In considering each of the solutions to the complex issues confronting you, the questions I should like you to repeat to yourself are: Is it fair to authors? Does it, in fact, carry out the famous Constitutional mandate "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries?"

Thank you.

Mr. KASTENMEIER. We thank you, Mr. Copland, for that fine statement. Your gift for composition is not limited to music apparently.

Mr. COPLAND. Thank you, sir.

Mr. KASTENMEIER. If you wish to summarize, Mr. Korman?

Mr. KORMAN. If I may, Mr. Chairman. Mr. Mercer has a statement in which he refers at page 2 to a list of organizations which in the past have urged repeal of this so-called jukebox exemption. And this, as the chairman knows, has been going on for a very long time. The only people supporting the jukebox position have been the jukebox industry itself.

The issues now are two. Mr. Mercer says, at the bottom of page 3, they are: What is a fair performance fee; and should that fee be subject to periodic review and adjustment as economic conditions change?

As you know, the Senate back in 1958 concluded that a fair fee would be between $19 and $20, and 8 years later, in 1966, the House Judiciary Committee came to the same conclusion. The bill as passed by the House in 1967 provided for a fee of only $8, and that was agreed to as a compromise because authors and composers recognized the overriding public importance of general copyright revision.

I think it is important to stress that last year the Senate committee stayed with the $8 fee only after providing a mechanism for periodic review and adjustment. That mechanism is the Copyright Royalty Tribunal, which would be empowered to review periodically and adjust all of the compulsory license fees in the bill, the mechanical license fee, the cable television license fee, and the jukebox license fee.

ASCAP supports the Senate committee's approach. We believe a strong case could be made for a fee higher than $8, but we will accept the $8 fee provided it is subject to periodic review and adjustment by the Copyright Royalty Tribunal.

Indeed, we can see no justification otherwise for any statutory fee, and certainly not for a fee of only $8 for jukeboxes. Fees should be arrived at by the normal bargaining process and, if special circumstances are believed to require compulsory licenses and statutory fees, a mechanism for adjustment must be provided. Both sides should know that if they fail to reach agreement on a reasonable fee, an impartial body stands ready to adjust the statutory fee on the basis of a full record.

I might interject here that ASCAP has had 25 years of experience under a consent judgment entered in the District Court for the Southern District of New York where the court has stood ready to fix fees. Perry Patterson, who will be appearing later for the jukebox manufacturers, has represented clients who would have been, in turn, represented by all industry groups who have petitioned the court to determine reasonable license fees. The court has never had to determine a license fee after a full hearing on the merits because the parties have always reached an agreement.

The Music Operators of America has said in the past that small operators could not be expected to bargain equally with the huge organizations like SESAC, BMI, and ASCAP. The fact is, that MOA would represent the industry, and we would sit down with MOA, as I envision the procedure, and work something out with them on the basis of what the current economic conditions are at the time. This is the way things are done in other industries, and I see no reason why the same procedure would not apply here.

There has also been talk in the past about how the rates would drive jukebox operators out of business. Mr. Mercer says at the top of page 6 of his statement:

> Creators prosper when users prosper. We certainly have no incentive to seek fees which would drive users out of business. With the Copyright Royalty Tribunal available to adjust statutory fees to reasonable levels as conditions change, subject always to veto by either House of Congress, we anticipate that the parties would engage in good faith negotiations and reach fair agreements, in the same way that business is normally conducted between buyers and sellers.
>
> Congress surely should be very wary of writing into the new copyright law any provision which may not only be unfair at the time of enactment, but which is bound to become unfair later, as economic conditions change.

The choice is simply whether Congress wishes to continue to bear the burden of hearing repeated arguments for changes in copyright fees, or whether it would be more efficient to adjust these fees by the Tribunal mechanism. The latter is clearly preferable, in our view.

Moreover, Mr. Chairman and members of the committee:

If the jukebox fee is not subject to adjustment by the Copyright Royalty Tribunal, we may be sure that the cable television and record industries will also seek the same treatment. If the point is won by one such large industry, carefully worked out compromises involving other large industries may well fall apart and much of the progress made in the spirit of compromise will be lost.

As a matter of principle, no composer, author or publisher would favor any compulsory license permitting users to perform our works without consulting us as to a fair price. But we have tried to see the point of view of others and to cooperate in reaching a workable compromise in the higher interest of securing enactment of this legislation.

H.R. 2223 is not a perfect bill, but we urge its enactment with one change: It is essential that the jukebox fee, like the other statutory fees, be subject to adjustment by the Copyright Royalty Tribunal.

Thank you.

[The prepared statement of Johnny Mercer follows:]

STATEMENT OF JOHNNY MERCER, COMPOSER-AUTHOR, MADE ON BEHALF OF THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS, AND PUBLISHERS

Mr. Chairman, my name is John H. Mercer. I was born in Savannah, Georgia, and have spent most of my professional life as a songwriter in California where I now reside.

I appear before you today on behalf of ASCAP but, like Mr. Copland, I believe I speak for all creators of music, whatever their affiliation.

I am honored to appear before you today, but of course I am disappointed that this important legislation has not yet been enacted. I appeared before the Senate Copyright Subcommittee in 1967 to urge passage of a bill similar to H.R. 2223. I earnestly hope that the efforts of this Subcommittee will bear fruit.

I have been fortunate in writing songs the public has liked, among them, "On The Atchison, Topeka and Santa Fe" (1946), "In the Cool, Cool, Cool of the Evening" (1951), "Moon River" (1961) and "Days of Wine and Roses" (1962), each of which won a Motion Picture Academy Award. Of course, like all other songwriters, I have written many works that have had no success. That's so common it can't even be called unfortunate. What is unfortunate is that when my songs were most popular, many jukebox operators made a good deal of money from members of the public who paid to hear them. I received nothing for those performances.

My hope is that the brilliant young writers of today—the Carole Kings, Neil Diamonds, Stevie Wonders, and John Denvers—whose works are now the raw material of the juke box industry will be more fairly treated than prior generations of songwriters.

There is, fortunately, no need to repeat in any detail the arguments made so often in the past as to why the so-called juke box exemption should be repealed. Rather, we should consider what all of the following meant when they urged its repeal:

American Bar Association
American Patent Law Association
Association of the Bar of the City of New York
Authors League of America, Inc.
California Bar Association
Copyright Office
Department of State
Federal Bar Association of New York, New Jersey and Connecticut
General Federation of Women's Clubs
Library of Congress
National Federation of Music Clubs
National Music Council

These disinterested parties, together with the interested ones—ASCAP, BMI, SESAC, the American Guild of Authors and Composers, and the National Music Publishers Association—all urged repeal of this unfair exemption. What we all meant, of course, is simply that the juke box industry, like all others who profit from performing music, should pay fair and reasonable license fees.

Let me mention briefly two points and then turn to the real issue today. First, the fact that the so-called exemption developed as a historical accident, rather than as a conscious decision of Congress applicable to the modern juke box industry, is well-known to this Committee and is discussed in the 1966 Committee Report (H.R. Rep. No. 2237, 89th Cong., 2d Sess.).

Second, it is equally well-established that, under arrangements between American and foreign performing rights organizations, American authors and composers are paid for performances of their works on juke boxes in other countries. The anomalous fact that we do not pay foreign authors and composers for our performances of their works on juke boxes has caused friction in our international copyright relations.

Now that the juke box industry agrees that it should pay for its performances, two questions remain: What is a fair performance fee? And should that fee be subject to periodic review and adjustment as economic conditions change?

In considering what fee is fair, we recall that in 1958 the Senate Judiciary Committee concluded that a fair fee would be between $19 and $20 annually per juke box. Eight years later, in 1966, the same conclusion was reached by the House Judiciary Committee. But when the House passed the General Revision Bill in 1967, the fee was $8. Authors and composers agreed to this much lower fee as a compromise, because they recognized the overriding public importance of general copyright revision.

Last year, the Senate Judiciary Committee considered this question and concluded that a fee higher than $8 per year was warranted. Nevertheless, the Committee "endeavored to facilitate the progress of this [general revision] legislation by preserving * * * the rate adopted by the House of Representatives." (S. Rep. No. 93-983, 93d Cong., 2d Sess., 1974, at 152).

It is important to stress that the Senate Committee stayed with the $8 fee only after providing a mechanism for periodic review and adjustment. That mechanism is the Copyright Royalty Tribunal, which would be empowered to review periodically and adjust all of the compulsory license fees in the Bill—the mechanical license fee, the cable television license fee and the juke box license fee. At the last moment, on the Senate floor, juke box fees were exempted from Tribunal review.

We support the Senate Committee's approach. We believe a strong case could be made for a fee higher than $8. But we would accept the $8 fee, provided it were subject to periodic review and adjustment by the Copyright Royalty Tribunal.

Indeed, we can see no justification otherwise for any statutory fee, and certainly not for a fee of only $8 for juke boxes. Fees should be arrived at by the normal bargaining process, and, if special circumstances are believed to require compulsory licenses and statutory fees, a mechanism for adjustment must be provided. Both sides should know that if they fail to reach agreement on a reasonable fee, an impartial body stands ready to adjust the statutory fee on the basis of a full record.

We have no hard current data on which to propose a reasonable juke box royalty fee. What we suggest is that the $8 fee be accepted not because it is reasonable but because a start must be made. The parties could thereafter sit down and work out a reasonable fee on the basis of current economic conditions.

Creators prosper when users prosper. We certainly have no incentive to seek fees which would drive users out of business. ASCAP and similar organizations also have obligations to the creators we represent to seek a fair rate for the valuable rights granted. With the Copyright Royalty Tribunal available to adjust statutory fees to reasonable levels as conditions change, subject always to veto by either House of Congress, we anticipate that the parties would engage in good faith negotiations and reach fair agreements, in the same way that business is normally conducted between buyers and sellers.

Congress surely should be wary of writing into the new Copyright Law any provision which may not only be unfair at the time of enactment, but which is bound to become unfair later, as economic conditions change.

The choice is simply whether Congress wishes to continue to bear the burden of hearing repeated arguments for changes in copyright fees, or whether it would be more efficient to adjust these fees by the Tribunal mechanism. The latter is clearly preferable, in our view.

Mr. Chairman, if the past is any guide, the juke box industry will continue to assert that it is an industry of small businessmen who are having a difficult time surviving. The same may fairly be said of many music creators and publishers. And whether the operators are large or small really is irrelevant to the basic questions here. We say they should pay, we say the amount should be fair and we say it should be subject to adjustment by a simpler method than amendment of the Copyright Law.

Moreover, if the juke box fee is not subject to adjustment by the Copyright Royalty Tribunal, we may be sure that the cable television and record industries will also seek the same treatment. If the point is won by one such large industry, carefully worked out compromises involving other large industries may well fall apart and much of the progress made in the spirit of compromise will be lost.

As a matter of principle, we do not favor any compulsory license permitting users to perform our works without consulting us as to a fair price. But we have tried to see the point of view of others and to cooperate in reaching a workable compromise in the higher interest of securing enactment of this legislation.

H.R. 2223 is not a perfect bill but we urge its enactment with one change; it is essential that the juke box fee, like the other statutory fees, be subject to adjustment by the Copyright Royalty Tribunal.

Thank you.

[Subsequent to the hearing the following correspondence was received for the record.]

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS,
New York, N.Y., August 6, 1975.

Re Copyright Revision Legislation (H.R. 2223).

Hon. ROBERT W. KASTENMEIER,
House of Representatives,
Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: I understand that some months ago, a suggestion was advanced that H.R. 2223 should be amended to exempt ballroom operators from copyright liability in those cases where the bands are engaged as "independent contractors", and impose liability solely upon the musicians.

ASCAP would strongly oppose any such amendment for a number of reasons. First, we think the many cases holding the proprietor of a dance hall or similar establishment liable for copyright infringement are sound. Performances of musical compositions by a band or orchestra occur only when a proprietor believes they will attract patrons and so enhance his revenues. This is true whether the band members are engaged as employees or under agreements designed to make them "independent contractors". Many cases impose liability whether or not the proprietor had knowledge of the compositions to be played or exercised any control over their selection. The cases are reviewed in *Shapiro, Bernstein & Co. v. H. L. Green Company*, 316 F.2d 304 (2d Cir. 1963). The leading cases are:

Dreamland Ball Room v. Shapiro, Bernstein & Co., 36 F.2d 354 (7th Cir. 1929);

M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924) *aff'd* 2 F.2d 1020 (4th Cir. 1924);

Bourne v. Fouche, 238 F.Supp. 745 (E.D.S.C. 1965);

M. Witmark & Sons v. Tremont Social & Athletic Club, 188 F.Supp. 787 (D. Mass.1960);

Shapiro, Bernstein & Co., Inc. v. Veltin, 47 F.Supp. 648 (W.D.La. 1942);

Harms v. Cohen, 279 Fed. 276 (E.D.Pa. 1921).

Indeed, in the *Veltin* case, the proprietor had stipulated in his contracts with orchestra leaders that no ASCAP music be played, and had even gone so far as to post signs in his establishment objecting to the performance of ASCAP music. Nevertheless, he was held liable.

Exemption of the ballroom operators from copyright liability and imposition of liability solely on the band would necessitate drastic and very expensive changes in the way musical performances are licensed. In many instances, it would become virtually impossible for the author, composer, and publisher of a copyrighted work to secure any payment for the performance of his music.

ASCAP and other performing right licensing organizations license on an annual or, in many cases, a seasonal basis. It is possible to do so because the same owner can be dealt with on a year to year basis. The bands employed, on the

other hand, are often itinerant or even "pick-up" groups, constantly re-forming with new personnel, who often play in one location for only a short period and then move on to another or disband. Finding and licensing them would be much more difficult and, of course, much more expensive than the present system.

ASCAP bases its license fees for performances in establishments such as ballrooms, taverns, and restaurants on objective factors, including seating capacity, type and frequency of musical entertainment, admission, cover, or similar charge, and drink prices. Because these factors, which constitute the establishment's "operating policy", are fairly constant and can be easily determined in the event of change ASCAP is able to keep its costs of licensing down, and consequently maintain low license fees. The enclosed form of agreement shows the factors and the rates which start at only $70 per year.

Under the proposed amendment, as it has been described to me, it would be necessary for ASCAP to license the bands. It would be very difficult to locate and keep track of the constant movement of all the different bands across the country. Similarly, it would be necessary to determine the operating policy of each establishment when a given band played, and base a license fee on the policy during the period of the band's engagement. The higher cost of licensing on this basis would have to be passed along in higher license fees.

Licensing musicians would also create difficulties with the musicians' union, the American Federation of Musicians (AFM). Article 25, Section 16 of the AFM By-Laws (1973) provides:

> "Leaders and members of the Federation are prohibited from assuming any responsibility for the payment of license fees for any composition they play and from assuming or attempting to assume any liability whatsoever for royalties, fees, damage suits, or any other claims arising out of the playing of copyright composition."

I think the question really comes down to who is most responsible for the performance and who derives the principal benefit. Certainly, the band members derive the benefit—they are paid to play. That payment, from the owner of the establishment, is usually an amount less than the increased revenues to the owner resulting from use of music. The proof of this is found in the frequent practice of "testing" use of music: if business picks up, it is kept; if it does not pick up—and does not earn more than the cost of the music—it is discontinued. In this sense, the use of music is "for profit" or it is not used at all.

Accordingly, the owner of the establishment decides whether music will be performed at all and, if it is, obtains a more significant return than the musicians. Therefore we think it is fair that the owner should pay for the right to perform the music.

With best wishes for a pleasant summer,

Respectfully,

BERNARD KORMAN.

Enclosure.

GENERAL LICENSE AGREEMENT—RESTAURANTS, TAVERNS, NIGHTCLUBS, AND SIMILAR ESTABLISHMENTS

Agreement between AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS ("SOCIETY"), located at

and

("LICENSEE"), located at as follows:

1. Grant and Term of License

(a) SOCIETY grants and LICENSEE accepts for a term of one year, commencing , and continuing thereafter for additional terms of one year each, unless terminated by either party as hereinafter provided, a license to perform publicly at

("the premises"), and not elsewhere, non-dramatic renditions of the separate musical compositions now or hereafter during the term hereof in the repertory of SOCIETY, and of which SOCIETY shall have the right to license such performing rights.

(b) Either party may, on or before thirty days prior to the end of the initial term or any renewal term, give notice of termination to the other. If such notice is given the agreement shall terminate on the last day of such initial or renewal term.

2. Limitations on License

(a) This license is not assignable or transferable by operation of law or otherwise, and is limited to the LICENSEE and to the premises.

(b) The broadcasting or telecasting or transmission by wire or otherwise, of renditions of musical compositions in the SOCIETY's repertory to persons outside of the premises is prohibited.

(c) This license is limited to non-dramatic performances, and does not authorize any dramatic performances For purposes of this agreement, a dramatic performance shall include, but not be limited to, the following.

(i) performance of a "dramatico-musical work" (as hereinafter defined) in its entirety,

(ii) performance of one or more musical compositions from a "dramatico-musical work" (as hereinafter defined) accompanied by dialogue, pantomime, dance, stage action, or visual representation of the work from which the music is taken;

(iii) performance of one or more musical compositions as part of a story or plot, whether accompanied or unaccompanied by dialogue, pantomime, dance, stage action, or visual representation;

(iv) performance of a concert version of a "dramatico-musical work" (as hereinafter defined).

The term "dramatico-musical work" as used in this agreement, shall include, but not be limited to, a musical comedy, oratorio, choral work, opera, play with music, revue, or ballet.

3. License Fee

(a) In consideration of the license granted herein, LICENSEE agrees to pay SOCIETY the applicable license fee set forth in the rate schedule printed below and made part hereof, based on "LICENSEE's Operating Policy" (as hereinafter defined), payable quarterly in advance on January 1, April 1, July 1 and October 1 of each year. The term "LICENSEE's Operating Policy, as used in this agreement, shall be deemed to mean all of the factors which determine the license fee applicable to the premises under said rate schedule.

(b) LICENSEE warrants that the Statement of LICENSEE's Operating Policy on the reverse side of this agreement is true and correct.

(c) Said license fee is Dollars ($ annually, based on the facts set forth in said Statement of LICENSEE's Operating Policy.

4. Changes in Licensee's Operating Policy

(a) LICENSEE agrees to give SOCIETY thirty days prior notice of any change in LICENSEE's Operating Policy. For purposes of this agreement, a change in LICENSEE's Operating Policy shall be one in effect for no less than thirty days.

(b) Upon any such change in LICENSEE's Operating Policy resulting in an increase in the license fee, based on the annexed rate schedule, LICENSEE shall pay said increased license fee, effective as of the initial date of such change, whether or not notice of such change has been given pursuant to paragraph 4(a) of this agreement.

(c) Upon any such change in LICENSEE's Operating Policy resulting in a reduction of the license fee, based on the annexed rate schedule, LICENSEE shall be entitled to such reduction, effective as of the initial date of such change, and to a *pro rata* credit for any unearned license fees paid in advance, provided LICENSEE has given SOCIETY thirty days prior notice of such change. If LICENSEE fails to give such prior notice, any such reduction and credit shall be effective thirty days after LICENSEE gives notice of such change.

(d) In the event of any such change in LICENSEE's Operating Policy, LICENSEE shall furnish a current Statement of LICENSEE's Operating Policy and shall certify that it is true and correct.

(e) If LICENSEE discontinues the performance of music at the premises, LICENSEE may terminate this agreement upon thirty days prior notice, the termination to be effective at the end of such thirty day period. In the event of such termination, SOCIETY shall refund to LICENSEE a *pro rata* share of any unearned license fees paid in advance For purposes of this agreement, a discontinuance of music shall be one in effect for no less than thirty days.

5. Breach or Default

Upon any breach or default by LICENSEE of any term or condition herein contained, SOCIETY may terminate this license by giving LICENSEE thirty days notice to cure such breach or default, and in the event that such breach or default has not been cured within said thirty days, this license shall terminate on the expiration of such thirty-day period without further notice from SOCIETY. In the event of such termination, SOCIETY shall refund to LICENSEE any unearned license fees paid in advance.

6. Notices

All notices required or permitted hereunder shall be given in writing by certified United States mail sent to either party at the address stated above. Each party agrees to inform the other of any change of address.

IN WITNESS WHEREOF, this agreement has been duly executed by SOCIETY and LICENSEE this day of , 19 .

AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS

By_____
DISTRICT MANAGER

_____
LICENSEE

By_____

_____
TITLE

(Fill In capacity in which signed:
(a) If corporation, state corporate office held; (b) If partnership, write word "partner" under signature of signing partner; (c) If individual owner, write "individual owner" under signature.)

STATEMENT OF LICENSEE'S OPERATING POLICY

LICENSEE _____

PREMISES _____

FULL ADDRESS _____

_____ TELEPHONE NO. _____

Indicate only applicable factors:

1. Seating capacity _____

2. The highest price (when musical entertainment is provided) of:
   a. Nationally advertised brand liquor . . . . . $_____
   b. Individual set-ups . . . . . _____
   c. Nationally advertised brand beer . . . . . _____
   d. Average price of dinner . . . . . _____

3. Does establishment advertise its entertainment YES ☐ NO ☐

4. Description of Entertainment — No. Nights Per Week — Nights Used (Circle)
   a. Single instrumentalist ☐ _____ Su M Tu W Th F Sa
   b. Two or more instrumentalists ☐ _____ Su M Tu W Th F Sa

5. Mechanical music not cleared at the source
   a. Radio ☐ No. of Speakers _____
   b. Records ☐
   c. Tapes ☐

6. Mechanical music cleared at the source
   a. Records ☐ Name and address
   b. Tapes ☐ of supplier: _____
   c. Wired ☐ _____
   _____

7. Show ☐ Act(s) ☐ Vocalist(s) ☐ Check if None ☐

8. Charge made
   Admission ☐ Minimum ☐ Cover ☐ Entertainment ☐
   Similar charge (describe): _____ $_____

9. Alternate or relief music provided by instrumentalist(s) ☐

10. Number of rooms with musical entertainment _____*
    *If music is performed in more than one room, fill out and attach a separate Statement of Operating Policy for each room.

11. If seasonal operation, indicate seasonal period
    Opening date _____ Closing date _____

Rate based on above policy $_____
(If more than one room,
total rate for premises $_____)

CERTIFICATE

I hereby certify that the foregoing Statement of Operating Policy is true and correct as of this _____ day of _____, 19____.

_____
LICENSEE

By _____

RATE SCHEDULE

This rate schedule applies to Bars, Grills, Taverns, Restaurants, Lounges, Supper Clubs, Night Clubs, Piano Bars, Cabarets, Roadhouses and similar establishments where:

(a) The highest price (when musical entertainment is provided) of a nationally advertised brand of bourbon, rye or scotch is less than 85¢ a drink; or

(b) If the establishment does not sell liquor, but sells beer, or if liquor or beer are not sold but the establishment sells set-ups, the highest price (when musical entertainment is provided) of a bottle, can, draught, or other serving of a nationally advertised domestic beer, or an individual set-up where beer is not sold, is less than 50¢.

ANNUAL RATE

		LIVE MUSIC—SINGLE INSTRUMENTALIST					LIVE MUSIC—TWO OR MORE INSTRUMENTALISTS					NO LIVE MUSIC—MECHANICAL MUSIC ONLY		
			NO. OF VARIABLES*					NO. OF VARIABLES**						
Seating Capacity	No. Nights Per Week	Base Rate	One	Two	Three	If Mech. Music Used, Add	Base Rate	One	Two	Three	If Mech. Music Used, Add	Base Rate	Mech. Music Plus Show or Act(s)	Show or Act(s) with Admission, Cover, Entertainment or Similar Charge
0-75	1	$80	$105	$140	$190	$25	$90	$120	$160	$215	$25	$70	$105	$140
	2-3	110	145	195	260	35	135	180	240	320	35	70	145	195
	4-7	140	185	250	330	45	180	240	320	425	45	70	185	250
76-150	1	95	130	170	225	35	130	175	230	310	35	100	130	170
	2-3	145	195	255	340	50	195	260	345	460	50	100	195	255
	4-7	190	255	340	450	65	260	345	460	615	65	100	255	340
151-225	1	130	170	230	310	45	170	225	300	400	45	130	170	230
	2-3	195	260	345	460	65	255	340	455	605	65	130	260	345
	4-7	280	350	460	615	85	340	455	605	805	85	130	350	460
226-300	1	165	220	295	390	55	210	280	375	500	55	160	220	295
	2-3	250	335	445	590	80	315	420	560	745	80	160	335	445
	4-7	330	440	585	780	105	420	560	745	995	105	160	440	585
301-375	1	200	265	355	475	65	250	335	445	590	65	190	265	355
	2-3	305	400	535	715	95	375	500	665	890	95	190	400	535
	4-7	400	530	710	950	125	500	665	390	1185	125	190	530	710
376-450	1	235	315	420	560	75	290	390	515	685	75	220	315	420
	2-3	360	475	630	840	110	435	580	775	1030	110	220	475	630
	4-7	470	630	840	1120	145	580	775	1030	1375	145	220	630	840
451-525	1	235	315	420	560	75	330	440	585	780	85	250	360	485
	2-3	360	475	630	840	110	495	660	880	1175	125	250	540	730
	4-7	470	630	840	1120	145	660	880	1175	1565	165	250	720	970
526-600	1	235	315	420	560	75	370	495	655	875	95	280	405	550
	2-3	360	475	630	840	110	555	740	985	1315	140	280	610	825
	4-7	470	630	840	1120	145	740	985	1315	1755	185	280	810	1100
601-675	1	235	315	420	560	75	370	495	655	875	95	310	450	615
	2-3	360	475	630	840	110	555	740	985	1315	140	310	675	925
	4-7	470	630	840	1120	145	740	985	1315	1755	185	310	900	1230
676-750	1	235	315	420	560	75	370	495	655	875	95	340	495	680
	2-3	360	475	630	840	110	555	740	985	1315	140	340	745	1020
	4-7	470	630	840	1120	145	740	985	1315	1755	185	340	990	1360
751 and over	1	235	315	420	560	75	370	495	655	875	95	370	540	745
	2-3	360	475	630	840	110	555	740	985	1315	140	370	810	1120
	4-7	470	630	840	1120	145	740	985	1315	1755	185	370	1080	1490

*VARIABLES (Applicable to single instrumentalist):

—Show or act(s) or vocalist(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

**VARIABLES (Applicable to two or more instrumentalists):

—Show or act(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by a band or an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

1046—12/74 (C)

RATE SCHEDULE

This rate schedule applies to Bars, Grills, Taverns, Restaurants, Lounges, Supper Clubs, Night Clubs, Piano Bars, Cabarets, Roadhouses and similar establishments where:

(a) The highest price (when musical entertainment is provided) of a nationally advertised brand of bourbon, rye or scotch is 85¢ or more a drink; or

(b) If the establishment does not sell liquor but sells beer, or if liquor or beer are not sold but the establishment sells set-ups, the highest price (when musical entertainment is provided) of a bottle, can, draught, or other serving of a nationally advertised domestic beer, or an individual set-up where beer is not sold, is 50¢ or more.

A rate schedule applicable to establishments charging less than the amounts set forth above [illegible] be furnished to such establishments.

ANNUAL RATE

Seating Capacity	No. Nights Per Week	LIVE MUSIC—SINGLE INSTRUMENTALIST: Base Rate	NO. OF VARIABLES*: One	Two	Three	If Mech. Music Used, Add	LIVE MUSIC—TWO OR MORE INSTRUMENTALISTS: Base Rate	NO. OF VARIABLES**: One	Two	Three	If Mech. Music Used, Add	NO LIVE MUSIC—MECHANICAL MUSIC ONLY: Base Rate	Mech. Music Plus Show or Act(s)	Show or Act(s) with Admission, Cover, Entertainment or Similar Charge
0-75	1	$90	$120	$160	$215	$35	$120	$160	$215	$285	$35	$90	$120	$160
	2-3	125	165	220	295	45	180	240	320	425	45	90	165	220
	4-7	155	205	275	370	55	240	320	425	570	55	90	205	275
76-150	1	120	160	215	285	50	160	215	285	380	50	130	160	215
	2-3	180	240	320	425	65	240	320	425	570	65	130	240	320
	4-7	240	320	425	570	80	320	425	570	760	80	130	320	425
151-225	1	160	215	285	380	65	215	285	380	510	65	170	215	285
	2-3	240	320	425	570	85	325	430	575	765	85	170	320	425
	4-7	320	425	570	760	105	430	575	765	1020	105	170	425	570
226-300	1	200	265	355	475	80	270	360	480	640	80	210	265	355
	2-3	300	400	535	715	105	405	540	720	960	105	210	400	535
	4-7	400	535	710	950	130	540	720	960	1280	130	210	535	710
301-375	1	240	320	425	570	95	325	435	580	770	95	250	320	425
	2-3	360	480	640	855	125	490	650	870	1155	125	250	480	640
	4-7	480	640	855	1135	155	650	865	1155	1540	155	250	640	855
376-450	1	280	375	500	665	110	380	505	675	900	110	290	375	500
	2-3	420	565	745	995	145	570	760	1015	1350	145	290	560	745
	4-7	560	750	995	1325	180	760	1015	1350	1800	180	290	750	995
451-525	1	280	375	500	665	110	435	580	775	1030	125	330	425	575
	2-3	420	565	745	995	145	655	870	1160	1550	165	330	640	865
	4-7	560	750	995	1325	180	870	1160	1545	2060	205	330	850	1150
526-600	1	280	375	500	665	110	490	655	870	1160	140	370	475	650
	2-3	420	565	745	995	145	735	980	1305	1740	185	370	715	975
	4-7	560	750	995	1325	180	980	1305	1740	2320	230	370	950	1300
601-675	1	280	375	500	665	110	545	725	970	1290	155	410	525	725
	2-3	420	565	745	995	145	820	1090	1455	1935	205	410	790	1090
	4-7	560	750	995	1325	180	1090	1455	1935	2580	255	410	1050	1450
676-750	1	280	375	500	665	110	600	800	1065	1420	170	450	575	800
	2-3	420	565	745	995	145	900	1200	1600	2130	225	450	865	1200
	4-7	560	750	995	1325	180	1200	1600	2130	2840	280	450	1150	1600
751 and over	1	280	375	500	665	110	600	800	1065	1420	185	490	625	875
	2-3	420	[illegible]	745	995	145	900	1200	1600	2130	245	490	940	1315
	4-7	560	750	995	1325	180	1200	1600	2130	2840	305	490	1250	1750

*VARIABLES (Applicable to single instrumentalist):

—Show or act(s) or vocalist(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

**VARIABLES (Applicable to two or more instrumentalists):

—Show or act(s).

—Admission, minimum, cover, entertainment or similar charge.

—Alternate or relief music (live) by a band or an instrumentalist except in those cases where the alternate music is provided solely at the time of a show or act(s).

SEASONAL RATES

For seasonal licensees, the rates for periods up to four months of operation are 1/2 the annual rate, for each additional month the rate is 1/12 the annual rate. The seasonal rate will in no case be more than the annual rate.

COMPUTATION OF RATE FOR MIXED POLICIES

1. Compute rate for the higher policy for the number of nights that the higher policy is in effect. The "higher policy" is the policy which generates the highest rate for any one day.
2. Note total number of nights entertainment is provided.
3. Compute rate for the lower policy using the total number of nights entertainment is provided under both the higher and lower policies.
4. Compute rate for the lower policy using the number of nights the higher policy is in effect.
5. Subtract rate computed in step 4 from rate computed in step 3.
6. Add rate computed in step 1 to rate computed in step 5 for total rate.

150M—12/74 (C)

Mr. KASTENMEIER. Mr. Chapin, will Mr. Oliver be your next witness?

Mr. CHAPIN. Yes, If it is permissible to you, I would like to use BMI's time first with Mr. Oliver's statement, and then I think that Mr. Frank Peewee King is probably not going to be here in time. I would like to just read a small portion of his statement. And finally, with your permission, we had filed a supplemental statement that I just want to submit for the record, if that is acceptable.

Mr. KASTENMEIER. Without objection, statements by individual members of the panel on behalf of your organization will be accepted for the record.

[The prepared statement of Broadcast Music, Inc. follows:]

STATEMENT OF BROADCAST MUSIC, INC.

BMI (Broadcast Music, Inc.) is the largest of the U.S. performing rights licensing organizations, representing over 40,000 writers and publishers located in every state. Most of the copyrighted music heard in America today is licensed by BMI.

The so-called jukebox exemption from payment of performance royalties was enacted in 1909. It was unjustified at that time, and certainly is today. No one seriously questions its inherent unfairness in 1975. Royalties are paid for all other performances for profit. The jukebox industry should not be singled out for a "free ride."

The anomaly of this situation is pointed up by the fact that in foreign countries royalties are paid for performances on jukeboxes. It is strange that the composer of Tennessee Waltz will be paid for a jukebox performance in Paris but not in Nashville.

The real question then is not if the jukebox industry should pay but how much they should pay.

Our position on the question of what the jukebox royalty rate should be is simply that there should not be a fixed statutory rate. The fixing of such a rate should be left to the usual processes of orderly negotiation between the interested parties, i.e., the performing rights associations on one hand and the representatives of the jukebox industry on the other hand. In this way, a true market place value can be placed on the rights given to the jukebox opreators. This is the way that rates are set for television, radio and most other users of music, and for BMI this method has worked efficiently and in the best interest of all concerned, the user, the creator and the public. There is no valid reason why the jukebox industry should continue to be treated differently from others in the music field.

If Congress were to set a fixed royalty rate, such rate would necessarily become outmoded as economic factors changed. Nor is a cost of living escalation provision the answer because other market factors both in the jukebox industry and the music licensing field are constantly changing. Congress should stay away from the rate making business. We should point out that Congress has traditionally not taken it upon itself to legislate fixed rates. Generally, if rates are fixed at all, it is the administrative agencies, and not Congress, which make any rate determinations. As stated above, however, we do not favor even an administrative agency being charged with this task. Such a Government agency would inevitably mean increased administrative expense and therefore decreased revenues to the beneficiaries of the amounts administered.

If Congress does adopt the above approach, in considering alternatives we would urge that the Copyright Royalty Tribunal periodically review that rate in a manner which can take into account all appropriate factors. As we stated above, there is no valid reason why the jukebox industry should be treated differently from other users of music.

If the Congress does not adopt a "free market place" approach or the Copyright Royalty Tribunal approach, we submit that the $8 rate provided for in H.R. 2223 is a fair value in today's market place. It must be remembered that such rate was contained in the 1967 House of Representatives Copyright Revision Bill. In eight years inflationary trends have certainly made any rates set in 1967 outmoded. Not to mention the ever increasing amounts the jukeboxes charge. Even in 1958 the Senate Committee on the Judiciary determined that a yearly per box payment of $19.70 would be reasonable.

Furthermore, it is important to recognize how the $8 rate was arrived at in 1967. It was the result of a compromise worked out by the Copyright Office with the understanding that this would remove one of the last barriers to immediate copyright revision. Thus, the consideration was that the jukebox owners would begin paying in 1968 at the rate of $8 a box. Obviously, that consideration is no longer valid because there has been no copyright revision bill, and, more important, the jukebox owners have not paid anything during the past 8 years.

The above is in summary form and we would be pleased to submit, in writing or at a hearing, any additional comments or information which you, or your subcommittee, may desire. We, of course, would like to reserve our right to comment further as the legislative process on copyright matters unfolds in the 94th Congress.

Mr. KASTENMEIER. The Chair should observe that 10 years ago here Mr. Herman Finkelstein, Mr. Korman's predecessor, represented ASCAP, and was it not Sydney Kaye who represented BMI for so many years, both very distinguished people, but apparently they have both retired in terms of actively representing the organizations.

Mr. KORMAN. Perhaps, Mr. Chairman, they just got discouraged. I notice that the same spokesmen are continuing to appear for the jukebox industry.

Mr. KASTENMEIER. Well, I should hope not.

Mr. Oliver, we will call on you.

TESTIMONY OF SY OLIVER, COMPOSER, ACCOMPANIED BY EDWARD CHAPIN, GENERAL COUNSEL, BROADCAST MUSIC, INC.

Mr. OLIVER. Mr. Chairman and gentlemen, my name is Sy Oliver. I am an arranger/composer and orchestra leader. I wish to speak to the removal of the jukebox exemption from payment for use of copyrighted music.

May I interject here, I am not speaking to the fiscal details involved. I am a writer. I do not have those facts at hand, and I am sure that that will be taken care of. But I would just like to speak my own position as a writer.

Gentlemen, this exemption was established by a law written in the year 1909. One year before I was born and many years before the music industry, as it exists today, came into being. And yet this law, written in good faith but for another time and totally different circumstances, still pertains.

I have been a professional musician since 1928. I was a member of the Jimmie Lunceford Orchestra when it achieved international attention in the thirties, ranking in popularity with the great Duke Ellington. Many of my compositions, as recorded by that orchestra, were outstanding hits and are currently popular both in sales and radio plays as well as jukebox plays. I am paid writers royalties from record sales, performance royalties from radio plays but nothing from 40 years of jukebox plays.

During the years 1939 through 1943 I composed and arranged for the Tommy Dorsey Orchestra. Again many of my compositions such as "Opus One" and "Yes Indeed" became famous record hits. The latter two, according to BMI performance records, each enjoyed more than a million radio performances by the midfifties. Again I was paid for record sales, radio performance. Nothing for jukebox plays which exceeded radio plays many times.

After my Army service I became musical director for Decca Records. Currently, I am leading my own orchestra for an extended en-

gagement at the Rainbow Room in Rockefeller Center, New York City.

The foregoing is to establish that I am indeed involved in the problem at hand.

As a member of the Jimmie Lunceford Orchestra, I began recording for the Decca Record Co. in 1934. It was about this time that the situation with which we are faced today was born—the time when the writers and publishers made a major sacrifice for the then infant jukebox industry. More of this later.

It should be noted that at the time the law exempting jukeboxes from payment for use of copyrighted music was written, there was no jukebox industry as we know it. Machines for playing records were to be found in cafes and saloons along with roll-playing pianos but they were the exclusive property of the proprietors—solely for the entertainment of his customers. It is unlikely that the proprietor ever realized the cost of the machine from its revenue, certainly not a profit. Hence the exemption. Gentlemen, the exemption was decreed because no profit was being derived from the use of copyrighted music. That is not the case today. Nor could the legislators of 1909 be expected to anticipate the conditions existent in 1975.

So it was with the writers and publishers I mentioned earlier on. Never dreaming in 1934 that the jukebox industry would become the giant it is today, they agreed to reduce their royalty rate by 50 percent which it remains today. to permit the sale of a 35-cent record as opposed to the standard 75-cent price. This 35-cent record was for the benefit of the jukebox sales. Admittedly a shortsighted policy in hindsight. But, rightly or wrongly, the end result was, the tail is finally wagging the dog. For today, I firmly believe that more profit is made from the jukebox play of copyrighted music than any other single source. For this the jukebox industry pays nothing, making the copyright law as it exists meaningless. I do not believe the legislators of 1909 intended this.

It should be noted that all other creative work produced by Americans is protected by our copyrighted code.

For instance, books published for public sale but private use cannot be used in whole or even in part for purposes of profit such as movies, TV, or stage plays without the permission of, and compensation to, the owner of copyright or his agent.

Conversely, musical recordings employing copyrighted music and similarly published for public sale but private use are being used for purposes of profit by the coin machine operators with no return to the owners of copyright. Much as though MGM had made "Gone With the Wind" without compensation to the owner of copyright.

So, on behalf of all writers and publishers, I ask for the removal of the jukebox industry's exemption from payment for the use of copyrighted music for purposes of profit—a contingency not anticipated by the writers of the code of 1909 and still in effect.

Thank you.

[The prepared statement of Sy Oliver follows:]

STATEMENT OF SY OLIVER, REPRESENTING BROADCAST MUSIC, INC.

My name is Sy Oliver. I am an arranger/composer and orchestra leader. I wish to speak to the removal of the jukebox exemption from payment for use of copyrighted music.

Gentlemen, this exemption was established by a law written in the year nineteen hunderd and nine! (1909). One year before I was born and many years before the music industry, as it exists today, came into being. And yet this law, written in good faith but for another time and totally different circumstances still pertains.

I have been a professional musician since 1928. I was a member of the Jimmie Lunceford Orchestra when it achieved international attention in the thirties, ranking in popularity with the great Duke Ellington. Many of my compositions, as recorded by that orchestra, were outstanding "hits" and are currently popular both in sales and radio plays as well as jukebox plays. I am paid writers royalties from record sales, performance royalties from radio plays but nothing from forty years of jukebox plays.

During the years 1939 through 1943 I composed and arranged for the Tommy Dorsey Orchestra. Again many of my compositions such as OPUS ONE and YES INDEED became famous record "hits." The latter two, according to BMI performance records each enjoyed more than a million radio performances by the mid-fifties. Again I was paid for record sales, radio performance. Nothing for jukebox plays which exceeded radio plays many times.

After my Army service I became musical director for Decca Records. Currently I am leading my own orchestra for an extended engagement at the Rainbow Room in Rockefeller Center, New York City.

The foregoing is to establish that I am indeed involved in the problem at hand.

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It should be noted that at the time the law exempting jukeboxes from payment for use of copyrighted music was written, there was no jukebox industry as we know it. Machines for playing records were to be found in cafes and saloons along with roll-playing pianos but they were the exclusive property of the proprietors . . . solely for the entertainment of his customers. It is unlikely that the proprietor ever realized the cost of the machine from its revenue, certainly not a profit. Hence the exemption. Gentlemen, the exemption was decreed because No Profit was being derived from the use of copyrighted music. That is not the case today. Nor could the legislators of 1909 be expected to anticipate the conditions extant in 1975.

So it was with the writers and publishers I mentioned earlier on. Never dreaming in 1934 that the jukebox industry would become the giant it is today, they agreed to reduce their royalty rate by 50% which it remains today, to permit the sale of a 35¢ record as opposed to the standard 75¢ price. This 35¢ record was for the benefit of the jukebox sales. Admittedly a short-sighted policy in hind sight. But, rightly or wrongly the end result was—the tail is finally wagging the dog. For today, I firmly believe that more profit is made from the jukebox play of copyrighted music than any other single source. For this the jukebox industry pays nothing, making the copyright law as it exists meaningless. I do not believe the legislators of 1909 intended this.

It should be noted that all other creative work produced by Americans is protected by our copyright code.

For instance—books published for public sale but Private use can not be used in whole or even in part For Purposes of Profit such as movies, TV, or stage plays without the permission of and compensation to the owner of copyright or his agent.

Conversely, musical recordings employing copyrighted music and similarly published for public sale but private use are being used For Purposes of Profit by the coin machine operators with no return to the owners of copyright. Much as though MGM had made Gone With The Wind without compensation to the owner of copyright.

So—on behalf of all writers and publishers—I ask for the removal of the jukebox industry's exemption from payment for the use of copyrighted music for purposes of profit. . . . a contingency not anticipated by the writers of the code of 1909 and still in effect.

Mr. KASTENMEIER. Thank you, Mr. Oliver.

We shall ask questions after all the witnesses have concluded, and the Chair will not attempt to identify the compositions or the accomplishments and honors that may be represented by our very distinguished

witnesses. I assume the people are sufficiently aware of your accomplishments.

The Chair would also observe for the benefit of the subcommittee that this morning we have three performance rights societies, which for all practical purposes, represent 99 or more percent of the authors and composers in America. And on the other economic side of the issue there is one predominant organization, the Music Operators of America, the association of jukebox operators. And also a representative of the manufacturers of those jukeboxes who will also, of course, have an economic interest in the copyright and the question that we are disposing of, hopefully.

Mr. Chip Davis and Mr. Ciancimino. Or did you wish to withhold until you determine whether or not Mr. King will arrive?

Mr. CHAPIN. I have since heard that it does not look like he is going to arrive, so with your permission, could I read portions of his statement?

Mr. KASTENMEIER. Yes, you may. And because we are losing time, Mr. Chapin, if you would do so as concisely as you can. I see it is a short statement.

Mr. CHAPIN. It is a very short statement, and I do not propose to read the first page and one-half which outlines who he is, what he has written and so forth. I will pick up in the middle of page 2 where he gives his conclusions and which are also BMI's conclusion. And this, as I say, is the statement of Mr. Frank Peewee King.

"Let us look at the economics of the coin machine business, particularly as it affects a songwriter. A record of 'Tennessee Waltz' sells for $1.25. Of this, the writers, two of us, Redd Stewart and me make 1 cent. Half to me, half to Redd. This is all the jukebox operators actually pay writers for the songs they put into their machines; 1 cent per machine. The jukebox operator gets at least a dime—10 cents—each time 'Tennessee Waltz' is played on his jukebox. Today's phonograph records will play up to 1,000 times before wearing out completely. This means that it is possible for the jukebox operator to make at least $100 per machine from 'Tennessee Waltz' from a record that he paid $1.25 for, if he had to buy them retail and he usually doesn't. Out of this Redd and I split 1 cent, one ten-thousandth of the take.

"The jukebox industry has grown by a half since writers last testified before the Congress 10 years ago. This can hardly be true of a so-called suffering business. Over 750,000 machines are now in use. I keep reading about video disks, and other entertainment devices that use music now being perfected and readied for the market. Knowing the business shrewdness and imagination of the coin machine people, I know that good and prosperous use will be made of these machines. I don't want any future coin machine use of music to be discounted, or written out of a new law as it was out of the last one, the 1909 act we have today.

"Jukebox operators should pay writers for the performances of their songs. All other American users do, users in other countries do as well. When an American song is played in a French jukebox the American composer is paid for the performance. When the same song is played on an American machine, he is not paid for the performance.

"TV stations and networks, radio stations and networks, ballrooms, concert halls, restaurants, night clubs, skating rinks, background music

services, airlines and others pay for music, even though music is not their only product. But music is the jukebox operators only product. Yet the jukebox operator is the only one not paying writers and publishers for music.

"What we ask you to do is to pass a law that removes the unfair jukebox exemption. We ask you to fix a rate of payment that is fair, just and proper. We ask you to undo years and years of free riding on the talent of songwriters. That's what I ask you to do on behalf of the 40,000 writers and publishers in BMI for whom I speak."

[The prepared statement of Frank Peewee King follows:]

STATEMENT OF FRANK PEEWEE KING, REPRESENTING BROADCAST MUSIC, INC.

I am Frank Peewee King and I presently live in Louisville, Kentucky, being born and raised in Wisconsin. I appear today representing BMI--Broadcast Music Inc.—and also speaking for myself as a writer and a publisher

I have written and collaborated on 300 songs, or more. I have written such songs as *Tennessee Waltz, Slow Poke, You Belong to Me* and *Bonaparte's Retreat*. All of these have been number one on the trade paper charts and all of them are still available on 45-rpm discs for play by juke boxes.

In 1974 I was elected to the Country Music Hall of Fame in Nashville. That's a great honor, equal to that when Tennessee selected my song to be its state song. That gave me a thrill, and I could understand how Rodgers and Hammerstein felt when Oklahoma honored their song.

I have been writing and playing professionally since I was 14 years old. My dad was a polka player in Wisconsin and I grew up as a youngster with a concertina in my lap. That started me writing country and folk and popular music. I have written a lot of polka music as well. Now, polka music doesn't get played on radio or television very much. But you can be sure that it gets a good go round on coin machines.

I am probably the only witness you are going to hear today who's been a longtime juke box customer It's a part of my way of life. I do a lot of touring around the country, most of it by bus, going from one date to another with my group. And every diner, bus station or truck stop we come to has a big, shining and expensive juke box. I have put a lot of coins—nickels, dimes and now quarters—to hear music--very often my own. But, although I have been a good customer, and an even greater supplier of what once used to be called nickel nabbing music—I have never gotten even one nickel back for the use of my music.

Being a businessman as well as a composer I like to think out problems in terms of economics.

Let's look at the economics of the coin machine business, particularly as it affects a songwriter. A record of *Tennessee Waltz* sells for $1.25. Of this, the writers, two of us, Redd Stewart and me, make 1¢. Half to me, half to Redd. This is all the juke box operators actually pay writers for the songs they put into their machines. One cent per machine. The juke box operator gets at least a dime—10 cents—each time *Tennessee Waltz* is played on his juke box. Today's phonograph records will play up to 1,000 times before wearing out completely. This means that it is possible for the juke box operator to make at least $100.00 per machine from *Tennessee Waltz*, from a record that he paid $1.25 for—if he had to buy them retail and he usually doesn't. Out of this Redd and I split one cent—one ten thousandth of the take.

The juke box industry has grown by a half since writers last testified before the Congress ten years ago. This can hardly be true of a so-called suffering business. Over 750,000 machines are now in use. I keep reading about video disks, and other entertainment devices that use music now being perfected and readied for the market. Knowing the business shrewdness and imagination of the coin machine people, I know that good and prosperous use will be made of these machines. I don't want any future coin machine use of music to be discounted, or written out of a new law as it was out of the last one . . . the 1909 act we have today.

Juke box operators should pay writers for the performances of their songs. All other American users do, users in other countries do as well. When an American song is played in a French juke box the American composer is paid for the per-

formance. When the same song is played on an American machine, he is not paid for the performance.

TV stations and networks, radio stations and networks, ballrooms, concert halls, restaurants, night clubs, skating rinks, background music services, airlines and others pay for music, even though music is not their only product. But music is the juke box operators only product. Yet the juke box operator is the only one not paying writers and publishers for music.

What we ask you to do is to pass a law that removes the unfair juke box exemption. We ask you to fix a rate of payment that is fair, just and proper. We ask you to undo years and years of free riding on the talent of songwriters. That's what I ask you to do on behalf of the 40,000 writers and publishers in BMI for whom I speak.

Mr. KASTENMEIER. Thank you.

I note that our distinguished colleague on the Judiciary Committee has joined our panel this morning, Mr. Mazzoli. And I am sure he would like to have greeted Mr. Frank Peewee King who is presently residing in Louisville had he been present.

Mr. MAZZOLI. Thank you, Mr. Chairman. That is not the only reason that I came this morning, but that was obviously one of the many. Mr. King is a very distinguished member of our community, and recently an inductee to the country music Hall of Fame. And as one who still has and for many years has had an interest in country music particularly, Peewee King and Redd Stewart, who the gentleman just mentioned, are very important people in our community. And I remember vividly as a young boy Peewee and Redd and Redd's brother and others had an aggregation that was on television every week, and I guess we all grew up as kids in the Louisville community knowing Peewee King.

So if I happen not to see him today, if you will please convey to him my best wishes.

Mr. CHAPIN. I certainly will.

Mr. MAZZOLI. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The Chair would also like to observe that Peewee King notes that he was born and raised in Wisconsin.

Mr. MAZZOLI. I wish you had not said that. Does the chairman have any connection with the State of Wisconsin?

Mr. PATTISON. We hum the "Tennessee Waltz" a lot up in New York.

Mr. KASTENMEIER. Next, the Chair would like to call on Mr. Chip Davis.

[The prepared statement of Louis F. (Chip) Davis follows:]

STATEMENT OF CHIP DAVIS

Mr. Chairman, Members of the Committee: I have been invited to testify on behalf of SESAC Writers. I am a young and very new writer in the industry and even though having three country western hits, this year I still find it difficult to make a living as a writer. This makes the juke box issue a very important one to me and also to my co-writers and colleagues.

A writer's income is derived from portions of publishing, portions of mechanical licenses and performance royalties. In each case, the product has been performed or issued with the intent of making money, or in other words performance for pay; and in each case a certain allotment or portion (royalty) is paid to the people who created the product.

It would seem to me that the juke box is a valid vehicle of and for public performance for pay, and that a provision should be made on the behalf of the creators of the product being sold on the juke boxes, to receive payment for the use of their creations.

The 1967 agreement between the juke box industry and performing rights societies certainly is an improvement, but in my opinion, would be more viable if

the eight dollar ($8.00) per box fee were subject to periodic review due to the cost of living increase.

Another strong point in favor of juke box royalties is related to publishing. Many of the new, young composers are trying to set-up publishing companies and cash flow from juke box royalties would aid in developing new talent and promoting new writers.

It is evident that the juke box operators have been making profit from the use of music for many years without having to pay the creators of that music any royalty. I strongly support the moral obligation to pay monies to the generators of projects when the projects are being used in money-making ventures.

TESTIMONY OF LOUIS F. (CHIP) DAVIS, COMPOSER

Mr. CIANCIMINO. Mr. Chairman, I would like to briefly introduce Mr. Chip Davis, an author and composer who has been affiliated with SESAC for the last few years, and who would like to say a few words about the jukebox issue.

Mr. Davis is the composer of all of the music currently contained on the No. 1 country album today, called Wolf Creek Pass. He has written every number on that album. He has recently had three of his songs released as singles, 2 of which were among the top 10 on the country charts, and the third of which is climbing the charts at the present time.

In addition, Mr. Davis is the recipient of a Cleo Award for 1974 as an author of a regional commercial.

Gentlemen, you have heard from the distinguished Aaron Copland, and you have heard from the well versed Sy Oliver, and I now present a young and very talented author and composer, Mr. Chip Davis.

Mr. KASTENMEIER. Mr. Davis.

Mr. DAVIS. Mr. Chairman, members of the committee. I have been invited to testify on behalf of SESAC writers. I am a young and very new writer in the industry and even though having three country western hits, this year I still find it difficult to make a living as a writer. This makes the jukebox issue a very important one to me and also to my cowriters and colleagues.

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Mr. KASTENMEIER. Thank you, Mr. Davis.

Mr. Ciancimino.

[The prepared statement of Mr. Ciancimino follows:]

STATEMENT OF ALBERT F. CIANCIMINO, COUNSEL FOR SESAC, INC.

Mr. Chairman, members of the Committee, my name is Albert F. Ciancimino, and I am a member of the New York Bar and counsel to SESAC Inc. in New York.

Until now, you have heard from several distinguished authors and composers on what they think of Sections 116 and 801 of H.R. 2223. I have the privilege of being the only attorney testifying on behalf of the performing rights industry. As such, perhaps a brief review of the history of the jukebox issue is in order.

The Copyright Law of 1909 does exempt jukebox operators from the payment of performance royalties. This anachronism and inequity in our existing law continues to the present day. Extensive hearings were conducted in the 80th, the 82nd Congress, the 83rd, the 85th and the 86th on the use of musical compositions on coin-operated machines. Finally, the 88th Congress, in 1963, a bill was reported by the full Committee on the Judiciary of the House of Representatives to remove the jukebox exemption. However, the 88th Congress adjourned before the bill was cleared by the Rules Committee for House Action. In 1967, the House did pass a bill (H.R. 2512) which provided for an annual compulsory license fee of $8.00 per box. H.R. 2512 was not enacted. In subsequent considerations of the jukebox issue, the Senate created a Copyright Royalty Tribunal to review all rates fixed in the statute. However, by amendment to Section 801, the $8.00 jukebox fee was removed from the scope of the Tribunal's authority and this is where we stand today.

At this point, some questions come to mind: What makes the jukebox industry so special? Why does such an obvious public performance for profit continue to go uncompensated to this day? Further, why does this industry need to have a fixed rate provided by Congress? And further still, why should this fixed rate, of all the fixed rates in H.R. 2223, be placed beyond the scope of the Royalty Tribunal's authority? These are difficult questions for someone like Chip Davis to understand, and these are the difficult questions that we are posing to this Committee today.

There is no compelling economic necessity for having a jukebox rate frozen into the statute. The fixing of such a rate should be left to the ordinary processes of bargaining in a free marketing. It is only in this way that a true value can be placed on the rights granted to jukebox operators by the performing rights organizations. This is the way it is done with almost every other industry which relies upon music, and the jukebox industry has no unique attributes which would require different treatment. The disadvantages of a statutorily fixed royalty rate should be obvious. One need only be reminded that the original eight dollar rate was contained in the 1957 House of Representatives Copyright Revision Bill. If that Bill had become law, we would have had 18 years of inflationary erosion which would have reduced the value of the eight dollar fee considerably and rendered it out-moded in comparison to modern-day values and prices.

However, should Congress choose to place fixed rates in the revision bill in certain areas, we see no reason to exclude the jukebox rate from the authority of the Copyright Royalty Tribunal. In Section 801, a Copyright Royalty Tribunal would be created to make determinations concerning the adjustment of certain copyright royalty rates—in particular, the rate for cable television in Section 111, and the rate for compulsory mechanical licensing of phonograph records in Section 113. As H.R. 2223 is presently constituted, the jukebox royalty of $8.00 per box will be the only fixed royalty rate which would not be subject to revision by the Royalty Tribunal. We submit that there is no reason whatsoever for such special treatment to be accorded to the jukebox industry. Any arguments of economic erosion or declining business trends put forth by the jukebox industry should be left to the sound discretion of a Royalty Tribunal in the periodic

review of the jukebox rate. The Tribunal would relieve Congress of the burden of making the necessary studies to determine whether a periodic adjustment of the jukebox fee would be justified.

In the event, however, that Congress chooses to exclude the jukebox royalty rate from the Tribunal's authority, may we submit that the eight dollar fee per box is woefully inadequate. It was inadequate in 1957 and is even more so today. If subject to review by the Tribunal, we would be willing to adhere to the $8.00 fee agreed to in 1967 on the floor of the house. If the jukebox fee is not made part of the authority to review rates given to the Copyright Tribunal, we would urge that inflationary trends since the 1967 agreement of $8.00 per box be considered and that the fee be raised accordingly in order to reflect such trends.

In conclusion: We reiterate our longstanding opposition to the inclusion of a fixed royalty rate in the statute for the jukebox industry. However, should a fixed rate be included in the statute, with a means for review by the Copyright Royalty Tribunal, we would adhere to the $8.00 fee agreed upon in 1967. If there be no provision for review by the Copyright Royalty Tribunal, we would hope that Congress would recognize the inequity of the $8.00 fee and consider inflationary trends since 1967 in order to arrive at a more equitable statutory royalty rate. This would, to some small degree, compensate for the free use of music by jukebox operators since the 1967 compromise.

TESTIMONY OF ALBERT F. CIANCIMINO, COUNSEL FOR SESAC, INC.

Mr. CIANCIMINO. Mr. Chairman and members of the committee, I am Albert F. Ciancimino, and I am a member of the New York bar and counsel to SESAC Inc. in New York.

Until now, you have heard from several distinguished authors and composers on what they think of sections 116 and 801 of H.R. 2223. I have the privilege of being the only attorney testifying on behalf of the performing rights industry. As such, perhaps a brief review of the history of the jukebox issue is in order.

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At this point, some questions come to mind: What makes the jukebox industry so special? Why does such an obvious public performance for profit continue to go uncompensated to this day? Further, why does this industry need to have a fixed rate provided by Congress? And further still, why should this fixed rate, of all the fixed rates in H.R. 2223, be placed beyond the scope of the Royalty Tribunal's authority? These are difficult questions for someone like Chip Davis to understand, and these are the difficult questions that we are posing to this committee today.

There is no compelling economic necessity for having a jukebox rate frozen into the statute. The fixing of such a rate should be left to

the ordinary processes of bargaining in a free marketplace. It is only in this way that a true value can be placed on the rights granted to jukebox operators by the performing rights organizations. This is the way it is done with almost every other industry which relies upon music, and the jukebox industry has no unique attributes which would require different treatment. The disadvantages of a statutorily fixed royalty rate should be obvious. One need only be reminded that the original $8 rate was contained as far back as in the 1957 House of Representatives copyright revision bill. If that bill had become law, we would have had 18 years of inflationary erosion which would have reduced the value of the $8 fee considerably and, in fact, rendered it outmoded in comparison to modern day values and prices.

However, should Congress choose to place fixed rates in the revision bill in certain areas, we see no reason to exclude the jukebox rate from the authority of the Copyright Royalty Tribunal. In section 801, a Copyright Royalty Tribunal would be created to make determinations concerning the adjustment of certain copyright royalty rates—in particular, the rate for cable television in section 111, and the rate for compulsory mechanical licensing of phonograph records in section 113.

As H.R. 2223 is presently constituted, the jukebox royalty of $8 per box will be the only fixed royalty rate which would not be subject to revision by the Royalty Tribunal. We submit that there is no reason whatsoever, and I would like to emphasize, no reason whatsoever, for such special treatment to be accorded to the jukebox industry. Any arguments of economic erosion or declining business trends put forth by the jukebox industry should be left to the sound discretion of a Royalty Tribunal in their periodic review of the jukebox rate. The Tribunal would relieve Congress of the burden of making the necessary studies to determine whether a periodic adjustment of the jukebox fee would be justified.

In the event, however, that Congress chooses to exclude the jukebox royalty rate from the Tribunal's authority, and we hope this will not be the case, may we submit that the $8 fee per box is woefully inadequate. It was inadequate in 1957 and is even more so today. If subject to review by the Tribunal, we would be willing to adhere to the $8 fee agreed to in 1967 on the Floor of the House. If the jukebox fee is not made part of the authority to review rates given to the Copyright Tribunal, we would urge that inflationary trends since the 1967 agreement of $8 per box be considered and that the fee be raised accordingly in order to reflect such trends.

In conclusion, Mr. Chairman and members of the committee, we reiterate our longstanding opposition to the inclusion of a fixed royalty rate in the statute for the jukebox industry. However, should a fixed rate be included in the statute, with a means for review by the Copyright Royalty Tribunal, we would adhere to the $8 fee agreed upon in 1967. If there be no provision for review by the Copyright Royalty Tribunal, we would hope that Congress would recognize the inequity of the $8 fee and consider inflationary trends since 1967 in order to arrive at a more equitable statutory royalty rate. This would, to some small degree, compensate for the free use of music by jukebox operators since the 1967 compromise.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Ciancimino.

On page 2, you meant rather than 1957, 18 years of inflationary erosion concerning the House copyright revision bill, you meant 1967, 8 years?

Mr. CIANCIMINO. No, I did not, Mr Chairman. It goes as far back as 1957, and I think the first mention of $8 as the fee is contained in 1957.

Mr. KASTENMEIER. 1957?

Mr. CIANCIMINO. Yes, Mr. Chairman.

Mr. KASTENMEIER. Mr. Chapin, you mentioned that today BMI authors and other authors get a performance royalty on French jukeboxes. How is that computed, how is that arrived at, what formula do the French employ, as an example? Do you happen to know?

Mr. CHAPIN. I think it is on a per box fee, and I might add that the rates vary anywhere from $60 to $80 per box, so that we are talking about a much higher rate than is being considered here.

Mr. KASTENMEIER. Mr. Korman, if the present bill were enacted into law, by what percentage would the total revenues of authors and composers represented by the three performance rights societies be more or less increased by virtue of the $8 a box royalty, if any?

Mr. KORMAN. Mr. Chairman, that is hard to say. It appears, if you assume 500,000 jukeboxes in use, which is the number mentioned in September 1974 when the Senate was debating this question——

Mr. KASTENMEIER. I am willing to assume the $4 million a year figure mentioned by Mr. Copland.

Mr. KORMAN. Well, at $4 million, the question would be what would be involved in collecting it and how much would it cost to distribute it? That is to say, if this money is to be paid to the Copyright Office, assuming it just funnels through that Office, ASCAP, BMI, and SESAC, for example, under the antitrust provisions in the section, if they can agree quickly among themselves how that should be split that would be one thing. I think ASCAP's gross revenues are approximately $80 million per year. I believe BMI, which in its statement describes itself as the world's largest performing rights society, collects about between $40 and $50 million a year. Mr. Chapin can, I am sure, furnish the figure. As to SESAC, Mr. Ciancimino knows I am sure that it is a couple of million dollars. On the arithmetic, that is $4 million added to that total of approximately $130 million. It is not a very, very large sum of money, Mr. Chairman. But this problem is a problem philosophically and it does create problems for us as we have said on the international scene. Foreign societies try to work special arrangements in their contracts with us because they say you do not collect on jukeboxes and we pay you for those uses. And frankly, Mr. Chairman, I do not know what the cost of distribution to composers and authors would be.

Mr. Mercer's statement says that we do not have current hard data, so that we really cannot propose a reasonable fee. We do not know what it ought to be. But we do think we ought to sit down with these people and find out what it should be.

It is simply incredible to me that a business which generates a half a billion dollars a year, selling nothing but performances of music, and incidentally, they do not pay anything, the record manufacturer pays the record royalty, the mechanical fee for the right to manufacture the records, that is not paid by the jukebox industry. Sure, some of the money flows to the composers because they buy the records.

On the other hand, they also resell a lot of those records, and I do not know how you quite weigh that. They sell their records, they are not all, by any means, worn out when they leave the jukeboxes, and they resell them as used records. But the economics of this data really have not been submitted and we say that we do not know what a fair fee should be. But we would like to find out.

Once they are obligated to pay it is my conviction that a fair agreement will be worked out.

Mr. KASTENMEIER. Let me ask you this, Mr. Korman, if a tribunal were provided for in the statute as the Senate committee provided, and realizing the music operators are businessmen who want to know with as much precision as possible what the liability would be, the tribunal would tend to open end that. They could not rely on the $8 a year or any other figure as of July 1, 1977. What would happen? Up to that point, it would have been $8, and at that point I assume the performance rights societies would make a proposal to raise the amount to *x* number of dollars, maybe $10 or $11, and if that is not agreed to, it would be submitted to the Register of Copyrights, who would submit it to the royalty tribunal under section 801. And what would be the allegations, and how would the determination be made as to what annual rate would thereafter be charged?

Mr. KORMAN. Mr. Chairman, I do not think anyone knows precisely what the answers to those questions are. I think this: that under this bill, the act would become effective on January 1, 1977.

Mr. KASTENMEIER. January 1.

Mr. KORMAN. On July 1, 1977, under section 802(a) the Register of Copyrights is to cause to be published in the Federal Register notice of commencement of proceedings for the review of the royalty rate specified in section 111 and 115, and we would hope that would be changed to add 116.

Now, the Senate committee report indicates that this is intended to be a review. This is at page 203. This is intended to be a review of the rates specified, of all of the statutory rates specified in the act.

Now, the machinery is not spelled out in very great detail, but I would anticipate, Mr. Chairman, that what would happen is this: We would sit down with the MOA or some committee of jukebox operators authorized to speak by the MOA and what we would do, as in the radio industry, for example, the National Association of Broadcasters, NAB, appoints a committee to negotiate with us. They advise us, through their counsel, that they are authorized to represent such and such stations. With those that are not represented we sign an extension agreement providing that the licenses be extended subject to retroactive adjustment when agreement is reached. As I have said, we have never had to go as far as having a court hearing on the merits.

Here I think we would try to sit down with an MOA committee and try to work something out, because as the chairman points out, it would be quite a risk for the MOA to go into arbitration on the $8 fee if they can work out a deal that they can agree is reasonable. And there would be a risk. They would know more about it then than we do because they know what the profits are. For example, they said they operate several businesses. They put it in terms of not being able to survive economically operating only the jukebox part of their business. I do not know whether that is true or not.

But, you get the problems of different businesses getting mixed up in one operation, or trying to separate out what is really the profit from jukebox aspects of the business.

Mr. KASTENMEIER. Let me say that that is an important revelation, because if the criterion is profits of the jukebox industry, that is one thing. If it is, as has been alluded to by some of the other witnesses, cost of living, or erosion over a period of time and the value of a set amount, fixed at a figure, that is quite something else.

Mr. KORMAN. It is not profits in any other area, Mr. Chairman, it is the value of the right. But you see, in all other areas you have a history. The radio industry was paying at one time, the local radio stations were paying ASCAP 2¼ percent, from 1941 through 1958, and they came in with a committee of the NAB, and they petitioned the court to reduce the rates. And they said we have been hit, and this was in 1959, by the full impact of television, and the recession of the fifties, and they said we ought to get a rate reduction. And anyway, ASCAP is doing very well with their new television incomes. And we sat around the table and we worked out a reduction from 2¼ to 2⅛ percent, and agreed on ways to resolve some of the accounting problems.

Incidentally, the history in radio has been that the rates have gone down. The ASCAP rate is now 1.725 percent, and it was not too long ago it was 2¼ percent. And this provision, Mr. Chairman, does not just provide for the rates to be increased. If the jukebox industry can come in and show that they are hurting, and $8 is too much, they can get the rates reduced. We think they put up such a fuss, frankly, because they are concerned that a fairminded arbitration panel would come up with a higher figure. We think they would too, and we think they should if that is what the facts justify.

Now, you say on what basis. Not profitability, but fair return compared to other things. What do ASCAP, BMI, and Sesac charge when they license a restaurant and the owner buys his records, and plays the music for the benefit of his patrons and he has to pay a license fee? And how does that relate to what he will be charged when the public pays for the music?

Mr. KASTENMEIER. Thank you. I'm going to yield.

Mr. DRINAN. Mr. Chairman?

Mr. KASTENMEIER. The gentleman from Massachusetts.

Mr. DRINAN. Just a point of information at this point. Would you tell us the arrangement with Muzak?

Mr. KORMAN. Muzak is a background music service which provides simultaneous performances, either over leased telephone wires or by means of a subchannel of the FM broadcast, to subscribers who pay Muzak a fee. Under one agreement we grant Muzak locally—it is a franchised operation, they have Muzak operators, let us say, in Boston and New York and so forth, and ASCAP has one agreement, and the same is true I believe for BMI and SESAC, they each have one agreement with each Muzak operator which authorizes the Muzak operator to license each subscriber. And in turn, the license fee paid for that license for the subscriber varies. They may be factories, doctors' offices, barbershops, restaurants, all kinds of users. The way the ASCAP agreement works, if it is what we call an industrial type of premises, a place that ASCAP representatives would not themselves find—an office or factory, which the public is not admitted to it, the

fee is 3½ percent of what the subscriber pays to Muzak. If it is a public type of place, such as a restaurant or shop, the last agreement was $27 per year, but a special and lower rate exists for shopping centers where the first unit was $27 and additional units were $15 each. But those rates are now subject to one of these court proceedings where we have not moved for several years. We do not try to make these expensive; in fact, we try to keep them cheap, and they are cheap. We have not moved for several years, and Mr. Patterson can confirm this, he represents the Seeburg people who have a background music service, because of the case that was brought testing the question of whether the old *Buck* v. *Jewell LaSalle Realty Co.* is still good law, and the Muzak operators say that they suffer competition from the people who install their own radios, and then hook up loudspeakers and play music in that fashion. Muzak says since they (the radio users) do not have to pay an' since the cable cases were decided by the Supreme Court; if they not have to pay and Muzak does, the ASCAP fee for Muzak should be reduced. We do not agree. But prior to asking the judge to decide whether Muzak's argument is relevant, we have agreed to hold off the Muzak and Seeburg proceedings until the Supreme Court decides the case that was argued last April, *20th Century Music Co.* v. *Aiken.*

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have just a few questions. As to ASCAP, BMI and SESAC, it is my understanding that these are at least similar organizations. Am I right or wrong on that?

Mr. CIANCIMINO. That is correct, Mr. Danielson.

Mr. KORMAN. That depends on what you mean by similar, but for this purpose, yes.

Mr. DANIELSON. I am not interested in splitting hairs. Some of you are not engaged in packing corned beef, but you are all engaged in licensing the performance of musical composition, is that correct?

Mr. CIANCIMINO. That is correct.

Mr. KORMAN. Yes.

Mr. CHAPIN. Yes.

Mr. DANIELSON. Would the $8 per machine, and I know none of you agree with that, but I have got to have something to talk about, with the $8 per machine per year fee be payable to each of the three, ASCAP, BMI and SESAC, or is it to some of them or is there one fee to all of them, and in the latter event, which I think is probably true, because I see a nodding of a very knowledgeable head in the background, then I would like to know what kind of an arrangement do you have to divide up that fee?

Mr. KORMAN. We have never had the pleasure of having to make such an arrangement because we have never collected the fee.

Mr. DANIELSON. I will stipulate to that now, but now if you can tell me how you would do it I would appreciate it.

Mr. KORMAN. Well, if I may first, Mr. Danielson, what we would do I think is to have a survey made, on a sample basis, because there are so many performances going on all the time by so many jukeboxes, and we would try to reach an agreement among ourselves as to what share each of the three organizations is entitled to based on what is being used in the jukeboxes.

Mr. DANIELSON. I see. Can a writer of music, a performer for the record, can he belong to more than one of these three organizations?

Mr. KORMAN. You say a performer, and you are speaking of a composer or an author of lyrics at this point, not the person who performs unless he also writes the work.

Mr. DANIELSON. We had one excellent presentation from Sy Oliver, and in two and a half pages he got right down to the nuts of it. Let me ask you this: Does Mr. Oliver belong to more than one of three?

Mr. OLIVER. No. I belong to BMI.

Mr. DANIELSON. So your compositions would be handled through BMI and not through the others?

Mr. OLIVER. That is right.

Mr. CIANCIMINO. Mr. Danielson, if I may?

Mr. DANIELSON. Sure.

Mr. CIACIMINO. The writer only belongs to one of the three organizations. Each of the three organizations represents their own repertoire of music and a writer cannot belong to more than one, because then it would result in certain crossover rights, and duplication of rights. So generally if a writer is affiliated with BMI, all of the music he composes is represented under this agreement with BMI, through BMI, and the same holds true for ASCAP and SESAC.

Mr. DANIELSON. Now, if BMI had granted a license to some public place where a performance was had, that licensee could utilize the BMI family or repertoire?

Mr. CIANCIMINO. That is correct.

Mr. DANIELSON. Would that licensee probably also have a license from ASCAP?

Mr. CIANCIMINO. I think maybe I might be able to take a shortcut here, Mr. Danielson. Any user of music on a substantial basis will normally have agreements with the three performing rights organizations. This means whatever music he utilizes, he is pretty confident that this music will be covered under one of the three licenses, so that in the main he is licensed to perform just about any piece of music that is written today.

Mr. DANIELSON. Now then, in the event that a jukebox operator, because really that is the thrust of the presentation today, jukeboxes, and the event a jukebox operator were brought under the law, it would seem highly probable that he would listen to all three organizations.

Mr. CIANCIMINO. Yes. The way the present bill reads he would pay his $8 into a central area; namely, the Register of Copyrights or to some other designated agency and that $8 would be for all of the music that he would use on that box for 1 year. And the $8, as Mr. Korman alluded to before, would either be divided on a voluntary basis between the three organizations, or upon failure to reach an agreement there would probably be some kind of determination that would have to be made.

Mr. DANIELSON. But it would not be in the licensee that would determine what the allocation would be?

Mr. CIANCIMINO. That is correct.

Mr. DANIELSON. He would simply buy his three licenses?

Mr. KORMAN. One license.

Mr. CIANCIMINO. One license with the $8 being distributed among the three performing rights organizations.

Mr. DANIELSON. I see. One question only remaining. I believe in Mr. Copland's statement he said something to the effect that there were

500,000 jukeboxes in operation in 1968. And I think Mr. King's statement showed something like 750,000 in operation currently. Is that about the correct figure?

Mr. CHAPIN. Yes; so far as we know.

Mr. DANIELSON. OK. Thank you very much.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

In Mr. King's statement it is stated here that when an American song is played on a French jukebox the American composer is paid for the performance. Would somebody want to respond on how much he is paid, and how is this done?

Mr. KASTENMEIER. I asked Mr. Chapin that.

Mr. CHAPIN. Yes. I had said that in the foreign countries the jukebox rate, and I am quoting here from an article in Variety where it says depending upon the country it ranges from $50 to $250 annually.

Mr. DRINAN. Is that then pursuant to copyright law, or international law? Tell me the mechanics of how that is done, and who establishes the rate and so forth?

Mr. CHAPIN. Well, it would be a rate between the performing rights society in that country that would be worked out by agreement with the local user.

Mr. DRINAN. Is there any usefulness in pursuing the legal machinery by which they do it and try to say that if virtually all other nations, I take it, or many nations do that, that the United States also should do it? I mean, do you people support that argument that we should internationalize copyright insofar as possible? More and more American music is being played all across the world, and can we learn something, in other words, from the example of foreign nations?

Mr. CHAPIN. Well, yes. And I think most of the people here today have pointed to this inequity where the foreign people get compensated, but there is no compensation here in the United States.

Mr. CIANCIMINO. If I might add, further, I think we also might learn, I would hope, from the situation which exists in most European countries where the fee that is negotiated is paid directly to the performing rights organization, and there is no dilution of fees through any kind of tribunal or agency that would be required to dispense it.

Mr. DRINAN. Well, that fee is not set by copyright statute in the foreign country?

Mr. CIANCIMINO. No; this is done by negotiation, but in most of the countries the performing rights organizations are either to some extent controlled by the government or very heavily regulated by the government. But again, the moneys go directly from the user to the performing rights organization.

Mr. DRINAN. Thank you. Another question, anticipating the testimony later on of Russell Mawdsley of the Music Operators, he suggests something on page 6, that they oppose any fee for registration of jukeboxes. Is that a real possibility, that somebody propose that there be registration of jukeboxes?

Mr. KORMAN. That was in the bill. It is in the Senate bill I think, and they want to amend it and take it out. Their foot slipped when they were getting themselves out from within the tribunal.

Mr. DRINAN. Would you people react to it?

Mr. KORMAN. Well, what it means is that this $4 million they would pay in gets distributed after the Copyright Office takes off the cost of

administering the money, and this 50 cents as I understand it, was supposed to represent part of the handling cost. So really the question is who bears that 50 cent per machine cost, the jukebox people or the composer.

Frankly, I had not focused on it. It seems to me that we have stayed by the $8, and I do not remember how the history of the 50 cents thing, how that got in there. Now, Mr. Chairman, I wish Mr. Finkelstein were here because he has a marvelous recall on these things, but it does make a 50 cents difference on a machine, and either the jukebox people or the composers pay it.

Father Drinan, going back to 1965, there were hearings, and on page 200 of part 1 of the hearings held by this committee there is a reference to the amounts that are paid abroad. This is a jukebox source, a Billboard article quoting Mr. Gordon, who then was the head of the Seeburg Corp., Jack Gordon, president of Seeburg Corp. This is a reprint from a story in Billboard of May 15, 1965. Mr. Gordon is quoted as saying:

> Jukebox operators do pay performance royalties in other countries, with French operators shelling out up to $480 per year per machine, British operators getting hit with up to $300 per year per machine and German operators being tapped up to $300 per year per machine.

This was an article attempting to stir up support for the jukebox fight by pointing out how much it might cost if that bill went through. Compare those numbers in the hundreds of dollars with the $8 we are willing to accept. And, Mr. Chairman, in terms of your question before expressing concern about how a fair fee would be determined by an arbitrator or panel of arbitrators which could be $300 or $400 per year, and would that drive the jukebox industry out of business? I do not think that arbitrators operate that way. They would know the economic impact of the fee. And while profit as such would not be their test, they surely would not fix a fee which would drive anyone out of business. The world just does not work that way.

Mr. DRINAN. Thank you very much. I have no further questions at this time.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am just interested in one aspect of this. With the radio stations each of your organizations will have an agreement with a particular radio station, is that right? And you do not charge on a per time use of the music, or do you?

Mr. KORMAN. No.

Mr. CIANCIMINO. No.

Mr. PATTISON. It is a percentage of their gross?

Mr. KORMAN. Essentially, Mr. Pattison, it works this way: it is a net, it is a percentage of a net figure, and it works out to be for the local radio stations, ASCAP, BMI and SESAC taken together I think something like probably two to two and a half percent of their gross.

Mr. PATTISON. If they play the Tennessee Waltz all day long, it comes out the same?

Mr. KORMAN. That is right. They get the right to perform any musical composition in any of the three repertoires under their license as often as they choose. They do not have to keep records of what they are playing. They just pay the one stipulated fee.

Now, for those stations that might be mostly talk, for example, just some musical programs, there is available a form of license called a

"per program" license where the fee is also a percentage. It is a higher percentage. For ASCAP it is 8 percent of the amount paid by advertisers just for those programs containing one or more selections in the ASCAP repertoire. If they only use BMI compositions, and they have a BMI blanket license they would not pay ASCAP anything—if they had an ASCAP per program license—on musical programs not using ASCAP music.

Mr. PATTISON. Then internally ASCAP, BMI and SESAC work out their arrangements with their own composers on a survey kind of basis?

Mr. KORMAN. You know that is even a tougher problem than collecting the money—is how you divide it up fairly.

Mr. CIANCIMINO. I would like to add that SESAC does not charge radio stations on a percentage basis. We have a flat-fee basis, and we use a station's power, their hours of operation and the market area, among other factors, and we arrive at a flat annual fee. But the license generally selected by the radio station is the blanket license, which for the one annual fee gives the station the right to perform any one or thousands of works in the SESAC repertoire. They do have available an alternate kind of licensing arrangement which we call a per-play or per-piece or per-use, but this is just not economically feasible to the user, at least they have not found it so.

Mr. PATTISON. The record keeping?

Mr. CIANCIMINO. Yes. Yes. So that the cheapest and most economical method historically has been the blanket license, and for the one blanket fee they have the right to use all of the music, and then we in turn, based on chart music, and based on performances in our own three separate, individual formulas, distribute these moneys to our respective affiliates.

Mr. PATTISON. So analogizing the radio station, for instance, to a jukebox why would it not be a sensible way to do it on the same basis, in other words?

Mr. KORMAN. A percentage in the case of ASCAP it would be marvelous. But it would also be expensive to operate that way. I say "marvelous" but it would depend, obviously on what the percentage was. If you worked out a fair percentage, the percentage notion has a lot of pluses. For one thing, it adjusts automatically for inflation. For another thing, if a fellow's business goes down his fees are reduced, and that is fair, you know to the extent that the value is less. The value of the license may be less to him.

Mr. PATTISON. I am thinking of the difference between the jukebox in the little grill somewhere that does not get much use and the one that is being used all the time in a big operation. I am thinking of the difference of the small grill operator who gets some play Friday nights and does not get much normally, and then the other operation that has got jukeboxes, master jukebox and all kinds of boxes all over the place and really that thing works all of the time.

Mr. KORMAN. Where you have a percentage contract, a percentage license, you must have a provision for an audit, because the licensee has the information solely in his possession on which the fee is based, and you cannot afford to get into a percentage way of dealing and auditing when you are talking about very low fees. You just cannot afford to do it. We license the average small restaurant, for example,

where the fellow has his own record or tape machine, rather than subscribing to a background music service, for about $70 a year. It used to be $60 and I think we just raised it $70. It was $60 since 1914. When ASCAP was formed, the original rate was $5 per month under the first licenses.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. Do any of my colleagues have any further questions?

Mr. DANIELSON. I have a question.

Mr. KASTENMEIER. Yes. Let me just ask whether Mr. Mann or Mr. Mazzoli have questions?

Mr. MAZZOLI. Mr. Chairman, I have just a couple of fairly brief ones just to sort of fill me in. An individual who has a grill, and who buys himself a stereo set and who buys some tapes at the local discount house still has to have a contract with the three agencies; is that correct?

Mr. KORMAN. Yes. It is anomalous that if he just puts in his own things, and pays himself for all the costs involved and furnishes the music, then he needs a license under the present law. But, if he brings in a jukebox and has the public put coins in it, in which he shares—he may get 40 or 50 percent of the gross taken in by the jukebox—that is not deemed to be a public performance for profit; therefore, he does not need a license.

Mr. MAZZOLI. You say you do not have any figures on the amount, accurate as to the number of machines extant throughout the country?

Mr. KORMAN. I have not got any idea.

Mr. MAZZOLI. 750,000 seems very low. Now when you calculate the number of machines, would that be an individual box station or would that be a master control?

Mr. KORMAN. They were talking about the master control.

Mr. MAZZOLI. And for an artist like Neil Diamond or John Denver who write, compose, orchestrate and perform, do they belong to one of your organizations?

Mr. KORMAN. You have mentioned a number of ASCAP members.

Mr. MAZZOLI. Those names just came to mind. Can they perform music from the repertoire of BMI or SESAC?

Mr. CIANCIMINO. Yes they can. A performer can perform any piece of music he desires, and the burden is on the one in the establishment where he is performing to have the clearance. That is the primary burden. But he can perform or record anything he wishes to.

Mr. MAZZOLI. And when he creates music, it comes within the repertoire of the agency he represents? Now, if he moves—Mr. Oliver, have you ever moved from BMI, or have you been with them from the beginning of your career?

Mr. OLIVER. Yes.

Mr. MAZZOLI. Do you have the privilege of moving to ASCAP or SESAC?

Mr. OLIVER. I could I suppose.

Mr. MAZZOLI. If so, what happens to your music?

Mr. OLIVER. My music, of course, is controlled by my agents, and the details of the copyright are handled by the publisher, and I do not know the laws pertaining to the situation you suggested.

Mr. MAZZOLI. Apparently it does not happen often.

Mr. CIANCIMINO. Yes; it does happen quite often. Insofar as a writer terminating agreements with one organization and going to another organization, it does happen. And, in our case, our policy is that we would terminate any rights that we have in the writer, any carryover rights, and we would allow him to be represented fully by the second performing rights society.

Mr. KORMAN. ASCAP members have a right to resign at the end of every year.

Mr. MAZZOLI. And their music can stay with them?

Mr. KORMAN. Either way, as they prefer.

Mr. MAZZOLI. Let me ask one final question to sort of fill in the gaps here. Using Mr. O'iver, and perhaps Mr. Copland and Mr. Davis, you pay some amount per year to belong to the agencies?

Mr. KORMAN. $10 in ASCAP's case, per year.

Mr. CIANCIMINO. Nothing for SESAC.

Mr. MAZZOLI. BMI?

Mr. CHAPIN. Nothing for BMI.

Mr. MAZZOLI. Is it the case, then, that anybody that works harder in the year is going to get back more in the distribution of money?

Mr. KORMAN. It is not a function of how hard you work. It is a function of how talented you are or how successful you are.

ASCAP must accept anyone to membership who applies and has had a single work either published or recorded. We must under our consent decree. The Government's theory being that you cannot possibly be a success unless you are in one of the performing rights licensing organizations or another. They have chosen to compel ASCAP to accept anyone who applies and who meets this minimal test.

