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# Copyright

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Monthly Review of the  
World Intellectual Property Organization (WIPO)

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## World Intellectual Property Organization

### Dr. Arpad Bogsch Re-Elected Director General of WIPO

At its ordinary session of September/October 1985, the General Assembly of the World Intellectual Property Organization (WIPO) re-elected Dr. Arpad Bogsch as Director General of WIPO. The election, which was unanimous and by acclamation, took place in a joint meeting with the Assemblies of the Paris Union for the Protection of Industrial Property and the Berne Union for the Protection of Literary and Artistic Works. Constitutionally, the agreement of the Assemblies of those two Unions is also necessary for the appointment of the Director General.

Dr. Bogsch was first appointed Director General in 1973 for a term of six years. In 1979, he was re-elected for a second term of six years. And in 1985, he was re-elected for a third term of six years, which expires on December 1, 1991.

Dr. Bogsch was born in Hungary in 1919 and, since 1959, has been a citizen of the United States of America. He has law degrees from universities in Budapest, Paris and Washington.

He delivered the following speech to the Governing Bodies following his re-election on September 23, 1985:

*"Mr. Chairman Jean-Louis Comte,*

*Thank you for the good news and for having conveyed it to me with warmth and eloquence.*

*Honorable Delegates,*

*I am grateful to you for your decision to re-elect me to the post of Director General of the World Intellectual Property Organization.*

*Since this decision is based on a decision of the WIPO Coordination Committee that was made last year on the proposal of the delegation of my country, the United States of America, I wish to repeat my heartfelt thanks to the delegation of that country, to the members of the Coordination Committee and to the then Chairman of that Committee, Minister Carlos Fernández Ballesteros.*

*Today, naturally, my thanks go to all the countries and all the delegations, the more so as, to my great pleasure, their decision was unanimous.*

*As Director General of an intergovernmental worldwide Organization, I wish to continue to serve with equal attention all the member countries. The fact that you have unanimously decided to place me in that position is a sign of confidence and, therefore, a source of encouragement for which I am particularly grateful to you.*

*With this confidence manifested by you, and with this encouragement coming from you, I shall continue to serve this Organization as much as I can in achieving the goals for which it was founded and for which it exists.*

*Naturally, the efficiency of an intergovernmental organization depends mainly on the attitudes and decisions, including decisions on program and budget, of the governments of its member States. But it is the secretariat of an intergovernmental organization that is to a large extent responsible for creating the conditions propitious to the making of good decisions. Those conditions include, in particular, an atmosphere of mutual respect between delegations, a completely open and equal attitude by the secretariat vis-à-vis all member countries, a judicious planning of meetings among representatives of member countries and good preparation and good servicing of those meetings. By good preparation, I mean documents that are clear, as short as possible, objective and correct. By good servicing, I mean efforts to bring about the maximum extent of agreement among delegations.*

*As I said in the Coordination Committee last year, in connection with its proposal that I be elected this year, I shall try to deploy and develop the services of the International Bureau or secretariat of WIPO mainly in three fields. Those intentions, by the way, also underlie my proposals contained in the draft budget for 1986 and 1987, and the draft medium-term plan for the four years following 1987 and ending with 1991, proposals that are before the present sessions of the Governing Bodies.*

*The three fields in question are: development cooperation with developing countries, extension or consolidation of intellectual property protection in*

*new fields, and simplification of the international protection of intellectual property rights.*

*Development cooperation: Our goal is that intellectual property should accelerate the development of developing countries. Naturally, each developing country's government sets its own economic goals. It is in the service of those goals that intellectual property should play a significant and realistic role. Such service requires trained persons, well-equipped and well-functioning industrial property offices and adequate legislation. My objective is that in every case where a developing country asks for advice and training, WIPO should be in a position to furnish it.*

*The second main objective is the consolidation of existing protection and the extension of intellectual property to new fields. Such new fields include, for example, biotechnology, computer software, integrated circuit designs, television broadcast satellites, cable television and videocassettes. One has to act positively and fast enough in all those and other fields, both nationally and internationally. Otherwise, intellectual property will lose much of its raison d'être. "Consolidation" also means our efforts to harmonize certain provisions of intellectual property legislation. And it also means our efforts to harmonize patent documentation in order to promote patent information. The latter is the backbone of any legal system for protecting inventions.*

*The third main objective is the simplification of the obtaining of protection for inventions, trademarks and industrial designs where the owner needs and wishes protection in several countries. Such "international" protection should cost less and should be obtainable in a simpler way than today. Our means of action are, or should be, the Patent Cooperation Treaty, a new worldwide system for the registration of marks, and an extension of the Hague*

*Agreement Concerning the International Deposit of Industrial Designs.*

*Results in all these fields come from interaction between the member States with WIPO as catalyst and organizer.*

\* \* \*

*The staff of WIPO is eager to give good service to the member States.*

*I wish to thank the staff of WIPO, once again, publicly, addressing myself to the representatives of our member States. It is their hard work, their enthusiasm for the objectives of the Organization, their imagination and their patience that I wish to praise and thank them for. It would take too much time to name all the staff members. But let me name the three Deputy Directors General, Klaus Pfanner, Marino Porzio and Lev Kostikov. Their devotion and skill are exemplary. I shall propose that they be continued in their present position. And I also mention those of my colleagues who are, or shortly should become, directors, namely, Claude Masouyé, Shahid Alikhan, Ludwig Baeumer, Paul Claus, François Curchod, Mihály Ficsor, Roger Harben, Kamil Idris, Lakshmanathan Kadirkamar, Thomas Keefer, Gust Ledakis, Enrique Pareja and Ibrahima Thiam.*

*Through my colleagues mentioned by name, I wish to thank all the staff and ask those mentioned by name to convey these thanks to those working directly with them.*

*Mr. Chairman, Honorable Delegates,*

*It is with these resolves towards the member States, and these feelings towards the staff, that I express my deep gratitude for your decision to re-elect me.*

*Thank you."*

## **Seminar on Copyright and Neighboring Rights**

(Cairo, October 7 to 10, 1985)

### **Report and Conclusions**

#### **Introduction**

1. At the invitation of the Government of the Arab Republic of Egypt and in close cooperation with the Ministries of Foreign Affairs and of Culture, the World Intellectual Property Organization (WIPO) convened a high-level African Seminar on Copyright and Neighboring Rights which was held in Cairo from October 7 to 10, 1985.
2. The purpose of the Seminar was to discuss and exchange views on certain aspects of copyright and neighboring rights in the context of development of developing countries, in particular in Africa.
3. The topics discussed were the role of intellectual property in the assertion of national identity; international relations in the field of copyright and neighboring rights; intellectual creation as an incentive for development and cultural promotion; economic impact of the protection of copyright and neighboring rights; piracy of sound and audiovisual recordings, radio and television broadcasts and printed matter; copyright as an expression of a development philosophy and policy.
4. Forty-four specialists from 17 countries (Angola, Benin, Cameroon, Chad, Egypt, Ethiopia, Ghana, Guinea, Ivory Coast, Kenya, Malawi, Morocco, Senegal, Somalia, Sudan, Togo, Tunisia) participated, in addition to three guest speakers invited by WIPO, one each from Greece, Nigeria and the United States of America.
5. The list of participants is annexed to this report.

#### **Opening of the Meeting**

6. The Seminar was opened by His Excellency Mr. Boutros Boutros Ghali, Minister of State for Foreign Affairs of the Government of the Arab Republic of Egypt. At the opening ceremony, statements were also made by Dr. Samir Sarhan, Under-Secretary of State in the Ministry of Culture (on behalf of Dr. Ahmad Heikal, Minister for Culture) and by Dr. Arpad Bogsch, Director General of the World Intellectual Property Organization (WIPO).