Mr. CIANCIMINO. Insofar as SESAC is concerned, since we do not charge any membership fee, the worst the member can do is die.

Mr. MAZZOLI. Thank you very much.

Thank you, Mr. Chairman.

Mr. DANIELSON. I have one remaining question.

In the case of radio stations, would a single radio station acquire a license from each of the three organizations?

Mr. CIANCIMINO. That is correct, yes.

Mr. DANIELSON. Would he pay each——

Mr. CIANCIMINO. Separately.

Mr. DANIELSON. To each of the three separately.

What we were contemplating, hypothetically, was in the case of a jukebox.

Mr. CIANCIMINO. It would be a different payout arrangement.

Mr. DANIELSON. To some common recipient?

Mr. CIANCIMINO. That is correct.

Mr. DANIELSON. Thank you.

Mr. KASTENMEIER. Mr. Mann, any questions?

Mr. MANN. No, thank you, Mr. Chairman.

Mr. KASTENMEIER. If not, the Chair, on behalf of the committee, would like to thank our witnesses this morning, Mr. Davis, Mr. Oliver, Mr. Copland, Mr. Ciancimino, Mr. Chapin, and Mr. Korman, for their contribution in this particular area. Perhaps you will have occasion to testify on another aspect of the copyright law in the future.

Mr. CIANCIMINO. Thank you.

Mr. KORMAN. We welcome the opportunity, Mr. Chairman.

Mr. CHAPIN. Thank you, Mr. Chairman.

Mr. KASTENMEIER. Next the Chair would like to call witnesses representing the Music Operators of America and also the manufacturers of jukeboxes, the manufacturing companies. I would like to ask my colleague on the Judiciary Committee, the gentleman from South Carolina, Mr. Mann, if he would care on our behalf, to greet the president, the national president of the Music Operators of America, Fred Collins.

Mr. MANN. Mr. Collins, will you come up and bring your associates, too?

Mr. KASTENMEIER. Mr. Mawdsley and Mr. Allen and Mr. Patterson, would you all come forward?

Mr. MANN. Thank you, Mr. Chairman.

The youngest one in that crowd is Fred Collins, Jr., who, in spite of his youth, has been in the music box business for over 20 years. He broke his teeth on it, I think. He is a dynamic community involved man, who, because of his involvement in community activities, and associated activities of the jukebox industry, because of his interest in its ethical standards and its public image and the dignity of it, has involved himself to the point that at his young age he is now president of that organization.

He happens to be an old friend and client of mine from Greenville, S.C., and we have maintained our friendship down over the years.

He will present to the committee those who are with him and those who are to make the primary statements on behalf of the music operators.

Mr. Collins.

TESTIMONY OF FRED COLLINS, JR., PRESIDENT, MUSIC OPERATORS OF AMERICA

Mr. COLLINS. Thank you, Mr. Chairman.

I would like to introduce on the far end Mr. Perry Patterson, who is counsel for the jukebox manufacturers. Next to him is Ted Nichols from Nebraska, who is the secretary of the Music Operators of America this year. And then next is Mr. Nicholas Allen, our counsel here in Washington with MOA. Next to me is the immediate past president of the Music Operators of America, and he is also the chairman of our legislative committee this year, from Massachusetts, Russ Mawdsley. On my left is Mr. Garland Garrett, the treasurer of the Music Operators of America from Wilmington, N.C.

We all do not have prepared statements, but we would be glad to answer any questions that you, Mr. Chairman, or the committee might have after Mr. Mawdsley reads our position statement. Thank you.

Mr. KASTENMEIER. Thank you.

Before getting to Mr. Mawdsley, I understand Mr. Mawdsley will make a presentation on behalf of the Music Operators of America, and perhaps aided by Mr. Allen. And then, Mr. Patterson, you have a statement, do you not?

Mr. PATTERSON. I have, yes.

Mr. KASTENMEIER. In which case we will hear from Mr. Patterson.

The Chair recalls that Mr. Nicholas Allen and Mr. Perry Patterson testified 10 years ago on behalf of their organizations and are well

known to this committee. Ten years ago I had the pleasure that Mr. Mann had today. As I recall, there was the retiring president from the west coast, from the Bay area, Mr. George Miller, and he was replaced by C. W. Pierce, who was from my district and was a constituent of mine from Green County, Wis. Mr. Pierce, I guess, has long since ceased to be a national president, but I am sure he is still interested in your organization.

Mr. ALLEN. He sent his greetings to you, Mr. Chairman, and enlisted your sympathetic ear.

Mr. KASTENMEIER. Mr. Mawdsley, you may proceed.

Mr. MAWDSLEY. With your permission, may I defer to Mr. Patterson, who has an appointment, and may he go on first, please?

Mr. KASTENMEIER. Yes, indeed.

Mr. Patterson.

TESTIMONY OF PERRY S. PATTERSON, COUNSEL, ROCK-OLA MANUFACTURING CORP., ROWE INTERNATIONAL, AND SEEBURG, INC.

Mr. PATTERSON. Thank you, Mr. Chairman.

Mr. Chairman, and members of the subcommittee, my name is Perry S. Patterson, and I presently reside in Coudersport, Pa. I am a member of the District of Columbia bar as well as the Pennsylvania bar, but I am a retired partner in the Washington and Chicago firm of Kirkland, Ellis, and Rowe, and that firm, through other partners than myself, have represented the Rock-Ola Manufacturing Corp. and the Seeburg Corp. and Rowe International, which are the only surviving jukebox manufacturers in the country, for going on at least 40 years.

I am here to reflect the manufacturers' unqualified support of the $8 annual fee, and this was the provision, of course, which was approved by this committee and passed by the House in 1967, and then again embodied in the Senate version as passed last year in precisely this same form. In its present form it is acceptable to the manufacturers, and we urge approval.

Now, my last appearance, as the chairman noted, was in 1966, and the composition of the subcommittee has changed, with the exception of the chairman and Mr. Fuchs.

There have been just innumerable hearings on this subject going back to the Vestal bill, which was introduced in 1926 to repeal the copyright exemption. And, there is voluminous testimony, quite inconsistent with the representations by the performing rights societies that coin-operated machines did not exist in significance. And, in this connection, without belaboring the history of the matter, in hearings in 1952 by Mr. David Rockola, quoting a spokesman for the authors copyright league, cites the existence of an extensive coin-operated business between 1905 and 1909. I mean, there were coin-operated xylophones, player pianos, phonographs, banjos, and even talking pictures. But, in these hearings in which Mr. Rockola, who is a real person, testified on H.R. 5473, there is ample documentation that Congress was aware of the existence of a coin-operated machine, coin-operated machine industry when it did enact the exemption of the coin-operated machines. They did not speak in terms of automatic phonographs, but in terms of a variety of coin-operated machines.

One of the objectives in the protracted negotiations by which we arrived at the $8 annual rate was to insulate the operators, and here again, speaking for the manufacturers, they obviously are not going to pay the annual fee directly. Their concern is with the economic implications of what annual fee the operators may have to pay.

In that connection, we had extended negotiations with the representatives of the performing rights societies, the Register of Copyrights, representatives of the manufacturers, and did come up with the $8 annual fee.

And, again in hearings before the Senate subcommittee, we did persuade the committee that this was a valid approach, and the utilization of the Office of Copyrights as a vehicle for distribution of the fees was equitable and reasonable as a substitute for direct negotiations on behalf of the operators with each of the performing rights societies.

Obviously as the testimony on behalf of the performing rights societies has indicated, they feel that the 1967 $8 rate is too low, and they oppose the insulation of reconsideration of that rate by the copyright tribunal.

Now, the manufacturers feel that the $8 rate, and here again, the three manufacturers whom I have canvassed tell me that their best information is that there are between 450,000 and 500,000 boxes in the country at the present time, they advise the the urban renewal programs have eliminated an awful lot of neighborhood taverns and restaurants. The interstate highway systems have insulated countless taverns from traffic patterns and patronage, so their business has not really enlarged. And in this connection, the first time I was here, let's say 20 years ago when I first was an associate in my firm participating in these hearings, I think there were 10 manufacturers of jukeboxes, and today there are 3.

Last year the Wurlitzer Corporation, which had been in existence, I think, since around—well, for 118 years—went out of the jukebox business. And, in their annual report to shareholders, they stated:

> In our coin-operated phonograph business, operating losses were sustained both in U.S. and some foreign subsidiaries due to steady rising costs, limited market growth, heavy investment in all areas, and high interest rates. As a result of the current situation as well as poor future prospects in the domestic market for this product, the board of directors of Wurlitzer, on March 5, decided to sell or liquidate the coin-operated segment of the company's business in the United States, and to close all branches of Wurlitzer Distributing Corporation.

And, in a press release on that same date, again the chairman of the company said that the company had sustained an operating loss of $7 million and concluded for business purposes to get out of the business.

The three remaining manufacturers are highly competitive, and they have provided me with information on the understanding that individual company figures would not be set on the record. The three remaining manufacturers advise me that in the aggregate, dollar sales volume and unit production is down between 20 and 30 percent. Employment is down drastically in all of the companies, in one particular, from 1,450 employees to 450. One of the other manufacturers has shut down its jukebox production from April to date. And, I am advised that their distributors' inventories are up to 300 percent and not moving. In other words, the jukebox business has not kept pace with population growth.

As I previously advised you, there are fewer jukeboxes in operation in this country by the manufacturers' estimate than there were in the years immediately succeeding World War II.

Now, in Mr. Mawdsley's testimony, I know he is going to detail the monetary contribution of the industry, the operators to the composers and artists, which historically, again, record after record will show, has not been negligible by any means.

In summary I note that no mention was made in the testimony of the performing artists, representatives of the performing societies, relative to the performing artists royalty, although there is a bill before this committee, and Senator Scott has introduced a bill to establish again this, what we feel is a rather anomalous utilization of the copyright law, that it would add to the $8, $1 a year to be paid to the Register of Copyrights, of which 50 percent would go to the performing artist, such as Al Hirt or Helen Reddy, and 50 percent would go, half of it, 50 cents would go to the record manufacturers.

As I note in my statement, I think this really is an anomalous extension of the whole concept of paragraph 8 of the Constitution, which states that its purpose was:

> To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.

To use the copyright clause of the Constitution as a vehicle for payment of royalties to record companies or to artists, because of their talents, which they are compensated for in any event, we feel is an abuse of the constitutional concept of copyright.

In this connection, I just noted recently that the November 1974 issue of the George Washington Law Review, has an 80-page article on the public performance right in recordings, and at the end, in summary, they conclude that they do not feel that it would be in the best economic interest of the industry to establish a new public performance right, and conclude that it would not be a desirable element in the general copyright revision.

I would commend—and I know Mr. Fuchs is familiar with the article, but it is an in-depth analysis of the implications of this problem.

So, in conclusion, we do support the $8 annual fee. We feel that the operators should not have to be subjected to a copyright tribunal review. The manufacturers, as I have just stated, oppose a performing artist royalty.

Thank you.

[The prepared statement of Mr. Patterson follows:]

STATEMENT BY PERRY S. PATTERSON ON BEHALF OF ROCK-OLA MANUFACTURING CORP., THE SEEBURG CORP. AND ROWE INTERNATIONAL, INC.

Mr. Chairman and Members of the Subcommittee, my name is Perry S. Patterson. I presently reside in Coudersport, Pennsylvania and appear as counsel for the Rock-Ola Manufacturing Corporation. The Seeburg Corporation, and Rowe International, Inc., the only manufacturers of coin operated automatic phonographs in the United States.

I am a member of the District of Columbia, Maryland, Illinois and Pennsylvania bars. I am a retired partner of the Chicago and Washington firm of Kirkland, Ellis and Rowe and the foregoing companies, and other manufacturers who have vanished from the scene, have been represented by partners of my former firm and by me on copyright legislation matters for at least forty years.

I am here to reflect the manufacturers' unqualified support of Section 116 of H.R. 2223 as now drafted providing for an $8.00 annual royalty per automatic phonograph. This is the royalty provision originally approved by this Subcommittee in 1967 and enacted by the House in that year in H.R. 2512. It represented a compromise arrived at only after protracted negotiations by the Office of the Register of Copyrights, The Music Operators of America, the manufacturers and the representatives of the performing rights societies, ASCAP, BMI and SESAC. It was in fact the first time that Congress had imposed a performance royalty on coin operated automatic phonographs.

Section 116 in H.R. 2223 is the same provision passed by the Senate in S. 1361 in September, 1974. In its present form it is wholly acceptable to the automatic phonograph manufacturers and we urge approval without modification.

My last appearance before this Subcommittee was in 1966 at the time of the consideration of H.R. 2512. The composition of this Subcommittee has so changed that the only surviving members of the 1967 Subcommittee are your chairman, Robert Kastenmeier and staff counsel, Herbert Fuchs, Esquire. For this reason I feel it relevant to note briefly in the current record some of the historical background of the juke box exemption.

Section 1(e) of the Copyright Law of 1909 expressly exempted the public performance of copyrighted works on coin operated machines from the obligation of making performance royalty payments. This exemption was not a frivolous or lightly considered action but rather a recognition by Congressional members after being presented with extensive documentation of the existence of a very substantial coin operated music machine industry that the payment of performance royalties, by the thousands of nickelodeon pianos and music boxes in saloons, restaurants and hotels would work undue economic hardship on the owners of such devices.

Representatives of ASCAP stated explicitly in the record of the hearings before this Subcommittee in the 80th Congress on H.R. 1269, H.R. 1270, and H.R. 2570 that ASCAP had no desire to extract performance royalties from the "little fellows", the little restaurant keepers or ice cream parlors and, that the representatives of ASCAP had instructions not to attempt to collect from the small businessmen even though they claimed they had such a right if they chose to exercise it. (Record of Hearings on above bills, pages 148–159, incl.).

The royalty structure in H.R. 2223 effectively protects the small operators and little businessmen from direct negotiations with the performing rights society.

I will not burden this record by detailed repetition of the history of efforts by the performing rights societies to repeal the 1909 exemption other than to say in brief summary as follows:

In 1926 the Vestal Bill H.R. 10434 was introduced at the initiation of ASCAP to repeal the juke box exemption and collect royalties from coin operated phonographs. Since then, for nearly 50 years legislation has been introduced or pending in every session of Congress, including the present one, aimed at repealing or modifying the provision of the 1909 Act exempting coin operated machines from the performing rights provisions of the law.

Hearings have been held on such bills in the Senate and House on at least 14 separate occasions to say nothing of extensive debates in both the Senate and House. Subcommittee members interested in the detailed history of legislative efforts of the performings rights societies for repeal of the exemption and the successful opposition of the operators and manufacturers to such repeal have available in the files of the Subcommittee, thousands of pages of testimony, statements, exhibits and reports. They amply document the unwillingness of prior committees and Congress to accept the argument for repeal.

The manufacturers will not, of course, be directly subject to royalty payments under Section 116 of H.R. 2223. As in the past, the surviving manufacturers are concerned about the legislation for the basic business reason that the businesses of their customers, the operators who buy their machines will be significantly affected by any increase in the proposed $8.00 annual rate. My clients' concern, however, is not confined to the $8.00 annual rate in H.R. 2223 as now drafted, but to three important prospective legislative considerations involving increased monetary exposure for the operators which are not presently in Section 116 of H.R. 2223 but which may be introduced by amendment for inclusion in Section 116 before final action on H.R. 2223.

The first anticipated problem affecting Section 116 is the prospect that an effort will be made to increase the $8.00 annual rate. On November 27, 1974, Senator McClellan sent a letter to the operators, the manufacturers, and other in-

terested parties in which he discussed what he thought would be a reasonable annual rate per phonograph for juke box operators to pay. He concluded that in lieu of the $8.00 rate that consideration be given to an annual rate of $19.70 per box, per year. Over the years of hearings suggested royalty rates had ranged from $4.00 annually to $80.00 annually but the apparent source for Senator McClellan's figure was a self-serving resolution passed by the National Licensed Beverage Association in 1967 in the course of hearings on repeal of the juke box exemption which association or its members would not in any event have been liable for payment of any royalty.

The second problem involves a provision in the Senate version of the General Copyright Revision, which, in addition to the $8.00 annual fee, provided for a Performing Artists Royalty payable by juke boxes at the rate of $1.00 annually but also payable at much higher rates by the broadcast industry and vigorously opposed by that industry. Prior to Senate passage, this provision was deleted by an amendment sponsored by Senator Ervin who expressed grave reservations as to its Constitutionality. The manufacturers strongly oppose the re-introduction of this royalty in Section 116.

Finally, the Senate passed General Copyright Revision while setting an $8.00 annual royalty fee per phonograph did not subject this fee to periodic review by the Copyright Tribunal established by the bill. The manufacturers favor retention of this exemption, because it relieves them of inevitable confrontations with the performing rights societies.

In summary, the automatic phonograph manufacturers oppose:

(1) Any increase in the proposed $8.00 annual rate.

(2) Any attempt to establish a Performing Artists Royalty.

(3) Subjection of the $8.00 annual fee to periodic Copyright Tribunal Review.

The Performing Artists royalty ignores the fact that the performing artists and record manufacturers are already compensated for their performing efforts; musicians on the basis of union scale, their popularity and bargaining powers.

The Performing Artists Royalty, particularly as it compensates manufacturers, achieves a result never conceived by the draftsmen of the copyright provision of the Constitution; Section 8, Clause 8, "To promote the Progress of Science and the Useful Arts by securing for limited times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries."

Mr. Mawdsley has described the problems faced by the music operators and their monetary contribution to the performing rights societies and music industry.

I will direct myself to the plight of the manufacturers. We are not living in what can be described as normal economic times and there are few industries that cannot demonstrate declining sales and employment over the past several years. However, in the case of the automatic phonograph manufacturers, which numbered about 10 thirty years ago, three now remain. The three companies for which I speak are Rock-Ola, Seeburg, and Rowe International.

In 1974 the Wurlitzer Corporation, which had manufactured musical instruments since 1856 and automatic phonographs since 1908 discontinued the manufacture of automatic phonographs because of the deteriorating economic climate in the industry.

I attach as Exhibit A an extract from the 1974 Annual Report of Wurlitzer explaining its reasons for withdrawal from the automatic phonograph field. Also, as Exhibit B, a Wurlitzer Press Release on the same subject.

The three surviving manufacturers for whom I speak have not benefited yet from Wurlitzer's withdrawal from competition. Each company has supplied me with information concerning their operations but have requested that I consolidate such information for reasons of competitive confidentiality.

In the aggregate, dollar sales volume and unit production is down by between 20% and 30%. Employment is down drastically, in one company from 1,450 employees to 450 employees. Another company has shutdown production for three months. Distributors' inventories in certain instances are as much as 300% above normal and sales are not improving.

The juke box business has not kept pace with population growth. It is estimated that there are fewer juke boxes in operation now than in the period 25 years ago after World War II.

Mr. Mawdsley has detailed the present and prospective monetary contribution of the industry to the record industry and the performing rights societies. Enactment of H.R. 2223 as now drafted will result in a contribution by the operators to the music industry of an estimated $8,500,000.00 a year. This is nearly 10% of

the total distributions of the performing rights societies ASCAP, BMI and SESAC which in 1974 was reported to be approximately $97.5 million.

The manufacturers believe the operators are contributing their fair share for their use of music and recommend approval of Section 116 of H.R. 2223 as drafted. They oppose any amendments which would expose the operators to additional monetary burdens.

EXHIBIT A

JUNE 1, 1974.

TO THE SHAREHOLDERS OF WURLITZER:

It is interesting to realize that the modern, complex, multi-national Wurlitzer Company of today was founded 118 years ago in a simple, pastoral setting in Cincinnati, Ohio. Here a young German named Rudolph Wurlitzer was engaged in the business of importing musical instruments for a frontier society. The company he founded thrived, as did the nation, with various members of the Wurlitzer family active in the management for well over a century. The last surviving son of the founder was Farny R. Wurlitzer who died May 6, 1972 after 68 years of dedicated service.

In the 118 year span of the Company's growth, the steady rise in standards of living in the countries served by The Wurlitzer Company has provided the public with time and money to enjoy musical instruments of all types. The Company has been successful in fulfilling this need and each year has continued to supply the kinds of instruments most wanted, both in the United States and throughout the world.

Two major new product lines were established during the year. One was the highly competitive Sprite organ line supplementing our medium and higher priced electronic organs. The introduction of the Sprite models to Wurlitzer dealers produced the largest number of advance orders for a new product in the history of the Company. Manufacture of a line of low-priced electronic organs including table models was also initiated during the year for sale through private label distribution. This product line has excellent growth potential.

Engineering and research activities have continued unabated to achieve innovative products, outstanding styling, and the greatest possible cost savings in manufacturing. Wide use of electronics in our products has been aided by the continued application of the new technology of Large Scale Integrated Circuits (LSI). The Wurlitzer Company was the first in the industry to produce electronic organs using LSI components.

Manufacturing efficiency has advanced during the years with the continued trend toward mechanized assembly and test in our factories. Although capital expenditures are necessarily high for special equipment, the operating cost savings are substantial. Additional manufacturing capacity resulted from the establishment of a Central American facility operating on a contract basis. This facility manufactures certain subassemblies for use in our various plants. The major Wurlitzer manufacturing activities are conducted at four plants in the United States and two in Europe, with additional manufacturing or licensed assembly operations in three locations in Latin America and one in South Africa.

To grow in the musical instrument world market requires the use of a variety of up-to-date marketing techniques. This year we have successfully brought into use many techniques in market research, sales training, advertising and promotion, and a variety of other skills necessary for aggressive world-wide operations. Marketing skills must, of course, be closely coupled with engineering, manufacturing, and financial activities of the highest order to achieve the overall forward thrust of growth for which the Company has been noted in recent years.

Our U.S. marketing operations for keyboard products consist of over eight hundred independent Wurlitzer music dealers and forty-seven Company owned retail music stores. Foreign marketing operations are handled by seven Company owned marketing subsidiaries as well as a large number of worldwide independent music dealers and phonograph and vending equipment distributors. This marketing organization grew in strength and breadth during the year, bringing fine Wurlitzer products to new markets.

REVIEW OF OPERATIONS

In the year ended March 31, 1974, The Wurlitzer Company achieved the highest level of consolidated sales in its 118 year history. Major achievements were also made in strengthening the Company for future growth and earnings through progress in technology, manufacturing, and marketing.

During the year engineering and research programs brought into being new competitive models in our pianos, key and action products, electronic pianos, electronic organs, and coin-operated products. Research programs in progress promise further important advances for the future. Manufacturing capability has been improved in all of our U.S. plants through the introduction of new methods and specially developed machinery. Manufacturing operations were started at the new Wurlitzer plant in Levern, Germany and a subassembly manufacturing operation was started with an associate firm in Guatemala, C.A. Final steps in the closing of the manufacturing plant at DeKalb, Illinois were completed early in the year, and manufacturing operations at Logan, Utah are improving steadily. Marketing operations have been strengthened by careful training and assignment of skilled personnel at both wholesale and retail levels. At Cheshire, England a new sales office and warehouse building was completed at the Parkgate Industrial Estate for Wurlitzer Limited, our subsidiary for keyboard product sales in Great Britain. Marketing operations in Europe were realigned for improved sales coverage in various Common Market countries. A major decision was reached to discontinue manufacture and sale of coin-operated phonographs in the U.S., a move which is expected to enhance future earnings.

Consolidated net sales on a world-wide basis for the year were $90,609,712, an increase of 7% over the previous year's sales of $83,842,546 and the highest ever achieved. The U.S. sales accounted for 81% of the total and foreign sales for 19%. Important growth occurred in all products except coin-operated phonographs.

Electronic organ sales continued its vigorous growth pattern of recent years showing an increase in dollar sales volume of about 24% over last year largely in our medium and higher priced organ products manufactured at Corinth, Mississippi. Two new electronic organ product line programs were undertaken by the Company during the year with manufacturing responsibility placed at the North Tonawanda Division. One is the Sprite organ line, a moderately priced series of organs with wide popular appeal. This product line, introduced at the June 1973 convention of National Association of Music Merchants, was an immediate success and produced a very substantial backlog of orders. At North Tonawanda intensive effort has been devoted to getting production underway on Sprite products to satisfy dealer demand. A second product line was also initiated during the year consisting of a series of low priced organs including battery-operated table models. Distribution has been primarily through non-Wurlitzer dealer channels. Acceptance of this line has been good and the future growth possibilities look attractive.

The Wurlitzer electronic piano is becoming a very popular product, and the increase in dollar sales over last year was 13%. Wurlitzer conventional pianos also showed an increase in dollar sales volume over last year. Sales of the widely accepted Wurlitzer cigarette and vending machine line in Europe continued to grow in the amount of 15% over last year.

Although our keyboard products business is profitable, vigorous, and growing rapidly, the overall operations of the Company resulted in a loss. Fortunately, many of the problems producing this result are now behind us and improved earnings for the future are clearly in prospect. The major trouble area affecting the earnings picture during the past year was our coin-operated phonograph business which has been unsatisfactory from the profit viewpoint for the last few years. At a Board of Directors' meeting on March 5, 1974 it was decided to discontinue phonograph manufacturing and selling operations in the United States. It was also decided to continue to manufacture and sell phonographs and related products outside of the United States through our German subsidiary, Deutsche Wurlitzer, as well as other subsidiaries engaged in sales on a worldwide basis. The decision to discontinue U.S. phonograph operations was a difficult one to make, but it is expected to enhance our financial position in the future in a number of beneficial ways.

The consolidated net loss for the year ended March 31, 1974 was $7,702,682 or $6.23 per share after a pre-tax provision of $11,366,000 for losses on disposal of our U.S. coin-operated phonograph business. This provision was a direct result of the decision to discontinue the coin-operated phonograph business and is believed to be adequate to cover the expected losses and costs associated with liquidation of the U.S. phonograph operations. We expect overall company operations for the year ending March 31, 1975 to be profitable.

Consolidated net earnings in the previous year ending March 31, 1973 were $2,191,171, or $1.77 per share before an extraordinary charge of $313,747 and $1,877,424, or $1.52 per share after the extraordinary charge.

The achievement of record dollar sales this year is evidence of the wide acceptance of Wurlitzer products all over the world. We believe world-wide interest in music is being stimulated partly by the new types of sounds and musical features available to the public. Products such as the Wurlitzer Orbit series of electronic organs with synthesizers and the Wurlitzer electronic piano have been a part of the growth of interest in new sounds, and it is expected that the trend will accelerate.

EXHIBIT B

THE WURLITZER CO.,
Chicago, Ill., March 5, 1974.

[News Release]

R. C. Rolfing, Chairman of the Board of The Wurlitzer Company, reported that the Company's directors decided at their meeting today that the coin-operated phonograph segment of the Company's business in the United States should be disposed of by sale or liquidation. The importance of this product in United States operations has diminished, and it is no longer profitable. Sales volume in the current fiscal year is estimated at approximately fifteen per cent of the Company's over-all volume. The decision does not affect the Company's European operations, where Deutsche Wurlitzer coin operated phonographs, cigarette and other vending equipment and accessories will continue to be produced for sale throughout the world.

Mr. Rolfing said that as a result of this decision it is expected that the Company's operations for the current fiscal year ending March 31, 1974 will result in a loss, inclusive of losses from liquidation of approximately $7,000,000 after tax benefits.

Mr. Rolfing added that the action taken would materially strengthen the Company and improve its operations, and that he is optimistic as to future earnings in its continuing manufacture, distribution, and sale of electronic organs, pianos, electronic pianos and related equipment at wholesale and in its 47 retail stores.

AGO KOERV, *Treasurer.*

Mr. KASTENMEIER. Thank you, Mr. Patterson.

Just for clarification, Mr. Patterson, you said the law review article suggests it would not be in the economic best interest of the industry to provide performing rights for artists. To what industry were they referring when using the term "industry"?

Mr. PATTERSON. Well, they are talking primarily about the record industry and the tape industry, and they do not touch on the constitutional implications of the creation of what I would characterize as an anomalous copyright, because I can conceive that, if Al Hirt could collect a performing artist royalty, by the same token Jack Nicklaus could copyright his swing, and the same with Mark Spitz, or Chris Evert, and I do not think that a literal reading or even an updating of the copyright clause to our present times would cover that as a proper vehicle for utilization of the copyright clause.

Mr. KASTENMEIER. Mr. Mawdsley, do you wish to make your statement?

[The prepared statement of Mr. Mawdsley follows:]

STATEMENT OF RUSSELL MAWDSLEY, IMMEDIATE PAST PRESIDENT AND CHAIRMAN OF THE LEGISLATIVE COMMITTEE OF MUSIC OPERATORS OF AMERICA, INC.

Mr. Chairman, I am Russell Mawdsley of Holyoke, Massachusetts. I appear here in behalf of Music Operators of America, Inc., the national organization of jukebox operators which has members in every State of the Union. I am the immediate past president of the organization and presently serve as chairman of its national legislative committee.

I have been a member of MOA for 20 years, and I have served on its board of directors and as an officer in each of its several offices over the past 13 years.

I am also vice-president of the Massachusetts Coin Machine Association, the state-wide organization of jukebox operators, and vice-president of the Western Massachusetts Music Guild, a local association of jukebox operators in the western part of the State.

In my city of Holyoke, I am presently a director of one of our leading commercial banks, and I am a member of the Holyoke Planning Board, having served as its chairman for two years.

I have been a member of the board of directors of the Holyoke Chamber of Commerce. I am a past president of the Holyoke Kiwanis, and a former trustee of a local savings bank.

I am president of Russell-Hall, Inc. a firm which operates jukeboxes, amusement machines, and a full line of vending machines, in the greater western Massachusetts area, an area which is centered around the City of Springfield, Massachusetts. My firm operates about 100 jukeboxes, 150 amusement machines, and 700 vending machines, in about 450 localities in this area.

THE JUKEBOX INDUSTRY

I would now like to give you a comprehensive view of the jukebox industry, nationwide. According to industry estimates, which we believe to be substantially correct, there are about 7500 jukebox operators, and about 450,000 jukeboxes on locations throughout the United States. We also estimate that jukebox operators purchase about 75,000,000 records each year for play in their machines. Prior to 1974, there were four manufacturers of jukeboxes in the United States, including Rock-Ola, Rowe-AMI, Seeburg, and Wurlitzer. In the spring of 1974, however, Wurlitzer discontinued its manufacture of jukeboxes, due to a significant decline in jukebox business.

ECONOMIC CONDITION OF THE JUKEBOX INDUSTRY

We would also like to give your Committee as clear an understanding as possible regarding the current economic condition of the jukbox industry.

Like most other industries, the costs of our equipment and materials have been rising drastically. New jukeboxes cost up to $2500 each, as compared with a maximum of about $2000 ten years ago when this Committee held hearings on this subject (Hearings on H.R. 4347, 89th Congress, Part I, page 561). Our singles records now cost on the average 75¢ per record, which is a marked increase from the 60¢ which a typical operator reported to this Committee at its hearings in 1965 (Hearings, Part I, page 570). Wages of our electronic and mechanical technicians and our other costs of operations have risen even more drastically, and are continuing to rise.

On the other hand, jukebox operators are unable to increase prices per play so as to keep abreast of their increasing costs of operations. In some businesses prices can be increased merely by changing the price tag, and the change may not be noticed. In our industry, it is a matter of reducing the number of songs a customer can play for a quarter, and also of changing the coin receiving mechanism on every one of the operators' machines. Also, the location owner must be consulted and his consent obtained, for he may object that a raise in the cost to play music will be detrimental to his business. Prices of two plays per quarter have been established by operators in some areas, but this is by no means generally accepted. In many areas, rates are still at 10¢ per play or three plays for a quarter, and there are even some areas where the rate remains at 5¢ per play.

These conflicting and continuing pressures have necessarily and inevitably resulted in a general reduction in the level of operators' income from operation of jukeboxes. While we do not have statistics on operators' revenue throughout the United States, I think we can state with reasonable certainty that revenues are declining. As a general average, gross receipts do not exceed $25 per jukebox per week. I know that in my own area gross receipts average only $24 to $25 per machine per week. And I would like to stress that these figures are *gross* receipts before they are divided between the operator and the location owner, which is done usually on a 50–50 basis. Thus, the operators' gross revenues average something on the order of $12.50 per week. It is out of this small figure, of course, that we must pay for our equipment and all of our costs of operations.

This economic picture explains why almost all operators have diversified their activities by adding amusement and vending machines to their jukebox operations. In fact, I am quite certain from my own experience that most operators cannot afford to operate jukeboxes unless they also operate amusement

and vending machines. It may be asked, then, why do operators continue to operate jukeboxes. The answer is that location owners usually require jukeboxes to be installed as a condition to having amusement and vending machines placed in their locations. And they insist on having jukeboxes in their locations so as to attract customers to their amusement and vending machines. This situation reflects the fact that jukeboxes provide the principal musical entertainment which most working people can now afford. Jukeboxes are, indeed, as someone has said, "the poor man's orchestra."

EFFECT OF H.R. 2223 ON THE JUKEBOX INDUSTRY

H.R. 2223 will have a serious impact on the jukebox industry. It must be noted that the jukebox industry has never before been subjected to copyright performance royalties. Thus, *any* new royalty will impact severely upon the industry, and will necessitate economic readjustments throughout the industry. The $8 royalty under Section 116 will add a completely new burden in the total sum of at least $4,000,000 per year. Over and above this, there will be at least $4,500,000 in mechanical royalties on the 75,000,000 records (at 6¢ per record under Section 115) which jukebox operators buy each year. This amounts to an increase of at least $1,500,000 per year in mechanical royalties over the existing rate of 2¢ per recording (4¢ per record). We understand that a study made for the Record Industry of America (RIAA) indicates that the increase which would result from the proposed new 3¢ mechanical royalty would amount to at least $5 per jukebox per year, or to some $2,250,000 more than the existing mechanical royalty. Thus, it is evident that the royalty burden imposed upon jukebox operators by H.R. 2223 will amount to at least $8,500,000 per year. We hope the Committee will agree with us that this is more than a fair return to copyright owners from this industry of small businessmen who serve as promoters of records, as well as being the largest single industry consumer of records.

THE JUKEBOX INDUSTRY POSITION ON H.R. 2223

We would like to summarize the position of Music Operators of America, Inc., on the jukebox royalty provisions of H.R. 2223 as follows:

1. We support the proposed new $8 jukebox royalty as provided in Section 116.
2. We oppose any increase in that proposed royalty.
3. We also oppose any provision for readjustment of that royalty through a Copyright Royalty Tribunal, or otherwise.
4. And finally, we oppose any fee for registration of jukeboxes.

Our reason for supporting the $8 royalty is the fact, as your Committee is well aware, that our representatives made an agreement with the other interested parties to accept this royalty at the time the General Revision Bill (H.R. 2512, 90th Congress) was under consideration by the House of Representatives. It was, and is, our understanding that this compromise was intended to be a complete resolution of royalty claims against our industry. We have stood by this compromise in the expectation that all other interested parties would likewise do so.

We oppose any increase in the proposed $8 royalty for whatever reason, whether because of adjusments in the Consumer Price Index, or otherwise. As we have shown above the jukebox industry simply cannot withstand any further increase in copyright royalty burdens.

Our opposition to any provision for a readjustment of the proposed statutory royalty rates rests upon the same grounds, that is, that the jukebox royalty is an agreed compromise which does not include any provision for such readjustment, and further that the jukebox industry cannot withstand any royalty increases, and should not be exposed to the uncertainties of such open-ended liabilities.

We continue to oppose any fee for the registration of jukeboxes, again, for the reason that such a fee would be inconsistent with the agreed compromise, and for the further reason that the administrative costs of registering jukeboxes should be borne by the beneficiaries of the new royalty, rather than by the jukebox operators who bear the burden of the royalty. In this connection, we would like to ask your Committee to delete from Section 116(b)(1)(A) the phrase which appears at lines 4 and 5 of page 24 of the Bill, and reads as follows: "and in addition to the fee prescribed by Clause (9) of Section 708(a)". That phrase was left in the companion Senate bill (S. 1361, 93d Congress) through oversight when the registration fee that was then provided by Section 708(a)(9) was deleted from that Bill. We understand there is no objection by the Copyright

Office to this request and that the staff of your Committee already have been advised of this needed correction.

THE MECHANICAL FEE

Section 115 would increase the existing mechanical fee from 2¢ to 3¢ per recording. This new royalty would have its most burdensome effect upon the jukebox industry, as this industry is the largest user of phonograph records. Thus, the jukebox industry faces a doubling up of new royalties under both Sections 115 and 116. This goes far beyond the proposal offered by our representatives in the 1965 hearings when they recommended an add-on to the mechanical fee to be paid by jukebox operators (Hearings, Part I, page 583). In 1966 and 1967, this Committee recommended an increase in the mechanical fee from 2¢ to 2½¢ (H. Rept. No. 83, 90th Congress, page 74), and that was the amount of the proposed mechanical fee when the $8 jukebox royalty was agreed to and adopted. We urge the Committee to require music publishers and composers to come forward with proof that any increase in the existing royalty is needed to compensate them fairly for the music they produce. In the absence of such persuasive proof we urge the Committee to retain the present rate of 2¢ per recording.

RECORDING ARTS PERFORMANCE ROYALTY

Although H.R. 2223 does not include any provision for a recording arts performance royalty, we note such a proposal has been made in H.R. 5345, a bill which we understand is also before this Committee. We are opposed to this proposed new royalty for the reason that it would upset the compromise agreement by which the proposed $8 jukebox royalty was first established. We also oppose any such new royalty as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kinds of musical copyrights they should be shared in a single royalty among all of those who claim to have contributed to the finished product.

CONCLUSION

In closing, I would like to state to the Committee that within the jukebox industry there have been, and still are, many who vigorously oppose conceding any performance royalty to copyright owners. This is because they believe jukebox operators perform a compensating service to the benefit of copyright owners. Any new proposal to increase the royalty rate, or to subject it to further revision, would substantially intensify that opposition and would make it increasingly difficult for the industry's leaders to preserve support for the provisions of the Bill as they have been agreed to.

We earnestly urge your Committee, therefore, to approve the provisions of H.R. 2223 relating to the jukebox industry in their present form, with the exception of the minor change in Section 116(b)(1)(A) discussed above, and excepting also any increase in the mechanical royalty under Section 115.

Thank you for giving us this opportunity to present the views of Music Operators of America, Inc.

TESTIMONY OF RUSSELL MAWDSLEY, CHAIRMAN, LEGISLATIVE COMMITTEE, MUSIC OPERATORS OF AMERICA, ACCOMPANIED BY NICHOLAS E. ALLEN, COUNSEL

Mr. MAWDSLEY. Yes.

Mr. Chairman, I am Russell Mawdsley of Holyoke, Mass. I appear here in behalf of Music Operators of America, Inc., the national organization of jukebox operators which has members in every State of the Union. I am the immediate past president of the organization and presently serve as chairman of its national legislative committee.

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H.R. 2223 will have a serious impact on the jukebox industry. It must be noted that the jukebox industry has never before been subjected to copyright performance royalties. Thus, any new royalty will impact severely upon the industry, and will necessitate economic readjustments throughout the industry. The $8 royalty under section 116 will add a completely new burden in the total sum of at least $3.6 million per year. Over and above this, there will be at least $4.5 million in mechanical royalites on the 75 million records—at 6 cents per record under section 115—which jukebox operators buy each year. This amounts to an increase of at least $1.5 million per year in mechanical royalties over the existing rate of 2 cents per recording—4 cents per record. We understand that a study made for the Record Industry of America, RIAA, indicates that the increase which would result from the proposed new 3 cents mechanical royalty would amount to at least $5 per jukebox per year, or to some $2,250,000 more than the existing mechanical royalty. Thus, it is evident that the royalty burden imposed upon jukebox operators by H.R. 2223 [illegible]l amount to at least $8 million per year.

We hope the committee will agree with us that this is more than a fair return to copyright owners from this industry of small businessmen who serve as promoters of records, as well as being the largest single industry consumer of records.

We would like to summarize the position of Music Operators of America, Inc., on the jukebox royalty provisions of H.R. 2223 as follows:

One: We support the proposed new $8 jukebox royalty as provided in section 116.

Two: We oppose any increase in that proposed royalty.

Three: We also oppose any provision for readjustment of that royalty through a copyright royalty tribunal, or otherwise.

Four: And finally, we oppose any fee for registration of jukeboxes.

Our reason for supporting the $8 royalty is the fact, as your committee is well aware, that our representatives made an agreement with the other interested parties to accept this royalty at the time the general revision bill, H.R. 2512, 90th Congress, was under consideration by the House of Representatives. It was, and is, our understanding that this compromise was intended to be a complete resolution of royalty claims against our industry. We have stood by this compromise in the expectation that all other interested parties would likewise do so.

We oppose any increase in the proposed $8 royalty for whatever reason, whether because of adjustments in the Consumer Price Index, or otherwise. As we have shown above, the jukebox industry simply cannot withstand any further increase in copyright royalty burdens.

Our opposition to any provision for a readjustment of the proposed statutory royalty rates rests upon the same grounds, that is, that the jukebox royalty is an agreed compromise which does not include any provision for such readjustment, and further that the jukebox industry cannot withstand any royalty increases, and should not be exposed to the uncertainties of such open-ended liabilities.

We continue to oppose any fee for the registration of jukeboxes, again, for the reason that such a fee would be inconsistent with the agreed compromise, and for the further reason that the administrative costs of registering jukeboxes should be borne by the beneficiaries of the new royalty, rather than by the jukebox operators who bear the burden of the royalty. In this connection, we would like to ask your committee to delete from section 116(*b*)(1)(A) the phrase which appears at lines 4 and 5 of page 24 of the bill, and reads as follows: "and in addition to the fee prescribed by clause (9) of section 708(*a*)."

That phrase was left in the companion Senate bill—S. 1361, 93d Congress—through oversight when the registration fee that was then provided by section 708(*a*)(9) was deleted from that bill. We understand there is no objection by the Copyright Office to this request and that the staff of your committee already have been advised of this needed correction.

Section 115 would increase the existing mechanical fee from 2 to 3 cents per recording. This new royalty would have its most burdensome effect upon the jukebox industry, as this industry is the largest user of phonograph records. Thus, the jukebox industry faces a doubling up of new royalties under both sections 115 and 116. This goes far beyond the proposal offered by our representatives in the 1965 hearings when they recommended an add-on to the mechanical fee to be paid by jukebox operators—hearings, part I, page 583.

In 1966 and 1967, this committee recommended an increase in the mechanical fee from 2 cents to 2½ cents—House Report No. 83, 90th Congress, page 74—and that was the amount of the proposed mechanical fee when the $8 jukebox royalty was agreed to and adopted. We urged the committee to require music publishers and composers to come forward with proof that any increase in the existing royalty is needed to compensate them fairly for the music they produce. In the absence of such persuasive proof, we urge the committee to retain the present rate of 2 cents per recording.

Although H.R. 2223 does not include any provision for a recordings arts performance royalty, we note such a proposal has been made in H.R. 5345, a bill which we understand is also before this committee. We are opposed to this proposed new royalty for the reason that it would upset the compromise agreement by which the proposed $8 jukebox royalty was first established. We also oppose any such new royalty as a matter of principle because we believe that there should be but one royalty for any one performance, and that if Congress creates any new kinds of musical copyrights, they should be shared in a single royalty among all of those who claim to have contributed to the finished product.

In closing, I would like to state to the committee that within the jukebox industry there have been, and still are, many who vigorously oppose conceding any performance royalty to copyright owners. This is because they believe jukebox operators perform a compensating service to the benefit of copyright owners. Any new proposal to increase the royalty rate, or to subject it to further revision, would substantially intensify that opposition and would make it increasingly difficult for the industry's leaders to preserve support for the provisions of the bill as they have been agreed to.

We earnestly urge your committee, therefore, to approve the provisions of H.R. 2223 relating to the jukebox industry in their present form, with the exception of the minor change in section 116(*b*)(1)(*A*) discussed above, and excepting also any increase in the mechanical royalty under section 115.

Thank you for giving us this opportunity to present the views of Music Operators of America, Inc.

Thank you, Mr. Chairman.

Mr. KASTENMEIER. Thank you, Mr. Mawdsley.

Mr. Mawdsley, for my benefit, I would ask you, or Mr. Allen, on page 8 you refer to "and in addition to the fee prescribed by clause (9) of section 708(a)," which certainly is in the bill, you have assumed that to be 50 cents.

How did you arrive at the fact that that would be 50 cents, you know, just for my benefit?

Mr. ALLEN. Well, are you speaking now—are you speaking of the registration fee?

Mr. KASTENMEIER. Yes; correct.

Mr. ALLEN. Well, it was 50 cents when added to the bill by the Senate subcommittee back in 1969, I believe. It was at that time that the committee reversed their original Senate bill provision with respect to the royalty and adopted the $8 as passed by the House, which added three other things. One of them was the 50-cent registration fee.

Mr. KASTENMEIER. It does not appear in the bill.

Mr. ALLEN. That is right.

Mr. KASTENMEIER. Designated as 50 cents, but a sum—it would be that?

Mr. ALLEN. We are assuming it would not. We are hoping it would not be put back in there.

Mr. Chairman, we are only talking about 50 cents because that is what it was. It never was anything else, and when the 50-cent registration fee was deleted by the Senate Judiciary Committee, that tie-in phrase that Mr. Mawdsley referred to was not also deleted. It really was just an oversight, and I understand both on the Senate side and on

this side, that it is considered to be a drafting error that would be corrected?

Mr. KASTENMEIER. I understand.

One other question I have. Supposing a bill more or less like this is passed, and a number of years go by, and you are able to live with and absorb the $8 fee, but it becomes evident that there has been an erosion, that there has been a cost-of-living increase, and that given the standards of, let us say, 1975, 1976, or 1977, with inflation and whatnot, suggests that a comparable fee at that time, some years hence, let us say the year 1980, would be $10 or $12. Would you oppose the matter being reopened for a determination of what an equitable fee would be by Congress or otherwise for the purpose of an adjustment, or do you consider the $8 nonadjustable, in concrete forever?

Mr. ALLEN. Well, Mr. Chairman, this is the way I think I should put this: The jukebox industry, the jukebox operators look to you, Mr. Chairman, and they look to the Congress to do the thing that is right in the public interest. Certainly no future Congress is going to be bound by what this Congress does, and no future committee is going to be bound by what your committee does. But, the jukebox people look to Congress for their protection, and we have made this point, or endeavored to make this point, whenever this question has cor[illegible]p in the past. We have made it when your committee was holding [illegible] ings 10 years ago. We cannot bargain on equal terms with the big performing rights societies, and we know it. We know from the history of the societies themselves that BMI was spawned because ASCAP could not be dealt with. We do not expect that we can bargain on equal terms with the people who control the music we play, but we can look to Congress.

Absent a ceiling in the statute, and this is the thing that has been so important to us all the way through, and so important to us when we agreed to the $8, the thing that we need most is the protection that is afforded by a statutory ceiling.

Now going back, if the Congress in its wisdom, and your committee in its wisdom, in the future should decide that a higher rate is in order, certainly our industry will abide by it and will gladly do so. B[illegible] we do not feel that we can bargain on equal terms, nor do we feel [illegible] can before a copyright tribunal litigate, let us say, on equal terms with an adversary who can pour in millions of dollars in an effort to raise the fee.

Ours would be a pittance. We could not do the job adequately of meeting the kind of opposition we anticipate.

Mr. KASTENMEIER. Well, I appreciate your statement, and that, as I recall, is a consistent statement, although I do wonder, with all deference, whether the Music Operators of America with 7,500 members plus the manufacturers, even though it may be an economically distressed industry at the moment, are not on equal terms with the three performing rights societies, given, as I think one of you has suggested, the slight difference from Mr. Korman's figures, that their gross receipts are somewhat under—I think you suggested $100 million, and they suggest somewhat over, that you are not on really equal economic footing with them.

Now, I should understand why it is that you would not want to have to bargain if, in fact, you were protected statutorily, so that such bargaining was unnecessary, obviously. But, the question as to whether

you are equals in a tribunal, should one be created, is a question about whose answer I am not very sanguine.

Mr. ALLEN. It is a matter of economics, Mr. Chairman, and just the sheer power of financial strength. Billboard magazine last month reported that the societies' yearly take is $97 million, almost $100 million. That is a different world from the jukebox people, whose incomes are in just thousands. They cannot possibly organize studies, economic studies or reports, analyses that come anywhere near what their opponents would be able to do; and that is why we do not feel that we can look down that road for the protection that we believe would be much more meaningful to us through the Congress.

Mr. KASTENMEIER. Yes.

I appreciate your statement, although in terms of economics, Mr. Mawdsley says that a box grosses perhaps $25 a week, and then it has to be split and so forth.

Looking merely at the gross alone, 50 times $25, $750 a year, times around half a million boxes, suggests somewhere approaching grosses handled by machines in the order of $375 million. That is not the net income, of course. That compares with perhaps $100 million handled by the performance rights societies in a year. So in comparing economic strength, one group against the other, you know, I am not altogether persuaded that you are at that sort of disadvantage, notwithstanding the fact that I should understand why you would not want to have to negotiate at all.

Mr. ALLEN. I would like to respond to some of the figures, Mr. Chairman.

You were using a $25 figure, and our point is that our people receive only a half of that.

Mr. KASTENMEIER. Yes. That is the outer figure of total money that the operator puts his hands on. He has to share that 50–50, and he then has to buy the machines, he has got the overhead, so his net is first of all, you split the $375 million in two, and then figure a net on the balance of $180 million plus. Obviously it is much smaller as a figure for 7,500 operators.

Mr. ALLEN. Now, our organization, Mr. Chairman, is not 7,500. It is about less than 1,000. So, we are small. We are small people compared with the people on the other side of this problem

Mr. KASTENMEIER. Mr. Mawdsley said there were 7,500, but I gather those that are actual members of your organization are more or less 1,000?

Mr. COLLINS. Right.

Mr. MAWDSLEY. I maybe have not explained what I meant to imply. We feel there are about 7,500 operators of jukeboxes in the country.

Mr. KASTENMEIER. That might be affected by this bill, whether or not they are members of your organization?

Mr. MAWDSLEY. That is right, and the members of our association are about 1,000.

Mr. PATTERSON. Mr. Chairman, if I may refer the committee to hearings before the Senate Subcommittee on Patents, Trademarks, and Copyrights on S. 597 in 1967, there is a study in there prepared at our request by Price, Waterhouse & Co. You may recall the details of that. And it appears on pages 268 through 273. But the Price, Waterhouse study states:

For the operators who own less than 5 machines, and who constitute 54.2 percent of the total replies received, the average amount available for salary and for Federal and State income taxes is less than the average for all operators and is $4,966 a year or $414 a month. If the annual amount is reduced by $1,122, representing a 6-percent return on a $23,000 investment, and $517 for the proposed royalty, the owner-operator would have $3,027 a year, or $252 a month available for salary and Federal and State income taxes.

Now they sent out something like 22,000 questionnaires to the estimated 7,000 jukebox operators, and I do not think that the economics of the industry have changed significantly, because I do know the price of the machines has gone from $2,000 to $2,500, and the price per play has remained fairly static, so that the average small operator's economic position is no better than it was when the $8 per year fee was agreed as a compromise.

Mr. KASTENMEIER. Yes. The thrust of that particular report is that the net an average operator makes is what? Around just under $5,000?

Mr. PATTERSON. That is right.

Mr. MAWDSLEY. May I point out, Mr. Chairman, that the figures that I used here on page 4, where I say I note the prior gross receipts average only $24 or $25, these are our figures that I derived from my company. Now these are highly disputed by some of the people that are on this panel as they think that my average is a little bit higher than theirs and that in certain sections of the country it is much lower than my average.

I truthfully had nothing to go on but my own figures from my own company, and we may be a little bit different than some of the other companies in the way we operate, and so we average a little bit higher.

Mr. KASTENMEIER. I am surprised that it is that low if we are dealing in quarters rather than dimes. You know, that is only 100 quarters per machine in a week, and that is not very much.

Mr. MAWDSLEY. If I may respond to that, our average in our company went up slightly when we did move from 10 cents to 25 cents a play, but not drastically. I think it went up probably by $1.35 per week per machine when we made the changeover from a 10-cent play to two for a quarter play.

Mr. KASTENMEIER. I am going to yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have one question. There is a section 115 and section 116 and both provide for a change in the mechanical fees from your testimony, is that correct?

Mr. ALLEN. No; not quite, Mr. Congressman. It is 115. It changes the mechanical.

Mr. PATTISON. From what, 2 cents to 3 cents?

Mr. ALLEN. Yes.

Mr. PATTISON. Mr. Mawdsley testified that there was a reference from a change to a 2 cents to 6 cents.

Mr. ALLEN. Mr. Congressman, the 6 cents is the combination of the two sides, that is the 3-cent royalty looking at the record as taking two or containing two songs.

Mr. PATTISON. So we are talking about the same thing, the 2 cents to the 3 cents, and that is reflected, is it not, to the price of the record?

Mr. ALLEN. Yes.

Mr. PATTISON. You do not pay that each time you play it?

Mr. ALLEN. Yes, Mr. Congressman. It is reflected in the price of the record, and that is why the jukebox industry insists that it is carrying

the burden of the mechanical fee. The manufacturers certainly do pass it on, and the record industry study referred to, was made, and you will be receiving it next week, includes an exhibit which establishes the cost of about $5 a box as a result of the 1-cent increase.

Mr. PATTISON. So that you could expect, if you were paying 75 cents for a record that you would pay 76 cents?

Mr. ALLEN. No, sir. It is in the 75 cents.

Mr. PATTISON. It is 2 cents now? And if it goes from 2 cents to 3 cents, then you expect it would go to 76 cents?

Mr. ALLEN. It probably would.

Mr. PATTISON. But that would be the total effect on the increase in the mechanical fee from 2 cents to 3 cents?

Mr. ALLEN. Yes.

Mr. PATTISON. I have no further question.

Mr. KASTENMEIER. That amount varies in a sense. They assume now they are paying $3 million a year in mechanical royalties buried in the price of the record, and that would be raised to 4.5, 50 percent by virtue of the mechanical royalty provided for in the bill.

Just one other question. As candidly as you can, could you tell me what happened in the Senate Judiciary to convince them that they ought to adopt a tribunal; that is to say, they are to make section 116 subject to tribunal readjustment after July 1, 1977? What persuaded them? Why were they persuaded? What equity did they see?

Mr. ALLEN. This was in executive session. The statements that Senator McClellan has made, or his counsel for him, are to the effect that they want to see all of the statutory rates dealt with similarly. Now, we answered in this way: CATV interests could never agree on a royalty, they remain widely apart even I believe to this time. Now, that was 114. The mechanical fee that we have been talking about, there was no incentive really from the proponents of that section to take it out of the copyright tribunal, because those same interests were advocating the new performance royalty and they could not argue against it.

Now, in our situation we are very much unlike CATV, and this is what we stressed in our responses to Senator McClellan. We had an agreement. We did not need a copyright royalty tribunal to resolve the current issue of what the royalty rate should be. CATV did. And the people behind the mechanical fee were neutral on it.

But the fact still remains we have an agreement, an agreement which we intended and expected to serve as a ceiling, and, therefore, the rationale for bringing the other statutory rates into the control of a copyright tribunal does not apply in our situation. And I think that is the reason behind the Senate action in taking it out.

I think I know a little about that one too, how that came about. It was for that very reason that we had an agreement. There was no need for any further review of a rate that had been agreed on, and I would surely like to emphasize this aspect of our problem. And I guess this is the nub of the hearing today, whether there should be readjustment of this rate. We are going right now from zero performance fee to a proposed $8. There is a huge jump there, and we have endeavored to show it is all we can stand. So, it is not like revising a rate. It is establishing something new that this industry has never had to carry before, and it is going to require a lot of adjustment, and undoubtedly

it will result in marginal locations, or a certain percentage anyway in marginal locations, being taken out.

Mr. KASTENMEIER. My last question is, you have heard, I believe it was Mr. Korman's suggestion, how if there were tribunal effective after July 1, 1977, how it would work, how you would negotiate, and what the history has been of ASCAP, talking about his own performing rights society, in negotiations with others up or down, as a matter of fact. How do you see it working? How would it work? Supposing the Senate bill as it came out of committee were, in fact, then enacted into law, despite your protestations. How would it work? That is, how do you see it working any differently than Mr. Korman suggested it might work operationally in terms of your getting together and negotiating?

Mr. ALLEN. Well, Mr. Chairman, the bill as it came out of the Senate does not have this in it.

Mr. KASTENMEIER. No; I understand. This is a hypothesis only, that somehow a bill as it came out of committee were adopted and you found yourselves, your industry, in a position of having a tribunal, a $8 fee, the other thing that you agreed upon, but there would be a tribunal. Then there would be notice in the Federal Register by the Register of Copyrights and so forth. How do you see it working? Presumably you and others, perhaps you and Mr. Patterson, and various others here, the officers of the organization would be involved as well, and we would be getting together with representatives of the performing rights societies and negotiating some way. I was wondering how you see it working if you were, you know, in that position, if that happened to you?

Mr. PATTERSON. I would think, Mr. Chairman, that there would be the alternative of negotiating with the representatives of the societies when they advise that they felt that the fee should be $12 per year or alternatively, trying to develop in depth and in detail the economics of the industry and whether there had been changes that merit that. And as Mr. Korman said, under the consent decree, ASCAP has yet to have the Federal court establish a decree although there have been a number of proceedings. The parties have arrived at a negotiated rate. But I think again, using the term you did, in candor, the reason the exception has prevailed for 40 years or more is because the jukebox industry has been a grassroots, rural industry in terms of image and in terms of looking to Congress for protection, while the performing rights societies have essentially been urban or metropolitan in image. And going to a copyright tribunal, the operators, in my judgment, feel that they would be at a disadvantage from a standpoint of sheer weight of bargaining strength, whereas if they were looking to their Congressman to accept as reasonable or not an increase in the statutory rate, their position would be more effective.

Mr. KASTENMEIER. But you do not take any major difference from the way Mr. Korman suggested it would operate, what he suggested in terms of hypothetically how it would operate?

Mr. PATTERSON. If it were there, for practical purposes I think that is how it would operate.

Mr. KASTENMEIER. Well, thank you very much.

If Mr. Pattison has no more questions, I would like to thank all the members of the panel for their contribution this morning. And in terms

of the case of Mr. Nicholas Allen and Mr. Perry Patterson, we want to greet you back to a hearing before this committee after an absence of many years. And I would express gratitude of the committee to the rest of you who as officers of the organizations and who have otherwise appeared before us this morning. Thank you.

Mr. COLLINS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. This concludes this morning's hearing on one aspect of copyright, section 116 on the impact on jukeboxes in America.

On next Thursday morning, June the 5th in this room at 10 o'clock, the committee shall hear from Mr. Ashton Hardy, General Counsel of the Federal Communications Commission; Mr. Thomas Keller, the Acting General Counsel of the Office of Telecommunications Policy; Mr. Fulton Brylawski, professor; Mr. Rondo Cameron and Mr. Donald Merry of Sicom Electronics Corp. So until that time the subcommittee stands adjourned.

Mr. ALLEN. I am sorry, I forgot to request permission. We are not going to be present, I think, at the later hearings having to do with mechanical fee and the royalty for the recording arts, and we would like to have permission to file whatever reply we think might be appropriate——

Mr. KASTENMEIER. Yes.

Mr. ALLEN [continuing]. To the statements that will be made.

Mr. KASTENMEIER. Without objection, not only will the prepared statements that you have made today be accepted for the record in full, in addition to your oral statements, but any statement the Music Operators of America or Mr. Patterson may have in connection with the question of mechanical royalty will be accepted for the record.

Until Thursday next, 10 o'clock in this room, the subcommittee stands adjourned.

[Whereupon, at 12:35 p.m. the subcommittee recessed to reconvene on Thursday, June 5, 1975, at 10 a.m.]

COPYRIGHT LAW REVISION

THURSDAY, JUNE 5, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to call, at 10:15 a.m., in room 2226, Rayburn House Office Building, the Honorable Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Pattison, and Railsback.

Also present: Herbert Fuchs, counsel, and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

The committee is meeting this morning for the purpose of continuing hearings on the copyright revision bill, H.R. 2223, and other bills relating to the subject. This morning we have a series of witnesses, the first two representing the Federal Government.

I would first like to call Mr. Ashton Hardy, the General Counsel, Federal Communications Commission. Mr. Hardy.

Mr. HARDY. Thank you, sir.

Mr. KASTENMEIER. You are most welcome. We would appreciate it if you would proceed.

TESTIMONY OF ASHTON R. HARDY, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. HARDY. Thank you, Mr. Chairman.

Mr. Chairman, I am pleased to have the opportunity to present the views of the Federal Communications Commission with respect to H.R. 2223, a bill for the general revision of the copyright law.

The committee is to be commended for addressing the very serious need for comprehensive reform of our Federal copyright laws. As you know, the statute governing this subject was enacted in 1909 and was drafted in terms of the problems of that era. Motion pictures and sound recordings as we now know them were not envisioned at that time, nor were radio and television.

Mr. Chairman, I realize that the scope of this legislation is broad and that your subcommittee is concerned with such diverse subjects as library photocopying, bootlegging of film and sound recordings, and the ownership of presidential documents. The Commission has no jurisdiction over matters such as these and consequently I will not comment on them. However, the Commission has asserted juris-

diction and promulgated comprehensive rules governing the cable television industry, the subject of section 111 (c) and (d) of the proposed legislation, and thus my testimony addresses some of the background of the cable copyright problem.

Cable television is among those forms of communication which were not foreseen or provided for in the 1909 act. For this reason a complex controversy arose over the copyright liability of cable systems. I would like to trace briefly the evolution of this controversy and the Commission's involvement in it.

When the first cable systems began to operate, most merely extended local television service to rural areas where it had not been previously available. They did not import distant signals into markets where television service already existed, nor did they originate programing or serve major metropolitan areas. For these reasons, broadcast licensees did not anticipate that the new industry would pose the copyright problems that now exist. Similarly, copyright proprietors were generally unconcerned about the growth of cable because they continued to receive royalties from conventional broadcasters and did not anticipate that CATV would affect this revenue.

Initially the FCC expressed reluctance to assert jurisdiction over cable in the absence of specific legislative authorization. In 1959, 26 FCC 402, the Commission ruled that cable systems could retransmit programs without the express authority of the originating station. We reasoned that cable was merely a means of extending television service and did not pose an economic threat to the broadcast industry. Pursuant to this ruling, cable operators were free to distribute programing without paying copyright royalties.

However, the attitude of the various parties changed abruptly when cable systems began to import distant signals, originate programing, and provide service in metropolitan markets which posed clear competitive threats to broadcasters. Copyright questions then came into focus and broadcasters and copyright proprietors sought protection from the FCC and the courts.

The Commission responded by abandoning its former laissez-faire posture on cable and in 1962 denied a cable system permission to import additional distant signals by microwave. I refer, of course, to the Commission's ruling in the *Carter Mountain Transmission Corp.* case, which was first affirmed by the District of Columbia Circuit Court of Appeals and certiorari was denied by the Supreme Court. [32 FCC 459, aff'd 321 F. 2d 359 (D.C. Cir.), *cert. denied*, 375 U.S. 951 (1963).] The Commission was influenced in its decision by the fact that the proposed importation would pose an economic threat to a television licensee which could deprive the public of his service.

In 1965 the Commission further asserted its jurisdiction over cable in its first report and order on cable television—38 FCC 683—which contained the so-called nonduplication rule. This rule manifested the Commission's desire to protect the public interest in existing television service, and to encourage the development of local broadcast stations. It prevented duplication of the originating station's signal on a cable system for a certain period before and after carriage by that station. Under the rule, a copyright proprietor could limit the time and area in which a program was shown and a broadcaster could present

programing previously shown on a network on a delayed basis without running the risk of losing his exclusivity to a cablecaster.

The Commission's second report and order, 2 FCC 2d 725, adopted in 1966, required that all new cable systems in the top 100 television markets, which parenthetically serve 90 percent of all television viewers, obtain FCC approval before importing new distant signals. Approval was conditioned upon a finding that the new service would be consistent with the establishment and healthy maintenance of television broadcast service in the area. The effect of the rule made it virtually impossible for cable systems to establish new service in urban markets.

Subsequently, a San Diego cable operator challenged the Commission's authority to bar expansion of its system under the major-market-distant signal rule. However, the Supreme Court upheld the Commission's action as reasonably ancillary to its duty to regulate television broadcasting. I refer, of course, to the *Southwestern Cable* case decided by the Supreme Court [392 U.S. 157, (1968)].

Because FCC regulation had not addressed many of the copyright questions posed by the advent of cable, broadcasters and cable proprietors sought relief in the courts. They argued for an expansive interpretation of the Copyright Act which would include a cable broadcast as a public performance and thus subject cable operators to copyright liability.

The Supreme Court confronted this issue in the now famous *Fortnightly Corp.* v. *United Artists Television, Inc.* case, 392 U.S. 290—1968—where United Artists sought to recover royalties from Fortnightly, a West Virginia cable system which imported into its market signals which could not be received through ordinary over-the-air means. Fortnightly argued that it provided merely a reception service, did not "perform", and therefore escaped liability.

In finding for the cable system, the Court employed a functional test under which it held that the cable system was a "viewer", not a "performer." Since "viewing" fell short of infringement, no liability was incurred. Implicit in the Court's opinion was the view that Congress is better equipped than the judiciary to strike an appropriate balance among the various competing interests.

The Commission then issued proposed general rules for cable operation [15 FCC 2d 417 (1968)]. This proceeding served as a catalyst for serious discussions concerning the manner in which the industry should be regulated. As this lengthy proceeding neared its close, the Commission forwarded a letter of intent on August 5, 1971, to Congress which outlined its plans for the near-term regulation of cable. In our letter, we acknowledged the argument raised by several parties that we should defer promulgating rules governing cable until new copyright legislation was enacted. In response we expressed the view that cable regulation and copyright could be separately considered. Accordingly, we urged the Congress to promptly enact a copyright statute and stated our intent to proceed with rulemaking. Among the rules outlined in our letter was a solution to the distant signal problem which would permit limited importation of such signals based upon a formula geared to market size, and a provision allowing program exclusivity in the top 100 markets.

In our letter, we encouraged industry principals to agree upon a schedule of royalty fees in negotiations then in progress. The result of these negotiations was the so-called "consensus agreement" which suggested certain revisions to the proposal advanced in our letter of intent and pledged the parties to support separate cable copyright legislation. The legislation was to establish a system of copyright liability for cable carriage of broadcast signals with compulsory licensing of signals authorized by the Commission. A schedule of royalty fees or other payment mechanism was to be agreed upon by copyright proprietors and cable operators. In the absence of agreement, the parties agreed to submit to compulsory arbitration.

The Commission found the provisions of the consensus agreement to be reasonable. Consequently, those aspects of the agreement subject to our jurisdiction were implemented in our first comprehensive cable rules issued in 1972. [36 FCC 2d 143.] We took this action believing that it would open the door to cable development and that copyright legislation would be enacted shortly thereafter. Unfortunately, the negotiations concerning fee schedules proved inconclusive, and compulsory arbitration has not been forthcoming. Thus, legislative efforts in this area have been stymied.

The importance of a prompt resolution of the copyright problem was heightened by a second ruling of the Supreme Court on the cable copyright issue. In *CBS* v. *Teleprompter*, 415 U.S. 394 (1974), a Teleprompter cable system imported signals from as far as 600 miles from its service area, as opposed to Fortnightly's 82 miles. It had also engaged in advertising not confined to program origination channels and had interconnected with other systems for specialized programing. Despite the disparity of distance and the presence of services characteristic of broadcasting, the court held that Teleprompter retained its "viewer" status and had not "performed" under the *Fortnightly* rationale. Thus, it was not liable under the Copyright Act.

Seemingly announcing the end of its resilience to construe the act to accommodate changing conditions, the Court called upon Congress to enact remedial legislation. Speaking through Mr. Justice Stewart, it said:

> These shifts in current business and commercial relationships * * * simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field must be left to Congress. (415 U.S. at 414.)

In view of the preceding analysis, it is clear that if a solution to the cable copyright dilemma is to be reached, it will only be through congressional action. I will not rehash the details of the various attempts made in Congress to enact legislation, for I am confident that they are better known to your subcommittee, Mr. Chairman, than they are to the Commission. Suffice it to say that legislation has been considered by at least one house of Congress every year for the last 10. Furthermore, I do not wish to offer detailed comments with respect to the specifics of section 111 (c) and (d) of the legislation now before you. Enactment of substantive copyright law is an area in which the Commission has no jurisdiction and in which we defer to congressional judgment and expertise.

However, the Commission has expressed some general views on the subject which perhaps bear repeating in this forum. First of all, we wish to express the importance of prompt congressional action. Mr. Chairman, this controversy has troubled the communications industry for nearly a decade. It continues to be a source of great conflict between the industries we regulate. We believe that it is time that the Congress place the interests of these parties in balance and resolve their differences through legislation. In this connection, we believe that it is essential and altogether just that cable operators pay reasonable copyright royalties. However, we express no judgment as to what precise form this legislation should take.

In our comments on previous legislation, we have on several occasions called attention to matters which we believed could be more effectively handled through the flexible approach afforded by the administrative process. In those comments we suggested that these matters not be written into substantive law but left to agency discretion. We made those remarks in connection with provisions which would have codified distant signal, minimum signal carriage, exclusivity, and sports blackout policies.

We continue to feel strongly that matters of this nature are more appropriately left to the Commission where they can evolve as the cable industry matures. For these reasons we were pleased that the Senate deleted provisions of this nature from S. 1361 of the 93d Congress, and that the legislation now before your subcommittee either omits reference to such regulatory matters or expresses them in broad general terms within which we can exercise considerable discretion. We are hopeful that any legislation which you report out will conform to these guidelines.

Mr. Chairman, this concludes my remarks. I would be pleased to respond to questions.

Mr. KASTENMEIER. Thank you, Mr. Hardy. I wish to compliment you on a very concise, coherent, and highly useful statement. We need to be aware of the history of what has transpired as seen through the eyes of the Commission.

Does the Commission, the Federal Communications Commission authorize—it does authorize or give licenses for cable television?

Mr. HARDY. Yes, sir. We issue certificates of compliance to cable television systems once they are initially franchised by a local franchising authority in the community in which the cable system is to operate.

Mr. KASTENMEIER. The first reference you make is to 1959. At that time did you authorize or license them in any sense?

Mr. HARDY. In 1959, no, sir. We did not at that time issue certificates of compliance.

Mr. KASTENMEIER. Did the Commission participate in any respect whatsoever in either the *United Artists-Fortnightly* case, or the *CBS-Teleprompter* case as amicus curiae or otherwise?

Mr. HARDY. No, sir, we did not participate in those proceedings before the courts.

Mr. KASTENMEIER. However, the Commission, I take it, it is the view of the Commission that it differs with those decisions insofar as they do not cause cable operators to pay reasonable copyright royalties?

Mr. HARDY. I do not believe we differ with the decision of the Court in that respect. I think that the Court pointed out that the 1909 legislation, the statute dating back to 1909, could not be construed to cover the industries which developed subsequent to that legislation. I am not sure that we agree with the Court's ruling, but we live with the Court's ruling. The Court has concluded that that statute was not adequate to cover the industry as it developed.

We do support at this time, as I have stated in our prepared remarks, some form of copyright legislation which would impose an obligation on the part of the cablecasters to pay some reasonable copyright royalties. The amount, the details of that legislation, we would leave to the expertise of Congress.

Mr. KASTENMEIER. Ten years ago when the matter came before us in the 1965 hearings the technique and the industry were commonly known as community antenna television, CATV. Now, it is known as cable television. From a service or technological standpoint, has the industry changed in 10 years sufficiently for us to take some special notice of that fact for purposes of copyrights?

Mr. HARDY. Well, Mr. Chairman, as you know, originally community antenna television systems, as it originated, was intended only to extend the signal which it could pick up over the air into the homes of viewers which could not pick up that signal over the air without a very large antenna. It was an antenna put in a location where it could pick up signals off of the air and transmit them over cable into those homes.

The industry has since that time—the technology since that time has developed which allows a cable operator to import from a distant community a signal via microwave facilities, and it now imports from very distant areas programing which would in effect fragment a local broadcast station audience. And I think it is for that reason, the technological developments, that it has become more obvious that copyright legislation is needed.

Mr. KASTENMEIER. Just two other questions. One, your advice to us, and I think it is very good advice, is not to be too specific, to stay away from, insofar as we can, such questions as distant signal limited importation, exclusivity, and sports blackout policies. And would you also include the question of origination? You know, we actually considered that 10 years ago. To what extent does the then CATV originate, and should this have something to do with its copyright policy?

Mr. HARDY. Well, I would also recommend I think on behalf of the Commission, and I am speaking for myself, of course, because the Commission has not taken any position in that sense, but the *Midwest Video* case was decided, and in the *Midwest Video* case it decided that the Commission did have jurisdiction and authority to require a cable system to originate programing. Since then, the Commission has had some rulemaking as to whether or not it would be appropriate to impose that obligation on a cable system at this time, because this industry is developing. I believe that would be better left with the Commission, with the administrative flexibility that is intended in the Administrative Procedures Act, rather than to carve it into the stone of a statute. I would recommend, on my own behalf anyway, that it would be my advice to the committee that it would be left better to the Commission's administrative flexibility.

Mr. KASTENMEIER. My last question is, you are aware, of course, of the provisions of H.R. 2223. That is to say, the form in which the Senate passed the bill early last fall. Is that bill acceptable in all respects to the Commission?

Mr. HARDY. Yes, sir. Insofar as it relates, as I began my testimony here today, there are many parts of that overall bill which do not apply to the areas regulated by the Commission, but insofar as that bill touches upon the copyright obligations in the cable industry, it is acceptable to the Commission; yes, sir.

Mr. KASTENMEIER. Thank you. I yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes. I take it what you are saying is you generally favor the bill that is pending before us, and you especially appreciate the fact that in contrast to earlier bills it provides certain latitudes that those other bills did not provide?

Mr. HARDY. That is correct.

Mr. RAILSBACK. To your Commission?

Mr. HARDY. Yes; it does.

Mr. RAILSBACK. Would you favor the FCC or the Copyright Office itself administering the fee schedules, in making determinations there?

Mr. HARDY. I think that should be left with the Copyright Office.

Mr. RAILSBACK. The Copyright Office, right. Are you satisfied that the bill as drafted contains enough authority to permit you to deal with questions of embargoes or exclusivity and so forth?

Mr. HARDY. Well, I think that the jurisdiction that the Commission presently has under the Supreme Court decision in *Southwestern Cable* is adequate at present. However, I recognize that there are some bills that have been submitted to both Houses of Congress which would question the jurisdiction of the Commission in the cable area, and the Chairman, I believe, has testified on that. And I am not thoroughly familiar with his testimony in those areas, and I would prefer to defer to his judgment on what legislation would be needed in the field of jurisdiction for the Commission. I would prefer not to answer that.

Mr. RAILSBACK. The FCC had promulgated certain rules before. How does the bill jibe with those rules that you promulgated earlier after the first court decision?

Mr. HARDY. Well, I may not understand your question, Mr. Railsback. Which rules are you referring to?

Mr. RAILSBACK. Well, I think, for instance, that you saw fit to regulate certain transmissions depending upon the area, the distance, and am I right on that?

Mr. HARDY. Distant carriage?

Mr. RAILSBACK. Right.

Mr. HARDY. The number of signals allowed to be carried, things of that nature; yes, we have.

Mr. RAILSBACK. Do you, or did you then, and how do you now feel about differentiating between the fee schedules as relates to, say, the secondary transmissions within a local area carrying where the primary transmissions reach? Do you think there should be a different fee schedule depending upon the type or the distances involved?

Mr. HARDY. I think that we would defer to the judgment of your committee on that. We would leave that to the committee as to whether

or not a fee schedule should be made—the local signal as opposed to the distant signal?

Mr. RAILSBACK. Right. Exactly.

Mr. HARDY. I think the parties to the consensus agreement, who I understand will be called on to testify before you——

Mr. RAILSBACK. Yes; they will.

Mr. HARDY. Will be better able to respond to that, and perhaps they could give you their suggestions. But insofar as the Commission is concerned, we would defer to the judgment of your committee on that.

Mr. RAILSBACK. Perhaps I am mistaken, but as I read the bill before us we do not differentiate in the fee schedule.

Mr. HARDY. That is correct. The same fee would apply to all carried signals, including distant.

Mr. RAILSBACK. Including, as I understand it, including aural transmissions under subsection (c) (1) (A)?

Mr. HARDY. That is correct.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Mr. Chairman, I pass and retain my right to interrogate if I may, please.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman. Perhaps we should not mention the Office of Telecommunications Policy to a representative of the FCC. But, I wonder if your recommendations are consistent with the recommendations of the Cabinet Committee report in January 1974 of the OTP?

Mr. HARDY. Father Drinan, I am not familiar with those, intimately familiar with those. I know of them, and I am not sure whether our testimony is consistent with them or not. I do not believe we studied our testimony to compare it with that report to determine whether it was consistent.

Mr. DRINAN. It confirms my suspicion that the FCC and the OTP were not talking very much to each other.

Would you point out anything in H.R. 2225 that either in your personal judgment or in discussions of the FCC that perhaps could be modified? In other words, we want as much help as we can get on the specifics, and I know that you do not want to get into them. You say we express no judgment as to what precise form this legislation should take. But, could you give us any helpful suggestions as to whatever conflicts might exist which could be resolved?

Mr. HARDY. Father Drinan, I think maybe the parties may have testimony that they will submit to you as they testify here before you, and I think in weighing both sides of the issue as presented by those parties you will be able to come up with whatever you believe a balancing of the equities between those parties.

The Commission, insofar as its comments on the bill that was submitted to us, would be that we are in agreement with the general principles, and we would leave the details to your committee.

Mr. DRINAN. All right. Thank you, sir. I have no more questions at this time.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. HARDY. Father Drinan, if I might, I would not like to leave this record with the impression that there is no ongoing discussions between the FCC and the OTP.

Mr. DRINAN. No. No. I approve of no discussion.

Mr. HARDY. We exchange documents, as I am sure you are aware, and comment on the documents submitted by both offices. We do not always come down on the same side, and I am sure frequently do not, particularly in the field of cable. I think there are, as you are well aware, many differences of opinion between the FCC and the OTP.

Mr. DRINAN. You would not care to take another minute or two to spell those differences out, would you?

Mr. HARDY. I am sure that they are so complex that it would take a great deal more than a minute.

Mr. DRINAN. Thank you, sir.

Mr. KASTENMEIER. Mr. Pattison.

Mr. PATTISON. I also see potential conflicts in your jurisdiction between the copyright law and the FCC's jurisdiction in the area of nonduplication of signals and exclusivity and also in the area of the use of translators, which we have not talked about. And I wonder if you would just comment a little bit more about the problems. I realize that the *Southwestern* case was decided and said that you have jurisdiction, but that was in the absence of copyright law. Now, suppose we pass a copyright law here that relates and governs cable, is that not going to cause some jurisdictional problems between the FCC and the copyright law?

Mr. HARDY. I am not sure that we will have any problems with our jurisdiction. If we were to feel that there were jurisdictional problems, I am sure that we could submit to Congress proposed legislation to clarify the jurisdiction of the Commission.

Insofar as this bill is concerned as it relates to the areas that you just mentioned, that being the use of translators, the use of microwave facilities, we do not believe that there is anything that you will be carving into statutory stone which would affect our jurisdiction. Were the courts to so construe your statute, then we would, of course, have to come to Congress for some clarifying legislation.

Mr. PATTISON. My point is once the cable system is paying a copyright fee, as they are not now, then questions arise of how they can use their license. It seems to me that our legislation is sort of in the situation, that if then your legislation changes, in other words, your rules change, then our legislation, to the extent that it was based upon your legislation at that time becomes somewhat impractical.

Mr. HARDY. I can only say to you I know of no present rulemakings which would affect it.

Mr. PATTISON. Well, for instance, you establish a fee, for instance, for cable operators based upon the fact that they do have the nonduplication rules. Assume that. And I do not suppose that it is going to happen, but just for the purpose of argument, just as an example. assume that you do away with your nonduplication rules. Then, of course, the fee would have to perhaps be different.

Mr. HARDY. Well, I know of nothing presently pending before the Commission which would indicate the Commission anticipates removing exclusivity protection or nonduplication protection.

Mr. PATTISON. That is not my point. The point is that it is obvious a change in your rules will reflect upon the statute that we ultimately pass, based upon the rules as they exist right now.

Mr. HARDY. I can only respond by saying, I suppose, Congress has to adopt legislation based upon a situation as it exists, leaving as much

flexibility as possible for future change. I really do not know how to respond to your question, Mr. Pattison, and I am not trying to evade it.

Mr. PATTISON. No. I understand.

Mr. HARDY. But I really do not know how to answer that. I can only say to you that all that Congress can do is adopt legislation based upon the present statute, and I know of no plans, I know of no pending rulemakings which would change the statute from the Commission standpoint, from its regulatory standpoint, so I don't know how to respond to that, how you can leave that flexibility.

Mr. PATTISON. I guess the problem is we are dealing in an area that is so rapidly changing, the technology is so rapidly changing that we cannot really foresee what kind of changes in technology will occur and, therefore, what rules you are going to adopt in response to that technology.

Mr. HARDY. I suspect that we have that same problem at the Commission.

Mr. PATTISON. So it would seem to me, knowing that there are probably going to be changes, that maybe we ought to think in terms of building in some sort of a mechanism so that those changes can be coordinated. I do not know how you do that.

Mr. HARDY. I am afraid that I cannot offer you any help because I do not know how you would do it either, sir.

Mr. PATTISON. Well, we will both think about it.

Mr. HARDY. All right.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. The gentleman from Illinois has another question.

Mr. RAILSBACK. Mr. Hardy, I wonder if you could make available to us the Commission's previous rules and orders concerning cable television? Could you do that for the record?

Mr. HARDY. The rules they have presently?

Mr. RAILSBACK. Yes.

Mr. HARDY. Certainly. I am sure we can do that.

Mr. RAILSBACK. I think that some have probably been superseded or preempted. Have there not been a whole series of orders and rules?

Mr. HARDY. Yes.

Mr. RAILSBACK. I think that it would be helpful to me personally to see all of them and the sequence.

Let me ask you this——

Mr. HARDY. We will make those available to the committee, sir.

[The material referred to is in the files of the subcommittee.]

Mr. RAILSBACK. Thank you. Was there ever an embargo of sports transmissions that involved minor league franchise areas, or can you give us a little bit of the background of that?

Mr. HARDY. I am afraid I do not know. Are you referring to sports blackouts?

Mr. RAILSBACK. Yes.

Mr. HARDY. That is presently pending before the Commission. It is considering sports blackout rules at the present. The Commission is attempting to make those rules consistent with the intent spelled out by Congress in the sports blackout legislation. We are trying to be consistent with those, or at least that is what the Commission is discussing at present. As to the outcome of those blackout rules, I do not know what those will be. They are presently being studied by the

Commission, and I understand they will come before the Commission for discussion late this month or in early July.

Mr. RAILSBACK. At one time I was led to believe that you were considering, the FCC was considering blacking out transmissions from a distance where there was a minor league franchise. Is that correct? Or do you recall?

Mr. HARDY. Yes, it could have applied to minor leagues.

Mr. RAILSBACK. Is that still under active consideration or what?

Mr. HARDY. The overall policy of sports blackout rules is under consideration and being discussed, yes.

Mr. RAILSBACK. Have there been any orders or rules as yet promulgated?

Mr. HARDY. Those are being studied, and the rules will be adopted hopefully this year.

Mr. RAILSBACK. Are you saying that you are looking for direction from the Congress as to what a blackout policy should be, how much it could encompass and whether it should affect minor league cities as well as major league areas or what?

Mr. HARDY. I am sure that the Commission would welcome any direction that Congress may wish to offer on that. We, at present, are operating off the statute that was adopted by Congress. We report annually on the effects in professional sports. But of course, we do not know what the effects, we have no data which we could study on the effect on minor league sports.

Mr. RAILSBACK. Let me ask you one other question. I think maybe you referred to the people that are involved, but I am not sure, I am not sure that that is going to be very helpful to us, and maybe your testimony might be more helpful. Do you personally believe, based on your experience or the Commission's experience, that this should be a different fee schedule depending upon, or that there should be some flexibility in a fee schedule taking into account the different distances and the different problems that may be involved in cable television.

Mr. HARDY. I am not sure that the Commission has taken a distinct position on that. We support the present bill which applies the same fee schedule regardless of the distance from which the signal is imported, be it a local signal or a distant signal which is imported. The Commission supports at the present time the present bill that was presented to us in its general form.

Mr. RAILSBACK. Thank you.

Mr. HARDY. And would apply it equally.

Mr. KASTENMEIER. Mr. Hardy, on behalf of the committee——

Mr. DANIELSON. Mr. Chairman, I have two questions if I may.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I am interested in the theory under which your Commission asserts jurisdiction for the regulation of cable. As I understand it, you feel that you have that right in order to protect television licensees from the economic threat of competition which might impair their ability to render their public service under their license; and conversely, in order to protect, to promote the development and health, economic health of local television stations. Aside from that, what basis of jurisdiction does FCC feel that it has regarding cable?

Mr. HARDY. The basis for the jurisdiction, as you stated, and as found by the Supreme Court, is based upon the responsibility that the Commission has to insure that this Nation has an efficient and widespread radio and television system.

Mr. DANIELSON. Well, on cable—we are not really worried about radio really, are we, particularly?

Mr. HARDY. Well, when I say radio, radio as defined includes television, because the Commission is a——

Mr. DANIELSON. But I am only speaking about television here, and can we agree on that? Now, proceed.

Mr. HARDY. Now, I was trying to answer your question insofar as it relates to the theory upon which the Commission asserted jurisdiction, and that was the theory as you stated, and that was approved by the Supreme Court. The theory is that if you lose the local service from a television broadcaster, then you have undermined the congressional intent to insure a nationwide, efficient, widespread radio system. And I use radio again in the sense that it includes television. And that was the theory approved by the Supreme Court.

Mr. DANIELSON. And of which I can understand the rationale and the logic, and I have no problem. Do you have any other basis?

Mr. HARDY. And I think the words used were "reasonably ancillary."

Mr. DANIELSON. Do you have any other basis?

Mr. HARDY. Any other basis for your legislation?

Mr. DANIELSON. For asserting jurisdiction to regulate cable?

Mr. HARDY. That is the extent. That is the extent of the rationale supporting our assertion of jurisdiction.

Mr. DANIELSON. Then I guess your answer is no, you have no other basis?

Mr. HARDY. That is correct.

Mr. DANIELSON. What does copyright have to do with either protecting existing television from an economic competitive threat, or the promotion of local television broadcasting?

Mr. HARDY. I am not sure that I know the answer to that.

Mr. DANIELSON. I did not think you did. Thank you very much That is all of my questions.

Mr. KASTENMEIER. Thank you, Mr. Hardy, for your appearance this morning. And we appreciate the help you have given us.

[The prepared statement of Ashton R. Hardy follows:]

STATEMENT OF ASHTON R. HARDY, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. Chairman, I am pleased to have the opportunity to present the views of the Federal Communications Commission with respect to H.R. 2223, a bill for the general revision of the copyright law.

The Committee is to be commended for addressing the very serious need for comprehensive reform of our federal copyright laws. As you know, the statute governing this subject was enacted in 1909 and was drafted in terms of the problems of that era. Motion pictures and sound recordings as we now know them were not envisioned at that time, nor were radio and television.

Mr. Chairman, I realize that the scope of this legislation is broad and that your Subcommittee is concerned with such diverse subjects as library photocopying, bootlegging of film and sound recordings, and the ownership of presidential documents. The Commission has no jurisdiction over matters such as these and consequently I will not comment on them. However, the Commission has asserted jurisdiction and promulgated comprehensive rules governing the cable television industry, the subject of Section 111(c) and (d) of the proposed

legislation, and thus my testimony addresses some of the background of the cable copyright problem.

Cable television is among those forms of communication which were not foreseen or provided for in the 1909 Act. For this reason a complex controversy arose over the copyright liability of cable systems. I would like to trace briefly the evolution of this controversy and the Commission's involvement in it.

When the first cable systems began to operate, most merely extended local television service to rural areas where it had not been previously available. They did not import distant signals into markets where television service already existed, nor did they originate programming or serve major metropolitan areas. For these reasons, broadcast licensees did not anticipate that the new industry would pose the copyright problems that now exist. Similarly, copyright proprietors were generally unconcerned about the growth of cable because they continued to receive royalties from conventional broadcasters and did not anticipate that CATV would affect this revenue.

Initially the FCC expressed reluctance to assert jurisdiction over cable in the absence of specific legislative authorization. In 1959 (26 FCC 402), the Commission ruled that cable systems could retransmit programs without the express authority of the originating station. We reasoned that cable was merely a means of extending television service and did not pose an economic threat to the broadcast industry. Pursuant to this ruling cable operators were free to distribute programming without paying copyright royalties.

However, the attitude of the various parties changed abruptly when cable systems began to import distant signals, originate programming, and provide service in metropolitan markets which posed clear competitive threats to broadcasters. Copyright questions then came into focus and broadcasters and copyright proprietors sought protection from the FCC and the courts.

The Commission responded by abandoning its former laissez-faire posture on cable and in 1962 denied a cable system permission to import additional distant signals by microwave. [*Carter Mountain Transmission Corp.*, 32 FCC 459, aff'd, 321 F. 2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963)]. The Commission was influenced in its decision by the fact that the proposed importation would pose an economic threat to a television licensee which could deprive the public of his service.

In 1965, the Commission further asserted its jurisdiction over cable in its First Report and Order on Cable Television (38 FCC 683) which contained the so-called Non-Duplication Rule. This rule manifested the Commission's desire to protect the public interest in existing television service, and to encourage the development of local broadcast stations. It prevented duplication of the originating station's signal on a cable system for a certain period before and after carriage by that station. Under the rule, a copyright proprietor could limit the time and area in which a program was shown and a broadcaster could present programming previously shown on a network on a delayed basis without running the risk of losing his exclusivity to a cablecaster.

The Commission's Second Report & Order [2 FCC 725 (1966)], required that all new cable systems in the top 100 television markets (serving 90% of all television viewers) obtain FCC approval before importing new distant signals. Approval was conditioned upon a finding that the new service would be consistent with the establishment and healthy maintenance of television broadcast service in the area. The effect of the rule made it virtually impossible for cable systems to establish new service in urban markets.

Subsequently, a San Diego cable operator challenged the Commission's authority to bar expansion of its system under the major-market-distant signal rule. However, the Supreme Court upheld the Commission's action as reasonably ancillary to its duty to regulate television broadcasting. [*U.S.* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968)]

Because FCC regulation had not addressed many of the copyright questions posed by the advent of cable, broadcasters and cable proprietors sought relief in the courts. They argued for an expansive interpretation of the Copyright Act which would include a cable broadcast as a "public performance" and thus subject cable operators to copyright liability. The Supreme Court confronted this issue in *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 290 (1968), where United Artists sought to recover royalties from Fortnightly, a West Virginia cable system which imported into its market signals which could not be received through ordinary over-the-air means. Fortnightly argued that it provided merely a reception service, did not "perform" and therefore escaped lia-

bility. In finding for the cable system, the Court employed a functional test under which it held that the cable system was a "viewer", not a "performer." Since "viewing" fell short of infringement, no liability was incurred. Implicit in the Court's opinion was the view that Congress is better equipped than the judiciary to strike an appropriate balance among the various competing interests.

The Commission then issued proposed general rules for cable operation [15 FCC 2d 417 (1968)]. This proceeding served as a catalyst for serious discussions concerning the manner in which the industry should be regulated. As this lengthy proceeding neared its close, the Commission forwarded a Letter of Intent on August 5, 1971, to Congress which outlined its plans for the near-term regulation of cable. In our letter, we acknowledged the argument raised by several parties that we should defer promulgating rules governing cable until new copyright legislation was enacted. In response we expressed the view that cable regulation and copyright could be separately considered. Accordingly, we urged the Congress to promptly enact a copyright statute and stated our intent to proceed with rulemaking. Among the rules outlined in our letter was a solution to the distant signal problem which would permit limited importation of such signals based upon a formula geared to market size, and a provision allowing program exclusivity in the top 100 markets.

In our letter, we encouraged industry principals to agree upon a schedule of royalty fees in negotiations then in progress. The result of these negotiations was the so-called "Consensus Agreement" which suggested certain revisions to the proposal advanced in our Letter of Intent and pledged the parties to support separate cable copyright legislation. The legislation was to establish a system of copyright liability for cable carriage of broadcast signals with compulsory licensing of signals authorized by the Commission. A schedule of royalty fees or other payment mechanism was to be agreed upon by copyright proprietors and cable operators. In the absence of agreement, the parties agreed to submit to compulsory arbitration.

The Commission found the provisions of the Consensus Agreement to be reasonable. Consequently, those aspects of the Agreement subject to our jurisdiction were implemented in our first comprehensive cable rules issued in 1972. (36 FCC 2d 143). We took this action believing that it would open the door to cable development and that copyright legislation would be enacted shortly thereafter. Unfortunately, the negotiations concerning fee schedules proved inconclusive, and compulsory arbitration has not been forthcoming. Thus, legislative efforts in this area have been stymied.

The importance of a prompt resolution of the copyright problem was heightened by a second ruling of the Supreme Court on the cable copyright issue. In *CBS* v. *Teleprompter*, 415 U.S. 394 (1974), a Teleprompter cable system imported signals from as far as 600 miles from its service area (as opposed to Fortnightly's 82 miles). It had also engaged in advertising not confined to program origination channels and had interconnected with other systems for specialized programming. Despite the disparity of distance and the presence of services characteristic of broadcasting, the Court held that Teleprompter retained its "viewer" status and had not "performed" under the *Fortnightly* rationale. Thus it was not liable under the Copyright Act.

Seemingly announcing the end of its resilience to construe the Act to accommodate changing conditions, the Court called upon Congress to enact remedial legislation. Speaking through Mr. Justice Stewart, it said:

> These shifts in current business and commercial relationships . . . simply cannot be controlled by means of litigation based on copyright legislation enacted more than half a century ago, when neither broadcast television nor CATV was yet conceived. Detailed regulation of these relationships, and any ultimate resolution of the many sensitive and important problems in this field must be left to Congress. (415 U.S. at 414)

In view of the preceding analysis, it is clear that if a solution to the cable copyright dilemma is to be reached, it will only be through Congressional action. I will not rehash the details of the various attempts made in Congress to enact legislation, for I am confident that they are better known to your Subcommittee, Mr. Chairman, than they are to the Commission. Suffice it to say that legislation has been considered by at least one house of Congress every year for the last ten. Furthermore, I do not wish to offer detailed comments with respect to the specifics of Sec. 111(c) and (d) of the legislation now before you. Enactment of substantive copyright law is an area in which the Commission has no jurisdiction and in which we must defer to Congressional judgment.

However, the Commission has expressed some general views on the subject which perhaps bear repeating in this forum. First of all, we wish to express the importance of prompt Congressional action. Mr. Chairman, this controversy has troubled the communications industry for nearly a decade. It continues to be a source of great conflict between the industries we regulate. We believe that it is time that the Congress place the interests of these parties in balance and resolve their differences through legislation. In this connection, we believe that it is essential and altogether just that cable operators pay reasonable copyright royalties. However, we express no judgment as to what precise form this legislation should take.

In our comment on previous legislation, we have on several occasions called attention to matters which we believed could be more effectively handled through the flexible approach afforded by the administrative process. In those comments we suggested that these matters not be written into substantive law but left to agency discretion. We made these remarks in connection with provisions which would have codified distant signal, minimum signal carriage, exclusivity and sports blackout policies. We continue to feel strongly that matters of this nature are more appropriately left to the Commission where they can evolve as the cable industry matures. For these reasons we were pleased that the Senate deleted provisions of this nature from S. 1361 of the 93d Congress, and that the legislation now before your Subcommittee either omits reference to such regulatory matters or expresses them in broad general terms within which we can exercise considerable discretion. We are hopeful that any legislation which you report out will conform to these guidelines.

Mr. KASTENMEIER. Next, the Chair would like to call Mr. Thomas J. Keller who is the Acting General Counsel for the Office of Telecommunications Policy in the Executive Office of the President.

We have your statement, Mr. Keller, and if you like you may proceed from it or proceed as you wish.

TESTIMONY OF THOMAS J. KELLER, ACTING GENERAL COUNSEL, OFFICE OF TELECOMMUNICATIONS POLICY, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. KELLER. Mr. Chairman, members of the subcommittee, I am pleased to respond to your invitation to discuss the views of the Office of Telecommunications Policy on H.R. 2223, the copyright revision bill.

My remarks today are limited to those sections of the bill which address the question of copyright payments by cable television systems. At the outset, I wish to say that OTP fully endorses the principle of copyright payment for the cable retransmission of broadcast originated programming. Before discussing the rationale behind this position, it may be helpful to place the cable-copyright question in an historical context.

The cable television industry began in the late 1940's as a means of bringing improved television reception to isolated communities in the mountainous regions of Pennsylvania and Oregon. Although this service spread rapidly in many small towns throughout the Nation, cable's telecommunications capacity was quite limited in its early days.

With the development of new technology increasing the potential capacity of a cable system to 20 television channels or more, cable enjoyed increased growth during the 1960's. Many new systems provided not only improved reception of nearby broadcast stations, but also began to originate television programming and to import additional

broadcast signals by means of microwave links from distant cities. Today, there are over 3,000 cable systems serving approximately 10 million cable subscribers.

As cable's capacity to increase signal availability in local markets became apparent, the broadcast industry, fearing shifts in established viewing patterns, began to sit up and take notice. Similarly, the program production industry became concerned that cable's importation of programs from distant markets could diminish the value of those programs when they were subsequently offered for sale to broadcast outlets in the market served by a cable system.

By 1966, the Federal Communications Commission had asserted jurisdiction over cable systems, primarily with respect to the retransmission of broadcast signals. Unable to resolve the issues of potential competition between cable and broadcasting, the FCC imposed a virtual freeze on cable expansion in the top 100 markets. In so doing, the Commission noted that cable's use of broadcast signals without reimbursement to program owners had a direct bearing on the cable-broadcast controversy. Thus, the copyright question became intertwined with communications policy issues regarding the competitive relationship between cable and broadcasting.

During this same period, the program production industry instituted law suits against cable operators for copyright infringement. Although the Supreme Court ultimately ruled that cable was not liable for copyright payments under a narrow reading of the Copyright Act of 1909, the Court also stated that Congress should take a fresh look at conforming the copyright law to new technological developments that were not envisioned 60 years ago. In this regard, the Court noted this issue had already become a subject for congressional consideration as part of the overall copyright revision that had been underway for several years.

The Office of Telecommunications Policy first confronted the cable-copyright issue soon after its creation. The Office was created in 1970. In June 1971, the President appointed a special committee to develop proposals for a comprehensive national policy on cable communications. The committee, chaired by the Director of OTP, recognized at the outset that cable technology offered a major solution to the problem of channel scarcity that is inherent in our present system of television broadcasting.

Unlike over-the-air broadcast technology which, because of spectrum limitations, permits only a limited number of channels in a given community, cable technology permits an abundance of channels. The Cabinet committee viewed cable as something far more than a mere vehicle for retransmitting broadcast signals; rather it saw cable as a technology with the potential to evolve into a medium of communication in its own right, offering new opportunities for access by the public to the electronic media, and new outlets of expression for program producers, advertisers, and virtually anyone who wished to convey a message.

In essence, cable's traditional retransmission service was seen as an adjunct to the provision of a multiplicity of channels that could be leased for a broad range of uses. It was apparent, however, that the public would receive the full benefits of cable's potential only if the medium were afforded a fair opportunity to develop and compete with

existing media, free of unwarranted governmental restrictions. To this end, OTP is preparing cable legislation which will establish a national plan and regulatory framework for cable communications based on the recommendations of the Cabinet committee.

Similarly, it was evident that the unresolved copyright question had been a factor in inhibiting the growth and development of cable, and had made the integration of cable into the television program distribution market most difficult. Accordingly, the report of the Cabinet committee, published in January 1974, included a recommendation that cable be subject to copyright liability. The committee felt that program retailers leasing cable channels should negotiate and pay for the right to use programs and other copyrighted information just as entrepreneurs in other media are required to do. The committee also recommended that cable system operators which retransmit broadcast signals should be subject to copyright payments in the form of a statutory compulsory license.

These recommendations were grounded on principles of equity, as well as general copyright theory and communications policy considerations. The purpose of copyright protection, under the Constitution, is to ensure that authors receive the encouragement they need to create, as well as the remuneration which they fairly deserve for their creations. Cable systems, in their retransmission of broadcast signals, make profitable use of copyrighted works and should therefore be subject to some form of payment. Moreover, only when cable is obligated to the payment of copyright can the argument of cable's "unfair competition" with broadcasters be put finally to rest.

As you know, Mr. Chairman, the question of the form that cable's copyright payment ought to take has been a subject of continuing controversy for many years. Numerous proposals have been put forward attempting to distinguish among various types of signals. But these previous proposals have failed for lack of agreement between the principal industries, and it now appears that a blanket compulsory license has gained the widest acceptance among the parties.

In 1971, faced with the cable "freeze" and the fact that the cable-copyright issue was an integral part of the competitive disputes between the cable and broadcast media. OTP encouraged representatives of the principal industries—namely, cable, program producers and broadcasters—to reach some form of agreement on copyright payment. The resulting "consensus agreement," providing for elimination of the freeze, and the promulgation of the FCC's present cable rules had, as a central provision, the agreement of all parties to support copyright legislation in the form of a compulsory license for cable's carriage of local and distant signals. The bill before you today incorporates such a provision and, although not a perfect answer to all aspects of the issue, we believe it provides a reasonable and workable solution to the problem.

Beyond our belief that payment of copyright fees by cable systems is in accord with traditional copyright principles of incentive and fairness for program producers, OTP also looks to copyright legislation to afford stability and certainty where previously there has been none. In this regard, we are concerned that the affected industries not be forced to revisit the uncertainties and disputes which now preoccupy them. While OTP takes no position on the particular fee schedule that

is incorporated in the bill, we recognize that Congress is writing on a clean slate here, without the benefit of prior experience with cable-copyright payments, and that it may be necessary to adjust the fee schedule in the future on the basis of additional experience and data. We do feel, however, that the provision in the present bill which allows the Copyright Tribunal to commence adjustment of the license fees as early as 18 months after enactment could undermine the certainty and stability which the bill would otherwise provide.

In summary, Mr. Chairman, OTP believes that the question of cable's liability for copyright has occupied and diverted the attention of major industries and all branches of Government for too many years. It is essential for copyright legislation to be enacted soon; first, because television program producers will thereby receive fair compensation for cable's profitable use of their product; and, second, because it is time to put the question to rest so that cable may grow and develop in response to the needs and demands of the public. In short, we believe that copyright legislation is a necessary prerequisite to full realization of cable's promise of additional channels, expanded services, and a multiplicity of outlets available for the people of this Nation.

That concludes my prepared statement, Mr. Chairman. I would be pleased to answer any questions that you or other members of the subcommittee may have at this time.

Mr. KASTENMEIER. Thank you very much, Mr. Keller.

Is there anything which the preceding witness, Mr. Hardy, said in behalf of the Federal Communications Commission, which representing the Office of Telecommunications Policy, you would not endorse?

Mr. KELLER. As to the position of the Commission on the bill before the committee today, I believe that the OTP and the FCC positions coincide perfectly. Basically, we feel, as does the Commission, that we do not have the expertise to address the specifics of the various provisions of section 111, but we do endorse the general principle of cable's payment of copyright.

Mr. KASTENMEIER. Your statement is somewhat more enthusiastic than that of the FCC in terms of endorsing cable television's future. I do not know whether that describes any real difference in policy or attitude.

Mr. KELLER. I think that the reason for that, Mr. Chairman, is principally the result of our having provided staff support for the Cabinet Committee on Cable Communications. As I indicated, we became intimately involved with the cable issue, not in terms of the service presently being provided by cable, but in terms of cable's long-range potential and, indeed, this is one of the charters of the Office of Telecommunications Policy, to look further down the road. And we see cable as something far more than a mere retransmission system. We see it as a vehicle for providing an abundance of channels for all kinds of communications uses.

Mr. KASTENMEIER. Just for my own benefit, about 20 years ago there was a discussion of the prospect of what was then called pay TV. But what we were really confronted with, I think, in 1965 was a different system called community antenna television which did not have origination for the most part, and was a retransmission system. But, presently cable, with the potential you allude to, suggests it is more like

the pay TV of 1955. Would you not agree? What difference is there between a cable television of 1975 and the pay TV proposals of 1955?

Mr. KELLER. I do not see much difference in terms of economics and viewer choice between the two, except that the pay TV experience of 1955 was an over-the-air broadcast subscription television technology, which, like conventional broadcast technology, was limited as to the number of channels that could be made available. With over-the-air subscription TV you might have one such outlet in a given community. Cable can provide any number of channels that might be made available for originated programing or programing that is provided by a program retailer who merely leases the channel from the cable operator, to be made available to subscribers either on a pay-as-you-go basis or an advertiser-supported basis or a combination of the two.

Mr. KASTENMEIER. Returning to the bill itself, while you generally support the bill, you indicate that it is not a perfect bill. And referring to imperfections, you do mention one area, and that is that you feel that the Tribunal's consideration of the fee schedule comes too early if it comes 18 months after enactment.

Mr. KELLER. Right. As I read it—I believe it is section 801 or 802——

Mr. RAILSBACK. 802.

Mr. KELLER [continuing]. The Tribunal would be empowered to reconsider the fee schedule every 5 years, except for the initial such reconsideration, which could commence, as early as 18 months after enactment. Our view is that the copyright question has inhibited cable development and has clouded the whole question of the appropriate regulatory approach to cable for so long that there should be a period of stability before controversies arise again in terms of how a new fee schedule ought to be structured.

Mr. KASTENMEIER. And that is said without respect to whatever the Tribunal might do; that is, raise fees or lower fees?

Mr. KELLER. Whether it might raise, lower, or whatever; right.

Mr. KASTENMEIER. Is there any other area that could be perfected in the bill other than that point?

Mr. KELLER. That was really the only point about which we felt strongly enough to address. When I say that it is not a perfect solution, obviously the various industries would like to see changes. But in terms of our overall attitude toward section 111, we do not have any major problems.

Mr. KASTENMEIER. Thank you.

The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Yes. Thank you very much, sir, for your statement. And you indicate that your organization is, in fact, preparing legislation. When will that be ready?

Mr. KELLER. That legislation has been in the preparation stage for about a year now, Father Drinan.

Mr. DRINAN. A year and a half, since January 1974.

Mr. KELLER. Well, that is fair enough.

Mr. DRINAN. OK. When will it be out?

Mr. KELLER. We hope it will be out within the next several months.

Mr. DRINAN. Next several months?

Mr. KELLER. That is, as I say, our hope.

Mr. DRINAN. We hope to act upon this in the next several days.

Mr. KELLER. I would say this, that the cable legislation being prepared by our office to implement the recommendations of the Cabinet Committee can be considered wholly separate and apart from the copyright question, which is being considered by this subcommittee.

Mr. DRINAN. Then it would not help us at all?

Mr. KELLER. It does not address the question of copyright payments. In fact, it presumes that copyright liability by cable systems would be handled by the copyright revision bill.

Mr. DRINAN. You say OTP is preparing cable legislation which will establish a national plan and regulatory framework for cable communications based on recommendations of the Cabinet Committee. And you can do all of that without referring to copyright?

Mr. KELLER. One of the recommendations of the Cabinet Committee was that the cable be subject to copyright payment. We presumed that that recommendation would be implemented by passage of section 111 of this bill or something like it. We do not contemplate addressing the copyright question in the cable bill we are drafting, which basically is a bill to establish the regulatory and jurisdictional framework.

Mr. DRINAN. So it is not relevant to what we are talking about at all?

Mr. KELLER. That is correct.

Mr. DRINAN. So why did you put it in? You had to say that OTP is doing something?

Mr. KELLER. Not at all, Father Drinan. The reason we put it in is because we see the growth of cable as an important factor in the development of the communications capability of this country in terms of service to the public.

Mr. DRINAN. I think just everybody, you know, sees that. But do you have anything to help us with? I mean, you do not disagree at all with the FCC, and I assume that you did not talk to FCC before coming here either, and you come here, two different agencies, one independent which is supposed to have jurisdiction by statute over this matter, and then you come and you do not tell us anything different. So, what are we supposed to learn from your presentation?

Mr. KELLER. Well, I suppose you could learn that here are two agencies of Government that endorse the general principle of copyright payment by cable and endorse the bill as it is before you now.

Mr. DRINAN. Well, that does not help much unless you give some specifics. I did not mean to be too critical, but I just had hoped that you people, after that report a year and a half ago, you know, January 1974, that you would have developed some specifics that would help us with this tough problem. I thank you.

Mr. DANIELSON [presiding]. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Thank you. Are there areas that are still inaccessible to television transmission like West Virginia or some of the rural mountainous areas, do you know?

Mr. KELLER. There are some isolated communities that may well have no access to a television signal at all.

As a matter of fact, if I may expand on that, OTP commissioned a study by Denver Research Institute to study the extent to which television signals were available in rural communities across the country,

and the study revealed that there were certain areas that had very little, if any, television service.

Mr. RAILSBACK. How long a report is that? How long of a report is that?

Mr. KELLER. I am not sure. It may go 50 or 100 pages.

Mr. RAILSBACK. I wonder if you could make that available to us?

Mr. KELLER. Certainly.

Mr. RAILSBACK. Let me ask you this: In your judgment, is there any value to be derived from differentiating in fees for distant transmissions as compared to local, and also perhaps the third case of areas that are being serviced that do not really have access to the networks, or you know, the television transmissions? Do you think we should provide some degree of flexibility in your fee schedules?

Mr. KELLER. As you know, that proposal has been around for a while. Various agencies, industry groups, and, indeed, this subcommittee have attempted to somehow define what is a local signal versus a distant signal. It is a very, very difficult question and you get into the problem of overlapping markets, into the——

Mr. RAILSBACK. Formulas, yes.

Mr. KELLER. Formulas, the whole thing. And the position OTP has taken, insofar as the principal industries here—the copyright people and the cable people—have agreed on the general idea of a compulsory license to cover all signals, is that for ease of administration, and to avoid definitional problems and disputes, this certainly seems to be the best way to go. I must say personally, in terms of logic and the economics of television program distribution, it would seem that possibly local signals ought not to be covered since the copyright owner has sold the program for distribution to a particular community.

Mr. RAILSBACK. Markets, right, local markets.

Mr. KELLER. Right; and the cable system merely enhances the reception capability of the local viewer. Now, that can be differentiated from the importation of a distant signal where the program owner did not contemplate distribution in that market. As I say, once you attempt to write that distinction into a law you get into all kinds of jurisdictional and definitional problems, and for purposes of administration it seems that a compulsory license covering local and distant signals is the best solution.

Mr. RAILSBACK. Thank you. That is all.

Mr. DANIELSON. Have you concluded?

Mr. RAILSBACK. Yes, I have. Thank you, Mr. Chairman.

Mr. DANIELSON. I have only a couple of questions. In response, in effect, to the question of the gentleman from Illinois, I know there are some areas where an ordinary television service is not available. Take the island of Guam, for example. I think everything brought into Guam has to be canned and is distributed thereafter by cable within the island. You take cities like Bishop, Calif., Chester, Calif., Chadron, Nebr., and you have the same situation. Within some of our larger cities there are areas which are in the shadow of large buildings, or mountains or hills, and there is just no reception unless you have cable. They have what is called Cold Water Canyon in Los Angeles, so there is definitely a role to be played by cable, even within the existing metropolitan area as well as in outlying areas.

I would like to have you tell me what is the primary role of the Office of Telecommunications Policy? What is the function or the purpose for which it was set up?

Mr. KELLER. Well, Mr. Danielson, it was set up in 1970 principally in response to recommendations of subcommittees of the House and Senate, a study by the General Accounting Office——

Mr. DANIELSON. But what is it supposed to do?

Mr. KELLER. Well, the issue of the telecommunications role of the executive branch had been around for several years, and during the fifties and the sixties it had been studied by the Congress, the GAO, and the Budget Bureau.

Mr. DANIELSON. I am aware of that. But I would like to know what is OTP's role, what is OTP supposed to do, and what is its mission in life?

Mr. KELLER. What these various study groups recommended was there be an executive branch capability that would have the resources and the authority to do several things. Number one, to manage and coordinate the Federal Government's use of communications, the budget for which amounts to about $10 billion annually. There was a need for some central coordinating group within the executive branch to coordinate for the purpose of promoting sharing of systems and eliminating duplication.

Mr. DANIELSON. OK. Now, what is the next point?

Mr. KELLER. The second function was to manage and assign that portion of the radio frequency spectrum which is used by Government agencies.

Mr. DANIELSON. Does FCC have nothing to do with that?

Mr. KELLER. The FCC has nothing to do with that, that is correct. The FCC allocates and assigns the frequencies that are available for the private sector.

Mr. DANIELSON. But those portions of the spectrum which go to the Government are within the OTP, and they recommend to the President that they be assigned to a given agency, is that correct?

Mr. KELLER. That is correct. And then the third function is to formulate and develop long-range policy recommendations for the use and development of telecommunications in this country. And this applies to domestic as well as international communications, whether they involve satellites, radio, television, telephone, telegraph, common carrier, cable, or microwave.

Mr. DANIELSON. And you make those recommendations to whom?

Mr. KELLER. Basically the recommendations go in three directions. First to the President, if the President wants advice on any given issue.

Mr. DANIELSON. On anything, yes.

Mr. KELLER. Involving telecommunications. Second, to the Congress by way of recommended legislation, or by way of views and recommendations on legislation that has been introduced by someone else. And third, to the FCC by way of advice and recommendations, if you will, on some of the longer range policymaking and rulemaking issues which the Commission is considering.

Mr. DANIELSON. All right. Now, in response to the questions by Mr. Drinan, you mentioned that the proposed legislation which you are working on, and which will be recommended, I presume, in the

next several months, that it has to do with structuring the areas to be served by cable and the manner in which it is to be served, the numbers of channels, et cetera, as opposed to in harmony I should say, those functions performed by our regularly licensed broadcasting systems?

Mr. KELLER. Well, the bill itself would not set forth the precise standards and specifications. Principally what the bill would do would be to make certain jurisdictional distinctions between non-Federal and Federal regulation of cable.

At the present time, the FCC, State cable agencies as well as local municipalities, all three regulate cable to one extent or another, and there is a lot of overlap and duplication. The bill would attempt to solve that problem and clearly delineate these jurisdictional boundaries.

Mr. DANIELSON. I see. I recognize we are talking about copyright in this committee.

Mr. KELLER. Right.

Mr. DANIELSON. And copyright basically is the relationship between the owner of the property, the copyrighted item, music, literature, or whatever it may be, and the person who uses it. It is the use of a person's property in programing. In the purest sense, it really has nothing to do with the jurisdictional relationship between television and cable, for example, although obviously it would have some impact because if a cable system could use copyrighted programs without compensation to the copyright owner, they would be in an economically advantageous competitive position with the TV station which does have to pay a fee, and that is what we are going to have to try to work out in this committee. But beyond that, I question that your organization, with its mission, has anything at all to do with copyright, even in the broadest interpretation of your so-called charter. Copyright is a proprietary thing, who is paying whom for use of whose property. And I think that is true of FCC also. Do you have any comments on that?

Mr. KELLER. I agree wholeheartedly, Mr. Danielson. And as I tried to indicate in my statement, OTP's involvement in the copyright question was really ancillary to our involvement in the broader question of cable development, and we addressed the copyright problem only by way of saying that it has to be solved if this issue of the competitive relationship between cable and broadcasting is ever going to be ironed out.

Mr. DANIELSON. I think it is essential that we resolve it, and that is what we are working on. I am just trying to put my mind in proper perspective. Just frankly what is the impact of the recommendations that you have made and are making, and those also by Mr. Hardy? I just sort of would like to know what is the point of interest and how much weight should we give to the testimony and so forth.

I do have one other little comment. I understood from your statement that you think that there probably ought to be two standards, your recommendation would be two standards of copyright payments, one for the original transmission area, and probably a different one for primary transmissions generated by the cable system?

Mr. KELLER. Yes. And we assumed that those primary transmissions or program originations, if you will, would be performances within the meaning of the general copyright law, and that section 111 only addresses the retransmission of programing on broadcast stations.

Mr. DANIELSON. Again, your interest would only lie to the extent that the origination, or the rebroadcast of or the importation of a distant signal was in a broadcast area of licensed stations so that you would have a competitive situation?

Mr. KELLER. I am not sure I understand that.

Mr. DANIELSON. As long as the cable is in new territory where it is not in competition with the traditional broadcasting system, would there be any competition?

Mr. KELLER. No; which is not to say, however, there would be no need for copyright payments.

Mr. DANIELSON. Of course. That is not any concern of yours within your charter, right?

Mr. KELLER. As to the matter of payment to the copyright owner for distribution of a program into an area that is unserved by broadcasting, this is not within our communications purview.

Mr. DANIELSON. Thank you very much. You have been very helpful. Are there any further questions of this gentleman?

Mr. RAILSBACK. Mr. Chairman, let me just ask one more.

Mr. DANIELSON. Yes.

Mr. RAILSBACK. On page 5 of your statement you mention that the Cabinet Committee thought that I think program retailers should also negotiate and pay a fee. Now, that is something different than we have heard before if, in fact, you mean that they are paying a separate fee from the cable television systems or companies, is that right? Is that a different suggestion?

Mr. KELLER. Yes; it is, Mr. Railsback. Let me try to explain. Basically cable can perform three functions by way of delivery of programing to a subscriber. First, it can take a broadcast signal off the air and retransmit it. We are saying for that service there should be a compulsory license to compensate the copyright owner.

The cable system can also originate programs at its head-ends; that is, it can go out and buy the rights to distribute a motion picture on its cable system, and in that case it would be acting just like a broadcaster or network. It would go right to the copyright owner or motion picture producer and buy the rights. And that is covered under the general provisions of the copyright law.

Now, third, it could lease channel capacity to what you might call a program retailer or a middleman. You or I might go to the motion picture producer and buy the rights to the film, and then in turn go to the cable operator and say, "I would like to lease one channel on Thursday night for distribution of this movie," and pay the lease rate charged by the cable operator.

Mr. RAILSBACK. So you are not talking about retransmissions?

Mr. KELLER. That is right.

Mr. RAILSBACK. Thank you.

Mr. DANIELSON. You are really only talking about retransmission in the one instance, the first instance?

Mr. KELLER. Correct.

Mr. DANIELSON. The other two, if the cable operator buys a movie, or buys the movie rights, whatever they may be, whatever compensation is involved is a part of a contract between the parties?

Mr. KELLER. Correct.

Mr. DANIELSON. And on the lease situation, the leasing of the line he is really acting as a common carrier, a public utility simply providing a vehicle through which the lessor utilizes the channel for whatever purpose, legitimate purpose we hope that he might have?

Mr. KELLER. Yes.

Mr. DANIELSON. So there is no copyright problem involved there?

Mr. KELLER. That is right. It is only with respect to the retransmission.

Mr. DANIELSON. And on retransmission we all know I think that television stations earn their incomes from commercials, from selling advertising. And one of the factors in determining the advertising rate is the number of viewers. If the number of viewers on the cable system is included in the number of viewers under the Nielsen ratings, or whatever you want to call them, could it not be argued that perhaps the copyright owner is being compensated at that point if you add another 5,000 viewers by cable, and those 5,000 are included in the, shall I say, guaranteed circulation of the TV station? Do you not have a copyright payment?

Mr. KELLER. I certainly can be argued that you do, but you get into all sorts of difficulties there with respect to which audience the advertising is directed toward or intended for, local and regional advertising and so forth.

Mr. DANIELSON. I realize, but again the marketplace, seller and buyer of the program, can sit down and fight it out over the table and decide what kind of a fee to pay?

Mr. KELLER. Yes; they could.

Mr. DANIELSON. Fine. Thank you very much. You have been most helpful.

[The prepared statement of Thomas J. Keller follows:]

STATEMENT OF THOMAS J. KELLER, ACTING GENERAL COUNSEL, OFFICE OF TELECOMMUNICATIONS POLICY, EXECUTIVE OFFICE OF THE PRESIDENT

Mr. Chairman, members of the Subcommittee, I am pleased to respond to your invitation to discuss the views of the Office of Telecommunications Policy on H.R. 2223, the copyright revision bill.

My remarks today are limited to those sections of the bill which address the question of copyright payments by cable television systems. At the outset, I wish to say that OTP fully endorses the principle of copyright payment for the cable retransmission of broadcast originated programming. Before discussing the rationale behind this position, it may be helpful to place the cable-copyright question in an historical context.

The cable television industry began in the late 1940's as a means of bringing improved television reception to isolated communities in the mountainous regions of Pennsylvania and Oregon. Although this service spread rapidly in many small towns throughout the Nation, cable's telecommunications capacity was quite limited in its early days.

With the development of new technology increasing the potential capacity of cable system to 20 television channels or more, cable enjoyed increased growth during the 1960's. Many new systems provided not only improved reception of nearby broadcast stations, but also began to originate television programming and to import additional broadcast signals by means of microwave links from distant cities. Today, there are over 3,000 cable systems serving approximately 10 million cable subscribers.

As cable's capacity to increase signal availability in local markets became apparent, the broadcast industry, fearing shifts in established viewing patterns, began to sit up and take notice. Similarly, the program production industry became concerned that cable's importation of programs from distant markets could diminish the value of those programs when they were subsequently offered for sale to broadcast outlets in the market served by a cable system.

By 1966, the Federal Communications Commission had asserted jurisdiction over cable systems, primarily with respect to the retransmission of broadcast signals. Unable to resolve the issues of potential competition between cable and broadcasting, the FCC imposed a virtual freeze on cable expansion in the top 100 markets. In so doing, the Commission noted that cable's use of broadcast signals without reimbursement to program owners had a direct bearing on the cable-broadcast controversy. Thus, the copyright question became intertwined with communications policy issues regarding the competitive relationship between cable and broadcasting.

During this same period, the program production industry instituted law suits against cable operators for copyright infringement. Although the Supreme Court ultimately ruled that cable was not liable for copyright payments under a narrow reading of the Copyright Act of 1909, the Court also stated that Congress should take a fresh look at conforming the copyright law to new technological developments that were not envisioned 60 years ago. In fact, this issue had already become a subject for Congressional consideration as part of the overall copyright revision that had been underway for several years.

The Office of Telecommunications Policy first confronted the cable-copyright issue soon after its creation in 1970. In June 1971, the President appointed a special committee to develop proposals for a comprehensive national policy on cable communications. The Committee, chaired by the Director of OTP, recognized at the outset that cable technology offered a major solution to the problem of channel scarcity that is inherent in our present system of television broadcasting.

Unlike over-the-air broadcast technology which, because of spectrum limitations, permits only a limited number of channels in a given community, cable technology permits an abundance of channels. The Cabinet Committee viewed cable as something far more than a mere vehicle for retransmitting broadcast signals; rather it saw cable as a technology with the potential to evolve into a medium of communication in its own right, offering new opportunities for access by the public to the electronic media, and new outlets of expression for program producers, advertisers, and virtually anyone who wished to convey a message. In essence, cable's traditional retransmission service was seen as an adjunct to the provision of a multiplicity of channels that could be leased for a broad range of uses. It was apparent, however, that the public would receive the full benefits of cable's potentital only if the medium were afforded a fair opportunity to develop and compete with existing media, free of unwarranted governmental restrictions. To this end, OTP is preparing cable legislation which will establish a national plan and regulatory framework for cable communications based on the recommendations of the Cabinet Committee.

Similarly, it was evident that the unresolved copyright question had inhibited the growth and development of cable, and had made the integration of cable into the television program distribution market most difficult. Accordingly, the Report of the Cabinet Committee, published in January 1974, included a recommendation that cable be subject to copyright liability. The Committee felt that program retailers leasing cable channels should negotiate and pay for the right to use programs and other copyrighted information just as entrepreneurs in other media are required to do. The Committee also recommended that cable system operators which retransmit broadcast signals should be subject to copyright payments in the form of a statutory compulsory license.

These recommendations were grounded on principles of equity, as well as copyright and communications policy rationale. The purpose of copyright protection, under the Constitution, is to ensure that authors receive the encouragement they need to create, as well as the remuneration which they fairly deserve for their creations. Cable systems, in their retransmission of broadcast signals, make profitable use of copyrighted works and should therefore be subject to some form of payment. Moreover, only when cable is obligated to the payment of copyright can the argument of cable's "unfair competition" with broadcasters be put finally to rest.

As you know, Mr. Chairman, the question of the form that cable's copyright payment ought to take has been a subject of continuing controversy for many

years. Numerous proposals have been put forward attempting to distinguish among various types of signals. But these previous proposals have failed for lack of agreement between the principal industries, and it now appears that a blanket compulsory license has gained the widest acceptance among the parties.

In 1971, faced with the cable "freeze" and the fact that the cable-copyright issue was an integral part of the competitive disputes between the cable and broadcast media. OTP encouraged representatives of the principal industries (cable, program producers and broadcasters) to reach some form of agreement on copyright payment. The resulting "Consensus Agreement," providing for elimination of the freeze and the promulgation of the FCC's present cable rules had, as a central provision, the agreement of all parties to support copyright legislation in the form of a compulsory license for cable's carriage of local and distant signals. The bill before you today incorporates such a provision and, although not a perfect answer to all aspects of the issue, we believe it provides a reasonable and workable solution to the problem.

Beyond our belief that payment of copyright fees by cable systems is in accord with traditional copyright principles of incentive and fairness, OTP also looks to copyright legislation to afford stability and certainty where previously there has been none. In this regard, we are concerned that the affected industries not be forced to revisit the uncertainties and disputes which now preoccupy them. While OTP takes no position on the particular fee schedule that is incorporated in the bill, we recognize that Congress is writing on a clean slate here, without the benefit of prior experience with cable-copyright payments and that it may be necessary to adjust the fee schedule in that it may be necessary to adjust the fee schedule in the future on the basis of additional experience and data. We do feel, however, that the provision in the present bill which allows the Copyright Tribunal to commence adjustment of the license fees as early as eighteen months after enactment could undermine the certainty and stability which the bill would otherwise provide.

In summary, OTP believes that the question of cable's liability for copyright has occupied and diverted the attention of major industries and all branches of government for too many years. It is essential for copyright legislation to be enacted soon, first, because television program producers will thereby receive fair compensation for cable's profitable use of their product, and second, because it is time to put the question to rest so that cable may grow and develop in response to the needs and demands of the public. In short, we believe that copyright legislation is a necessary prerequisite to full realization of cable's promise of additional channels, expanded services and a multiplicity of outlets available for the people of this Nation.

That concludes my prepared statement Mr. Chairman. I would be pleased to answer any questions that you or other members of the Subcommittee may have at this time.

Mr. DANIELSON. We have to move along. I find that we are overscheduled in the first place, and as is traditional with this committee we are overquestioning in the second place. It is my fault, and I assume responsibility. I am going to recommend that the next three witnesses try to confine themselves with all of the self-discipline they can so that we can at least give everyone a chance to appear, and I will try to discipline myself.

Our next witness is Mr. E. Fulton Brylawski, chairman of the Copyright Committee of the Bar Association for the District of Columbia.

Won't you please come forward and sit down, and pull up the microphone and give us the benefit of all of your statement as quickly as you can? Thank you.

TESTIMONY OF E. FULTON BRYLAWSKI, CHAIRMAN, COPYRIGHT COMMITTEE, BAR ASSOCIATION, DISTRICT OF COLUMBIA

Mr. BRYLAWSKI. Mr. Chairman, I am E. Fulton Brylawski, chairman of the Copyright Committee of the Bar Association of the District of Columbia and an attorney specializing in copyright and related

matters. My appearance and testimony today, however, is as a concerned individual and not in my official capacity as chairman of the Copyright Committee of the local bar association. At this point, I ask that my formal statement be accepted and printed in the record. And if I could, I will address myself from a rather truncated statement.

Mr. DANIELSON. Without objection, it is so ordered and I would appreciate it if you would do that. You can truncate it very well I am sure, and hit the high spots.

[The prepared statement of Mr. Brylawski follows:]

STATEMENT OF E. FULTON BRYLAWSKI

Mr. Chairman. My name is E. Fulton Brylawski, Chairman of the Copyright Committee of the Bar Association of D.C. and an attorney specializing in copyright and related matters. In my brief testimony here today, I hope to alert the Subcommittee to a few constitutional disabilities of the copyright revision bill, principally the bill's violation of the separation of powers doctrine underlying the U.S. Constitution. Even the present method of administration of the copyright laws by the Copyright Office seems to be a violation of this doctrine, but any doubt on this score would be eliminated by reason of the additional powers and functions to be reposed upon the Copyright Office under the copyright revision bill.

The doctrine of Separation of Powers is often mentioned but little understood. Sometimes it is discussed as part of our federal system of checks and balances. While our Constitution bears its imprint, it has rarely been formulated or applied with any degree of specificity, so that it remains an amorphous and somewhat illusive concept.

Recognizing the need to better understand and clarify the doctrine, the Senate established in 1966 a subcommittee on the separation of powers, headed by Senator Sam Ervin, with the general purpose of investigating the incursions by any of the three branches of government into the constitutionally mandated sphere of another. More specifically, the committee's inquiry was directed to the problem of the exercise of emergency powers by the President in the absence of legislative authorization, the need for more effective congressional oversight of the interpretation of legislation by the judiciary and executive agencies and the extent to which the executive branch may ignore mandates contained in congressional legislation. Various methods of exercising legislative oversight of executive activity were explored to remedy the supposed imbalance of power between the legislative and executive branches. Yet, the subcommittee was also concerned with congressional encroachment upon the executive function. Regardless of the individual stance taken either for or against the extension of executive power, it is interesting to note that no one questioned the validity or vitality of the separation of powers doctrine.

Unfortunately, as a result of its primary concern with executive encroachment, both Congress and the Ervin committee were guilty of a rather ironic oversight. While seeking to use the doctrine as a means of reasserting legislative power rightfully belonging to Congress, they failed to recognize that a subdepartment of the legislative branch, namely the Copyright Office, had been poaching upon the executive function through its exercise of broad executive or administrative powers. This problem promises to become more critical in the near future since the Copyright Office, under the copyright revision bill now under consideration, soon hopes to assume the full trappings of a regulatory agency.

Before examining the constitutionality of the revision bill, it seems appropriate to examine the Copyright Office under the present statute to determine whether its current operation passes constitutional muster under the separation of powers doctrine. Inasmuch as the legislative department through Congress enacts the copyright laws and the same department through the Copyright Office administers or executes them, there is no separation between the legislative power of enactment and the executive power of executing the copyright laws. As a matter of fact, under the Copyright Act of 1870, Congress directly supervised the administration of the copyright law, so that substantially the same legislative instrumentality enacted and administered the copyright laws. How this rather patent violation of the separation of powers doctrine escaped the attention of constitutional scholars is puzzling. What is perhaps clear, however,

is that the Copyright Office found its way somewhat accidentally into the legislative department because copyright deposits provided a ready and cheap means for enrichening the collections of the Library of Congress, which happened to be lodged in the legislative department. As long as the Copyright Office performed only a record-keeping or depository function for such copyright deposits, it behaved in a library-like fashion and did not exercise enough power to attract attention or raise any constitutional eyebrows. With its evolution and maturity into a full administrative or regulatory agency, however, the Copyright Office now seems confronted with the constitutional question whether its adoption by a legislative parent was legitimate.

Today, the Copyright Office operates substantially under the Act of 1909 with few minor amendments. An examination of the pre-1909 proceedings, including the Librarian's conferences in 1905 to 1906, as well as the 1909 Committee Report prohibiting the Register of Copyrights from exercising any "judicial functions", makes it extremely clear that our present copyright statute does not empower the Register of Copyrights to decide and pass upon the copyrightability of works submitted for registration or to interpret the copyright statute or to apply any such statutory interpretation to the facts of a particular copyright application. This conclusion was supported by the early text writers such as Arthur Weil in his 1917 treatise "American Copyright Law", as well as by Congressman Frank Currier, the congressional father of the Act of 1909, who was Chairman of the House Committee on Patents at the time of the passage of the Act of 1909 and its earlier deliberations. His views on the limited functions of the Register of Copyrights as a record-keeper without the power of determining copyrightablity are re-stated in the pre-1909 legislative proceedings as well as the 1912 hearings on the Morrison bill.

Nevertheless, the restraints imposed upon the Register's function under the Act of 1909 have been eroded away or ignored. Perhaps, in obedience to Parkinson's law or the institutional imperative and, despite Congressman Currier's admonition that the Copyright Office should not have an examining staff nor decide what is copyrightable, the Copyright Office today has acquired an examining staff of approximately thirty lawyers as well as thirty-five non-legal examining specialists, and this staff decides what is copyrightable.

Thus, the Copyright Office has evolved from small beginnings of a depository or registry office into a full-grown administrative agency, exercising rather substantial discretionary and interpretative powers, however they may be denominated as judicial, executive or legislative. Perhaps, Congressman Currier was wrong in his concept that the Copyright Office should be an office of registry only. Possibly the 1909 statute should have been drafted to permit the broad exercise of administrative discretion and judicial interpretation which the Copyright Office daily exercises. To the extent that the Copyright Office has misread the 1909 statute to deny copyright secured by a simple deposit and payment of a fee and adopted instead the more traditional review and scrutiny of a team of examiners as in the Patent Office, a serious question is posed whether the Act of 1909 is constitutional if it authorizes this kind of copyright action. Particularly germane to this constitutional inquiry is the fact that the Copyright Office is but a division of the Library of Congress which in turn is part of the legislative branch of the federal government. If the Copyright Office exercises broad executive and interpretative functions, then the legislative branch, which enacts the copyright legislation, also would execute the same laws through its subdivision, the Copyright Office. The executive branch of the federal government would have nothing to do with the execution of the copyright laws. A court review of a rejected copyright application would be available, but apparently only in a limited proceeding in the nature of mandamus. The legislative branch would thereby be a governmental hermaphrodite which does everything. No other example of a more apparent violation of the constitutional separation of powers doctrine can be found.

One of the features of the Copyright Office as a legislative subdepartment, supposedly distinguishing it from an administrative agency such as the Patent Office, is that the Copyright Office does not make any factual determinations as part of its examining procedure. Actually, the current examining procedures of the Patent Office and Copyright Office are not so dissimilar. Where the patent or trademark examiner searches his own Office files to determine the eligibility of an applicant for a patent or trademark, the Copyright Office now does very much the same thing with its own records. Where the Patent examiner has a collection or library of reference materials which he consults to determine the

propriety of approving a patent or trademark application, the Copyright Office examiners similarly have developed a body of expertise, reference material and collateral source material as a basis for approving or rejecting copyright applications. In some instances, the copyright examiners have conducted research in the Library of Congress records and reference books having nothing to do with copyright, primarily to determine whether the work involved has been previously published, whether the author is dead, or whether other information exists which might make the particular copyright applicant ineligible for the copyright claimed or might restrict him only to a more limited copyright. Clearly this type of copyright examination is legally indistinguishable from the Patent Office examination and the Copyright Office must thereby be performing an executive and/or adjudicative function similar not only to that of the Patent Office but also to almost any other federal executive or administrative agency.

The broad power presently exercised by the Copyright Office is well illustrated by a contemporary example. The present copyright statute includes no definition of publication and makes no provision for copyright in sound motion pictures. Moreover, no judicial determination has been made on how a motion-picture, or more appropriately a sound track, might be published and none have commented upon whether a sound track is a copyrightable portion of a sound motion picture. Nevertheless, the Copyright Office has adopted a definition of publication applicable to sound tracks as well as a new regulation that sound tracks are copyrightable. If the copyright statute supports these interpretations, then the Copyright Office would have exercised the broadest judicial power in its *de novo* interpretation of the statute and, if these interpretations are not supported by the statute, then the Copyright Office would have exercised a legislative function in adding to the copyright law new provisions on publication and the copyrightability of sound tracks. That the Copyright Office may not share in nor perform any such legislative or judicial function seems axiomatic and any attempt to do so would seem a clear violation of the separation of powers doctrine.

Mindful that the Copyright Office may now be acting in violation of its constitutional and statutory authority, it is appropriate to examine the copyright revision bill to determine what, if any, new constitutional problems may thereby be created. Under the Act of 1909, a rather modest and ambiguous rule and regulation power was given to the Register of Copyrights, apparently only to facilitate the internal administration of the Copyright Office. The revision bill, however, would vest in the Register explicit and new discretionary and regulatory powers, which would exacerbate the constitutional problems of the present law. One feature of the bill goes even further by creating within the Copyright Office a Copyright Royalty Tribunal which would have the authority to decide disputes with respect to the distribution of royalties and to establish new royalty rates from time to time on cable TV, jukeboxes, phonorecords and possibly performances if S. 1111 or its equivalent is adopted by the Congress. This Tribunal would provide for an on-going method of rate adjustment without recourse to Congress and this objective is laudable. However, a very restricted court review of these rate determinations is provided in the bill, generally limited to fraud, and excluded from this review would be the customary complaint that the administrative determination is unsupported by the evidence, is arbitrary or capricious or suffers some other legal irregularity.

The new rate-making function vested by the revision bill of the Copyright Office would be substantially indistinguishable from the rate-making activities of certain agencies in the executive branch as the ICC, FPC and CAB. Rate-making has always been deemed a legislative function. Delegation of the legislative power to establish rates has been permitted to the executive branch but only within clear and rather narrow guidelines. Yet, no delegation of a legislative authority has ever been sanctioned to a congressional subdivision, not even a congressional committee, much less to a body not constituted of elected representatives such as the Copyright Office. Hence, the rate-making function of the Copyright Royalty Tribunal would involve a clear unconstitutional delegation of legislative power as would compound the serious constitutional disabilities of the present copyright law under the separation of powers philosophy.

Actually, it should be self-evident that the copyright revision bill is unconstitutional. The net result of the revision bill would be to weld the enactment, execution and judicial review of the proposed copyright law into a function administered almost entirely within the legislative branch of government, providing no participation by the executive branch and only a very limited review by the courts. If this combination of functions be constitutional, then there

would be no legal prohibition against Congress transferring from the executive to the legislative fold all of the functions of the Patent Office, SEC, ICC, FTC and virtually any other administrative or executive agency of the federal government.

Apart from constitutional disabilities under the separation of powers doctrine and improper delegation of legislative power, the copyright revision bill may be unconstitutional as a denial of due process under the 14th Amendment. Under § 809 of the copyright revision bill, the scope of judicial review of royalty distribution has been substantially limited to matters amounting to fraud or corruption and judicial review of royalty rate determination has been ignored. It is true that the Congress may limit judicial review of an administrative agency except where constitutional questions are raised. Yet, the rationale of such a limited review is that all the parties would have their day in court in a quasi-judicial proceeding before the particular administrative body. Here, the Copyright Royalty Tribunal would be part of the legislative branch and it cannot be admitted that the proceeding before it would be either administrative or quasi-judicial without doing some violence to the separation of powers doctrine. Even if we were to ignore this problem, there is nothing in the copyright revision bill which would provide the due process safeguards of notice and hearing, and because a legislative subdepartment would not fit the definition of "agency" under the Administrative Procedure Act, the procedural safeguards of that Act would be inapplicable.

It would be exceedingly fatuous of me to assume that I can do anything more than merely scratch the surface of these complicated issues within the brief span of time allowed and I respect the reasons why more time is not available. However, having stated the problem, I would at least like to briefly offer one possible solution apart from restricting the Copyright Office to its original function as a depository or registry office. A reasonable alternative would be to remove the Copyright Office from the Library of Congress and the legislative department and to reestablish it in the executive branch of the federal government, as would legitimatize its present executive and quasi-judicial operation and thereby save the constitutionality of the proposed copyright revision bill. By opting for a regulatory agency in the executive branch of government, the Copyright Office also would become subject to the due process safeguards of the Administrative Procedure Act, which even the Register of Copyrights admitted in a November 4, 1974 proceeding on type face designs was not now applicable to the Copyright Office as a legislative subdepartment.

Finally, removing the Copyright Office from the legislative branch would have some important in-house benefits. For instance, the Register of Copyrights presently functions and has expertise totally dissimilar from the Librarian of Congress under whose supervision and direction she must operate. In addition, the Copyright Office cannot be promptly or directly responsive to the needs of its own personnel and other purely parochial matters if the Librarian's approval is required on matters relating to hiring, firing, pay scales, relationships with the rental agent and the like. On the other hand, re-locating the Copyright Office as an autonomous agency within the executive department, like the Patent Office, would increase efficiency by removing the bureaucratic layer presently imposed by the requirement of the Librarian's approval for almost every act and function of the Copyright Office.

The separation of the Copyright Office from the Library of Congress, moreover, would not hamper the Librarian's ability to enlarge and enrich his collections from copyright deposits. It is clear that the Copyright Office does not have to be a subdepartment of the Library of Congress as a condition for copyright deposits to flow into the Library. Prior to 1870, the very substantial accumulations of copyright deposits were nonetheless acquired by the Librarian of Congress even though his department was not responsible for the administration of the copyright laws.

Because of the limits of time, I recognize that my brief statement will provide only a tip-of-the-iceberg glimpse of the constitutional problems. A more extensive review is incorporated in a longer study which I am preparing under the title "The Copyright Office: A Constitutional Confrontation" which is scheduled for publication in the November, 1975 issue of the George Washington Law Review. I thank the Committee for allowing me to appear and express these views.

Mr. BRYLAWSKI. My formal statement essentially raises three constitutional pitfalls of the copyright revision bill. The first, which is somewhat a legacy of current copyright administration and practice,

is that the execution of the copyright laws by the Copyright Office, a subdepartment of the legislative branch of the Federal Government, violates the separation of powers doctrine of our Constitution in that there is no separation thereby provided between the enactment of the copyright laws and their execution if both functions are performed within the legislative branch.

Today, the Copyright Office operates substantially under the act of 1909 with few minor amendments. An examination of the pre-1909 proceedings and the 1909 committee report clearly establishes that our present copyright statute reposes very narrow authority upon the Register of Copyrights, which some have characterized as merely ministerial to permit the Copyright Office to receive and record claims of copyright. At the annual ABA convention last year, the present Register of Copyrights, Ms. Barbara Ringer, acknowledged the rather passive nature of her office as being a Registry Office with little more than two old ladies with a filing cabinet.

The present bill, H.R. 2223, proposes to vest in the Register broad discretionary, administrative, and regulatory powers. In addition, chapter 8 of the bill establishes new ratemaking and royalty distribution functions in the Copyright Royalty Tribunal to be created within the Copyright Office. These functions would resemble the regulatory activities of certain agencies in the executive department such as the ICC, FPC, and CAB. Yet, rather limited judicial review is provided for these new Copyright Office functions.

The net result of the revision bill would be to weld the enactment, execution, and judicial review of the proposed copyright law into a function to be administered almost entirely within the legislative branch of government, providing no participation by the executive branch and only a very limited review by the courts. If this combination of functions is constitutional, then there would be no legal prohibition against Congress transferring from the executive fold all of the functions of the Patent Office, SEC, ICC, FTC, and virtually any other executive or administrative agency of the Federal Establishment.

How this patent violation of the separation of powers doctrine escaped the attention of constitutional scholars is puzzling. Perhaps, the explanation derives from the fact that the Copyright Office quite accidentally found its way into the legislative department over 100 years ago when Librarian Ainsworth Spofford recognized that copyright deposits would provide a ready and cheap means for enrichening the collections of the Library of Congress into a great national library and, hence, persuaded Congress in 1870 to transfer the copyright registration or depository function to the Library of Congress. As long as the Library of Congress, and afterwards the Copyright Office, performed only a recordkeeping or depository function for copyright deposits, it behaved in a library-like fashion and did not exercise enough power to attract attention or raise any constitutional eyebrows. With its evolution and maturity into a full administrative or regulatory agency, however, the Copyright Office now seems confronted with the constitutional question whether its adoption by a legislative parent was legitimate.

The second constitutional reef over which Congress must chart the copyright bill is that the ratemaking, if not the royalty distribution, function of the Copyright Royalty Tribunal is a legislative function

which can only be delegated to an executive agency within clearly defined and rather narrow standards if the copyright revision bill is not to be an unconstitutional delegation of legislative power. Standards for such ratemaking activities are not clearly established in the bill. Moreover, the Copyright Office, within which the Copyright Royalty Tribunal would operate, is not an executive agency but rather a legislative subdepartment. Since Congress may not delegate legislative powers to one of its own committees, it seems obvious that it may not delegate such power to a legislative subdepartment, here the Copyright Office, which is not even a segment of an elective body.

Third, there is a substantial danger that the Copyright Royalty Tribunal might run afoul of the due process clause under the fourteenth amendment. The procedural safeguards of the Administrative Procedure Act would not apply since neither the Copyright Royalty Tribunal, nor the Copyright Office, of which it is a part, would seem to fit the definition of agency under section 551, title 5, United States Code, the codified version of the Administrative Procedure Act.

Unfortunately, section 804 of the copyright revision bill, dealing with the procedures of the Copyright Royalty Tribunal, does not seem to guarantee the constitutional minimum of a hearing, notice in the Federal Register, and certain other procedural guarantees. Moreover, judicial review under section 809 of the revision bill of royalty rate determinations has been totally ignored and judicial review of royalty distribution has been limited to matters amounting to fraud and corruption. All of these elements concerning the procedures of the Tribunal and the judicial review of its decisions raise the question whether the parties affected by such rate determinations or royalty distributions would have their day in court.

If the constitutionality of the present bill is to be saved it would seem necessary to remove the Copyright Office from the Library of Congress and reestablish it in the executive branch like the Patent Office, its constitutional sibling. Transplanting the Copyright Office thus into the executive branch would not only legitimatize the executive and quasijudicial operations of the Copyright Office under the revision bill, but would also subject the Copyright Office to the due process safeguards of the Administrative Procedure Act, which even the Register of Copyrights admitted in a November 4, 1974, proceeding on typeface designs was not now applicable to the Copyright Office as a legislative subdepartment.

I recognize that my brief statement can only provide a superficial glimpse of the constitutional problems, but I trust that these remarks will prove to be constructive, and helpful to the committee.

I am now open to questions if I can elaborate on any of these points. Thank you very much.

Mr. KASTENMEIER. Thank you, Professor Brylawski.

I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Yes. What would you do to correct the bill?

Mr. BRYLAWSKI. Well, I would provide an enabling provision whereby the Copyright Office function and the activity delegated to the Copyright Office would be moved into the executive department, possibly the Department of the Interior or the Department of Commerce.

Mr. RAILSBACK. You would move the whole Office and all of its functions?

Mr. BRYLAWSKI. Yes.

Mr. RAILSBACK. What about giving the FCC the power that is envisioned, that is given in the bill to the Copyright Royalty Tribunal?

Mr. BRYLAWSKI. I think it would have authority over more than what the FCC does.

Mr. RAILSBACK. No, I mean the fee schedule, setting the fees and some of the other powers, giving that power to the FCC rather than to the Register of Copyrights?

Mr. BRYLAWSKI. I think it could be done insofar as the cable TV royalties and rates are concerned, but there are also the royalties and rates under the section relating to sound recordings and distribution of jukebox royalties and so forth which would not be matters, I think, normally within the competence or jurisdiction of the FCC.

Mr. RAILSBACK. Has there ever been a case that you know of where the authority of the Copyright Office to implement and execute laws has been challenged?

Mr. BRYLAWSKI. Well, there only have been approximately six reported challenges of copyright administration or the authority of the Copyright Office to reject registrations since the act in 1909. None of those cases have raised the constitutional questions which I raise before the committee today.

Mr. RAILSBACK. Thank you.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I just want to say thank you. I had not thought about that constitutional problem at all, for which I can only sit here and blush and say thank you very much. And I will pass.

Mr. KASTENMEIER. The gentleman from New York, Mr Pattison.

Mr. PATTISON. I feel the same way. No questions.

Mr. DANIELSON. I think you may have a point.

Mr. KASTENMEIER. Mr. Pattison?

Mr. PATTISON. No. No questions.

Mr. KASTENMEIER. Let me just ask one further question. Quite apart from the theoretical constitutional question you cite, is there any practical disability or disadvantage to parties by virtue of the Librarian of the Congress or the Register of Copyrights theoretically being a part of the legislative branch? After all, they must exercise laws, and I think the Librarian and the Register are not appointed by the Congress as such. They are appointed, the Librarian is appointed by the President, and the Register by the Librarian I believe.

Mr. BRYLAWSKI. That is correct.

Mr KASTENMEIER. Consequently, for all practical purposes, they are as separate from us as any executive agency. I am talking about the practical, the practical rather than the theoretical constitutional question.

Mr. BRYLAWSKI. Well, I can think of several things, but I will try to boil them down to two things in response to your question. I think that the Copyright Office in recent years has felt certain constraints. I am not sure they would rationalize them as constitutional constraints. Because they are in the legislative department, they do not have quite the formal procedures and hearings of the Patent Office with respect to the exchange with the copyright applicant and his attorney concerning matters which they object to or afford the basis on which they refuse registration. They certainly have attempted to perform fairly,

but the procedures have been quite informal, and the adoption of regulations or practices in the form of the Compendium of Copyright Office Practices has been done somewhat informally without permitting input by interested parties like in a typical executive agency where they would put forth a proposed regulation, notice in the Federal Register and take testimony and the like.

Now, Ms. Ringer did follow the course of action of having a formal hearing and took testimony for the first time last November on the question of changing the regulations on copyright on original typeface design, and the response was good, but this is all being done gratuitously and informally.

The second question is the extent you wish to formalize the procedures in the Copyright Office, or to encourage the type of examination in the Copyright Office that you would have in the Patent Office. You would have to subscribe to a slightly different fee concept, where at the present time the copyright fee is $6 whether it is a several million dollar motion picture or a completely, commercially untested musical composition. The fee structure in the Patent Office starts from $45 and it goes up, partly to match the fact that the examination there is very substantial. And I think that the examination of the Copyright Office is much broader and deeper than it was several years ago, and I think that it will continue to be.

So we have the philosophical question as to how large a fee we want to impose upon a claim of copyright on a commercially untested work. Those are just two of several points which I could raise in response to your question.

Mr. KASTENMEIER. Well, I appreciate the point you have raised. On behalf of the committee, Mr. Brylawski, we would like to thank you for your contribution.

Mr. BRYLAWSKI. My pleasure. Thank you.

Mr. KASTENMEIER. Next the Chair would like to call on Prof. Rondo Cameron, who, incidentally, is well known to the Chair for his work at the University of Wisconsin several years ago. Professor Cameron is an author, scholar, and teacher, and you are most welcome, Mr. Cameron. You have a short statement, and you may proceed.

TESTIMONY OF PROF. RONDO CAMERON, AUTHOR, SCHOLAR, AND TEACHER

Mr. CAMERON. Mr. Chairman, members of the committee, members of the staff. I appreciate this opportunity to present my views, those of an ordinary citizen, on this important legislation. It frequently happens in the legislative process that the voices of ordinary citizens are drowned by the clamor of special interests, and I include among those the bureaucracy that we have heard from today. I am glad to see that such does not appear to be the case with the bill now under consideration.

Although I qualify myself as an ordinary citizen, my interest in the outcome of this legislation is far from negligible. Moreover, as a teacher, a research scholar, and an author, I am representative of the many thousands—indeed, millions—of others who pursue those honorable professions. For us—teachers, scholars, authors—the printed word is at the very heart of our professional lives and of our livelihood. Books, magazines, and scholarly journals are the tools of our trade.

Both as producers and users of copyrighted material we are vitally interested in the protection of the intellectual property of authors and in its accessibility for fair use by teachers, students, and scholars.

Mr. Chairman, let me note, for the record, that I am the author, coauthor, or editor of eight books that have appeared in more than 20 different editions; of more than 100 articles, contributions to symposia, columns, and reviews; and that various of my writings have been translated into virtually all major languages including Japanese, Korean, and Arabic. I am also the editor of the "Journal of Economic History," a scholarly publication with an international circulation. Finally, as president of the Economic History Association, I am the official representative of its 1,000-odd individual members, and speak unofficially on behalf of many other similar scholar-teachers.

Mr. Chairman, in view of my background and interests, I will confine my remarks to those portions of the bill concerned with literary works, as defined in the bill, and more particularly to sections 106–108. In general, Mr. Chairman, I find the bill to be excellent, at least those portions with which I am most familiar, a great improvement over the present chaotic state of copyright law. I wish to commend your committee and its staff, its predecessors in previous Congresses and their counterparts in the Senate, for striving to bring order out of chaos. I wish for the bill speedy, if now belated, passage.

In spite of my general commendation and my wishes for speedy passage, I do have two points of criticism. It seems to me that there are two flaws in the bill which, however, can be remedied with minimal changes in the text of the bill. The first concerns the unnecessarily vague language in sections 107 and 108. The second concerns an omission from the bill of serious concern to authors of textbooks especially. I will take them up in that order.

One. One of the most widespread abuses of the rights of authors at the present time results from the technological progress that has made possible cheap, rapid reproduction of published works by photocopying and similar processes. As a researcher and teacher, I have found these devices most useful and convenient; but as an author, I have suffered from the unwarranted and unfair—and unremunerated—copying of my books and articles. It is one thing to photocopy a few isolated pages in preference to laboriously copying by hand or typewriter a series of passages needed for later reference; it is quite another to photocopy entire chapters, articles, and even books for sale or other forms of distribution.

Although sections 107 and 108 take a step in the right direction by identifying and attempting to cope with this abuse, they are not, in my opinion, sufficiently specific and precise. I believe the bill should set specific limits on the amount and number of copies that can be made of a copyrighted publication, beyond which the user or duplicator should pay a royalty to the author and publisher. I will be glad to indicate what I think those limits should be if the committee wishes.

As the analysis of the Senate bill 1361 of the 93d Congress states succinctly—Calendar No. 946, page 118: "Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented." In my opinion the best way to prevent it is not to forbid it legally, which would only result in surreptitious infringements, but to require the beneficiaries to pay a royalty to the owner of the copyright.

Two. There is no provision at all in the bill for the payment of royalties on the resale of published books and similar works. I am not concerned here with the market for old, rare, and out-of-print books, many of which are no longer under copyright in any case, or with the casual, informal markets that exist, for example, among college students for the resale of textbooks among friends and classmates. What is of concern, however, is the numerous large, organized markets for the commercial resale of used or "secondhand" books, especially textbooks.

The existence of these markets constitute a serious threat, in the language of section 107, to "the potential market for or value of the copyrighted work." As above, I do not suggest that such commercial resale should be prohibited, merely that the wholesalers or retailers should be required to pay a royalty to the owner of the copyright. Musical composers, artists, moviemakers, and such receive royalties on commercial "performances and displays" of their works; it is only fair that authors should receive royalties for the commercial resale of theirs.

Subject to these two qualifications, Mr. Chairman, which I hope the committee will remedy in its final markup of the bill, I again congratulate you on your fine work in revising the copyright law. Thank you for your attention.

Mr. KASTENMEIER. Thank you, Professor Cameron.

In the second suggestion you make, I am rather interested because I do not recall that the publishers or others who ought to be interested in this question have raised it. Now, perhaps they have, but I do not recall that they have, so we will have to ask them. They would have a financial interest in this.

Mr. CAMERON. Certainly, Mr. Chairman. And that point was brought to my attention in my conversations with my publishers. It is estimated, for example, on a normal commercially successful textbook, in the second year after it is published about one-third of the copies used are secondhand copies, and in the third and subsequent years as much as 50 percent and more of the copies are secondhand copies.

Mr. KASTENMEIER. On the first point, you invite us to ask you what the limits might be on the amount and number of copies that can be made by duplication. I will invite you to suggest, partly because it will, I think, give us an indication of how you conceive of the problem. The types of materials and the types of matter differ so greatly that I am wondering whether they are all susceptible to the same rule. In any event, what limits do you think might be placed on copies?

Mr. CAMERON. A reasonable rule, Mr. Chairman, would follow the guidelines that photocopying should be, without payment of royalties, should be restricted to the kinds of copying that a scholar, for example, would do by hand, or on a typewriter. And this suggests, or translates more specifically in that photocopying of single copies of isolated pages might proceed without payment of royalty, but the photocopying of multiple copies of one or more pages, or the photocopying of a single copy of an entire item, such as a chapter in a book, or an article in a journal, should be made subject to royalty payments.

Mr. KASTENMEIER. In other words, one could not then make two copies of a single page without payment of royalty?

Mr. CAMERON. It seems to me, Mr. Chairman, that that may be a minor point; but, yes. I would say the legislation which would restrict

photocopying without payment of royalty to a single copy of an isolated page.

Mr. KASTENMEIER. Thank you. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Suppose that single copy is made today and tomorrow somebody else comes back to make a single copy, would you change the rule at that point?

Mr. CAMERON. This is a matter of grave concern in the case of library copying. I do not know how it could be dealt with except that if it were discovered that a conspiracy were underfoot, then I suppose it could be dealt with.

Mr. DANIELSON. I do not know how many conspiracies you may have investigated, or if you have any concept of the amount of time and money involved in a conspiracy. but anyway, it is an interesting thought.

On your secondhand book subject, what a copyright owner is entitled to under the Constitution is the protection of the use of his literary property so that it will stimulate his activities in producing some more. Suppose instead of selling the book 1 student bought a book and 10 students in a little group were allowed to read the same book. Now, you have 10 pairs of eyes rather than 1 pair of eyes on this book. What would you suggest about that?

Mr. CAMERON. That happens regularly, all of the time, Mr. Danielson. I do not think anything could be done about it. I am not greatly concerned about the voluntary and the spontaneous activities of students to avoid payment for books. What I am concerned about is the commercial exploitation of the desire of students to reduce their payment to the owners of the copyrighted material.

Mr. DANIELSON. Well, your suggestion is interesting. But, in the real world that we live in, I want to suggest to you, you do not count on my vote.

That is all, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I was just going to comment on, I guess, the same thing, the problem of the resale of old books. It seems to me as far as textbooks are concerned, it is usually resolved by the author coming out with a new edition about once a month.

Mr. CAMERON. It does not work quite that way.

Mr. PATTISON. No; I understand. But I think it would be a very difficult problem to regulate and resolve.

In the area of the number of copies, what you have suggested is, I think, under anybody's definition within, I do not think any librarian would have any problem determining that that was fair use to the limit you suggested, so making it specific would not really add very much. I think the problem comes about when you are talking about specialized journals that even a very limited kind of use, where you are talking about making three or four copies, it is going to have a very big effect on that particular journal; whereas in Time magazine or something like that, Time magazine really does not care whether you made all of the copies you wanted. It is cheap, and it is out of date within a week's time, and they are not concerned. So, the nature of the journal is really what determines how many copies will constitute fair use. And I would suggest that any kind, any number of copy limitation just simply would not accomplish very much.

Mr. CAMERON. I do not follow your reasoning on that, Mr. Pattison.

Mr. PATTISON. Well, a scientific journal, for instance, which has a very limited subscription, any kind of copying at all of that——

Mr. CAMERON. Precisely.

Mr. PATTISON. Almost exceeds fair use.

Mr. CAMERON. That is why I say that there should be specific limits.

Mr. PATTISON. Well, it seems to me from the standpoint of the librarian and the other part of it, which is the teacher's part, that if the teacher wants to take an article out of Time magazine and make 10 copies for his class of one particular page of Time magazine, that probably also would be fair use, even though it would not be fair use in the technical journal. And we have to look at both sides of that picture. We have the teacher's side, as you quite well expressed.

Mr. CAMERON. Yes.

Mr. PATTISON. And the other side, which is the author's side. The author in the case of Time magazine probably would be perfectly willing to admit that 10 copies of 1 page would be fair use, whereas the author of the scientific journal may well not.

Mr. CAMERON. But——

Mr. PATTISON. So if we put an artificial limitation on the number of copies——

Mr. CAMERON. As the bill is now written, there is no protection except through tedious and extensive judicial process for the author of the article in the scientific journal.

Mr. PATTISON. On the other side, there is no protection for the teacher who wants to get that information out, and would presumably get quick permission from certain kinds of authors and journals who are delighted to have you copy all you want. But the practical matter of getting permission——

Mr. CAMERON. Telephone call.

Mr. PATTISON. Well, a telephone call from Dubuque, Iowa, to Time magazine for a sixth grade teacher who wants to do something tomorrow is kind of ridiculous. I mean, it just does not work out, and the teacher ends up having to subject himself to that terrible penalty that we have added to the bill if he does not make a telephone call, and even if he did make the telephone call he is not even sure who he is talking to.

Mr. CAMERON. What he does now is what he would continue to do, I hope, after the bill is passed, which is to go ahead and make the copies.

Mr. PATTISON. But the problem—that is the problem, I think, designing a bill that we know is going to be violated, and I am not sure that that is the right way to legislate. I have no further questions.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Professor, in respect to resale, I am inclined to think that under the law, the general law of contracts, unless the seller puts some kind of a restriction or a reservation on the sale, that that person, that business can do with that property whatever any owner wants to do with it. It is like you buy a piece of art work or a painting, or a patented machine, you buy it without any restriction, and you can sell it, you can give it away, you can do whatever you want to do. That is frankly my initial impression.

Mr. KASTENMEIER. Would the gentleman yield?

Mr. RAILSBACK. Yes.

Mr. KASTENMEIER. Yes. Actually this brought my attention to section 109(a) which says, "Notwithstanding the provisions of section 106(5), the owner of a particular copy or phonorecord lawfully made under this title," the copy being a copy of a book or anything else, I gather, "or any person authorized by him is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord," meaning such person is entitled to resale without royalty. So the bill, in fact, comes down in opposition to your suggestion. Your suggestion would be to remove that?

Mr. CAMERON. Yes.

Mr. RAILSBACK. But I mean, even in the absence of that, it is my belief that you become a proprietor, just like you buy a book, you become the owner of it, or you buy a painting, you buy a piece of patented machinery, you buy a design, you can either give it away, you can sell it, you are the owner of it, and that is what you are paying for. Except if the owner wants to attach a condition to his contract of sale; in other words, what you are talking about is contract, you offer me a book, I buy your book, and unless there is a condition, unless you attach a condition, I can do with it anything I want to do. And that is just the law of contracts.

Mr. CAMERON. That is correct, Mr. Railsback. But I am suggesting that in this case it should be changed in order to provide for fairness to the authors of the copyrighted material.

Mr. RAILSBACK. I think that you would have to change it in so many other areas, to be fair about it—well, let me just pursue something else. How do you feel about having a central intermediary as far as to obtain price quotes on published works? In other words, one of the problems that editors have, I think, or students, is that they have a work, they perhaps should pay for reproducing it, I think, I agree, and what I am saying is I agree with you that there are instances where they should be paying, but I imagine in some cases it is very difficult to get price quotes. What do you think about having some kind of a central intermediary or central office to get hold of the author to, you know, get a price?

Mr. CAMERON. In general, Mr. Railsback, I am against multiplying the bureaucracy. I would not like to see that.

Mr. RAILSBACK. How would you deal with the problem of relative inaccessibility then? In other words, where it is difficult to get hold of somebody?

Mr. CAMERON. I do not think that is a problem, and as I——

Mr. RAILSBACK. Well, you know why it is not a problem? Because they do not do it now. They just go ahead and reproduce it. In other words, the law is not in force.

Mr. CAMERON. Well, as I pointed out in my statement, I am not concerned with the isolated, casual exchanges of isolated copies of books, but I am concerned about the commercial resale of hundreds of copies of textbooks.

I would like to bring to your attention and that of the entire committee that in Great Britain and several other European countries there are now proposals, which will almost certainly be enacted into law, to pay authors royalties on library use; that is to say, libraries will keep records of how many times a book is checked out, and authors will be paid royalties according to that. And I think that is also, although I

have not gone that far in my recommendations to the committee, it certainly is in the same direction as my proposal for royalties on resales.

Mr. RAILSBACK. That is all I have. Thank you.

Mr. DANIELSON. I have one observation I must make or I will have indigestion all day, Mr. Chairman. I want you to understand one thing, Professor, that under the Constitution the only purpose of copyright is to promote the progress of science and useful arts. That is all. There is nothing else. But for that, you would have nothing on copyright.

Now, the disease which makes second-rate nations of some of the countries of Europe need not be adopted to affect our own structure, and while I am here, it is not going to be. I recommend, sir, with all respect to your intellectual achievements, that you join the real world. This proposal of yours has no chance whatever of success.

Mr. CAMERON. Mr. Danielson, you tend to confirm my opinion of the majority of Congressmen. Thank you.

Mr. DANIELSON. That is very well. I am delighted.

Mr. KASTENMEIER. Thank you, Professor Cameron.

[The prepared statement of Rondo Cameron follows:]

STATEMENT OF PROFESSOR RONDO CAMERON

Mr. Chairman, Members of the Committee, Members of the Staff: I appreciate this opportunity to present my views, those of an ordinary citizen, on this important legislation. It frequently happens in the legislative process that the voices of ordinary citizens are drowned by the clamor of special interests. I am glad to see that such does not appear to be the case with the bill now under consideration.

Although I qualify myself as an ordinary citizen, my interest in the outcome of this legislation is far from negligible. Moreover, as a teacher, a research scholar, and an author, I am representative of the many thousands—indeed, millions—of others who pursue those honorable professions. For us—teachers, scholars, authors—the printed word is at the very heart of our professional lives and of our livelihood. Books, magazines, and scholarly journals are the tools of our trade. Both as producers and users of copyrighted material we are vitally interested in the protection of the intellectual property of authors and in its accessibility for fair use by teachers, students, and scholars.

Mr. Chairman, let me note, for the record, that I am the author, co-author, or editor of eight books that have appeared in more than twenty different editions; of more than 100 articles, contributions to symposia, columns, and reviews; and that various of my writings have been translated into virtually all major languages including Japanese, Korean, and Arabic. I am also the editor of the *Journal of Economic History*, a scholarly publication with an international circulation. Finally, as president of the Economic History Association, I am the official representative of its thousand-odd individual members, and speak unofficially on behalf of many other similar scholar-teachers.

Mr. Chairman, in view of my background and interests, I will confine my remarks to those portions of the bill concerned with literary works, as defined in the bill, and more particularly to Sections 106–108. In general, Mr. Chairman, I find the bill to be excellent (at least those portions with which I am most familiar), a great improvement over the present chaotic state of copyright law. I wish to commend your committee and its staff, its predecessors in previous Congresses, and their counterparts in the Senate, for striving to bring order out of chaos. I wish for the bill speedy if now belated passage.

In spite of my general commendation and my wishes for speedy passage, I do have two points of criticism. It seems to me that there are two flaws in the bill which, however, can be remedied with minimal changes in the text of the bill. The first concerns the unnecessarily vague language in Sections 107 and 108. The second concerns an omission from the bill of serious concern to authors of textbooks. I will take them up in that order.

(1) One of the most widespread abuses of the rights of authors at the present time results from the technological progress that has made possible cheap, rapid

reproduction of published works by photocopying and similar processes. As a researcher and teacher, I have found these devices most useful and convenient; but as an author I have suffered from the unwarranted and unfair (and unremunerated) copying of my books and articles. It is one thing to photocopy a few isolated pages in preference to laboriously copying by hand or typewriter a series of passages needed for later reference; it is quite another to photocopy entire chapters, articles, and even books for sale or other forms of distribution. Although Sections 107 and 108 take a step in the right direction by identifying and attempting to cope with this abuse, they are not in my opinion sufficiently specific and precise. I believe the bill should set specific limits on the amount and number of copies that can be made of a copyrighted publication, beyond which the user or duplicator should pay a royalty to the author and publisher. I will be glad to indicate what I think those limits should be if the committee wishes. As the analysis of the Senate bill 1361 of the 93rd Congress states succinctly (Calendar No. 946, p. 118):

"Isolated instances of minor infringements, when multiplied many times, become in the aggregate a major inroad on copyright that must be prevented."

In my opinion the best way to prevent it is not to forbid it legally, which would only result in surreptitious infringements, but to require the beneficiaries to pay a royalty to the owner of the copyright.

(2) There is no provision at all in the bill for the payment of royalties on the resale of published books and similar works. I am not concerned here with the market for old, rare, and out-of-print books, many of which are no longer under copyright in any case, or with the casual, informal markets that exist, for example, among college students for the resale of textbooks among friends and classmates. What is of concern, however, is the numerous large, organized markets for the coommercial resale of used or "second hand" books, especially textbooks. The existence of these markets constitute a serious threat, in the language of Section 107, to "the potential market for or value of the copyrighted work." As above, I do not suggest that such commercial resale should be prohibited, merely that the wholesalers or retailers should be required to pay a royalty to the owner of the copyright. Musical composers, artists, moviemakers and such receive royalties on commercial "performances and displays" of their works; it is only fair that authors should receive royalties for the commercial resale of theirs.

Subject to these two qualifications, Mr. Chairman, which I hope the commitee will remedy in its final mark-up of the bill, I again congratulate you on your fine work in revising the copyright law. Thank you for your attention.

Mr. KASTENMEIER. The Chair would now like to call on Mr. Donald D. Merry, president of Sicom Electronics Corp.

Mr. Merry, you are welcome.

TESTIMONY OF DONALD D. MERRY, PRESIDENT, SICOM ELECTRONICS CORP.

Mr. MERRY. Thank you, Mr. Chairman. I realize that you are running short of time, so I will try to accelerate.

Gentlemen, please accept my sincere appreciation for this opportunity to speak to you today on H.R. 2223 and copyright matters in general.

My presentation will take approximately 14 minutes and has been arranged to minimize the confusion from discussing specific subjects lifted out of context.

Congressional scheme in copyrights: It has always been a characteristic of our social and governmental attitude to find the concept of a monopoly reprehensible. In the building of this Republic, Congress has acted, in accordance with the Constitution, to develop a body of laws which have as a primary goal the benefit of society at large. Sometimes, to accomplish that goal, it was and is necessary for Congress to embrace rather than oppose the concept of a monopoly. So it is in matters of

patents and copyrights which are, in themselves, monopolies. Congress has, and I think rightly so, "dangled a carrot," called a copyright, in front of those creative individuals among us to stimulate them into producing, through their unique talents, works which will benefit society at large. The "carrot" or monopoly or copyright is only granted for a limited time and with the understanding that upon termination of the monopoly all rights inure to the public domain.

Ralph Waldo Emerson wrote, "The man who grasps principles can successfully select his own methods. The man who tries methods, ignoring principles, is sure to have trouble."

In the matter of copyrights, the underlying principle is the benefit of society at large. The method is to reward the creator. It follows that, in any legislation centering on copyrights, the primary interests of society are at least as important as the methods and secondary benefactors involved.

The music industry has prospered and grown dynamically since 1920. There is an accompanying chart to show that. This has only been possible because of a sound underlying body of laws. Title 17 has served society well since 1909.

As we meet during these sessions to consider changing and revising the present copyright statutes, we should be cautioned by Emerson's wisdom and not "get the methods ahead of the principle" or we are sure to have trouble. There has been, during the past 10 years, a great deal of emotion and activity at the Federal and State legislative level and also in the Federal and State courts related to control efforts in the copyright area. Indeed, most of these efforts resulted in various authorities, both Federal and State, imposing some form of control over matters of a copyright nature when the authority to do such was vested only in Congress. We all know the familiar saying about "too many cooks spoiling the soup."