7. The Minister of State for Foreign Affairs welcomed the participants and felt that this Seminar would provide a good opportunity for a constructive dialogue to increase cooperation in the field of copyright and neighboring rights between WIPO and African countries as well as among African countries themselves. He commended the role of WIPO and its initiative for having convened this Seminar.

8. The Director General of WIPO in welcoming the participants expressed his appreciation to the Government of the Arab Republic of Egypt for the efficient organization and for the facilities provided for the Seminar. He felt that the discussions should allow for a better understanding of problems and their effect on the overall dynamics of development. He hoped the Seminar would take advantage of the presence of experts from several countries of the African continent to learn about the initiatives in those countries in the field of copyright and neighboring rights. The Director General of WIPO further mentioned that WIPO devotes a fair part of its activities and resources in providing advice and assistance to developing countries in connection with the preparing of legislation, establishing or strengthening of national institutions and infrastructure in the field of copyright and neighboring rights. He confirmed the readiness of his Organization to continue cooperating with African countries in their efforts to improve the copyright systems.

#### **Election of the Chairman**

9. The participants unanimously elected Mr. Ezz Eldine Ismail, President of the Egyptian Academy of Arts, as Chairman of the Seminar.

#### **Substantive Discussions**

10. Several papers were presented in connection with each of the topics contained in the agenda by the invited lecturers, by WIPO officials and by some of the participants. In addition, reports were also given by each of the specialists on the copyright and neighboring rights situation in their respective countries.

11. After a lively discussion in which most participants took part, the Seminar adopted the following conclusions:

## Conclusions

12. The participants at the Seminar:

(i) expressed their deep gratitude to the Government of the Arab Republic of Egypt for having hosted the Seminar and for its gracious hospitality;

(ii) expressed considerable appreciation of WIPO for having organized this Seminar and for the useful statements made by its representatives and its guest speakers which led to an interesting and fruitful exchange of views;

(iii) noted the situation of copyright protection in the countries as reported in the course of the Seminar;

(iv) agreed to the need of having effective legislative instruments for the rights involved, which might take into account the consequences of new technologies and protect expressions of their folklore; they noted that most of the countries are in the process of adopting, revising and updating such instruments;

(v) also noted that even in certain countries that did have copyright laws, the required infrastructure for ensuring implementation of such legislation did not exist;

(vi) emphasized the need for supporting the economies of book and music publishing by effectively countering the piracy of literary and artistic works; promoting national authorship for school and university level textbooks; encouraging national recording industries by effective measures against piracy of sound and audiovisual recordings;

(vii) noted, in particular, the impact of the Resolutions adopted by the WIPO Worldwide Forums on Piracy held in 1981 and 1983 and the awareness these had created in a number of countries, which had resulted recently in particular in the legal measures taken to prevent or eliminate piracy; and endorsed the Resolution adopted on October 2, 1985, by the WIPO Conference;

(viii) noted also that the notion of copyright should be considered in its broader context including the aspect of production of cultural material in order to underline the role of intellectual creativity for the benefit of the society at large;

(ix) concluded that, in consideration of the problems encountered by authors, performers, phonogram producers and broadcasters in the face of ever-growing technological developments and the

need to protect and preserve national cultural identities;

- (a) appropriate national copyright and neighboring rights legislation be promulgated in countries where it did not exist; that such legislation be compatible regionally and internationally and where it did exist but was considered inadequate or obsolete, it should be amended and updated;
- (b) due consideration be given in such legislations to provision of antipiracy measures such as inclusion of civil remedies and deterrent penal sanctions against infringements, to ensure the protection of authors and other rights owners; also a possible provision of a levy on blank tapes and videocassettes. In addition, undertaking information dissemination amongst judges, as well as police, customs and revenue authorities to indicate the extent to which commercial piracy is stifling efforts to safeguard and promote national cultures and how it constitutes a grave prejudice to the economy and employment in the countries affected by it;
- (c) consider a Regional Agreement or Convention to safeguard African cultural identity in the field of folklore protection;
- (d) set up, with the cooperation of WIPO, where these do not exist, suitable cost-effective administrative infrastructures to ensure proper application of national laws and international obligations in the field of copyright and neighboring rights;
- (e) consider, where they have not yet joined, early accession, by countries concerned, to the Berne Convention for the Protection of Literary and Artistic Works and to relevant international conventions in the field of neighboring rights;
- (f) also consider participation in the WIPO Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights, in order to continue reviewing, monitoring and improving programs of interest to developing countries in general, and to the developing countries of the African continent in particular;
- (x) asked WIPO to intensify its cooperation and assistance in encouraging indigenous creative artistic activity by:
  - (a) training of specialists;
  - (b) creation or improvement of national legislation;
  - (c) creation or improvement of governmental and other institutions for administration of national legislation and the exercise of rights granted by such legislation;

(xi) and finally, the participants at the Seminar expressed the hope that the implementation of these conclusions would lead to a more effective and enlarged role for copyright in the context of development and as an incentive for promotion of national creativity.

### **Adoption of the Report**

13. The participants at the Seminar unanimously adopted this report.

### **Closing of the Meeting**

14. After several statements reiterating thanks to the Government of the Arab Republic of Egypt and the World Intellectual Property Organization (WIPO), and after a poem was recited by the specialist participant from Guinea, Mr. Wolibo Doukouré, Director General of the Guinean Copyright Bureau, eulogizing Africa, the meeting was declared closed.

### **ANNEX**

#### **List of Participants**

##### **I. States**

###### **Angola**

Mme Marie de Lourdes Soares da Silva  
Technicienne, Institut national de la propriété intellectuelle (INPI), Luanda

###### **Benin**

M. Ben-Youssef Saïbou  
Directeur, Bureau béninois du droit d'auteur (BUBE-DRA), Ministère de la culture, de la jeunesse et des sports, Cotonou

###### **Cameroon**

M. Thomas Melone  
Professeur, Douala  
M. Dikongue Yves Epacka  
Directeur général de la Société camerounaise du droit d'auteur (SOCADRA), Douala

###### **Chad**

M. Wayor Moussa  
Directeur de la culture, de l'alphabétisation et de la promotion des langues nationales, Ndjamen

###### **Egypt**

Mr. Mohamed Samir Sarhan  
Under-Secretary of State, Ministry of Culture  
Mr. Ezz Eldine Ismail  
President, Academy of Arts  
M. Mohamed Aboudeif Allam  
Secrétaire général du Conseil supérieur de la culture, Secrétaire du Conseil permanent des droits des auteurs et Conseiller du Ministre de la culture  
Mr. Nabil Elaraby  
Ambassador, Director, Legal Department, Ministry of Foreign Affairs

Mr. Erram El-Din Hawas

Acting Director, Department for International Organizations, Ministry of Foreign Affairs

M. Ismail Saddik

Conseiller du Ministre de la culture

M. Lami Elmotei

Représentant du Comité général égyptien des auteurs

Mrs. Olfat Abdul-Rahim

Manager, Publishing Department, Information and Documentation Center, The General Egyptian Book Organization