In line with that, there is presently sweeping across our country a trend that will, if allowed to mature, reverse the primary and secondary goals of the intent of our present congressional copyright scheme, leaving the interests of society neglected. My purpose here today is to provide what hopefully will be constructive comments to assure society is not neglected and we continue to enjoy sound growth in our industry based on fair, equitable laws.

Comments on H.R. 2223: Addressing ourselves now to specific points in H.R. 2223, I offer the following comments.

Under section 115, at page 21, line 21: "A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another." I suggest you add "without the approval of the owner of the master sound recording." Many of the sound recording masters in use today are licensed out to businesses who manufacture and distribute under the compulsory license provisions. Present wording of section 115 could be construed so as to render legally useless large libraries of music properly assembled for this purpose.

Presently, section 115 effectively requires the use of musicians to qualify for a compulsory license and ignores the fact that there are businesses which specialize in recording—studios—and there are businesses which manufacture and distribute. Of course, there are also the major music companies who are wealthy enough to do both.

Section 115, as it stands, would eliminate that segment of the music industry—small business—which cannot justify or afford an expensive recording studio. It preempts the present pooling of such cost by small business and would result in lost royalties to the copyright holder. It favors big business.

Section 115, paragraph (a), clause (2), should be reviewed carefully to assure it does not stifle creativity. Many innovations, such as the electronic moog, might be cramped by the wording of this clause.

Under section 115, paragraph (c), clause (1) at line 21: It is suggested that, due to problems frequently experienced today, a more specific location for the identification of a copyright holder be set forth. "The registration or other public records of the Copyright Office" is, I contend, too vague to be workable as experience has proved. This is an excellent time to solve this age-old problem by simply nailing down a specific location where anybody can obtain this information readily. By location, I mean a specific file in the Library of Congress.

Under section 115, paragraph (c), clause (3) at line 35: The requirement for a CPA to certify with a detailed statement of account, the monthly royalty reports, each month, is unworkable in practice and is a severe and unnecessary burden on small businesses. It will not hurt big business. Annual certified statements following monthly statements, attested to by company officers, should be adequate.

Under section 115, some provisions should be provided to clarify situations which arise when the copyright holder refuses to acknowledge the rights of a compulsory license applicant. Experience has shown that this is not an isolated problem. The statutes are generally written with the protection of the copyright holder in mind; however, where we have a compulsory contract between two parties by statute, we must be sure to offer consideration to both.

Under section 301, more detail should be set forth defining the legal status of property rights which are vested in the public. Such property, presently in the public domain, is being denied the public use through various interpretations of the many courts across our great land. The confusion exists at all court levels, both Federal and State and even manifests itself in a five-to-four Supreme Court decision. While section 301 is supposed to preempt those laws in the nature of copyrights, such intent is circumvented by simply calling it another name; that is, unfair competition. In one case a court ruled that a plaintiff had no statutory property right and the plaintiff had no common law property right but the plaintiff did have a "quasi property right" in a musical sound recording. How in the world can a businessman foresee a court creating a whole new thing not provided by statute? Much of the public's time and money can be spared by eliminating expensive litigation in our courts through clarifying definition now.

Under section 302, an objection must be made to the copyright term of life plus 50 years. First of all, this has been proposed more as an attempt to standardize with what is the custom in certain European countries and the wording of the Geneva Convention. In Europe, they don't feel as we do about monopolies and cartels. Our Government, the people, feel differently and I see no reason to offer more stimulus to the creative individuals in our society than is required to keep society enriched with a free flow of ideas and useful arts. Certainly no

one can say the present incentive of 28 years plus 28 years has resulted in lack of growth. Why then increase the cost to society? It is absolutely not necessary. Remember, the primary goal of the copyright laws is to benefit society. This philosophy also extends to the idea of extending present copyrights beyond their legal limit. How can that possibly give a just return to society for granting a monopoly—copyright?

Additionally, now that sound recordings are entitled to copyright protection, a problem arises where the creator is granted a copyright for life plus 50 years. Most sound recordings are created by a corporation whose life—specified in the articles of incorporation—is perpetuity. So we have perpetuity plus 50 years which is forever and that conflicts with the Constitution which requires that such monopolies be "for limited times."

Regarding section 705, some consideration should be given to providing additional data to the public by the Library of Congress. If, in fact, the primary purpose of the copyright scheme is to benefit the public then an effort should be made to make it easy for the public to avail themselves of that which is theirs. To accomplish this is relatively simple. In addition to the aforementioned file reflecting the copyright holder, the date and renewal date of the copyright should be shown. A separate file containing works on which the copyrights have expired should be provided so it may be used by the society which paid for it with a limited monopoly.

Concluding remarks: The preceding comments have been offered to help bridge the gap between the businessplace and the legislative offices of you gentlemen. Throughout this presentation you undoubtedly noted that an emphasis was placed on society's welfare. I felt this was necessary. During the past 10 years, the hotly contested battles which have taken place in our courtrooms on such subjects as cable TV, pirating sound recordings, and copying of literary works, and others, have resulted in so much case law that is at odds with statutory law.

Federal judges disagreeing with other Federal judges. Companies fighting tooth and nail in ugly displays of greed, power, and corruption. Not once in some 100-plus court cases reviewed by this person involving copyright matters did the interests of society emerge. Always it is some special interest faction attempting to cement a position of advantage over others. More often than not, those of us whose lives are involved with copyrights are easily caught up in the complex and emotional issues at hand and it is very difficult to keep one's head screwed on correctly—to view the issues from their proper perspective.

I suggest to you, gentlemen, that our own lifeblood, the society in which we live, has not received a proper share of her just earnings and consideration. Please contemplate this as you consider some of the suggestions which I have brought to you today.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Merry. I think you kept well within your allotted time of 14 minutes, and I do not think you took that much time.

I would like to yield to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. I have no questions, but I want to thank you for your testimony.

Mr. MERRY. Thank you, sir.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Same thing. I have no questions. I wish to thank you. In fact, I have nothing here that I can quarrel with.

Mr. MERRY. Thank you, sir.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I am interested in the fact that you do not specify what problems arise from section 115(a) as it relates to something like the moog.

Mr. MERRY. No, I do not. My feeling in that particular section, sir, was that as several other of the persons ahead of me have testified, the technological advances have required a revision of this law. And there was a time prior to Public Law 92-140 when Congress did not see, for instance, that sound recordings were entitled to coypright. They were not creative in nature. They now see fit to award them copyrights. The same is true of arrangements that are now creative in nature that were not before. The electronic moog is the example that I use, but it is possible for someone to be creative in a sense today that they never recognized in years past. For instance, creative dancing is something that lately, and I suspect in the 1920's it probably would have been scandalous, but today it is recognized as an art form.

Mr. PATTISON. I am just curious how it would affect, how paragraph 115—I am not just maybe as familiar with that as you are. How would that impact on something like the moog?

Mr. MERRY. The moog is a musical instrument that electronically creates musical sounds and simulates other instruments.

Mr. PATTISON. Every band has a moog these days.

Mr. MERRY. You indicated in here that an arrangement shall not change the basic melody and fundamental character of the work and shall not be subject to a protection as a derivative work under this without the consent of the copyright owner, and then I think when an author, and I will use a musical work as an example, when the author gets a copyright, which is generally identified in sheet music form, it is possible for another creative artist like Burt Bacharach or someone to come along and redo that work and change the fundamental character of not necessarily the—well, let's take some of the more contemporary presentations, and the one that comes to mind is Jesus Christ Superstar. That is an interpretation that involves many adaptations to the original work, and so do others.

Mr. PATTISON. About which there has been brought out a lot of litigation on that particular one.

Mr. MERRY. Right. Yes. There probably has been.

Mr. PATTISON. There is a performing group and the authors have differed by exactly what you are pointing out.

Mr. MERRY. Yes.

Mr. PATTISON. They have said that the performance was a separate thing.

Mr. MERRY. I see. The effort here, of course, is to protect the property owner.

Mr. PATTISON. No, it is both.

Mr. MERRY. I think that if we accepted the concept of compilation copyrights and derivative works, then we have to not restrain the

people who would derive another work through a compilation and deny him a chance to express himself in his medium. I think it is something that has to be looked into. I think it might be something that just has not been viewed from all the vantage points that it should.

Mr. PATTISON. Uh huh.

Mr. MERRY. It is not anything that I cannot personally live with. I am just looking at it from the benefit of creative people in the society at large.

Mr. PATTISON. Well, I thank you for your comments, and they are extremely helpful.

Mr. KASTENMEIER. I would only, in conclusion, want to say that when you were talking about a corporation, and you suggest that this would provide for a copyright for life plus 50, or for perpetuity plus 50, that is not the case. That would be a work for hire, and the term is a term of 75 years from the date of first publication. It is a fixed term. It does not endure during the life of a corporation.

Mr. MERRY. All right, Mr. Chairman, I understand what you are saying, but I offer this explanation. You have to differentiate between the components of the musical work, and there are basically five of them. There is the music, the words, the arrangement, the plastic disc, being the record itself, and then the artist's rendition, say Johnny Cash singing it. Now, in the case of the music, and the song, and the arrangement, that is granted a copyright for life plus 50 years, but not if this is, let us say, Columbia Records who comes along and utilizing that copyright under contract creates a sound recording, and they get a copyright on that sound recording, the corporation itself has created the sound recording, and they are entitled to copyright for life plus 50 years.

Mr. KASTENMEIER. They would be entitled insofar as they created it as a corporate interest and held a copyright.

Mr. MERRY. Yes.

Mr. KASTENMEIER. They would be entitled to 75 years after publication?

Mr. MERRY. Only 75 years? Okay. That was not clear to me. Thank you.

Mr. KASTENMEIER. But nonetheless, your points, otherwise, I think, are well made, and we appreciate your contribution this morning.

Mr. MERRY. Thank you very much.

[The prepared statement of Donald D. Merry follows:]

STATEMENT OF DONALD D. MERRY, PRESIDENT, SICOM ELECTRONICS CORP.

Gentlemen, please accept my sincere appreciation for this opportunity to speak to you today on H.R. 2223 and copyright matters in general.

My presentation will take approximately 14 minutes and has been arranged to minimize the confusion from discussing specific subjects lifted out of context.

CONGRESSIONAL SCHEME IN COPYRIGHTS

It has always been a characteristic of our social and governmental attitude to find the concept of a monopoly reprehensible. In the building of this Republic, Congress has acted, in accordance with the Constitution, to develop a body of laws which have as a primary goal the benefit of society at large. Sometimes, to accomplish that goal, it was and is necessary for Congress to embrace rather than oppose the concept of a monopoly. So it is in matters of patents and copyrights which are, in themselves, monopolies. Congress has, and I think rightly so, "dangled a carrot", called a copyright, in front of those creative individuals among us to stimulate them into producing, through their unique talents, works

which will benefit society at large. The "carrot" or monopoly or copyright is only granted for a limited time and with the understanding that upon termination of the monopoly all rights inure to the Public Domain.

Ralph Waldo Emerson wrote, "The man who grasps principles can successfully select his own methods. The man who tries methods, ignoring principles, is sure to have trouble."

In the matter of copyrights, the underlying Principle is the benefit of society at large. The Method is to reward the creator. It follows that in any legislation centering on copyrights, the Primary interests of society are at least as important as the Methods and Secondary benefactors involved.

The music industry has prospered and grown dynamically since 1920 (see accompanying chart). This has only been possible because of a sound underlying body of laws. Title 17 has served society well since 1909.

As we meet during these sessions to consider changing and revising the present copyright statutes, we should be cautioned by Emerson's wisdom and not "get the methods ahead of the principle" or we are sure to have trouble. There has been, during the past 10 years, a great deal of emotion and activity at the Federal and State legislative level and also in the Federal and State courts related to control efforts in the copyright area. Indeed, most of these efforts resulted in various authorities, both Federal and State, imposing some form of control over matters of a copyright nature when the authority to do such was vested only in Congress. We all know the familiar saying about "too many cooks spoiling the soup".

There is presently sweeping across our country a trend that will, if allowed to mature, reverse the primary and secondary goals of the intent of our present Congressional copyright scheme, leaving the interests of society neglected. My purpose here today is to provide, what hopefully will be, constructive comments to assure Society is not neglected and we continue to enjoy sound growth in our industry based on fair, equitable laws.

COMMENTS ON H.R. 2223

Addressing ourselves now to specific points in H.R. 2223, I offer the following comments.

Under section 115, at page 21, line 21—"A person may not obtain a compulsory license for use of the work in the duplication of a sound recording made by another." I suggest you add "without the approval of the owner of the master sound recording". Many of the sound recording masters in use today are licensed out to businesses who manufacture and distribute under the compulsory license provisions. Present wording of section 115 could be construed so as to render legally useless large libraries of music properly assembled for this purpose. Presently section 115 requires the use of musicians to qualify for a compulsory license and ignores the fact that there are businesses which specialize in recording (studios), and there are businesses which manufacture and distribute. There are also the major music companies who are wealthy enough to do both. Section 115 as it stands would eliminate that segment of the music industry (small business) which cannot justify or afford an expensive recording studio. It pre-empts the present pooling of such cost by small business and would result in lost royalties to the copyright holder. It favors big business.

Section 115, paragraph (a), clause (2) should be reviewed carefully to assure it does not stifle creativity. Many innovations such as the moog might be cramped by the wording of this clause.

Under Section 115, paragraph (c), clause (1), at line 21—It is suggested that, due to problems frequently experienced today, a more specific location for the identification of a copyright holder be set forth. . . . "the registration or other public records of the copyright office" is too vague to be workable as experience has proved. This is an excellent time to solve this age old problem by simply nailing down a specific location where anybody can obtain this information readily. By location, I mean a specific file in the Library of Congress.

Under Section 115, paragraph (c), clause (3), at line 35—The requirement for a CPA to certify with a detailed statement of account, the monthly royalty reports, each month, is unworkable in practice and it is a severe and unnecessary burden on small businesses. It will not hurt big business. Annual Certified statements following monthly statements attested to by company officers should be adequate.

Under Section 115, some provisions should be provided to clarify situations which arise when the copyright holder refuses to acknowledge the rights of a

compulsory license applicant. Experience has shown that this is not an isolated problem. The statutes are generally written with the protection of the copyright holder in mind; however, where we have a compulsory contract between two parties by statute, we must be sure to offer consideration to both.

Under Section 301, more detail should be set forth defining the legal status of property rights which are vested in the public. Such property, presently in the public domain, is being denied the public use through various interpretations of the many courts across our great land. The confusion exists at all court levels, both Federal and State and even manifests itself in a 5 to 4 Supreme Court decision. While section 301 is supposed to preempt those laws in the nature of copyrights, such intent is circumvented by simply calling it another name; i.e., unfair competition. In one case a court ruled that a plaintiff had no statutory property right and the plaintiff had no common law property right but the plaintiff did have a "Quasi property right" in a musical sound recording. How in the world can a businessman foresee a court creating a whole new "thing" not provided by statute! Much of the public's time and money can be spared by eliminating expensive litigation in our courts through clarifying definition now.

Under Section 302, an objection must be made to the copyright term of life plus 50 years. First of all, this has been proposed more as an attempt to standardize with what is the custom in certain European countries and the wording of the Geneva Convention. In Europe, they don't feel as we do about monopolies and cartels. Our government, the people, feel differently and I see no reason to offer more stimulus to the creative individuals in our society than is required to keep society enriched with a free flow of ideas and useful arts. Certainly no one can say the present incentive of 28 years plus 28 years has resulted in lack of growth. Why then increase the cost to society? It is absolutely not necessary. Remember, the primary goal of the copyright laws is to benefit society. This philosophy also extends to the idea of extending present copyrights beyond their legal limit. How can that possibility give a just return to Society for granting monopoly (copyright)?

Additionally, now that sound recordings are entitled to copyright protection, a problem arises where the creator is granted a copyright for life plus 50 years. Most sound recordings are "created" by a corporation whose life (specified in the articles of incorporation) is perpetuity. So we have perpetuity plus 50 years which is forever and that conflicts with the Constitution which requires that such monopolies be "for limited times."

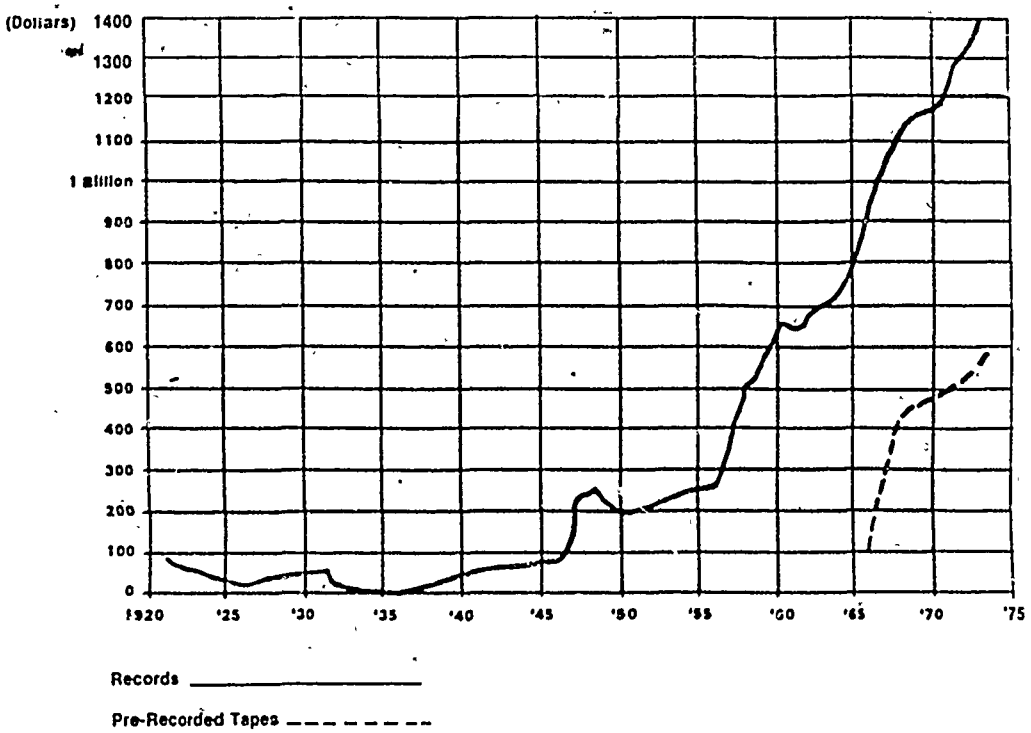
Regarding Section 705, some consideration should be given to providing additional data to the public by the Library of Congress. If, in fact, the primary purpose of the copyright scheme is to benefit the public then an effort should be made to make it easy for the public to avail themselves of that which is theirs. To accomplish this is relatively simple. In addition to the aforementioned file reflecting the copyright holder, the date and renewal date of the copyright should be shown. A separate file containing works on which the copyrights have expired should be provided so it may be used by the society which paid for it with a limited monopoly.

CONCLUDING REMARKS

The preceding comments have been offered to help bridge the gap between the business place and the legislative offices of you, gentlemen. Throughout this presentation you undoubtedly noted that an emphasis was placed on society's welfare. I felt this was necessary. During the past ten years, the hotly contested battles which have taken place in our courtrooms on such subjects as cable T.V., pirating sound recordings and copying of literary works and others have resulted in so much case law that is at odds with statutory law. Federal judges disagreeing with other Federal judges. Companies fighting tooth and nail in ugly displays of greed, power and corruption. Not once in some 100 plus court cases reviewed by this person involving copyright matters did the interests of society emerge. Always it is some special interest faction attempting to cement a position of advantage over others. More often than not, those of us whose lives are involved with copyrights are easily caught up in the complex and emotional issues at hand and it is very difficult to keep one's head screwed on correctly—To view the issues from their proper perspective.

I suggest to you, gentlemen, that our own life blood, the society in which we live, has not received a proper share of her just earnings and consideration. Please contemplate this as you consider some of the suggestions which I have brought to you today.

U.S. RECORD/TAPE SALES 1921-1972



U.S. RECORD SALES 1921-1972

(Source. Record Industry Association of America. Excise tax payments, estimates from other data.)

YEAR	SALES IN MILLIONS OF DOLLARS	YEARLY PERCENT CHANGE
1921	$106	— %
1922	92	—13.2%
1923	79	—14.1%
1924	68	—13.9%
1925	59	—13.2%
1926	70	+ 18.6%
1927	70	N.C.
1928	73	+ 4.3%
1929	75	+ 2.7%
1930	46	—38.7%
1931	18	—60.9%
1932	11	—38.9%
1933	6	—45.5%
1934	7	+ 16.7%
1935	9	+ 28.6%
1936	11	+ 22.2%
1937	13	+ 18.2%
1938	26	+ 100%
1939	44	+ 69.2%
1940	48	+ 9.1%
1941	51	+ 6.3%
1942	55	+ 7.8%
1943	66	+ 20%
1944	66	N.C.
1945	109	+ 65.2%
1946	218	+ 100%
1947	224	+ 2.8%
1948	189	—15.6%
1949	173	— 8.5%
1950	189	+ 9.2%
1951	199	+ 5.3%
1952	214	+ 7.5%
1953	219	+ 2.3%
1954	213	— 2.7%
1955	277	+ 30.0%
1956	377	+ 36.1%
1957	460	+ 22.0%
1958	511	+ 11.1%
1959	603	+ 18.0%
1960	600	— 0.5%
1961	640	+ 6.7%
1962	687	+ 7.3%
1963	698	+ 1.6%
1964	758	+ 8.6%
1965	862	+ 13.7%
1966	959	+ 11.3%
1967	1051	+ 9.6%
1968	1124	+ 6.9%
1969	1170	+ 4.1%
1970	1182	+ 1.0%
1971	1251	+ 5.8%
1972	1383	+ 10.6%

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Billboard 1973-1974 International Music-Record Directory

Mr. KASTENMEIER. This concludes this morning's hearing on copyrights. The subcommittee, upon adjournment, will meet on Wednesday next for a continuation of our hearings on copyrights. Until such time, we stand adjourned.

[Whereupon, at 12:25 p.m., the hearing was recessed to reconvene on Wednesday, June 11, 1975, at 10 a.m.]

COPYRIGHT LAW REVISION

WEDNESDAY, JUNE 11, 1975

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, CIVIL LIBERTIES,
AND THE ADMINISTRATION OF JUSTICE
OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10:10 a.m., in room 2226, Rayburn House Office Building, Hon. Robert W. Kastenmeier [chairman of the subcommittee] presiding.

Present: Representatives Kastenmeier, Danielson, Drinan, Badillo, Pattison, Railsback, and Wiggins.

Also present: Herbert Fuchs, counsel; and Thomas E. Mooney, associate counsel.

Mr. KASTENMEIER. The committee will come to order.

We are convened this morning for another hearing in the series of hearings on the proposed revision of the Copyright Law. This morning will be completely devoted to witnesses representing cable television, in one respect or another. We have six witnesses representing varying viewpoints on the question of how this proposal will affect cable television in this country.

The House will be in session earlier than normal. We will try to move as quickly as we can, but with due respect to the witnesses, we will try to complete our business, so we will be able to attend the regular session.

I am very pleased this morning to greet as our first witness the chairman of the National Cable Television Association, Rex A. Bradley. Mr. Bradley, will you come forward, please?

You might also like to identify your colleagues. The Chair observes that you have a rather substantial statement and addendum of material submitted to the committee, which, will, without objection, be accepted for the record. You may proceed, sir.

TESTIMONY OF REX A. BRADLEY, CHAIRMAN, NATIONAL CABLE TELEVISION ASSOCIATION

Mr. BRADLEY. Mr. Chairman, I have a shorter version of my testimony, from which, in the interest of time, I will be speaking. If members of the committee would like to have copies, we have them available.

With me at the table on my right is Mr. Bruce Lovett, who is the immediate past chairman of NCTA; I relieved him a couple of months ago. He is also vice president for industry affairs of ATC, one of the Nation's larger cable companies.

To my left is Mr. Stuart Feldstein, who is the vice president for legal and government relations for NCTA. And at the end of the table is Mr. Don Andersson, who is the vice president for statistical services of NCTA.

As you have indicated, my name is Rex Bradley, and I am chairman of the National Cable Television Association, and I am also president of TeleCable Corp. of Norfolk, Virginia, which is the owner and operator of 15 cable systems serving 130,000 subscribers in 10 States. Today I am speaking in my capacity as chairman of NCTA.

The National Cable Television Association is the major trade association representing the cable television industry. Our membership includes both multiple system operators and independent cable television operators. NCTA's 1,320 member systems currently serve 5.8 million subscribers, or 58 percent of the Nation's 10 million cable television households. We recognize that copyright was conceived in the public's interest, to assure that creative minds would be encouraged by compensation to produce and distribute the fruits of that creativity. Later in my statement I will discuss further our view of copyright and comment specifically on H.R. 2223.

Since time is limited, I will summarize my longer statement. The longer statement, submitted for the record, contains a comprehensive review of cable's early development, the FCC's gradual assumption of jurisdiction over cable, and the early pattern of broadcaster opposition to cable growth.

Additionally, it takes note of the important legal decisions on copyright, resulting in two Supreme Court decisions holding cable not liable for copyright under the 1909 law, attempts of various parties to negotiate a settlement, and the very close relationship between FCC regulatory actions and the copyright question.

I believe it is important for the Congress to understand this background to current copyright consideration. It demonstrates the complexity of the cable/copyright problem, the intense pressures and uncertainties created for the cable industry and the almost inextricable interrelationship between copyright and cable regulation.

During these hearings, I am sure you will hear charges—principally from broadcasting and motion picture representatives—to the effect that the cable television industry has not lived up to its copyright responsibilities, that cable is an unfair competitor, and that the industry has attempted to delay resolution of the copyright issue.

I can only assure you that throughout this frustrating period NCTA has attempted in every way possible to live up to its fundamental commitment to work for fair copyright legislation.

As a member of this committee you are no doubt aware that there are divisions within the cable industry over the issue of copyright payments. There are those who feel that there should be no copyright liability at all. Others believe that there should be no liability for signals received off-the-air, while others suggest no liability for a complement of signals that can reasonably be defined as adequate service. I believe, however, that the majority of the members of NCTA support the association's efforts to work with Congress in arriving at fair and reasonable legislation.

Before addressing myself to specific provisions in H.R. 2223, I would like to emphasize several key factors which I believe this com-

mittee and the Congress must consider in arriving at fair copyright legislation.

The Constitution and the courts have recognized that copyright protection has a twofold purpose, to encourage creativity and equally as important, to promote the dissemination of knowledge to the public.

Cable television, through its reception and distribution of television broadcast signals, promotes the dissemination of knowledge to the public. Indeed, without this service, significant numbers of Americans would be denied the fruits of creative labor. Congress should be cognizant of this vital CATV role. Legislation which, for whatever reason, restricts or decreases the dissemination of knowledge to the cable television public would not be consonant with the primary public interest concern of copyright.

Second, the Congress should be aware that imposition of copyright liability will have an impact on the CATV subscribing public. To a significant extent, the cost of copyright liability will be borne by cable subscribers.

Let me make several further observations on the current financial state of the industry. It has taken several years, but an awareness is growing that CATV is not the pot of gold it was once thought to be. Last year, for example, nine of the top publicly held companies—companies who will bear a very sizeable percentage of the copyright burden—suffered a combined net loss of nearly $17 million on total revenues of $267 million.

CATV is a capital intensive business. It is also a business whose expenses, for the most part, are fixed, subject to very little influence of the CATV manager. Cable systems experience a number of substantial expenses, whose levels are established arbitrarily by some authority, not subject to the moderation of competitive pressures. Some of these expenses are subject to change, with little opportunity of the CATV operator to influence the level. Examples of these are pole rents, microwave charges, interest, franchise taxes, property taxes, and FCC fees.

Because most cable expenses are fixed, the only opportunity for cable operators to obtain and maintain a favorable profit margin is through additional subscribers, or by increasing subscriber rates—often difficult because city councils' approval must be obtained.

The uncertainties related to these uncontrollable expenses make financial planning and borrowing difficult and expensive.

Let me now turn to the specific provisions of H.R. 2223. Chapter 8 of the bill would create for the first time a Copyright Royalty Tribunal in the Library of Congress. This tribunal would be composed of three persons and would be empowered by statute to adjust copyright royalty rates, the revenue base, and in certain circumstances, the distribution of royalty fees. The tribunal is directed to undertake a review of royalty rates within 6 months of the date of enactment of the law, and that review is to be completed within 18 months. Thenceforth, the tribunal would conduct a review every 5 years ad infinitum.

Mr. Chairman, we are opposed to the establishment of a tribunal with the uncertainty which is inherent in the tribunal's power, and we further believe that chapter 8 of this bill is laced with infirmities that represent a very serious threat to the future viability of the cable television industry. This tribunal carries with it the potential for substantial escalation of copyright fees in a very short period of time.

The Office of Telecommunications Policy has already pointed out the damaging effect this uncertainty and lack of stability can have. You will hear further about the impact of uncertainty on cable's growth by a representative of the financial community following my presentation.

I do not think that I exaggerate when I say that virtually any significant copyright payment by this industry represents a financial burden. An unknown periodic review as mandated in this bill presents, in my opinion, not potential, but actual grave economic problems to a growing industry. You are aware of the difficulties that all high-risk businesses are now facing in obtaining short-term financing. I do not wish to plead economic hardship to this subcommittee, but plead I must. We in the industry know too well the economic realities and the potential grave effects of further uncertainty on the capital market.

Further, chapter 8 contains no criteria to guide tribunal review of rates; it contains no provision for judicial review of the tribunal's decision other than for fraud, and in our opinion, it provides for no effective congressional review. In short, we find this section of the bill fraught with uncertainty, an uncertainty that this industry can ill afford.

I would like to suggest a more reasonable approach to the issue of insuring fair rates in the future. Such an approach is already contained in the bill. Section 111(d) provides for the establishment of a compulsory license for secondary transmissions by cable systems. Royalty fees are computed on the basis of escalating percentages of gross receipts from subscriber revenues. We believe that this progressive fee schedule, based on percentages, represents an eminently logical and reasonable approach. It substitutes marketplace economics for arbitrary decisions. It has the logic of a graduated income tax without the loopholes. It provides for the interests of the copyright owners, since their revenues from cable will increase as the cable system revenues increase. Such an approach takes both the industry's growth and inflation into account. If cable television is to grow and prosper, so will the owners of copyrighted product share in that growth and prosperity.

In summary, then, we strongly urge this subcommittee to retain the approach of the bill's progressive fee schedule based on a percentage of revenues, and discard the uncertainty that is inherent in the power of the tribunal to change these percentages. Such an approach avoids the need to establish yet another bureaucratic procedure and substitutes a logical and simple approach for an arbitrary and complicated one.

Section 501 of H.R. 2223 deals with infringement of copyright. Subsection (b) thereof entitles the copyright owner to initiate action for infringement. We have no objection to that provision. However, subsection (c) grants a television broadcast station rights as legal or beneficial owner of a copyright for purposes of instituting action for infringement. We very strongly object to this provision.

As you know, the rights to most television programs are held, not by the broadcaster, but by the copyright owner. In those cases, where the television station does hold the copyright, he is fully protected against infringement under subsection (b). However, subsection (c) would grant to hundreds of broadcasters the right to institute harass-

ing suits against cable operators for very minor or even inadvertent violations of FCC regulations. Such a provision is, we think, an aberration, unprecedented in copyright law. It should be stricken from the bill. Adequate remedies for violations of FCC regulations already are available under the Communications Act.

Mr. Chairman, in earlier testimony before this subcommittee Deputy Assistant Attorney General Irwin Goldbloom, of the Justice Department, urged that CATV systems not be required to pay copyright on local signals carried. He further stated that by carrying local signals, the cable system enhances the broadcaster's market, and that the copyright holder is helped, not hurt, by cable system carriage. NCTA fully supports this line of thinking. We note also that Thomas Keller, Acting General Counsel for OTP, stated to the subcommittee last week that local signals should not be liable for copyright.

While Mr. Goldbloom did not suggest to this subcommittee a method or mechanism for imposing liability only on signals outside the area of free use, the logic of his recommendation is undeniably sound. NCTA has addressed internally this question in great detail. We have researched and studied a variety of possible approaches to the Justice Department's concept of an area of free use.

We have, however, determined that it is apparently impossible to arrive at a fee formula embodying this concept applied on a system-by-system basis, which does not discriminate unfairly against one portion of the cable television industry, and consequently against the public receiving service from such systems.

We believe that the concept advanced by the Justice Department can and should be embraced in the following manner. Copyright liability for CATV distribution of broadcast signals should be imposed without respect to signals carried. There appears to be no fair way to impose liability for carriage of certain signals and not others.

By retaining the present fee schedule in H.R. 2223 and exempting from liability the first $25,000 in gross quarterly subscriber receipts for all cable television systems, copyright legislation can give some recognition to that portion of cable service which fills gaps, or improves reception in the service areas of broadcast stations.

Such an exemption involves a reasonably small dollar amount in relationship to the total copyright revenues to be derived from cable now and in the future. It also has the benefit of providing substantial relief to the smaller, traditional community antenna systems. The owners of copyrighted product themselves have frequently stated that they are not primarily concerned with this type of cable system. Indeed, the 1971 consensus agreement envisioned a total exemption from liability for all cable systems serving fewer than 3,500 subscribers. The blanket exemption we propose would have the practical effect of exempting nearly all systems with fewer than 1,500 subscribers. We believe this kind of exemption to be an equitable and fair approach to the problem of copyright liability for local signals. We submit for your serious consideration an amendment to achieve this.

Mr. Chairman, I will now turn to the third matter NCTA would like to comment on. Earlier in my testimony I have alluded to the FCC's cable television regulations and to the close historical interrelationship between copyright and regulation as applied to cable. For your convenience, the most pertinent of those regulations are in-

cluded in my text, but, in the interest of time I will skip over those and not read them.

It has been remarked, and I think not too facetiously, that while the Congress has been laboring to develop copyright provisions applicable to cable, the FCC has for some time now been guarding the copyright gate by promulgating copyright regulations of its own.

Earlier this year, in an address to the NCTA convention, Barbara Ringer, Register of Copyrights, stated that the FCC rules "contained the most elaborate copyright provisions I have ever seen anywhere."

She continued:

> I don't know much about communications law, but I know copyright law when I see it, and the exclusivity provisions of the FCC regulations are copyright regulations; in effect, the enactment of a copyright law through the regulatory process. And they are unquestionably the most complex and difficult to understand of anything I've ever read in this field.

Absent legislation, or specific congressional direction, and in spite of Supreme Court decisions, the Federal Communications Commission has consistently invoked copyright principles to protect broadcasting from competition. The pervasive nature of the Commission's forays in a variety of regulatory matters into "exclusivity" of all types is in and of itself a subject for broad independent investigation.

For the purpose of these hearings, however, one thing ought to be indisputably clear. While the FCC's 1972 rules have granted cable systems the right to carry a limited number of broadcast signals, that right—and the value and marketability of those signals for cable operators—has in very large part been negated by the Commission's syndicated and network program exclusivity provisions. Stated in the simplest of terms, a cable operator has the right to carry signals, but has an obligation to black out most of the programing on those signals. And this is achieved through the Commission's "copyright regulations."

For example, the cable system under construction in Wauwatosa, Wis., must under the FCC's syndicated exclusivity regulation delete 62 percent of the programing on one channel it imports, and 58 percent on the other channel. What, the operator can fairly ask, is the value of carrying the signal? Appendix C of my testimony contains a more detailed explanation of this problem.

It ought to be beyond any logical dispute that if cable systems are to incur liability for the distribution of these signals, then they should have the right to show what has been paid for. Yet, if copyright legislation of H.R. 2223 were enacted today, that would not be the case. We believe it is imperative that the Congress should insure that cable operators get what they pay for. This should be done in this legislation, and we are submitting language to accomplish this aim.

I would like to invite the subcommittee's attention to several additional recommendations for perfecting changes in section 111 of the bill.

Section 111(b) of H.R. 2223 appears to make the secondary transmission of over-the-air pay-television signals an act of infringement, and one subject to civil and criminal penalties. This subcommittee should be aware that Federal Communications Commission regulations require CATV systems to carry the signals of all television broadcast stations in specified geographical areas, regardless of whether

those signals are originated by commercial broadcast stations or STV stations. Therefore, under section 111(b) the cable system would be faced with either violating FCC rules and regulations, or the copyright law.

Next, section 111(a)(4) exempts government-owned and non-profit translators from the requirement to pay fees. As a matter of law, we believe that no rational distinction can be made between CATV systems whose purpose is to improve reception of television signals, and translators which serve the same purpose. Additionally, of course, H.R. 2223 does not exempt nonprofit and government-owned CATV systems. Should not such translators be placed on an even competitive footing with commercial translators and cable systems?

Third, section 111(a)(3), as currently drafted, raises the possibility that cable operators providing leased channels to the public or others could incur copyright liability for the material programed on those channels by the lessees. Federal Communications Commission regulations require that certain cable systems make available channels for lease on a nondiscriminatory basis and that the cable operator may exercise no control over the program content on those channels. We respectfully suggest that the language of section 111(a)(3) be changed to insure that the cable operator does not incur copyright liability on leased channels. The lessee, of course, would remain liable for the payment of copyright.

Finally, portions of section 111 and the language of section 801(a) raise the possibility that copyright fees in the future could be based on cable revenues from sources other than basic CATV distribution of broadcast signals.

I believe it is not the intent of Congress to impose copyright liability on cable operations beyond the basic reception service, and indeed there would be no logic to such an approach. The liability contemplated in this legislation has no relationship to revenues derived from local origination, pay cable operations, or any other such service initiated by a cable operator.

We are submitting suggested clarifying language to deal with these four matters.

In conclusion I would like to say, Mr. Chairman, NCTA has for 8 years now worked hard under very trying circumstances to assist in achieving fair and reasonable copyright legislation for CATV. We will continue those efforts, and we stand ready to assist this subcommittee in every way possible. We are handing you copies of the amendments I have mentioned, and I will be very happy to respond to questions.

Mr. KASTENMEIER. Thank you, Mr. Bradley. One point you mentioned, the "Consensus Agreement of 1971."

Mr. BRADLEY. Yes, sir.

Mr. KASTENMEIER. Is that agreement, as far as you know, or as far as you are concerned, is that agreement still in effect?

Mr. BRADLEY. It's in effect to the extent that its effect has not been denied by actions of the Senate in developing their version of the copyright bill; and certain actions of the FCC, and certain actions of certain broadcasters. Some of the provisions of the Consensus Agreement have been overlooked, or have been ignored. So, it is, in effect, a general type of agreement with some violations.

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Mr. KASTENMEIER. Was that agreement set down in writing, and does it appear in a public document, incorporated in the Senate hearings? I don't happen to know that.

Mr. BRADLEY. I don't know whether it's incorporated in the Senate hearings. It has been published in the Television Digest.

Mr. KASTENMEIER. Was this an agreement of parties, was it verbal, or was it subscribed to?

Mr. BRADLEY. It was written.

Mr. KASTENMEIER. It's written down, set down in writing?

Mr. BRADLEY. Yes, sir.

Mr. KASTENMEIER. Mr. Bradley, do you happen to have a copy of that?

Mr. BRADLEY. Yes, sir; I have a published copy, it appeared in a magazine.

Mr. KASTENMEIER. Would you make that available to the committee?

Mr. BRADLEY. Yes, sir.

Mr. KASTENMEIER. In referring to the tribunal, you indicate that—referring to section 501—you indicate that broadcasters would have other remedies, adequate remedies, you state, for violations of FCC regulations are already available under the Communications Act.

What remedies do you have reference to, in connection with broadcasters pursuing their rights against cable television operators?

Mr. BRADLEY. Well, there are two aspects of this, Mr. Chairman. Where the broadcaster owns the copyright, he has the same remedy that any copyright owner has.

And with reference to the FCC regulations, where the broadcaster alleges that a cable system has violated the regulations, he can file a complaint with the FCC, who will then take appropriate action.

Mr. KASTENMEIER. Under the bill that the Senate passed, and given the economics of your industry, say, for calendar year 1974, if that is possible, what do you assume the cost would be under the formula of the Senate bill to at least your member/subscribers as opposed to others?

Mr. BRADLEY. The cost to the industry in total would be, in our estimation, $6,700,000.

Mr. KASTENMEIER. That is the entire industry.

Mr. BRADLEY. Yes, sir.

Mr. KASTENMEIER. And that is obviously an estimate, $6.6, or $6.7 million?

Mr. BRADLEY. $6.7 million. And to the members of our association it would be slightly over $4 million.

Mr. KASTENMEIER. Thank you, Mr. Bradley. I yield to my colleague from California, Mr. Wiggins.

Mr. WIGGINS. Mr. Bradley, do you accept, or reject the proposition that cable should pay a royalty fee to the holder of the copyright for the transmission of copyrighted material?

Mr. BRADLEY. We are willing, Mr. Wiggins, to pay copyright, as I have indicated, to a pool which would distribute the proceeds to the copyright owners.

Mr. WIGGINS. Having accepted in principle the payment of a copyright royalty, what is the justification for exempting from that payment those cable systems with gross revenues of less than $25,000?

Mr. BRADLEY. The point there, sir, is that within our industry, as I have mentioned, there is a wide divergence of opinion on property. There are many members of our association, and many members of the industry who are not members of our association who are violently opposed to any copyright payment. There has been testimony, as I mentioned, to the effect that various people feel that there certainly should be no payment for local stations which can be received locally over the air.

Our suggestion is simply an effort to exclude those small systems which would encounter an unusual financial burden as a result of copyright payments; and pass a token recognition of the fact that there should be no payment for the local signals. And while you can't relate the dollars to the value of local signals, at least it is an effort to recognize that.

Mr. WIGGINS. What part of the cable industry—if your answer can reflect it in percentage—would be exempt by the $25,000 gross receipt exemption?

Mr. BRADLEY. Slightly over 50 percent would be exempt.

Mr. WIGGINS. Now, in that connection, I think it's well that we keep in mind that the royalty fee schedule is not a tax, which might be subject to policy reasons for granting preferred tax rates to socially or economically deprived units in furtherance of a governmental policy.

Rather, this is a statutory payment to the owner of the property.

The bill before us proposes a fee schedule commencing at one-half of 1 percent of the gross revenues up to $40,000, and graduated up to 2½ percent. As you have indicated in your testimony, and as we all know, this represents about a 50-percent reduction from that originally considered by the Senate.

Can you enlighten me and the members of the committee what considerations entered into that judgment by the Senate, why was that reduced?

Mr. BRADLEY. There was a study prepared by someone named Mitchell, to the Senate, which indicated the economic impact of these dollars on the cable industry. I, to some degree, am speculating for a moment, since I was not there personally. But, in discussions which related to this point, there is this continual recognition that we should not be paying for local signals that are receivable over the air.

And that in paying this schedule we are paying an amount substantially in excess of the fee schedule for these signals that we might be legitimately required to pay for, if you exclude the local ones. If you accept that point, which we do, any payment is substantially higher than the numbers would indicate because we are paying for, in effect, all service.

Mr. WIGGINS. Well, would it be fair for me to conclude that the Senate listened to your argument that local signals should not be subject to royalty payments, and perhaps your argument that all signals should be exempt, and simply made an accommodation to these arguments by reducing by 50 percent the fee schedule proposed in the original House bill and thus reached a compromise?

Mr. BRADLEY. Perhaps so, I really don't know. I do know that in our experience it would be extremely difficult to relate a dollar amount to be paid to a value to be established in any scientific fashion for the

signals, or the contents of the signals which are being carried. I think the decision, admittedly without total scientific foundation, was arrived at from the basis of representations by various persons, that the industry could presumably pay this amount and that the copyright owners would be adequately compensated in receiving this amount of money.

Mr. WIGGINS. I have been told that primary transmitters who have customarily paid copyright royalties, compute that royalty payment as a cost of doing business, and that the cost as a percent of total cost is considerably higher than the percentage figure here for cable. Numbers as high as 75 percent and more have been represented to me as being equivalent to the cost of doing business by primary transmitters of copyrighted material.

You may disagree with those numbers, but do you disagree with the proposition that the percentages stated in this bill are significantly less than those paid by primary transmitters of copyrighted material?

Mr. BRADLEY. I'm not familar with it, sir. But, accepting your statement, I presume that they are less in absolute value. However, the primary transmitter has the opportunity to sell advertising, which increases his revenue, which in turn gives the copyright owner a chance to get higher dollar returns for the value of his copyrighted material.

We don't have that opportunity, we don't sell advertising. While we do collect from the customers, it is a relatively inflexible type of revenue.

Mr. WIGGINS. Then that is your justification for paying a lesser return, because you are denied revenue opportunity for sale of advertising.

Mr. BRADLEY. Sir, as I mentioned before, and you will hear additional testimony from others who follow me, I am sure, to the effect that we should not be paying any copyright; and in paying on this schedule we are paying as much as we can be reasonably expected to pay; and in particular, in view of the fact that I know of no way of scientifically developing what the value should be. It is a political, arbitrary decision that must be made, and it seems to us to be totally adequate.

Mr. WIGGINS. I understand your point.

Now, I want to move on to the tribunal. Your testimony indicated opposition to the periodic review by the tribunal because it would be an unstabling factor in the financing of cable operations.

There are a great many corporate, regulated entities in this country which are subject to review by rate-making authorities. Is there any difference, conceptually, between a tribunal subjecting your royalty payments to review, and therefore your revenue to some uncertainty, and the review that a utility, for example, is exposed to?

Mr. BRADLEY. I believe there is. It seems to me that in the case of a utility the reviewing authority will establish the rate, is controlling the amount of revenue which can be received by that utility.

In the case of the tribunal, the tribunal would have the authority to decide how much of our existing revenue could be taken away from us and given to someone else, and without any type of limit, and in our opinion without any demonstrable basis for establishing this. And the financial community, and the investment community, looking at the prospect of a totally unknown possible deduction from our revenue

hanging over our head, are going to be extremely reluctant to invest. We have, to some degree, some of that now.

As you no doubt know, certain of our expenses that we have had are historically uncontrollable; and the uncertainty of this one is of greater magnitude.

Mr. WIGGINS. One final question, Mr. Chairman, then I will yield back the balance of my time.

I would think that if your industry was subjected to the royalty schedule, it would attempt to pass through those added costs to your subscribers. Is there any reason that you would be unable to do that?

Mr. BRADLEY. It would be difficult in many instances. We, in order to get rate increases, generally must appear before a city council in an effort to justify our rate. And though we have great respect for city councils, very frequently they are not sophisticated analysts that are encountered nationally, and the local pressures and politics are brought to bear on them and cause us to frequently get substantially less than we feel we need; and sometimes nothing.

Mr. WIGGINS. Are they currently unsympathetic to your rising costs, accounts, and all the other cost factors that go into provision of the cable?

Mr. BRADLEY. It varies from place to place, yes, sir. In my personal experience, my company has recently made a presentation—we are in the process of doing it now—with all of the figures that I think almost any sophisticated accountant could accept, which justifies a rate increase of $1.25 over what we are now getting. We are probably going to end up with 75 cents because they feel we shouldn't increase the rate to their fellow citizens. We have been through this, as have other companies, many times.

Mr. WIGGINS. Thank you, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

On the matter of the tribunal, let me ask you this, it may not be realistic, but the tribunal could lower the fees, as well as raise them. Would you comment on that, please?

Mr. BRADLEY. Yes, sir. While it is theoretically possible that the tribunal might lower the fees, the risk in the eyes of the investment community, and the financial community is still there, that they are likely to raise the rates in an undeterminable amount. And realistically, in view of our experiences, and the experiences generally encountered in the country, we think the chances are much greater that they will go up, than down.

Mr. DANIELSON. Well, I think that is the realistic view of the situation, although it could happen, I suppose, the other way.

How about the prospect of a periodic review by the tribunal, say, every 5 years? There are changes in costs, in the marketplace, and the value of the dollar. Will you comment on whether or not it would be proper for the tribunal to have this power?

Mr. BRADLEY. Yes, sir. With the statement I just made, the uncertainty of the tribunal's action, the financial community is still going to be reluctant to consider investment, or to consider investment at lower costs, which we desperately need.

Second, the escalating fee schedule that is contained in the bill, and the fact that the percentages apply to the gross revenues will tend

to compensate for inflationary effects in the presumption that the cable system will grow, both by the addition of subscribers, and by increasing rates which will reflect costs.

Mr. DANIELSON. You mentioned earlier increasing of rates. A while ago in response to Mr. Wiggin's question you expressed insecurity as to whether your local franchising agency, usually a city council, would recognize your added costs.

Is it not the general pattern in your industry that wherever you operate, the company operates under a franchise from some governmental agency or another?

Mr. BRADLEY. Yes, sir.

Mr. DANIELSON. And are the rates charged to your subscribers fixed by that franchising agency?

Mr. BRADLEY. At the present time they are not all fixed, some of them are, and some of them are not. But, under the new rules of the FCC, the 1972 rules, the franchising agency will fix and approve the rate.

Mr. DANIELSON. You are also required, aren't you, to carry all TV signals within at least the primary transmission area?

Mr. BRADLEY. Yes, sir.

Mr. DANIELSON. How far out does that extend, just the primary transmission area?

Mr. BRADLEY. In the top 100 markets it is 35 miles; in the other markets the distance varies with what is called the grade B contour of the broadcast station, which generally is roughly 70, 75 miles.

Mr. DANIELSON. You are getting out beyond the primary transmission area, at least in the grade B; are you not?

Mr. BRADLEY. I believe, sir, that the definition of the FCC of "primary transmission area" separates into the two categories, the top 100 markets, and the other markets. Though, it is certainly true that we are getting out a farther distance.

Mr. DANIELSON. And you are required to carry those signals.

Mr. BRADLEY. Yes.

Mr. DANIELSON. You made reference to the fact that small operators who are within the primary transmission area, I think that you are using the terms not necessarily synonymously, but they tend to be the same, have such few subscribers, and obviously a lesser growth revenue that you feel they should be exempted.

I think that is on the theory that they are operating in the primary transmission area; am I right in that?

Mr. BRADLEY. For the most part, yes, sir.

Mr. DANIELSON. How about the other part, is the state of the art such that a small operator could have a distribution system located a number of miles away, quite a number of miles away, and receive his input either by microwave, or a lease line of some kind?

Mr. BRADLEY. Yes, sir; that is technically feasible. However, the economics of the situation are such that unless he has a pretty large universal subscriber, he can't afford to pay microwave charges, or invest in microwave service.

Mr. DANIELSON. How big a system would you need to break through this economic barrier?

Mr. BRADLEY. I don't know that I can answer precisely, but there are some small systems in the western part of the country where there is virtually no television reception, where microwave service is used,

and the rate charged the subscriber is much higher than in other parts of the country.

So, while I haven't seen the figures, they are, presumably, economically viable. They must be, they are still in business.

Mr. DANIELSON. Are there any in the eastern parts of the United States, say, east of the Mississippi?

Mr. BRADLEY. Small systems using microwave?

Mr. DANIELSON. Yes, or leased cable, other means to bring it in, other than picking it out of the air.

Mr. BRADLEY. Yes, sir; I am sure there are some. I believe there are some in the State of Pennsylvania, and there are probably others.

Mr. DANIELSON. Well, that brings you into a situation where those people would be competing, probably, with a local transmission, or could be.

Mr. BRADLEY. You mean competing signals?

Mr. DANIELSON. Yes.

Mr. BRADLEY. Imported in this fashion?

Mr. DANIELSON. Yes.

Mr. BRADLEY. They are competing in a sense, perhaps, in those instances they are usually—or are sometimes, at least—importing the signal that is not available locally. They are filling out a network service, or an independent.

Mr. DANIELSON. What I am thinking of, see, unfortunately we are dealing with copyright here——

Mr. BRADLEY. Yes, sir.

Mr. DANIELSON [continuing]. And I think there is tremendous confusion. FCC is trying to regulate using copyright, and we are trying to regulate it; it's kind of mixed up.

But, if you have an overlap, and you are bringing in outside signals into an area served by a regular TV station, conceivably you are bringing in signals which compete for viewer interest with another signal generated locally.

Mr. BRADLEY. Yes, sir.

Mr. DANIELSON. And the copyright value to the owner of the copyright could be diminished. Would you comment on that, please?

Mr. BRADLEY. Well, I'll try; it is a complicated picture, obviously. There are owners of the copyright of the programs distributed by the local station; and there are owners of the copyright of the programs which are imported. And, certainly, there is some likelihood that there will be some reduction in the viewership of the local signals if the transmitted imported signal is more attractive to that viewer.

So, on the one hand, I suppose, it's fair to say that the owner of the copyright of the local signals might suffer, and the other one might benefit.

Mr. DANIELSON. You certainly gave us a truism that this is a complicated problem. I would like a helpful suggestion. I don't mean you are not being helpful, but if you have a constructive suggestion on how to solve this, I would invite it.

Mr. KASTENMEIER. The Chair will interrupt for the purpose of observing for the subcommittee that there is an on-going quorum call to which members may desire to respond. However, the committee will continue through this or any other quorum call. But, in the event of a vote we will recess.

And I want to observe that Mr. Bradley is the first of six witnesses. We have already been in session for about an hour.

Mr. DANIELSON. If you would give me a comment, I would invite it, please.

Mr. BRADLEY. Well, as we both agree, it's very complicated. There are members of our association, our industry, that feel that we should pay copyright only for those imported signals, and there is certainly a lot of logic to that, and we agree to the logic.

The difficulty that we encounter is trying to develop a formula for determining the payment on those signals; it results in copyright payments by a selected few portions of our industry, and the rest of us are paying nothing.

Mr. DANIELSON. Well, I don't have any solution, but I'm seeking it wherever I can find it; I don't have any solution.

I'll make one gratuitous comment, though. I would think cable should look forward, without reluctance, to being classified in something of the nature of a public utility. You are really in an in-between zone here. You are allowing local governments to franchise you and regulate your rates. The FCC says you must carry a local signal, whether you want to, or not. You have no choice, no discretion, if the local TV station puts out "Deep Throat," you are going to have to show it; I guess the same would be true of "The Longest Day," or whatever that show was.

You are subject to the whims of local regulatory agencies, local ratesetting agencies. You have very properly stated that local ratesetting agencies are not sophisticated enough to properly reflect your cost basis.

I think since you are handled more or less as a utility, you ought to relax and enjoy it. [Laughter.]

I think that some of the problems could be resolved—that's free. Thank you.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you, Mr. Chairman.

Mr. Bradley, I'm sorry I had to go to another subcommittee, but I did read your paper and I compliment you on it.

On page 60 you indicate that opinion within the industry is deeply divided, and I wonder if you could tell us how many people feel that no copyright liability should attach at all to cable. You indicate the positions range from that, and I assume that's a minority. I wonder if they could justify that position on the basis of the *CBS-Teleprompter* decision.

Mr. BRADLEY. I don't know how many there are. We think it is a minority. I really don't know.

Mr. DRINAN. Well, is that minority going to fight for their particular view that copyright liability should not attach?

Mr. BRADLEY. I believe so, yes.

Mr. DRINAN. They will justify it?

Mr. BRADLEY. Yes, sir; they will attempt to justify it, I'm sure.

Mr. DRINAN. But I take it from your testimony that you feel that copyright liability, rightly or wrongly, will in fact attach.

Mr. BRADLEY. Yes, sir.

Mr. DRINAN. What does the Supreme Court opinion mean on the *Teleprompter* decision?

Mr. BRADLEY. Well, in the case of the Supreme Court decision the court was rendering a decision with respect to the 1909 Copyright Law. And, of course, when that law was written there was no recognition of some of the modern technologies, including cable. I believe in their remarks the members of the court indicated that they were disturbed about having to apply a 1909 law to the present day.

So, it is our feeling that the public opinion is such, and that the rights of copyright holders are such, in certain instances, that they are entitled to payment, and we are willing to pay. Although, if in its wisdom the Congress decides there should be no payment for copyright, we would be tickled to death. [Laughter.]

Mr. DRINAN. Well, I would like to get some reasons why that might be so. In the *Teleprompter* case there is a basis for that, and you say here the FCC has gone almost contrary to the Supreme Court opinion.

Well, I had several other questions, but my colleagues here, I want them to question and comment; and I look forward to your colleagues. Thank you very much.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. If you agree that there should be a copyright payment, why must we in Congress fix the amount; why can we simply not say that there shall be a copyright payment, and then leave it to the normal market forces to say what the payment should be?

Mr. BRADLEY. The amount of payment is something that in the interest of equity to both the copyright holders, and to our industry we would like to see fixed. We would like to avoid the possibility of having an unknown amount established without a real control by us. And, as I mentioned, the adverse impact on the financial community is something that is of great concern to us.

Mr. BADILLO. But anybody in business, or in life for that matter, doesn't have everything fixed; electricity might go up, rent might go up, why should this be fixed? What you really mean, you would like it fixed at a lower amount, we are not talking about, obviously, you would like a fixed amount at a certain level.

Why should this be different from rent, electricity, paper clips, or anything else you have in business?

Mr. BRADLEY. Well, in the case of the other things that you mentioned, there are certain options which are usually available. If the rent goes up too high you can move to another location, or build your own building. And in the case of these other things, the moderating effect of the marketplace, the competitive forces in the country tend to keep the figures from going totally out of sight. In this case, there is no such pressure.

Mr. WIGGINS. Would the gentleman yield?

Mr. BADILLO. Sure.

Mr. WIGGINS. Isn't the real reason that largely you don't originate grams and there is an infringement before you have any reason to negotiate.

Mr. BRADLEY. Yes, sir.

Mr. WIGGINS. In other words, they are carrying a signal originated by somebody else, and there is an infringement before there is any reason to start talking about a fee.

Mr. BRADLEY. Yes, sir.

Mr. BADILLO. So, then, if you agree there should be a copyright payment, and there has to be regulation, why should Congress be the

one to fix that amount. Isn't it better at all times to have the determination made by a tribunal who can listen to the arguments on both sides, a tribunal who can conduct an investigation of the financial circumstances of the parties involved, and make a reasonable decision, based upon the circumstances as they come up from time to time?

Mr. BRADLEY. In a setting of rate by a tribunal, in addition to the uncertainty that worries us, there would be some pretty significant pressures brought to bear by some of our opponents in this world——

Mr. BADILLO. There are no pressures brought on Congress, I gather.

Mr. BRADLEY. I know that, sir. [Laughter.]

But, there are more of you, and we have great confidence in your ability to set the rate.

Mr. BADILLO. I have no further questions.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. Relative to this exemption, this $100,000 gross income exemption, isn't it true that that exemption, if enacted, would cover most of the rural stations which pick something out of the air, don't import very much by microwave and other means, and are primarily the people you can make the best argument about that should not pay copyright fees, as opposed to the local person who picks—the CATV who picks local signals off the air, and where you get a reasonably good signal anyway?

Mr. BRADLEY. Yes. This $100,000 figure would—in round numbers—exempt systems that have 1,500 subscribers or less, small systems that have 2,000, or so. But, at least that takes care of the very small one, the one that is rendering a master antenna system type of service in the pure sense.

Mr. PATTISON. How would you handle the problem where this $100,000 exemption would provide an incentive to small systems—or big systems, for that matter—to become a series of small systems?

In other words, you take a situation where you have a variety of systems in the suburbs that are all served by one head-end and are owned by the same company, but could be owned by different companies?

Mr. BRADLEY. I believe the bill now has a definition of "system" in it, that would prevent that. That definition includes all the area served by one head-end of a cable system.

Mr. PATTISON. But there could be a breakpoint where a system could say, "Well, it's better to install a couple of other head-ends and get the exemption."

Mr. BRADLEY. I believe that the cost of installing head-ends would prevent that, because it's substantial.

Mr. PATTISON. OK. Now, another subject. You talk about the black-out of the nonduplication rule. When you black out a distant signal because a local system has that particular program on, can you later broadcast that particular program? What is the practice?

Mr. BRADLEY. No. We cannot rebroadcast it. When a program is being blacked out, in all but one area of the country it's blacked out simultaneously with the broadcast which the viewer will see. Now, this has to do with the network exclusivity. There are two types of black-outs. One I just mentioned is network, when an imported network signal is showing the same program as the local station, you black out the imported one and show the local one.

The other type of exclusivity is syndicated exclusivity, where a television station has purchased the right to a particular movie or program. That station has the right to prevent us from showing that same program when it's imported from another signal, even though he may not have shown it.

Mr. PATTISON. Would you elaborate a little on that, I missed that.

Mr. BRADLEY. Yes, sir. When television stations buy program rights to a particular movie, or syndicated program, they frequently have an exclusive right in that area. That exclusive right exists even though they may not have shown that program; and it conceivably even exists if they may never show that program.

So, that same program being imported from a distance cannot be shown under the exclusivity rule.

Mr. PATTISON. Any time?

Mr. BRADLEY. Any time during the period of the contract arrangement.

Mr. DANIELSON. Will the gentleman yield?

Mr. PATTISON. Yes.

Mr. DANIELSON. How would you prevent this? If it's coming in by cable, or microwave, how do you black out this program?

Mr. PATTISON. I think it's done by notification. The local station has notified the local CATV and says, "We have bought Bambi——

Mr. DANIELSON. Or "I Love Lucy."

Mr. PATTISON. But "Bambi" is more likely. [Laughter.]

I know you wanted to buy "Deep Throat"—[Laughter.] And then they can't show it, I guess.

I'm interested in what your proposal is, that you really eliminate the nonduplication rules, if we passed the copyright law.

Mr. BRADLEY. Yes, sir.

Mr. PATTISON. Now, the normal argument, transmission or communications argument about that—without regard to copyright—would have a very serious effect on the local transmission, the fractionalization of the local market. Particularly it would effect, for instance, the news programs that are produced locally. That is just about the only thing that is produced locally by local affiliates besides the "Dialing for Dollars" thing they have in the morning. The whole effort of the local affiliate is really in producing news, and that's about it; is that correct?

Mr. BRADLEY. Yes, sir; that is essentially correct.

Mr. PATTISON. Well, wouldn't there be a communications effect—never mind the copyright effect—wouldn't there be a communications effect if, in fact, the nonduplication rule were eliminated so you can always show things while the local news program is on? Wouldn't that have an effect on the local advertiser that usually sponsors local news?

Mr. BRADLEY. If I understand your question correctly—and I hope I do—there is currently no prohibition against bringing in programs of an entertainment, or other nature, which compete with the local news.

Mr PATTISON. I see.

Mr. BRADLEY. And certainly, I would admit that if the local news is not as attractive to the eyes of a viewer as something else, he is going to look at something else.

I think there might be a beneficial effect in this type of competition, it will sharpen up the local station so that he will make the news more attractive.

Mr. PATTISON. Well, my point is, if you are going to show a duplicating program—not a news program, but "I Love Lucy," which is a duplicating program which will be precluded from showing during the local news time, I mean——

Mr. BRADLEY. I understand now, I did not understand your question.

Yes. The answer I gave, I guess, would apply here.

Mr. PATTISON. My point is, isn't that basically, fundamentally, a matter of communications policy, as opposed to copyright policy; couldn't we leave that to the FCC?

In other words, we shouldn't be determining here in this committee whether local news is going to be heard and therefore, all you get is Walter Cronkite and John Chancellor, and the rest of the people. That is not really our area, and shouldn't that be left with the FCC?

Mr. BRADLEY. Well, I think, sir, that your question poses a theoretical possibility. In our efforts throughout the years to determine an instance of actual damage to a broadcaster we haven't found the first one; and we repeatedly asked for that. So, while there is some theoretical possibility, I think it's probably not a very real one.

I think, too, that we have stood in the past on the position that if there is a demonstrated harm, we would like to know about it, and we are willing to talk about it and reason.

Mr. PATTISON. I just have one other question, and that relates to the whole issue of translators, dealt with on page 19 of your statement. I would just like to have you enlighten us a little bit more about that. I don't really understand the whole mechanism of that, how that works.

Mr. BRADLEY. A translator is a repeating device that is established in areas where there are holidays in the signals of the broadcasting station.

Mr. PATTISON. And the translators are installed by whom?

Mr. BRADLEY. Well, they are variously owned. In some instances they are owned by the broadcasting station. In other instances they are owned by a group of local citizens; and in other instances by a government agency.

Mr. PATTISON. And how does that affect——

Mr. BRADLEY. Well, our point there, is that the bill does not now assess copyright liability to government-owned translators and we suggest that they are no different from anybody else.

Mr. PATTISON. What would the government own a translator for?

Mr. BRADLEY. That would be a local government which would own it.

Mr. PATTISON. Oh, I see, just to improve the signal for the local people.

Mr. BRADLEY. Yes, sir.

Mr. PATTISON. Or CATV could own a translator, couldn't it?

Mr. BRADLEY. I don't think so. I think the FCC would prohibit it.

Mr. PATTISON. OK. I have no further questions.

Mr. KASTENMEIER. Mr. Bradley, I want to thank you on behalf of the committee for your contribution this morning, the excellent presentation of your association.

[The prepared statement of Rex Bradley, and suggested amendments to H.R. 2223 follow:]

STATEMENT OF REX A. BRADLEY, CHAIRMAN, NATIONAL CABLE TELEVISION ASSOCIATION

My name is Rex Bradley, I am Chairman of the Board of the National Cable Television Association and also President of TeleCable Corp., Norfolk, Va., owner and operator of 15 cable television systems serving 130,000 subscribers in ten states. Today I speak to you in my capacity as Chairman of NCTA.

The National Cable Television Association is the major trade association representing the cable television industry. Our membership includes both multiple system operators and independent CATV operators, as well as manufacturers and other suppliers of cable television equipment and services. NCTA's 1,320 member systems currently serve 5.8 million subscribers or 58% of the nation's 10 million cable TV households.

NCTA has previously appeared before this subcommittee to present our views on copyright revision legislation and also on the newsman's shield issue.

We are, of course, vitally interested in matters affecting the CATV industry and its subscribers and we thank you for the opportunity to appear before you and assist you in your deliberations.

Mr. Chairman, since time is limited and there are many groups to hear from, I will not present a detailed description of cable television, the nature of its services, and the future role we believe broadband cable communications will play in meeting this nation's communications needs. I will be happy to submit this information for the record, if the committee so desires.

However, I do believe that because of the complexity of the issues now under consideration, and because of the potential impact on the public and the CATV industry of the action ultimately taken by Congress on copyright law revision, it is in order to place into perspective some aspects of the history of cable development.

I will state at the outset that we believe that copyright was conceived in the public's interest—to assure that creative minds would be encouraged by compensation to produce and distribute the fruits of that creativity. Copyright was not conceived as a mechanism to deny the public access to creative works. Later in my statement I will discuss further our view of copyright and comment specifically on HR 2223.

Cable television first developed in the late 1940's in Pennsylvania and Oregon as a simple "master antenna" service in response to commercial broadcasting's inability to adequately serve outlying areas. Indeed, by bringing programming to communities that otherwise would have received none, CATV performed a beneficial role for both broadcasters and the public.

Gradually, broadcasters, perceiving that cable growth could result in additional competition among broadcasters for audience, began urging Congress and the FCC to contain cable's growth.

Commencing in the mid-60's and throughout the decade the FCC gradually extended its jurisdiction over CATV operations. As is well known now, FCC regulatory actions in 1966 and 1968 imposed a virtual six year freeze on expansion of cable in the nation's largest television markets where approximately 85% of the public resides.

In 1972 the FCC issued its Third Report and Order[1] which was designed to permit a controlled growth of cable in the larger urban markets. Then FCC Chairman Burch characterized the plan as one designed to "integrate cable television into the national communications structure."

Appended to my testimony (Appendix A) is a summary of those 1972 FCC regulations which have rightfully been called among the most complex rules and regulations ever devised by the mind of man.

During the FCC's six year freeze cable growth did not halt completely. Operators continued to expand in areas where systems were already in operation and in those limited areas of the country outside of the freeze zone. Also, more attention was given to providing additional services for example, originating local community programming—on existing systems.

As of mid-1975, there were approximately 3,240 cable systems serving nearly 7,000 communities in all 50 states. Nearly ten million American homes received

[1] CATV Report and Order 36 FCC 2nd 143 (1972).

cable television service, or about 15 percent of the nation's television households. Franchises have been granted in another 2,600 communities, but are not yet operating. Applications are pending in approximately 1,000 additional communities.

Subscriber fees for CATV service range from $4 to $11 monthly and average about $5.50 nationally.

The cable industry employs an estimated 25,000 men and women in management, construction, engineering, programming, finance and marketing capacities.

In that necessarily broad sketch of cable's development I have purposely omitted reference to copyright. Let me briefly retrace my steps focusing on the role the copyright question has played in cable's development.

As cable growth continued, alarmed broadcasters charged that cable television systems were engaged in "unfair competition" when they carried programs without permission or payment. Those claims of unfair competition were judicially tested and rejected in 1964 by the U.S. Court of Appeals in the 9th Circuit.[2]

During this same period the first copyright suit was brought against two CATV systems by United Artists Corp. Later a second suit in which the issue went beyond liability for simple reception was brought by CBS. Primarily due to adverse rulings by the lower courts in the United Artists case, NCTA publicly committed itself to work for a legislative solution to the copyright problem and also undertook negotiations with representatives of the broadcasting and motion picture industries. Words cannot really reflect the atmosphere in the cable television industry following those adverse lower court rulings. The prospect was simply one of total bankruptcy—turning the CATV industry lock, stock and barrel over to the motion picture industry.

In 1968 the Supreme Court, reversing the lower courts, held in the United Artists[3] case that CATV was not liable for copyright in receiving off-the-air signals. Five months later the FCC proposed and adopted as interim procedures "retransmission consent" rules which required CATV to obtain permission of broadcast stations and program owners to carry broadcast programs—the very thing which the Supreme Court had just ruled CATV did not need to do. Needless to say, in the ensuing four years virtually no such consent was granted.

Negotiations between the cable and motion picture industries continued on the amount of copyright fees to be paid to copyright holders. Then in 1971, in an effort to break the regulatory impasse over cable, the Office of Telecommunications Policy and the FCC fashioned the so called "Consensus Agreement" under which the parties—broadcasters, copyright owners, and cable—affirmed support for copyright legislation and approved the outline for new FCC cable regulations. Of course, the Congress was not a party to this agreement.

Subsequently the Supreme Court in 1974 ruled in CBS v. TelePrompTer[4] that cable television systems were not liable for copyright for carriage of *any* broadcast signals under the meaning of the 1909 law. Following that decision the focus shifted to Congress and renewed efforts to revise the 1909 law with, among many other things, provisions for cable television.

I have reviewed these highlights in an effort to demonstrate the complexity of the cable/copyright problem, the intense pressures created for the cable industry by it, and the almost inextricable interrelationship between copyright and cable regulation.

During these hearings I am sure you will hear charges—principally from broadcasting and motion picture representatives—to the effect that the cable television industry has not lived up to its copyright responsibilities, that cable is an unfair competitor, and that the industry has attempted to delay resolution of the copyright issue.

We intend not to engage in "Who struck John" rhetoric in these hearings. I can only say that throughout this frustrating period NCTA has attempted in every way possible to live up to its fundamental commitment to work for fair copyright legislation. Legislation fair to all parties concerned, fair to a young, developing industry and fair to the present and future CATV subscribing public who most assuredly will be affected by imposition of copyright liability on cable.

As members of this subcommittee may be aware, there are divisions within the CATV industry over the issue of copyright payments. Positions range from no copyright liability at all, to no liability for signals received off-the-air, and no liability for a complement of signals that can reasonably be defined as adequate service. I believe, however, that the majority of the members of NCTA support

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[2] Cablevision, Inc. v. KUTV, Inc., 335 F. 2d 348 (9 Cir., 1964).
[3] Fortnightly Corp. v. United Artists Television Corp., 392 U.S. 390 (1968).
[4] Columbia Broadcasting System v. TelePrompTer Corp., 476 F. 2d 338 (2 Cir., 1974).

the Association's efforts to work with Congress in arriving at fair and reasonable legislation.

Before addressing myself to specific provisions in HR 2223 I would like to emphasize several key factors which I believe this subcommittee and the Congress must consider in arriving at fair copyright legislation for CATV.

The Constitution provides for copyright protection to promote the progress of the arts and sciences by giving authors and inventors exclusive right to the product of their creativity for a limited period of time. However, the courts have recognized that copyright protection has a two-fold purpose; to encourage creativity and to promote the dissemination of knowledge to the public. It is necessary to maintain a balance between encouraging creativity through a limited monopoly, and the paramount interest of the public in unrestricted freedom to use the works of others after authors have harvested their rewards.[5] Consequently, copyright legislation is not only for the benefit of the owner of a work, but equally as important, for the benefit of the public.

In this context it is important to keep in mind that cable television through its reception and distribution of television broadcast signals, promotes the dissemination of knowledge to the public. Indeed, without this service, which is well valued by a growing percentage of the population, significant numbers of Americans would be denied the fruits of creative labor. Congress should be cognizant of this vital CATV role. Legislation which, for whatever reason, restricts or decreases the dissemination of knowledge to the CATV public would not be consonant with the primary public interest concern of copyright.

Secondly, the Congress should be aware that imposition of copyright liability will have an impact on the CATV subscribing public. As mentioned, those subscribers value highly their CATV service. I am sure that members of this subcommittee have on occasion heard from CATV subscribers when those subscribers felt that Federal regulations or law threatened them with loss of programming. To a significant extent the cost of copyright liability will be borne by cable subscribers.

Let me make several further observations on the current financial state of the industry. It has taken several years, but an awareness is growing that CATV is not the pot of gold it was once thought to be. Last year, for example, nine of the top publicly held companies—companies who will bear a very sizeable percentage of the copyright burden—suffered a combined net loss of nearly $17 million on total revenues of $267 million.

CATV is a capital intensive business. It is also a business whose expenses, for the most part, are fixed and subject to very little influence of the CATV manager. Many expenses are subject to the same inflationary pressures experienced generally throughout the country, with the normal competitive influences between suppliers tending to moderate the rate of increase. However, in addition, cable systems experience a number of substantial expenses, whose levels are established arbitrarily by some authority not subject to the moderation of competitive pressures. Some of these expenses are subject to change with little opportunity of the CATV operator to influence the level. Examples of these are pole rents, microwave charges, interest, franchise taxes, property taxes, and FCC fees.

Because most cable expenses are fixed, the only opportunity for cable operators to obtain and maintain a favorable profit margin is through additional subscribers, or by increasing subscriber rates (often difficult because city council approval must be obtained).

The uncertainties related to these uncontrollable expenses make financial planning and borrowing difficult and expensive. Appendix B contains further detailed information on the financial impact of copyright liability for cable.

Let me now turn to the specific provisions of HR 2223. Chapter 8 of the bill would create for the first time a Copyright Royalty Tribunal in the Library of Congress. This Tribunal would be composed of three persons and would be empowered by statute to adjust copyright royalty rates, the revenue base, and in certain circumstances the distribution of royalty fees. The Tribunal is directed to undertake a review of royalty rates within six months of the date of enact- of the law, and that review is to be completed within 18 months. Thenceforth, the Tribunal would conduct a review every five years ad infinitum.

Mr. Chairman, we are opposed to the establishment of this Tribunal, and we further believe that Section 8 of the bill is laced with infirmities that represent a very serious threat to the future viability of the cable television industry and

[5] Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932).

to the services the industry hopes to offer to the public. Let me explain. This Tribunal carries with it the potential for substantial escalation of copyright fees in a very short period of time. The Office of Telecommunications Policy has already pointed out the damaging effect this uncertainty and lack of stability can have. You will hear further about the impact of uncertainty on cable's growth by a representative of the financial community following my presentation. I do not think I exaggerate when I say that virtually any significant copyright payment by this industry represents a financial burden. An unknown periodic review as mandated in this bill presents, in my opinion, not potential, but actual grave economic problems to a growing industry, one that is voraciously capital intensive in its formative stages. You are aware of the difficulties that all high risk businesses are now facing in obtaining short term financing. I do not wish to plead economic hardship to this subcommittee, but plead I must. We in this industry know too well the economic realities.

Further, Chapter 8 contains no criteria to guide Tribunal review of rates; it contains no provision for judicial review of the Tribunal's decision other than for fraud; and in our opinion it provides for no effective Congressional review. In short, we find this section of the bill fraught with uncertainty, an uncertainty that I submit this industry can ill afford.

I would like to suggest a more reasonable approach to the issue of insuring fair rates in the future. Such an approach is already contained in the bill.

Section 111(d) provides for the establishment of a compulsory license for secondary transmissions by cable systems. Royalty fees are computed on the basis of specified percentages of gross receipts from subscriber revenues from basic cable service. The applicable percentages increase according to the revenues or size of a cable system. We believe that a progressive fee schedule based on percentages represents an eminently logical and reasonable approach to increasing fees. It substitutes marketplace economics for arbitrary decisions. It has the logic of a graduated income tax without the loopholes. The revenues derived by copyright owners from cable will increase, as the cable system revenues increase. Such an approach takes both the industry's growth and inflation into account. If cable television is to grow and prosper, so will the owners of copyrighted product share in that growth and prosperity.

In summary then, we strongly urge this subcommittee to retain the approach of a progressive fee schedule based on a percentage of revenues, and discard the concept of periodic review. Such an approach avoids the need to establish yet another bureaucratic procedure and substitutes a logical and simple approach for an arbitrary and complicated one.

Section 501 of HR 2223 deals with infringement of copyright. Subsection (b) thereof entitles the copyright owner to initiate action for infringement of copyright. We have no objection to that provision. However, subsection (a) grants a television broadcast station rights as legal or beneficial owner of a copyright for purposes of instituting action for infringement. We very strongly object to this provision.

As you know, the rights to most television programs are held, not by the broadcaster, but the copyright owner. In those cases, where the television station does hold the copyright he is fully protected for infringement under subsection (b). However subsection (c) would grant to hundreds of broadcasters across the country the right to institute harassing suits against cable operators for very minor or even inadvertent violations of FCC regulations. Such a provision is, we think, an aberration and one unprecedented in copyright law. It should be stricken from the bill. Adequate remedies for violations of FCC regulations are available under the Communications Act.

In any event we believe that this subcommittee's report should make clear that inadvertent violations of FCC rules do not constitute infringement of copyright.

Mr. Chairman, in earlier testimony before this subcommittee Deputy Assistant Attorney General Irwin Goldbloom of the Justice Department stated:

"We strongly urge, with respect to (b) [where the CATV system is, in whole or in part, within the local service area of the primary transmitter] that the secondary transmittal should be completely free of liability; hence, royalty free or no licensing would be in order. The secondary transmission in such a situation where the CATV system is, in whole or in part, within the local service area of the primary transmitter, *finds the cable system only filling gaps or improving reception in the service area of the primary transmitter, supplementing the primary tranmission. Such transmission does not impair the primary transmitter's mar-*

ket; in fact, it enhances it. The copyright holder is helped and not hurt by such activity." [Emphasis added.]

In short the Justice Department has recommended that there be an area of "free use" with respect to CATV distribution of local broadcast signals. NCTA fully supports this line of thinking We note also that Thomas Keller, Acting General Counsel of OTP, stated to the subcommittee last week that local signals should not be liable for copyright.

While Mr. Goldbloom did not suggest to this subcommittee a method or mechanism for imposing liability only on signals outside that area of "free use", the logic of his recommendation is undeniably sound. NCTA has internally addressed this question in great detail. We have researched and studied a variety of possible approaches to the Justice Department's concept of an area of free use.

We have, however, determined that it is impossible to arrive at a free formula embodying this concept applied on a system-by-system basis, which does not discriminate unfairly against one portion of the cable television industry, and consequently against the public receiving service from such systems.

We believe that the concept advanced by the Justice Department can and should be embraced in the following manner. Copyright liability for CATV distribution of broadcast signals should be imposed without respect to carriage of signals. There appears to be no fair way to impose liability for carriage of certain signals and not others.

By retaining the present fee schedule in HR 2223 and exempting from liability the first $25,000 in gross quarterly subscriber receipts for all cable television systems, copyright legislation can fairly take into consideration that portion of cable service which fills gaps or improves reception in the service areas of broadcast stations.

We point out that such an exemption involves a reasonably small dollar amount in relationship to the total copyright revenues to be derived from cable now and in the future. It also has the benefit of providing some degree of relief to the smaller traditional community antenna systems. The owners of copyrighted product themselves have frequently stated that they are not primarily concerned with this type of cable system. Indeed the 1971 Consensus Agreement envisioned a total exemption from liability for many cable systems serving fewer than 3500 subscribers. The blanket exemption we propose would have the practical effect of exempting nearly all systems with fewer than 1500 subscribers.

The reduction in revenues derived from larger cable systems, particularly in the larger television markets which the copyright owners have targeted as the primary source of future revenues, would be quite small as a percentage and of course, new revenues generated by cable system growth would be fully assessable.

We believe this kind of exemption to be an equitable and fair approach to the problem of copyright liability for local signals. We submit for your serious consideration an amendment to achieve this.

Mr. Chairman, I will now turn to the third matter NCTA would like to comment on in relationship to HR 2223. Several times in my testimony I have alluded to the FCC's cable television regulations and to the close historical interrelationship between copyright and regulation as applied to cable. I would again urge the members of this subcommittee to read those regulations. For your convenience the most pertinent of those regulations are printed below.

SYNDICATED EXCLUSIVITY

§ 76.151 Syndicated program exclusivity; extent of protection.

Upon receiving notification pursuant to § 76.155:

(a) No cable television system, operating in a community in whole or in part within one of the first fifty major television markets, shall carry a syndicated program, pursuant to § 76.61 (b), (c), (d), or (e), for a period of one year from the date that program is first licensed or sold as a syndicated program to a television station in the United States for television broadcast exhibition;

(b) No cable television system, operating in a community in whole or in part within a major television market, shall carry a syndicated program, pursuant to §§ 76.61 (b), (c), (d), or (e), or 76.63(a) (as it refers to § 76.61 (b), (c), (d), or (e)), while a commercial television station licensed to a designated community in that market has exclusive broadcast exhibition rights (both over-the-air and by cable) to that program. Provided, however, That if a commercial station licensed to a designated community in one of the second fifty major television markets has such exclusive rights, a cable television system located in whole or in part

within the market of such station may carry such syndicated programs in the following circumstances:

(1) If the program is carried by the cable television system in prime time and will not also be broadcast by a commercial market station in prime time during the period for which there is exclusivity for the program;

(2) For off-network series programs:

(i) Prior to the first non-network broadcast in the market of an episode in the series;

(ii) After a non-network first-run of the series in the market or after one year from the date of the first non-network broadcast in the market of an episode in the series, whichever occurs first;

(3) For first-run series programs:

(i) Prior to the first broadcast in the market of an episode in the series;

(ii) After two (2) years from the first broadcast in the market of an episode in the series;

(4) For first-run, non-series programs:

(i) Prior to the date the program is available for broadcast in the market under the provision of any contract or license of a television broadcast station in the market;

(ii) After two (2) years from the date of such first availability;

(5) For feature films:

(i) Prior to the date such film is available for non-network broadcast in the market under the provisions of any contract or license of a television broadcast station in the market;

(ii) Two (2) years after the date of such first availability;

(6) For other programs: one day after the first non-network broadcast in the market or one year from the date of purchase of the program for non-network broadcast in the market, whichever occurs first.

Note 1: For purposes of § 76.151, a series will be treated as a unit, that is.

(i) No episode of a series (including an episode in a different package of programs in the same series) may be carried by a cable television system, pursuant to §§ 76.61 (b), (c), (d), or (e) or 76.63 (a) (as it refers to § 76.61 (b), (c), (d), or (e)) while any episodes of the series are subject to exclusivity protection.

(ii) In the second fifty major television markets, no exclusivity will be afforded a different package of programs in the same series after the initial exclusivity period has terminated

Note 2: As used in this section, the phrase "broadcast in the market" or "broadcast by a market station" refers to a broadcast by a television station licensed to a designated community in the market.

NETWORK EXCLUSIVITY

§ 76.92 Stations entitled to network program nonduplication protection.

(a) Any cable television system which operates in a community located in whole or in part within the 35-mile specified zone of any commercial television broadcast station or within the secondary zone which extends 20 miles beyond the specified zone of a smaller market television broadcast station (55 miles altogether), and which carries the signal of such station shall, except as provided in paragraphs (e) and (f) of this section, delete, upon request of the station licensee or permittee, the duplicating network programming of lower priority signals in the manner and to the extent specified in §§ 76.94 and 76.95.

(b) For purposes of this section, the order of nonduplication priority of television signals carried by a cable television system is as follows:

(1) First, all television broadcast stations within whose specified zone the community of the system is located, in whole or in part;

(2) Second, all smaller market television broadcast stations within whose secondary zone the community of the system is located, in whole or in part.

(c) For purposes of this section, all noncommercial educational television broadcast stations licensed to a community located in whole or in part within a major television market as specified in § 76.51 shall be treated in the same manner as a major market commercial television broadcast station, and all noncommercial educational television broadcast stations not licensed to a community located in whole or in part within a major television market shall be treated in the same manner as a small market television broadcast station.

(d) Any cable television system operating in a community to which a 100-watt or higher power translator station is licensed, which translator is located within

the predicted Grade B signal contour of the television broadcast station that the translator station retransmits, shall upon request of such translator station licensee or permittee, delete the duplicating network programming of any television broadcast station whose reference point (See § 76.53) is more than 55 miles from the community of the system.

(e) Any cable television system which operates in a community located in whole or in part within the specified zone of any television broadcast station or within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any 100-watt or higher power television translator station which is licensed to the community of the system.

(f) Any cable television system which operates in a community located in whole or in part within the secondary zone of a smaller market television broadcast station is not required to delete the duplicating network programming of any major market television broadcast station whose reference point (See § 76.53) is also within 55 miles of the community of the system.

It has been remarked, and I think not too facetiously, that while the Congress has been laboring to develop copyright provisions applicable to cable, the FCC has for some time now been guarding the copyright gate by promulgating copyright regulations of its own.

Earlier this year, in an address to the NCTA Convention, Barbara Ringer, Register of Copyrights, stated that the FCC rules "contained the most elaborate copyright provisions I have ever seen anywhere." She continued:

"I don't know much about communications law, but I know copyright law when I see it, and the exclusivity provisions of the FCC regulations are copyright regulations; in effect, the enactment of a copyright law through the regulatory process. And they are unquestionably the most complex and difficult to understand of anything I've ever read in this field."

Absent legislation, or specific Congressional direction, and in spite of Supreme Court decisions, the Federal Communications Commission has consistently invoked copyright principles to protect broadcasting from competition. The pervasive nature of the Commission's forays in a variety of regulatory matters into exclusivity of all types is in and of itself a subject for broad independent investigation.

For the purposes of these hearings, however, one thing ought to be indisputably clear. While the FCC's 1972 rules have granted cable systems the right to carry a limited number of broadcast signals, that right—and the value and marketability of those signals for cable operators—has in very large part been negated by the Commission's syndicated and network program exclusivity provisions. Stated in the simplest of terms, a cable operator has the right to carry signals, but the obligation to black out most of the programming on those signals. And this is achieved through the Commission's "copyright regulations."

For example, the cable system under construction in Wauwatosa, Wis. must under the FCC's syndicated exclusivity regulation black out 62 percent of the programming on one channel it imports, and 58% on the other channel. What, the operator can fairly ask, is the value of carrying the signal? Appendix C contains a more detailed explanation of this problem.

It ought to be beyond any logical dispute that if cable systems are to incur liability for the distribution of these signals, then they should have the right to show what has been paid for. Yet if copyright legislation with provisions for cable television were enacted today, that would not be the case. We believe it is imperative that the Congress address this matter. This should be done in this legislation, and we are submitting language to accomplish this aim.

Before concluding, Mr. Chairman, I would like to draw the subcommittee's attention to several additional recommendations for perfecting changes in section 111 of the bill.

Section 111(b) of HR 2223 appears to make the secondary transmission of over-the-air pay-television (STV) signals an act of infringement and one subject to civil and criminal penalties. This subcommittee should be aware that Federal Communications Commission regulations require CATV systems to carry the signals of all television broadcast stations in specified geographical areas regardless of whether those signals are originated by commercial broadcast stations or STV stations. Therefore, under Section 111(b) the cable system would be faced with either violating FCC rules and regulations or the copyright law. Consequently we urge that Section 111(b) be amended so as not to apply to the required carriage of an STV signal.

Next, section 111(a) (4) exempts government-owned and non-profit translators from the requirement to pay fees. As a matter of law, we believe that no rational distinction can be made between CATV systems whose purpose is to improve reception of television signals and translators which serve the same purpose. Additionally, of course, HR 2223 does not exempt non-profit and government-owned CATV systems. Should not such translators be placed on an even competitive footing with commercial translators and cable systems?

Third, section 111(a) (3), as currently drafted, raises the possibility that cable operators providing leased channels to the public or others could incur copyright liability for the material programmed on those channels by the lessees. Federal Communications Commission regulations require that certain cable systems make available channels for lease on a non-discriminatory basis and that the cable operator may exercise no control over the program content on those channels. We respectfully suggest that the language of section 111(a) (3) be changed to insure that the cable operator does not incur copyright liability on leased channels. The lessee, of course, would remain liable for the payment of copyright.

Finally, portions of section 111 and the language of section 801(b) raise the possibility that copyright fees in the future could be based on cable revenues from sources other than basic CATV distribution of broadcast signals.

I believe it is not the intent of Congress to impose copyright liability on cable operations beyond the basic reception service, and indeed there would be no logic to such an approach. The liability contemplated in this legislation has no relationship to revenues derived from local origination, pay cable operations or any other such service initiated by a cable operator. In those specific cases copyright will have already been paid. Revenues derived from other potential services, meter reading, for example, have no connection with copyright. Again, Mr. Chairman, there would clearly seem to be no equity or logic in such an approach. We are submitting suggested clarifying language to deal with this issue.

In conclusion, Mr. Chairman, I would like to state that NCTA has for eight years now worked hard under trying circumstances to assist in achieving fair and reasonable copyright legislation for CATV. We will continue those efforts, and we stand ready to assist this subcommittee in every way possible. I will be happy to respond to questions.

APPENDIX A.—SUMMARY OF FCC CABLE TELEVISION RULES

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), the United States Supreme Court established that CATV systems were interstate operations, properly to be regulated by the Federal Communications Commission. The Court stated, at pages 168–169:

"Nor can we doubt that CATV systems are engaged in interstate communications, even where, as here, the intercepted signals emanate from stations located within the same State in which the CATV system operates. We may take notice that television broadcasting consists in very large part of programming devised for, and distributed to, national audiences, respondents thus are ordinarily employed in the simultaneous retransmission of communications that have very often originated in other States. The stream of communication is essentially uninterrupted and properly indivisible. To categorize respondents' activities as intra-state would disregard the character of the television industry, and serve merely to prevent the national regulation that 'is not only appropriate but essential to the efficient use of radio facilities.' " (Citation and footnote omitted.)

Subsequently, detailed regulations of the FCC were upheld in *Black Hills Video Corp.* v. *United States*, 399 F.2d 65 (8 Cir., 1968).

CATV systems are governed by comprehensive regulations of the Federal Communications Commission (See, 47 C.F.R. 76.1 *et seq.*). The Commission's regulatory scheme varies, depending on the location of a community within which a CATV system operates, as that community is related to communities designated by the Commission as a "television market." The regulations further distinguish between "major" television markets (which are divided into "Top-50" and "Second-50" markets) and "smaller" television markets.

The major television markets in the country, defined by 35 mile circles around a central point in each market, contain about 85 percent of the population of the United States. This large area has only recently been opened to development by cable television.

Early federal regulations attempted to establish some kind of a formative direction for cable television as it existed then. In the more than seven years that have followed, the Federal Communications Commission has adjusted its regulatory

program to reflect changes in the cable television technology. So, when we talk about the regulatory atmosphere within which cable television now must operate, there are essentially four different areas.

First, there is the area regarding the delivery of signals which are received off the air. Then there is the delivery of the nonbroadcast signals. Then there are technical standards imposed upon the industry. And, lastly, there is an attempt to resolve the very difficult problem of the relationship between Federal, State, and Local regulatory jurisdictions.

The number of television broadcast signals that cable TV systems are allowed to carry is determined by their geographic location. If they are in one of the 50 largest markets in the country, they are entitled to carry three full network stations, three independent stations and an unlimited number of "unobjected to" educational television stations as well as an unlimited number of non-English language broadcast stations. In small markets, there is no provision for the importation of two "wild-card" signals.

This means that the cable television operator who faces entry into any locality must measure the available signals off-the-air, fit them to this complement, which the FCC allows him to carry, and then see if he can find an attractive combination which will allow him to market his service.

As a limitation on what the CATV operator can do with those signals, the FCC has incorporated a copyright concept: the concept of program exclusivity. That means if a local television station is broadcasting "I Love Lucy" at 6:00 at night and a station which a CATV operator is importing from a distant market also broadcasts "I Love Lucy" at the same time period, then "I Love Lucy" on the distant, or imported, signal must be blacked out, so that the viewers cannot see "I Love Lucy" on the distant channel. Viewers are forced to turn to their local channel if they want to watch "I Love Lucy." That is the effect of nonduplication, or copyright exclusivity, written into federal regulations.

There are two types of exclusivity which the FCC has imposed on cable television. One is for network programs. There the time period is simultaneous. This means that a network show, "Dean Martin," being broadcast at 9:00 locally and the more distant station also broadcasts "Dean Martin" at 9:00, then "Dean Martin" on the distant station must be blacked out.

But the network exclusivity rules are much more complicated than this simple description. There are complicated mileage zones of protection of various sizes drawn around television markets. A 35-mile circle will be drawn around major markets (top 100) and a 55-mile circle around minor markets, with certain refinements. Examples: (1) 54 miles from two minors, no protection; (2) 54 miles from one minor and 34 miles from another minor, protect second minor; (3) 34 miles from a minor and a major, no protection; (4) 34 miles from a minor and 54 miles from a major, protect minor; (5) 54 miles from a minor and a major, no protection.

In addition, there is a very complicated system of non-network exclusivity: What the Commission calls "syndicated exclusivity."

In these 50 largest television markets the rules provide for one year protection (pre-clearance) from the date that a wholly newly created program is first sold or licensed anywhere in the country. During that year CATV systems may not import such programs into any of the top 50 television markets. Thereafter local stations will be protected for the run of their exclusive copyright contract. These contracts generally run from 4–7 years. CATV systems would not be permitted to carry films or series under contract irrespective of whether these programs are actually being shown on the local station.

In television makets 51–100, the rules break down programs into essentially five categories—off-network series, first-run series, first-run nonseries, feature films, and "other programs" which are really off-network specials. When I say "off-network special" that means that a special has had exhibition on a television broadcast network sometime in the past. The time period is not "simultaneous" in these cases; it varies from one to two years. In some cases, CATV can carry a program broadcast on a distant station one day after it's broadcast on a local station, but exclusion lasts no longer than one year from the first market purchase or non-network broadcast in the local market. This system is a very complicated control of what the CATV operator has to do with respect to "blacking out" signals from distant stations, and are limitations on the use of programs on the distant signals.

In addition, the FCC has moved into the new area of delivery on nonbroadcast signals—the cablecasting or narrow-casting of channels.

New systems in a major television market must also have a certain minimum channel capacity. That channel capacity, as it breaks down into layman's lan-

guage is 20 channels—twenty 6 MHz channels (a 6 MHz channel is a television channel). It must also provide for equivalent bandwidth so that if it receives off-the-air at its head-end antenna and delivers 12 television signals, it must have a system capacity of 24 channels. So, for each off-the-air television channel delivered the system must also have the capacity of providing one other channel for nonbroadcast purposes. The use of those channels is for the primary purpose of delivery of non-decoded, nonbroadcast signals; or, for the use of nonbroadcast decoded signals; that is, pay TV by wire. The new rules also provide that all new systems in the major markets must have two-way capacity for nonvoice return signals.

The federal regulations also provide that all the new CATV systems have to provide room for access channels. Access channels are divided into essentially four categories. First, there is a public access channel, which must be available for anyone to come in off the street and say his piece. That channel must be nondiscriminatory, it must be non-commercial, it may not make any charges at all except for live production costs of over five minutes in the studio. In addition, the CATV system is required to have the minimal equipment and facilities necessary so that the public can use this channel.

Second, federal regulations require provision of an educational television access channel, which must be provided by the CATV system free for the first five years after the completion of the system's trunk line cable. The purpose of the free five-year period, according to the FCC's reports, is to encourage the innovative use of educational television on cable systems. Third, there is a requirement that new systems must have a "government" channel which also must be free for five years after the completion of the trunk line. Fourth, there is the requirement that cable systems must have at least one "leased" channel available for any purpose at all, on either an hourly basis or on a total channel leased basis. There is one other feature of this access channel proposal. The delivery of nonbroadcast signals. That is the requirement imposed by the federal government for an expansion of that access channel capability, provided that on 80 percent of the weekdays (Monday through Friday) the channels are used for 80 percent of any three hour period in that time, for six weeks running. The CATV system has six months within which to provide an additional channel for these uses. If that access user can supply the product to fill that channel he can then spill over into these other channels until 80 percent of the time in any three hour period for 80 percent of the weekdays is filled; then he is entitled to still another channel, and that will go on and on as the demand increases.

There are operating rules which the FCC has provided for these channels. For example, on the educational channel, there can be no commercial advertising, there can be no lottery information, there can be no indecent or obscene material, and records of the use of these educational channels must be kept by the cable system operator for at least two years.

The final area concerns franchise standards. These franchise standards were adopted by the FCC out of concern about the proper relationship between the local and the federal governments. Every new franchise must weigh, in a full public hearing, the applicants' qualifications, as to their legal competency, their character, financial capability, and technical capacity. The franchise must require that there be significant construction of a CATV system within one year, and the FCC says that they think about 20 percent per year is reasonable. There must be an equitable and reasonable extension of the trunk line in every succeeding year until every person in the community is capable of being served, and the CATV system must reach a substantial percentage of its franchise area. The FCC also provides that all new franchises must be of fifteen-year duration. There must be approval by the city fathers of an initial subscriber rate, and approval of requests for increases in that rate, including the installation rates and the subscriber rates. There also must be in every new franchise a procedure for the investigation and resolution of complaints and there must be maintenance of a local business office or agent by the CATV system in the community for that purpose.

CATV systems operating as of March 31, 1972, are grandfathered, that is they do not have to comply with these regulations until March 31 of 1977, or until the end of their franchise period if it is earlier than that date.

In addition, the regulations also contain the following rule, found at 47 C.F.R. § 76.7(a):

"On petition by a cable television system, a franchising authority, an applicant, permittee, or licensee, of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any

provision of the rules relating to cable television systems, *impose additional or different requirements*, or issue a ruling on a complaint or disputed question." (Emphasis added.)

NATIONAL CABLE TELEVISION ASSOCIATION,
PUBLIC AFFAIRS DEPARTMENT,
Washington, D.C., August 1, 1975.

Hon. ROBERT KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Rayburn Building, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: NCTA is pleased to submit the enclosed supplemental statement in connection with the Subcommittee's current consideration of revision of the copyright law. The statement addresses a number of issues which arose during the June 11–12 hearings, and which we believe require amplification or clarification.

We shall be happy to respond to any further requests for information or questions by the Subcommittee.

Sincerely,

REX A. BRADLEY, *National Chairman.*

Enclosure.

MEMORANDUM FROM THE NATIONAL CABLE TELEVISION ASSOCIATION CONCERNING H.R. 2223

During the copyright subcommittee hearings on H.R. 2223 June 11–12 a number of questions arose concerning aspects of NCTA's position on H.R. 2223. While many of these questions were resolved during the hearings, NCTA would like to take this opportunity to offer the following supplementary statement on matters discussed during the hearings. These matters include NCTA's views with respect to the Copyright Royalty Tribunal and projections regarding the amount of copyright revenues to be paid by the cable industry under NCTA's proposed amendments to H.R. 2223, information concerning the sale of commercial programming to the television networks and syndication of programming to local television stations, and the provision of H.R. 2223 granting rights to broadcast stations as legal or beneficial owners of a copyright for purposes of instituting infringement actions.

THE COPYRIGHT TRIBUNAL

In its formal statement before the subcommittee, NCTA strongly objected to the establishment of a copyright tribunal as specified in H.R. 2223 with the uncertainty and vagueness inherent in the tribunal's power.

NCTA believes that the threshold question which Congress must address in this regard is the very concept of the tribunal itself and not merely the infirmities present in Chapter 8 of the bill.[1]

There are three basic and interrelated arguments advanced in favor of establishing a copyright tribunal with broad powers: (1) the Congress does not have the capability to make informed decisions in this area (2) since Congress is "fixing" copyright fees in legislation a periodic review is essential and (3) it is necessary to have an impartial and unbiased authority to examine facts and weigh data in order to fairly adjust future royalty rates for CATV. While at first glance these arguments appear to be reasonable, they do not stand up to logical analysis.

There is no basis for assuming that an inexpert appointed body will be capable of making informed decisions about copyright royalty rates. Specifically what data and which facts are to be utilized by the tribunal in adjusting rates? None are specified. Is it to be a cable system's gross revenues, its net, its margin of profit or loss? Is it related to the number of broadcast channels a system carries, the number of programs it carries, or only the number of programs a system distributes which do not have to be blacked out because of FCC regulations? Will it relate to the rates charged by a cable system? The same questions can be asked on the copyright side. It should be obvious that no one of these factors represent data and facts from which a fair fee schedule can be derived. Absent any criteria or methodology in the legislation for adjusting rates, an inexpert authority is, at best, being asked to render a Solomon-like decision

[1] As previously pointed out by NCTA, those infirmities include inadequate Congressional and judicial review procedures, the power of the tribunal to change the "revenue base", and the lack of criteria and standards governing operation of the tribunal.

without the benefit of either practical guidance or divine inspiration. It is quite likely that the evidence presented to this review body will tend to be inconclusive or at least widely disparate. (We note for example, that the copyright owners have argued that a fair level of copyright payments for CATV would be in the range of 16-20% of gross revenues.)

The point is that because of the unique nature of the cable/copyright matter any decision about CATV royalty rates will tend to be an arbitrary one. Comparisons with other approaches to compulsory licensing of copyrighted material are not necessarily valid. The cable copyright issue proceeds outside most marketplace considerations, and has a unique relationship to regulatory factors. Congress, with its responsibility for oversight and review of the FCC and the regulatory process, is the only body which can fully evaluate and weigh these factors.

For the same reasons, there is little logic to the argument that Congress does not have the capability to deal with the copyright rate matter. On an issue which will have a direct impact on the public, Congress is the most appropriate body to attempt to achieve a fair resolution. It is Congress which is charged by the Constitution with the responsibility and authority for national copyright policy. The Congress should not shirk its responsibilities in this area. Its goal ought to be to arrive at an equitable solution keeping uppermost in mind the rights and desires of the public. NCTA respectfully submits that this public interest standard will not be met by avoiding the issue and setting in motion a new and unnecessary bureaucratic process with the attendant forms and procedures which too often plague small businesses and ultimately, the consumer.

Hardly will the new law (with a Congressionally established progressive fee schedule) have been in effect when a tribunal will be required to reexamine the Congress' work. And even assuming that criteria to guide a tribunal could be developed and were set in the bill, it is highly unlikely that any substantive data would emerge in such a short period of time to warrant a review of rates or to justify any adjustment of those rates.

Finally, copyright interests have attempted to plant the impression that tribunal review is necessary because Congress is proposing to fix the CATV fee schedule in legislation. This "fixed fee" argument is a spurious one. Royalty fees are to be computed on the basis of escalating percentages of gross receipts from subscriber revenues, not fixed fees. In essence, what the copyright interests are seeking is not one, but two methods to guarantee that future copyright revenues will rise sharply. They seek a progressive fee schedule and a mandated periodic review.

The progressive fee schedule represents a logical marketplace approach. Stated simply, as a CATV system's revenues increase so do copyright revenues. Conversely, under the approach currently contained in the bill a cable system could find itself in the anomalous position of losing money and having both its gross revenues and net revenues decreasing while its copyright payments are increasing. There is no equity and logic in freezing in legislation such a marketplace aberration.

Additionally, it should be understood that while the initial impact of copyright liability on an industry-wide basis does not appear to be excessive, the capacity of individual cable systems to absorb the added burden of copyright payments varies widely. For many systems the addition of copyright payments on top of pole attachment rentals, franchise levies, and annual FCC subscriber fees will significantly reduce the system's operating ratio. NCTA has previously pointed out that in many cases cable systems have been unable to secure rate increases from local rate reviewing authorities to offset increases in operating expenses. For example, cable systems in Charleston and Morgantown, W. Va. have been denied rate adjustments even though their last increase was in 1965; the Pottsville, Penn. system which last increased rates in 1963 has been denied a rate hike; the Santa Cruz, Calif. system has been denied an increase although it has not had one in 18 years.

The point is that by tying the prospect of future royalty increases to the percentage mechanism currently contained in H.R. 2223, a closer marketplace determination of future copyright fees will result.

NCTA believes that Congress must be fully cognizant of all the ramifications of the current tribunal approach. In dealing with the issue of future copyright royalties Congress should strive for a simple and clear methodology for assuring that all parties—including the CATV viewing public—are treated fairly.

NCTA is convinced that a graduated royalty payment scale based on a percentage of each CATV system's gross subscriber revenues represents the best approach to adjusting future copyright payments.

FUTURE COPYRIGHT PAYMENTS

During the subcommittee's hearings copyright interests went to great lengths to emphasize that CATV's copyright liability would amount to only a small percentage of the industry's gross revenues and that the industry could easily afford to pay this amount.

Based on this argument, the copyright owners then go on to claim that the fee schedule currently contained in the bill should be increased.

Congress should not be fooled by this line of reasoning. It should be fully aware of the impact the future growth of the cable television industry (which now serves only 14 percent of the nation's television homes) will have on future copyright payments.

If H.R. 2223 were law today and contained the NCTA proposal exempting from copyright liability the first $100,000 of each CATV system's annual basic service revenues, the cable television industry's 1975 copyright liability would be approximately $5 million.

This $5 million liability represents 0.76 percent of the CATV industry's estimated 1975 basic service revenues of $660 million (based on 10,000,000 cable-subscribing households paying an average monthly rate of $5.50, or $66 per year). However, the extent of CATV copyright liability will increase sharply within the next 10 years.

For example, two recent independent studies[2] of the CATV industry contain significant growth projections.

One study projects 32 million subscribing households by 1984; the other projects 22 million CATV households by 1983.

Current CATV growth patterns would indicate that the projected growth of 22 million households is a conservative estimate, the projected 32 million households is an optimistic estimate.[3]

Nevertheless, the two projections give extremes of a range of growth that are helpful in assessing CATV's future copyright liabilities.

Assuming that by 1983–84, the same basic monthly subscriber fee assessed today ($5.50) remained stable. (1) 22 million cable-subscriber households would produce annual revenues of $1.45 billion, and (2) 32 million households would provide revenues of $2.11 billion.

Industry copyright liability, however, would not remain at 1975's 0.76 percent of annual revenues.

Today, less than 200 cable systems serve 10,000 or more subscribers. Even so, they would account for 76 percent of the 1975 liability of $5 million, with their payments representing an average of 1.5 percent of annual revenues.

CATV's growth will come from existing large systems as they expand their subscriber base, and from new major systems developed within the major metropolitan market areas.

Because these larger systems will be paying copyright liability closer to the high end of the graduated fee schedule, the average payment will certainly be at least 1.5 percent of annual revenues if, indeed, not more.

Based on an average assessment of 1.5 percent of revenues, the CATV industry at 22 million subscribers in 1983 would be paying $21.8 million in copyright liability (more than 300 percent above today's $5 liability, with slightly more than a 100 percent increase in total subscribers).

At 32 million subscribers in 1984, the industry would be paying $31.7 million in copyright liability (more than 500 percent above today's $5 million liability, with slightly more than a 200 percent increase in total subscribers).

NCTA believes therefore, that Congress must in its consideration of copyright take full note of these CATV industry growth patterns and their impact on future liability.

PROGRAMMING PRACTICES—NETWORK AND SYNDICATION

During the hearings a number of questions were asked about the practices of networks in obtaining product from program producers and the leasing of programming to television stations on a city by city basis (syndication). Of particular concern were the methods for determining the value of a product during negotiations, the relationship of such factors as the product itself, the market and exclusivity arrangements in arriving at fair compensation, and of course, the effect CATV carriage has on the value of a particular product and how that effect

[2] "CATV Networks and Pay-TV: Feasibility and Prospects," Knowledge Industry Publications, Inc., New York, New York, 1975.

[3] "CATV," Frost and Sullivan (Technological Market Research firm), New York, New York, 1975.

enters into marketplace detemination of the value of the product and the sale of advertising. The following material provided by a major syndicator and supplier of network programming, contains pertinent information about those matters.

Network Programming (Commercial)

(1) Definition

Network programming is television programming broadcast on one of the three commercial U.S. television networks on a national inter-connected basis. Most contracts between program suppliers and the three networks carry an exclusivity clause granting the network the exclusive right to broadcast the programming for a stated period of time. This exclusivity commonly prohibits the supplier from licensing the programs to the other television networks or to any television stations or CATV systems in the exclusivity area, which is usually the U.S., its territories and possessions, and English-language Puerto Rico. There are occasional minor variations among the networks as to the exclusivity area (e.g., to include Bermuda or Tijuana, Mexico).

(2) Types of Programming

(A) *Prime Time*—(7:00 p.m. to 11:00 p.m., except Central and Mountain time zones: 6:00 p.m. to 10:00 p.m.)

In prime time the most common types of programming are half-hour and one-hour series. In addition, the networks program theatrical feature films, made-for-television feature films, entertainment specials, news and some public affairs documentaries and specials and some sports events in prime time.

(B) *Day-time Monday-Friday Programming.*—The great majority of programming in this time period on the networks consist of game shows, quiz shows, talk shows and soap operas.

(C) *Saturday Morning Programming.*—Most programming on Saturday morning on the networks is children's programming, a considerable portion of which is in animation.

(D) *Late Evening.*—Each of the three networks takes a different approach to late evening programming (post-prime time). One network programs talk shows, another programs feature films and the third programs a mixture of various types of programming ranging from variety specials to dramatic shows produced especially for that time period.

Most of the programming referred to in (A) through (D) above (except for sports, news and public affairs) is supplied to the networks by outside producers and suppliers. In addition, the networks themselves produce and broadcast news and public affairs programming and additional sports programming at various times during the week, with special emphasis on news and public events and sports on Saturday and Sunday afternoon as well as early evening news shows during each weekday.

(3) The program suppliers

As indicated above, most of the entertainment programming broadcast by the three national commercial networks are supplied by entities unaffiliated with the networks. These are primarily the major motion picture companies and independent producers. The networks in whole or in part finance the development of this programming by financing the cost of stories, outlines, scripts, pilot films and the like. In exchange for financing the various steps of development, the network receives an exclusive option to license the financed program or programs at agreed-upon license fees. In the case of television series, the network options can continue for from five to seven years of product.

(4) Compensation

As indicated above, the program suppliers are compensated by the networks for the programming they supply. The networks also compensate the individual stations across the country which carry the network programming in accordance with affiliation agreements which exist between each network and its affiliate stations. In addition, the stations sell local advertisers commercial time adjacent to network programming, which, because of the larger audiences generated by network programming, commands higher prices than other local time. The networks receive their compensation from national advertisers who purchase advertising time on the networks.

Syndication

(1) Definition

Television syndication is the leasing of programming to individual stations on a city by city basis. Most contracts carry an exclusivity clause covering 35 miles

from the city of license prohibiting other television stations or CATV systems from using the same material. The product is composed mainly of the following:

1. *Specials.*—Usually first-run entertainment or documentary material with two telecasts over a year's term.

2. *First-Run Series.*—Primarily half-hours with 26 to 39 originals and sufficient repeats to fill out a 52-week telecast schedule on a once-a-week basis (i.e., 26 & 26 as in Ozzie's Girls, or 39 & 13 as in Price Is Right). Some strip programming is offered (What's My Line, Truth Or Consequences) running five a week with 195 new shows and 65 repeats being typical. Another major form is the talk/variety shows such as Mike Douglas, Merv Griffin and Dinah Shore. Because of the nature of the program content, very few repeats are produced. First run contracts are usually for a one-year period of time.

3. *Off-Network.*—Those series which achieve network success and build up at least four years of production are valuable to the syndicated market. They are usually half-hour (Hogan's Heroes, I Love Lucy, Adam-12) or hour (Perry Mason, Ironside, Marcus Welby) in length. Contracts run anywhere from two runs to unlimited runs with six typical. Usual contract terms cover five to seven years.

4. *Catalog Product.*—This is older series product, mostly off-network, that is sold for a short duration (Honeymooners, Have Gun Will Travel). Usually one or two runs with contract term of one to two years in selective markets.

5. *Feature Films.*—Common trend is to sell the networks first and syndicate post network. Most popular packages carry 20 to 30 pictures and terms are five to seven years with five to ten runs of each feature. Older features recycled are replaced with the better titles continuing television exposure and the poorer titles going on the shelf.

(*B*) *Station scheduling of syndicated product*

1. *Affiliates.*—Most affiliate stations (ABC, CBS, NBC) in the eastern time zone have the following local time periods to fill:

9:00 am to 10:00 am.
1:00 pm to 1:30 pm.
4:30 pm to 8:00 pm. (with the exception of network news).
11:00 pm to 11:30 pm.
1:00 am to signoff.

Local and network news usually fill the 6:00–7:30 pm time period and the 11:00–11:30 pm time period. Features are used afternoon and late night weekends, preemptions in prime time and as five-a-week early shows which are on a decline.

The most valuable part of the day for the syndicator is 7:30–8:00 p.m. for first-run once-a-week programming. The second most valuable part is 4:30–6:00 p.m. with talk/variety shows, off-network syndication and feature films taking time in that order.

2. *Independent Stations.*—Independents have a poorer circulation in the daytime and do not pay much for this area. It's primarily used for the multiple run feature films and live local shows. Since most affiliates attract an older audience with their talk/variety and news programming in late afternoon and evening (4.00–8.00pm), indies basically target their counterprogramming to the kidult audience. This material is primarily off-network series (I Love Lucy, Star Trek, Wild Wild West, Andy Griffith, Flintstones, Gilligan's Island). The 8:00–11:00 pm time period is comprised of ninety minute talk/variety shows, feature films, sports and off-network series. Most all Monday to Friday programming is "stripped" (same series each day in time period).

(*C*) *Price Negotiations*

Most rate cards are set on the philosophy that the biggest markets with the most circulation pay the biggest prices (New York) and the smaller markets pay a much smaller price proportionately (Zanesville, Ohio). This is tempered by historical price patterns and artistic merit of new program offerings (Mary Tyler Moore would be more desirable than the Doris Day series and thus sell for much higher dollars). Supply and demand, plus the skill of the negotiator, play a large part in arriving at a final price in each market.

(*D*) *Station Income*

The United States advertising-supported stations' basic goal is to attract a huge audience through the proper selection of programming. This audience is subsequently "priced" and resold to advertisers primarily through their advertising agencies. Value would be shown through the use of rating research material.

To illustrate, each rating point represents 1% of the total market households. Therefore, in a million household market, a one rating would mean 10,000 homes. Ten rating points would thus achieve an audience size of 100,000 homes. Hypothetically, a ten rating would be worth $250 per 30 second spot. If the station could change its programming and increase the rating from a ten to a fifteen, it would automatically increase its price per spot by 50% making it worth $375. It obviously leads to the conclusion that successful programming is worth more money in net profits even though its cost might be higher than less effective programming.

CATV is measured by the rating services in any county where there are over 10% cable homes. Since this viewing is listed in the research books, the station is getting credit and charges his rates accordingly. There is no separate breakout of CATV systems in the books.

INFRINGEMENT OF COPYRIGHT

Section 501 deals with infringement of copyright. Subsection (b) thereof entitles the copyright holder to initiate action for any infringement of his copyright. That is as it should be. However, subsection (c) grants a television broadcast station rights as a legal or beneficial owner of copyright in the programs it transmits for purposes of instituting action for infringement against cable television systems. The rights to most television programs are held not by an individual broadcaster, but by a syndicator or other program owner. They are fully protected by subsection (b). In those cases where a television station does hold the copyright, it has every right to sue for infringement under subsection (b), too. Subsection (c) would grant to hundreds of broadcasters the ability to institute harassing suits against cable operators for minor or even inadvertent violations of FCC rules. This creation of private attorneys-general is unprecedented in copyright law and should be stricken from the bill. Infringement of copyright is fully actionable under Section 501 (b), and adequate remedies for violations of FCC regulations are available to broadcasters under the Communications Act.

More specifically, under the FCC's rules cable television systems are permitted to carry both "local" and "distant" television signals. Under certain circumstances the rules also require these systems to delete or black out certain programs from the distant signal. These exclusivity rules are based on unfair competition and copyright related concepts. Because the rules are quite complex, a cable system even in good faith sometimes fails to delete a program which should have been deleted. Causes for this include inadequate program schedule notices, last minute schedule changes by either the distant or local station, equipment malfunctions, power outages and program overruns. Furthermore, given the small size of most cable television operations and the vast number of programs involved (the average CATV system carries over 9 television broadcast stations), unintentional errors can and do occur. It can thus be seen that there will be many instances where under the terms of Section 111, the cable system would be guilty of prima facie copyright infringement. The FCC has remedies for the willful and repeated violations of these rules by cable system operators. These remedies include cease and desist orders and revocation of operating authority. In addition, the FCC has asked Congress to include cable systems in the section of the Communications Act dealing with forfeitures. Thus adequate remedies are available without resorting to copyright infringment suits in the courts. Section 501 (c) should therefore be deleted.

CABLE TELEVISION
UNDER THE 1972 FCC RULES
AND THE IMPACT OF ALTERNATIVE COPYRIGHT FEE PROPOSALS

AN ECONOMIC ANALYSIS

by

BRIDGER M. MITCHELL

in
Association With

ROBERT H. SMILEY

57-,36 1079

September 20, 1972

INTRODUCTION

Final rules of the Federal Communications Commission governing cable television service in the 100 largest television markets went into effect March 31, 1972, following six years of FCC proceedings during which development of CATV service in major cities has been effectively blocked by interim regulations prohibiting the importation of distant television signals. The rules as effective allow limited importation to occur, varying with the size of the market and the locally-receivable signals, but at the same time provide broad "exclusivity" protection to local stations for their programs, thus requiring cable systems to delete programs from the imported signals.

No provision for payment of fees by cable systems to the copyright owners of television broadcast programming shown on those systems is included in the FCC rules, and under the Fortnightly[1/] decision cable systems are not liable for copyright. Nevertheless, the Commission anticipates congressional legislation to require copyright payments and would regard its enactment as a reaffirmation of the FCC's regulatory program toward cable television.

1/ Fortnightly Corporation v. United Artists, 392 U. S. 390 (1968)

This study assesses the profitability of cable television in the major markets under the final FCC rules and determines the impact of alternative copyright fee schedules which have been proposed. Our research builds on the computer simulation method and detailed cost and revenue data developed by Comanor and Mitchell in their published study of the impact of the FCC rules as proposed in July 1970. We have considerably modified and expanded their work to include the following:

. . . .the March 1972 FCC rules

. . . .more accurate and detailed predictions of penetration in major markets

. . . .the effect of the exclusivity provisions on penetration

. . . .a comprehensive set of cable system parameters encompassing market type, available signals, system location and subscriber and construction characteristics

. . . .four alternative copyright fee schedules (including no fees)

In outline, the analysis of CATV profitability focuses on a number of market and system characteristics which can be identified as typical or representative of a cable system if it were to be constructed under current rules. By varying the characteristics (e.g., system size, or lineup of local signals, or housing density) over a comprehensive set of characteristics, the outlook for cable in nearly all parts of the major markets can be assessed.

analysis, costs and prices have been measured in 1970 values; costs, revenues and rates of return are consequently in "real" terms. Except for rules changes since July 1970, cost figures are based on Comanor and Mitchell's detailed report. Throughout this study when discussing the size of a cable system we refer to the number of subscribers in its fifth year of operation, at which point it has virtually achieved its final size.

Our analysis includes revenues from subscribers, determined by penetration rates dependent on local and distant signals carried, and a realistic amount from advertising on a local origination channel. No revenues or costs have been attributed to the development of leased channels.

All systems considered in this study are newly constructed. The effect of potential copyright fees on existing systems in comparable market circumstances would be somewhat different only in the short run. For several years, these already-built systems would experience reduced profitability and the systems' owners would earn lower returns than they had anticipated. At the same time, revenues would still exceed operating costs, so that the original systems would not actually go out of business. But subsequently, when the systems required rebuilding, the copyright fees could make reconstruction unprofitable, since nearly the same investment considerations apply either to rebuilding an existing system or to constructing the same system in a similar but unwired community.

MARKET CATEGORIES AND SYSTEM LOCATION

In examining the probable effect of various provisions for payment of copyright fees we will consider separately the characteristics of typical cable systems in four types of markets: the top 50 markets, markets ranked 51-100, markets below 100, and areas located outside television markets. The FCC rules permit different signal carriage in each of these situations, and impose differential requirements affecting system costs. In addition, the density of housing, the prevalence of underground utilities and the level of family income also varies by market size. A tabular summary of these major market characteristics is set forth in Table 1.

As R. E. Park's econometric findings 2/ strongly demonstrate, the location within the market is also of fundamental importance to determining penetration levels. For this study we therefore sub divide each of the markets 1-50, 51-100, and 100+ into typical "middle market" and "edge market" systems. Middle market locations are close to off-the-air signals, while edge market systems are approximately half-way between the transmitter and the B-contour limit of the local signals. (The forth category, an "outside market" system, is necessarily at or beyond the location of a typical edge market system.) Thus the typical systems to be analyzed fall into one of seven boxes in the following matrix:

2/ "Prospects for Cable in the 100 Largest Television Markets"

TABLE 1

MAJOR CHARACTERISTICS OF FOUR MARKET TYPES

	Markets 1-50	Markets 51-100	Markets 101+	Outside Markets
Local signals typically available	3 networks, or 3 networks + 1 independent	3 networks	2-3 networks (some UHF)	1-2 networks (some UHF)
Imported signals allowed	2 in all cases; 2-3 independents typical	2 in all cases; 2 independents typical	maximum of 1 independent plus any missing networks	no restrictic
Exclusivity protection	Yes	Yes	No	No
Capacity requirements	20 channels 2-way capability	20 channels 2-way capability	12 channels 2-way capability	12 channels 2-way capability
Local origination	standard; minimum below 10,000 subscribers	standard; minimun below 10,000 subscribers	standard; minimum below 10,000 subscribers	minimum
Density (houses per mile)	150-200	125-150	100	30
Underground	10-20%	5-10%	5%	0%
Family income (1975)	$11,400-$12,200	$10,000-$11,400	$10,000	$9,000

Market Type / Location	1 - 50	51 - 100	101 +	Outside
Middle				- - -
Edge				

Within each box, indicating a specific market type/system location, we further consider the two or three most likely lineups of available local signals. While we have not reported every combination which can occur, the cases tabulated are representative of the majority of signal patterns to be encountered and they cover a degree of variation sufficient to include most other possibilities.

CABLE PENETRATION

At the time Comanor and Mitchell's research was undertaken virtually no reliable statistical information was available to quantify the effects on cable penetration of the number, types and quality of local signals available, the additional cable signals provided, the price of cable service and the incomes of potential subscribers. That study provided estimates of most of these variables by use of multiple regression analysis on a randomly selected sample of 149 systems drawn from the Television Factbook. The authors noted that these systems were largely outside of the top 100 markets or in areas of quite poor reception, or both. Projection of penetration in the major markets under the then-proposed FCC rules (allowing four distant independent signals) was recognized as subject to considerable error.

Since publication of the Comanor-Mitchell paper the measurement of factors determining penetration has been advanced considerably by Park in his study "Prospects for Cable in the 100 Largest Television Markets." Park uses statistical techniques closely related to those employed earlier. He improves on the Comanor-Mitchell study in three major ways:

First, all 63 cable systems analyzed by Park had at least three A-contour, good reception-quality signals available off-the-air.

Second, all data were verified with system operators by telephone interview, insuring greater accuracy than available from only published sources.

Third, two improved measures of signal quality were incorporated into the analysis. Distance of the cable system from each transmitter was explicitly included, and UHF signals were measured separately to account for more rapid signal attenuation with distance and the absence of UHF tuners in some households.

The complete penetration equation as estimated by Park measures the effects of the following variables:

.....number of off-the-air VHF signals, with separate categories for networks, duplicate networks, independent, educational and foreign signals; by distance from transmitter

.....number of off-the-air UHF signals, by the same categories; by distance from transmitter; with measurement of UHF set penetration

.....number of cable signals, by the same categories

.....color set penetration

.....annual subscriber price

.....annual family income

Park's research is particularly appropriate to the present assessment of the effect of alternative copyright fee schedules on the viability of cable systems in the major markets. In projecting penetration rates for the systems studied here the average figure predicted by Park's equation has generally been used, since

this represents the central experience to be expected in the major markets. In addition, a selected number of intermediate sized systems have been analyzed using penetration rated 33% greater than predicted on average. Such increased penetration is definitely atypical, and would be expected to occur in only about one out of ten market situations, because of factors not fully accounted for in the penetration equation.

DENSITY

Density, the number of homes per cable mile, can vary considerably from one potential franchise area to another. Comanor and Mitchell reported an average density of 95 within major markets, and 79 outside, in their sample of Factbook systems. More recently available data for a number of municipalities in the Dayton, Ohio and Boston, Massachusetts areas are tabulated in the appendix. For systems in this study we have assumed somewhat higher densities than considered by Comanor-Mitchell, ranging from 80 homes per mile outside of television markets up to 200 homes per mile with 20% of plant underground in the central areas of markets 1-50.

In practice, of course, both higher and lower densities will be encountered. But the tendency to a substantially higher figure for any important number of similar systems is unlikely in view of the FCC's emphasis that it will not authorize carriage of broadcast signals by systems which do not serve all parts of the community. 3/

3/ Federal Register, p. 3276, §180

THE EFFECT OF THE EXCLUSIVITY RULES

The new FCC rules require cable operators to "black-out" numerous classes of programs on imported signals when those programs are also shown by a local station. The degree of protection provided varies with the type of programming and may extend up to two years. For our purposes the primary effect of these rules is to reduce the attractiveness of distant signals to subscribers and thus reduce cable penetration. Aside from providing for one channel-switching device for each imported signal, we have not allowed any additional costs of performing the blacking-out function itself, keeping records, etc.

At this writing, evidence on the magnitude of the exclusivity effect is limited to a preliminary study by R. E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations." From detailed program listings for four stations---two networks and two independents---plus partial listings for ten other stations, Park synthesizes the expected proportion of a broadcast week that a distant signal would be blacked out. A portion of his findings are reproduced in Table 2.

Park's results indicate, for example, that in those top 50 markets in which local service provides three networks and one independent, the cable system importing two additional independents will be required to black them out about 39% of the time. If it imports a third independent (on a stand-by basis, since the rules

TABLE 2

PERCENTAGE OF TIME DISTANT SIGNAL CHANNELS ARE BLACKED-OUT

LOCAL SIGNALS	Number of Distant Signals Allowed	Number of Distant Stations From Which to Choose				
		2	3	4	5	6
Markets 1 - 50						
3 network + 2 independent	2	51%	35%	26%	20%	16%
3 network + 1 independent	2	39%	24%	15	11	8
3 network	3	52	27%	15	9	6
Markets 51 - 100						
3 networks	2	16%	6	2	1	0

Source: R.E. Park, "The Exclusivity Provisions of the Federal Communications Commission's Cable Television Regulations," Table 2, p.5.

allow only two distant signals at any moment on the cable) and "fills in the blanks" where possible, it can reduce the blacked-out time to about 24%. Importing a fourth independent further reduces this to 15%, etc. The boxed-in figures represent the expected effect when no stand-by signals are imported.

The impact of the exclusivity rules on subscriber penetration is likely to be at least as great as the reduction in viewing hours. Programs receiving protection will be predominantly those with large audiences, many of whom would value an earlier or alternative viewing date or time which cable could otherwise provide. Nevertheless, lacking data to refine an estimate of this effect, we assume that exclusivity protection is equivalent in its impact on penetration to a proportionate reduction in the number of full-time distant independents carried on the cable, using the appropriate boxed figures from Table 2.

Will it be profitable for a cable system import stand-by independent signals? The costs of additional imports will rise as the CATV system must go further to find each additional independent. Concurrently, the proportion of time that can be filled in with each extra signal is declining. The exclusivity rules thus place the cable firm in a situation of sharply diminishing returns as regards additional penetration from distant signals. Generally, the answer will be "no." Exceptions may occur where the

stand-by independent has particularly attractive programming, or when importation costs are less dependent on distance, as could occur with satellite transmission.

Regarding importation costs, we have assumed for all systems in this study that distant signals are delivered by cable system-owned microwave links of 50-100 miles per channel imported. Average distances to the first and second closest independents (in the top 25 markets) are tabulated in the appendix. These averages range from 91 to 208 miles to the closest signal, and 125 to 325 miles for the next closest for several types of markets. Thus the microwave cost estimates used here must be considered generally low, although they may be closer approximations for markets with several closely spaced systems which pool their microwave facilities.

COPYRIGHT FEE SCHEDULES

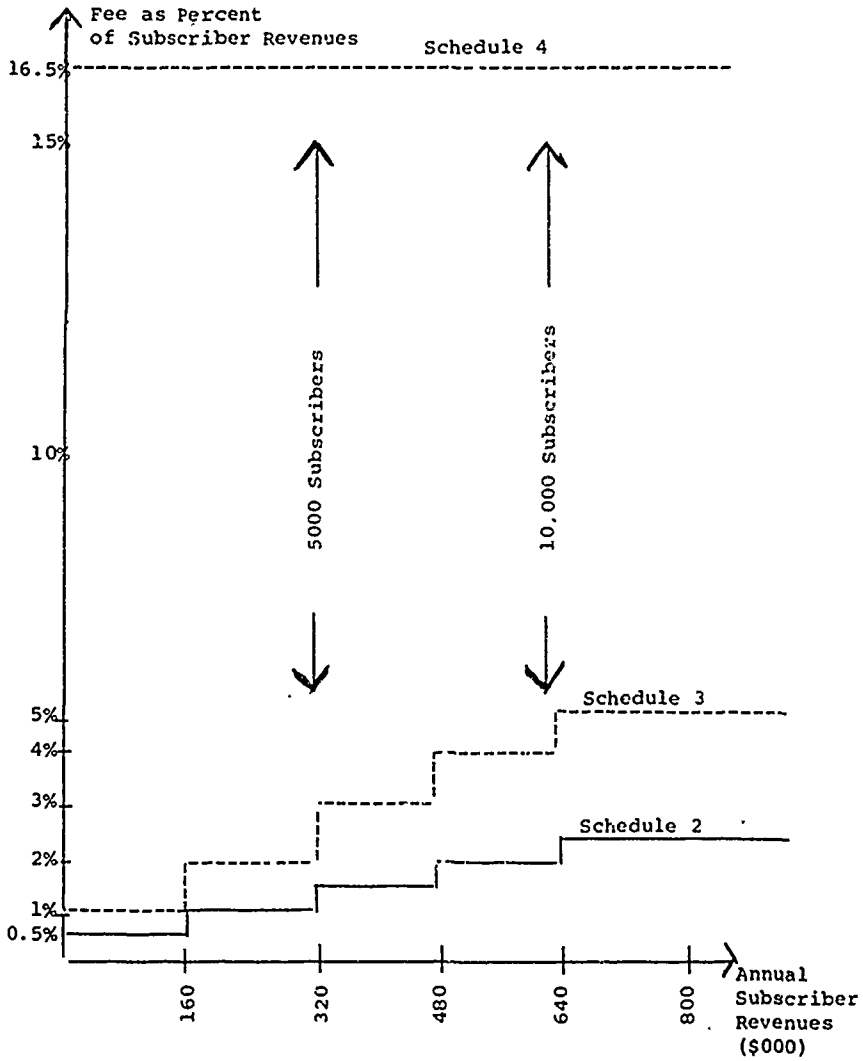
In the analysis which follows we consider four alternative fee schedules for payment by cable systems to copyright owners. Schedule 1 is the baseline case of zero fees. Schedules 2 and 3 levy successively larger fees as the system's revenue grows. Schedule 3 (incorporated in Bill S.644) begins at 1% of subscriber revenues, and rises to 5% of revenues exceeding $640,000 annually; Schedule 2 is exactly half of Schedule 3. For the fourth Schedule we consider a flat fee of 16.5% of subscriber revenues, regardless of the size of annual revenue. The exact details of these fees are set forth below and in the accompanying figure 1.

Copyright Fee Schedule No.				Annual Subscriber Revenue
1	2	3	4	
0%	.5%	1%	16.5%	of 1st $160,000
0%	1.0%	2%	16.5%	of 2nd $160,000
0%	1.5%	3%	16.5%	of 3rd $160,000
0%	2.0%	4%	16.5%	of 4th $160,000
0%	2.5%	5%	16.5%	of remaining revenue

In comparing systems in different market circumstances and with alternative fee schedules, we keep unchanged the subscriber price as well as the system size and other attributes of the CATV service. Cable television systems have some of the attributes of a "natural monopoly," flowing principally from their high fixed-low variable

Figure I

Alternative Copyright Fee Schedules



Schedule 1 = no fee

cost nature. But, in practice, the behavior of cable systems is increasingly limited by local and federal regulation, and by competition among firms for franchises. Both of these forces sharply restrict the ability of cable firms to adjust price or output at will.

Present regulation and competition for new franchises, plus the threat of more extensive regulatory action if firm behavior is perceived as excessive, has kept monthly subscriber rates virtually constant in current prices over several years. Seiden, in 1970, found most recently franchised systems charging between $5.00 and $7.00 per month. In their sample of Factbook systems Comanor and Mitchell reported a mean price of $5.00 per month. Park in 1972 has an annual average price of $63 for his sample of A-contour cable systems. The assumption that moderate cost increases, including copyright fees, cannot be passed on in the form of higher prices is consistent with the recent market experience.

Assuming no price response by cable firms if a 16.5% surcharge were imposed requires further discussion. Firms would doubtless make strong representations to local authorities about the need for higher prices, and bids for new franchises would quote higher rates. But granting for the moment that regulators allowed part or all of the surcharge to be translated into higher subscriber rates, how would cable profits be affected?

The answer depends primarily on how rapidly penetration would decline as prices were raised; in technical economic terms, on the elasticity of demand. If, for example, a 16.5% increase in price, from $5.00 per month to $5.83, results in a 16.5% decrease in penetration, say from 30% to 25% of homes passed, then the higher price has (approximately) 4/ no effect on total subscriber revenue--it is fully offset by reduced demand for service.

A basic result of economic theory states that consumers' demand for a service will be increasingly sensitive to its price as more and closer substitutes are available for that service. Thus households in areas with a diversity of broadcast signals, with generally clear reception and with a variety of entertainment alternatives can be expected to decline service rapidly as prices rise. This availability of good substitutes for CATV describes most top 100 markets. The econometric work of R.E. Park confirms this degree of price elasticity of demand in such areas; in fact, the figures in the example above correspond almost exactly to Park's statistical findings. 5/ 6/

4/ Calculating the percentage changes, for convenience, in terms of the original price and penetration, results in a slight approximation. A more exact result is obtained using the average of the old and new price and penetration.

5/ Park, "Prospects for Cable...", p. 140.

6/ For a discussion of the effect of demand elasticity on maximum rates permitted by a regulatory authority, see Comaner and Mitchell, "The Costs of Planning: The FCC and Cable Television

How, then would cable systems' profits be affected by a 16.5% copyright payment and a concommitant rise in subscriber rates? Revenues would be unchanged, while operating costs would increase sharply by the amount of the copyright payments. There would be some small offsetting changes in other incremental costs, resulting from the saving achieved by not serving the subscribers who do not purchase service at the higher price. For typical systems, there are rather small costs of installing additional drop lines, additional maintenance and billing expenses and slightly higher taxes and dues related to numbers of subscribers.

In consequence, the net effect of allowing higher subscriber rates in conjunction with 16.5% copyright fee payments would be to reduce rates of return to nearly the same levels as would be achieved by holding subscriber rates unchanged with the same 16.5% copyright fees. In addition, penetration would be lower, providing a narrower base for future leased-channel services capable of generating additional payments from cable systems to program suppliers.

We remind the reader that the discussion in the preceeding several paragraphs assumed a degree of upward price adjustment which has not been observed. In the remainder of this study we adhere to a fixed monthly price of $5.00 7/ for maximum cable broadcast service allowed by the FCC rules. 8/

7/ Plus $1.00 for second television sets in 20% of households.

8/ One other reminder may be in order. Since we are considering all prices and costs in 1972 terms, increases in the monthly subscription rate at about the rate of increase of consumer prices generally will not contradict our observation that real subscription rates cannot be adjusted.

An analysis of the profitability of systems under the alternative assumption of higher rates and consequently reduced penetration would yield approximately the same findings.

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MEASUREMENT OF CABLE SYSTEM PROFITABILITY

To summarize the profitability of the typical cable systems of this study we will calculate the (pre-tax) financial rate of return on total capital invested in each system. The financial (or internal) rate of return9/is the single comprehensive measure of investment in a cable system. Unlike ratio measures for a particular year (e.g. net revenues divided by total capital) it correctly recognizes the opportunity cost of front-end financing, i.e. that several years are required before systems achieve full penetration, during which time invested funds are needed. Using the financial rate of return permits us to compare the profitability of funds invested in CATV systems with other types of investments, and thus the likelihood of cable systems being constructed.

The rate of return required to induce investment in a cable system will depend on the proportion of total capital which can be obtained through debt instruments and the associated borrowing rates, and the minimum return demanded by equity investors. Because the cable industry more closely resembles a high-risk growth industry than a public utility, at least at the present time, both lenders and investors demand higher rates of return than for seasoned investments.

9/ The internal rate of return is that discount rate which equates the present value of revenues and costs over the lifetime of the system. For further discussion, see Comanor and Mitchell, "Cable Television and the Impact of Regulation," p. 184.

For this study we have held both revenues and cost at 1970 price levels over the full life of the cable system. Financial measures are consequently in real (constant dollar) terms. The corresponding rate of return concept is the financial return which would occur if prices did not rise throughout the economy; whereas in an inflationary period, investors expect price increases and demand higher returns in money terms to compensate them for the otherwise reduced value of their funds when their investment is recovered. Thus if investors expect a 4% rate of inflation to continue indefinitely and will invest in enterprises comparable to cable television only when they return 15% on average, the required rate of return in constant prices would be 11%.

A detailed investment survey 10/ of the CATV industry in late 1971 reports that mature cable companies with demonstrated earnings have found long-term credit expensive, and that institutional investors are looking for a 15% return as a combination of interest and equity appreciation. As a standard of minimum profitability necessary to generate investment in new cable systems, we will use a 10% constant-dollar financial rate of return on total capital. This is on the low [illegible] of recent financing experience of established CATV companies, and [illegible]uld therefore apply to new systems constructed by the larger multiple system owners today. New CATV firms lacking a

10/ Halle & Stieglitz, Inc., "The Cable Television Industry."

track record will face higher costs of capital and will require somehwat higher rates of return to justify their construction.

RESULTS--AN EXAMPLE

We are now prepared to analyze the financial results for typical systems in the several market situations discussed earlier. For each system, the computer simulates the complete revenue and cost experience to be expected, using the parameters supplied by the analyst. The detailed cost and revenue schedules have been built into the Comanor-Mitchell computer program, modified to include the changes in FCC rules, penetration and costs discussed earlier and in the appendix of this study.

As an example, consider the abstract of the computer output reproduced in Table 3 . Part A indicates that this example is representative of a 25,000 subscriber system located near the middle of a top 50 market. Density is assumed to be 200 homes per mile, and family income $12,200. Annual subscriber rates are $62.40, corresponding to $5.00 per month plus a small additional amount for second sets. Since this is a central urban location, 20% of the cable miles are underground, and standard local origination equipment has been budgeted. Revenue from advertising on the cablecasting channel has been estimated at $2.20 per subscriber annually. The table of signals carried shows that 3 VHF networks plus one viewing-test network are available off-the-air. In addition there is one UHF independent and a VHF educational station. In addition to these broadcast signals, the cable system imports two independents and

TA' E 3

ABSTRACT OF COMPUTER OUTPUT FOR TYPICAL CATV SYSTEM

PART A. - INPUTS AND PARAMETERS

Market Rank: 1-50

System Location: Middle

System Size in 5th Year: 25,000 Subscribers

Homes Per Mile=200

Family Income=12200

Annual Charge Per subscriber: $62.40

Underground: 20.0%

Local Origination: Standard

AD Revenues Per Subscriber: $2.20

Number of Microwave Channels: 3

Average Number of Hops Per Microwave Channel: 3.

	Signals Off Air					Additional Cable Signals
	Local		Viewing Test		Total	Imported
	VHF	UHF	VHF	UHF		
Networks	3	0	1	0	4	0
Independents	0	1	0	0	1	2
Educational	1	0	0	0	1	1
Total	4	1	1	0	6	3

Predicted Penetration 5th Year

With Fulltime Distant Signals 0.281

With Distant Signals Subject to Exclusivity protection 0.272

Table 3 (continued)

PART B. - GROWTH AND REVENUES

Year	1	2	3	4	5	6	7	8	9	10	Total
Subscribers	7500	13750	20000	23750	25000	25500	26007	26519	27037	27560	
Penetration	8.2%	15.0%	21.8%	25.8%	27.2%	27.8%	28.3%	28.9%	29.4%	30.0%	
Total Revenue ($000)	$240	680	1080	1400	1560	1616	1648	1681	1714	1747	13366

PART C. - COPYRIGHT FEES AND FINANCIAL RETURN SUMMARY

	Financial Rate of Return Assuming	
	10 year life	15 year life
Copyright fee schedule number: 1.	7.8%	10.4%
2.	7.2%	9.9%
3.	6.6%	9.3%
4.	2.7%	5.5%

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one educational station. These signals are imported by microwave, averging 3 hops of 35 miles each per channel.

Within five years the system is assumed to reach maturity, apart from further growth due to rising incomes or enlargement of its franchise area. Penetration is predicted to be 28.1% if the distant signals are fully available, but 27.2% as a result of exclusivity protection on the independent channels.

Part B summarizes the growth of penetration, subscribers, and system revenue (including advertising) over the first 10 years.

In Part C we may assess the impact of copyright fees on profitability. For each of the four fee schedules described earlier we report two rates of return--one assuming a 10 year average lifetime of capital, the second assuming 15 years. If fixed capital equipment is replaced about every 15 years, this system will earn a 10.4% real rate of return on total invested capital absent any copyright fees. Alternatively, the statutory schedule (number 3) reduces the rate of return to 9.3%, and the flat 16.5% fee lowers returns sharply to 5.5%. A shorter lifetime for equipment reduces these returns by 2.5 to 3 percentage points.

In the analysis below we report rates of returns based only on 15-year lifetimes. Fifteen years represents a compromise between somewhat longer physical lifetimes for some parts of the cable plant and rather shorter economic lifetimes of currently operating systems experiencing technological obsolescence. It appears

unlikely that 20-channel systems built today will remain competitive beyond 1985 without major rebuilding.

RESULTS--IN DETAIL

The financial prospects for cable under the final FCC rules and the impact of alternative copyright fee schedules are contained in the seven tables which follow. While we shall briefly review the major findings here, the reader should consult the tabulations for particulars. Tables 4 and 5 report the expected experience in middle markets of large and intermediate sized systems respectively.

Line 1 of Table 4 restates the example system discussed in detail above. Lines 2 and 3 are for similarly situated communities with somewhat different sets of local signals. Penetration ranges from about 22-27% and rates of return from 7.5 to 10.4% when there are no copyright fees. Despite somewhat higher penetration rates, systems in the second 50 middle markets earn lower returns, principally because of reduced density, while in the lowest ranked markets there is great variation, with profitable, 55% penetration systems when one network is missing from the local signals.

Intermediate-sized systems in middle markets are decidedly below the 10% rate of return needed to attract investment funds. Except where quite large systems of 25,000 or more subscribers can be built, central city areas of the major markets are not bright prospects for cable under present rules, even without copyright payments.

TABLE 4

LARGE SYSTEMS IN MIDDLE MARKETS

SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
			Markets 1-50					
Size=25,000			Density=200		Underground=20%			
1. 3NV,1IU,1EV	1NV	2I,1E	$12,200	27.2%	10.4%	9.9%	9.3%	5.5%
2. 3NV,1EU	-	3I,1E	11,400	24.7	9.2	8.7	8.1	4.5
3. 3NV,1IV,1IU,1EV	-	1I,1E	12,200	21.9	7.5	7.0	6.5	3.1
			Markets 51-100					
Size=25,000			Density=150		Underground=10%			
4. 3NV,1EU	-	2I,1E	$11,400	24.0%	6.0%	5.5%	5.0%	1.7%
5. 2NV,1NU	-	2I,1E	10,200	30.7	8.3	7.8	7.3	3.8
6. 1NV,2NU	-	2I,1E	10,000	35.3	10.3	9.7	9.1	5.4
			Markets 101 +					
Size=15,000			Density=125		Underground=5%			
7. 1NV,2NU	-	1I,1E	$10,000	29.6%	9.2%	8.7%	8.2%	3.8%
8. 2NU	-	1N,1I,1E	10,000	55.4	19.9	19.3	18.6	12.8

In these tables, N means network, I means independent, E means educational; V means NHF, U means UHF.

TABLE 5

INTERMEDIATE-SIZE SYSTEMS IN MIDDLE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee 1	2	Schedule No. 3	4
	Size=10,000			Markets 1-50 Density=200		Underground=20%			
1.	3NV,1IU,1EV	1NV	2I,1E	$12,200	27.2%	6.1%	5.7%	5.4%	1.4%
2.	3NV,1EU	-	3I,1E	11,400	24.7%	5.2	4.8	4.5	0.7
3.	3NV,1IV,1IU, 1EV	-	1I,1E	12,200	21.9%	4.0	3.7	3.4	*
	Size=10,000			Markets 51-100 Density=150		Underground=10%			
4.	3NV,1EU	-	2I,1E	$11,400	24.0%	2.4%	2.1%	1.7%	*
5.	2NV,1NU		2I,1E	10,200	30.7	4.5	4.1	3.8	0.1
6.	1NV,2NU	-	2I,1E	10,000	35.3	6.1	5.7	5.4	1.3
	Size=7,500 #			Markets 101 + Density=125		Underground=5%			
7.	1NV,2NU	-	1I,1E	$ 10,000	29.6%	6.5%	6.2%	5.9%	1.0%
8.	2NU	-	1N,1I,1E	10,000	55.4	16.1	15.8	15.4	9.1

= minimum origination facilities and no advertising revenues.

*= negative return

The prospects for large systems at the edge of major markets (Table 6) are brighter. In the top 50 markets penetration is in the 34-38% range with rates of return 11.0-12.6%. In the second 50 markets penetration ranges up to 45% with rates of return from 9.7-13.4%. In the smaller markets and also the fringe (outside) areas we find more heterogeneous results, with quite profitable CATV possibilities where fewer than three networks are available.

The corresponding intermediate-sized edge systems are again unprofitable in all 3 network cases. This indication of the importance of large systems, or economics of scale in technical terms, is developed in more detail in Table 8, by systematically varying the size of the most profitable system from each of the four market types in Tables 4-7. While large systems would seem feasible in the major metropolitan areas, as of March 1971 only 20 systems had more than 20,000 subscribers and the largest had less than 50,000 11/. Some fraction of these economies of scale can be achieved when a series of smaller systems are under common ownership and thereby realize savings from efficient use of management and technical personnel and can share local programming and and signal importation expenses.

The results presented in tables 4-8 are based on market, economic and construction factors which typify the most common situations which will be encountered in middle and edge locations of each of the four types of markets. Of course, within each category there will be a degree of variation, clustered around the typical situa-

11/ Television Digest, CATV and Station Coverage Atlas.

TABl 6

LARGE SYSTEMS IN EDGE MARKETS

	SIGNALS		5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee 1	2	Schedule No. 3	4
			Markets 1-50					
	Size=25,000		Density=150		Underground=10%			
1. 3NV,1IU,1EV	1NV	2I,1E	$12,200	37.9%	12.6%	12.0%	11.4%	7.6%
2. 3NV,1EU	-	3I,1E	11,400	37.1	12.3	11.7	11.1	7.0
3. 3NV,1IV,1IU, 1EU	-	1I,1E	12,200	34.4	11.0	10.5	9.9	5.9
			Markets 51-100					
	Size=25,000		Density=125		Underground=5%			
4. 3NV,1EU	-	2I,1E	$11,400	36.3%	9.7%	9.2%	8.6%	4.7%
5. 2NV,1NU	-	2I,1E	10,200	38.4	11.0	10.4	9.8	5.7
6. 1NV,2NU	1NV	2I,1E	10,000	44.9	13.4	12.8	12.2	7.9
			Markets 101 +					
	Size=15,000		Density=100		Underground=5%			
7. 1NV,2NU	-	1I,1E	$10,000	41.5%	10.7%	10.2%	9.7%	4.9%
8. 2NU	-	1N,1I,1E	10,000	65.5	19.0	18.4	17.8	12.0
			Outside Markets					
	Size=15,000 #		Density=80		Underground=0%			
9. 2NV	-	1N,3I,1E	$ 9,000	50.1%	11.4%	10.9%	10.3%	5.2%
10.2NU	-	1N,3I,1E	9,000	65.5	16.5	15.9	15.2	9.5%

#=Minimum origination facilities and no advertising revenues

TABLE 7

INTERMEDIATE-SIZE SYSTEMS IN EDGE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
				Markets 1-50					
	Size=10,000			Density=150		Underground=10%			
1.	3NV,1IU,1EV	1NV	2I,1E	$12,200	37.9%	7.3%	7.0%	6.6%	2.2%
2.	3NV,1EU	-	3I,1E	11,400	37.1	7.1	6.8	6.4	2.0
3.	3NV,1IV,1IU, 1EU	-	1I,1E	12,200	34.4	6.4	6.0	5.7	1.5
				Markets 51-100					
	Size=10,000			Density=125		Underground=5%			
4.	3NV,1EU	-	2I,1E	$11,400	36.3%	5.5%	5.2%	4.8%	0.7%
5.	2NV,1NU	-	2I,1E	10,200	38.4	6.5	6.1	5.7	1.4
6.	1NV,2NU	1NV	2I,1E	10,000	44.9	8.1	7.7	7.3	2.7
				Markets 101 +					
	Size=7,500 #			Density=100		Underground=5%			
7.	1NV,2NU	-	1I,1E	$10,000	41.5%	7.8%	7.5%	7.1%	1.9%
8.	2NU	-	1N,1I,1E	10,000	65.5	15.3	15.0	14.6	8.4
				Outside Markets					
	Size=7,500 #			Density=80		Underground=0%			
9.	2NV	-	1N,3I,1E	$ 9,000	50.1%	7.4%	7.0%	6.7%	1.3%
10.	2NU	-	1N,3I,1E	9,000	65.5	12.3	11.9	11.5	5.7

#=Minimum origination facilities and no advertising revenues

TABLE 1

Size of System and Rate of Return

Edge Markets 1-50

Density = 150 Underground = 10%

Income = $12,200 Penetration = 37.9%

Signals:

Local	3 NV, 1 IU, 1 EV
Viewing Test	1 NV
Imported by Cable	2 I, 1 E

Financial Rate of Return
(15 year life)
Copyright Fee Schedule No.

Size (Subscribers in 5th Year)	1	2	3	4
3500 #	0.1%	*	*	*
5000 #	3.6	3.4	3.2	*
7500 #	7.6	7.3	7.0	2.4
10000	7.3	7.0	6.6	2.2
15000	9.8	9.3	8.8	4.6
25000	12.6	12.0	11.4	7.6
50000	15.0	14.3	13.6	9.5

Edge Markets 51-100

Density = 125 Underground = 5%

Income = $10,000 Penetration = 44.9%

Signals:

Local	1 NV, 2 NU
Viewing Test	1 NV
Imported by Cable	2 I, 1 E

3500 #	0.8%	0.6%	0.4%	*
5000 #	4.4	4.2	4.0	*
7500 #	8.5	8.2	7.9	3.1
10000	8.1	7.7	7.3	2.7
15000	10.6	10.1	9.6	5.1
25000	13.4	12.8	12.2	7.9
50000	15.9	15.1	14.4	10.2

TABLE 8
(con't)

Middle Markets 101 +

Density = 125 Underground = 5%

Income = $10,000 Penetration = 55.4%

Signals:

Local	2 NU
Viewing Test	- -
Imported by Cable	1 N, 1 I, 1 E

3500 #	4.7%	4.5%	4.2%	*	
5000 #	9.9	9.7	9.4	3.2	
7500 #	16.1	15.8	15.4	9.1	
10000	17.0	16.5	16.1	10.0	
15000	19.9	19.3	18.5	12.8	
25000	23.8	23.0	22.2	16.4	

Edge Markets Outside

Density = 80 Underground = 0%

Income = $9000 Penetration = 65.5%

Signal:

Local	2 NU
Viewing Test	--
Imported by Cable	1 N, 3 I, 1 E

3500 #	1.4%	1.2%	1.0%	*	
5000 #	6.4	6.2	5.9	*	
7500 #	12.3	11.9	11.5	5.7	
10000 #	13.6	13.2	12.7	6.7	
15000 #	16.5	15.9	15.2	9.5	
25000 #	19.5	18.7	17.9	12.4	

= minimum originator facilities and no advertising revenue.
negative return

tions we have reported. Some communities will have higher incomes, others will require extensive undergrounding, still others will require high-cost local origination facilities, etc.

To measure the sensitivity of our findings for typical systems to such variations, we have rerun all of the intermediate-sized systems (tables 5 and 7) assuming that penetration is one-third greater than would be expected on average, for each set of market characteristics. A variety of unmeasured factors can cause actual penetration to vary above or below the average value predicted by the penetration equation. In increasing the average value by one-third we have in effect selected only the 10% of the cases in which penetration is most favorable; in other words, nine out of 10 communities having the same signal lineups, income, etc. will have lower penetration.

Turning to the results in Tables 9 and 10 we find that such unusually high penetration is sufficient to produce at least one profitable system in each type of market, at least if copyright fees are absent. Thus, 7,500-10,000 subscriber systems have some chance of earning a going rate of return in the top 100 markets only when local circumstances produce unusually favorable penetration.

We turn finally to the financial prospects for cable when copyright fees are required. The predominant effect of Schedule 3, the statutory fees proposed in S.644, is to reduce the financial rate of return on total capital a full percentage point for profitable

TABLE 9
10% Most Favorable Penetration Conditions

INTERMEDIATE-SIZE SYSTEMS IN MIDDLE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee Schedule No. 1	2	3	4
				Markets 1-50					
		Size=10,000		Density=200		Underground=20%			
1.	3NV,1IU,1EV	INV	2I,1E	$12,200	36.3%	10.2%	9.8%	9.4%	4.9%
2.	3NV,1EU	-	3I,1E	11,400	32.9	8.0	7.7	7.3	3.0
3.	3NV,1IV,1IU 1EV	-	1I,1E	12,200	29.2	6.9	6.6	6.2	2.1
				Markets 51-100					
		Size=10,000		Density=150		Underground=10%			
4.	3NV,1EU	-	2I,1E	$11,400	32.0%	5.9%	5.5%	5.2%	1.1%
5.	2NV,1NU	-	2I,1E	10,200	40.9	7.4	7.0	6.7	2.4
6.	1NV,2NU	-	2I,1E	10,000	47.1	10.4	10.0	9.6	5.0
				Markets 101 +					
		Size=7,500 #		Density=125		Underground=5%			
7.	1NV,2NU	-	1I,1E	$10,000	49.5%	15.1%	14.7%	14.3%	8.4%
8.	2NU	-	1N,1I,1E	10,000	73.9	20.1	19.7	19.3	12.3

= minimum originator facilities and no advertising revenue.

TABLE 10
10% Most Favorable Penetration Conditions

INTERMEDIATE-SIZE SYSTEMS IN EDGE MARKETS

	SIGNALS			5TH YEAR		FINANCIAL RATE OF RETURN (15 year life)			
	Local	Viewing Test	Imported by cable	Family Income	Penetration	Copyright Fee 1	Copyright Fee 2	Schedule No. 3	Schedule No. 4
				Markets 1-50					
		Size=10,000		Density=150		Underground=10%			
1.	3NV,1IU,1EV	1NV	2I,1E	$12,200	50.5%	11.7%	11.3%	10.9%	6.0%
2.	3NV,1EU	-	3I,1E	11,400	49.5	11.5	11.1	10.7	5.8
3.	3NV,1IV,1IU 1EU	-	1I,1E	12,200	45.9	10.7	10.3	9.9	5.2
				Markets 51-100					
		Size=10,000		Density=125		Underground=5%			
4.	3NV,1EU	-	2I,1E	$11,400	48.4%	8.7%	8.3%	7.9%	3.2%
5.	2NV,1NU	-	2I,1E	10,200	51.2	9.7	9.3	8.9	4.0
6.	1NV,2NU	1NV	2I,1E	10,000	59.9	12.6	12.2	11.8	6.7
				Markets 101 +					
		Size=7,500 #		Density=100		Underground=5%			
7.	1NV,2NU	-	1I,1E	$10,000	55.3%	13.4%	13.1%	12.7%	7.0%
8.	2NU	-	1N,1I,1E	10,000	87.4	19.3	18.9	18.5	11.6
				Outside Markets					
		Size=7500 #		Density=80		Underground=0%			
9.	2NV	-	1N,3I,1E	$ 9,000	66.9%	12.8%	12.5%	12.1%	6.3%
10.	2NU	-	1N,3I,1E	9,000	87.3	16.0	15.6	15.2	8.8

#=Minimum origination facilities and no advertising revenues

and near-profitable systems, and by somewhat less for systems well below the 10% return level. Thus, in the example system (the first line of Table 4) the rate of return falls from 10.4 to 9.3%.

A one-point change in the rate of return on total capital has a considerably larger effect on equity holders. Suppose that one-half to two-thirds of the cable system is financed by 8% 12/ debt instruments. Because of leverage, a 10% return on total capital will then correspond to a return on equity up to 13% or 14%. In consequence, a decline to a 9% return on total capital can reduce the return on equity by two to three percentage points, depending on the capital structure of the system. Changes of this magnitude are more than sufficient to postpone or eliminate construction of cable systems which otherwise appear marginally profitable.

The preponderance of evidence in Tables 4-10 is that large systems at the edges of top 100 markets will earn a 10-13% rate of return before copyright payments, large systems in middle markets are not likely to exceed 10%, and intermediate and smaller-sized systems will be marginally profitable only where special factors operate. Copyright fees, at the level of Schedule 3, would significantly slow the rate of growth of cable in the major markets, particularly in middle areas with good quality signals and in edge market communities of intermediate size.

12/ In an inflationary period borrowing costs would be higher by approximately the expected rate of inflation.

Copyright fee schedule number 2 is exactly one-half the rate of schedule 3. As expected, it has approximately half the effect of schedule 3 in reducing the rate of return for all systems.

Schedule 4 is the flat 16.5% copyright fee. Its effect on rates of return is devasting. Of all variations studied in the top 100 markets, only a single system earns a 10% return--the 50,000 subscriber edge market 51-100 system in Table 8. Fee payments of this magnitude would effectively halt cable growth in the large cities.

CONCLUSION

The outlook for early development of cable television service in the major cities is at best mixed. As compared with the rules discussed two years ago, the final FCC rules more tightly restrict the choice of broadcast signals a system can provide to its subscribers.

Analysis of the important variations in potential market and cable systems characteristics in these urban areas demonstrates that only the largest systems, or multiply-owned systems of slightly smaller scale, will be viable in the central city areas where off-the-air reception quality is high, and then only under favorable construction and penetration conditions. At the edges of these markets returns will be sufficient to attract investment in the largest scale systems, but systems of 10,000-15,000 will be profitable only under especially favorable circumstances.

In an investment environment in which the majority of urban households can be profitably wired for cable television service only when atypically propitious cost and demand factors occur, to require more than quite limited copyright payments will significantly retard or halt CATV expansion in the urban markets. The proposed statutory fee schedule in S.644 (up to 5% of subscriber revenue) would generally lower rates of return on total capital a full percentage point for systems in the profitable range, and in an important proportion of cases its leveraged effect on equity investors would be sufficient to create unprofitable systems.

As expected, a fee schedule of one-half that in S.644 reduces rates of return on total capital about one-half a percentage point. Fees of this magnitude would restrict cable construction primarily in market circumstances where returns are already limited for other reasons. In contrast, a flat 16.5% copyright payment would create a decidedly unprofitable investment climate for cable television throughout the top 100 markets, far outweighing the limited prospects opened up by the 1972 FCC rules.

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APPENDIX

Modified Costs and Revenues

Several cost items in the Comanor-Mitchell Report have been modified for this study, either to take account of the FCC rules as finally adopted or as a result of the availability of more recent information. A brief summary of those costs which were modified for all systems investigated in this report is presented below:

1. Local Franchise Tax. 5% of gross revenues annually.

2. FCC Fee. $35 initial fee plus $0.30 per subscriber annually.

3. Channel switchers. One switcher included in capital equipment costs for each imported signal.

4. Pole rent. All results reported here include pole rent of $250 per aerial mile in top 100 markets, $175 in other markets.

5. Local origination. We assume the Comanor-Mitchell standard systems, with capital costs of $38,000 and annual operating expenses of $4300, and for smaller systems a minimum system, with capital costs of $11,000 and operating expenses of $2500 per year for live origination. All systems are assumed to provide a time-and-weather channel.

6. Public service channels. The final FCC rules require CATV systems to provide 3 non-broadcast channels for non-commercial public access, educational access, and government access respectively. The public access channel is to be provided without charge, while the other two channels will be free for five years. The costs of meeting these provisions are taken to be an additional 75% of the capital costs assumed for local origination, plus $4875 per year for part-time technician salaries.

7. The previously proposed 5% "public dividend" tax for support of non-commercial broadcasting has been eliminated.

8. Rate of subscribers growth over time. Park's recent research on cable penetration completed after the publication of the Comanor-Mitchell Report, indicates a more rapid maturation of cable growth than was previously assumed. While the precise growth path has not been definitively established, for this study we have increased the rate of subscriber growth so that the typical system reaches its mature size in the fifth year. Thereafter, some additional growth occurs as real incomes of potential subscribers are assumed to rise at a rate of 2% per year.

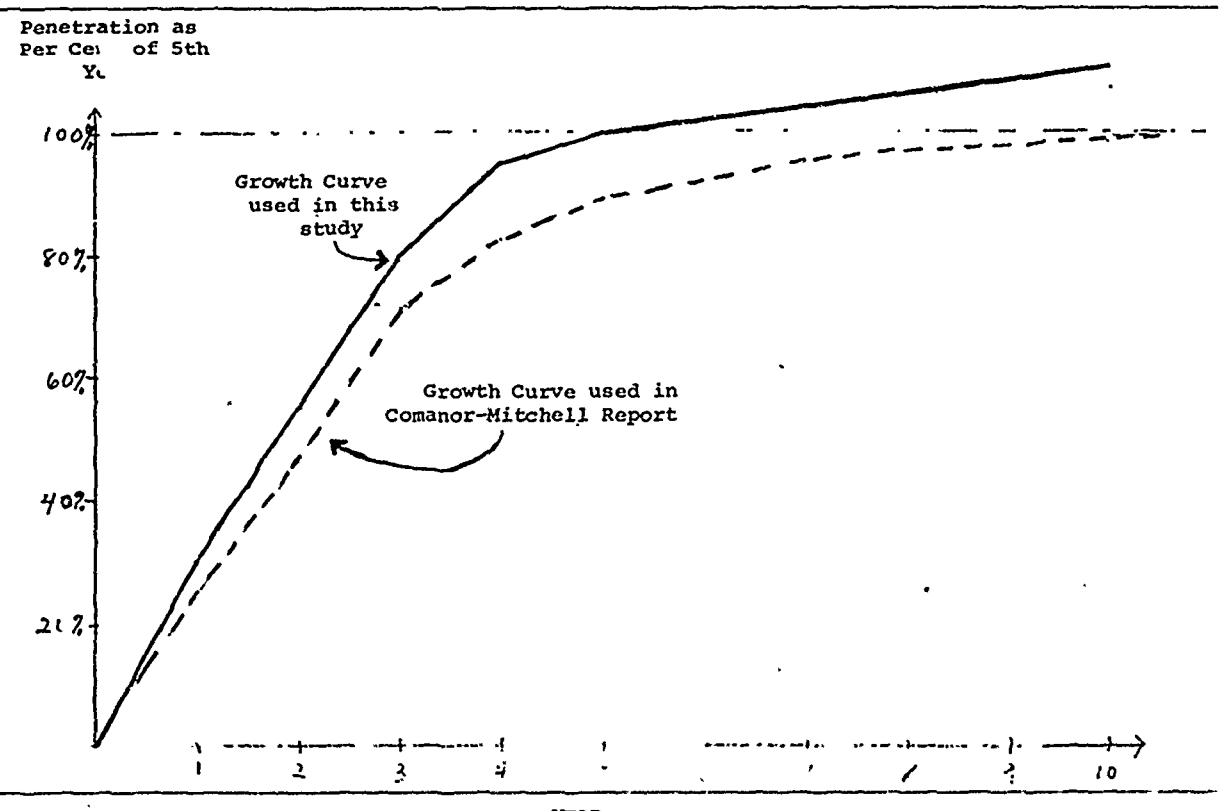
   As compared with Comanor-Mitchell, the effect of these modifications is to increase the size of typical systems in two ways:
   a) study systems gain subscribers more rapidly in early years;
   b) the size of a study system is measured in its fifth year, rather than its size after twelve to fifteen years.

   Figure A1 provides a graphical comparison of the growth curve used for this study and the earlier Comanor-Mitchell study.

As in the Comanor-Mitchell Report, financial (internal) rates of return are calculated for a firm of indefinite life by assuming that the firm reaches an equilibrium of revenues and costs after one 15-year lifetime, or generation, of equipment. Thereafter, the plant is rebuilt periodically, while subscriber penetration is held constant at the mature level. The rate of return is generally robust with respect to exact assumptions about conditions in later generations. Another solution to this terminal value problem is to assign the firm a value at the end of its first generation, based on operating characteristics such as revenues, subscribers, etc. For an example of this method see L. L. Johnson, "Cable Communications in the Dayton Miami Valley: Basic Report."

Figure A1

Rate of Subscriber Growth over Time



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The Penetration Equation

Technical details of the penetration equation are summarized below. For further discussion see R. E. Park, "Prospects for Cable in the 100 Largest Television Markets."

$$\log\left(\frac{Pen}{1 - Pen}\right) = -8.159 + 3.098 \log X_N + 0.290 \log X_D + 0.212 \log X_I + 0.298 \log X_E - 0.540 \log X_F - 1.473 \log P + 1.398 \log Y + 0.523 \log C$$

where

$$X_i = \frac{1 + W_i}{1 + 0.731u \sum_{U_i}(1-d^{1.6})^{1/1.6} + \sum_{V_i}(1-d^{1.6})^{1/1.6}}$$

i = N = network
D = duplicating network
I = independent
E = educational
F = foreign

W_i = number of cable signals of type i

U_i = number of B-contour off-air UHF signals of type i

V_i = number of B-contour off-air VHF signals of type i

Pen= penetration = subscribers/households passed by cable

P = annual price

Y = median family income

C = color set penetration

u = UHF set penetration

In order to use Park's estimated equation to predict penetration for the typical systems investigated in this report, representative values must be assigned to the variables of the equation. The following values are employed in all of the simulations:

P = $62.40, corresponding to the $5 per month plus $1 per month for 20% of subscribers as a charge for second set.

C = 50%. The effect of varying color set penetration is not estimated with sufficient precision to incorporate variations in color set ownership across different types of markets.

u =	80%	if 0 local network UHF signals
	90%	if 1 local network UHF signal
	95%	if 2 local network UHF signals
	99%	if 3 local network UHF signals

F = 0. Foreign stations are not included among the signals carried by study systems.

In simulating cable systems in this study, we consider systems located in the central area of a television market, where off-the-air signal quality is generally high, and outlying areas of the same market, where quality is diminished. In the penetration equation the distance variable d is a measure of the reduction in quality. A d value of 0 corresponds to a viewer in the center of the market, while a value of 1 represents a viewer at the B-contour of the off-the-air signal.

For the systems in this study we have used the following values:

In middle markets:
d = 0 for local stations
d = 1 for viewing-test stations

In edge markets:
d = 0.5 for local stations
d = 0.75 for viewing-test stations

Tables 9 and 10, "Ten Percent Most Favorable Penetration conditions," are calculated using 133% of the penetration implied by Park's equation above. This corresponds approximately to the penetration value at the upper 10% confidence limit.

Table A1

Households, Population and Density in Dayton, Ohio (Market No. 41)

A. Dayton Urban Area

City	Population (1970)	Dwelling Units (1970)	Density (Dwelling Units Per Street Mile)
Dayton	243,601	85,401	149
Kettering	69,599	22,809	110
Fairborn	32,267	10,156	107
Miamisburg	14,797	4,839	71
Vandalia	10,796	3,335	96
West Carrollton	10,748	3,476	87
Centerville	10,333	2,984	66
Oakland	10,095	3,795	90
Four Communities Less than 10,000 persons	23,364	7,683	---
	425,620	144,487	119

B. Dayton Urbanized Area (excluding urban area above)

	583,000	192,000	110

source: Johnson, L. L., "Cable Communications in the Dayton Miami Valley: Basic Report."

Table A2

Population, Households, Density and Underground
in Boston, Massachusetts (Market No. 6)

City	Population	Homes	Density	Underground
Boston	613,140	224,825	340	51%
Brookline	58,090	18,954	234	40.5%
Chelsea	30,122	8,154	210	17%
Somerville	87,047	28,323	328	21.6%

source: Foundation 70 "Cable in Embryo: Economic Consideration for Urban Franchising."