M. Mahmoud Loutfi

Représentant de la Société des auteurs et compositeurs

Mr. Mohamed Al-Khatib

Chairman of International Relations, Egyptian Radio TV Union

M. Adli El Moualid

Directeur de la Société des auteurs et scénaristes

M. Hassan Nabil Mohamed Kamal

Directeur du Département des droits des auteurs, Conseil supérieur de la culture

Mr. Ahmed Halawa

Brigadier, Anti-Piracy (Audio and Video) Squad, Police Department

M. Youssef Ghohar

Représentant de l'Union des auteurs

M. Mahmoud Abdelmonem Mourad

Représentant de l'Union des éditeurs

M. Ahmed Fouad Hassan

Président du Syndicat des musiciens

M. Hamdi Gheis

Président du Syndicat des acteurs

M. Saad Eldin Wahba

Président du Syndicat des cinéastes

M. Saleh Reda

Président du Syndicat des artistes

Miss Naima Mahmoud Handy

General Director of Censorship

Mme Naima Hamdi

Directrice, Département de la censure artistique

M. Mohamed Hossam Loutfi

Faculté de droit, Université du Caire

M. Mohammad Labib Chanab

Faculté de droit, Université du Caire

**Mr. Ahmed Abdel Wahab**

Author and Script Writer, Film Centre

**Mr. Mohamed Osman**

General Secretary, Association of Scenario Writers

**Mrs. Nagdi Hafez Ahmed Ali**Author and Script Writer, Association of Cinema and TV  
Theatre Writers**Ethiopia****Mr. Saleh Abdelkader Kebire**Advocate at the High Court, President of the African  
Jurists Association for East Africa Region and Ethiopia,  
Addis Ababa**Ghana****Mr. E.B. Odoi Anim**

Copyright Administrator, Ministry of Information, Accra

**Guinea****M. Wolibo Doukouré**Directeur général, Bureau guinéen du droit d'auteur  
(BGDA), Ministère de l'enseignement supérieur et de la  
recherche scientifique, Conakry**Ivory Coast****M. Amon d'Aby**Président, Bureau ivoirien du droit d'auteur (BURIDA),  
Ministère des affaires culturelles, Abidjan**Kenya****Mr. S.N. Ndemange**

General Manager, Music Copyright Society of Kenya, Nairobi

**Malawi****Mr. James B. Kailale**Solicitor General and Secretary for Justice, Ministry of  
Justice, Lilongwe**Morocco****M. Abderraouf Kandil**Directeur général, Bureau marocain du droit d'auteur,  
Rabat**Senegal****M. Babacar Ndoyé**Directeur général, Bureau sénégalais du droit d'auteur,  
Ministère de la culture, Dakar**M. Pathé Diagne**

Professeur, Dakar

**Somalia****Mr. Omer Hussein Farah**

First Secretary, Somali Embassy, Cairo

**Sudan****Mr. Amin A. El Sayed**Assistant Director General for Artistic Works, Intellectual  
Property Office (Copyright), Ministry of Guidance and  
National Information, Khartoum**Togo****M. Kossi Tsogbé**Attaché d'administration à la Culture, Responsable du  
Bureau togolais du droit d'auteur, Lomé**Tunisia****M. Tahar Ben Slama**Directeur général, Société des auteurs et compositeurs,  
Tunis**II. Guest Speakers****Greece****M. Georges Koumantos**

Professeur, Université d'Athènes

**Nigeria****Mr. Akin Thomas**Managing Director, Heinemann Educational Books Ltd.,  
Lagos**United States of America****Mr. Anthony P. Harrison**Associate Register of Copyrights, Copyright Office,  
Library of Congress, Washington, D.C.**III. Liaison Officer****M. Wafik Zaher Kamil**Conseiller, Mission permanente de la République arabe  
d'Egypte auprès de l'Office des Nations Unies et des institu-  
tions spécialisées à Genève**IV. International Bureau  
of the World Intellectual Property Organization (WIPO)**Dr. Arpad Bogsch  
Director GeneralMr. Marino Porzio  
Deputy Director GeneralMr. Claude Masouyé  
Director, Public Information and Copyright DepartmentMr. Shahid Alikhan  
Director, Developing Countries Division (Copyright)

## Notifications

### Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)

#### NETHERLANDS

##### Declaration by the Kingdom of the Netherlands Extending the Effects of its Ratification of the Paris Act (1971) to Articles 1 to 21 and the Appendix

The Government of the Kingdom of the Netherlands, referring to the deposit done on October 9, 1974, of its instrument of ratification, with effect from January 10, 1975, of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971 (Paris Act, 1971), with the declaration that its ratification thereof does not apply to Articles 1 to 21 and the Appendix of the Paris Act (1971),\* depo-

sited, on October 24, 1985, a declaration extending, for the Kingdom in Europe, the effects of its ratification to the said Articles and the Appendix.

Articles 1 to 21 and the Appendix of the Paris Act (1971) will enter into force, with respect to the Kingdom of the Netherlands (in Europe), three months after the date of this notification, that is, on January 30, 1986.

Berne Notification No. 113, of October 30, 1985.

## National Legislation

### GERMANY (FEDERAL REPUBLIC OF)

#### Law Amending Provisions in the Field of Copyright

(of May 23, 1985)\*

##### **Article 1**

###### *Amendment of the Copyright Law*

The Copyright Law of September 9, 1965,<sup>1</sup> (BGBI. I, p. 1273) as last amended by Article 144 of

the Law of March 2, 1974,<sup>2</sup> (BGBI. I, p. 469) is amended as follows:

1. Article 2(1), item 1, shall be worded as follows:

“1. Literary works, such as writings and speeches, and programs for data processing;”

\* Published in *Bundesgesetzblatt I*, 1985.

<sup>1</sup> See *Copyright*, 1965, pp. 251 *et seq.*

<sup>2</sup> *Ibid.*, 1976, pp. 277–278.

**2. Article 3 shall be worded as follows:**

*“Adaptations”*

*Article 3.* Translations and other adaptations of a work which constitute personal intellectual creations of the adapter shall be protected in the same manner as works without prejudice to the copyright in the preexisting works adapted. Insignificant adaptations of a non-protected musical work shall not be protected as independent works.”

**3. Article 47(1), second sentence, shall read as follows:**

“The same shall apply to youth welfare homes and to the official provincial pictorial materials services or comparable publicly-owned institutions.”

**4. Article 47(2), second sentence, shall read as follows:**

“They must be destroyed not later than the end of the school year following the transmission of the school broadcast, unless an equitable remuneration has been paid to the author.”

**5. The following third sentence shall be added to Article 49(1):**

“Claims may be asserted only by a collecting society.”

**6. Article 52 shall read as follows:**

*“Public Communication”*

*Article 52.* (1) The public communication of a work which has already been published shall be permissible if the communication serves no gainful purpose on the part of the organizer, spectators are admitted free of charge and, in the case or recitation or performance of the work, none of the performers (Article 73) receives special remuneration. An equitable remuneration shall be paid for the communication. The obligation to pay remuneration shall not apply in respect of events organized by the Youth Welfare Service, the Social Welfare Service, the Old Persons Welfare Service, the Prisoners Welfare Service and for school events on condition that in accordance with their social or educational purpose they are only accessible for a specifically limited circle of persons. This shall not apply if the event serves the gainful purpose of a third party; in such case, the third party shall be required to pay the remuneration.

(2) The public communication of a work which has already been published shall be per-

missible at a religious service or celebration of the churches or religious communities. However, the organizer shall pay the author an equitable remuneration.

(3) Public stage performances and broadcasts of a work and public presentations of cinematographic works shall in all cases be permissible only with the consent of the copyright owner.”

**7. Articles 53 and 54 shall read as follows:**

*“Reproduction for Private and Other Personal Uses”*

*Article 53.* (1) It shall be permissible to make single copies of a work for private use. A person authorized to make such copies may also cause such copies to be made by another person; however, this shall apply to the transfer of works to video or audio recording mediums and to the reproduction of works of fine art only if no payment is received therefor.