TABLE A3

Average Characteristics of Signals Available in Top 100 Markets

Line	Number of Markets	Local Network Signals	Independent V	Independent U	Educational V	Educational U	Viewing Test Net.	Viewing Test Ind.	Distance to Closest Top 100 Independents 1st.	Distance to Closest Top 100 Independents 2nd.	Family Income (1975)
Markets 1-50											
(1)	34	3 NV	0.6	1.4	0.6	0.6	0.1	0.0	208	325	$12,229
(2)	11	3 NV	0	0	0.4	0.5	0.3	0.2	184	252	11,416
Markets 51-100											
(3)	21	3 NV	0	0	0.4	0.4	0	0	198	325	$11,371
(4)	7	2 NV, 1NU	0	0	0.1	0.4	1.1	0.1	163	252	10,217
(5)	5	1 NV, 2NU	0	0	0.2	0.2	0	0	91	125	11,713
(6)	6	3 NU	0	0.2	0	0.3	0	0.2	114	174	11,611

TOP-100 TV MARKETS, [illegible] AND EACH OF THE TWO SPANISH TOP-25 MARKETS [illegible]

Market	Market Signals Net	Market Signals Ind	Viewing Test Signals Net	Viewing Test Signals Ind	Additional Signals Net	Additional Signals Ind	Total	U.S. Nearest Top 25 Station(s) with [illegible] Net	Ind
1. [illegible], N.Y. [illegible]	3	5	-	-	-	2	10	Philadelphia, Pa.-Wilmington, New Jersey 93 m.	[illegible]
2. Los Angeles-San Bernardino-Corona-Riverside, Calif	3	8	-	-	-	2	13	San Francisco-Oakland-San Jose Calif. 347 m.	[illegible]
3. Chicago, Ill	3	4	-	-	-	2	9	Milwaukee, Wis. 89 m.	[illegible]
4. Philadelphia, Pa.-Wilmington, N.J.	3	3	-	-	-	2	8	New York, NY-Linden-Paterson, N.J. 93 m.	Baltimore, Md
5. Detroit, Mich.	3	3	-	-	-	2	8	Cleveland-Lorain-Akron, Ohio 117 m.	[illegible]
6. Boston-Cambridge-Worcester, Mass.	3	3	-	-	-	2	8	Hartford-New Haven-New Britain-Waterbury, Conn. 33 m.	[illegible]
7. San Francisco-Oakland-San Jose, Calif	3	3	1	-	-	2	9	Sacramento-Stockton-Modesto, Calif. 75 m.	[illegible]
8. Cleveland-Lorain-Akron, Ohio	4	5	-	-	-	2	11	Buffalo, N.Y. 173 m.	[illegible]
9. Washington, D.C.	4	5	1	-	-	2	12	Baltimore, Md. 35 m.	[illegible]
10. Pittsburgh, Pa.	4	2	-	-	-	2	8	Cleveland-Lorain-Akron, Ohio 115 m.	Buffalo, N.Y.
11. St. Louis, Mo.	4	2	-	-	-	2	8	Indianapolis-Bloomington, Ind. 221 m.	[illegible]
12. Dallas-Ft. Worth, Tex.	3	2	-	-	-	2	7	Houston, Tex. 225 m.	[illegible]
13. Minneapolis-St. Paul, Minn.	3	2	-	-	-	2	7	Milwaukee, Wis. 309 m.	Chicago, Ill.
14. Baltimore, Md	3	1	-	-	-	2	6	Washington, D.C. 35 m.	Philadelphia-Wilmington, N.J.
	3	2	-	1	-	2	8		

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Market	Market Signals		Viewing Test Signals		Additional Signals		Total	The Nearest Top 20 Markets Within Portion(s) of Each Market Delineated [illegible]		[illegible]	
	Net	Ind	Net	Ind	Net	Ind		[illegible]		[illegible]	
16. [illegible], Tex.	3	1	-	-	-	2	6	Dallas-Ft. Worth, Tex	225 m.	Kansas City, Mo.	[illegible] m.
17. [illegible]polis-[illegible]ington, Ind.	3	2	2	-	-	2	9	Cincinnati, Ohio-Newport, Ky.	100 m.	Chicago, Ill.	[illegible] m.
18. [illegible]cinnati, Ohio-[illegible], Ky.	3	1	-	-	-	2	6	Indianapolis-Bloomington, Ind.	100 m.	Cleveland-Lorain-Akron, Ohio	[illegible] m.
19. [illegible]ta, Ga.	3	2	-	-	-	2	7	Cincinnati, Ohio- Newport, Ky.	369 m.	Indianapolis-Bloomington, Ind.	[illegible] m.
20. [illegible]	4	1	-	-	-	2	7	Boston-Cambridge-Worcester, Mass.	93 m.	New York, N.Y.-Linden-Paterson, N.J.	[illegible] m.
[illegible]	4	1	3	3	-	2	13				
[illegible]-[illegible]bury, Conn	4	1	-	-	-	2	7				
[illegible]	4	1	3	3	-	2	13				
21. [illegible]-[illegible], Wash	3	2	-	-	-	2	7	Sacramento-Stockton-Modesto, Calif.	424 m.	San Francisco-Oakland-San Jose, Calif.	[illegible] m.
[illegible]	3	2	-	-	-	2	7	Atlanta, Ga	604 m.	Washington, D.C.	[illegible] m.
22. [illegible] City, Mo.	3	1	1	-	-	2	7	St. Louis, Mo.	230 m.	Chicago, Ill.	414 m.
23. Milwaukee, Wis.	3	1	-	-	-	2	6	Chicago, Ill.	89 m.	Indianapolis--Bloomington, Ind.	[illegible] m.
24. Buffalo, N.Y.	3	1	-	-	-	2	6	Cleveland-Lorain-Akron, Ohio	173 m.	Detroit, Mich.	[illegible] m.
25. [illegible]-[illegible]ston-[illegible]desto, Calif.	3	2	-	-	-	2	7	San Francisco-Oakland, San Jose, Calif.	75 m.	Los Angeles-San Bernardino-Corona-Fontana, Calif.	[illegible] m.
	3	2	-	-	-	2	7				
	3	2	-	-	-	2	7				
26. [illegible]phis, Tenn.	3	-	-	-	-	3	6	St. Louis, Mo.	240 m.	Atlanta, Ga.	[illegible] m.
27. Columbus, Ohio	3	-	-	-	-	3	6	Cincinnati, Ohio-Newport, Ky.	100 m.	Cleveland-Lorain-Akron, Ohio	[illegible] m.
28. [illegible]-St. Petersburg, Fla.	3	1	-	-	-	2	6	Miami, Fla.	205 m.	Atlanta, Ga.	416 m.

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Market	Market Signals Not	Market Signals Ind	Viewing Test Signals Not	Viewing Test Signals Ind	Additional Signals Not	Additional Signals Ind	Total	Two nearest Top 25 Markets having [illegible] Station(s); with air time [illegible]			
								Closest [illegible]		[illegible]	
29. Portland, Ore.	3	1	-	-	-	2	6	Seattle-Tacoma, Wash	145 m	Sacramento-Stockton-Modesto, Calif.	452 m.
30. Nashville, Tenn.	3	1	-	-	-	2	6	Atlanta, Ga.	214 m	Cincinnati, Ohio-Newport, Ky.	[illegible] m.
31. New Orleans, La.	3	1	-	-	-	2	6	Houston, Tex.	313 m.	Atlanta, Ga.	[illegible] m.
32. Denver, Colo.	3	1	-	-	-	2	6	Kansas City, Mo	538 m.	Dallas-Ft. Worth, Tex.	[illegible] m.
33. Providence, R.I.	3	-	3	2	-	2	10	Boston-Cambridge-Worcester, Mass.	41 m.	Hartford-New Haven-New Britain-Waterbury, Conn.	[illegible] m.
34. Albany-Schenectady-Troy, N.Y.	3	-	-	-	-	3	6	Hartford-New Haven-New Britain-Waterbury, Conn.	82 m.	New York, N.Y.-Linden-Paterson, N.J.	[illegible] m.
	3	-	-	-	-	3	6				
	3	-	-	-	-	3	6				
35. Syracuse, N.Y.	3	-	-	-	-	3	6	Buffalo, N.Y.	138 m.	New York, N.Y.-Linden-Paterson, N.J.	194 m.
36. Charleston-Huntington, W.VA	3	-	-	-	-	3	6	Cincinnati, Ohio-Newport, Ky.	164 m.	Cleveland-Lorain, Akron, Ohio	217 m.
	3	-	-	-	-	3	6				
37. Kalamazoo-Grand Rapids-Muskegon-Battle Creek, Mich	4	1	-	-	-	2	7	Chicago, Ill.	109 m.	Milwaukee, Wis.	129 m.
	4	1	-	-	-	2	7				
	4	1	-	-	-	2	7				
	5	1	2	-	-	2	10				
38. Louisville, Ky	3	1	-	-	-	2	6	Cincinnati Ohio-Newport, Ky.	90 m.	Indianapolis-Bloomington, Ind.	[illegible] m.
39. Oklahoma City, Ok.	3	-	-	-	-	3	6	Dallas-Ft. Worth, Tex.	190 m.	Kansas City, Mo.	[illegible] m.
40. Birmingham, Ala.	3	-	-	-	-	3	6	Atlanta, Ga.	140 m.	St. Louis, Mo.	[illegible] m.
41. Dayton-Kettering O.	3	1	2	-	-	2	8	Cincinnati, Ohio-Newport Ky	48 m.	Indianapolis-Bloomington, Ind.	[illegible] m.
42. Charlotte, N.C.	3	1	-	-	-	2	6	Atlanta, Ga	227 m.	Washington, D.C.	33[illegible] m.
43. Phoenix-Mesa, Ariz	3	2	-	-	-	2	7	Los Angeles-San Bernardino-Corona-Fontana, Calif.	357 m.	Sacramento-Stockton-Modesto, Calif	[illegible] m.

Market	Market Signals Net	Market Signals Ind	Viewing Test Signals Net	Viewing Test Signals Ind	Additional Signals Net	Additional Signals Ind	Total	Two Nearest Top 25 Markets Having Television Station(s); with Air Miles to Nearest Cities in Each Market: Closest Market		Next Closest Market	
44. Norfolk-Newport News-Portsmouth-Hampton, Va.	3	1	-	-	-	2	6	Washington, D.C.	146 m.	Baltimore, Md.	169 m.
	3	1	-	-	-	2	6				
	3	1	-	-	-	2	6				
	3	1	-	-	-	2	6				
45. San Antonio, Tex.	3	1	-	-	-	2	6	Houston, Tex	189 m.	Dallas-Ft. Worth, Tex.	252 m.
46. Greenville-Spartanburg-Anderson, S.C.	5	-	-	-	-	2	7	Atlanta, Ga	137 m.	Cincinnati Ohio-Newport, Ky.	316 m.
	5	-	1	-	-	2	8				
	5	-	-	-	-	2	7				
	5	-	-	-	-	2	7				
47. Greensboro-High Point-Winston-Salem, N.C.	3	-	-	-	-	3	6	Washington, D.C.	240 m.	Atlanta, Ga.	305 m.
	3	-	-	-	-	3	6				
	3	-	-	-	-	3	6				
48. Wichita-Hutchinson, Kan	3	-	-	-	-	3	6	Kansas City, Mo	177 m.	Dallas-Ft. Worth, Tex.	340 m.
	3	-	-	-	-	3	6				
49. Salt Lake City, Ut.	3	-	-	-	-	3	6	Sacramento-Stockton-Modesto, Calif.	533 m.	Los Angeles-San Bernardino-Corona-Fontana, Calif.	579 m.
50. Wilkes-Barre-Scranton, Pa.	3	-	-	-	-	3	6	New York, N.Y.-Linden-Paterson, N.J.	98 m.	Philadelphia, Pa-Burlington, N.J.	104 m.
	3	-	-	-	-	3	6				
51. Little Rock, Ark.	3	-	-	-	-	2	5	St. Louis, Mo.	291 m.	Dallas-Ft. Worth, Tex.	333 m.
52. San Diego, Calif.	3	1	1	1	-	2	8	Los Angeles-San Bernardino-Corona-Fontana, Calif.	112 m.	San Francisco-Oakland-San Jose, Calif.	458 m.
53. Toledo, Ohio	3	-	2	-	-	2	7	Detroit, Mich.	53 m.	Cleveland-Lorain-Akron, O.	[illegible] m.
54. Omaha, Neb.	3	-	-	-	-	2	5	Kansas City, Mo.	166 m.	Minneapolis-St. Paul, Minn.	[illegible] m.
55. Tulsa, Okla.	3	-	-	-	-	2	5	Kansas City, Mo	216 m.	Dallas-Ft. Worth, Tex.	231 m.
56. Daytona Beach, Fla.	3	-	-	-	-	2	5	Miami, Fla.	204 m.	Atlanta, Ga.	411 m.
57. Lancaster, N.Y.	3	-	-	-	-	2	5	Buffalo, N.Y.	67 m.	Cleveland-Lorain-Akron, O.	239 m.
58. Harrisburg-Lebanon-Lancaster-York, Pa.	5	-	-	-	-	2	7	Baltimore, Md.	68 m.	Philadelphia, Pa.-Burlington, N.J. or Washington, D.C.	94 m.
	5	-	-	-	-	2	7				
	5	-	3	1	-	2	11				
	5	-	3	-	-	2	10				

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Market	Market Signals Not	Market Signals Ind	Viewing Test Signals Not	Viewing Test Signals Ind	Additional Signals Not	Additional Signals Ind	Total	Two Nearest Major Markets Station(s) with Nielsen Ratings	Closest Market		Next Closest Market	
59. Lumberton, Tex.-Shreveport, La.	3	1	-	-	-	2	6		Dallas-Ft. Worth, Tex.	166 m.	Houston, Tex.	[illegible] m.
60. Mobile, Ala-Pensacola, Fla	3	-	-	-	-	2	5		Atlanta, Ga.	283 m.	Houston, Tex.	490 m.
61. Davenport, Iowa-Rock Is.-Moline Ill	3	-	-	-	-	2	5		Chicago, Ill	151 m.	Milwaukee, Wis.	[illegible] m.
62. Flint-Saginaw-Bay City-Saginaw, Mich.	3	-	4	1	-	2	10		Detroit, Mich.	57 m.	Cleveland-Lorain-Akron, O.	145 m.
	3	-	-	-	-	2	5					
	3	-	-	-	-	2	5					
63. Green Bay, Wis.	3	-	-	-	-	2	5		Milwaukee, Wis.	102 m.	Chicago, Ill.	[illegible] m.
64. Richmond-Petersburg, Va	3	-	-	-	-	2	5		Washington, D.C.	97 m.	Baltimore, Md.	[illegible] m.
	3	-	-	-	-	2	5					
65. Springfield-Decatur-Champaign-Urbana-Danville, Ill	5	-	-	-	-	2	7		St. Louis, Mo.	86 m.	Chicago, Ill.	[illegible] m.
	5	-	3	1	-	2	11					
66. Cedar Rapids-Waterloo, Iowa	3	-	-	-	-	2	5		Chicago, Ill.	225 m.	Milwaukee, Wis.	[illegible] m.
	3	-	-	-	-	2	5					
[illegible] Minneapolis, [illegible]	3	-	-	-	-	2	5		Kansas City, Mo.	180 m.	Minneapolis-St. Paul, Minn.	[illegible] m.
[illegible] Jacksonville, Fla.	3	-	-	-	-	2	5		Atlanta, Ga.	285 m.	Miami, Fla.	[illegible] m.
[illegible] Cape Girardeau, Mo.-[illegible] Ky-[illegible], Ill.	3	1	-	-	-	2	6		St. Louis, Mo.	115 m.	Indianapolis-Bloomington, Ill.	[illegible] m.
[illegible] Lynchburg, Va.	4	-	-	-	-	2	6		Washington, D.C.	196 m.	Baltimore, Md.	[illegible] m.
	4	-	-	-	-	2	6					
71. Knoxville, Tenn.	3	-	-	-	-	2	5		Atlanta, Ga.	155 m.	Birmingham, Ala.	[illegible] m.
[illegible] Fresno, Calif.	3	1	-	-	-	2	6		Sacramento-Stockton-Modesto, Calif.	150 m.	San Francisco-San [illegible]-Corona-Fontana, Calif.	[illegible] m.
73. Raleigh-Durham, N.C.	2	1	-	-	2	2	7		Washington, D.C.	233 m.	Baltimore, Md.	[illegible] m.
	2	1	1	-	1	2	7					

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Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having [illegible] Station(s); with Air Mileage Between Principal Cities in each Market			
	Net	Ind	Net	Ind	Net	Ind		Close[illegible] Market		[illegible] Market	
74. Johnstown-Altoona, Pa.	3	-	2	-	-	2	7	Baltimore, Md., or Washington, D.C.	142 m.	Cleveland-Lorain-Akron, Ohio	166 m.
75. Portland-Poland Springs, Me.	3	-	-	-	-	2	5	Boston-Cambridge-Worcester, Mass.	99 m.	Hartford-New Haven-New Britain-Waterbury, Conn.	179 m.
76. Spokane, Wash.	3	-	-	-	-	2	5	Seattle-Tacoma, Wash	229 m.	Sacramento-Stockton-Modesto, Calif.	659 m.
77. Jackson, Miss.	3	-	-	-	-	2	5	Atlanta, Ga.	351 m.	Houston, Tex.	353 m.
78. Chattanooga, Tenn.	3	-	-	-	-	2	5	Atlanta, Ga.	103 m.	Cincinnati Ohio-Newport, Ky.	203 m.
79. Youngstown, Ohio	3	-	-	-	-	2	5	Cleveland-Lorain-Akron, Ky.	61 m.	Detroit, Mich.	150 m.
[illegible]	3	-	-	1	-	2	6	Chicago, Ill	73 m.	Milwaukee, Wish	137 m.
[illegible]	3	-	-	-	-	2	5				
81. Albuquerque, N.M.	3	-	-	-	-	2	5	Dallas-Ft. Worth, Tex	588 m.	Los Angeles-San Bernardino-Corona-Fontana, Calif.	855 m.
82. Fort Wayne-Roanoke, Ind.	3	-	-	-	-	2	5	Indianapolis-Bloomington, Ind.	105 m.	Cincinnati Ohio-Newport, Ky.	140 m./3
83. [illegible], Ill	3	-	-	-	-	2	5	Chicago, Ill	143 m.	St Louis, Missouri.	145 m.
84. [illegible]	3	-	-	-	-	2	5	Washington, D.C.	260 m.	Baltimore, Md.	310 m.
[illegible]	3	-	-	-	-	2	5				
[illegible]	3	-	-	-	-	2	5				
[illegible]	3	-	1	-	-	2	6	Minneapolis-St. Paul, Mo.	190 m.	Kansas City, Mo.	327 m.
[illegible], S.C.	3	-	-	-	-	2	5				
1. Evansville, Ind.	3	-	-	-	-	2	5	Indianapolis-Bloomington, Ind.	145 m.	St. Louis, Mo.	150 m.
[illegible]	2	-	-	-	3	2	7				

Market	Market Signals		Viewing Test Signals		Additional Signals		Total	Two Nearest Top 25 Markets Having Independent Stations(s); With Air Mileage Between Principal Cities in each Market			
	Net	Ind	Net	Ind	Net	Ind		Closest Market		Next Closest Market	
85. Beaumont-Port Arthur, Tex.	3	-	-	-	-		5	Houston, Tex.	79 m.	Dallas-Ft. Worth, Tex.	245 m
89. Duluth-Superior, Minn.	3	-	-	-	-		5	Minneapolis-St. Paul, Minn.	136 m.	Milwaukee, Wis.	331 m.
93. Wheeling, W.Va.-Steubenville, Ohio	2	-	3	1	-	2	8	Cleveland-Lorain-Akron, Ohio	111 m.	Detroit, Mich.	198 m.
97. Lincoln-[illegible]	3	1	3	-	-	2	9	Kansas City, Mo.	164 m.	Minneapolis-St. Paul, Minn.	336 m.
[illegible]-[illegible], Neb.	3	1	-	-	-	2	6				
102. Lansing-Onondaga, Mich	2	-	3	-	-	2	7	Detroit, Mich.	82 m.	Chicago, Ill.	169 m.
[illegible]	2	-	3	-	-	2	7				
[illegible]	3	-	-	-	-	2	5	Milwaukee, Wis.	75 m.	Chicago, Ill	124 m.
[illegible]	3	-	-	-	-	2	5	Atlanta, Ga.	65 m.	Cincinnati Ohio-Newport, Ky.	[illegible]
[illegible]	3	-	-	-	-	2	5	Dallas-Ft Worth, Tex.	334 m.	Kansas City, Mo.	481 m.
[illegible]-Lewiston, Ala.	3	-	-	-	-	2	5	Atlanta, Ga.	143 m.	Cincinnati Ohio-Newport, Ky.	542 m.
[illegible]	3	-	1	-	-	2	6				
[illegible]	3	-	-	-	-	2	5	Chicago, Ill.	80 m.	Milwaukee, Wisc.	81 m.
[illegible]-Rockford-[illegible], Ill	3	-	1	-	-	2	6				
[illegible]-[illegible]-Sioux City, N.D.	3	-	-	-	-	2	5	Minneapolis-St. Paul, Minn.	214 m.	Milwaukee, Wisc.	509 m.
135. [illegible], La.-El Dorado, Ark.	2	1	-	-	1	2	6	Houston, Tex.	270 m.	Dallas-Ft Worth, Tex.	273 m.
	2	1	3	-	-	2	8				
138. Columbia, S.C.	3	-	-	-	-	2	5	Atlanta, Ga.	154 m.	Cincinnati Ohio-Newport, Ky.	401 m.

Explanatory Notes:

[a] Market includes a foreign station

[b] Indicates there is a non-operational station in the market with a construction permit less than 18 months old.

Appendix C

The Effect of the FCC's Syndicated Program Exclusivity Regulations On Cable Television Systems

Under the FCC's 1972 Cable Television Regulations, cable television systems in the top 100 television markets are generally permitted to carry all 'local' television stations and two (or three, in some instances) distant independent stations.

Programming on the distant independent stations which is under contract to the local market television stations is subject to the FCC's syndicated exclusivity regulations.

When a local-market station requests 'protection' of its programs under the exclusivity rules, a cable system must 'blackout' the programming on the imported stations which is also under contract to the local-market station.

Requests for such protection are known by NCTA to be in force in new CATV systems in such markets as North Little Rock, Arkansas (Market #50); Hampton and Newport News, Virginia (Market #44); Scranton, Pennsylvania (Market #49); Wauwatosa, Wisconsin (Market #23); Albany, New York

(Market #34); Philadelphia, Pennsylvania (Market #4); North Syracuse, New York (Market #35).

Some examples of the effect of the exclusivity regulations in these television markets is shown below:

(1) Scranton, Pa., is located in television Market #49 (Scranton-Wilkes-Barre, Pa.). There are three network stations in the market. The cable system in Scranton imports three distant independent stations.

Due to exclusivity requests from all three market stations, the cable system is losing 32 percent of all programming from the three distant independent stations during the critical 'prime-time' viewing period of 7-10 p.m. nightly -- or the equivalent of a total loss of one of the three distant stations.

(2) Newport News, Va., is located in television market #44 (Norfolk-Hampton-Newport News-Portsmouth, Va.). There are three network stations and one independent station in the market. The cable system in Newport News imports two distant independent stations.

At present only one of the four market stations requests exclusivity protection. Yet, in a recent week, requests for protection from this one station against one of the imported stations resulted in the 'blackout' of 21 percent of the full-day programs on the distant station.

(3) Wauwatosa, Wi., is located in television market #23 (Milwaukee, Wi.). There are three network stations and one independent station in the market. The cable system, presently under construction, will import two independent stations when it becomes operational.

Although the system is not yet in operation, it has already received written and verbal requests for syndicated program protection from all four market stations.

The requests require that 62 percent of the daily programming of one distant station, and 58 percent of the daily programming of the other distant station be 'blacked out'.

The devastating effect of the program 'blackouts' is illustrated in the following three pages.

Pages 5 and 6 represent the Friday, January 24, 1975 schedules of the two Chicago independent television stations to be imported into Wauwatosa.

Page 7 shows the limited number of programs from the two stations that would be permitted to be shown by the cable system. Program titles which must be 'protected' are 'Xed' out, and would not be available to cable subscribers.

NON NETWORK PROGRAMS AVAILABLE FROM CHICAGO STATIONS

Friday, January 24, 1975

	Channel 9 WGN-TV	Channel 32 WFLD-TV
6:00 AM	Romper Room	
6:30	Top O' The Morning	
7:00	Ray Rayner	
7:30		
8:00	Garfield Goose	
8:30	Bewitched	
9:00	Movie"Light In The Piazza"(2hrs)	
9:30		
10:00		
10:30		
11:00	Phil Donahue(60M)	Newstalk(Start 10:55AM)
11:30		New Zoo Revue
12:00	Bozo's Circus	Popeye
12:30 PM		Magilla Gorilla
1:00	Father Knows Best	Petticoat Junction
1:30	Love, American Style	Green Acres
2:00	I Love Lucy	That Girl
2:30	Dealer's Choice	Banana Splits
3:00	Flintstones	Popeye
3:30	Mickey Mouse Club	Little Rascals
4:00	Gilligan's Island	Speed Racer

NON NETWORK PROGRAMS AVAILABLE FROM CHICAGO STATIONS

Friday, January 24, 1975

	Channel 9 WGN-TV	Channel 32 WFLD-TV
4:30 PM	Bugs Bunny	Three Stooges
5:00	Hogan's Heroes	Batman (60M)
5:30	Bewitched	
6:00	Andy Griffith	It Takes A Thief (60)
6:30	Dick Van Dyke	
7:00	Movie "Princess and the Pirate" (2hrs)	Diamond Head
7:30		Truth or Consequences
8:00		Merv Griffin (90M)
8:30		
9:00	FBI (60)	
9:30		Travel World
10:00	News	Best of Groucho
10:30	Movie "Hurry Sundown" (2hrs45Min)	Untouchables (60)
11:00		
11:30		Thriller (60)
12:00		
12:30 AM		
1:00	News (Start 1:15AM)	
1:30	Movie (Start 1:45AM) "Whistling in the Dark" (1hr35M)	
2:00		
2:30		
3:00	Biography (Start 3:20AM)	

Source: TV Guide, Illinois - Wisconsin Edition

PROGRAMS AVAILABLE FOR CARRIAGE FROM CHICAGO STATIONS

Friday, January 24, 1975

	Channel 9 WGN-TV	Channel 32 WFLD-TV
6:00 AM	Romper Room	
6:30	Top O' The Morning	
7:00	Ray Rayner	
7:30		
8:00	Garfield Goose	
8:30	xxxxxxxxxxxxxxxxxxxx	
9:00	xxxxxxxxxxxxxxxxxxxx	
9:30	xxxxxxxxxxxxxxxxxxxx	
10:00	xxxxxxxxxxxxxxxxxxxx	
10:30	xxxxxxxxxxxxxxxxxxxx	
11:00	xxxxxxxxxxxxxxxxxxxx	Newstalk
11:30	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
12:00	Bozo's Circus	xxxxxxxxxxxxxxxxxxxx
12:30		xxxxxxxxxxxxxxxxxxxx
1:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
1:30	Love, American Style	Green Acres
2:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
2:30	xxxxxxxxxxxxxxxxxxxx	Banana Splits
3:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
3:30	xxxxxxxxxxxxxxxxxxxx	Little Rascals
4:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
4:30	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
5:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
5:30	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
6:00	Andy Griffith	It Takes A Thief
6:30	xxxxxxxxxxxxxxxxxxxx	
7:00	Movie "Princess and Pirate"	Diamond Head
7:30		Truth or Consequences
8:00		xxxxxxxxxxxxxxxxxxxx
8:30		xxxxxxxxxxxxxxxxxxxx
9:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
9:30	xxxxxxxxxxxxxxxxxxxx	Travel World
10:00	News	Best of Groucho
10:30	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
11:00	xxxxxxxxxxxxxxxxxxxx	xxxxxxxxxxxxxxxxxxxx
11:30	xxxxxxxxxxxxxxxxxxxx	Thriller
12:00	xxxxxxxxxxxxxxxxxxxx	
12:30	xxxxxxxxxxxxxxxxxxxx	(end)
1:00	News	
1:30	xxxxxxxxxxxxxxxxxxxx	
2:00	xxxxxxxxxxxxxxxxxxxx	
2:30	xxxxxxxxxxxxxxxxxxxx	
3:00	xxxxxxxxxxxxxxxxxxxx	
3:30	(end)	

xx. xxxx No Program Service On The Channel

SUGGESTED AMENDMENTS TO H.R.2223

SUBMITTED BY

NATIONAL CABLE TELEVISION ASSOCIATION, INC.

June 11, 1975

AMENDMENT TO H.R. 2223

1. A basic premise of the FCC's restrictions over the years has been that CATV is somehow engaged in unfair competition because it doesn't pay for the programs it carries. Once CATV pays copyright for over-the-air signals, this rationale is destroyed and CATV ought then to get what it pays for. Thus, the bill should contain language directing the FCC to eliminate the non-duplication and syndicated exclusivity rules.

On page 15, line 17, strike out "in" and all that follows down through line 23 and insert in lieu thereof the following:

> where the cable system, at least one month before the date of the secondary transmission, has not recorded the notice specified by subsection (d).
>
> (3) A cable system whose secondary transmissions have been subject to compulsory licensing under subsection (c) shall not be required to delete any programming from any signals authorized by the Federal Communications Commission or lawfully carried by such system.

AMENDMENT TO H.R. 2223

2. This amendment would make the fee schedule in H.R.2223 applicable only to revenues in excess of the first $25,000 of quarterly gross. It is felt that this initial $25,000 reflects, on an industry-wide basis, the amount of revenue earned from the carriage of purely local signals.

On page 16, line 20, strike out "up to $40,000" and insert in lieu thereof "totalling more than $25,000 but not more than $40,000"

AMENDMENT TO H.R. 2223

3. Chapter 8 of H.R.2223 provides for a Copyright Tribunal, which is a mechanism for periodic review of CATV's fees. The first readjustment would take effect within 18 months after the Act became law, and then every five years thereafter. This infinite arbitration provision could result in a hefty increase in CATV's copyright fees over the years. CATV's fee should be set in the bill and not be subject to change except by future legislation. This amendment deletes CATV fees from those that can be reviewed periodically by the Copyright Tribunal.

On page 58, line 33, strike out "sections 111 and" insert in lieu therof "section"

On page 58, line 34, strike out "and" and all that follows down through "fee" on page 59, line 7.

On page 59 beginning on line 13 strike out "sections 111 and" and insert in lieu thereof "section".

On page 59, line 17, insert "section 115 of" immediately before "this title".

On page 16 beginning on line 9, strike out the following:

"irrespective of source and separate statements of the gross revenues paid to the cable system for

advertising, leased channels, and cable-casting for which a per-program or per-channel charge is made and by subscribers

AMENDMENT TO H.R.2223

4. Although the initial fee schedule is clearly imposed only on revenues from recurring charges for the basic cable service, portions of Section 111 and Chapter 8 raise the spectre of copyright fees also being based in the future on revenues from other sources. This is clearly improper since copyright is and will be paid for product used in such other services as local program origination, leased channel operations and pay cable. In the event periodic review of CATV fees remains in the bill, this amendment will eliminate the above possibility.

On page 59, beginning on line 2, strike out "or the revenue basis in respect to section 111."

On page 59, beginning on line 6, strike out "or the revenue basis on which the royalty fee shall be assessed or both.

AMENDMENT TO H.R. 2223

5. Chapter 5 of H.R.2223 contains the remedies for infringement. One special provision gives broadcasters the right to file copyright infringement suits. This would appear to cover such things as accidental carriage of programs which should have been blacked out by the cable system under the non-duplication or syndicated exclusivity rules. In addition to the nuisance value of these suits, the statutory damages and attorney's fees could cause substantial expense. Violations of the FCC's rules should be brought to the agency, not to the courts by a broadcaster. Thus, the amendment deletes the broadcaster's right to sue the cable operator. The true copyright owner's right to sue for infringement remains intact.

On page 47 strike out line 18 and all that follows down through line 25.

AMENDMENT TO H.R.2223

6. Governmental and non-profit translators are exempt from copyright under section 111 (a) (4) of H.R.2223. This amendment would delete that section.

On page 14, line 18, strike out ";or" and insert a period in lieu thereof.

On page 14, strike out line 19 and all that follows down through line 25.

AMENDMENT TO H.R.2223

7. There is some language in Section 111 which leaves the cable operator's liability for copyright on leased channels somewhat ambiguous. It seems clear that a cable operator is like a common carrier in those situations and therefore only the lessee should bear copyright liability. This amendment clarifies a CATV operator's liability for copyright on leased channels.

On page 14, beginning on line 8, strike out "a common, contract, or special" and insert in lieu thereof "any".

AMENDMENT TO H.R.2223

8. Section 111(b) covers the "secondary transmission" of over-the-air pay TV programs. There is a potential conflict between this provision and the FCC's rules regarding carriage of such stations. This amendment insures that no conflict can occur.

On page 14, line 27, strike out "Notwithstanding the provisions of" and insert in lieu thereof "Except as provided in".

On page 14, line 33, before the period insert the following:

:Provided, however, That such secondary transmission is not actionable as an act of infringement if the carriage of the signals comprising the secondary transmission is required under the rules, regulations, or authorizations of the Federal Communications Commission.

AMENDMENT TO H.R.2223

9. The following amendment cleans up the language in section 111 (e) relating to the necessarily nonsimultaneous carriage of television stations by CATV systems located in Alaska, Hawaii and the various territories and possessions.

On page 17, beginning on line 29, strike out "or" and all that follows down through line 33 and insert in lieu thereof ":Provided, however, That a nonsimultaneous further transmission by a "cable system" not located in whole or in part within the boundary of the forty-eight contiguous States, territories or possessions of a."

Mr. KASTENMEIER. Next the Chair would like to call Mr. David O. Wicks, Jr., representing Becker Communications Associates.

I would observe this is our second witness, if we take as long with the second as we did with the first, the energy bill will be completed before we are.

Mr. Wicks, we welcome you. You have a statement here?

Mr. WICKS. Yes, sir.

Mr. KASTENMEIER. Without objection your statement and exhibits will be received for the record, and you may proceed.

TESTIMONY OF DAVID O. WICKS, JR., BECKER COMMUNICATIONS ASSOCIATES

Mr. WICKS. Thank you, sir. I will attempt to be as brief as I can and refer to the statement at various points.

Mr. Chairman, my name is David Wicks. I am a vice president of Warburg Paribas Becker, Inc., headquartered in Chicago, Ill. With me today on my right is Charles W. Petty, of Mayer, Brown & Platt, counsel for Becker.

Our firm, and its predecessor, A. G. Becker & Co., Inc., has for a number of years rendered investment banking and other financial services to members of the CATV industry. During the last 3 years, Becker and its affiliates have been one of the principal sources of CATV financing. During this period, I have been primarily responsible for obtaining debt financing for the large: multiple-system cable television operators.

In 1973, A. G. Becker organized Becker Communications Associates as a limited partnership for the purpose of lending to the cable television industry in partnership with insurance companies, banks, and other institutional lenders. I was instrumental in the formation of Becker Communications Associates and have a partnership interest in the firm. I appear here today as a representative of Becker Communications Associates, and at the request of the [NCTA] and various individual CATV operators. However, I wish to point out that the views I will give are my own and may not be representative of these various interests.

I will not address myself to the pros and cons of copyright legislation for the cable industry. However, I wish to make two points with respect to the impact of H.R. 2223 on the television financing as we see it today.

First, the copyright royalty schedule provided in section 111(d) of the Bill will have a substantial and adverse effect on the net income of CATV operators and on their ability to raise additional capital either in the debt or equity market. An increase in the level of these fees would have even more severe consequences.

Second, the provision in section 802 of the bill for an adjustment every few years introduces a serious financial uncertainty and impedes the industry's ability to obtain both medium- and long-term capital investment. In our opinion the combined effect of the liability imposed by the bill for copyright royalty payments, together with uncertainty as to the future level of these payments, will operate to substantially reduce the availability of both debt and equity financing.

As pointed out by the Committee for Economic Development, cable television is a capital-intensive industry, and our findings certainly

confirm this point. Exhibit 1 presents data on the nine leading CATV companies for which such data is publicly available. This group had total revenues in 1974 of $265 million, and outstanding long-term debt of $517 million.

By comparison, Dennis McAlpine, of the investment banking firm of Tucker, Anthony & R. L. Day, in testimony earlier this year before Senator Hart's commitee, reported that the nine leading broadcasting companies generated revenues of $3.6 billion, or about 13 times as great as the CATV companies, but had long-term debt outstanding of $573 million, only slightly greater than that of the nine leading CATV companies.

Put in a different perspective, these CATV companies have approximately $1.95 of debt per dollar of revenue compared to 16 cents for the broadcasters.

In such a highly leveraged industry as cable television, what might be considered small changes in costs can have a major impact on net income and consequently on the ability to raise additional equity capital, which in turn provides the base for additional debt financing.

Becker Communications, and its affiliates, are in continuing contact with lenders to the CATV industry and regularly compile statistics on the availability of debt and equity financing. Within the last several months, in connection with a report which was submitted to the Federal Communications Commission, we have contacted the leading lenders to the industry and have developed statistics on capital availability in 1975 and 1976 from 32 commercial banks, 10 intermediate term lenders, and 34 insurance companies which combined represent the bulk of the financing for the industry. A copy of this report is attached as exhibit II. Our survey showed the availability of approximately $185 to $200 million in each of the next 2 years for the CATV industry dependent upon what assumptions are made by the various lenders as to improved profitability of specific firms within the industry.

While it is difficult to accurately project the true capital requirement of the industry—as pointed out by these institutions—we believe this level of financing is inadequate to provide for any substantial expansion of service or construction of new plant facilities. As a reference point, under proposed regulations of the Federal Communications Commission, a large number of cable companies serving the top 100 markets would be required to make substantial expenditures on existing plant in order to bring their systems in compliance with the Commission's 1972 rules on channel capacity and two-way communication capability. The NCTA has estimated the cost of this upgrade program to be approximately $423 million, if completed by the Commission's deadline of March 1977.

If the cable television business is to raise even a fraction of the capital estimated to be necessary before it comes into compliance with the Commission's rules and builds substantial additional capacity, it must become a profitable industry. As Mr. Bradley pointed out, and as exhibit I shows, the nine CATV companies lost a total of approximately $16.3 million in 1974. Obviously, these results must improve before substantial new capital will be available.

This is not to say that the nine leading companies whose results are summarized in exhibit I represent a cross section of the entire industry. However, the lenders to the industry tend to view the industry in

terms of the publicly available data for the large firms, and we do not have any evidence that financing is more easily obtained by smaller firms. Indeed, the experience of my firm is that such smaller firms have greater difficulty in obtaining financing.

In our opinion, the copyright royalty rate provided for by section 111(d) of the bill, even though it has been said by some to be nominal, will substantially impede the ability of both the larger publicly owned, and the smaller privately owned companies to obtain additional investment capital.

Let me attempt to illustrate the impact of copyright royalty payments with a specific example. At the present time, the average revenue per subscriber is in the range of $5 to $6. Assuming a relatively high level of $6.50 per month, our studies of representative firms in the industry show that the level of operating and general and administrative costs have been approximately 62 percent; interest approximately 14 percent, and depreciation approximately 19 percent, leaving a pre-tax profit of only about 5 percent, or 33 cents in the example.

The imposition of a 2½-percent royalty rate introduces an additional cost of 16 cents per month on the $6.50, reducing pre-tax profits to 2.3 percent, a decline of 50 percent in pre-tax profits. This is an unacceptably low return on revenues either for debt or equity financing.

It might be argued, as the questions this morning suggested, that the fee might be passed on to the cable subscriber and profitability improved. However, the experience of the industry, as we have seen, has been that local franchising authorities are reluctant to increase rates on a timely basis to keep pace with increasing costs, and there are indications, as we have seen, of market resistance to increased subscriber rates over the currently prevailing levels.

I have alluded to a second concern of those in the business of lending funds to this industry, and that is the potential for successive increases in the copyright royalty rate during the term of long-term financing. This could result from action by the copyright royalty tribunal which would be created by section 802 of the bill. The bill sets no limit on the rate which might be imposed in a future year, thereby raising at a minimum the possibility of significant changes in the assumption upon which such financing was arranged. Lenders can be expected to respond to this uncertainty by increasing their rates, lending smaller amounts for shorter periods of time, or imposing other less favorable terms on CATV borrowers. Thus, uncertainty has its own separate cost to the industry.

In conclusion, Mr. Chairman, although we are not here to question the concept of liability for payment of a copyright royalty fee, the amount of that fee must be viewed in terms of the impact which it will have upon the industry's ability to obtain the additional financing which is essential to its growth and development as a significant communications medium.

Further, the uncertainty created by the open-ended power granted to the Copyright Royalty Tribunal to adjust that fee in future years is itself a significant impediment to the industry in obtaining such financing.

I have not previously mentioned one further aspect of section 802 which is a cause for concern. It is not clear from this provision that the tribunal's power of adjustment would be limited to the amount of the

fee itself. Section 802 appears to provide that the tribunal can also change the revenue basis on which the royalty fee is assessed, perhaps even to include services which do not involve copyright issues at all. We are not certain how broadly this power might be construed and, frankly, Mr. Chairman, I'm almost afraid to ask, and that of course is the point, uncertainty has its own cost.

I appreciate the opportunity to appear before this subcommittee. Do you have any questions?

Mr. KASTENMEIER. Thank you, Mr. Wicks, for a very useful summation of the financial difficulties of cable television.

Although I observed that you, yourself, and and obviously Becker Communications have great faith in cable television for you to concentrate in investing, financing, you must believe in the future of this industry.

Mr. WICKS. I would say that is a fair statement.

Mr. KASTENMEIER. It appears to be, perhaps like broadcasting, an industry which would require a great deal of capital at the outset, but which, if successful, would require less as the years go by. Consequently early financial statements in terms of the industry would appear to be not particularly good; but in the long term they would be in terms of showing profit, would be much more promising.

Like television itself, like broadcasting which, in a sense if you compare them, radio broadcasting, two generations old, with television, already a generation old, would have less long-term debts than a relative newcomer, cable itself. But the outlook would not be much different than for the broadcasting industry, is that correct?

Mr. WICKS. Well, I think there are a number of points in your question, sir. I want to point out that I am not as familiar with the other communications industries as I am with cable television. But it would seem to me, one way to answer your question is that a number of the CATV companies have within their plants television studios, which I have been told are on par with the local stations. Therefore, it would seem to me that the level of expenditures a cable television operator has to go through to deliver signals would be greater in total, as you pointed out, in the first stages of the industry.

Mr. KASTENMEIER. One other question or observation. Obviously, as a financial adviser and consultant as far as the industry is concerned, you are interested in certainty in terms of the risk and cost, and I would therefore presume that you would want this matter resolved one way or the other, rather than for it to be open-ended, for any sort of potential litigation really knowing—notwithstanding the two court suits—not really knowing, ultimately, what the resolution might be on the question of liability for cable television, is that not correct?

Mr. WICKS. That is correct, sir. When we look at a new company, we know there are a number of items within the projection which will be subject to change; and the more we can reduce the changes, or the magnitude of those changes, the easier it is for us to structure a loan that is in keeping with the abilities of the borrower.

Mr. KASTENMEIER. Congressman Badillo referred to another prospect, namely that the principle of the viability be established, and you negotiate from there. Would you not agree that the bill in its present form already determines a number of questions with some certainty?

That is to say, there is a compulsory license; there is a statutory formula fixed, even though it is subject to the tribunal's discretion after July 1, 1977.

In other words, there are a number of established points which reduce the unknown character of the liability already fixed in this bill; is that not true?

Mr. WICKS. Yes, sir.

Mr. KASTENMEIER. I yield to the gentleman from Illinois. Mr. Railsback.

Mr. RAILSBACK. Your exhibit 1 shows shareholder equity. Is that the shareholder equity of all of the asset value, or how is that determined?

Mr. WICKS. That, sir, is generally from the statement submitted to the shareholders which is assets less all of the liabilities. Or, to put it in different form, that would be the portion on the bottom right-hand portion of the two-page financial statement that is normally called shareholders' equity; it includes the invested capital and interest.

Mr. RAILSBACK. I notice that Teleprompter and Tele-Communications seem to be major losers, why is that?

Mr. WICKS. Major losers, sir, in the case of net income?

Mr. RAILSBACK. As far as return on equity, and revenue are concerned.

Mr. WICKS. Well, certainly on both of them there is a negative return. I cannot comment, not having detailed knowledge on the two companies, what the key elements of each of these losses were.

Mr. RAILSBACK. But, you disagree, then, with the National Association that you do not agree to the fee schedule that was provided in the bill. You are not objecting to a copyright liability, but you object to that fee schedule; is that correct?

Mr. WICKS. No, sir; that is not correct. I am attempting here to show that there will be an inpact of any level that is imposed on the industry; and for purposes of this illustration used the number that was in the bill.

Mr. RAILSBACK. As I understand it, you are really not objecting to a liability, are you?

Mr. WICKS. No, sir. Not being an operator I don't have quite the same feelings as to whether liability for copyright here is correct. I am attempting to say that if a liability is imposed, that will have an impact both to debt provider and equity investor.

Mr. RAILSBACK. That is all I have, Mr. Chairman.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Following up Mr. Railsback, my understanding of this presentation is that you are here to furnish us with a warning that if copyright liability is imposed, it definitely will result in a financial burden to these CATV companies which could impair their ability to obtain financing.

And, two, that if the tribunal, called for in the bill, is established and given jurisdiction to regulate this copyright liability, then (1) the uncertainty of such a liability will again impair the financing capacity of these companies; and (2) somewhat to the side, the language of the bill does not restrict the tribunal necessarily on just plain rates. These are really your points.

Mr. WICKS. I believe so.

Mr. DANIELSON. In addition to your own current company, which was formed in 1973, Becker Communications Associates, that is a successor to a previous organization, A. G. Becker Co., Inc.

Mr. WICKS. No, sir. Warburg Paribas Becker is the successor to A. G. Becker. Becker Communications is a separate company which was formed by, in this case, Becker.

Mr. DANIELSON. Well, I guess I inferred incorrectly from your statement. You mentioned the predecessor A. G. Becker, and of course you are talking about Warburg Paribas Becker, Inc.

Mr. WICKS. That is correct.

Mr. DANIELSON. You have had 2 years with this later organization. How long a time were you affiliated with the prior organization?

Mr. WICKS. Well, I have been with A. G. Becker for 7 years; and prior to that I was in the financial community, a commercial bank.

Mr. DANIELSON. At that time, were you involved in providing financing for CATV operations?

Mr. WICKS. Not as a specialty, no, sir.

Mr. DANIELSON. Your experience, then, in that field goes back 7 years?

Mr. WICKS. Well, my general financing goes back approximately 12 years.

Mr. DANIELSON. I am talking about cable.

Mr. WICKS. Cable 3 years.

Mr. DANIELSON. In that time, has there come to your attention any instance of a cable company becoming insolvent, having to close down for financial reasons?

Mr. WICKS. I can't answer your question specifically in terms of the real nature of insolvency and bankruptcy. To the best of my knowledge there has not been a loss to a debt holder. I think there have been instances in which the lender has had to take action which may, or may not have impacted on the equity holder; but that the debt at some point was repaid, or the loan was put back on a current basis.

Mr. DANIELSON. In the general term of financial failure, they have survived.

Mr. WICKS. Yes, sir. But I am not a lawyer, so I want to be a little careful. I think there have been instances in which companies have filed under the bankruptcy law, or other similar such things for protection of various interests.

I don't know of any outright absolute failure in which everybody lost their total investment.

Mr. DANIELSON. But, as a counterpart to that, it is my understanding of your statement that many of the CATV companies are operating on a rather thin profit margin.

Mr. WICKS. Yes, sir. I would say that most of the lenders that I know in this industry are watching these companies on a monthly basis; and as far as the ability to cover interest and principal, some of them are very tight, especially as we came through last year.

Mr. DANIELSON. The potential impact of copyright royalty liability and the determination of the liability rate is something, then, which you feel must be considered most carefully by this committee.

Mr. WICKS. Yes, sir.

Mr. DANIELSON. You have a comment on page 6 that there seems to be a reluctance by local franchising agencies to grant increases in rates on a timely basis. Have you observed that in your experience?

Mr. WICKS. Yes, sir. I think the best way to describe that is that the cable operators today that we have worked with have said that costs have soared over the last 4 to 5 years. Over a long period of time, the increases have been coming along. And then, when they got to the point where it was necessary, they went before the local council. Because of the fact that these people do not see that kind of a request very often it requires a long time for them to go through the procedures and try and understand the implications. It seems to take a lot longer, perhaps, than with other regulatory units that might be more familiar with financial statements.

Mr. DANIELSON. And you cite two articles, indicating that there is resistance in the market to an increase in rates. That would be apart from the franchising board.

Mr. WICKS. Yes, sir.

Mr. DANIELSON. You have read those articles, I assume; I have not. Do they seem to be sound, or not?

Mr. WICKS. They seem to be sound from my point of view, watching my clients preparing their marketing plans; and also in terms of the projections that we work on together, as to what rate level you can assume these subscribers will be willing to pay over a period of time.

Mr. DANIELSON. I think we must keep that in mind. I am going to read that article. Before we impose the copyright liability here, there certainly has to be an adjustment in the compensation of the cable systems to make up for that cost.

Mr. WICKS. It seems to me, some of the resistance is, people reach a point beyond which they don't want to pay for something they believe they are already getting for free.

Mr. DANIELSON. Well, that may be inherent in the industry. I have no further questions, thank you very much.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Well, I don't want to unduly belabor a rather straightforward statement—you make the position quite clear. But I would like to try to understand the importance of this factor of uncertainty as it may impact lenders and investors by asking several questions.

It seems to me that lenders and investors have already accepted a great many hazards in this industry. First of all, they have accepted the risk that technological changes will render the whole operation obsolete.

You have accepted the risk of a certain degree of FCC regulations which may affect profitability. I think if you accept the risk that the governmental unit granting the franchise may revoke it, placing your borrower out of business absolutely, you accept the risk of certain unregulated costs, labor, interest charges and normal operating expenses, which have been escalating. You accept the risk of taxation, and the uncertainty implicit in that.

And the question is, can you endure the risk of a regulated royalty schedule, or is that going to be the straw that breaks the camel's back. Now, do you think that is so important that it will be the unacceptable risk that will cause lenders to reverse their traditional willingness to advance credit for cable operations?

Mr. WICKS. No, sir, we don't see that as the straw that breaks the camel's back. I think that the point is the industry is not in a strong position to go to the capital markets. And I think the added level of

uncertainty will have a negative impact on the industry's ability to continue with those lenders.

There are a great many insurance companies in this country who lend money to industrial concerns. Out of all those insurance companies—and I'm sorry I can't tell you what the number is, it must be in the thousands—there are only 13 who regularly review cable television proposals. And of those 13 today less than half will accept, or entertain a proposal from a cable company. I have been able to follow this market for some time and it is currently very, very thin.

And this kind of uncertainty gives the finance commitee, if you will, who reviews these loans, trouble in accepting that these loans can be made; they would much rather lend to something that is more certain.

So, it is not the straw that breaks the camel's back, but it doesn't help.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. I wonder, Mr. Wicks, if you think we have the power to force the local authorities to make the new price—16 cents per month, as you mentioned—a passthrough which is automatically added to the royalty that they pay, or the fee that they pay every month.

In other words, if it's 16 cents per month, as you suggest, $1.92 per year, do you think we have the power to say that's a passthrough which would not, therefore, be adversely affecting the profits of the industry?

Mr. WICKS. I can't answer the question whether you have the power to do that. It may be that can be done, but then you get to the point of, will the consumer, who is currently paying $6, or $7, will he be willing to continue on this service. He may decide that that is the straw that broke the camel's back and unhook.

Mr. DRINAN. I'm advising that you overstate your case, in all candor, $1.92 a year, that is a very small rise, and something that is really inexpensive, $5, or $6.50 a month. If the passthrough were there, your argument would crumble, would it not, as to the adverse effect?

Mr. WICKS. Well, I agree the 16 cents doesn't seem that large. On the other hand, there are other fees that are being passed through, plus the fact that the $6.50 fee may have just been raised from $5, or $5.75.

Mr. DRINAN. Do you think the 2½ percent royalty rate is in the ball park, is something that would be acceptable, or do you think that's inevitable?

Mr. WICKS. I think the 2½ percent is certainly easier for the industry to live with than the higher fees that I saw in earlier testimony, a few years ago, of 16 percent, or as we heard this morning, 20-some percent.

Mr. DRINAN. Thank you very much for your testimony. I yield back.

Mr. KASTENMEIER. The gentleman from New York, Mr. Badillo.

Mr. BADILLO. As I understand your statement, you say you take no position whether the copyright fee should apply, but you say that if the present schedule applies, it is beyond the ability of the industry to bear that; is that correct?

Mr. WICKS. It does have a financial impact, yes sir. I don't say it is beyond the capability of the industry to survive.

Mr. BADILLO. What do you recommend, if anything?

Mr. WICKS. I don't think I'm in a position to represent a level that is livable. I have not analyzed the industry from that point of view.

Mr. BADILLO. Well, you have analyzed the industry from the point of view of its costs. I happen to be a certified public accountant, among

other things, and I am struck by the fact that the depreciation, according to your schedule, is 20 percent. Isn't that unusually high for an industry?

Mr. WICKS. I'm not sure I'm qualified to put that in perspective to other industries. I think it is a fairly consistent number for this industry.

Mr. BADILLO. What is the average life of the assets?

Mr. WICKS. Well, I think it is quite varied, sir. There may be others in a better position to answer that question. I know the accounting practice is, as one might read in the footnote, that there may be 10 different average lives defined.

Mr. BADILLO. But since you said you think they can't pay because you add up these items and get to a very small amount, I just wanted to know how you get to these amounts. Isn't the interest rate of 14 percent very high, and probably matched only by institutions such as New York City? [Laughter.]

Mr. WICKS. Yes, sir, it's high; but this is a very leveraged industry.

Mr. BADILLO. But doesn't that depend on how much you want to invest? If you decide you want to put a certain amount of money into stock, and you want to borrow money, you can adjust the interest rate, depending upon how much of an equity you want to put in, and how much you want to borrow. If you put in a very small investment, and you borrow 95 percent, then you are going to have a very high interest rate. If you put in a different kind of investment, then you have a lower interest rate. Isn't that so?

Mr. WICKS. Yes, sir, that is accurate; but I don't think it would be fair to characterize this industry as having the ability to have that kind of choice. The average company in that industry is extremely small, and the equity——

Mr. BADILLO. Closely held, too?

Mr. WICKS. Very closely held.

Mr. BADILLO. And they can also determine the administrative expenses more closely than one that is not closely held. For example, 62 percent for operating and administrating expenses may have a small profit, but that may include, if it is a closely held company, salaries and traveling expenses of the stockholders.

Mr. WICKS. I think in most cases, sir, the stockholders are the manager-owners, and probably don't pay themselves much of a salary. I would say that most of the expenses in there are fairly fixed.

Mr. BADILLO. Well, isn't that, then, the reason why—obviously we can't examine the books, and I'm not here to be a certified public accountant. If you cannot, as someone who is concerned with the industry, if you cannot even make a recommendation, isn't that the reason why maybe, instead of having a fee altogether, fee schedule altogether, the entire thing should be left with the tribunal, and let the tribunal examine the books and determine whether the 14 percent interest rate is proper, or is just really under-financing of the company; and determine how the life of the assets is to be spread out, so that the depreciation can be computed, and determine whether the salaries are proper.

Isn't really a tribunal which can study the financial condition of these companies the best form to reach a conclusion, since even you, who have been in the industry for such a long time, cannot make a recommendation to this Committee?

Mr. WICKS. Well, sir, I think from my point of view, there is more certainty setting up a number in a schedule, than there is leaving this to a tribunal.

Mr. BADILLO. But you can't make a recommendation, so, how are we supposed to get to an amount?

Mr. WICKS. Well, I don't think it would be proper for me to make that determination.

Mr. BADILLO. No further questions.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions.

Mr. KASTENMEIER. That concludes the questions. Mr. Wicks, we appreciate your appearance here this morning.

[The prepared statement of Mr. David Wicks and exhibits follow:]

STATEMENT OF DAVID O. WICKS, JR., BECKER COMMUNICATIONS ASSOCIATES

My name is David Wicks. I am a Vice President of Warburg Paribas Becker Inc., headquartered in Chicago, Illinois. Our firm, and its predecessor, A. G. Becker and Co., Incorporated, has for a number of years rendered investment banking and other financial services to members of the CATV industry. During the last three years, Becker and its affiliates have been one of the principal sources of CATV financing. During this period, I have been primarily responsible for obtaining debt financing for the larger multiple system cable television operators.

In 1973, A. G. Becker organized Becker Communications Associates as a limited partnership for the purpose of lending to the cable television industry in partnership with insurance companies, banks and other institutional lenders. I was instrumental in the formation of Becker Communications Associates and have a partnership interest in the firm. I appear here today as a representative of Becker Communications Associates.

I will not address myself to the pros and cons of copyright legislation for the cable industry. However, I wish to make two points with respect to the impact of H.R. 2223 on cable television financing as we see it today. First, the copyright royalty schedule provided in section 111(d) of the Bill will have a substantial and adverse effect on the net income of CATV operators and on their ability to raise additional capital either in the debt or equity market. An increase in the level of these fees would have even more severe consequences.

Second, the provision in section 802 of the Bill for an adjustment in the royalty rates after July 1, 1977, and during calendar year 1984 and in each subsequent fifth calendar year thereafter, introduces a serious financing uncertainty which will impede the industry's ability to obtain both medium and long term capital investment. In our opinion, the combined effect of the liability imposed by the Bill for copyright royalty payments together with uncertainty as to the future level of these payments will operate to substantially reduce the availability of both debt and equity financing.

It is recognized that cable television is a capital intensive industry. In its report entitled, "Broadcasting and Cable Television: Policies for Diversity and Change," the Committee for Economic Development notes that the future development of cable television will be determined in great measure by the availability and cost of capital. Yet, the Report continues: "Because of the economic and regulatory climate, venture capital is presently in very short supply. These difficulties are compounded by the fact that the construction of the cable system requires a very heavy initial investment. Furthermore, the return in the early years is slow. It may be 10 years or more before an investor realizes substantial profit."

Our findings confirm this point. Exhibit I presents data on the nine leading CATV companies for which such data is publicly available. This group had total revenues in 1974 of $265.5 Million and outstanding long-term debt of $517 Million. By comparison, Dennis McAlpine of the investment banking firm of Tucker, Anthony & R. L. Day, in testimony on May 22, 1975, before the Senate Anti-Trust Subcommittee chaired by Senator Hart, reported that the nine leading broadcasting companies generated revenues of $3.6 Billion, about 13 times as great, but had long-term debt outstanding of $573 Million, only slightly greater than that of the nine leading CATV companies. Stated another way, the CATV companies

had approximately $1.95 of debt per dollar of revenue as compared to 16 cents for the broadcasters.

In such a highly leveraged industry as cable television, what might be considered small changes in costs can have a major impact on net income and consequently on the ability to raise additional equity capital, which in turn provides the base for additional debt financing.

Becker Communications, and its affiliates, are in continuing contact with lenders to the CATV industry and regularly compile statistics on the availability of debt and equity financing. Within the last several months, in connection with a report which was submitted to the Federal Communications Commission, we have contacted the leading lenders to the industry and have developed statistics on capital availability in 1975 and 1976 from 32 commercial banks, 10 intermediate term lenders and 34 insurance companies.

The lenders included in this survey have provided a substantial portion of the total available debt financing for CATV construction and operation. Accordingly, their projections as to future financing plans provide the best and most authoritative indication of expansion prospects for the cable television industry. A copy of this report is attached as Exhibit II. Our survey showed the availability of approximately $185 to $200 Million in each of the next two years, dependent upon what assumptions are made as to improved profitability of specific firms within the industry

While it is difficult to accurately project the true capital requirements of the CATV industry over this time frame, we believe this level of financing is inadequate to provide for any substantial expansion of service or construction of new plant facility. As a reference point, under Proposed Regulations of the Federal Communications Commission, a large number of cable companies serving the top 100 markets would be required to make substantial expenditures on existing plant in order to bring their systems in compliance with the Commission's 1972 Rules on channel capacity and two-way communication capability. The National Cable Television Association has estimated the cost of this upgrade program to be approximately $423 Million, if completed by the Commission's deadline of March 31, 1977.

If the cable television business is to raise even a fraction of the capital estimated to be necessary before it comes into compliance with the Commission's rules and builds substantial additional capacity, it must become a profitable industry. Exhibit I shows, however, that the nine leading CATV companies lost a total of approximately $16.3 million in 1974. Obviously, these results must improve before substantial new capital will become available.

This is not to say that the nine leading companies whose results are summarized in Exhibit I represent a cross section of the entire industry. Most CATV operators are small privately owned firms. However lenders generally tend to view the industry in terms of the publicly available data for the large firms and we do not have any evidence that financing is more easily obtained by smaller firms. Indeed, the experience of Becker Communications Associates is that such smaller firms have greater difficulty obtaining financing.

In our opinion, the copyright royalty rate provided for by section 111(d) of the Bill, even though it has been said to be a nominal rate by some, will substantially impede the ability of both the larger publicly owned and the smaller privately owned companies to obtain additional invested capital.

Let me illustrate the impact of copyright royalty payments by a specific example which is applicable to both large and small operators. At the present time, the average revenue per subscriber is in the range of $5 to $6. Assuming a relatively high level of $6.50 per month, our studies of representative firms in the industry show that the level of operating and general and administrative costs have been approximately 62 percent, interest approximately 14 percent, and depreciation approximately 19 percent, leaving a pre-tax profit of about 5 percent, or 33 cents in our example of a monthly subscription rate of $6.50. The imposition of a 2½ percent royalty rate introduces an additional cost of 16 cents per month, reducing pre-tax profits to 2.3 percent, a decline of 50 percent in pre-tax profits. This is an unacceptably low return on revenues either for debt or equity financing purposes.

It might be argued that a fee of this magnitude can be passed on to the cable subscriber and profitability improved. However, the experience of the industry has been that local franchising authorities are reluctant to increase rates on a timely basis to keep pace with increasing costs and both the Committee on Economic Development and a leading economic consultant to the industry have found indications of market resistance to increased subscriber rates over the currently

prevailing levels. (See Mitchell and Smiley, Cable Cities and Copyrights. 5 *The Bell Journal of Economics and Management Science* 235 (Spring, 1974). Committee on Economic Development, Broadcasting in Cable Television: Policies for Diversity and Change (1975).)

I have alluded to a second concern of those in the business of lending funds to this industry and otherwise arranging financing, and that is the potential for successive increases in the copyright royalty rate during the term of long-term financing. This could result from action by the Copyright Royalty Tribunal which would be created by section 802 of the Bill. The Bill sets no limit on the rate which might be imposed in a future year, thereby raising at a minimum the possibility of significant changes in the assumptions upon which such financing was arranged. Lenders can be expected to respond to this uncertainty by increasing their rates, lending smaller amounts for shorter periods of time or imposing other less favorable terms on CATV borrowers. Thus, uncertainty has its own separate cost to the industry.

In conclusion, Mr. Chairman, although we are not here to question the concept of liability for payment of a copyright royalty fee, the amount of that fee must be viewed in terms of the impact which it will have upon the industry's ability to obtain the additional financing which is essential to its growth and development as a significant communications medium. Further, the uncertainty created by the open-ended power granted by section 802 to the Copyright Royalty Tribunal to adjust that fee in future years is itself a significant impediment to the industry in obtaining such financing.

I have not previously mentioned one further aspect of section 802 which is a cause for concern. It is not clear from this provision that the tribunal's power of adjustment would be limited to the amount of the fee itself. Section 802 appears to provide that the tribunal can also change the revenue basis on which the royalty fee is assessed, perhaps even to include services which do not involve copyright issues at all. We are not certain how broadly this power might be construed and that, of course, is the point. Uncertainty has its own costs.

I appreciate the opportunity to appear before this Subcommittee to present our views on the impact of H.R. 2223 on cable television financing. I will be happy to respond to your questions.

EXHIBIT I

COMPARATIVE DATA, NINE LARGEST PUBLIC CATV COMPANIES[1]

[Dollar amounts in millions]

	Revenue		Net income		Long-term debt[1]		Shareholders' equity		Return on equity (percent)		Return on revenue (percent)	
	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973	1974	1973
Teleprompter	$86.6	$76.7	($7.3)	($29.7)	$156.1	$123.1	$112.3	$124.8	(6.5)	(23.8)	(8.4)	(38.7)
Tele-Communications	34.2	26.6	(17.2)	(2.0)	116.0	105.5	30.0	47.6	(57.3)	(4.2)	(50.2)	(7.6)
American Television & Communications	26.7	20.5	1.9	2.1	57.3	43.6	36.2	29.3	5.2	7.2	7.1	10.2
Cox Cable	23.4	18.2	2.1	1.9	30.7	23.9	16.9	14.6	12.4	13.0	9.0	10.4
Viacom	36.2	31.3	2.7	2.4	43.5	37.0	26.3	24.3	10.3	9.9	7.5	7.7
Communications Prop	13.9	12.0	(.4)	.6	50.4	40.0	14.6	15.0	(2.7)	4.0	(2.9)	5.0
U-A Columbia	13.6	10.1	1.1	.7	17.6	15.1	15.9	14.8	6.9	4.7	8.1	6.9
Cablecom General	21.6	19.8	1.1	(4.4)	21.5	18.3	11.3	10.2	9.7	(43.1)	5.1	(22.2)
United Cable TV	9.1	7.9	(.3)	.5	24.2	16.8	18.9	19.0	(.2)	2.6	(3.3)	6.3
Total	265.5	223.1	(16.3)	(27.9)	517.3	423.3	282.4	299.6				

[1] Excluding current maturities.

Source: Latest annual report of each company.

EXHIBIT II

BEFORE THE FEDERAL COMMUNICATIONS COMMISSION, WASHINGTON, D.C.

(Docket No. 20363)

In the Matter of: Amendment of part 76 of the Commission's Rules and Regulations relative to postponing or cancelling the March 31, 1977 date by which major market cable television systems existing prior to March 31, 1972, must be in compliance with section 76.251(a)(1)-(a)(8)

COMMENTS OF WARBURG PARIBAS BECKER, INC.

In connection with the above-referenced Notice of Proposed Rulemaking soliciting comments on the March 31, 1977 deadline for compliance with the provisions of Section 76.251(a)(1)-(a)(8) of the Commission Rules, The Becker and Warburg-Paribas Group, Inc., by its Attorneys, hereby records with the Commission, its following findings of available Capital Financing for the CATV Industry, particularly concerning funds available for so called system "rebuild".

The Becker and Warburg-Paribas Group, Inc. ("BWPG") and its predecessor, A. G. Becker & Co. Incorporated, has over 80 years of experience in the field of investment banking. Its activities include the granting and distribution of debt issues, the evaluation of debt and security issues for public and private clients. The firm is a member of the New York, American, Mid-West and Pacific Stock Exchanges, as well as the Chicago Board of Options Exchange and numerous regional stock exchanges. BWPG engages in international investment banking through its European partners, S. G. Warburg & Co. London and Cie Financiere de Paris and des Pays Bas in Paris. Further, Becker Communications Associates ("BCA") is an active lender to the CATV industry with approximately $20 million in loans and commitments outstanding and BCA and Warburg Paribas Becker ("WPB") (a wholly-owned subsidiary of BWPG which handles the corporate finance activities of BWPG) have five officers who specialize in CATV.

In connection with their corporate finance activities in CATV, the Becker groups are in continuing contact with the lenders to the Industry and regularly compile statistics on the lending activities to the Industry In order to provide the Commission with statistics on the available capital to the Industry, particularly as it might relate to the capital requirements imposed by 76,251, they have, within the last several weeks contacted the leading lenders to the industry and have developed statistics on capital availability in 1975 and 1976. The data supplied herein, therefor, is extremely current.

As a basis for this study, WPB personnel contacted by phone or in person or compiled data from its files on 32 commercial banks, ten intermediate term lenders and 34 insurance companies. For many reasons, including the fact that many companies would not make their figures public, (being prohibited in certain instances from doing so by contractual obligations) available financing facilities from the equipment suppliers to the Industry or from equipment leasing companies are not included. The bulk of the contacts with the sampled lenders occurred in the months of January and February 1975. We believe it to be as complete a study as has been done to date and certainly the only study which has been done to our knowledge on this aspect of the CATV lending situation.

As shown in Chart 1, the lender groups had loans outstanding to CATV companies at December 31, 1974 of approximately $1 billion. This group anticipates lending approximately a further $185 million to the industry in 1975 with a range of $360 million to $74 million if the economy and available cash flow should change appreciably for the better or worse.

Impacting significantly on these general projections will be the level of deficit financing by the Federal Government. As demonstrated in 1974, during periods of tightening of available funds, CATV companies find it proportionately more difficult to get commitments for financing. Further, the emphasis of many commercial banks is to shorten the maturity of their loans which has the effect of making construction loans to new CATV systems difficult to justify economically.

The institutions expect to lend slightly more funds in 1976 based, in part, on an expected improvement in the overall economy and a continued emphasis on improving reported profits within the major CATV companies.

The projections for 1975 and 1976 are generally speculation or guesstimates on the part of most institutions since they generally react to loan proposals rather than actively seeking loans. However, the most accurate predictions come from

the intermediate lenders since the bulk of these institutions have CATV specialist units and have specific CATV loan budgets for 1975 and 1976. In the same vein, the least accurate prediction comes from the banks since few have CATV specialists and a number of banks make loans to the industry through more than one lending unit or division. Finally, the widest range in the prediction comes from the insurance companies and this is a function of demand, credit and rate. Generally, CATV will be competing in insurance companies with an investment policy to upgrade their placement activities to A or Baa quality and most CATV borrowers could not qualify for such credit ratings.

Of particular importance to the review of the 1977 deadline, virtually no lender surveyed felt that they were in a position to help fund a significant portion of the more than $400 million required capital projected by the ("NCTA") to bring systems into compliance. Adversely impacting on the ability or desire of these institutions to supply such funds is the fact that most CATV borrowers are now judged by lenders to be fully leveraged based on their current subscriber and cash flow levels. Accordingly, new credit extensions must be based on projected increases in subscriber levels, additional revenue producing services and/or other cash flow generating sources not for replacement of equipment The projections of available financing in Chart 1 are for new builds or extensions to existing systems, refinancing of existing systems to longer maturities and/or acquisition loans. The basic assumption of the lenders is that the proceeds of their loan will be used to build plant in front of potential subscribers at a low enough cost that the actual operating cash flow will be sufficient to amortize their loan over a fixed period at a given interest rate.

Specific examples of lender comments might be helpful. First, a number of insurance companies who lend to one of the top 10 public CATV Multiple Systems Operator companies ("MSO's") have informed the president of that MSO, that in their judgment the company is fully leveraged and that they will not be able to lend any funds for 1977 compliance without an increase in unleveraged subscribers, an increase in cash flow and/or an increase in revenue producing services. Second, a mid-west bank reported that they had found that they could not lend as much as their borrowers requested when compliance was a factor because many of the rules did not have an economic justification—that is insufficient potential revenue to cover the costs. Finally, an intermediate lender reported that they were concerned about their ability to continue serving their CATV clients because these clients were being forced to borrow additional funds to comply with 1977 when the lender actually needed to see these same clients reduce their outstanding balances in accordance with their note agreement.

An example of the impact in increased cost on the debt capacity of a system might be the following. Assuming a system in a 100,000 home community at an industry standard of 100 homes per mile and an average cost of overhead plant of $7,000 per mile, the plant cost would be $7,000,000.00. Assuming the franchise holder borrowed this sum and achieved 30% penetration of the 100,000 homes, he would have debt per subscriber of $233. The ability to borrow on this system will be shown by the following. Assuming a 10 year loan at 10% interest and a $6.00 monthly subscriber rate with operating costs of 40% resulting in an operating monthly cash flow level of $3.50 would amortize $266 of debt per subscriber. (Source: Bond Tables based on $3.50 available cash flow 10 year maturity and 10% interest). Based on current standards, this would be a very difficult loan to finance as most lenders would want to have a margin of safety greater than the $33 difference between $266 and $233. Consequently, most lenders would probably not loan more than $200 per subscriber.

If for FCC rule compliance purposes the franchise holder is in the same situation and had to increase his costs per mile from $7,000 to $8,000 with all other factors held constant, the debt per subscriber would become $267. Assuming that this increased cost would not result in increased subscribers so the monthly cash flow would be held constant and support $266 of debt, the franchise holder would not be able to borrow sufficient funds. For purposes of this analysis, we have not considered the infusion of equity capital from the franchise holder as this would be offset in part by the need to borrow the initial operating losses.

In summary, based upon WPB's survey of traditional lenders to the CATV industry, it does not appear that these sources will be able to fund any meaningful portion of the capital requirement generated by the 1977 rebuild requirements. We therefore urge the Commission to suspend the 1977 compliance date. Absent such a suspension, capital investment, if available at all, will be needlessly

diverted from construction of new systems and the attainment of a subscriber and revenue base needed to support the growth and development of the industry.

Respectfully submitted,

WARBURG PARIBAS BECKER, INC.
By JOHN D. MATTHEWS
JOHN I. DAVIS
Its Attorneys.

SUMMARY OF PROJECTED AVAILABLE DEBT FUNDS FOR THE CABLE TELEVISION INDUSTRY IN 1975 AND 1976

[Dollar amounts in millions]

	Number of institutions surveyed	Outstandings at Dec. 31, 1974	Projected funding in 1975		
			High	Low	Most probable
1. 1975:					
Commercial banks	32	$623	$189	$44	$100
Intermediate lenders	10	104	90	25	44
Insurance companies	34	302	81	5	41
Total	76	1,029	360	74	185

	Number of institutions surveyed	Projected funding in 1976		
		High	Low	Most probable
2. 1976:				
Commercial banks	32	$236	$90	$144
Intermediate lenders	10	139	47	69
Insurance companies	34	130	34	81
Total	76	505	171	294

Mr. KASTENMEIER. Our next witness this morning is Mr. Robert Cooper, Executive Secretary of Community Antenna Television Association. Mr. Cooper, you have a statement. You may proceed, and perhaps you would like to introduce your associates.

TESTIMONY OF ROBERT COOPER, EXECUTIVE SECRETARY OF COMMUNITY ANTENNA TELEVISION ASSOCIATION

Mr. COOPER. Mr. Chairman, I would like to introduce the gentlemen here with me. The gentleman on my left is Mr. Peter Athanas, general manager of Southern Wisconsin Cable. The gentleman on my right is Mr. Kyle Moore, the president of the Oklahoma City CATV Association. The gentleman on my near left is Mr. Richard L. Brown, the general counsel for CATA.

Mr. Chairman and members of the subcommittee, I am Robert Cooper, executive director of CATA.

CATA, or the Community Antenna Television Association is a trade association organized in 1973 that today has as members some 400 CATV systems throughout the United States. Originally organized to focus on proposed copyright legislation, CATA has broadened its membership and scope of activities to include such matters as participating in FCC proceedings. Generally stated, CATA's philosophy recognizes that the roots of CATV lie within the community—hence our name, a name abandoned in the 1960's by the NCTA.

We are not here to pull punches or present diplomatic truths, we are here to present real truths, nor will we play a lengthy numbers game. You should know, I believe, however, that there are by our count

some 25 state and regional associations that have voted against the NCTA position that was previously testified to. I think you can count by the fingers of one hand the remaining State and regional associations that still give unqualified support to the NCTA position.

Furthermore, the Pennsylvania State Association and the NCTA's largest single member company, TelePrompter, have requested and received time on their own to present views contrary to NCTA. TelePrompter and the Pennsylvania systems, it might be noted, serve some 2 million homes between them, which is approximately 20 percent of the entire cable industry. Now, these statistics reveal only conclusions, not reasons; and that is perhaps what we will address in our testimony, too.

We submit that the only reason CATV copyright presently has any support is not because the copyright-supporting splinter of the industry believes that CATV should pay, but because, as you can determine from testimony before you, it is politically expedient to do so and because of something called the Consensus Agreement, The NCTA, NAB, and MPAA can try to explain the agreement to you. For our part, we will concentrate on the merits as we see them, of the copyright issue.

CATA is here today because its membership does not believe that the motion picture industry is entitled to place its hands in the pockets of CATV operators or CATV subscribers. We reject the joint copyright position of NCTA, NAB, MPAA, that CATV owes something called "reasonable copyright."

The imposition of copyright on CATV is, in part, a tax—if you will allow the word—on the viewing public. We also believe it to be a deception to an American television-viewing public which has been told time and time again of the benevolence of broadcasters and broadcasters who delivered "free television."

As we all know, it is not a free system—it is an advertiser-supported system which means we all pay once for the programs we watch by paying higher prices for television-advertised products. Additionally, approximately 10 million households must also pay a second time by subscribing to CATV. Now, through copyright legislation, 10 million-plus cable homes will be asked to pay yet a third time.

Remember that probably CATV would have never come into existence if the FCC had fastidiously followed the Congressional mandate of Section One of the Communications Act "to make available, so far as possible, to all the people of the United States, a rapid, efficient, nationwide and world-wide wire and radiocommunications service."

Yet, in our view, some 25 years after the FCC commenced fumbling with television allocations, 2 million households, or 3 percent of all homes, receive absolutely no over-the-air television signals today. In fact, it is estimated that over 3 million homes, or some 15 percent of the total population, still do not receive the three national network signals off the air. It is CATV, however, that over the last 25 years has filled gaps in the FCC's allocation voids and, incidentally, lent a boost to your congressionally passed all channel receiver law.

It is antithetical, then, to your Communications Act purposes to saddle CATV, and through it the American television-viewing public with a tax for the privilege of watching.

Now, copyright is a creation of the legislature under a constitutionally delegated power. Also under the Constitution, you have spe-

cifically been delegated power to make laws affecting interstate commerce and have done so vis-a-vis broadcasting by passage of the Communications Act. Today, the Communications Act and Copyright Act are in a state of apparent tension. I say "apparent" because the program suppliers would have you believe that the main purpose of copyright is to give authors money so that they will have incentive to write. This is simply not true. Copyright is not to reward authors, but to insure that creative works find their way to the public. The Supreme Court has pointed that out in economic terms, pointing out that copyright grants are made in "the connection that encouragement of individual effort by personal gain is the best way to advance public welfare."

Thus, the tension dissolves when it is realized that Congress has also established a Communications act and created the FCC to fulfill similar, if not identical, purposes. Those purposes being to secure the general benefits of radio and television programing to all the people of the United States and to encourage their larger and more effective use in the public interest.

In these stated purposes it is inconceivable that the FCC's own general counsel could testify before you that CATV should pay just because the argument has been around for a long time. The FCC's Mr. Hardy desires to see resolution of this issue merely for the sake of resolution. His desire can be accommodated just as well by deleting CATV from this bill.

There are other voices in and out of the CATV industry who say that "the copyright issue must be solved—it must be put behind us because until it is laid to rest, the investment community will not advance the capital required by cable to expand and grow."

We have no quarrel whatsoever with this line of reasoning, except when it is expanded to the illogical conclusion that the industry should simply pay copyright merely to expedite the removal of this uncertainty. Clearly, CATV's future is better served by the removal of CATV from copyright legislation.

And then there are voices in our industry who say, "We can afford to pay" with remarks like "What is one or two, or two and-a-half percent of our gross?" Well, let me tell you what it is.

In December 1973, CATA, at the specific request of Senator John McClellan prepared an economic study of more than 250 CATV systems, ranging upward in size to 5,800 subscribers. In that study, which we will submit for the record, CATA found, for example, that for 1 percent of gross proceeds to copyright a system of 1,000 to 1,500 subscribers we would experience a reduction of net revenues of 13.8 percent. This happens to be the equivalent, then, of 1 percent of gross. 13.801 is the number.

Frankly, the industry cannot afford to pay that, and that is the truth. Now, lest this be considered solely as a flat dollar exemption, such as the $100,000, which has been kicked around prior to my testimony, it is not. Copyright will also adversely affect larger systems, including multiple-owned systems.

We also regard as fundamental considerations the following questions which should be asked of every proponent of copyright liability for CATV:

1. Why should this industry pay?

2. Who will really pay? And,
3. Who will receive the payments?

Consider this, there are hundreds of thousands of hospital rooms around this country, offering television service at a price. Patients rent a television set and the set supplier, the hospital, and maintenance man all profit. The rates are as high as $3 a day, nationally, according to the hospital association. This is an unmolested industry, hospital television, HOTV, possibly with gross revenues exceeding cable. Why are they not in the copyright bill? Simply because, providing the service of facilitating television viewing is their job. The Supreme Court has twice held that the same rationale applies to CATV, and these cases of the Supreme Court are exceedingly instructive. First, one must lay aside the program-supplier-sponsored misconception that the cases are irrelevant—relevant, pardon me, because they dealt only with the 1909 Copyright Act. Of course, the Supreme Court was dealing with the 1909 Copyright Act, but the decision was made "with due regard to changing technology"; that is not based on 1909 concepts. In fact, the Court held:

"Mere quantative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment houseowner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of function that CATV plays in the total process of television broadcasting and reception."

The Court reasoned that television viewing was a combined activity, a combined activity of broadcasters and viewers. Broadcasters perform, viewers do not. Broadcasters are active performers, viewers passive beneficiaries. CATV "falls on the viewer's side of the line."

The Court concluded as a matter of separation of powers—not as a matter of copyright policy—that the job of accommodating "various competing considerations of copyright, communications, and antitrust" belonged to Congress. The Court did not intend that Congress, in fact, adopt CATV copyright liability.

Then came TelePrompter-CBS, where the Court was faced with microwaved, long-distance signal importation—more than 450 miles—by CATV systems that also originated their own programs, also sold local advertising, and also interconnected with other systems. The Court found no copyright significance to these auxiliary activities and found that the distance the signals traveled did not "alter the function that CATV performs for its subscribers." In fact, the Court stated:

> The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.

Mr. Chairman and members of this committee, when a television station broadcasts, the broadcast is in the public domain. The Supreme Court characterization of what CATV does is as true today as it was when the Court made its decision. What CATV does—its viewer function—is not altered by the words of the 1909 act, or H.R. 2223.

Those advocating CATV liability have a high burden of persuasion because CATV does fulfill Communications act goals by making television more widely available, or often available for the first time.

It is a viewer-oriented medium, as are translators, master antennae, rooftop antennae, and television sets themselves. None of these entities are prospectively liable for copyright under your bill, and none should be, for they are all part of the process of nationwide dissemination of programing that you have legislated in the Communications Act.

In fact, in TelePrompter-CBS, the copyright holders argued that CATV prerelease of programs would dilute the profitability of reruns and other syndicated properties, thus removing incentive to produce television programs. The court rejected this argument. It recognized that the appropriate nexus was missing, that is, copyright holders do not receive money from the ultimate user—the television viewer—the money comes from the advertisers.

In fact, the Court recognized that the distant signal carriage does not interfere with the "copyright holders' means of extracting recompense for their creativity and labor"; and that, in fact, CATV provides a larger viewing market to the benefit of both the advertiser and the copyright holder.

We submit that CATV should not pay because CATV does not owe.

This leads to the question of who would really pay, were this bill to become law. Well, there is no doubt that your imposition of copyright on CATV would be, at least in part, a consumer tax on television viewing. Must the cable viewer himself pay it? It could stop at the cable company, as it was pointed out, but it will not because there are no free lunches in this world.

Is it a large amount? At the national average, $6 per home. You have all the figures before you. The copyright bite works out to $1.80 per home per year for the 2.5-percent rate, which is irrespective of the number of signals carried.

In the seven congressional districts of this committee, there are approximately 73,000 cable homes. Under this bill, these 73,000 homes could pay to copyright holders up to $131,400 this year.

So, do the television viewers care? CATA has already received more than 200 community resolutions opposing this viewing tax, from cities as diverse as Eau Claire, Wis. and Granville Village, N.Y.

These resolutions from municipalities will be supplied for the record. Further, the U.S. Conference of Mayors and the League of Cities has also adopted a joint resolution in 1974, unanimously opposing the inclusion of CATV in the copyright bill. The message, I believe, is that the constituents are concerned about higher CATV charges that will result from copyright legislation.

The third question concerns to whom copyright payments would be made. Mr. Jack Valenti, president of the MPAA, told Senator McClellan's committee on the Judiciary on August 1, 1973, that he also represents something called the Committee of Copyright Owners, composed of eight independent suppliers of copyrighted television programs, which are listed in my text. Mr. Valenti testified:

> The programs supplied by members of CCO to stations, and thereby to cable systems, constitute by far the largest part of all copyright programs carried by television and cable.

In a CATA study of programs broadcast in New York City during a recent week in the month of March we found that 46 percent of all copyright-on-file evening programs on CBS are in fact owned by those

eight CCO firms; similarly, 32 percent for NBC, and 17 percent for ABC.

Finally, we also checked movie copyrights on file for that week in March of this spring, and it was reflected that 51 of the 68 movies—60 percent—were owned by one of these eight firms. Clearly, Mr. Valenti is correct about his employer's position.

But, to make the analysis and our point more clear, please consider that the largest copyright owner of the big eight—MCA—had gross revenues in 1974 of $641 million, a third more than not the largest cable company, but all cable companies; the whole cable industry.

Given the current state of economic affairs in our cable industry, we are indeed saddened that we were not the first in thinking of a relief act for our industry, a royalty from program suppliers to CATV for aiding viewers to see their programs. Program suppliers, we feel, clearly can afford to pay.

Thank you.

Mr. KASTENMEIER. Before yielding to Mr. Pattison I just have a clarifying question. In terms of constituent members, does CATA differ from NCTA?

Mr. COOPER. You mean is there an overlapping of membership?

Mr. KASTENMEIER. Are the operators more or less, characteristically, the same, as far as size?

Mr. COOPER. I have never seen an analysis of that, I can give you an expression from my own experience. The impression would be, "No." Typically, our operators tend to be smaller and dependent in the sense that they probably own a couple of systems as opposed to multiple systems.

Mr. KASTENMEIER. They tend to be smaller in terms of operations?

Mr. COOPER. They tend to be smaller in terms of operations, and in terms of subscribers, the area they serve. They are more rural, as a consequence.

Mr. KASTENMEIER. Does the type of retransmission that they engage in, would that be substantially different from NCTA members?

Mr. COOPER. I don't think substantially, no, sir.

Mr. KASTENMEIER. One other question. Does the view of your organization differ from the ad hoc committee on cable television?

Mr. COOPER. I am not aware of any significant difference, no, sir.