(2) It shall be permissible to make or to cause to be made single copies of a work

1. for personal scientific use, if and to the extent that such reproduction is necessary for the purpose,
2. to be included in personal files, if and to the extent that reproduction for this purpose is necessary and if a personal copy of the work is used as the model for reproduction,
3. for personal information concerning current events, in the case of a broadcast work,
4. for other personal uses,
  - (a) in the case of small parts of published works or individual contributions that have been published in newspapers or periodicals,
  - (b) in the case of a work that has been out of print for at least two years.

(3) It shall be permissible to make or to cause to be made copies of small parts of a printed work or of individual contributions published in newspapers or periodicals for personal use,

1. in teaching, in non-commercial institutions of education and further education or in institutions of vocational education in a quantity required for one school class or
2. for State examinations and examinations in schools, universities, non-commercial institutions of education and further education and in vocational education in the required quantity,

if and to the extent that such reproduction is necessary for this purpose.

(4) Reproduction

- (a) of graphic recordings of musical works,
- (b) of a book or a periodical in the case of essentially complete copies,

shall only be permissible, where not carried out by manual copying, with the consent of the copyright owner or in accordance with paragraph (2), item 2, or for personal use in the case of a work that has been out of print for at least two years. Likewise, the reproduction of a program for data processing (Article 2(1), item 1) or of essential parts thereof shall only be permissible with the consent of the copyright owner.

(5) Copies may be neither disseminated nor used for public communication. It shall be permissible, however, to lend out lawfully made copies of newspapers and works that are out of print or such copies in which small damaged or lost parts have been replaced with reproduced copies.

(6) The recording of public lectures, representations or performances of works on video or audio recording mediums, the realization of plans and sketches for works of fine art and the reproduction of works of architecture shall only be permissible with the consent of the copyright owner.

*Obligation to Pay Remuneration*

*Article 54.* (1) Where the nature of a work makes it probable that it will be reproduced by the recording of broadcasts on video or audio recording mediums or by the transfer from one video or audio recording medium to another in accordance with Article 53(1) or (2), the author of the work shall be entitled to payment of equitable remuneration from the manufacturers

1. of appliances and

2. of video or audio recording mediums that are obviously intended for the making of such reproductions, in respect of the possibility of making such reproductions that is created by the sale of the appliances and of the video or audio recording mediums; in addition to the manufacturer, any person who commercially imports or reimports such appliances or such video or audio recording mediums into the territory on which this Law applies shall be jointly liable.

(2) Where the nature of a work is such that it may be expected to be reproduced in accordance with Article 53(1) to (3) by the photocopying of a copy or by some other process having similar effect, the author of the work shall be entitled to payment of equitable remuneration from the manufacturer of appliances intended for the making of such reproductions, in respect of the

possibility of making such reproductions created by the sale or other placing on the market of the appliances; in addition to the manufacturer, any person who commercially imports or reimports such appliances into the territory on which this Law applies shall be jointly liable. Where appliances of such type are operated in schools, universities or vocational training institutions or in other educational and further education institutions (educational institutions), research institutions, public libraries or in institutions which have available appliances for the making of photocopies on payment, the author shall also be entitled to payment of equitable remuneration from the operator of the appliance. The amount of the remuneration to be paid in total by the operator shall depend on the type and extent of utilization of the appliance that is to be expected in view of the circumstances, particularly the location and the habitual use.

(3) The entitlement afforded by paragraph (1) and the first sentence of paragraph (2) shall not apply where it is probable under the circumstances that the appliances or the video and audio recording mediums will not be used to make reproductions within the territory in which this Law applies.

(4) The amounts set out in the annex shall be deemed equitable remuneration in accordance with paragraphs (1) and (2) where not otherwise agreed.

(5) The author shall be entitled to require information from those persons required to pay remuneration under paragraphs (1) and (2) as to the nature and quantity of appliances and video or audio recording mediums sold or otherwise put into circulation on the territory in which this Law applies. The author shall be entitled to require the information necessary to assess the remuneration from the operator of an appliance in an institution within the meaning of the second sentence of paragraph (2). The information shall be provided in each case for the preceding calendar year.

(6) Claims under paragraphs (1), (2) and (5) may only be asserted by a collecting society. Each copyright owner shall be entitled to an equitable share in the remuneration paid under paragraphs (1) and (2)."

8. Article 68 shall be deleted.

9. Article 72 shall read as follows:

"*Article 72.* (1) Photographs and products manufactured in a similar way to photographs shall be protected, *mutatis mutandis*, by the pro-

visions of Part I applicable to photographic works.

(2) The right afforded by paragraph (1) shall belong to the photographer.

(3) The right afforded by paragraph (1) shall expire in respect of photographs that constitute documents of current events 50 years after the publication of the photograph, but 50 years already after its manufacture where the photograph has not been published within such period; in respect of all other photographs, the period of 50 years shall be replaced by a period of 25 years. The period shall be calculated in conformity with Article 69."

**10.** In Article 87(3), the reference "Article 53, paragraph (5)" shall be replaced by the reference "Article 54(1)."

**11.** The following Article 108a shall be inserted after Article 108:

#### *"Unlawful Exploitation on a Commercial Basis*

*Article 108a.* (1) Where the person carrying out reproduction or distribution within the meaning of Article 106 or of Article 108 does so on a commercial basis, the penalty shall be imprisonment for up to five years or a fine.

(2) The attempt to commit such an offense shall be punishable."

**12.** Article 109 shall read as follows:

#### *"Criminal Prosecution*

*Article 109.* Offenses under Articles 106 to 108 shall only be prosecuted on complaint unless the prosecuting authorities deem that an *ex officio* prosecution is justified in view of the particular public interest."

**13.** –Article 110 shall read as follows:

#### *"Right of Destruction and Similar Measures*

*Article 110.* In the case of offenses under Articles 106, 107, item 2, and 108, the injured party may assert the rights afforded by Articles 98 and 99 in accordance with the provisions of the Code of Criminal Procedure concerning compensation to injured parties (Articles 403 to 406(c)) in a procedure before the District Court irrespective of the value of the matter in dispute. The provisions of the Penal Code concerning seizure (Articles 74 to 76a) shall not apply to the objects mentioned in Articles 98 and 99."

**14.** Article 111 shall read as follows:

#### *"Publication of the Judgment*

*Article 111.* Where a penalty has been pronounced in respect of offenses under Articles 106 to 108a, the judgment shall be published on demand if the injured party so requests and can show a justified interest. The nature of the publication shall be laid down in the judgment."

**15.** The following Article 137a shall be inserted after Article 137:

#### *"Photographic Works*

*Article 137a.* (1) The provisions of this Law as regards the term of copyright shall also apply to those photographic works whose term of protection under the law previously in force has not yet expired on ...[entry into force of this Amending Law].

(2) Where a right of exploitation in a photographic work has been assigned or transferred to another person, such assignment or transfer shall not extend, in case of doubt, to the period of time by which the term of copyright in photographic works has been extended."

## Article 2

#### *Amendment of the Law on the Administration of Copyright and Related Rights*

The Law of September 9, 1965, on the Administration of Copyright and Related Rights<sup>3</sup> (BGBI. I, p. 1294), as last amended by Article 287, item 21, of the Law of March 2, 1974 (BGBI I. p. 469), is amended as follows:

**1.** The following addition shall be made to the title:

"(Copyright Administration Law)."

**2.** Article 13(3) shall read as follows:

"(3) The basis for calculating the charges shall normally be the pecuniary advantages obtained from the exploitation. The charges may also be computed on other bases where these result in criteria for the advantages obtained from exploitation that may be collected in an economically justifiable manner. When calculating the charges, the proportion of the utilization of a work in the total exploitation operation shall be taken into appropriate account. In establishing such charges and in collecting the remuneration,

<sup>3</sup> *Ibid.*, 1965, pp. 268 *et seq.*

the collecting society shall have due regard to the religious, cultural and social interests of the persons liable to pay the remuneration, including the interests of youth welfare."

3. The current Article 16 shall be inserted after Article 13 as Article 13a.

4. Article 13a(2), second sentence, shall be worded as follows:

"This shall not apply to the presentation of a work by means of phonograms, to presentations of broadcasts of a work or to events at which as a rule non-protected or insignificantly adapted works of music are performed."

5. The following Article 13b shall be inserted after Article 13a:

*"Presumption of Entitlement"*

*Article 13b.* (1) Where the collecting society asserts a claim to information that may only be asserted by a collecting society, it shall be presumed that it administers the rights of all the copyright owners.

(2) Where the collecting society asserts a right to remuneration under Article 27 or Article 54(1) or (2) of the Copyright Law, it shall be presumed that it administers the rights of all the copyright owners. Where more than one collecting society is entitled to assert the right, the presumption shall only apply where the claim is asserted jointly by all entitled collecting societies. Where the collecting society receives payments for those copyright owners whose rights it does not administer, it shall exempt the persons liable to make payments from the remuneration claims of such copyright owners."

6. Article 14 shall read as follows:

*"Arbitration Board"*

*Article 14.* (1) In disputes to which a collecting society is a party, any party may apply to the Arbitration Board where the dispute concerns

1. the use of works or performances protected by the Copyright Law or
2. the conclusion or amendment of an inclusive contract.

(2) The Arbitration Board shall be constituted at the supervising authority (Article 18(1)). It shall consist of a Chairman or his deputy and two assessors. The members of the Arbitration Board must be competent to act as judges in conformity with the German Justices Act. They shall be appointed by the Federal Minister for Justice for four years; they may be reappointed.

(3) The members of the Arbitration Board shall not be bound by instructions.

(4) Recourse to the Arbitration Board may be obtained by written application.

(5) The Arbitration Board shall endeavor to obtain an amicable settlement to the dispute. A settlement decided by the Arbitration Board shall become enforceable when signed by the Chairman and the parties and the day on which it has been reached is recorded thereon; Article 797a of the Code of Civil Procedure shall apply *mutatis mutandis*.

(6) An arbitration agreement concerning future disputes under paragraph (1), item 2, shall be null and void if it does not afford every party the right to apply to the Arbitration Board, instead of to an arbitration tribunal, and to require a decision by the ordinary courts.

(7) Application to the Arbitration Board shall interrupt prescription in the same way as institution of legal proceedings. The interruption shall continue until the procedure before the Arbitration Board is completed. Article 211(2) of the Civil Code shall apply *mutatis mutandis*. If the application to the Arbitration Board is withdrawn, the prescription shall be deemed not to have been interrupted."

7. The following Articles 14a to 14c shall be inserted after Article 14:

*"Settlement Proposal by the Arbitration Board"*

*Article 14a.* (1) The Arbitration Board shall take its decisions on a majority vote. Article 196(2) of the Judiciary Law shall be of application.

(2) The Arbitration Board shall propose a settlement to the parties. The settlement proposal shall be reasoned and shall be signed by all members of the Arbitration Board. The settlement proposal shall point out the possibility of opposition and set out the consequences of failure to comply with the time limit for opposition. The settlement proposal shall be served on the parties.

(3) The settlement proposal shall be deemed to have been accepted and an agreement corresponding to the content of the proposal to have been entered into if the Arbitration Board has received no written opposition within one month of service of the proposal.

(4) The accepted settlement proposal shall be enforceable; Article 797a of the Code of Civil Procedure shall apply *mutatis mutandis*.

*Limitation of the Settlement Proposal;  
Waiver of a Settlement Proposal*

*Article 14b.* (1) Where disputes under Article 14(1), item 1, concern the applicability or suitability of charges (Article 13) and where the substance is also disputed, the Arbitration Board may limit its settlement proposal to comments as to the applicability or suitability of the charges.

(2) Where the applicability or suitability of charges under Article 14(1), item 1, are not in dispute, the Arbitration Board may waive a settlement proposal.

*Disputes Concerning Inclusive Contracts*

*Article 14c.* (1) In the case of disputes under Article 14(1), item 2, the settlement proposal shall contain the contents of the inclusive contract. The Arbitration Board may only propose an inclusive contract with effect from January 1 of the year in which the application was made.

(2) At the request of any of the parties, the Arbitration Board may make a proposal for a provisional settlement. Article 14a(2), second to fourth sentences, and (3) shall be of application. The provisional settlement shall apply, failing any other agreement, until completion of the procedure before the Arbitration Board.

(3) The Arbitration Board shall inform the Federal Cartels Office (*Bundeskartellamt*) of the proceedings. Article 90(1), second sentence, and (2) of the Law Against Restrictions on Competition shall be of application *mutatis mutandis* subject to the limitation that the President of the Federal Cartels Office may not appoint as a representative any member of the supervising authority (Article 18(1))."

**8. Article 15 shall read as follows:**

*"Proceedings Before the Arbitration Board*

*Article 15.* The Federal Minister for Justice shall have the power to lay down, by ordinance,

1. the procedure before the Arbitration Board,
2. detailed regulations on the remuneration of members of the Arbitration Board for their activities,
3. charges (fees and expenses) to be imposed by the supervising authority for proceedings before the Arbitration Board to cover administrative costs; the fees shall not be in excess of those applicable to first instance proceedings,

4. provisions concerning the party liable for costs, the time at which charges are due and their prescription, the obligation of payment in advance, exemption from charges, the procedure for the fixing of charges and legal remedies against the fixing of charges."

**9. Article 16 shall read as follows:**

*"Assertion of Claims Before the Courts*

*Article 16.* (1) For disputes under Article 14(1), claims may not be asserted in court proceedings unless they have been preceeded by proceedings before the Arbitration Board.

(2) This shall not apply for disputes under Article 14(1), item 1, in which the applicability and equitability of the charges are not disputed. Should it nevertheless prove during the action that the applicability or the equitability of the charges is in dispute, the Court shall suspend the action to enable the parties to apply to the Arbitration Board. If the party that disputes the applicability or equitability of the charges does not provide within two months of suspension evidence that an application has been made to the Arbitration Board, the action shall be continued; in such event, the applicability and equitability of the charges on which the exploitation relationship has been based by the collecting society shall be deemed to have been accepted.

(3) Prior application to the Arbitration Board shall likewise not be required for applications for a restraint order or an injunction. Once a restraint order or an injunction has been issued, the action shall be receivable without the limitation contained in paragraph (1) if a time limit has been imposed on that party under Articles 926 and 936 of the Code of Civil Procedure for instituting proceedings.

(4) Claims to the conclusion of an inclusive contract (Article 12) shall be heard exclusively in first instance by the competent Provincial High Court (*Oberlandesgericht*). Part 1 of the Second Volume of the Code of Civil Procedure shall apply *mutatis mutandis* to the procedure. The Provincial High Court shall determine the content of the inclusive contracts, in particular the nature and amount of remuneration, at its discretion. The findings of the Court shall replace the corresponding agreement between the parties. Determination of an agreement is only possible with effect from January 1 of the year in which the request was made. Appeals from final decisions taken by the Provincial High Court shall be governed by the Code of Civil Procedure."