Mr. KASTENMEIER. I yield to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I just want to thank Mr. Cooper for his statement; it certainly provides us with the other side of the coin, and gives us a real different philosophical point of view that we obviously have to consider. I have no questions about the statement.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Just one question, Mr. Cooper. On what do you base your conviction here, that you expressed so well, that copyright is not due. Do you go back to the Supreme Court opinion, or how, ultimately do you do it?

Mr. COOPER. I think basically the Court said in its two opinions what we have always believed as a group of operators; and we believe in the language of and subsequent court, many, many Court decisions interpreting, perhaps, the section of the Constitution that deals with copyright.

Mr. DRINAN. And you believe that all these people have deviated from what you believe to be the law simply because they worked out the consensus agreement, and it is politically expedient for them to go that way?

Mr. COOPER. I think that is what they say, and I have to agree. That is their analysis why they are where they are; yes, sir.

Mr. DRINAN. Well, now, just a clarifying one last question. Do you think that any part of cable television, under any circumstances, should be required to pay copyright fees?

Mr. COOPER. Sir, I think we almost need to talk about the definition of cable television. If we are talking only about a system that receives broadcasts from off-the-air sources, and supplies those broadcasts to its customers, then my answer to you is, no, we can't see any area, any geographic center of operation, any size of system, any dollar economic growth revenue determination of system that to us makes any sense that should be liable for copyright, based upon our philosophical view that is set forth here.

However, if a system, a functioning operating system wishes on its own to serve the needs of its community to procure for display only on the cable movies, sporting events, and other events that are not generally available off the air to broadcasting, then I am sure that they must and should enter the normal marketing mechanisms, and pay their proportionate percentages of copyright fees, just as any originating transmitting facility should do.

Mr. DRINAN. All right, thank you for your statement.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Well, first, Mr. Cooper, I want to compliment you for coming out swinging. You have stated the other side of the coin, as you indicated, not only objecting to any imposition of copyright fees, but suggesting that you ought to be paid for expanding the market of the originator.

You have just answered a question which suggests to me that you do not object conceptually to the whole idea of copyright. Do you affirm that?

Mr. COOPER. By conceptually, I guess we are talking about the consti tutional conception of copyright as a means of making available to the public?

Mr. WIGGINS. Well, it is a two-edged sword. The language which you indicated, indicates the policy of making available to the public; and then the framers of the Constitution, I believe, added to the language, "by securing for a limited time to authors and inventors the exclusive right", and so forth.

So, I think it is fair to say the Constitution contemplates some mechanism for securing those rights, and we do so in the payment schedule.

Mr. COOPER. I agree.

Mr. WIGGINS. You conceptually agree to that. And you would apply it to cable in the sense of cable-originated programs, not simply transmitting someone else's signal.

You make a case that the payment is not due, and support that position in part by the argument which relates to payment of the royalty by the viewers, as opposed to putting that economic burden on the advertisers; is that correct?

Mr. COOPER. That is correct.

Mr. WIGGINS. Well, it seems to me that this notion of advertisers' paying the royalty is almost unique to the television industry, and perhaps to radio. But, if you get away from those and talk about books, for example, the author is paid by the reader—the analogy being to the viewer. Indeed, you can carry that analogy quite a ways, and it seems that television, and perhaps radio are unique in the sense that someone else picks up the tab; is that not so?

Mr. COOPER. Yes.

Mr. WIGGINS. Well, then we shouldn't place too much emphasis on the notion that the viewer may ultimately have to pay as a reason for rejecting the payment of copyright by a cable television, should we?

Mr. COOPER. Well, I think that is probably a political decision.

Mr. WIGGINS. No, I am not thinking about it politically. I am trying to get some evenhanded treatment of those who exploit for profit the protected works of authors and inventors.

Well, I am going to reread your statement carefully, Mr. Cooper because it is a threshold question that we have to come to grips with, whether you should pay anything. That is a difficult question on which you have strong views. But we only get to the question of the tribunal and the rates if they get past the threshold. Thank you for raising the issue.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. I have very little to add to what has already come forward here. I just want to be sure I understand the thrust of your presentation. I think I do, and that is, it is your position that the cable should pay no royalty except in those situations where it originates its own program, and then of course it would be on a negotiated basis, I suppose, with the owner of the copyprighted material.

Mr. COOPER. That is correct.

Mr. DANIELSON. And the items you pick off the air and transmit to your subscribers that are things that are already disseminated, it is your position that a cable is to serve as sort of an amplifier for the eyes and ears of the viewer, and you are simply enabling the viewer for a subscription fee to see and to hear the programs that are already broadcast by someone else.

Mr. COOPER. Yes, sir. I think what we are really doing is fulfilling a mandate that is stated in the Communications Act, to provide the widest possible dissemination.

Mr. DANIELSON. Well, that may be a legal effect of what you are doing. What you are doing is to sell to your subscribers a service and enable them to see and hear things which they couldn't otherwise see and hear.

Mr. COOPER. We are selling to him, if you will, the utilization of our amplifiers and our cables; yes, sir.

Mr. DANIELSON. Thank you very much.

Mr. KASTENMEIER. Mr. Drinan?

Mr. DRINAN. You mentioned the seven congressional districts of this committee, and this is of interest to me. There are approximately 73,000 cable homes. That is collectively, in all seven?

Mr. COOPER. In all seven districts, that's correct.

Mr. DRINAN. If counsel could furnish that to each of the seven members, I am sure they would be as interested as I am.

Mr. COOPER. We certainly will, sir.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Mr. Cooper, do you think the networks ought to have to pay to run movies that have already been made public? In other words, if I pick up an old movie, do you think a network should have to pay a fee for copyright? Or, for that matter a station like WGM, which is a nonnetwork station. Do you think that a network, or an independent television station ought to have to pay a fee?

Mr. COOPER. Well, the point is, it is in the public domain for the first time——

Mr. RAILSBACK. So, they are perpetuating, then, the Federal Communications Act.

Mr. COOPER. Yes.

Mr. RAILSBACK. Should they have to pay for running that movie?

Mr. COOPER. I have trouble between a fee and——

Mr. RAILSBACK. For the copyright, I'm sorry.

Mr. COOPER. Okay.

Mr. RAILSBACK. They are disseminating a creative work to the public.

Mr. COOPER. Yes, sir.

Mr. RAILSBACK. Just like you are doing.

Mr. COOPER. No, not just like it.

Mr. RAILSBACK. Maybe not just like, but they are disseminating it. What I am asking you is, should that network have to pay a fee?

Mr. COOPER. All right, they are disseminating this movie, program, whatever it might be into and through the public domain from its airway, for which they are receiving revenues. Yes, they should.

Mr. RAILSBACK. They are receiving revenues from their advertisers.

Mr. COOPER. Yes, sir.

Mr. RAILSBACK. You are receiving your revenues from your viewers.

Mr. COOPER. That's correct.

Mr. RAILSBACK. I have trouble seeing the difference, could you give me your reasoning? Why should you not have to pay?

Mr. DANIELSON. Will the gentleman yield?

Mr. RAILSBACK. Yes.

Mr. DANIELSON. I think the gentleman pointed out here at one point, the broadcasters are actively broadcasting this copyrighted material; the cable system is passively——

Mr. COOPER. Delivering it.

Mr. DANIELSON [continuing]. Receiving it, I think that's it.

Mr. RAILSBACK. But, I just don't understand the logic where the network on the one hand is acting as an information disseminator and, on the other hand as a program originator where somebody else has produced, and actually has to buy that performance, or pay a fee, or pay a copyright, or buy the copyright. I have difficulty seeing where in that case——

Mr. COOPER. I think I can answer it for you.

Mr. RAILSBACK. Go ahead.

Mr. COOPER. Their cost of doing business runs the gamut from electricity to the power and all this business, right?

Mr. RAILSBACK. Right.

Mr. COOPER. All right. The minute that signal leaves the transmitting tower it's in the ether, as it were; it's in the atmosphere, in the public domain. Their cost of delivery of the signal stops the

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minute, the instant that signal radiates from the transmitting tower; will you accept that?

In other words, as soon as they release it it's gone and they have no more expense involved in the delivery of that signal.

Mr. RAILSBACK. Yes; they don't deliver it by cable, they deliver it by other means.

Mr. COOPER. That's correct.

Mr. RAILSBACK. That is a different system.

Mr. COOPER. Well, not necessarily. On the other hand, our expense only begins where their expense stops.

Mr. RAILSBACK. But they don't charge viewers, do they?

Mr. COOPER. We did a very interesting study on that a few months ago in which we pointed out that based upon the gross receipts of all television stations of all markets in the country we can very quickly determine a cost per household per year; a cost based upon increased costs for all goods and services that were for sale in the marketplace, which included a percentage for advertising cost, half of one percent for Coca-Cola, for example.

If you do this, you very quickly determine that there is some place between $21 and $50 a year per home, is the average cost, nationwide, that we all pay, we all share it, for the broadcasting service that exists.

Mr. RAILSBACK. You know, what really bothers me and this may not be analogous, but we have sat through record piracy hearings where we have received testimony from record companies to the effect that they have to pay rather substantial costs to invest in a particular production. Then certain people pirate that work product, and sell it at a reduced cost. They have gotten the benefit of that capital investment, and the cost of producing that work and they make a big profit.

Now, I have difficuty. I see you charging the individual viewer, and I see the networks using advertisers, and I see you both disseminating creative works, which is in the public interest. But to me it is not logical for them to have to pay for copyright, and you do not.

Mr. WIGGINS. Will the gentleman yield?

Mr. RAILSBACK. Yes.

Mr. WIGGINS. Would it make any difference if your reception of the signal were taped by you and rebroadcast at your convenience?

Mr. COOPER. Would it make a difference philosophically?

Mr. WIGGINS. In terms of your viability for copyright payments.

Mr. COOPER. I would expect it would, yes, sir.

Mr. WIGGINS. What is the difference, other than time?

Mr. COOPER. I think there is a very significant difference, the time of showing, the fact that it is not a simultaneous release.

You see, the cable company—and this is an argument that goes back to 1954, that the cable companies participate in the programing and scheduling of the releases that they show upon their system. Well, the factual matter is, we do not. The disseminator, the television broadcast station showing the movie that you refer to, he picks everything that goes in it, the contents. We have absolutely no choice over it. His expenses absolutely stop the minute that signal is broadcast, whereas ours only begin at that point. He gets a free ride through the federally regulated airways of which there is only a limited quantity available, and we must therefore share those airways, so it's not creating a problem.

Mr. RAILSBACK. That free ride is very, very tightly regulated.

Mr. COOPER. That is correct. And I assure you, sir, on the other end, we are even more tightly regulated by the Federal Communications Commission for our "free ride" to our actual cable.

See, a broadcaster, take a total capital plant investment of—to pick a round number—$1 million for a million homes, $1 per home. You can't even begin to touch service to a real or potential cable television home for less than $100, or $150 per home invested, going in, to start with. That is because we have a very high expense of delivering the signal from our head-in, if you will, or tower, to the individual home. We don't have free rides on the waves, we don't have free easements, we must pay a local franchise fee tax. The rights-of-way where we string our cables are the same to us as the broadcaster's either through which he transmits from his transmitting tower on top of the Sears Building, except that we have to pay money, we have to pay a substantial amount of money and have a very high risk involved in maintaining our transmission medium; he has none. His stops the minute his signals goes into the public airways.

Mr. KASTENMEIER. I have just one last question to follow up on several questions that have been asked. Do I understand you correctly, Mr. Cooper, that you feel that CATV should not have to pay a copyright fee unless there might be certain other conditions, for example, if he originates; if he tapes and retransmits; if he sells advertising, if he does a series of other things than simple retransmission, extemporaneous, then, are you conceding that you might have to pay a copyright?

Mr. COOPER. I think on a point-by-point basis, what we are really talking about in terms of conceding that copyright could and should be paid is specifically on the pay television aspect of our industry where a movie specifically is bought and then shown on the cable.

Mr. DANIELSON. If I may interrupt. You mentioned pay television. If you originate, if you just simply put Bambi on the cable, whether you charge individually for it, or not, do you see any reason why you should not pay copyright, if you originate?

Mr. COOPER. If I have procured Bambi, or the rights to show it on the open market——

Mr. DANIELSON. If you originate, put it on your cable——

Mr. COOPER. Should I pay copyright for showing Bambi?

Mr. DANIELSON. Yes.

Mr. COOPER. Absolutely, sir.

Mr. DANIELSON. It isn't a matter of whether you charge your subscribers, but if you put it on your cable, you should pay.

Mr. COOPER. Many systems have a 24-hour movie channel. That is not something you pay extra for, that is just part of the service.

Mr. KASTENMEIER. Getting back to my question, what I am trying to establish is that if cable systems involve themselves in certain activities—which some of your members must—then to that extent they might, you concede, owe a copyright. So, it isn't a flat no-copyright-at-all situation, but no copyright if, or unless a cable system involves itself in certain aspects.

Mr. COOPER. No copyright payment for signal transmission, is, I believe what we are saying. I don't like the word "retransmission," but everybody uses it.

Mr. KASTENMEIER. But the fact of life is that increasingly cable systems do much more than simply retransmission.

Mr. COOPER. And they do pay for it now, sir, when they are out buying Bambi to show.

Mr. KASTENMEIER. It is a rather mixed situation, it isn't quite as black and white.

Mr. COOPER. That is exactly right, exactly right. They do pay for it now when they show Bambi.

Mr. DRINAN. One more question. I wonder, sir, if you have statutory language, what would you substitute for 2223, the relevant sections? If you would have that prepared, I think that would give me, at least, a better idea.

Mr. COOPER. I can submit that to you.

Mr. DRINAN. Thank you.

Mr. COOPER. Thank you,sir.

Mr. KASTENMEIER. Mr. Cooper, I want to compliment you on your presentation here this morning, we appreciate it.

Mr. COOPER. Thank you, sir.

[The prepared statement of Robert Cooper follows:]

STATEMENT OF ROBERT COOPER, EXECUTIVE DIRECTOR, CATA

Mr. Chairman, and members of the subcommittee, I am Robert Cooper, Executive Director of CATV.

CATA, the Community Antenna Television Association, is a trade association organized in 1973 that today has as members some 400 CATV systems throughout the United States. Originally organized to focus on proposed copyright legislation, CATA has broadened its membership and scope of activities to include such matters as participating in FCC proceedings. Generally stated, CATA's philosophy recognizes that the roots of CATV lie within the community—hence our name, a name abandoned in the 1960s by our immediate predecessors in testimony.

We are not here to pull punches or present diplomatic truths—just real truths. Nor will we play a lengthy numbers game. By a numbers game. I mean statistics on who does or does not support this bill. However, you should know that some 25 state and regional associations have voted against the NCTA position. And you can count on the fingers of one hand the state and regional associations still supporting the NCTA position. Furthermore, the Pennsylvania State Association and the NCTA's largest single member company, TelePrompTer, have requested and received time on their own to present views contrary to NCTA. TelePrompTer and the Pennsylvania systems serve over two million homes. These statistics reveal only conclusions, not reasons. We submit that the only reason CATV copyright presently has any support is not because the copyright-supporting splinter of the industry believes that CATV should pay; but because it is politically expedient to do so and because of something called the consensus agreement. The NCTA, NAB, and MPAA can try to explain that agreement to you. For our part, we will concentrate on the merits of the copyright issue.

CATA is here today because its membership does not believe that the motion picture industry is entitled to place its hands in the pockets of CATV operators or CATV subscribers. We reject the joint copyright position of NCTA-NAB-MPAA that CATV owes reasonable copyright.

The imposition of copyright on CATV is, in part, a tax on the viewing public. It is also a deception to an American television-viewing public which has been told time and time again of the benevolence of broadcaster-delivered "free television". As we all know, it is not a free system—it is an advertiser-supported system which means we all pay once for the programs we watch by paying higher prices for television-advertised products. Also, approximately ten million households must pay a second time to actually receive television signals or clear pictures by subscribing to CATV. And now, through copyright legislation, they will be asked to pay yet a third time. Remember, CATV probably would never have come into existence if the FCC had fastidiously followed the Congressional mandate of Section One of the Communications Act "to make available, so far

as possible, to all the people of the United States, a rapid, efficient, nation-wide, and world-wide wire and radiocommunications service." Yet, twenty-five years after the FCC commenced fumbling with television allocations, two million households or 3 percent of all homes, receive absolutely no over-the-air television signals. It is estimated that over ten million homes, or 15 percent of the population, do not receive the three national network signals off the air. It is CATV, however, that over the last 25 years has filled gaps in the FCC's allocations voids and lent a boost to UHF television in tandem with your all channel receiver law.

It is antithetical, then, to your Communications Act purposes to saddle CATV, and through it, the American television-viewing public with a tax for the privilege of watching.

Copyright is a creation of the legislature under a constitutionally delegated power: "To promote the progress of science and useful acts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

Also under the Constitution, you have specifically been delegated power to make laws affecting interstate commerce and have done so vis-a-vis broadcasting by passage of the Communications Act. Today, the Communications Act and Copyright Act are in a state of apparent tension. I say apparent because the program suppliers would have you believe that the main purpose of copyright is to give authors money so that they will have incentive to write. Not true. The main purpose is not to reward authors, but to insure that creative works find their way to the public. The Supreme Court has pointed out that in economic terms, copyright grants are made in "the connection that encouragement of individual effort by personal gain is the best way to advance public welfare. * * *" Thus, the tension dissolves when it is realized that Congress has also established a Communications Act and created the FCC to fulfill similar, if not identical, purposes: those being to secure the general benefits of radio and television programming to all the people of the United States and to encourage their larger and more effective use in the public interest. In these stated purposes, it is inconceivable that the FCC's own general counsel could testify before you that CATV should pay just because the argument has been around for a long time. We submit that if the FCC testifies in support of copyright, it ought to relate that testimony to some area of concern within its jurisdiction. If Mr. Hardy desires to see resolution of the issue merely for the sake of resolution, his desire can be accommodated just as well by deleting CATV from this bill.

There are other voices in and out of the CATV industry who say that "the copyright issue must be solved—it must be put behind us, because until it is laid to rest, the investment community will not advance the capital required by cable to expand and grow."

We have no quarrel with this line of reasoning, except when it is expanded to the illogical conclusion that the industry should simply pay copyright merely to expedite the removal of this uncertainty when CATV's future is better served by the removal of CATV from copyright legislation.

And then, there are voices in our industry who say "We can afford to pay" with remarks like "What is one or two or 2½ percent of our gross?" Let me tell you what it is.

In December, 1973, CATA turned into Senator John McClellan an economic study of more than 250 CATV systems, ranging in size from 40 subscribers to 5,800 subscribers. In that study, which we will submit for the record, CATA found that in the singular "rate" level of one percent of gross proceeds to copyright that, among other breakdowns by system size, systems of 1,001-1,500 subscribers would experience reduction of net revenues of 13.8 percent.

Frankly, the industry cannot afford to pay and that is the truth. Lest this be considered solely a pitch for a small system exemption, that is, a flat dollar exemption, such as $100,000, it is not. For copyright will adversely affect larger systems, including multiply owned systems.

We also regard as fundamental considerations the following questions which should be asked of every proponent of copyright liability for CATV:

1. Why should this industry pay?
2. Who will really pay?
3. Who will receive the payments?

CATV should not pay copyright because there is no debt owing. There are hundreds of thousands of hospital rooms in this country offering television service at a price. Patients rent a television set and the set supplier, the hospital,

and maintenance man profit. Rates are as high as $3 a day. There is an unmolested industry—hospital television—possibly with gross revenues exceeding CATV. Why are they not in the copyright bill? Because they are providing the service of facilitating television viewing. The Supreme Court has twice held that the same rationale applies to CATV. These cases are instructive. First, one must lay aside the program-supplier sponsored line that the cases are irrelevant because they dealt with the 1909 Copyright Act. Of course, the Supreme Court was dealing with a 1909 Copyright Act. But they said, in Fortnightly that the decision was made "with due regard to changing technology. * * *", i.e., not based on 1909 concepts. The Court held: "* * * mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception."

The Court reasoned television viewing was a combined activity of broadcasters and viewers; that broadcasters perform and viewers do not; broadcasters are active performers and viewers passive beneficiaries and CATV "falls on the viewer's side of the line."

The Court concluded as a matter of separation of powers—not as a matter of copyright policy—that the job of accommodating "various competing considerations of copyright, communications, and antitrust" belonged to Congress. The Court did not intend that Congress, in fact, adopt CATV copyright liability.

Then came *TelePrompTer-CBS*, where the Court was faced with microwaved, long-distance signal importation—more than 450 miles—by CATV systems that also originated their own programs, also sold local advertising and interconnected with other systems. It was contended that this entire package moved CATV to the broadcaster side of the line. The Court found no copyright significance to the other CATV activities and found that the distance that signals travelled did not "alter the function [CATV] performs for its subscribers." The Court stated: "When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing *is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer.*" (Emphasis added.)

Mr. Chairman, members of this committee, two points: (1) When a television station broadcasts, the broadcast is in the public domain; (2) The Supreme Court's characterization of what CATV does is as true today as it was when the Court made its decision. What CATV does—its viewer function—is not altered by the words of the 1909 Act or H.R. 2223.

Those advocating CATV liability have a high burden of persuasion because CATV fulfills Communications Act goals by making television more widely available or available for the first time. It is a viewer-oriented medium, as are translators, master antennae, rooftop antennae, and television sets themselves. None of these entities are prospectively liable for copyright under your bill. None should be, for they are all part of the process of nationwide dissemination of programming that you have legislated in the Communications Act.

In *TelePrompTer-CBS*, the copyright holders argued that CATV prerelease of programs (which would not apply to network television) would dilute the profitability of reruns and other syndicated properties, thus removing incentives to produce television programs. The Court rejected this argument. It recognized that the appropriate nexus was missing, that is, copyright holders do not receive money from the ultimate user—the television viewer—but from the advertisers "who use the drawing power of the copyrighted material to promote their goods and services."

The Court recognized: that distant signal carriage does not interfere with the "copyright holders' means of extracting recompense for their creativity and labor"; and that, in fact, CATV provides a larger viewer market (to the benefit of both the advertiser and copyright holder).

We submit that CATV should not pay because it does not owe. Copyright holders are paid by advertisers, not currently, and hopefully, not in the future, by viewers or by those that help the viewing process—CATV systems.

This leads to the second question—who will really pay. There is no doubt that your imposition of copyright on CATV would be, at least in part, a consumer tax on television viewing. Some have difficulty with the word "tax". But it is a form of territorial taxation, that is, a special television viewing charge to be paid only by cable viewers. Must the viewer himself pay it? It could stop at the cable company. But it will not because there are no free lunches. Is it a large amount? At the national average cable charge of $6 per month per home, the copyright bite is $1.80 per year—for the 2.5 percent rate, irrespective of number of signals carried.

In the seven Congressional districts of this Committee, there are approximately 73,000 cable homes. Under this bill, these 73,000 homes could pay to copyright holders up to $131,400 per year.

What about the television viewers? They care, too. We have already received more than 200 community resolutions opposing this viewing tax from cities as diverse as Eau Claire, Wisconsin, and Granville Village, New York.

These resolutions from municipalities will be supplied for the record. Further, the United States Conference of Mayors and the League of Cities also adopted a joint resolution opposing the inclusion of CATV in the copyright bill. Your constituents are concerned about higher CATV charges that will result from copyright legislation.

The third question concerns to whom copyright payment would be made. Jack Valenti, president of the MPAA, told Senator McClellan's Committee on the Judiciary on August 1, 1973, that he represents the Committee of Copyright Owners, composed of eight independent suppliers of copyrighted television programs: (1) Columbia Pictures Industries, Inc.; (2) Metro-Goldwyn-Mayer, Inc.; (3) Metromedia Producers Corporation; (4) Paramount Pictures Corporation; (5) Twentieth Century Fox Film Corporation; (6) United Artists Corporation; (7) MCA, Inc.; and (8) Warner Brothers, Inc. Mr. Valenti said: "* * * the programs supplied by members of CCO to stations, and thereby to cable systems, constitute by far the largest part of all copyright programs carried by television and cable. * * *" CATA has completed a tabulation of copyright registrations for television programs broadcast in New York City during a recent week.

Of all program hours telecast by the three networks in New York City, between 5:00 p.m. and 11:30 p.m., in the sample week:

46.15 percent of all copyright-on-file program time on CBS was owned on record by one of these eight CCO firms; similarly, 31.58 percent for NBC; and 16.67 percent for ABC.

Finally, movie copyrights on file for that week reflected that 51 of 68 movies (60 percent) were owned by one of these eight firms. Clearly, Mr. Valenti is correct in his analysis of who owns copyright. But to make the analysis and our point more clear, please consider that the largest copyright owner of the big eight—MCA—had gross revenues in 1974 of $641 million—a third more than not the largest cable company, but all cable companies—the whole cable industry. Given the state of economic affairs in the cable industry, we are indeed saddened that we were not first in thinking of a relief act for our industry—a royalty from program suppliers to CATV for aiding viewers to see their programs. They can clearly afford to pay.

Mr. KASTENMEIER. Our next witness is Mr. Frederick W. Ford, counsel for the Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law. Mr. Ford, would you like to introduce your colleagues?

TESTIMONY OF FREDERICK W. FORD, COUNSEL, AD HOC COMMITTEE OF CONCERNED CABLE TELEVISION OPERATORS FOR A FAIR COPYRIGHT LAW

Mr. FORD. Mr. Chairman and members of the committee, I am Frederick W. Ford, a member of the Washington law firm of Pittman Lovett Ford & Hennessey, with offices at 1819 H Street NW. I appear here today on behalf of the Ad Hoc Committee of Concerned Cable Television Operators for a Fair Copyright Law to suggest an amendment to the bill and to support passage of the bill, as amended.

Accompanying me are Ben V. Willie of Iowa; C. Warren Fribley of New York; Lawrence Flinn of Connecticut, and George Gardner of Pennsylvania.

I have conceded 5 minutes of the time alloted to me to Teleprompter Corp., which is the largest owner of cable television in the country. I have, therefore, cut my statement rather drastically. I would like to have the entire statement incorporated in the record, because I will eliminate large parts of it in order to confine myself to the allotted time.

Mr. KASTENMEIER. The chairman appreciates that, Mr. Ford, and without objection the 17-page statement and the appendixes will be received for the record.

Mr. FORD. The ad hoc committee opposes the payment of copyright on the community antenna function, and suggests an amendment to the bill to eliminate copyright liability of community antennas for carriage of television signals. That suggested amendment is contained in footnote 5.

The ad hoc committee does not view the matter of copyright payments as an issue between it and the Office of Copyrights, the copyright owners, the NAB, AMST, or NCTA, because none of them will pay copyright, only the public ultimately pays copyright on television programs. The issue here is between the copyright owners and the subscribing members of the public to community antennas.

The issue is as follows: Should the Congress, contrary to the reason and logic of the U.S. Supreme Court, on two occasions, create the legislative fiction that CATV is engaged in the display or performance of a copyrighted work publicly and is, therefore, liable for the payment of copyright fees which, of course, it would have to collect from the public as a part of its antenna service?

The public should not be required to pay a second copyright fee for the same program because of the type of antenna it uses.

The Office of Copyrights makes its case for CATV copyright liability on the fact that CATV charges its subscribers a fee for its antenna services which makes a profit and failure to share these profits could damage the copyright. The Supreme Court disagreed with these assumptions and found otherwise in *TelePrompTer Corporation* v. *CBS*, 415 U.S. 394 (1974). If the Office of Copyright's theory of liability is correct—which it is not—then anyone who makes a profit, directly or indirectly, from a performance of a copyrighted work should be liable. This liability would run to wire and receiver manufacturers and countless other business enterprises which enable the public to view the performance.

CATV services keeps the copyright owner honest by delivering the signal carrying his program to the public for which he has been paid.

At the present time, a sponsor who buys a program usually pays the copyright owner for one performance over one or more stations. The sponsor pays the copyright owner, directly or indirectly, for tickets to the show for everyone within the grade B contour of the stations televising it and as far beyond that contour as it can be received. This cost is passed on to the public eventually in the purchase price of the product.

It is a scientific fact, recognized in the Sixth Report and Order, however, that over average terrain only 90 percent of the locations in the grade A contour receive an adequate signal 50 percent of the time, and within the grade B contour only 70 percent of the locations receive an adequate signal 50 percent of the time. I will venture that most sponsors paying for a program think they are getting a potential of 100 percent of the locations 100 percent of the time, but that just isn't so, even though the copyright owner is probably collecting for 100 percent of the locations 100 percent of the time.

A community antenna television system within the grade B contour merely aids the sponsor in getting his money's worth from the copyright owner and the station by assuring the sponsor that anyone who desires the signal will receive it clearly, and thus increase the potential audience. Certain copyright owners are not satisfied with this. They collect from the sponsor who recovers his cost from the public and they would like to collect again from the CATV operator who must also pass his cost on to the public. Some way or other it does not seem right for the public to have to pay for "two tickets to the same performance." No one has attempted successfully, to my knowledge, to refute this argument. They merely ignore it and talk about something else.

Cable television or its advertisers will pay for any copyrighted program it originates, whereas the public would receive nothing for the cash the broadcasters would have the copyright owner siphon from the public via CATV which otherwise could be used for copyright fees for more diverse programing.

There is a basic conflict between communications policy and any copyright law in which a cable antenna system is required to pay copyright on any signal it is authorized to receive and distribute on its system by the Federal Communications Commission.

The proposed legislation would compel CATV to pay copyright owners for distributing signals carrying their copyrighted works. The broadcaster has the right to pick and choose the copyrighted works he will buy and broadcast.

Congress should set the record straight. If the Commission is confirmed by Congress in the power to require carriage of particular signals by CATV, then CATV will remain a supplemental reception service, perform nothing, and owe nothing.

If it is desired to require copyright payment by CATV for its supplemental role, then CATV should be entitled to carry whatever programs it desires, delete the advertising, and substitute its own. This is strictly a communications policy question. The broadcaster should not be permitted to have it both ways—collect additional revenue from sponsors for the added carriage of CATV and require CATV to pay copyright fees.

In short, the broadcaster is arguing for the morality of unjust enrichment to copyright owners at the expense of the public CATV serves, as a means of using copyright to restrict the growth of CATV. It is the public who will unjustly enrich the broadcaster and/or the copyright owner, not the CATV operators. These anti-consumer provisions should not be enacted into law.

We urge the Congress not to compromise the fundamental legal principles established by the U.S. Supreme Court on two occasions.

decisions that are on the side of the viewer. The broadcaster, whatever his motives are, is wrong in trying to saddle its viewers with extra copyright payments to view its "free" programs through use of a more efficient rented antenna.

Imposing copyright fees on the community antenna function and, in effect, making the American public pay tribute twice to the 28 corporations in New York and Hollywood that own substantially all of the copyrighted material on TV, to watch "free TV" is wrong. If the copyright owners or merchandisers exercise forbearance on the short-term profit of double payment and permit cable television to flourish, they will be amply rewarded with even greater profits from the insatiable requirements of cable television for material to fill its many origination channels in the years to come.

The Commission's power to limit the number of distant signals imported by microwave has been confirmed. No further power is needed to protect the copyright owner and the public interest.

Now that the "unfair competition" shibboleth has been discredited, the only bases for contending that CATV should pay copyright are:

One: That it makes a profit from the use of copyrighted material, and

Two: That it really does engage in public performance for profit.

Neither one of these positions are sound. There is no principle of copyright law which assesses liability for copyright based on profit alone and certainly none exists in the pending bill.

As to the display or performance of copyrighted works publicly by community antennas, the complete answer is that a reception antenna does not perform. The cable operator does not convert the electronic signal into pictures and sound—he merely delivers a signal to the subscriber who furnishes his own equipment to convert the signal to pictures and sound in order to receive and view the performance. The CATV operator does not use or sell any program or the peformance thereof either publicly or privately. A CATV operator sells a receiving antenna service, just as a manufacturer sells a receiving antenna from which he makes a profit. But, community antennas do not perform anything.

Despite the FCC's push for copyright liability, the copyright law is not the place to bypass the Commerce Committees and embed regulatory flexibility in concrete. The Senate Commerce Committee in its report on S. 1361 stated that "it believes that in view of the potential impact of certain provisions in S. 1361 on our nationwide communication service, ample opportunity should have been afforded it to consider those provisions in-depth and to have held hearings on the communications issues."

Certainly, CATV should be eliminated from this bill, if for no other reason than to permit the Commerce Committees to develop a national communications policy on cable television before any copyright policy on the community antenna function is undertaken.

Based on the foregoing review of the background and the provisions of this legislation, it must be concluded that the provisions of H.R. 2223 concerning CATV are philosophically unsound. An across-the-board payment, including payment by the public for two tickets to the same performance or for distant signals as limited by the Commission's rules, is, in our opinion, soaking the consumer.

We believe that this subcommittee is justified and should adopt the community antenna industry's historical position by amending this bill to eliminate any copyright liability for the community antenna function, under section 106 or other provisions of H.R. 2223, but not, of course, the origination function of cable television systems for which it should be liable like anyone else.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Ford. The Chair yields to the gentleman from New York, Mr. Pattison.

Mr. PATTISON. I have no questions. It seems to me that this statement is basically—there are no substantial disagreements between your position and the position that was stated just a few minutes ago.

Mr. FORD. Well, I haven't heard all of the statement, I haven't seen it. Some of the answers I would not agree with. I think, fundamentally, I am making a very decided distinction between the performer and the viewer.

Mr. PATTISON. I have no further questions.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. Mr. Ford, I am going to make an argument to which I do not expect you to agree, but I would like you to give me your reasons for disagreeing.

I think it can be stated fairly and accurately that there is some relationship between payment of copyright and the market to be served by the copyrighted work. For example, the sale by a playwright to an individual producer for the performance of a play does not carry with it that all other producers may reproduce that play for profit without a further payment.

Similarly, the production of a movie for showing at residential theaters does not carry with it the implication that it can be reproduced on television without the payment of an additional copyright fee.

The reason, I think, is that the owner of a copyright bargained for a particular market, and that he did not bargain for more than that. Now, if there is some validity to this argument, could it not be said that the owner of a copyright, selling copyrighted work, the original transmitter, bargains for a market, and he did not bargain for the expanded market by cable television, and that accordingly, he should get some additional compensation by reason of that expanded market.

Mr. FORD. Well, my response is that he does in fact bargain and receives payment for every person who has a receiver within the reach of that television station. So, he makes his bargain, he gets his cash. He intends to sell it, and he dedicates it to the public within the bounds of that station.

And when he figures his price, he knows substantially how many people are there. He knows precisely what he is selling, and who he is dedicating this program to.

Mr. WIGGINS. Well, I am assuming something that you may challenge, that the cable opens up a new market that is not available to normal transmission.

Mr. FORD. But the advertiser receives the benefit of that. And the copyright owner, as the Supreme Court pointed out, will increase his fee to compensate him for the reception of that program by all the people within that area. That was the logic on which the Supreme Court permitted the distant signal to be brought in because it said it

did not—the Supreme Court in its logic said—it did not affect the ability of the copyright owner to extract compensation for his product.

Mr. WIGGINS. In summary, then, your answer to my argument is that it is the same market.

Mr. FORD. The same market. It has been paid for by the man watching that program simultaneously with its broadcast.

Now, when you get into delayed broadcasts, when you get into some of the other things, then you are getting into the question of origination, the producer; you have the other producer, the books and all those other things which are different.

But what I am talking about is a simultaneous reception, and there is no basis under the Sun for the copyright owner to get paid a second time.

Mr. WIGGINS. In that event, would you differentiate between local and distant signals?

Mr. FORD. No, I would not. I would have up until the Supreme Court decision; and the logic for this can be found in the CBS case. I think, when you look at it, the Commission limits the number of distant signals that can be brought in.

If you look at the cited statistics in my statement—which I did not read—the income of the copyright owners—and we are talking about, really, only 28 companies. If we look at their income from copyrights, as near as we can determine from the figures which have been published, they have made a very substantial increase in their income as a result of television.

Now, as a result, if a few distant signals are brought in, they should give something back for this tremendous increase in profits they have made in the last 10 years.

Mr. WIGGINS. To whom?

Mr. FORD. To the public by not charging the public. For instance, about 85 percent of the public is in the first 100 markets. And these distant signals that are brought in are most beneficial to those other markets beyond the first 100 markets.

Mr. WIGGINS. Just to get a direct answer, you would not support the concept of a copyright payment for the importation of distant signals for simultaneous transmission on local television?

Mr. FORD. No, based on the Supreme Court decisions.

Mr. KASTENMEIER. The gentleman from Massachusetts, Mr. Drinan.

Mr. DRINAN. Thank you very much, Mr. Chairman. Mr. Ford, the statute that you refer to on page 5 does not, as I read it, state categorically that the transmission has to be simultaneous; perhaps it is there. This would allow for delayed broadcast.

Mr. FORD. It is not intended.

Mr. DRINAN. Not intended. But you intend it.

Mr. FORD. "The further transmitting to the public, by means of broadcast receiving equipment of whatever design, including antennas, and related equipment, wherever located, which receives and makes available by means of cable, or wires and related equipment to individual reception sets," there is nothing in here that would permit anything other than simultaneous reception.

Mr. DRINAN. It does not preclude it, though.

Mr. FORD. Probably.

Mr. DRINAN. You should tighten that up.

Mr. FORD. In the "Provided" part it probably does. "The further transmission is made without altering or adding to the content"—there is no specific prohibition against that. It should be tightened up.

Mr. DRINAN. Thank you.

Now, I have trouble with the words also "no direct transmission fee is charged" the words "direct admission fee," if an auditorium invited 500 people to see something that they otherwise could not see, I would assume that you would say they should pay the copyright.

Mr. FORD. I would say that is logically converting it from a reception service to a production and a performance.

Mr. DRINAN. All right.

Mr. FORD. There should be a copyright paid.

Mr. DRINAN. How can you say there is no direct transmission fee when they pay $5 or $6 a month?

Mr. FORD. What was that, again?

Mr. DRINAN. If they pay a direct admission fee, pay their dollar to get in to see that nice film that otherwise they couldn't see, you would say they have to give the copyright to the original transmitter.

How can you say, if they pay $6 a month for this regular subscribing service, that they are immune from that copyright liability?

Mr. FORD. They are paying for a service, an antenna service, $6 a month. They are paying an admission fee to a performance in the other case; that is the distinction that I make.

Mr. DRINAN. I suppose the transmission fee in that other case just covers the cost of the cable television.

Mr. FORD. Well, the issue is whether it is a performance or isn't a performance. If it just covers the cost, it's still a performance; and it is not a payment for the reception service, or the rental of the antenna. It is the admission charge to a performance, and I would make that distinction.

Mr. DRINAN. Well, while your testimony is persuasive, Commissioner, may I just conclude by asking, is this proposed amendment to section 106, is that all that you want in the law, from this testimony?

Mr. FORD. That's correct. There are some things that have to be deleted.

Mr. DRINAN. That's the essential thrust.

Mr. FORD. Yes.

Mr. DRINAN. Thank you very much.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

I want to recap again with you my impression, and that impression is from your testimony. In response to Mr. Wiggins' questions, Mr. Wiggins brought out that a copyright owner on a theatrical production, for example, charges a royalty fee for a performance within a theater, with which I have no quarrel.

The fee is the same, regardless of whether a theater is sold 10 percent, or 50 percent, or standing room only; the fee is the same. He is paying a fee for the potential audience, which would have to be 100 percent full, that is the potential. Now, that is true if it is a regular, legitimate theater, a motion picture theater, or a drive-in, the same analogy applies.

I think it is your position that where a motion picture is broadcast by television through a broadcasting channel, the royalty rate is in-

cluded on the basis of the potential audience of that TV station; whether all the people listen, or part of them, that's the potential audience, potentially 100 percent of the viewing public within both the grade A and the grade B contours.

I think it's your position that cable within those areas simply enhances the possibility that you may get a 100-percent audience. On the other extreme, where cable originates a program, originates a movie, for example, you have no objection in your philosophy to the payment of a royalty.

Mr. FORD. If he becomes the producer of the program, that's right.

Mr. DANIELSON. So, you accept that concept.

Mr. FORD. That is on a bargaining basis.

Mr. DANIELSON. I understand both of these, and I have one that gives me a problem, and that is an imported signal. The imported signal is broadcast, but in computing the royalty fee that the advertiser has to pay, in fact, he was computing a full house within the grade A and grade B contour, but he wasn't necessarily computing this outlying area, the area into which it's imported—or into which it's exported, I don't know which it is. I have a problem there, would you help me out on that?

Mr. FORD. Yes. The Commission requires very detailed reports on what stations are carried by what systems. There is a very definite, specific limitation on the number of distant signals that you can bring in. Any copyrighter, in selling his product to a particular station that is a distant station, for instance Arlington, knows full well that that program is going to be delivered to that community, and he will adjust his rate accordingly.

That is why I believe the Supreme Court said that the importation of a distant signal did not prevent the copyright owner from extracting the full value for his product.

Mr. DANIELSON. On this theater concept, again, with a potential full house, standing room only; if the theater is half empty, I guess the copyright owner prevents the theater owner from giving away the rest of the tickets and bringing in 500 people who might not otherwise have attended. It makes no difference on his royalty.

Mr. FORD. And in addition to that, his next attraction, he will not pay quite as much.

Mr. DANIELSON. That is a matter of bargaining.

One last thing is a comment. I'm glad that you have recognized what bothered me very much in all those hearings, that there seems to be a confusion between a communications policy and a copyright policy. Our committee is charged with the copyright policy, and I think there seems to be an effort to try to have it in the regulations for communications through the device of copyright.

Well, thank you very much.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. Do you think there might be a constitutional problem, by having the Copyright Office too involved in administering this, as it is a kind of quasi-legislative agency, an executive-type agency?

Mr. FORD. I really hadn't considered at any length the Copyright Office involvement except to the extent that I know they are going to ask for a lot of information; and knowing bureaucracies as I do, it will get greater, and greater, and greater. We are already regulated by the FCC, the States are now moving into it, and to have the Copyright

Office move into it too, it just seems to me that the industry is going to be swamped in paper.

Mr. RAILSBACK. Am I correct then, that you would favor the FCC handling it?

Mr. FORD. I think there is no question that on the technical aspects of cable television we must have a uniform system. The FCC must have jurisdiction to regulate certain aspects of cable television, there is no question about that.

Mr. RAILSBACK. Thank you.

Mr. FORD. There is one thing I would like to add, if I may. There was a statement to the effect—or a question—concerning the Consensus Agreement.

Within 3 months after the Consensus Agreement was issued, the Commission issued its statement, its Rules of 1972, and in the course of that, in my view, they abrogated the Consensus Agreement within 3 months. And not only that, but within the last few weeks they issued another report in Docket No. 19995 in which they repeated that.

As far as I am concerned, the Consensus Agreement wasn't an agreement to begin with, never has been, and shouldn't be recognized at any time by anybody.

Mr. KASTENMEIER. Mr. Ford, I just have one more question. You were talking about the Commission; do you agree with its rule on exclusivity, 76–151, the rule referred to by Mr. Bradley?

Mr. FORD. I am probably its most ardent foe. I have presently a case pending on behalf of Mr. Barco who will be here in a few moments, before the Court of Appeals, and hopefully they will disagree with about six other circuits that have held the nonduplication rule valid. I think it is invalid, I think it is terrible, and I hope to get it knocked out.

Mr. KASTENMEIER. The reason I asked you, to the extent that you and anyone else rely on those as a reason for us not to legislate in the area of copyright because the FCC made these rules to protect these people, and therefore we should rely on these rules. But if in fact we can't rely on these rules either, there may not be very much to rely upon.

Mr. FORD. Well, hopefully, within a few weeks, there will be nothing to rely upon. [Laughter.]

Mr. KASTENMEIER. One other question, and it is just a matter of information, I don't know that it really pertains to what we are doing. The question is, do cable system managements have the right to deny membership by any applicant, up or down the block in the city?

Mr. FORD. This is a very young industry, and some of the franchises issued were two paragraphs, one was just the consent to hook up wires. And as the industry matures, as new franchises are being written, as cities become more mature, then, I think, we will find a definite obligation that you cannot deny service, the same as a public utility.

Mr. KASTENMEIER. Certainly broadcasters cannot deny service to anybody. But to the extent that cable television is different, that you do have a subscriber, you could either make the contract with such a person, or not. It may differ in terms of the potential market.

Mr. FORD. I have never heard—and I have been pretty active—but I have never heard of any difficulty at all because every cable operator I know will get every connection he can get.

Now, there are problems. For example, supposing a particular house is out in the country 8 miles, by itself, and your rate is $4 a month; it costs $4,000 a mile to run a cable out there, then you have problems. But probably the franchise is so written as not to include those outlying areas.

Mr. KASTENMEIER. Well, I think theoretically you might have a problem there, you might have a subscriber who is an electronics expert, you might have a subscriber on the system who originates and transmits, who might transmit himself. I don't know if that would be possible, but he would transmit to his neighbors up and down the street for a lesser fee. I was just wondering what the relationship would be of the original cable operator and the subsequent operator in the field who is obviously not paying copyright, other than to retransmit such signals.

Mr. FORD. Well, this raises a bunch of questions. Most cities do not grant exclusive licenses, or exclusive franchises, at least they have not in the past. But most of them now have ordinances which prohibit the operation of a system—and they define "system"—without a certificate from the city. The Commission defines 50 customers as a cable system before you become subject to those various rules.

But basically there is no problem at all, most of the ordinances exclude apartment houses. And of course the legislation here exempts apartment houses. Now, some of these apartment houses may have two, or three thousand apartments in them and yet, they will be exempt under the bill which is pending here; whereas a cable system of a thousand customers in a little small town out here will be liable. So, to that extent it's an inaccurate bill.

Mr. KASTENMEIER. Well. I was looking, theoretically, at what problems could arise.

Mr. FORD. Yes.

Mr. KASTENMEIER. In any event, the committee thanks you again for appearing this morning.

Mr. FORD. I tell you, I hope I'm not going to be back in here in 10 years.

Mr. DANIELSON. I hope you are, we'll have a better bill.

[The prepared statement of Frederick W. Ford follows:]

STATEMENT OF FREDERICK W. FORD ON BEHALF OF THE AD HOC COMMITTEE OF CONCERNED CABLE TELEVISION OPERATORS FOR A FAIR COPYRIGHT LAW

I. INTRODUCTION

Mr. Chairman: My name is Frederick W. Ford. I am a member of the Washington, D.C. law firm of Pittman Lovett Ford and Hennessey, with offices at 1819 H Street, N.W. I appear here today on behalf of the Ad Hoc Committee of Concerned Cable Television Operators For a Fair Copyright Law to suggest an Amendment to the Bill and to support passage of the Bill, as amended.

H.R. 2223 is almost identical with S. 1361 which was passed by the Senate at the Second Session of the 93rd Congress. Senate Report No. 93-983 from the Committee on the Judiciary and Senate Report No. 93-1035 from the Committee on Commerce to accompany S. 1361 contain the views of the Committees on that Bill. The Report of the Judiciary Committee (p. 100) contains a history of the Copyright Revision Legislation, a sectional analysis of the Bill and discussion.[1]

[1] There is attached hereto as Appendix 1 a Memorandum to The Ad Hoc Committee of Concerned Cable Television Operators For a Fair Copyright Law on S. 1361, dated November 15, 1974, explaining the reasons the industry has tried in the past to compromise this issue. All of those efforts were unsuccessful. The 1974 Supreme Court's decision in *TelePrompTer* v. *CBS*, *infra*, now places a totally different complexion on the cable copyright issue as to distant signals authorized by the FCC to be carried.

II. PERTINENT PROVISIONS OF H.R. 2223

Briefly, Section 106 gives an exclusive right to a copyright owner to "display" or "perform the copyrighted work publicly" subject to Sections 107-117. Section 111 provides an exemption for certain secondary transmissions, including hotels and apartment houses,[2] institutional material, certain carriers and non-profit groups. Subsection (b) provides for full liability for the retransmission of a Pay-TV work. Subsection (c) provides certain compulsory licenses for the community antenna function of cable systems. Notwithstanding the compulsory license, full copyright liability is imposed if the secondary transmission is not permissible under the FCC rules or authorizations. In short, the public will ultimately have to respond in cash for an operator's violation of FCC rules which certainly has nothing to do with copyright.

Subsection (d) provides for filing certain information with the Office of Copyright, depositing royalty payments there, based on a sliding percentage scale of gross receipts from subscribers, and for the distribution of those funds. Subsection (e) contains various definitions.

Section 801 provides for a Copyright Tribunal to adjust the royalty base as the arbitrators think, if not overruled by the House or Senate within 90 days.

III. DIVERSE POSITIONS

There are strong differences of opinion between the Register of Copyrights, broadcasters, copyright owners and most CATV operators concerning liability of CATV for copyright fees. The Register of Copyrights, broadcasters and copyright owners favor liability of community antennas for copyright. As I understand the situation, the Register of Copyrights' position is not whether but how much CATV should pay. Copyright owners would like the Congress to impose complete liability on community antenna systems. The broadcasters' interest, in whether or not community antennas pay copyright has always been obscure to me, unless the more expenses community antennas have, the higher the rate and the fewer subscribers they will have. Copyright then becomes a device to protect broadcasters—not to compensate the author.

The broadcasters were not very obscure, however, in 1971 when NCTA and the copyright owners were about to compromise their differences. The National Association of Broadcasters and the Association of Maximum Service Telecasters went to the White House Office of Telecommunications Policy[3] and sparked enough pressure by it and the FCC to cause the NCTA Board of Directors to capitulate by a one vote majority into accepting the iniquitous "Consensus Agreement" without change. Apparently, the NCTA still feels committed in principle to pay "reasonable" copyright despite the coercion and even though the FCC repudiated the "Consensus Agreement" within three months after it was initialed[4] as it had to do. But the commitments of the NCTA Board then or now really have no bearing on the issue facing this Subcommittee. Those commitments cannot determine the public interest or, in our opinion, justify this Committee in recommending that the public pay twice to see the same show. The Ad Hoc Committee opposes the payment of copyright on the community antenna function and suggests an amendment to the Bill to eliminate copyright liability of community antennas for carriage of television signals.[5]

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[2] What defense can there be for the provisions of this Bill that establishes copyright liability *based on the method of the viewers' payment?* To wit, hotels and apartments are exempted, as indirect payors, and CATV subscribers are included as direct payors. It is unlikely that the Courts would accept such an arbitrary distinction even if the industries involved agree to it.

[3] *NTCA & Copyright*, The History, Recent Board Action, The Future (Dec. 1974, p. 9).

[4] *Cable Television Report and Order*, 36 FCC 2d 3, 27 (1972). See to same effect, *First Report and Order in Docket No. 19995*, 40 Fed. Reg. 17727 (1975).

[5] The following amendment to section 106 is suggested. Notwithstanding the provisions of section 106, the following are not infringements of copyright:

* * * * * * *

"(5) the further transmitting to the public, by means of broadcast receiving equipment of whatever design, including antennas, and related equipment, wherever located, which receives and makes available by means of cable or wires and related equipment to individual reception sets of the kind commonly used in private homes, of a transmission embodying a performance or exhibition of a work, *Provided*. The further transmission is made without altering or adding to the content of the original transmission and no direct admission fee is charged for the privilege of seeing or hearing such transmission and the receiving apparatus is not coin operated."

IV. THE ISSUE

The Ad Hoc Committee does not view the matter of copyright payments as an issue between it and the Office of Copyrights, the copyright owners, the NAB, AMST, or NCTA, because none of them will pay copyright—only the public ultimately pays copyright on television programs. The issue here is between the *copyright owners* and the *subscribing members of the public* to community antennas. That issue is as follows: "Should the Congress, contrary to the reason and logic of the United States Supreme Court, on two occasions,[6] create the legislative fiction that CATV is engaged in the display or performance of a copyrighted work publicly and is, therefore, liable for the payment of copyright fees which, of course, it would have to collect from the public as a part of its antenna service?"

The proposed legislation would create this legislative fiction by defining the right to display or "perform the copyrighted work publicly."[7] The definitions of "perform," "display," "publicly" and "transmit" in Section 101 of the Bill intend, according to the Committee Report,[8] to mean that "A cable television system is performing when it retransmits the broadcast to its subscribers." The right of public performance in the copyright owner is not limited by any "for profit" requirement. Section 111 of the Bill proposes limited exceptions from liability of CATV and establishes communications policy—the proper function of the Commerce Committee.[9]

V. THE PUBLIC SHOULD NOT BE REQUIRED TO PAY A SECOND COPYRIGHT FEE FOR THE SAME PROGRAM BECAUSE OF THE TYPE ANTENNA IT USES

The Office of Copyright makes its case for CATV copyright liability on the fact that CATV charges its subscribers a fee for its antenna services which makes a profit and failure to share these profits could damage the copyright. The Supreme Court disagreed with these assumptions and found otherwise in *Teleprompter Corp.* v. *CBS*, *supra* n.2. If the Office of Copyrights' theory of liability is correct, which it is not, then anyone who makes a profit, directly or indirectly, from a performance of a copyrighted work should be liable. This liability would run to wire and receiver manufacturers and countless other business enterprises which enable the public to view the performance.

The fact that CATV makes a profit, by assisting the TV station to deliver its programs to the public it is obligated to serve and for which the copyright owner has been paid, has no bearing on whether the public should pay copyright fees via CATV. CATV services keeps the copyright owner honest by delivering the signal carrying his program to the public for which he has been paid.

At the present time, a sponsor who buys a program usually pays the copyright owner for one performance over one or more stations. The sponsor pays the copyright owner, directly or indirectly, for tickets to the show for everyone within the grade B contour of the stations televising it and as far beyond that contour as it can be received. This cost is passed on to the public eventually in the purchase price of the product.

It is a scientific fact, recognized in the Sixth Report and Order,[10] however, that over average terrain only 90% of the locations in the Grade A contour receive an adequate signal 50% of the time, and within the Grade B contour only 70% of the locations receive an adequate signal 50% of the time. I will venture that most sponsors paying for a program think they are getting a potential of 100% of the locations 100% of the time, but that just isn't so, even though the copyright owner is probably collecting for 100% of the locations 100% of the time.

A community antenna television system within the Grade B contour merely aids the sponsor in getting his money's worth from the copyright owner and the station by assuring the sponsor that anyone who desires the signal will receive it clearly, and thus increase the potential audience. Certain copyright owners are not satisfied with this. They collect from the sponsor who recovers his cost from the public and they would like to collect again from the CATV operator who must also pass his cost on to the public. Some way or other it does not seem right for the public to have to pay for "two tickets to the same performance." No one has

[6] *Fortnightly Corp.* v. *United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter, Inc.* v. *CBS*, 415 U.S. 394 (1974).
[7] Sections 102, 106, H.R. 2223, 94th Cong., 1st Sess.
[8] Senate Report No. 93-983, 93rd Cong. on S. 1361, p. 113.
[9] See Senate Report No. 93-1035, 93rd Cong., 2d Sess. on S. 1361, p. 66.
[10] 41 FCC 148.

attempted successfully, to my knowledge, to refute this argument. They merely ignore it and talk about something else.

The copyright owners by virtue of their access to the air, with no charges by the Government to transport their product to the public compared to CATV companies which pay up to $10,000 a mile for their channels of communication to subscribers, should certainly be required to forgo a second fee from a reception service for the public.

This is particularly true here when a handful of companies seek this double payment from the American people across the country for what Congressional policy and judicial rulings now dictate is in the public domain.[11]

Cable television or its advertisers will pay for any copyrighted programs it originates, whereas the public would receive nothing for the cash the broadcasters would have the copyright owner siphon from the public via CATV which otherwise could be used for copyright fees for more diverse programming.

There is a basic conflict between communications policy and any copyright law in which a cable antenna system is required to pay copyright on any signal it is authorized to receive and distribute on its system by the Federal Communications Commission.

The Supreme Court has construed the Communications Act to empower the Commission to regulate CATV. In exercising this power, the Commission requires, as a condition of receiving and carriage of television broadcast signals, that CATV systems carry all local signals. The definition of local signal varies according to the size market where the system is located. Neverthelss, the Commission exercises its power to require carriage of certain signals and permits the carriage of others. Such regulations now constitute CATV a supplemental service to make the Commission's allocations of frequencies more effective. Until set aside, revised or revoked, CATV systems must comply with those carriage rules.

The proposed legislation would compel CATV to pay copyright owners for distributing signals carrying their copyrighted works. The broadcaster has the right to pick and choose the copyrighted works he will buy and broadcast. Congress should set the record straight. If the Commission is confirmed by Congress in the power to require carriage of particular signals by CATV, then CATV will remain a supplemental reception service, perform nothing, and owe nothing. If it is desired to require copyright payment by CATV for its supplemental role, then CATV should be entitled to carry whatever programs it desires, delete the advertising and substitute its own. This is strictly a communications policy question. The broadcaster should not be permitted to have it both ways—collect additional revenue from sponsors for the added carriage of CATV and require CATV to pay copyright fees. In short, the broadcaster is arguing for the morality of *unjust enrichment* to copyright owners at the expense of the public CATV serves as a means of using copyright to restrict the growth of CATV. It is the public who will unjustly enrich the broadcaster and/or the copyright owner—not the CATV operators. These anti-consumer provisions should not be enacted into law.

We urge the Congress *not* to compromise the fundamental legal principles established by the United States Supreme Court on two occasions—decisions that are *on the side of the viewer*. The *broadcaster*—whatever his motives are—is wrong in trying to saddle its viewers with extra copyright payments to view its "free" programs through use of a more efficient rented antenna.

Imposing copyright fees on the community antenna function and, in effect, making the American public pay tribute twice to the 28 corporations in New York and Hollywood that own substantially all of the copyrighted material on TV, to watch "free TV" is wrong. If the copyright owners or merchandisers exercise forbearance on the short term profit of double payment and permit cable television to flourish, they will be amply rewarded with even greater profits from the insatiable requirements of cable television for material to fill its many origination channels in the years to come. The Commission's power to limit the number of distant signals imported by microwave has been confirmed. No further power is needed to protect the copyright owner and the public interest.

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[11] Section 605 of the Communications Act of 1934, as amended, prohibits unauthorized disclosure of interstate wire or radio communications except "This section shall not apply to the receiving, developing, publishing, or *utilizing* the contents of any radio communication which is broadcast or transmitted by amateurs or others for use of the general public. . . ." (Italic supplied.)

Now that the "unfair competition" shibboleth has been discredited,[12] the only bases for contending that CATV should pay copyright are (1) that it makes a profit from the use of copyrighted material and (2) that it really does engage in a *public performance for profit*. Neither one of these positions are sound. There is no principle of copyright law which assesses liability for copyright based on profit alone and certainly none exists in the pending Bill.

As to the display or performance of copyrighted works publicly by community antennas, the complete answer is that a reception antenna does *not* perform. The cable operator does not convert the electronic signal into pictures and sound—he merely delivers a signal to the subscriber who furnishes his own equipment to convert the signal to pictures and sound in order to receive and view the performance. The CATV operator does not use or sell any program or the performance thereof either publicly or privately. A CATV operator sells a receiving antenna service, just as a manufacturer sells a receiving antenna from which he makes a profit, but community antennas do not perform anything. They are, factually and logically, on the side of the viewer. The only way this can be changed is by enactment of the legislative fiction that furnishing an antenna is a performance publicly.

Despite the FCC's push for copyright liability, the copyright law is not the place to bypass the Commerce Committees and embed regulatory flexibility in concrete. The Senate Commerce Committee, in its Report on S. 1361 stated that it " * * * believes that in view of the potential impact of certain provisions in S. 1361 on our Nation-wide communications service, ample opportunity should have been afforded it to consider those provisions in-depth and to have held hearings on the communications issues." Certainly, CATV should be eliminated from this Bill, if for no other reason than to permit the Commerce Committees to develop a national communications policy on cable television before any copyright policy on the community antenna function is undertaken.

IV. CONCLUSION

Based on the foregoing review of the background and the provisions of this legislation, it must be concluded that the provisions of H.R. 2223 concerning CATV are philosophically unsound. An across-the-board payment, including payment by the public for two tickets to the same performance or for distant signals as limited by the Commission's rules, is, in our opinion, soaking the consumer. We believe that this Subcommittee is justified and should adopt the community antenna industry's historical position by amending this Bill to eliminate any copyright liability for the community antenna function, under Section 106 or other provisions of H.R. 2223, but not, of course, the origination function of cable television systems for which it should be liable like anyone else.

Thank you.

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[12] Comments of U.S. Department of Justice in FCC Docket No. 18397A (1970).

"II. THE COMMISSION'S ANALYSIS

"Two premises pervade the Commission's analysis and proposals with respect to importation of distant signals, not only in this immediate proceeding, but throughout its consideration of CATV problems: The first is that television broadcasters are being subjected to 'unfair competition' from CATV operators, and the second is that there is a public interest in preserving marginal television broadcasters from failure by various cross subsidy devices and restrictions aimed at CATV. We submit that both of these are incorrect as a matter of policy.

"1. *Unfair Competition.* The Commission's theory of 'unfair competition' is relatively simple: As a result of the Supreme Court's decision in *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968), CATV operators do not have to pay copyright fees on broadcast signals, and this the Commission says, results in 'unfair competition' against broadcasters who do have to pay copyright fees for programming.

"Certainly the *Fortnightly* decision frees the CATV operator from an expense which broadcasters must bear; but if the Commission is to employ an analysis based on equating lower costs with *'unfair competition,'* then it cannot look at CATV cost savings in isolation.* [Footnote omitted.] It has, for example, turned over to broadcasters publicly owned spectrum at no charges, and allows them to use it at nominal charges. This publicly-owned spectrum, when combined with a broadcast transmitter, constitutes a program delivery system which CATV operators cannot duplicate at anything approaching the unit cost per viewer. Under the Commission's analysis, this constitutes 'unfair competition' by broadcasters against all other media of communications including CATV.

"The Commission's basic error is misapplying the concept of 'unfair competition.' If this concept is to have any meaning it must refer to specific acts by one competitor which are intended to harm others. See generally *Callman, The Law of Unfair Competition, Trademarks and Monopolies, Ch. 2, 'The Theory of Unfair Competition.'* By treating CATV cost savings as 'unfair competition,' the Commission has obscured the basic public policy issues with which it is confronted, and has introduced unnecessarily emotional terminology into the making of policy for both broadcasters and CATV operators."

APPENDIX NO. 1

LAW OFFICES OF
PITTMAN LOVETT FORD AND HENNESSEY
1000 FEDERAL BAR BUILDING WEST
1819 H STREET, NORTHWEST
WASHINGTON, D.C 20006
(202) 293-7400

ELIOT C. LOVETT (1963) -
RALPH D. PITTMAN
FREDERICK W. FORD
LEE G. LOVETT
JOSEPH F. HENNESSEY
JOHN N. PAPAJOHN
ERIC T. ESBENSEN
ROBERT A. BERNSTEIN

CABLE ADDRESS
"PITLO"

OF COUNSEL
GREGG P. SKALL
750 TERMINAL TOWER
CLEVELAND, OHIO 44113
(216) 241-3820

MEMORANDUM

November 15, 1974

TO: Ad Hoc Committee of Concerned Cable Television Operators
For a Fair Copyright Law
Post Office Box 389
Painted Post, New York 14870

FROM: Frederick W. Ford

SUBJECT: Copyright Legislation

This memorandum is in response to your request for an analysis of United Sates Senate Bill No. 1361 which was passed on September 11, 1974 and is now pending in the House of Representatives In addition, this will respond to your further request, by letter of October 29, 1974, that we discuss the reasons that community antenna systems, as distinguished from other phases of cable television systems, should not be liable for copyright. Finally, you ask that an appropriate revision of Section 111 of S.1361 be prepared.

I — BACKGROUND

Before undertaking an analysis of the bill, it is important to understand its background A brief history of the copyright revision program will aid in appreciating the various positions of the cable industry as they have evolved during the past 10 years.

The present Copyright Law of the United States was enacted in 1909 to carry out the following language of Article 1, Sec. 8 of the Constitution of the United States:

> "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The Legislative Appropriations Act of 1955 appropriated funds for a comprehensive program of research and study of Copyright Law revision by the Copyright Office of the Library of Congress A number of reports were published, including the **Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law. 1965 Revision Bill** (89th Cong , 1st Sess , House Committee Print), explaining the thinking behind its various sections. The bill proposed by the Register of Copyrights was introduced on February 4, 1965 (H.R. 4347, 89th Cong., 2nd Sess.).

In describing the basic approach of the bill, the Register of Copyrights stated at page 13·

> "The basic legislative problem is to insure that the copyright law provides the necessary monetary incentive to write, produce, publish, and disseminate creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should because of copyright restrictions."

When some commentators discuss copyright and the incentives to the starving writer in the cold garret, they are not talking about television. There may be starving writers in cold garrets but, if there are any such people involved in television, it is 28 companies, including the networks, that are keeping them there. This copyright bill probably will not put one penny in any of their pockets.

Note the testimony of Mr. Arthur B. Krim, President of the United Artists Corporation, on June 24, 1965, when he appeared before Subcommittee No. 3 of the House Judiciary Committee (Hearings on H.R. 4347, p. 1332), on behalf of Allied Artists Television Corp., Danny Thomas Enterprises, Inc., Desilu Productions, Inc., Embassy Pictures Corp., Independent Television Corp., Metro-Goldwyn Mayer, Inc., Wolper Productions, Inc., Screen Gems, Inc., Seven Arts Productions, Inc., Twentieth Century-Fox Television, Inc., United Artists Television, Inc., Universal Pictures, Inc., Walt Disney Productions, Inc., and Warner Bros. Pictures, Inc. Mr. Krim stated:

> "I think, gentlemen, that this group of companies which, as you can see, number 14, represents in excess of 75 percent of the copyrighted material which is going over the airwaves today. I would venture the further guess that if we were to add to these 14 another number, certainly not more than 14, and of course including the three networks, we would cover so close to 100 percent of the copyrighted material which is going over the airwaves and that the exceptions would be relatively minor in nature."

The Register of Copyrights claimed in his Report that he took no position on the two pending cases against the cable industry.1/ Nevertheless, he stated (p. 22) that under Section 106(a) (4) and (5),

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> "A community antenna service would be performing when it retransmits the broadcast to subscribers over wires;"

On pages 40, et seq., the Report discusses secondary uses of transmissions. It lists the arguments advanced for an outright exemption of CATV and those opposed to any exemption before summarily disposing of this issue as follows:

> "On balance, however, we believe that what community antenna operators are doing represents a performance to the public of the copyright owner's work. We believe not only that the performance results in a profit which in fairness the copyright owner should share, but also that, unless compensated, the performance can have damaging effects upon the value of the copyright. For these reasons, we have not included an exemption for commercial community antenna systems in the bill."

Extensive hearings were held on H.R.4347, in 1965, during the 1st Session of the 89th Congress which resulted in the bill being reported on October 12, 1966 with amendments. These amendments did not alter the definitions recommended by the Register of Copyrights "To perform or display a work 'publicly' " or " 'transmit'." This language was intended to impose full liability on the transmissions by CATV as provided by Section 106 of the bill. Earlier studies of the Office of Copyright had not considered CATV. It was purely an afterthought.

The bill also was amended, however, by adding a highly complicated Section 111 which provided limitations on exclusive rights by secondary transmissions (Union Calendar No. 999, 89th Cong., 2d Sess.). Section 111 contained in H.R.4347 may be briefly summarized in the following six points.

1. In order to enjoy any exemption from the payment of copyright fees, a CATV system must not originate any programming other than "weather, time and news reports, free from editorial comment. agricultural reports, religious services, and local proceedings of governmental bodies", there must be no "commercial or political" advertising or sponsorship of closed circuit presentations, and there must be no charges made for any particular program or programs. Also, not more than two channels may be devoted to originations. Finally, if the CATV operator engages in the deletion of any commercials or station identification, or in any way alters program content, he loses all exemption under the Act.

2. A CATV system otherwise eligible for exemption is not liable for the payment of copyright royalties for any broadcast programs received within the "limits of the area normally encompassed" by the broadcast station whose signal is received, as determined by the Register of Copyrights. Furthermore, if a copyright program is broadcast by two or more TV stations which provide a Grade B signal over the CATV system, and if one of the TV stations has the exclusive license from the copyright owners to transmit the program in the area served by the CATV system, the CATV system must protect that exclusivity, provided it is given ten days' written notice of the exclusivity.

3. A CATV system which receives the program of a television station which does not "normally" serve the area in which the CATV operates must pay copyright fees for such programs, except in an area which is not "adequately" served by television stations.

1/ Fortnightly Corp. v. United Artists Television Inc. 392 U.S. 390 (1968)
TelePrompTer, Inc. v. CBS 415 U.S. 394 (1974)

4. If the CATV system is in an area which is not "adequately" served by television stations, it can receive, under a system of compulsory licensing, the programs of a TV station which does not normally serve the area. The bill or report defines an area as "adequately" served when a "preponderance" or "more than half" or "substantially all" of the programs of the three major television networks are normally received. Also, the exclusivity limitation discussed under paragraph 2, above, applies equally in an inadequately served area. In order to qualify for compulsory licenses for the importation of non-Grade B or non-local signals under the provisions discussed above, the CATV system must supply to the Register of Copyrights information as to the persons who own or control the CATV system and information as to the name and location of the stations carried on the CATV system.

5. If a CATV system receives the programs of non-local stations in an area covered by a "local" station, and duplicates the programming provided by the local station, the CATV system loses all exemption from copyright liability.

6. The parties bargain for a reasonable fee and the Court decides the issue in case they cannot agree. Failure of either party to offer or accept a reasonable fee will incur up to treble fee damages for the copyright holder.

The section reflects many regulatory concepts which would be enforced by the copyright bill. These regulatory concepts, it was understood, had their origin at the Commission. It should be remembered that at this time (October 12, 1966) the legality of the Commission's Second Report and Order asserting general jurisdiction over CATV was still very much in doubt. The Commission's regulatory program of containment "peeks" out of the provisions of this section.

In presenting testimony on H.R. 4347 (89th Cong.), which became H.R. 2512 (90th Cong.), the then President of NCTA (Hearings before Subcommittee No. 3, Committee on the Judiciary, House of Representatives, 89th Cong., 1st Session, p. 1245, June 24, 1965), after discussing the conflict between the bill and communications policy under the jurisdiction of the Interstate and Foreign Commerce Committee, stated that **CATV systems should be free of copyright clearance requirements.** An amendment was then offered2/ (Hearings, p. 1255) to exempt CATV from copyright with the following three qualifications. (1) The further transmission by CATV is made without altering the content, (2) no direct admission fee is charged, and (3) the reception apparatus is not coin operated. This amendment would have removed the possibility, it was stated, of a conflict between this legislation and other legislation being considered for establishment of communications policy.

When H.R. 2512 was passed, Section 111, relating to CATV, was stricken from the bill under an agreement between the Chairmen of the Judiciary Committee and the Interstate and Foreign Commerce Committee. This agreement was entered into to settle a violent dispute between the Committees over regulation of CATV in the copyright bill. This dispute erupted after a speech by Congressman Arch A. Moore, Jr. (R. W.Va.) (Cong. Record, April 6, 1967, p. H3624, et seq.) following up his letter of the previous day to all members of the House.

In his speech, Congressman Moore attacked the bill for attempting to use copyright for the regulatory control of CATV by. (1) an invasion of the jurisdiction of the Commerce Committee, (2) effectively prohibiting CATV from originating programs, and (3) protecting pay-TV on broadcast stations and effectively precluding pay cable.

As the bill passed, it left CATV fully liable for copyright. NCTA agreed to the bill because of the frightening decision of the U.S. District Court (S.D. N.Y.) holding CATV liable for infringement of copyright. If this decision were to be affirmed on appeal, at least half of the legislative process would be completed and speedy legislative action would be possible to protect the industry.

On August 2, 1966, the then President of NCTA presented testimony to the Subcommittee on Patents, Trademarks and Copyrights of the Committee on the Judiciary of the U.S. Senate of S.1006, an identical bill to H.R. 4347. This testimony was delivered some 16 months after testimony before the House on H.R. 4347 and some eight months before House passage of H.R. 2512.

A number of things had occurred between the House and Senate Committee hearings. The District Court (S.D. N.Y.) had held on May 23, 1966 that **Fortnightly's** CATV system had infringed United

2/ "Notwithstanding the provisions of Section 106, the following are not infringements of copyright.

• • • • •

"(5) the further transmitting to the public, by means of broadcast receiving equipment of whatever design, including antennas, and related equipment, wherever located, which receives and makes available by means of cable or wires and related equipment to individual reception sets of the kind commonly used in private homes, of a transmission embodying a performance or exhibition of a work, **Provided.** The further transmission is made without altering or adding to the content of the original transmission and no direct admission fee is charged for the privilege of seeing or hearing such transmission and the receiving apparatus is not coin operated."

Artists copyrights, the FCC asserted jurisdiction over all CATV systems on March 8, 1966, and the House Subcommittee no. 3 announced substantial modification in the provisions of H R. 4347 Operating in this climate, NCTA believed, at that time, that it was compelled to make a compromise proposal In doing so, it was stated:

> "These proposals in their entirety may satisfy no one — certainly not ourselves — but they are made in good faith . . ." (Hearing, Id. p. 86).

There were six points in the proposal. In brief, they were as follows:

1. No liability for programs received off-the-air;
2. A compulsory license for distant signals in an inadequately served area;
3. Industry wide bargaining for programs from distant signals received in adequately served areas at fees fixed by statue somewhat higher than fees in adequately served areas;
4. Liability of CATV for all copyrighted programs which it originates;
5. Music should be considered cleared at the source;
6. No limitation on CATV reception of non-copyrighted programs.

Despite the efforts of NCTA to propose a solution to the copyright issues, admittedly, under the pressure of the District Court holding, no action was taken on that bill. It should be noted that the Department of Justice opposed any extension of copyright liability to CATV because of the possibility of harmful anti-competitive consequences and that this extension is not justified by valid considerations of the right to copyright protection (Hearings, p. 211, et seq.).

S. 597 was introduced by Senator McClellan on January 23, 1967 and S. 543 was introduced by him on January 22, 1969. These bills, so far as CATV is concerned, were substantially the same as S.1006, however, further hearings were held on S.547 and a Committee Print of December 10, 1969 (91st Cong., 1st Session) contained a number of changes in Section 111. S.644 was introduced on February 18, 1971 containing the changes reported in Section 111 of S.547. Except for technical changes, S.1361, introduced on March 26, 1973, was the same as S.644.

In a letter dated November 1, 1968, the NCTA submitted to Senator McClellan a proposal which, under the circumstances then existing, NCTA believed was the only workable compromise, i.e. an across-the-board approach. This plan would (1) require a compulsory license upon an inclusive payment for all television signals carried, (2) a single place to pay, (3) a provision honoring sports "blackouts" under Public Law 87-331, and (4) no restrictions on originations or reception of uncopyrighted programs Needless to say, this proposal was not accepted. This plan, as well as many other proposals, made to the National Association of Broadcasters and copyright owners have all been rejected

Finally, Tom Whitehead, of OTP, and Chairman Dean Burch called a meeting of the interested parties from which came the Consensus Agreement of November 8-12, 1971. This Agreement has been termed the ransom price extracted from NCTA for the supposed relaxation of CATV rules (Cable Television Report and Order, 36 FCC 2d 3 (Feb. 3, 1972).)

The Consensus Agreement, it is understood, was adopted by a one-vote majority of the NCTA Board of Directors under great pressure from the Government. That sort of agreement is no agreement (For a current press account of the Agreement see **CABLE NEWS**, Dec. 17, 1971.) Moreover, all of the Consensus Agreement had to be accepted or nothing — no qualifications or reservations of any kind were permittted. The pressure for acceptance by the Government was so great that time was not allowed to consult the industry generally.

The stated purpose of copyright legislation, Mr. Burch informed Senator McClellan in his letter of January 26, 1972, was ". . . to bring cable into the competitive television programming market in a fair and orderly way." (Underscoring supplied.)

Cable television, when it originates like a broadcaster, is already on a completely competitive basis with television — except for the anti-siphoning restrictions placed on cable by the FCC. If there was any intention of being fair, no such restrictions would have been placed on one of two competitors by the Government. When CATV is acting as a master antenna on the "side of the viewer" it is not a competitor. Television stations compete with each other which is facilitated by CATV The CATV function does not compete (fairly or unfairly) with television — a concept fully supported by the Department of Justice. (See Comments of Department of Justice in FCC Docket 18397-A, Dec. 7, 1970.)

Chairman Burch also stated in his letter to Senator McClellan:

> "But the nature of consensus is that it must hold together in its entirety or not at all — . . ."

It is important to observe that the Commission disavowed the Consensus Agreement, in denying the public the right to comment on it, as it must. This was done by the Commission just a few short

months after the Agreement by stating, in paragraph 66 of the Cable Television Report and Order, that:

> "The Commission has no intention of setting out detailed regulations today only to revise them tomorrow. But, as we gain experience and insight, we retain the flexibility to act accordingly — to make revisions, major or minor — and to keep pace with the future of this dynamic area of communications technology."

If the Commission can disavow the Agreement in 1972, certainly after the Supreme Court decision in 1974 in **TelePrompTer Corp. v. CBS, Inc.**, supra n. 1, determined that importation of distant signals would have no impact on copyright holders extracting recompense for their creativity and labor or suffer loss, the cable television industry is certainly justified in disavowing the Agreement

In addition to this fact, when the compulsion under which CATV was subjected, in proposing compromise plans and accepting the Consensus Agreement, there is no reason to continue to support the payment of copyright. This is particularly true in the light of Department of Justice's opposition to the extension of copyright to CATV as anti-competitive.

On July 31 and August 1, 1973, hearings were held on S.1361. The bill was reported on July 3, 1974 and was passed by the United States Senate on September 11, 1974 It is now pending in the House of Representatives where no action is likely this year. A new bill must be introduced and passed by both houses next year before it becomes law. As previously indicated, H.R 2512 was passed in 1967 after Section 111 was deleted from the bill following a major confrontation between two committees It is, therefore, important to analyze Section 111 in the context of the present situation because Subcommittee No. 3 of the House Judiciary Committee has not considered the provisions of the present section

II— ANALYSES OF S. 1361

S. 1361 consists of eight chapters containing some 68 sections in Title I — General Revision of Copyright Law. There are three chapters of particular concern to cable television Chapter 1 is concerned with the Subject Matter and Scope of Copyright. Chapter 5 deals with Copyright Infringement and Remedies. Chapter 8 establishes the Copyright Tribunal.

CHAPTER 1

SUBJECT MATTER AND SCOPE OF COPYRIGHT

Section 101 defines various terms. "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 " "To 'display' a work means to show a copy of it, either directly or by means or 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." "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, (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 " "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."

In the Report of the Senate Committee on the Judiciary to accompany S 1361, at page 113, the meaning of the above provisions are explained as follows:

> "Under the definitions of 'perform', 'display', 'publicly' and 'transmit' in Section 101, the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: . . . a cable television system is performing when it retransmits the broadcast to its subscribers, . . . The purely aural performance of a motion picture sound track or the sound portions of an audiovisual work, would constitute a performance of the 'motion picture or other audiovisual works', but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecords would not constitute performance of the motion picture or audiovisual work."

The foregoing provisions make it clear that the bill intends to reverse the holding of the United States Supreme Court in **Fortnightly Corp. v. United Artists Television, Inc.**, 392 U S 390 (1968) that

> "Broadcasters perform, viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, a passive beneficiary. When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV no more than enhances the viewer's capacity to receive the broadcaster's signal, it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an 'active' role in making reception possible in a given area, but so do ordinary television sets and antennas." (Footnotes omitted.)

Section 106 lists five fundamental rights given to copyright owners — the exclusive rights of reproduction, adaptation, publication, performance and display — are stated generally in this section

> "These exclusive rights, which comprise the so-called 'bundle of rights' that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, may be owned and enforced separately."

However, the bill, after setting up these exclusive rights, provides various limitations, qualifications, or exceptions in the remaining 11 sections of the chapter. Thus, section 106 is subject to those sections and must be read in conjunction with these provisions (Report, p 110, et seq.).

Section 111, which was deleted from H.R. 2512 before it was passed by the House in 1967, has been revised by the Senate. This section modifies the liability of CATV by limitations on the exclusive rights of copyright owners in secondary transmission.

This section has five subsections. Subsection (a) provides that a secondary transmission (CATV) embodying a performance or display of a work is **not** an infringement if:

(1) The secondary transmission is not made by a cable system, but is, in effect, a master antenna system located in the local service area of a broadcast station licensed by the FCC for which no direct charge is made.

(2) The secondary transmission is solely for purposes described in clause (2) of Section 110 (systematic instructional activities, related to teaching content of the transmission, if transmitted for reception in classrooms, to persons disabled from attending classes or reception by government employees in the course of official duties).

(3) The secondary transmission is by a carrier that has no control over subject matter or recipients thereof and which only provides wire or cable for use of others.

(4) The secondary transmission is by a governmental body or other non-profit organization which makes no charge except to defray actual expenses. This exemption applies to "translators" or "boosters". "This exemption does not apply to a cable television system." (Report, Id, p. 131)

Subsection (c) provides in clause (1) for compulsory licensing of secondary transmission of the primary transmission by an FCC licensed broadcast facility upon compliance with the notice of ownership and quarterly payment provisions of subsection (d), and (A) the primary transmission is exclusively aural and the secondary transmission is permissible under FCC rules, (B) where the cable system is, in whole or in part, within the local service area as prescribed by the FCC, of the primary transmitter, or (C) where carriage of signals comprising the secondary transmission is permissible under FCC rules.

Clause (2) of subsection (c) provides that notwithstanding the compulsory license, the secondary transmission is actionable under Section 501, 502 and 506, as an infringement where carriage of the signals comprising the secondary transmission is **not** permissible under FCC rules or where the cable system has not recorded a notice with the Office of Copyright, as specified in subsection (d). This section **converts the Copyright Law into an enforcement law for FCC rules by which broadcasters could continually harass cable operators with vexatious litigation on any pretext of carriage of signals not permitted by the FCC rules.** It is submitted that this is not a proper function of Copyright Law.

The Committee considered excluding from the scope of the compulsory license carriage of certain professional sports, but decided to leave this matter to the Commission and the Commerce Committee (Report p. 132).

Subsection (b). The meaning of subsection (b) is clearer if considered after (c) because it is phrased in terms of an exemption to both (a) and (c). This section provides that notwithstanding exemptions of subsection (a) (master antenna, teaching, carriers or co-ops) or subsection (c) (compulsory license for aural primary transmissions carried in compliance with FCC rules, local service area signals, or where secondary transmission are permissible under the FCC rules subject to the notice to Copyrights Office) the secondary transmission is not made for reception of public at large, but limited to particular members of the public (pay-TV).

Subsection (d) (1) provides for notice of ownership of the cable system and other information that may be required to the Office of Copyright one month before the secondary transmission. Clause (2) provides for deposit in the Office of Copyright, on a quarterly basis, in accordance with the Register's regulations (A) a statement of account specifying source of income, number of subscribers and the like, and (B) the quarterly royalty, based on a sliding percentage scale on gross receipts from subscribers for the basic services of providing secondary transmission of primary broadcast transmitters. The sliding scale runs from ½ percent on quarterly gross receipts of up to $40,000 to 2½ percent on quarterly gross receipts of more than $160,000. Based on a $5.00 monthly rate, a 3000 subscriber system would pay $250 a quarter and a 6000 subscriber system would pay $750 a quarter on $90,000 of gross receipts for basic subscriber services (Report p. 133). Note the rate base may be expanded to other services on which copyright may already been paid and the rate increased. The only limit is what the three arbitrators from the American Arbitration Association prescribe that is not set aside in Congress within 90 days.

Clause (3) of subsection (d) provides procedures for the distribution of royalty fees deposited with the Register of Copyrights.

Subsection (e) contains definitions of "primary transmission", "secondary transmission", "cable systems" and "local service area of a primary transmitter".

The definition of "secondary transmission" makes special provision for non-contiguous states, territories and possessions.

The definition of "cable system" is unusual in that for royalty fee purposes the Commission's definition is changed to: two or more cable systems in contiguous communities under common ownership or control or operating from one headend shall be considered one system.

The definition of "local service area of a primary transmitter" is the one in which a television broadcast station is entitled to insist on carriage by the cable system under FCC rules.

CHAPTER 5

COPYRIGHT INFRINGEMENT AND REMEDIES

Section 501 provides that anyone who violates any of the rights provided in Section 106 through 117 is an infringer. It provides that the legal or beneficial owner may institute an action for infringement subject to certain requirements. The most significant provision is that for any secondary transmission by a cable system which is actionable as an infringement of Section 111(c), a television station holding a copyright or other license to transmit or perform that work shall, for purposes of instituting an action, be treated "as a legal or beneficial owner, if such secondary transmission occurs within the local service area of that television station." The Court may require notice to all persons having an interest in the copyright, as disclosed by the records in the Office of Copyright.

Section 502 gives the Courts power to restrain infringements of copyright.

Section 504 provides that an infringer is liable for actual damages and profits or, at the election of the copyright owner, statutory damages of $250 to $10,000 as the Court considers just. If the infringement was willful, statutory damages may be increased to $50,000 by the Court or if the infringer shows that he had no reason to believe his acts were an infringement, the Court may reduce the statutory damages to $100.

Section 506 provides severe criminal penalties for willful infringement, ranging from $2500 fine and one year imprisonment to $50,000 fine and seven years imprisonment.

CHAPTER 8

COPYRIGHT ROYALTY TRIBUNAL

Section 801 establishes in the Library of Congress a Copyright Royalty Tribunal. This section states that the purpose of the Tribunal is to make determinations concerning the adjustment of royalty rates specified by Sections 111 and 115 to assure that the rates are reasonable. If the Tribunal finds the statutory rates a Tribunal rate, or the revenue basis in respect to Section 111 does not provide a reasonable royalty fee for the basic service of providing secondary transmissions of the primary broadcast transmitter or is otherwise unreasonable, the Tribunal may change the royalty rate or the revenue basis on which the fee is assessed or both to assure reasonable royalty fee. This section makes it clear that neither the rates nor the rate base on which they will be calculated is fixed, but may be changed very shortly.