10. The following Article 20a shall be inserted after Article 20:

*"Communication of Importation Reports"*

*Article 20a.* The supervising authority shall be entitled to communicate data concerning the importation of appliances and video or audio recording mediums within the meaning of Article 54 of the Copyright Law, provided to it by the Federal Office of Trade and Industry, to the collecting society entitled to administer the claim to remuneration."

11. The following Article 26a shall be inserted after Article 26:

*"Pending Actions"*

*Article 26a.* Articles 14 to 16 shall not be applied to actions already pending before the Arbitration Board on entry into force of this Law; Articles 14 and 15 of the Law on the Administration of Copyright and Related Rights in its version of September 9, 1965 (BGB1. I, p. 1294), shall apply to such actions."

### Article 3

#### Berlin Clause

This Law shall also apply in the *Land Berlin* in accordance with Article 13(1) of the Third Transitional Law.

### Article 4

#### Entry into Force

- (1) Article 2, item 8, shall enter into force on the day following the promulgation of this Law.
- (2) Article 2, items 6, 7 and 9, shall enter into force on January 1, 1986.
- (3) All other provisions of this Law shall enter into force on July 1, 1985.

### Annex to Article 54(4) of the Copyright Law

#### Schedule of Remuneration

I. *Remuneration Under Article 54(1):*

The remuneration due to all copyright owners shall be	
1. for each	
audio recording appliance	2.50 DM
2. for each	
video recording appliance	
with or without audio recording	18.00 DM
3. in respect of	
audio recording mediums,	
for each hour of playing time	
in normal utilization	0.12 DM
4. in respect of	
video recording mediums,	
for each hour of playing time	
in normal utilization	0.17 DM
5. for each audio and video	
recording appliance for	
whose operation separate	
mediums are not required	
(items 3 and 4) twice	
the remuneration rates	
under items 1 and 2.	

II. *Remuneration Under Article 54(2):*

1. Remuneration for all copyright owners under Article 54(2), first sentence, shall be, for each reproduction appliance permitting	
from two to 12 copies a minute	75 DM
from 13 to 35 copies a minute	100 DM
from 36 to 70 copies a minute	150 DM
more than 70 copies a minute	600 DM
2. Remuneration of all copyright owners under Article 54(2), second sentence, shall be, for each A4 page of photocopying	
(a) for photocopies made exclusively from books	
approved by a provincial authority as school-	
books and intended for school use	0.05 DM
(b) for all other photocopies	0.02 DM
3. For reproduction appliances with which colored photocopies can be made and for colored photocopies, the rate of remuneration shall be double.	
4. These rates of remuneration shall be applied <i>mutatis mutandis</i> to other reproduction processes having a comparable effect.	

# UNITED KINGDOM

## Cable and Broadcasting Act 1984

(Excerpts from Chapter 46)

(of July 26, 1984)

### PART I CABLE PROGRAMME SERVICES

#### **Copyright**

##### *Copyright in cable programmes*

22.— After section 14 of the 1956 Act there shall be inserted the following section—

##### *“Copyright in cable programmes”*

14A.—(1) Copyright shall subsist, subject to the provisions of this Act, in every cable programme which is included in a cable programme service provided by a qualified person in the United Kingdom or in any other country to which this section extends.

(2) Copyright shall not subsist in a cable programme by virtue of this section if the programme is included in the cable programme service by the reception and immediate re-transmission of a television broadcast or a sound broadcast.

(3) Subject to the provisions of this Act, a person providing a cable programme service shall be entitled to any copyright subsisting in a cable programme included in that service and any such copyright shall continue to subsist until the end of the period of fifty years from the end of the calendar year in which the cable programme is so included, and shall then expire.

(4) In so far as a cable programme is a repetition (whether the first or any subsequent repetition) of a cable programme previously included as mentioned in subsection (1) of this section—

- (a) copyright shall not subsist therein by virtue of this section if it is so included after the end of the period of fifty years from the end of the calendar year in which it was previously so included; and
- (b) if it is so included before the end of that period any copyright subsisting therein by virtue of this section shall expire at the end of that period.

(5) The acts restricted by the copyright in a cable programme are—

- (a) in so far as it consists of visual images, making, otherwise than for private purposes, a cinematograph film of it or a copy of such a film;
- (b) in so far as it consists of sounds, making, otherwise than for private purposes, a sound recording of it or a record embodying such a recording;
- (c) causing it, in so far as it consists of visual images, to be seen in public, or, in so far as it consists of sounds to be heard in public, if it is seen or heard by a paying audience;
- (d) broadcasting it or including it in a cable programme service.

(6) The restrictions imposed by virtue of the last preceding subsection in relation to a cable programme shall apply whether the act in question is done by the reception of the programme or by making use of any record, print, negative, tape or other article on which the programme has been recorded.

(7) In relation to copyright in cable programmes, in so far as they consist of visual images, the restrictions imposed by virtue of subsection (5) of this section shall apply to any sequence of images sufficient to be seen as a moving picture; and accordingly, for the purpose of establishing an infringement of such copyright, it shall not be necessary to prove that the act in question extended to more than such a sequence of images.

(8) For the purposes of subsection (5) of this section a cinematograph film or a copy thereof, or a sound recording or a record embodying a recording, shall be taken to be made otherwise than for private purposes if it is made for the purposes of the doing by any person of any of the following acts, that is to say,—

- (a) the sale or letting for hire of any copy of the film, or, as the case may be, of any record embodying the recording;
- (b) broadcasting the film or recording or including it in a cable programme service;

(c) causing the film or recording to be seen or heard in public.

(9) For the purposes of paragraph (c) of subsection (5) of this section, a cable programme shall be taken to be seen or heard by a paying audience if it is seen or heard by persons who either—

(a) have been admitted for payment to the place where the programme is to be seen or heard, or have been admitted for payment to a place of which that place forms part, or

(b) have been admitted to the place where the programme is to be seen or heard in circumstances where goods or services are supplied there at prices which exceed the prices usually charged at that place and are partly attributable to the facilities afforded for seeing or hearing the programme;

Provided that for the purposes of paragraph (a) of this subsection no account shall be taken—

(i) of persons admitted to the place in question as residents or inmates therein, or

(ii) of persons admitted to that place as members of a club or society, where payment is only for membership of the club or society and the provision of facilities for seeing or hearing cable programmes is only incidental to the main purposes of the club or society.

(10) The copyright in a cable programme is not infringed by anything done in relation to the programme for the purposes of a judicial proceeding.

(11) In this Act—

'cable programme' means a programme which is included, after the commencement of section 22 of the Cable and Broadcasting Act 1984, in a cable programme service;

'cable programme service' means a cable programme service within the meaning of the said Act of 1984 or a service provided outside the United Kingdom which would be such a service if subsection (7) of section 2 of that Act and references in subsection (1) of that section to the United Kingdom were omitted;

'programme', in relation to a cable programme service, includes any item included in that service.

(12) The foregoing provisions of this section shall have effect as if references in those provisions and in section 12(9) of this Act to sounds included references to signals serving for the im-

partation of matter otherwise than in the form of sounds or visual images."

#### *Inclusion of broadcasts in cable programmes*

23.—(1) At the end of paragraph (d) of subsection (4) and paragraph (b) of subsection (7) of section 14 of the 1956 Act (copyright in television and sound broadcasts) there shall be added the words "or including it in a cable programme".

(2) After subsection (8) of that section there shall be inserted the following subsection—

"(8A) The copyright in a television broadcast or sound broadcast is not infringed by any person who, by the reception and immediate re-transmission of the broadcast, includes a programme in a cable programme service—

(a) if the programme is so included in pursuance of a requirement imposed under subsection (1) of section 13 of the Cable and Broadcasting Act 1984; or

(b) where the broadcast is made otherwise than in a DBS service (as defined in subsection (6) of that section) or an additional teletext service (as so defined), if and to the extent that it is made for reception in the area in which the cable programme service is provided."

(3) After section 27A of that Act there shall be inserted the following section—

#### *"Exercise of jurisdiction of tribunal in relation to inclusion of broadcasts in cable programmes"*

27B. —(1) On a reference to the tribunal under this Part of this Act relating to licences to broadcast works or sound recordings for reception in any area, the tribunal shall exercise its powers under this Part of this Act so as to secure that the charges payable for the licences adequately reflect the extent to which the works or recordings will be included, in pursuance of requirements imposed under section 13(1) of the Cable and Broadcasting Act 1984, in cable programme services provided in areas parts of which fall outside that area.

(2) The preceding subsections shall have effect, with the necessary modifications, in relation to applications under this Part of this Act as it has effect in relation to references thereunder."

(4) For subsection (3) of section 40 of that Act (broadcast of sound recordings and cinematograph films and diffusion of broadcast programmes) there shall be substituted the following subsections—

“(3) Where a television broadcast or sound broadcast is made by the Corporation or the Authority and the broadcast is an authorised broadcast, then, subject to subsection (3A) below, any person who, by the reception and immediate re-transmission of the broadcast, includes a programme in a cable programme service, being a programme comprising a literary, dramatic or musical work, or an adaptation of such a work, or an artistic work, or a sound recording or cinematograph film, shall be in the like position, in any proceedings for infringement of the copyright (if any) in the work, recording or film, as if he had been the holder of a licence, granted by the owner of that copyright to include the work, adaptation, recording or film in any programme so included in that service.

(3A) Subsection (3) above applies only—

- (a) if the programme is included in the service in pursuance of a requirement imposed under section 13(1) of the Cable and Broadcasting Act 1984; or
- (b) if and to the extent that the broadcast is made for reception in the area in which the service is provided.”

*Inclusion of sound recordings  
and cinematograph films  
in cable programmes*

24.—(1) At the end of paragraph (c) of section 12(5) of the 1956 Act (copyright in sound recordings) there shall be added the words “or including it in a cable programme.”

(2) In section 13(5) of that Act (copyright in cinematograph films) for paragraph (d) there shall be substituted the following paragraph—

“(d) including the film in a cable programme.”

(3) After section 40 of that Act there shall be inserted the following section—

*Inclusion of sound recordings and cinematograph films in cable programmes*

40A.—(1) Where a cable programme is sent and a person, by the reception of that programme, causes a sound recording to be heard in public, he does not thereby infringe the copyright (if any) in that recording under section 12 of this Act.

(2) Where a cable programme is sent and the programme is an authorised programme, any person who, by the reception of the programme,

causes a cinematograph film to be seen or heard in public shall be in the like position, for any proceedings for infringement of copyright (if any) in the film under section 13 of this Act, as if he had been the holder of a licence granted by the owner of that copyright to cause the film to be seen or heard in public by the reception of the programme.

(3) If, in the circumstances mentioned in the last preceding subsection, a person causing a cinematograph film to be seen or heard infringes the copyright in the film by reason that the cable programme was not an authorised programme—

- (a) no proceedings shall be brought against that person under this Act in respect of his infringement of that copyright, but
- (b) it shall be taken into account in assessing damages in any proceedings against the person sending the programme, in so far as that copyright was infringed by him in sending the programme.

(4) For the purposes of this section, a cable programme shall be taken, in relation to a cinematograph film, to be an authorised programme if, but only if, it is sent by, or with the licence of, the owner of the copyright in the film.”

SCHEDULE 5

....

The Copyright Act 1956

6.—(1) In the proviso to subsection (3) of section 2 of the 1956 Act (copyright in literary, dramatic and musical works) the word “and” immediately preceding paragraph (d) shall be omitted and after that paragraph there shall be inserted the following paragraph—

“(e) the inclusion of the work in a cable programme.”

(2) In subsection (5) of that section for paragraph (e) there shall be substituted the following paragraph—

“(e) including the work in a cable programme.”

(3) In section 3(5) of that Act (copyright in artistic works) for paragraph (d) there shall be substituted the following paragraph—

“(d) including the work in a cable programme.”

(4) In section 6(9) of that Act (general exceptions from protection of literary, dramatic and mu-

sical works) for the words "caused to be transmitted to subscribers to a diffusion service" there shall be substituted the words "included in a cable programme".

(5) In section 7(8) of that Act (special exceptions as regards libraries and archives) for the words "causes it to be transmitted to subscribers to a diffusion service" there shall be substituted the words "includes it in a cable programme".

(6) In section 9(11) of that Act (general exceptions from protection of artistic works) for the words "television programme which is caused to be transmitted to subscribers to a diffusion service" there shall be substituted the words "cable programme".

(7) In subsection (10) of section 14 of that Act (copyright in television broadcasts and sound broadcasts) for the words from "the visual images or sounds" to the end there shall be substituted the following paragraphs—

- "(a) the visual images or sounds in question, or both, as the case may be, are broadcast; or
- (b) in the case of a television broadcast or sound broadcast made by the technique known as direct broadcasting by satellite, the visual images or sounds in question, or both, as the case may be, are transmitted to the satellite transponder."

(8) After that subsection there shall be inserted the following subsection—

"(11) The foregoing provisions of this section shall have effect as if references in those provisions and in section 12(9) of this Act to sounds included references to signals serving for the impartation of matter otherwise than in the form of sounds or visual images."

(9) In subsection (1) of section 16 of that Act (supplementary provisions for purposes of Part II) for the words "and sound broadcasts" there shall be substituted the words "sound broadcasts and cable programmes".

(10) In subsection (6) of that section after the word "broadcast" there shall be inserted the words "cable programme".

(11) In section 18(3) of that Act (right of owner of copyright in respect of infringing copies etc.) for the words "a sound broadcast" there shall be substituted the words "a sound broadcast or a cable programme" and for the words "or broadcast" there shall be substituted the words "broadcast or programme".

(12) In section 24(2) of that Act (general provisions as to jurisdiction of tribunal) for the words "cause the work or an adaptation thereof to be transmitted to subscribers to a diffusion service" there shall be substituted the words "include the work or an adaptation thereof in a cable programme" and for the words "or to broadcast it" there shall be substituted the words "to broadcast it or to include it in a cable programme".

(13) In subsection (1) of section 28 of that Act (exercise of jurisdiction of tribunal in relation to diffusion of foreign broadcasts) for the words "cause works to be transmitted to subscribers to a diffusion service" there shall be substituted the words "include works or sound recordings in a cable programme service provided", for the word "distributing", in the first place where it occurs, there shall be substituted the words "including in such a service", after the word "works", in the second place where it occurs, there shall be inserted the words "or recordings" and for the words "distributing those programmes" there shall be substituted the words "including those programmes in a cable programme service".

(14) In subsection (2) of that section after the words "the works", in both places where they occur, there shall be inserted the words "or recordings", for the words "cause those works to be transmitted to subscribers to diffusion services" there shall be substituted the words "include those works or recordings in cable programme services provided" and for the words "cause those works to be so transmitted" there shall be substituted the words "so include those works or recordings".

(15) In subsection (4) of that section after the word "works", in the first place where it occurs, there shall be inserted the words "or sound recordings".