Section 802 requires the Register of Copyrights to give notice on July 1, 1975 of proceedings to review royalty rates prescribed by Sections 111, 114 and 115. During the year 1982 and every fifth year thereafter, petitions for adjustment of the rates may be filed.

Section 803. If the Register of Copyrights determines that there is a controversy on distribution of fees or gives notice of significant interest of a petition under Section 802, he shall request the American Arbitration Association to submit three names to which objections can be filed. If no objections are filed, it will constitute a panel of the Tribunal to function as the Tribunal. If objections to members are well founded, additional names shall be requested and the Tribunal then constituted. There is no provision for appeal to the Courts. Three arbitrators unskilled in this area will effectually control rates and the rate base.

Section 806 provides for a report of a Tribunal decision to the Senate and House and Section 807 provides that, if either House resolution, within 90 days, does not favor the decision, it shall not become effective. If no resolution of disapproval is passed, the Tribunal decision shall become effective.

Section 809 does not provide for any judicial review of the Tribunal's decisions on royalty rates.

SUMMARY

In brief, Section 106 makes cable television systems, when performing as a community antenna, fully liable as an infringer when distributing copyrighted programs on signals received from television stations. Exceptions from liability are provided for master antenna, teaching or instructional activities, common and other carriers and nonprofit co-ops. CATV is given a compulsory license to carry radio, local and other signals authorized by the FCC.

Nevertheless, it is an infringement if carriage of a signal is not permissible under FCC rules or the appropriate notice is not filed with the Office of Copyright. This provision is a real sleeper because it will give **copyright protection and penalties both civil, criminal and injunctive to the broadcaster if CATV by accident or otherwise fails to nonduplicate a network or syndicated signal** or in any other way carries a signal not permitted by the FCC rules. In addition, over-the-air carriage of pay-TV is fully actionable unless cleared by the owner of the copyright. QUERY. May the broadcaster clear programs — apparently not — he can only sue.

A sliding scale of across-the-board fees is prescribed on basic services which must be deposited with the Office of Copyright quarterly. A hearing will be held in 1975 to consider both the rate base and the rates to be paid to insure a "reasonable royalty fee", whatever that is. No standards are prescribed — only the subjective idea of the three arbitrators will prevail unless disapproved within 90 days by one house of Congress. There is no Court appeal to test whether the record supports the award.

Stiff civil and criminal penalties are provided for infringements. Broadcasters holding a license are treated as a beneficial owner within their local service area for purposes of instituting an action for infringement.

A Copyright Royalty Tribunal is formed. Panels of the Tribunal are appointed from the American Arbitrator Society. The rates prescribed in Section 111(d)(1) and the rate base (basic subscriber service) will be reviewed in 1975 and again in 1982 and every five years thereafter to assure the copyright owner a "reasonable royalty fee."

III — THE PUBLIC SHOULD NOT PAY A COPYRIGHT FEE VIA CATV

It is clear that the Register of Copyrights makes his whole case for CATV copyright liability on the fact that CATV charges its subscribers and makes a **profit** and failure to share these profits could **damage** the copyright. The Supreme Court disagreed with these assumptions and found otherwise in **TelePrompTer Corp. v. CBS, Inc.**, supra n.l. If the Register's theory of liability is correct, which it is not, then anyone who makes a profit, directly or indirectly, from a performance of a copyrighted work should be liable. This liability would run to wire and receiver manufacturers and countless other business enterprises which enable the public to view the performance. Moreover, this theory assumes that the retransmission of a television signal by CATV is a performance which the Supreme Court of the United Sates, on two occasions, has held that is is not. Mr. Arthur Krim, in his testimony before Subcommittee No. 3, House Judiciary Committee (Hearings on H.R.4347, P. 1334, June 24, 1965), attempted to justify the assertion that carriage of programs by CATV would seriously damage the copyrighted work by referring to the importation of distant signals. Neither Mr. Krim, the Register of Copyrights, or anyone else has attempted to show that the reception of a signal carrying a copyrighted work off-the-air in an area the television station is obligated to serve and for which the copyright owner has been compensated in any way damages the future runs of the work, the broadcaster or anyone else. As we have shown, the Supreme Court found Mr. Krim's contention erroneous.

The fact that CATV makes a profit, by assisting the TV station to deliver its programs to the public

It is obligated to serve and for which the copyright owner has been paid, has no bearing on whether CATV should pay copyright. CATV services keeps the copyright owner honest by delivering the signal carrying his program to the public for which he has been paid. In February 1965, in my remarks before the International Radio and Television Society, I stated:

> "At the present time, a sponsor who buys a program usually pays the copyright owner for one performance over one or more stations. The sponsor pays the copyright owner, directly or indirectly, for tickets to the show for everyone within the Grade B contour of the stations televising it and as far beyond that contour as it can be received. This cost is passed on to the public eventually in the purchase price of the product.
>
> "It is a scientific fact, recognized in the Sixth Report and Order, however, that over average terrain only 90% of the locations in the Gade A contour receive an adequate signal 50% of the time, and within the grade B contour only 70% of the locations receive an adequate signal 50% of the time. I will venture that most sponsors paying for a program think they are getting a potential of 100 % of the locations 100% of the time, but that just isn't so, even though the copyright owner is probably collecting for 100% of the locations 100% of the time.
>
> "A community antenna television system within the Grade B contour merely aids the sponsor in getting his moneys worth from the copyright owner and the station by assuring the sponsor that anyone who desires the signal will receive it clearly, and thus increase the potential audience. Certain copyright owners are not satisfied with this. They collect from the sponsor who recovers his cost from the public and they would like to collect again from the CATV operator who must also pass his cost on to the public. Some way or other it does not seem right to me for the public to have to pay for 'two tickets to the same performance ."

No one has attempted, to my knowledge, since that time to refute this argument.

There is an additional factor relating to the question of "profits". Although early figures breaking down program expenses for television were not published, it is significant that the television industry, as a whole, was reported in 1952, by the FCC, to have had revenues of $323,266,000 and expenses of $267,902,000. In 1973, the Commission reported that 604 VHF and UHF stations expended 218,266,000 for film and $64,749,000 for royalty and license fees for a total of $283,015,000. The three networks expended $624,430,000 in amortization expense on programs obtained from others, $3,128,000 for records and transcriptions, $7,248,000 for music license fees and $75,467,000 for other performances or program rights. It is difficult, if not impossible to estimate the actual copyright fees received because of the intermixture of other program costs with copyright. It is obvious, however, that because of television the 28 companies that control, almost 100% of copyrighted fare on television, have made huge profits (of which 85% we are told, comes from the top 50 markets) from that exposure and have been paid handsomely by the public through the broadcaster for programs dedicated to serve that same public. Why should the copyright owner, these 28 companies, Mr. Krim spoke of in 1965 and a few others that may have since joined them, be entitled to "siphon off" duplicate copyright fees from the public under the guise that CATV makes a "profit" and these companies are entitled to "a piece of the action"?

Those facts should demonstrate conclusively that the copyright owner giants (1) by virtue of their access to the air, (2) with no charges by the Government to transport their product to the public (3) compared to CATV comoanies which pay up to $10,000 a mile for their channels of communication to subscribers, should certainly be required to forego double fees from a reception service for the public. The small number of copyright owners who dominate this area should certainly be required to give something back to the public in return for using the public domain for what are obviously huge profits. Cable television or its advertisers will pay for any programs it siphons from broadcast television, whereas the public would receive nothing for the cash the broadcasters would have the copyright owner siphon from the public via CATV.

There is a basic conflict between communications policy and any copyright law in which a cable antenna system is required to pay copyright on any signal it is authorized to receive and distribute on its system by the Federal Communications Commission.

The Court has construed the Communications Act to empower the Commission to regulate CATV. In exercising this power, the Commission requires, as a condition of receiving and carriage of television broadcast signals, that CATV systems must carry all local signals. The definition of local signal varies according to the size market where the system is located. Nevertheless, the Commission exercises its power to require carriage of certain signals and permits the carriage of others. Such regulations now constitute CATV a supplemental service to make the Commission's allocations of frequencies more effective. Until set aside, revised or revoked, CATV systems must comply with those carriage rules.

The proposed legislation would compel CATV to pay copyright owners for distributing signals carrying their copyrighted works. The broadcaster has the right to pick and choose the copyrighted works he will buy and broadcast. Congress should set the record straight. If the Commission is confirmed in the power to require carriage of particular signals by CATV, than CATV is a supplemental reception service, performs nothing, and owes nothing. If it is desired to require copyright payment by CATV for its supplemental role, then CATV should be entitled to carry whatever programs it desires, delete the advertising and substitute its own. The broadcaster should not be permitted to have it both ways — collect additional revenue from sponsors for the added carriage of CATV and require CATV to pay copyright fees In short, the broadcaster is arguing for the morality of **unjust enrichment** to copyright owners at the expense of the public CATV serves as a means of using copyright to restrict the growth of CATV It is the public who will unjustly enrich the broadcaster and/or the copyright owner — not the CATV operators. These anti-consumer provisions should not be enacted into law.

IV — CONCLUSION

Based on the foregoing review of the background and the provisions of this legislation, it must be concluded that the provisions of S. 1361 concerning CATV are philosophically unsound. An across-the-board payment, including payment by the public for two tickets to the same performance or for distant signals as limited by the Commission's rules, is, in my opinion, soaking the consumer and will add to an already inflationary economy. I believe that you are justified and should revert to the industry's historical position and make every effort to seek an amendment to this bill, substantially as recommended in 1965 (supra n.1), to eliminate any liability under Section 106 or other provisions of S. 1361.

The Subcommittee on Communications of the Senate Commerce Committee, in its Report No 93-1035 on S. 1361, proposed certain amendments to the bill. In conclusion, the subcommittee stated on page 71:

> "Despite proposing amendments to the Judiciary Committee's amendment in the nature of a substitute for S.1361, you Committee emphasizes it is reporting the bill out without recommendation.
>
> "Clearly, some of its subject matter substantially affects the broadcasting and cable industries, and is regulatory in nature.
>
> "Should it be enacted it will have a significant impact on our nationwide communications system, without the relevant issues having been analyzed in the forum designated the Senate for that purpose, i.e. your Committee on Commerce."

I have not undertaken to separate the regulatory parts of the bill from those properly in a copyright bill. At a later time, this type analysis should be made in order to further demonstrate the inappropriateness of the provisions of S. 1361 relating to cable television.

Frederick W. Ford

AD HOC COMMITTEE
OF CONCERNED CABLE TELEVISION OPERATORS
FOR A FAIR COPYRIGHT LAW,
Painted Post, N.Y., June 10, 1975.

Re H.R. 2223—Omnibus Copyright Revision Legislation—Cable Television.

Hon. ROBERT W. KASTENMEIER,
Chairman, Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Judiciary Committee, House of Representatives, Washington, D.C.

DEAR CONGRESSMAN KASTENMEIER: The Ad Hoc Committee of Concerned Cable Television Operators For a Fair Copyright Law is enclosing herewith for insertion in the records on the current Hearings on the above-referenced legislation the following:

1. Listing of State and Regional cable television associations that have adopted resolutions against the payment of copyright fees by cable television systems.
2. Copies of resolutions passed by 53 municipalities in the United States against the payment of copyright fees by CATV systems and indirectly the United States public that happens to view their television on CATV systems.

It is pertinent to note that no municipalities in the United States have voted in favor of having CATV systems pay copyright. It would obviously not be logical for them to do so because the cost of the copyright fees will be passed on to the subscribing U.S. consumers. Obviously they know it would not be popular or even intelligent to adopt such a position. This special interest legislation would in effect require the American consumer to pay special copyright fees for viewing programming that has advertisements attached to it. Such "pork barrel" legislation is clearly not in the public interest.

You will note that to date 23 states have officially adopted resolutions against the payment of copyright fees by CATV systems. CATV operators are essentially providing an "antenna service". As such, CATV operators do not understand this entire issue of copyright. However, as CATV operators become more and more aware that they will have to pay copyright fees in the immediate future if this disastrous legislation goes through, they are putting pressure on individual state associations to officially adopt positions against the payment of copyright.

The only people that are for the payment of copyright are the large multiple system owned CATV operators that control the National Cable Television Association. These operators feel that the Federal Communications Commission will continue to enact disastrous legislation in our industry if this copyright issue is not settled. We agree that it should be settled. But we also feel that to agree to pay copyright which we feel is fundamentally immoral and anti-consumer is not the appropriate course of action.

We hope that your Committee will consider in its deliberations on the proposed copyright legislation the strong feeling of the municipalities that voted against this legislation. Please also consider the feelings of all the state associations representing approximately ½ of all the states in America that have taken the trouble to adopt resolutions against this legislation as it relates to cable television.

Very truly yours,

LAWRENCE FLINN, JR., *Member.*

LISTING OF STATE AND REGIONAL CATV ASSOCIATIONS THAT HAVE ADOPTED A "NO PAY" POSITION ON COPYRIGHT AS OF JUNE 6, 1975

STATE ASSOCIATIONS

1. Alabama*
2. Arkansas
3. Colorado
4. Iowa*
5. Kentucky*
6. Louisiana
7. Minnesota*
8. New York*
9. Oklahoma*
10. Oregon*
11. Pennsylvania [1]

Footnotes at end of listings.

12. Texas*
13. Virginia*
14. West Virginia

STATES REPRESENTED THROUGH REGIONAL CATV ASSOCIATIONS

STATES REPRESENTED AND NAME OF REGIONAL ASSOCIATIONS

15. Illinois, Illinois-Indiana CATV Assn.
16. Indiana.
17. Maryland, Maryland-Delaware CATV Assn.
18. Delaware.
19. Kansas, Mid-America CATV Assn.
20. Missouri.
    Oklahoma (counted above. Passed separate resolution).
21, Nebraska.
22. Colorado, Rocky Mountain CATV Assn.
23. Wyoming*

STATE ASSOCIATIONS THAT HAVE VOTED TO ADOPT THE NCTA POSITION ON COPYRIGHT

1. California.
2. Florida.

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*Copy of resolution passed is submitted herewith. The other resolutions have been recently reported by telephone or in the press and copies of the related resolutions passed will be obtained and copies will be submitted to Congress.

[1] Would pay copyright on distant signals only beyond basic complement of 7 TV signals. (3 nets, 1 ETV, & 3 Independents).

AD HOC COMMITTEE
OF CONCERNED CABLE TELEVISION OPERATORS
FOR A FAIR COPYRIGHT LAW
BOX 389
PAINTED POST, NEW YORK 14870
TELEPHONE 607 962-3890

4 10 1975

July 3, 1975

Hon. Robert W. Kastenmeier
Chairman, Subcommittee on Courts, Civil
Liberties, and the Administration of
Justice
Room 2232 -
Rayburn Office Building
Washington, D.C. 20515

Re: H.R. 2223 - Omnibus Copyright Revision Legislation - Cable Television

Dear Congressman Kastenmeier:

In reference to our letter to you dated June 10, 1975, enclosed herewith is a resolution passed by the City of Bellaire, Ohio requesting Congress to remove any provision requiring the payment of copyright fees by cable television systems from the above referenced legislation.

Please include the enclosed document in our previous filing for insertion in the records for the current deliberations on this proposed legislation. Thank you for your help in this matter.

Very truly yours,

THE AD HOC COMMITTEE OF
CONCERNED CABLE TELEVISION
OPERATORS FOR A FAIR COPYRIGHT
LAW

By Jonathan I. Singer

JIS:mc
Enclosures

cc: Members of the House Subcommittee on Courts, Civil Liberties and the Administration of Justice

RESOLUTION NO. 326

RE: OMNIBUS COPYRIGHT REVISION LEG...TION - CABLE TELEVISIO..

WHEREAS, the matter of lia..lity of cable television ope cors and, through them cable subscribers to pay copyright royaltie .. television signals carried on cable television is now before . Congress of the United States in the Omnibus Copyright Revisic Bill;

WHEREAS, the 1974 annual meeting of the United States Co ..nce of Mayors in San Diego did unanimously approve Resolution Num urging the United States Senate not to adopt legislation which .. place an extra surcharge on the viewing of television programm via a cable television system;

WHEREAS, this resolution was ignored and had no effe or action of the United States Senate in the September 9th ac Senate Bill S.1361;

WHEREAS, the United States Supreme Court has twice h t carriage of broadcast signals by cable television is not er ance under Federal copyright law for which copyright royaltie. e quired to be paid; and

WHEREAS, as a matter of pure logic and economic theo p ent of copyright royalties for carriage of broadcast signals c. ca television is improper and can result in consumers pay py ht royalties twice;

WHEREAS, the cable television industry, still in its fa. should not be overburdened with required fees and charges, pay of which must be subsidized by the ultimate consumer, the cable television subscriber;

WHEREAS, the continuation of quality cable television serv in and for the community of Bellaire, Ohio, is important to the well-being, education, and informed status of our citizens;

WHEREAS, adoption of this copyright legislation by the ful Congress of the United States will be inflationary and will selectively "tax" the cable viewing residents of Bellaire, Ohio

NOW, THEREFORE, BE IT RESOLVED, by the Council of the City of Bellaire, Ohio:

§1. That the Congress of the United States is urged to remove from the Omnibus Copyright Revision Bill all language which woul require a copyright payment for carriage of broadcast signals on cable television.

BEST COPY AVAILABLE

§2. Urges that the Honorable Jonn Glenn and Honorable Robert Taft, Senators and Honorable Wayne L. Hays, our Congressman, do everything within their power to defeat Senate Bill S.1361.

§3. That this resolution shall take effect and be in force from and after the earliest period allowed by law.

Passed this 19th day of June, 1975.

Attest: Robert Kohl
Clerk of Council

Walter D. Tyston
President of Council

Approved this 19th day of June, 1975.

Henderson Cartwright
Mayor

Mr. KASTENMEIER. The Chair would now like to call George J. Barco, general counsel for the Pennsylvania Cable Television Association.

Mr. Barco, you may proceed.

TESTIMONY OF GEORGE J. BARCO, GENERAL COUNSEL, PENNSYLVANIA CABLE TELEVISION ASSOCIATION

Mr. BARCO. First, may I point out here on the map what part of Pennsylvania I come from, so that you know the place from which I come.

Mr. Chairman and members of the Subcommittee on Courts, Civil Liberties and the Administration of Justice—I purposely mention that title because that is one of the reasons I'm here today because I believe that the orbit of your jurisidiction can afford us some of the relief we are seeking. Having seen you gentlemen on television in the execution of your duty, I was reinforced in my belief.

Further, Mr. Chairman, I want you to know that we have a statement here that is longer than the 5 minutes allocated to us, and we would ask that it be included in the record. I have prepared my remarks to fit within the time which has been allowed to me.

Mr. KASTENMEIER. The Chair appreciates that, Mr. Barco, and your statement and the Pennsylvania Cable Television Association policy position statement of March 1975, will be received in the record.

Mr. BARCO. Thank you, Mr. Chairman.

I am George J. Barco of Meadville, Pa. For the past 23 years I have been a part owner and president of several cable television companies, and I have served as general counsel for the past 20 years of Pennsylvania Cable Television Association. Pennsylvania is the State where commercial CATV started some 27 years ago, and where more communities and a greater percentage of the television viewing public secure reception by CATV service than in any other State.

For the past 10 years particularly, I have been concerned that the views and concepts, and, in turn, many aspects of government treatment accorded to the industry have been influenced to a great extent by a pervasive preoccupation, inside and outside the industry, with the technical and theoretical capabilities of cable television to provide broad television and communications services.

This preoccupation has been obsessive to such an extent that the financial, technological, and practical requirements for such an evolution have not been fully analyzed, or recognized, on the one hand, and, at the same time, the significance of the television reception function being provided by CATV has been discounted and the real nature of the service today confused and distorted.

The Pennsylvania position on copyright places the television reception function in clear focus and places that function in proper perspective, both with relation to the subscribers it presently serves, and with relation to the capabilities for cable to improve and equalize television reception opportunities for the public generally. The Pennsylvania position also recognizes the desirability of realizing the potential of cable television for providing increased program choices in part through microwaving of additional signals, acknowledging that this function is distinct from the television reception function, and that

providing such service may be subject to reasonable copyright payment.

It is no secret that there is a fundamental and serious division in the industry on the issue of copyright payment. The Pennsylvania position in essence represents the view of a substantial segment of the industry that is opposed in principle to the concept of across-the-board copyright liability, and particularly, copyright liability for television reception of signals received off the air.

The other substantial segment of the industry—and particularly on the board of directors of the NCTA—has been willing, and even eager, to agree to payment of copyright fees "across the board" in response to an assortment of influences, including the appeal of an expedient response to the pressure for copyright payment; the desperate hope that such a commitment will evoke some response from the Federal Communications Commission in the direction of relaxing its very restrictive regulations of CATV; and the expectation that such payment from the existing industry will be the means of securing the availability of microwaved signals thought to be a prerequisite for the economic viability of cable television for the large cities and the cable communications industry of the future.

One measure of the extent of the division is that some 18 State and regional associations have either drafted a resolution for action, or have taken action, in opposition to the NCTA position of copyright payment "across the board".

The basic principle of the Pennsylvania position that off-the-air television reception should not be subject to the burdens and risks involved in a commitment to copyright payment is founded on the pertinent facts and circumstances. The broadcasters and copyright owners make use of the public resource of the airwaves without payment.

In addition, the policy of the 1934 Communications Act favors the widest possible distribution of broadcast services for the general benefit and welfare of all citizens. As a consequence, there must accrue a fundamental right in the public to utilize on an equal basis all signals receivable off the air, whether by conventional rooftop antenna, or by cable television.

I am unable in the time allotted to me to further detail the philosophical and factual basis for the Pennsylvania position, and I have, therefore, attached the position in full to this statement for the record.

In summary, the Pennsylvania position so far as payment of copyright fees is as follows:

One. No copyright fees should be payable for television reception of off-the-air signals, regardless of the total number involved.

Two. No copyright fees should be payable for basic television reception, whether secured off the air, or by microwave. While we have stated that basic television reception should include the national networks, three independent television stations, and one educational television station, we recognize that there is room for differences of opinion as to what basic television reception should include.

Three. Copyright fees would be payable on the reception of microwaved signals, other than those required for basic television reception in two above, at the rate of two-tenths of 1 percent per microwaved channel.

Another fundamental concern emphasized in the Pennsylvania position is that the copyright bill not effect a confirmation of the present FCC regulatory treatment of the industry. For example, the FCC definition of so-called distant and local signals has little relation to actual reception conditions for signals received off the air; and the application of these artificial and arbitrary definitions results in unreasonable, unfair, and discriminatory treatment for television viewers.

Finally, and most important, cable television viewers—comprising 10 million subscriber homes with over 30 million viewers—have never been informed of the proposal for copyright payment for their television reception service, while payment will not be required for the same reception by their next door neighbor using a conventional rooftop antenna. In this day of consumer concern and special awareness for due process, the lack of fairness and reasonable treatment for cable subscribers for television reception—both off the air and for basic television service—is most evident, is not supportable, and certainly should not be countenanced by this committee whose very title stands as a beacon light for the citizens of our Nation for proper protection of their basic rights.

Mr. Chairman and members of this committee, I have been a member of the negotiating committee of the industry; and I was party to the consensus agreement. I should be very glad to answer any questions you have.

Mr. KASTENMEIER. Thank you, Mr. Barco. In that connection, when the agreement was concluded in 1971, you were one of those who were agreeable to the provisions?

Mr. BARCO. Absolutely not. There was a very strong division, then, and we were told by the then Chairman of the FCC that this had to be because it was demanded by the White House, otherwise we cannot relax the rule. There had been a freeze on the industry, and the industry was desperate. The manufacturers were going out of business, the industry was at a standstill; and it was only by a two-vote majority that that was carried and accepted by the board of our directors and the officers of the association. There were very, very violent arguments about the whole thing. And, as Mr. Ford has pointed out, the other factors shortly followed, so it was never given any credence by anybody.

Mr. KASTENMEIER. Off the record.

[Discussion off the record.]

Mr. KASTENMEIER. Mr. Barco, we do have another witness whom we will not be able to hear without returning. So, I will request that we recess and then return during what would otherwise be the lunch hour, and proceed with our last witness.

I propose we will return at 1:45, after we vote, and conclude at 2 o'clock.

Mr. BARCO. Mr. Chairman, before I am dismissed, may I please just make one suggestion? You note that our position provides that when a signal is carried far beyond its normal area of operation——

Mr. KASTENMEIER. By microwave.

Mr. BARCO. Yes. We believe that under some circumstances a copyright fee should be paid.

Mr. KASTENMEIER. I was interested in this and hoped to question you about this.

Mr. BARCO. I will be glad to come back after lunch.

Mr. DANIELSON. If the gentleman can come back——

Mr. BARCO. I will be very happy to come back.

Mr. KASTENMEIER. The subcommittee will be in recess for 15 minutes, until 1:45.

[Whereupon, at 1:30 p.m. a recess was taken until 1:55 p.m.]

Mr. KASTENMEIER. The subcommittee will come to order for the resumption of our testimony today. When we recessed we were hearing from Mr. George Barco, who had submitted his testimony, and was in the position of anticipating a question of mine, to the position of the Pennsylvania Cable Television Association, No. 3, that copyright fees would be payable on the reception of microwaved signals.

What are microwave signals, in common parlance, so that we might understand what that refers to?

Mr. BARCO. There are two types of signals in cable television systems received and transmitted to their subscribers. One, what we receive normally over the air, and the other where we have to use microwave operations, where you bring a signal by long distance with a series of retransmitting of signals, reaching the ultimate destination. Now, may I explain that?

Mr. KASTENMEIER. Yes.

Mr. BARCO. I said we take three positions, as Your Honor will remember. First, anything "off the air" should pay no copyright because it is a basic right of the American citizen to receive these broadcast television signals. Number two, we said there is also a right to basic television reception, regardless of how it is received, by the public.

Now, even though in Pennsylvania there is no need to have anything except what we receive off the air—in any part of Pennsylvania—there are some signals brought in by microwave from New York City, for instance. But they are not needed for basic television reception excepting in those instances where we want it.

Now, we think there are some communities in the Midwest and Far West where they cannot get the signals any way except by microwave, but it is a very small number of communities. We think that those people should be entitled to receive television reception, regardless of whether it's off the air, or by microwave, without the payment of copyright because of the fact that it is important to the welfare of our Nation to have everybody receive television reception. And we say they should be able to receive the three networks, three independents, and one educational station.

You might ask, why do we cite that number—this is the reception provided to people in the large cities. Why should there be second-class citizens in the smaller communities. Television reception in the small communities, gentlemen, is more important than television reception in the big cities because this is the most important thing they have outside eating and sleeping.

Mr. KASTENMEIER. In terms of the networks, the independent and educational television stations, there is an FCC determination of what constitutes a complete service within a market in terms of some configuration as to what type of network stations constitute——

Mr. BARCO. A market.

Mr. KASTENMEIER. A fully served area. I guess this is somewhat different.

Mr. BARCO. Mr. Chairman, that definition is an artificial one, established by the FCC. The amazing thing to us in the industry is that they will give a license to a broadcaster to put a signal out in the air. They can't restrict that licensed signal, where it goes. And then they come and say to us, "Well, you can't carry it" even though we pick it out of the air. They say, "You can receive this one, but you can't receive that one." Frankly, we can't understand it at all.

And the other thing we have to keep in mind, Mr. Chairman, is that, if in the same community, if you use a rooftop antenna, you can receive anything that is receivable off the air, like you do with the CATV system. But the FCC comes and says to us, "If you have to buy television reception service from a cable company, you can't bring in but so many stations," but they make no such restriction on rooftop antennas, regardless of the number of signals received.

Mr. KASTENMEIER. Mr. Barco, do the members of your association—and it is a very old one in Pennsylvania—differ in terms of their characteristics, or types of programs, the type of transmitting they are involved in, than the members of the national association that testified before?

Mr. BARCO. No, generally not. I would say to you that from our personal knowledge, we have about 60 systems which do cable casting, which is local origination. Our system has been doing that for 8 years, and we know a number of other systems who do the same thing.

Mr. KASTENMEIER. Thank you. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

Thank you, Mr. Barco. On cable casting for origination of programs you do not question that copyright fees should be paid on that type of program.

Mr. BARCO. Absolutely not. And we do pay on those we buy.

Mr. DANIELSON. I just wondered whether you had any question on that.

Mr. BARCO. No, no question.

Mr. DANIELSON. Under the formula that you come up with here, your three points, can you give me an estimate of how many CATV systems would be paying copyright, and how many would not?

Mr. BARCO. My recollection is that that was checked by the NCTA Office, and they estimated about 750 systems would be paying copyright, that is if they brought it in by microwave beyond, off the air.

Mr. DANIELSON. I understand. Well, 750—how many systems are there?

Mr. BARCO. Altogether around 3,000.

Mr. DANIELSON. About 25 percent?

Mr. BARCO. But you must keep in mind, Congressman, that 89 percent of the top 100 market, or 89 markets rather, have not been developed for CATV, and this is where the play is going to come in because they think that they are going to develop those markets by bringing in the distant signals by microwave. And when they get beyond the basic television reception, then they will have to pay.

And of course, that is all based on the proposition that when you bring in a signal by microwave, there has not been any compensation to the copyright owner. If he is being compensated because he knows about it, then of course we don't think there should be double payment. But if he hasn't been paid, it's only right that he should be paid.

Mr. [illegible]NIELSON. I think I understand your position, thank you, very much.

Mr. KASTENMEIER. The gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. No questions, thank you.

Mr. KASTENMEIER. The gentleman from New York, Mr. Pattison.

Mr. PATTISON. No questions.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins?

Mr. WIGGINS. Are the microwave signals beamed to a receiver?

Mr. BARCO. To a receiving antenna.

Mr. WIGGINS. I mean to a specific customer?

Mr. BARCO. Yes, the customer in this case being the CATV system.

Mr. WIGGINS. It's not from the air, that is.

Mr. BARCO. Oh, no, you have to have a special pickup.

Mr. WIGGINS. In those systems in Pennsylvania that have some experience in cable casting, which is a word describing the origination, I think——

Mr. BARCO. Local origination.

Mr. WIGGINS. Has there been difficulty in obtaining financing for those stations by reason of the fact that they are, or should be liable for copyright payments?

Mr. BARCO. No. You see, those systems, of course, have two types of programs, the cable casting, No. 1, a locally originated program; and then they have these other programs that they buy. They go on the marketplace and negotiate the price as broadcasters do. We have had no problems in that respect at all.

Mr. WIGGINS. That's all.

Mr. KASTENMEIER. Thank you very much, Mr. Barco, for your testimony here today. I am sorry we kept you so long.

[The prepared statement of George J. Barco, and the Pennsylvania Cable Television Association Policy Position follow:]

STATEMENT OF GEORGE J. BARCO, GENERAL COUNSEL, PENNSYLVANIA CABLE TELEVISION ASSOCIATION

Mr. Chairman, members of the subcommittee, I am George J. Barco of Meadville, Pa. For the past 23 years, I have endeavored to participate actively and positively in the deliberations of the cable television industry leadership on the various issues affecting it nationwide.[1] During this time I have been a part owner and president of several cable television companies, including the one serving the community in which I live. Also, I have served as General Counsel for the past 20 years of Pennsylvania Cable Television Association, the [illegible] association of the cable television industry in Pennsylvania where the CATV industry was born as a commercial enterprise some 27 years ago and where more communities and a greater percentage of the television viewing public secure reception by CATV service than in any other state.

During this period, I have been personally and directly acquainted with the nature and development of the industry itself and have observed the changing views and concepts of others toward the industry. I have been concerned, again and again, particularly during the last 10 years, that these views and concepts, and, in turn, many aspects of government treatment accorded to the industry have been influenced to a great extent by a pervasive preoccupation, inside and outside of the industry, with the technical and theoretical capabilities of cable television to provide broad television and communications services. This preoccupation has been obsessive to such an extent that the financial, technological and practical requirements for such an evolution have not been fully analyzed

[1] National Chairman [then known as President], National Cable Television Association, 1957; Member, Board of Directors of NCTA, 15 years ending in 1972; Member, NCTA Copyright Negotiating Committee, 1972–1975; Member, NCTA Music Copyright Negotiating Committee, 1972–1975.

or recognized, on the one hand, and, at the same time, the significance of the television reception function being provided by CATV have been discounted and the real nature of the service today confused and distorted.

Time and again it has been acknowledged by the Federal Communications Commission, the broadcasters and the copyright owners themselves that the master or community antenna television reception function which the CATV industry was established to perform, does not interfere with or encroach upon the respective interests of broadcasters and copyright owners, because the service is supplementary to, and supportive of, broadcasting and corrective of some of the technical limitations of the technology. Regardless of all of the talked about hopes, dreams and promises for cable, it is a central fact that cable as it exists today represents only a concept of the ultimate cable communications technology, and the implementation of that concept requires tremendous expenditures of time and money with very considerable risks, uncertainties and unknowns.

The Pennsylvania Position on copyright places the television reception function of cable television in clear focus and places that function in proper perspective, both with relation to the subscribers it presently serves, and with relation to the capabilities for cable to improve and equalize television reception opportunities for the public generally. The Pennsylvania Position also recognizes the desirability of realizing the potential of cable television for providing increased program choices in part through microwaving of additional signals, acknowledging that this function is distinct from the television reception function, and that providing such service may be subject to reasonable copyright payment.

I must emphasize that the Pennsylvania Position represents not merely an expedient response to the various pressures for the resolution of the copyright issue for the industry, nor does it represent an effort to limit or reduce the extent or amount of copyright payment motivated by business self-interest. It is presented rather as the right, logical and equitable resolution of the issue in view of the true nature of the functions concerned and the over-all public interest in them.

The Pennsylvania Position was originally developed by the Pennsylvania Cable Television Association in 1969 and reviewed and refined by it in March of 1975 [with much time and consideration being given to the issue by a broad base of Association membership in both instances]. However, its adherents are not limited to Pennsylvania, for it has wide acceptance across the nation.

It is no secret that there is a fundamental and serious division in the industry on the issue of copyright payment. The Pennsylvania Position in essence represents the views of a substantial segment of the industry that is opposed in principle to the concept of "across the board" copyright liability, and particularly, copyright liability for television reception of signals received off the air.

The other substantial segment of the industry has been willing and even eager, to agree to payment of copyright fees "across the board" in response to an assortment of influences, including the appeal of an expedient response to the pressure for copyright payment; the desperate hope that such a commitment will evoke some response from the Federal Communications Commission in the direction of relaxing its very restrictive regulations of CATV; and the expectation that such payment from the existing industry will be the means of securing the availability of microwaved signals thought to be a prerequisite for the economic viability of cable television for the large cities and the cable communications industry of the future.

Although NCTA still officially adheres to the views of this segment, its policy in this respect has been seriously questioned and reviewed again and again, even as late as May 23, 1975. In this regard, it must be taken into account that many members of NCTA have interests in television broadcasting and copyright holdings which are to some extent clearly in conflict with CATV interests as such. It is my opinion that the position of NCTA on copyright has been definitely weighted and influenced by these interests and still is today.

One measure of the extent of the division is that some 18 state and regional associations have either drafted a resolution for action, or have taken action, in opposition to the NCTA position of copyright payment "across the board." I believe that a clear plurality if not majority of cable operators throughout the country are opposed to copyright payment for signals received off the air and are convinced that payment for these signals is not reasonable.

The basic principle of the Pennsylvania Position that off the air television reception should not be subject to the burdens and risks involved in a commitment to copyright payment is founded on the pertinent facts and circumstances.

The broadcasters and copyright owners make use of the public resource of the airwaves without payment. In addition, the policy of the 1934 Communications Act favors the widest possible distribution of broadcast services for the general benefit and welfare of all citizens. As a consequence, there must accrue a fundamental right in the public to utilize on an equal basis all signals receivable off the air, whether by conventional rooftop antenna or by cable television.

Again, since the copyright owners choose to distribute their property by broadcasting, there is no reasonable basis for any expectation by them that they should control or limit the distribution as if they were providing for a performance in a theater, arena or hall.

From the point of view of the subscriber, it is incomprehensible that liability to copyright fees should depend on the accident of topography—or in the real life situation of the television viewer—whether he is living in a high area where a conventional antenna provides adequate reception or whether he lives behind the hills or along the river where CATV service is required or desirable to provide satisfactory television reception. These reception conditions can change from street to street in a given community.

A correlating basic principle of the Pennsylvania Position is that inasmuch as CATV can provide the means for equalizing the television reception opportunity for all the viewers, thereby correcting a limitation or deficiency in broadcasting technology, service for at least basic television reception should not be subject to copyright, by whatever means reception is secured.

I am unable in the time allotted to me to further detail the philosophical and factual basis for the Pennsylvania Position, and I have, therefore, attached the Position in full to this statement for the record.

In summary, the Pennsylvania Position so far as payment of copyright fees is as follows:

(1) No copyright fees should be payable for television reception of off the air signals, regardless of the total number involved.

(2) No copyright fees should be payable for basic television reception, whether secured off the air or by microwave. While we have stated that basic television reception should include the national networks, three independent television stations and one educational television station, we recognize that there is room for differences of opinion as to what basic television reception should include.

(3) Copyright fees would be payable on the reception of microwaved signals (other than required for basic television reception in (2) above) at the rate of two-tenths of one percent per microwaved channel of the gross receipts from monthly service charges only.

While not included in the Pennsylvania Position, I should mention that a number of individuals favoring the Pennsylvania Position have suggested that as an alternative, fees could be based on the fee schedule in H.R. 2223, prorated against the number of distant signals microwaved as the numerator over the total signals carried as the denominator. Thus, if a system carried a total of ten signals, three of which were microwaved and subject to copyright payment, the system would pay three-tenths of the fee schedule.

Another fundamental concern emphasized in the Pennsylvania Position is that the copyright bill not effect a confirmation of the present FCC regulatory treatment of the industry. For example, the FCC definition of so-called "distant" and "local" signals has little relation to actual reception conditions for signals received off the air; and the application of these artificial and arbitrary definitions results in unreasonable, unfair and discriminatory treatment for television viewers.

To those who are concerned that the Pennsylvania Position may not provide "enough" initial extra payment for copyright owners, I submit that the reasonableness of the resolution of the copyright issue is not determined by the size of any additional copyright payment but by whether or not there is a proper basis for payment. Furthermore, the copyright owners themselves over the years have stated that their primary concern is not with the existing industry or in the off the air television reception, but in the future of the industry in the 89 of the 100 top markets not yet developed.

The prevailing opinion is, and NCTA statistics establish, that these markets can develop only by bringing in additional television signals by microwave and by the purchase of much copyrighted programs for local origination. These markets also have the highest promise for the pay cable market, programs for which will be purchased from copyright owners. In short, the copyright owners themselves will be the beneficiaries of tremendous gain from the increased distribu-

tion potential of cable for their copyright product—which will be many multiples of any amount which could possibly be secured from the present industry on any basis.

Finally and most important, cable television viewers—comprising 10,000,000 subscriber homes with over 30,000,000 viewers—have never been informed of the proposal for copyright payment for their television reception service, while payment will not be required for the same reception by their next door neighbor using a conventional rooftop antenna. In this day of consumer concern and special awareness for due process, the lack of fairness and reasonable treatment for cable subscribers for television reception—both off the air and for basic television service—is most evident, is not supportable, and certainly should not be countenanced by this Committee whose very title stands as a beacon light for the citizens of our nation for proper protection of their basic rights.

PENNSYLVANIA CABLE TELEVISION ASSOCIATION POLICY POSITION UPDATE ON COPYRIGHT

In October, 1968, the Board of Directors of Pennsylvania Cable Television Association, after careful study and consideration, formulated a position on copyright which was approved by the overwhelming vote of the members of the Association at a special meeting held in April, 1969, together with background explanation.

The background explanation for the position called attention to the distinct difference, both in fundamental concept and practical objectives, between the traditional community antenna television system which operates solely or mainly to provide television reception service in fringe areas, and the much promoted—but still largely undeveloped—cable communications system which is expected to provide broad television and communication services, particularly in metropolitan areas, including distribution of copyrighted programs purchased for showing through the wired system.

The background explanation also particularly noted:

The United States Supreme Court decision in *Fortnightly Corporation* v. *United Artists Corporation*, decided in June, 1968, in which service provided by the traditional CATV system was held to be on the "viewer's side of the line" and, therefore, not subject to copyright liability;

The action of the Federal Communications Commission in its Proposed CATV Rules and Inquiry, issued in December, 1968, which—among other things—in effect, foreclosed the industry on the copyright question so far as new system development is concerned and the expansion of system reception service in many areas;

The general precept that the community antenna television reception function of providing off the air reception for television signals should not be colored in its copyright and FCC regulatory treatment by the future potentials and possibilities for CATV, *or* traded as an expedient to accelerate or to promote the resolution of product and marketing problems which may be involved in the development of some of these capabilities.

Based on these considerations, the central concept and principle of the "Pennsylvania Position" on copyright was set forth as follows:

To the extent that a wired system of any kind anywhere is performing the television reception function of an antenna as the traditional CATV system, the reception should not be subject to restrictions or to copyright liability any more than reception by a conventional antenna and, accordingly, that there should be no copyright payment for television reception provided of signals received off the air.

Correlating principles were also set forth regarding the availability of "basic" television reception service to all and regarding the desirability of exploring the possible basis upon which microwaving of signals might provide increased programming.

In the intervening period since the adoption of this position, the following significant developments and occurrences must be taken into account as bearing upon the copyright issue:

(1) The Federal Communications Commission has demonstrated conclusively that with its rigid conditioning to the broadcasting environment of scarcity—created by the inherent limitations in frequency allocations—its primary commitment is to the existing broadcasting market order of things, with the accompanying characteristics of market monopoly and lack of program diversity. So strong is the FCC's commitment and concern in this respect that it has been

supercautious in its restraint of CATV to assure that there is no possibility that CATV will effect any change in the status quo.

This predilection was manifested most clearly in the FCC's action with regard to the Consensus Agreement of November, 1971, which was notable not only because the FCC exacted the requirement of copyright payment as the condition for any relaxation of its rules, but also because of the scant quantum of relief given in exchange for this exaction. The nature and extent of the FCC's signal carriage restrictions constitute a clear declaration of the FCC determination that any development in CATV technology can occur only on the condition that there be no change in the existing television broadcasting order.

(2) The extended negotiation efforts by representatives of National Cable Television Association with representatives of the copyright owners have established that the position and attitude of the copyright owners do not allow for the usual business bargaining process, the demands of the copyright owners being consistently exorbitant and unrealistic, and without regard for the consequences either for the industry or the subscribing public.

(3) In addition to the restraints placed by the FCC rules on CATV television reception services, and in turn on catv system development and growth, the 1972 Rules as related to local franchising, taken with the related actions of state and/or municipal governments, have resulted in a multi-structured regulation of CATV which is duplicative, inconsistent, costly and most burdensome.

(4) While the bright promise of the potential and capacity of cable television has not dimmed, special difficulties have been encountered in system construction and operation in large and metropolitan city areas, and the feasibility and acceptance of CATV service in such areas are yet to be established.

(5) In keeping with the earlier expressed opposition of the United States Department of Justice to the extension of copyright liability of CATV because of the harmful anticompetitive consequences and because the extension is not justified by the appropriate considerations for copyright protection, the Department of Justice in its December, 1970, filing before the FCC concluded that CATV's not paying for retransmission of broadcast signals is not unfair competition and the FCC's attempted application of this concept in the circumstances has obscured the basic policy issues presented.

(6) The United States Supreme Court in *Teleprompter Corporation* v. *Columbia Broadcasting System, Inc.*, decided in March, 1974, extended the *United Artists* decision in holding that: "By importing signals that could not normally be received with current technology in the community it serves, a CATV system does not, for copyright purposes, alter the function it performs for its subscribers. When a television broadcaster transmits a program, it has made public for simultaneous viewing and hearing the contents of that program. The privilege of receiving the broadcast electronic signals and of converting them into the sights and sounds of the program inheres in all members of the public who have the means of doing so. The reception and rechanneling of these signals for simultaneous viewing is essentially a viewer function, irrespective of the distance between the broadcasting station and the ultimate viewer."

Against the perspective of these developments and occurrences, the soundness of the central concept and principle of the Pennsylvania position on copyright has been confirmed. Furthermore, the application of this concept and principle must be reinforced and supplemented in view of the broad and long-term implications of any departure from them, both in terms of the consequences to basic television reception service and to the development of cable communication services.

Concerning the television reception function of CATV, an overriding and fundamental public interest concern must be that basic television reception for everyone should be free and not subject to the burdens and risks involved in a commitment to copyright payment.

This concern gives strong reinforcement to the principle that television reception service for signals off the air should not be subject to copyright payment, simply because of the CATV means used to receive them. On the other hand, inasmuch as CATV and related technology can provide the means for equalizing the television reception opportunity for all viewers, thereby correcting a limitation or deficiency in broadcasting technology, service for at least basic or minimum television reception should not be subject to copyright payment, by whatever means reception is secured.

To the extent that reception is being provided by CATV of signals received off the air or to furnish basic television reception, there is no proper basis whatever upon which there can be any complaint or objection by any broadcaster or copy-

right owner, since such reception is substantially in keeping with the present marketing order.

Concerning the potential of CATV systems for increasing program choices, in part through the microwaving of distant signals, a number of policy and practical situations come into play, and all of these strongly indicate that there should be no copyright payment for such reception. In addition to the reasons in support of this conclusion in the *CBS* case and in the Justice Department position to which reference has been made, it is generally accepted that the copyright owners (who use the public resource of the airwaves without cost) have no right to impose an absolute control on the distribution of the copyright property which they choose to distribute by broadcasting.

At the same time, it is also generally accepted that a method can be developed whereby copyright owners can be fully compensated for the actual exhibitions and performances of their property, without the necessity of restricting or burdening CATV systems or services—which may well be the means for dramatically increasing the distribution possibilities for copyright property. Finally, there is a public interest in encouraging the investment of the huge capital commitments required for the construction of CATV systems with their greatly increased communications capacities, and also in encouraging the utilization of these capacities.

Recognizing that such microwaving may require some marketing adjustments and to respond by way of compromise to the overall objections of the broadcasters and copyright owners, a payment of two-tenths of one per cent per channel of the monthly service charge gross receipts would apply in exchange for a compulsory license for such reception.

With regard to both of these aspects of CATV, it is essential that the resolution of the CATV copyright issue not include a confirmation of the nature and extent of regulation undertaken by the Federal Communications Commission over cable television or of its present rules governing CATV. The copyright law should include no provision regarding the regulation of CATV which must be a matter of separate congressional legislative determination.

In summary, the policy position update on copyright is as follows:

I. No copyright fees should be payable for television reception of off the air signals provided by a CATV system to subscribers, with such service to be specifically exempt from copyright.

II. No copyright fees should be payable on reception provided by a CATV system to its subscribers of at least basic or minimum television reception, consisting of reception of the national networks (at this time three), of three independent television stations and of one educational television station, whether reception is secured off the air, by microwave or other means, with such service to be specifically exempt from copyright.

III. A compulsory license for reception of microwaved signals (other than required for minimum reception service as described above) should be granted, for which there should be a payment of two-tenths of one per cent per microwaved channel of the gross receipts from monthly service charges only. This rate should be statutorily fixed and payable into a copyright pool, to be distributed by an equitable formula.

IV. There should be no restriction or interference by the Federal Communications Commission with regard to any of the above services.

Finally, in any resolution of the copyright issue, there must be a recognition of the interests of the CATV subscribers, who up to this date have never been independently represented in any of the hearings and discussions on the subject and who have never had an opportunity to be heard. CATV companies should undertake the responsibility of fully informing subscribers of the various aspects of the issue in the course of the legislative process, particularly if copyright payment must be added to the service costs paid by the subscriber.

Mr. KASTENMEIER. The Chair would now like to call Mr. William Bresnan who is the president of the Cable Television Division of Teleprompter Corp.

Mr. Bresnan, we apologize for the delay in reaching you this morning, but we are interested in the subject. I see you have a prepared statement which is not particularly lengthy, you may proceed from it.

TESTIMONY OF WILLIAM J. BRESNAN, PRESIDENT, CABLE TELEVISION DIVISION OF TELEPROMPTER CORP.

Mr. BRESNAN. Thank you very much.

Good afternoon, I am William J. Bresnan, senior vice president of Teleprompter Corp., and president of our Cable Division. Teleprompter is the Nation's largest cable television company, having approximately twice as many cable television subscribers as the second largest company.

On my right is Jay Ricks, a partner in the firm of Hogan & Hartson. On my left is Jacqueline Da Costa, director of Media Information and Analysis at Ted Bates & Co., and to her left is Barry P. Simon, Teleprompter's vice president and general counsel.

Teleprompter's position on copyright is straightforward. We believe cable television systems should not be required to pay any copyright fee for the carriage of broadcast signals.

To understand this position, it is necessary to understand a basic fact about the broadcast industry—a fact which makes that industry unique among all other distributors of copyrighted materials. The broadcaster, unlike the movie producer or the book publisher, does not sell a copyrighted product. What the broadcaster sells is the attention of the viewers. The purchaser is the advertiser. The more viewers the broadcaster can deliver to the advertiser, the more the advertiser will pay. And the more the advertiser pays, the more money is available for the broadcaster to pay the copyright owner.

Cable television affects this relationship only by enlarging the audience available to the broadcaster. In many cases this actually increases the advertising revenues available to pay the copyright owner. In no case does it deprive the copyright owner of anything to which he is entitled.

Thus, a cable system operator is not like a record pirate, as has been previously questioned in this hearing, rather, he is more like a network affiliate. And a network affiliate, I might add, actually receives compensation from the network for expanding the network market area.

I would like to cite two examples. First, imagine a television station located in a community part of which is in a valley where television reception is poor. Imagine also that a cable television system offers its service to the people of the community. The people who live in the valley have three choices:

One, they can install a rooftop antenna to watch the programs broadcast by the television station;

Two, they can subscribe to the cable television system and thereby get the benefit of the antenna tower erected by the cable television system; or,

Three, they can do neither and simply not watch the TV station's programs.

As the Supreme Court has twice recognized, choices 1 and 2 are functionally identical. Since no copyright liability attaches when the viewer erects his own antenna, why should there be any liability when the viewer avails himself of the antenna tower erected by the cable television station?

It is no answer to say that the cable television system makes—or at least tries to make—a profit out of providing its service, for clearly the antenna manufacturer—like the television set manufacturer and numerous other third parties in television-related businesses—also seeks to make a profit.

Before going on to the second example, let's pause for a moment to consider alternative 3, where the prospective viewer neither buys the tall antenna nor subscribes to the cable service but simply doesn't watch the programs broadcast by our hypothetical television station.

If this happens, what is the result? The station has a smaller audience and therefore its advertising spots are less attractive to potential advertisers. So, the station gets less money. And this means there is less money available to the station to pay the copyright owner. From this we can see that cable television, far from stealing from the copyright owner, by increasing the size of the broadcaster's audience actually increases the moneys paid to the copyright owner.

Now, consider a second situation. In this case, imagine a television station in New York City whose programs are imported via microwave hops—by a cable system and retransmitted over the cable to the cable television system's subscribers in Oswego, New York, who otherwise would not be able to receive the New York City station.

Is this situation really any different from our first example? Is the copyright owner somehow damaged by the action of the cable station? Is he, perhaps, deprived of the ability to exploit his creation in Oswego after it has been seen there on the cable?

The answer to all of these questions is, no. Because of the nature of broadcast economics, the copyright owner cannot be injured by the cable system's importing the New York City station into Oswego. And this is true even without consideration of the complicated FCC exclusivity rules which seek to give added protection to the copyright owner and which may require the cable system to delete programing so as to allegedly protect the copyright owner's markets.

As in the first example, by showing the imported programs in Oswego the cable system increases the audience of the New York City station. And this is not just a theoretical increase. The rating services—Nielsen and ARB—spend large sums of money to keep track of cable subscribers with the result that every single cable subscriber is accounted for in their surveys and so finds his way into some television station's rate card. Thus, by simply checking in Nielsen we find, for example, that in San Luis Obispo County, Calif., 30 percent of the television homes view the Los Angeles independent and network stations on a regular basis; in Grant County, N. Mex., 51 percent of the television homes view El Paso on a regular basis; in Chemung County, N.Y., 19.5 percent of the television homes view the New York City independent stations on a regular basis; in Lane County, Oreg., 20 percent of the television homes view the Portland independent and network stations on a regular basis; and in Sweetwater County, Wyo., 81 percent of the television homes view the Salt Lake City network stations on a regular basis.

In these cases, and in countless others, such coverage would be impossible without cable television.

This fact has not been lost on the broadcasters. For example, the literature put out by the Association of Independent Television Sta-

tions, in text accompanying these illustrations in which the white areas—excuse me, Barry, would you point out, please——

Mr. SIMON. In New York, for example, it's right here.

Mr. DANIELSON. Would the witness go on the other side, please?

Mr. SIMON. I'm sorry. In New York the black line goes like this.

Mr. BRESNAN. The black line represents the perimeter of the local television market as defined by the Association of Independent Broadcasters. I would like to quote from the text that accompanies those drawings.

"The accompanying illustrations show how cable television can dramatically increase the physical coverage area of independent stations, expanding their influence far beyond the perimeters of the local television market.

"Advertisers on cable-connected independent stations share in this expanded TV coverage reaching a bonus audience of consumers as valuable to the national/regional advertiser as those situated within the defined local market area."

As a further illustration of this point I have here a stack of brochures; these are promotional brochures put out by the television stations. Each one takes pains to point out that its audience includes cable subscribers in distant markets. So we find that:

KTLA, an independent station in Los Angeles, claims a greater potential audience than any other Los Angeles station, network, or independent. The station credits its "significant penetration by way of CATV stations."

WGN, an independent station in Chicago claims substantial viewing far beyond the reach of its signal by virtue of CATV systems.

The rate card of KSL, a network affiliate in Salt Lake City, shows coverage by KSL of "Mountain America"—even extending, thanks to cable television, as far as northern Wyoming.

The list could go on and on. But rather than belabor the point, I will simply submit these brochures themselves to the committee.

What do these extra viewers that cable adds to the audience of these stations mean to the relationship between station and advertiser? It means that the station time is more valuable and so the advertiser pays more. Now listen to what Miss Da Costa, who is in charge of all media-related research at Ted Bates, the Nation's fifth largest advertising agency, says:

> Viewing occurring on CATV systems has been included in surveys for quite some time in the total audience reported for individual stations. The industry has generally used these total audience figures to establish rates and corresponding cost efficiencies. This practice compensates stations for all viewing including that which takes place within CATV houses—both inside and outside the range of the station's off-air reception area.

To go back to our example, we see that the copyright owner whose creation is broadcast by the New York City station and imported, by cable, to viewers in Oswego has not been deprived of the chance to earn money by showing his production in Oswego. For the advertising revenues to be derived from showing the program to the cable subscribers in Oswego have already been derived by the New York City station. And, as a result, the New York City station will pay the copyright owner more than if the station were unable to reach the Oswego audience.

To allow the copyright holder to be compensated again—this time directly by the Oswego cable system—would be giving him the windfall of an undeserved second payment. This is a windfall that neither the cable television industry nor the 15 percent of the American households, which are cable television subscribers, can afford.

Thank you.

Mr. KASTENMEIER. Thank you, Mr. Bresnan.

You make a consistent point that regular broadcasters benefit, as do advertisers, and potentially the copyright owner, by virtue of the additional audience that cable television provides. Do the broadcasters agree to that, or do they dispute that fact?

Mr. BRESNAN. I will be submitting to you the brochures from the broadcasters who claim all of these additional market areas. Those two charts are the work of the Association of Independent Television Broadcasters. Now, there may be times when they claim one thing and at times another, but when they construct the rate chart, they do claim these territories.

[The material referred to is in the files of the subcommittee.]

Mr. KASTENMEIER. I am only asking for the purpose of ascertaining whether that is a point in dispute, or whether the broadcasters agree to that, that this includes your subscribers, in terms of their sold audience.

Mr. BRESNAN. I'm not sure I understand the question clearly. There is no dispute that broadcasters claim coverage of the CATV subscribers who are provided the signals by the CATV system.

I have been advised by Miss De Costa on my left——

Mr. KASTENMEIER. Yes, I thought perhaps Miss De Costa might know more precisely, as a matter of technical expertise, whether that is correct. It is a matter of fact rate cards are built on the basis of cable audiences, as well as normal audiences. Do the broadcasters dispute that?

Miss DE COSTA. No. As a matter of fact, they look towards this audience to increase the size of their delivery.

Mr. BRESNAN. Miss De Costa has advised me, Mr. Chairman that to her knowledge every single cable television customer finds his way into a broadcaster's rate base.

Mr. KASTENMEIER. Does the Teleprompter Corp. have a number of different types of systems? That is to say, does it have systems which retransmit only, and other systems which originate, use microwaves predominantly? What sort of systems do you have?

Mr. BRESNAN. Our company is a pretty good cross section of all types of cable systems, from coast to coast, from large to very small. We originate in some, and in others we do not. It is a good cross section of the industry.

Mr. KASTENMEIER. Were you a party to the consensus agreement, or were you present at that time; or on the basis of litigation, did you absent yourself?

Mr. BRESNAN. I am glad you asked that because that so-called consensus agreement came up quite a bit today, and I do have some pretty strong feelings about it.

The consensus agreement come about at a time shortly after the time that the company I had been with merged into Teleprompter and Teleprompter's then management pretty much carried the ball. Although I was on the NCTA board—I believe I was vice chairman—when that came about.

I would like to state that the consensus agreement, in my opinion, was really a legend. It was pushed down the throat of the cable television industry, in my opinion, by the White House. If you like, I can expand on that.

Mr. KASTENMEIER. I'm sorry, did you say that you were present at the time?

Mr. BRESNAN. I was present at the NCTA board meeting.

Mr. KASTENMEIER. For a different corporation?

Mr. BRESNAN. No; I was with Teleprompter. But Teleprompter's position was being determined by the then Teleprompter management. I had just joined the company shortly before then by virtue of the merger of my company into Teleprompter.

Mr. KASTENMEIER. And you said it was "shoved down the throat" of the cable people. How about the other parties, might they also have been somewhat unwilling, or unenthusiastic about the compromises they received?

Mr. BRESNAN. I doubt that they had too little to be unenthusiastic about, sir. At the time that that happened, the cable television industry had been frozen for about 5½ to 6 years. And we were in a very deep freeze for about 3 years, from 1968 through 1971.

During the summer of 1971 the FCC studied proposed new rules which would lift the freeze on cable television, and things started to look pretty good for cable television after a long dry spell.

And in August of 1971 the then Chairman of the FCC sent a letter of intent to Congress, explaining the rules that the Commission proposed to adopt. Shortly thereafter, representatives of the broadcasting, copyright, and cable television industries were invited to a White House meeting. The net result of that meeting was that the cable television industry balked at these changes. They were told in no uncertain terms by Peter Flanigan that if they didn't agree to this thing they would get nothing, the White House would see to that.

That story was delivered back to the National Cable Television Association board of directors. Some of the directors voted for it reluctantly, some voted against it; but it was a pretty sad day for cable TV.

Mr. KASTENMEIER. Do I understand the context that was used, "you would get nothing," not only to potential copyright legislation that the administration might take a position on, but particularly the FCC rules then pending?

Mr. BRESNAN. Specifically it had to do with the FCC rules. The FCC had in a letter of intent stated that it believed it should handle the regulatory aspects of cable TV, and leave up to the Congress the handling of the copyright aspects.

Mr. KASTENMEIER. Then I assume, if I follow this correctly—and I assure you, I do not know precisely what transpired—that as a result of your fellow cable operators coming to an agreement, the Commission subsequently issued rules recognizing that compromise.

In other words, reading between the lines of what you have said, the consensus agreement did produce some concessions for the cable industry, as well as the others, as a result of your coming to that agreement in terms of the consensus agreement; or at least others.

Mr. BRESNAN. Well, first of all——

Mr. KASTENMEIER. In other words, was there not a quid pro quo which the consensus agreement reflects?

Well, this committee is not party to such a bargain, but I suppose we might take note of it.

Mr. BRESNAN. The rules that we were hoping to get out of the FCC we did not get. And I recall such powerful words—I think they were attributed to Peter Flanigan—"There will be a blood bath for cable television."

Mr. KASTENMEIER. Well, that has not happened either, has it?

Mr. BRESNAN. We seem to have gotten everything.

Mr. KASTENMEIER. The Chair yields to the gentleman from Illinois, Mr. Railsback.

Mr. RAILSBACK. The blood bath was earlier, wasn't it? [Laughter.]

Do you think we could have a copy of your annual report that is referred to in your earlier testimony, would that be possible?

Mr. BRESNAN. Yes, sir.

[The material referred to is in the files of the subcommittee.]

Mr. RAILSBACK. Do you recall the reason for what appears to be an extraordinary loss to your company in 1973?

Mr. BRESNAN. Yes. Teleprompter Corp. was expanding into several of the top markets. Teleprompter, I guess, was probably attempting to do more to prosecute the intention of the FCC rules than any other company. It was not getting subscribers as fast as it was building plant. It stopped construction in a number of systems, and slowed down construction in others. It changed its whole mode of operations, if you will, from that of a construction company to that of an operating company.

There were significant operating costs and losses, and there was some write down of assets due to this change.

Mr. RAILSBACK. So, it really was, or could be characterized as an extraordinary loss, or a nonrecurring loss.

Mr. BRESNAN. Well, of part of it you could say that. However, in 1974 the industry also had a loss.

Mr. RAILSBACK. You went from $29 million down to about $7 million?

Mr. BRESNAN. Yes. And the interesting thing, Mr. Railsback, we picked up a bit of information this morning from a very well-respected cable analyst, and he tells us that of the 15 publicly held companies which represent 4.2 million of the 10 million cable subscribers; that those systems combined showed a net loss in 1974 of $31 million.

Now, we don't know how much profit or loss privately held companies would have because we don't have access to that information. But we estimate that the entire industry last year did not operate at a profit.

Mr. RAILSBACK. Let me just mention, the exhibit attached to your testimony reflects that the nine largest public CATV companies, there was a 1974 loss of $16.3 million; but 17.2 percent of that total figure was Telecommunications; and in the year 1973 there was a loss, a net income loss of $27.9. There is a figure that you had that year, and this is part of the total figure, that your company had a 29.7. Two companies have a rather severe impact on the total figure in both years, your Telecommunications and Teleprompter.

Mr. BRESNAN. No question about that, sir. However, the fact remains that in 1974, at which time Teleprompter did not have a real large loss, as we had in 1973, the top 15 publicly held companies I referred to just a moment ago, had a net result of a $31 million loss.

Mr. RAILSBACK. Which year was that?

Mr. BRESNAN. 1974.

Mr. RAILSBACK. Well, in 1974 Telecommunications had contributed toward that 17.2 percent of the 15 companies.

Mr. BRESNAN. Yes.

Mr. RAILSBACK. I think that is all I have.

Mr. KASTENMEIER. The gentleman from California, Mr. Danielson.

Mr. DANIELSON. Thank you, Mr. Chairman.

After this consent agreement which I think we all have heard a lot about recently, do you know whether the cable industry had any part in drafting it, preparing it? That is the Consensus Agreement.

Mr. BRESNAN. I don't know, sir.

Mr. DANIELSON. You are not saying that the cable industry did not participate in the preparation, you are saying you don't know whether they did.

Mr. BRESNAN. I am saying I don't know.

Mr. DANIELSON. Do you know of anybody who does know?

Mr. BRESNAN. We believe it was drafted by OTP. There were meetings conducted, where the participants included representatives of the NCTA and the broadcasting industry, and I believe the copyright industry. I don't know whether they were actual drafting sessions. We could find out.

Mr. DANIELSON. But your opinion is that, at least subsequent to those meetings, the agreement was drafted by, in your opinion, OTP.

Mr. BRESNAN. Yes, sir.

Mr. DANIELSON. Which is Office of Telecommunications policy, I believe.

Mr. BRESNAN. That's correct.

Mr. DANIELSON. Were you present at the meeting where you were told, you get this, or you get nothing?

Mr. BRESNAN. The meeting with Mr. Flanigan?

Mr. DANIELSON. Well, you referred to a meeting——

Mr. BRESNAN. I was present at a meeting of the NCTA board, where the remarks of the meeting with Mr. Flanigan were reported to the board.

Mr. DANIELSON. In other words, someone reported to you that had been said.

Mr. BRESNAN. That is correct.

Mr. DANIELSON. Who reported that to you?

Mr. BRESNAN. The person I remember specifically who gave quite a bit of reporting at that time was Gary Christensen, who at that time was general counsel to NCTA.

Mr. DANIELSON. And he made that report to a group of National Cable Television Association people, which included yourself; is that correct?

Mr. BRESNAN. That is correct.

Mr. DANIELSON. Do you know whether there were any changes made in the so-called consensus agreement after that time, before it was signed?

Mr. BRESNAN. I can't recall, sir.

Mr. DANIELSON. You recall no changes, but you do not recall that there were no changes, also; is that correct?

Mr. BRESNAN. That is correct.

Mr. DANIELSON. You do not recall any changes, but you also do not know if there were no changes.

Mr. BRESNAN. That is correct.

Mr. DANIELSON. Were you an officer of Teleprompter at the time the agreement was signed?

Mr. BRESNAN. Yes, I was.

Mr. DANIELSON. Were you at a policymaking level at Teleprompter at that time?

Mr. BRESNAN. No, sir.

Mr. DANIELSON. Do you have any knowledge as to whether or not Teleprompter would have agreed to the so-called consent agreement, but for the threat that you reported, that you would get this, or you would get nothing?

Mr. BRESNAN. To my knowledge neither Teleprompter nor anyone else at NCTA would have accepted that agreement, were it not for the threat; that was the feeling I got.

Mr. DANIELSON. Were you at the meeting of the NCTA people when it was reported?

Mr. BRESNAN. Yes, I was.

Mr. DANIELSON. And can you tell me whether your feeling, which I am going to describe as a negative feeling for point of reference; can you tell me whether that was shared, as far as you can tell, by others?

Mr. BRESNAN. As far as I can tell, sir, it was. It was a very, very gloomy meeting at which we were told we would have to accept something which we all knew was bad for our industry.

Mr. DANIELSON. Directing your attention, now, to the two charts on the side wall which your colleague pointed out a while ago, I note that the upper one depicts what I am going to call New England, Pennsylvania, New Jersey, New York, and up through to Maine. Portions of the map are in a dark gray, and portions in white.

It is my understanding that in the white area, the area that is circumscribed by a heavy dark, black line, is the primary viewing area of the New York City television broadcasting stations; am I right on that?

Mr. BRESNAN. Yes, sir.

Mr. DANIELSON. And beyond that heavy line there continue to be, in irregular formation, other white areas, reaching from upper New York back all the way, I guess, to the St. Lawrence River to Canada; down through New York, one leg going out to a lake—I can't name it.

Mr. PATTISON. Atlantic. [Laughter.]

Mr. DANIELSON. Another leg going down to the Pennsylvania southern end, again western boundary. Do I understand your testimony to be that those white areas are included within the potential viewing audience of the New York City television stations, in conjunction with their advertising rate schedule. Am I right, or wrong on that?

Mr. BRESNAN. You are right.

Mr. DANIELSON. I would like to ask a question, and I think it's really for Miss Da Costa. I understand Miss Da Costa is a professional advertising agency person; am I correct?

Miss DA COSTA. Yes, sir.

Mr. DANIELSON. How long have you been so employed?

Miss DA COSTA. More than I care to admit, about 30 years.

Mr. DANIELSON. Well, you started as a child, then. [Laughter.]

Miss DA COSTA. Thank you.

Mr. DANIELSON. Anyway, does your work include the contracting for advertising through television stations by the clients of your advertising agency?

Miss DA COSTA. Not directly, sir. I advise our buyers and planners of all media available to them to buy. I am not directly involved in buying.

Mr. DANIELSON. But that includes advice as to television audiences?

Miss DA COSTA. Yes, that is my area of expertise, I am charged with media research at Ted Bates.

Mr. DANIELSON. The Ted Bates Co., I'm pretty ignorant in that field; are they a pretty well-established firm?

Miss DA COSTA. Yes, they are the fifth largest agency in the country.

Mr. DANIELSON. Do they handle major clients, major industries, businesses?

Miss DA COSTA. Yes, sir, many of them.

Mr. DANIELSON. Not Joe's Used Car Lot.

Miss DA COSTA. All of our clients are national accounts.

Mr. DANIELSON. I like Joe's Used Car Lot——[Laughter.]

You have expertise in big ones.

Miss DA COSTA. All of our accounts are national accounts.

Mr. DANIELSON. Then, the statement which I made—I wasn't too sure if I understand you correctly. Do you know of your own personal knowledge that in computing the advertising rates which are charged to these national accounts by the TV stations for their advertising, is the audience encompassed in these white areas in the charts included?

Miss DA COSTA. Yes, sir.

Mr. DANIELSON. I don't suppose you handle the California accounts.

Miss DA COSTA. No, sir.

Mr. DANIELSON. There is a similar chart there, maybe the witness can explain. Where did you obtain these charts, what is the source of the charts?

Mr. BRESNAN. The Association of Independent Television Stations.

Mr. DANIELSON. And can you tell me what that is?

Mr. BRESNAN. A group of broadcasting companies that are not affiliated with network companies.

Mr. DANIELSON. And someone has simply copied these maps from their information.

Mr. BRESNAN. We have brochures that this Association of Broadcasters has put out.

Mr. DANIELSON. And they are blowups, are they?

Mr. SIMON. Exactly.

Mr. DANIELSON. I'm not going to ask you whether you copied them, you might have a copyright problem. [Laughter.]

Anyway, that's really what they represent.

Mr. BRESNAN. Yes, sir.

Mr. DANIELSON. I see that California and the Southwest are included; and do the same analogies of white areas and gray areas prevail there, as in New York?

Mr. BRESNAN. Yes. As a matter of fact, I would like to make one further point. Mr. Simon, would you find that line?

Mr. SIMON. Here is the dark line, the primary viewing line again.

Mr. DANIELSON. And this is from San Francisco.

Mr. SIMON. That's correct, San Francisco stations.

Mr. BRESNAN. The white area goes all the way up to Oregon, and east into Nevada.

Miss Da Costa advises me that, not only do the broadcasters from San Francisco claim this coverage—and therefore ultimately moneys filter back to the copyright area—but she says also, that the syndicators will at the same time be selling programs in the Sacramento, Reno and Redding markets, also; they are selling them again to those markets. And what they are proposing to do now in the case of CATV, is to sell them a third time in many cases.

Mr. DANIELSON. Now lastly, it's my understanding that the owner of a copyrightable item, let's say the film of Bambi, may sell the right to use it to, say, a Boston TV station for their regular broadcast.

Suppose that the same film has been sold by the copyright owner, leased, licensed, what have you, to a TV station in the city of New York for its use. And through cables they picked it up and disseminated the program within the city of Boston, let's say, a month in advance of the showing in the city of New York.

Does not this diminish the value of the Boston licensee in using the film?

Mr. BRESNAN. Sir, if the copyright owner—the owner of the product—didn't recognize when selling that product, in this case, the Bambi film to the New York station, didn't recognize that that signal would go up into the Boston area, he is a fool because the coverage area of these stations, as you will see when you examine the brochures that I am going to leave with you, is clearly depicted. This is no secret. It's no surprise—it shouldn't be a surprise because it's stated in the advertising literature how far out that station's signal goes because of CATV.

Mr. DANIELSON. OK. Are you, sir, or any of you in your group able to tell me, or do you have any expertise, how are the negotiations carried on between a copyright owner—the owner of Bambi, for example—and the station?

I don't know anything about that. Do you advertising people do that kind of work?

Miss DA COSTA. Well, generally the syndicator is the one that sells programming to individual stations within markets. They negotiate and take that into account, the number of homes that are delivered to that particular station and that particular market.

Mr. DANIELSON. I think we have a word of art here. You said "syndicators," are they the people who sell the films, and so forth——

Miss DA COSTA. Yes, sir.

Mr. DANIELSON [continuing]. To broadcasting stations?

Miss DA COSTA. There is some company that does that, although there are some originating producers that do their own selling.

Mr. DANIELSON. But in that connection, the sale includes whatever is the copyright royalty, that is in the package.

Miss DA COSTA. That is a total package, yes.

Mr. DANIELSON. Now, some of the Teleprompter stations originate their own programs, I am sure I heard you say that.

Mr. BRESNAN. Yes, sir.

Mr. DANIELSON. Now, in those instances you do pay royalties, do you, for the copyrighted materials that you use?

Mr. BRESNAN. Yes, and we agree with the principle of that.

Mr. DANIELSON. Now, do you negotiate with the copyright owner, or with one of those syndicators?

Mr. BRESNAN. We buy the program generally from a distributor of the program.

Mr. DANIELSON. Can you tell me if the word "distributor" as you use it is similar to "syndicator"?

Mr. BRESNAN. Yes.

Mr. DANIELSON. Thank you, that's all the questions I have.

Mr. KASTENMEIER. The gentleman from California, Mr. Wiggins.

Mr. WIGGINS. If I understand you correctly, when you are selling time to a large market, you can extract from an advertiser a greater fee because of his access to that market.

Do you have any data showing that the copyright owner shares in that?

Mr. BRESNAN. The copyright owner negotiates with the broadcaster for the fee which he will receive for the carriage of his program. The copyright owner has available to him the advertising brochures of the station, showing the coverage area.

I have no reason to believe that the copyright owner wouldn't take advantage of such material in his negotiations. I have never sat in on those negotiations, I'm not sure what goes on there.

Mr. WIGGINS. Does anybody at the table have personal experience in this?

Miss DA COSTA. I don't think that anyone can really determine what portion of the rate they are charging, if it's just a copyright, or just the time, or the use of the program. I think the syndicator establishes the rate that will include some copyright fees. And also, in negotiating with the station he will hopefully get what he feels the program is worth.

Mr. WIGGINS. But at least you are representing to us as a fact that the negotiated fee is based upon the the total market to be served.

Miss DA COSTA. That is taken into consideration, yes, sir.

Mr. WIGGINS. Now, you have experience, Miss Da Costa, with national and regional accounts. I gather your agency does not handle local advertisers.

Miss DA COSTA. We have one that we call a local advertiser, the Chase Manhattan Bank.

[Laughter.]

Mr. WIGGINS. Well, I was thinking more about Joe's Used Car Lot.

[Laughter.]

Mr. WIGGINS. It seems to me that local independents are constantly barraged by auto dealers selling their cars--I don't understand that a local used car lot is really appealing to those large market areas. My feeling is that such a local car dealer would be unwilling to pay for that kind of expanded coverage because it's beyond his normal service area.

If that is the case, isn't it likely that commercial operators similarly situated would be denied the market of their own, and would not be

inclined to go to the owner of a copyrighted work and buy something that is shown in one of these isolated areas?

What I am trying to project to you very inartfully is that it seems to me there is a difference betweeen local advertising and regional and national advertising, and that to the extent that national advertisers blanket an area, they deny to a copyright owner the opportunity to sell his work to a local advertiser. Have I made that point clear?

Mr. RAILSBACK. Will the gentlemen yield?

Mr. WIGGINS. Yes.

Mr. RAILSBACK. Oak Park Savings and Loan carry ball games and they come into my area, and they come in with local advertising, or Koons.

Miss DA COSTA. I'm not familiar with those.

Mr. RAILSBACK. His point is—if the gentleman will yield further—you may not always have a regional advertiser.

Miss DA COSTA. Let me just explain to you how that works, starting with the national advertiser. A national advertiser presumably has national distribution, and his product can be bought across the country. Therefore, any advertising that he buys in one market, or an accumulation of markets, his advertising is worth putting it on that station because his product is everywhere.

A regional advertiser has a similar situation within the region area that they have product distribution.

As far as the local, the truly local advertising that you are describing, sir, that advertiser feels, when he is investing money on a television station within his market that the medium is strong enough to get him customers, even though he pays a 10-percent premium for those homes that are not potentials for him.

Mr. WIGGINS. Well, perhaps that's so. Your illustration mentioned New York City and Oswego, I believe. I would think there is a possibility at least that a used car dealership in Oswego, which might otherwise be in the market to buy a movie, is not going to do so because that movie is being transmitted to New York City. And that to an extent it is true that a copyright owner is deprived of an opportunity to sell his product in Oswego.

Miss DA COSTA. But if we examine hard research data that is available to us by county, where we can see the signals and stations that are being viewed by the homes in the county, we see that 10 percent of a county's homes views signals that are imported from as far away as New York. And consequently the potential for that local car distributor is 90 percent of the market.

Mr. WIGGINS. Well, I would like to be exposed to this hard data on which you base your conclusion. I realize the conclusion is stated in the testimony, but suppose that you worked out the figures in support of this and, if you have them, would make them available to the committee. Mr. Chairman, I would appreciate it

Miss DA COSTA. Sir, I did prepare a selected list of counties in which I looked at the actual viewing as it is reported by the Nielsen Co., which is a recognized research organization. This is the kind of information, if you will allow me to just mention it.

For example, in Oneida County, which is in the State of New York, we found that 3.4 percent of the households viewed the WNEW TV station in the course of a whole week.

Mr. KASTENMEIER. The chairman will interrupt to announce this is the second ring for a vote on the House floor.

Mr. DANIELSON. Are we coming back?

Mr. KASTENMEIER. No, we are not coming back.

Mr. DANIELSON. Mr. Chairman, may I suggest that the pamphlets the witnesses placed on the table—they don't belong in our record—but may we receive them for our files, for the record?

Mr. KASTENMEIER. Yes. Any materials that the witnesses have made available.

The gentleman from New York, Mr. Pattison?

Mr. PATTISON. Well, I had some, but we are not going to have time.

Mr. KASTENMEIER. On behalf of the committee, we thank you, Mr. Bresnan, Miss Da Costa, and your associates, for appearing here today.

The Chair will announce that tomorrow at 9:30 the subcommittee will convene, first to hear briefly the news archives issue with two witnesses; and then, at 10 o'clock witnesses generally supporting section 111, more particularly from the broadcasting industry.

Until that time, the subcommittee will stand adjourned.

[The prepared statement of William J. Bresnan follows:]

STATEMENT OF WILLIAM J. BRESNAN, SENIOR VICE PRESIDENT AND PRESIDENT, CABLE DIVISION, TELEPROMPTER CORP.

Good afternoon, I am William J. Bresnan, Senior Vice President of Teleprompter Corp., and President of our Cable Division. Teleprompter is the nation's largest cable television company, having approximately twice as many cable television subscribers as the second largest company.

On my right is Jay Ricks, a partner in the firm of Hogan & Hartson. On my left is Jacqueline Da Costa, Director of Media Information and Analysis at Ted Bates & Co., and to her left is Barry P. Simon, Teleprompter's Vice President and General Counsel.

Teleprompter's position on copyright is straightforward. We believe cable television systems should not be required to pay *ANY* copyright fee for the carriage of broadcast signals.

To understand this position, it is necessary to understand a basic fact about the broadcast industry—a fact which makes that industry unique among all other distributors of copyrighted materials. The broadcaster, unlike the movie producer or the book publisher, does not sell a copyrighted product. What the broadcaster sells is the attention of the viewers. The purchaser is the advertiser. The more viewers the broadcaster can deliver to the advertiser, the more the advertiser will pay. And the more the advertiser pays, the more money is available for the broadcaster to pay the copyright owner.

Cable television affects this relationship only by enlarging the audience available to the broadcaster. In many cases this actually increases the advertising revenues available to pay the copyright owner. In no case does it deprive the copyright owner of anything to which he is entitled.

This is easily demonstrated by two examples.

First, imagine a television station located in a community, part of which is in a valley where television reception is poor. Imagine also that a cable television system offers its service to the people of this community. The people who live in the valley have three choices: (1) they can install a tall rooftop antenna to watch the programs broadcast by the television station, (2) they can subscribe to the cable television system and thereby get the benefit of the antenna tower erected by the cable television system or (3) they can do neither and simply not watch the TV station's programs. As the Supreme Court has twice recognized, choices 1 and 2 are functionally identical. Since no copyright liability attaches when the viewer erects his own antenna, why should there be any liability when the viewer avails himself of the antenna tower erected by the cable television station? It is no answer to say that the cable television system makes (or at least tries to make) a profit out of providing its service for clearly the antenna manufacturer (like the television set manufacturer and numerous other third parties in television related businesses) also seeks to make a profit.

Before going on to the second example, let's pause for a moment to consider alternative (3)—where the prospective viewer neither buys the tall antenna nor subscribes to the cable service but simply doesn't watch the programs broadcast by our hypothetical television station. If this happens, what is the result? The station has a smaller audience and therefore its advertising spots are less attractive to potential advertisers. So the station gets less money. And this means there is less money available to the station to pay the copyright owner. From this we can see that cable television, far from stealing from the copyright owner, by increasing the size of the broadcaster's audience actually increases the monies paid to the copyright owner.

Now consider a second situation. In this case imagine a television station in New York City whose programs are imported—via microwave hops—by a cable system and retransmitted over the cable to the cable television system's subscribers in Oswego, New York who otherwise would not be able to view the New York City station.

Is this situation really any different from our first example? Is the copyright owner somehow damaged by the action of the cable station? Is he, perhaps, deprived of the ability to exploit his creation in Oswego after it has been seen there on the cable?

The answer to all these questions is, no. Because of the nature of broadcast economics, the copyright owner cannot be injured by the cable system's importing the New York City station into Oswego. And this is true even without consideration of the complicated FCC exclusivity rules which seek to give added protection to the copyright owner and which may require the cable system to delete programming so as to allegedly protect the copyright owner's markets.

As in the first example, by showing the imported programs in Oswego the cable system increases the audience of the New York City station. And this is not just a theoretical increase. The rating services—Nielsen and ARB—spend large sums of money to keep track of cable subscribers with the result that every single cable subscriber is accounted for in their surveys and so finds his way into some television station's rate base. Thus, by simply checking in Nielsen we find for example, that

In San Luis Obispo County, California, 30% of the television homes view the Los Angeles independent and network stations on a regular basis,

In Grant County, New Mexico, 51% of the television homes view the El Paso network stations on a regular basis,

In Chemung County, New York, 19.5% of the television homes view the New York City independent stations on a regular basis,

In Lane County, Oregon, 20% of the television homes view the Portland independent and network stations on a regular basis, and

In Sweetwater County, Wyoming, 81% of the television homes view the Salt Lake City network stations on a regular basis.

In these cases, and in countless others, such coverage would be impossible without cable television.

This fact has not been lost on the broadcasters. For example, the literature put out by the Association of Independent Television Stations, in text accompanying these illustrations in which the white areas show the reach of independent stations as enhanced by cable television, states

"The accompanying illustrations show how cable television can dramatically increase the physical coverage area of independent stations . . . expanding their influence far beyond the perimeters of the local television market. . . .

"Advertisers on cable-connected independent stations share in this expanded TV coverage . . . reaching a bonus audience of consumers as valuable to the national/regional advertiser as those situated within the defined local market area."

As a further illustration of this point, I have here a stack of promotional brochures put out by television stations. Each one takes pains to point out that its audience includes cable subscribers in distant markets. So we find that,

KTLA, an independent station in Los Angeles, claims a greater potential audience than any other Los Angeles station, network or independent. The station credits its "significant penetration by way of CATV stations."

WGN, an independent station in Chicago, claims substantial viewing far beyond the reach of its signal by virtue of cable systems.

The rate card of KSL, a network affiliate in Salt Lake City, shows coverage by KSL of "Mountain America"—even extending, thanks to cable television, as far as northern Wyoming.

The list could go on and on. But rather than belabor the point, I'll simply submit these brochures themselves to the Committee.

What do the extra viewers that cable adds to the audience of these stations mean to the relationship between station and advertiser? It means that the station time is more valuable and so the advertiser pays more. Listen to what Miss Da Costa, who is in charge of all media related research at Ted Bates, the nation's fifth largest advertising agency, says:

"Viewing occurring on CATV systems has been included in surveys for quite some time in the total audience reported for individual stations. The industry has generally used these total audience figures to establish rates and corresponding cost efficiencies. This practice compensates stations for all viewing including that which takes place within CATV homes (both inside and outside the range of the station's off-air reception)."

To go back to our example, we see that the copyright owner whose creation is broadcast by the New York City station and imported, by cable, to viewers in Oswego, has not been deprived of the chance to earn money by showing his production in Oswego. For the advertising revenues to be derived from showing the program to the cable subscribers in Oswego have already been derived by the New York City station. And, as a result, the New York City station will pay the copyright owner more than if the station were unable to reach the Oswego audience.

To allow the copyright holder to be compensated again—this time directly by the Oswego cable system—would be giving him the windfall of an undeserved second payment. This is a windfall that neither the cable television industry nor the 15% of the American households which are cable television subscribers can afford.

Thank you.

[Whereupon, at 2:55 p.m., the subcommittee adjourned, to reconvene at 9:30 a.m., Thursday, June 12, 1975.]

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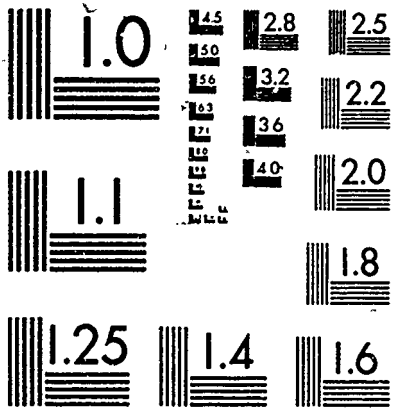

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