(16) At the end of section 31(3) of that Act (extension of Act to Isle of Man, Channel Islands, colonies and dependencies) there shall be added the words "or—

- (e) in the case of a cable programme, it was sent from a place in that country."

(17) At the end of section 32(1) of that Act (application of Act to countries to which it does not extend) there shall be added the following paragraph—

- "(f) apply in relation to cable programmes sent from places in that country as they apply in relation to cable programmes sent from places in the United Kingdom."

(18) In subsection (4) of section 40 of that Act (broadcasts of sound recordings and cinematograph

films and diffusion of broadcast programmes) for the words "the programme to be transmitted" there shall be substituted the words "including the programme in a cable programme service".

(19) In subsection (5) of that section after the words "a work" there shall be inserted the words "or sound recording" and after the words "the work" there shall be inserted the words "or recording".

(20) In section 41(5) of that Act (use of copyright material for education) for the words "and television broadcasts" there shall be substituted the words "television broadcasts and cable programmes".

(21) In section 43(2)(d) of that Act (false attribution of authorship) for the words "or broadcasts" there shall be substituted the words "broadcasts or includes in a cable programme".

(22) In subsection (1) of section 48 of that Act (interpretation) after the definition of "building" there shall be inserted the following definition—"cable programme", 'cable programme service' and 'programme' have the meanings assigned to them by section 14A of this Act;".

(23) For subsection (3) of that section there shall be substituted the following subsections—

"(3) References in this Act to the inclusion of a programme in a cable programme service are references to its inclusion in such a service by the person providing that service.

(3A) For the purposes of this Act no account shall be taken of a cable programme service if, and to the extent that, it is provided for—

- (a) a person providing another such service;
- (b) the Corporation; or
- (c) the Authority;

and for the purposes of this subsection a cable programme service provided for the Welsh Fourth Channel Authority, the subsidiary mentioned in section 12(2) of the Broadcasting Act 1981 or a programme contractor within the meaning of that Act shall be treated as provided for the Authority.

(3B) For the purposes of this Act no account shall be taken of a cable programme service which is only incidental to a business of keeping or letting premises where persons reside or sleep, and is operated as part of the amenities provided exclusively or mainly for residents or inmates therein."

(24) In subsection (5) of that section for the words "the causing of a work or other subject matter to be transmitted to subscribers to a diffusion ser-

vice" there shall be substituted the words "including a work or other subject matter in a cable programme".

(25) In paragraph 36(3) of Schedule 7 to that Act (transitional provisions) for paragraph (c) there shall be substituted the following paragraph—

"(c) including the work or an adaptation thereof in a cable programme."

### The Dramatic and Musical Performers' Protection Act 1958

7.—(1) In section 6 of the Dramatic and Musical Performers' Protection Act 1958 (special defences) for the word "transmission", in each place where it occurs, there shall be substituted the words "cable programme" and after the word "made" there shall be inserted the words "or included".

(2) In section 7 of that Act (consent on behalf of performers) for the word "transmission", in each place where it occurs, there shall be substituted the words "cable programme", after the word "made" there shall be inserted the words "or included" and after the word "making", in both places where it occurs, there shall be inserted the words "or including".

(3) In subsection (1) of section 8 of that Act (interpretation), after the definition of "broadcast" there shall be inserted the following definitions—

""cable programme" means a programme included in a cable programme service, and references to the inclusion of a cable programme shall be construed accordingly;

"cable programme service" means a cable programme service within the meaning of the Cable and Broadcasting Act 1984 or a service provided outside the United Kingdom which would be such a service if subsection (7) of section 2 of that Act and references in subsection (1) of that section to the United Kingdom were omitted";.

(4) Also in that subsection after the definition of "performers" there shall be inserted the following definition—

""programme", in relation to a cable programme service, includes any item included in that service";.

(5) After subsection (2) of that section there shall be inserted the following subsection—

"(3) Section 48(3) of the Copyright Act 1956 (which explains the meaning of references in that Act to the inclusion of a programme in a cable programme service) shall apply for the purposes of this Act as it applies for the purposes of that Act."

## Correspondence

### Letter from the United Kingdom

Denis de FREITAS\*















## APPENDIX

**Telecommunications Act 1984 — Section 6**

(Telecommunication systems exempt from licensing requirement)

**6.** (1) Section 5(1) above is not contravened by the running by a broadcasting authority of a telecommunication system in the case of which every conveyance made by it is either—

- (a) a transmission, by wireless telegraphy, from a transmitting station for general reception of sounds, visual images or such signals as are mentioned in paragraph (c) of section 4(1) above; or
- (b) a conveyance within a single set of premises of sounds, visual images or such signals which are to be or have been so transmitted.

(2) Section 5(1) above is not contravened by—

- (a) the running of a telecommunication system in the case of which the only agency involved in the conveyance of things thereby conveyed is light and the things thereby conveyed are so conveyed as to be capable of being received or perceived by the eye and without more;
- (b) the running by a person of a telecommunication system which is not connected to another telecommunication system and in the case of which all the apparatus comprised therein is situated either—
  - (i) on a single set of premises in single occupation; or
  - (ii) in a vehicle, vessel, aircraft or hovercraft or in two or more vehicles, vessels, aircraft or hovercraft mechanically coupled together; or
- (c) the running by a single individual of a telecommunication system which is not connected to another telecommunication system and in the case of which—
  - (i) all the apparatus comprised therein is under his control; and
  - (ii) everything conveyed by it that falls within paragraphs (a) to (d) of section 4(1) above is conveyed solely for domestic purposes of his;

and references in paragraphs (b) and (c) above to another telecommunication system do not include references to such a system as is mentioned in subsection (1) above (whether run by a broadcasting authority or by any other person).

(3) In the case of a business carried on by a person, section 5(1) above is not contravened by the running, for the purposes of that business, of a telecommunication system which is not connected to another telecommunication system and with respect to which the conditions specified in subsection (4) below are satisfied.

(4) The said conditions are—

- (a) that no person except the person carrying on the business is concerned in the control of the apparatus comprised in the system;
- (b) that nothing falling within paragraphs (a) to (d) of section 4(1) above is conveyed by the system by way of rendering a service to another;
- (c) that, in so far as sounds or visual images are conveyed by the system, they are not conveyed for the purpose of their being heard or seen by persons other than the person carrying on the business or any employees of his engaged in the conduct thereof;
- (d) that in so far as such signals as are mentioned in paragraph (c) of section 4(1) above are conveyed by the system, they are not conveyed for the purpose of imparting matter otherwise than to the person carrying on the business, any employees of his engaged in the conduct thereof or things used in the course of the business and controlled by him; and
- (e) that, in so far as such signals as are mentioned in paragraph (d) of section 4(1) above are conveyed by the system, they are not conveyed for the purpose of actuating or controlling machinery or apparatus used otherwise than in the course of the business.

(5) In this section—

“broadcasting authority” means a person licensed under the Wireless Telegraphy Act 1949 to broadcast programmes for general reception;

“business” includes a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate;

“vessel” means a vessel of any description used in navigation;

“wireless telegraphy” has the same meaning as in the said Act of 1949.

## Collective Administration of Authors' Rights

### Music Performing Rights Organizations in the United States of America: Special Characteristics; Restraints; and Public Attitudes

John M. KERNOCHAN\*

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#### I. Introduction

To the non-U.S. observer, the institutions and methods by which music performing rights are defined and licensed and by which the license fees are collected in the United States of America may seem very strange. It is the purpose of this paper: (1) to review briefly the present U.S. situation and how it

developed; (2) to sketch some of the special legal and practical restraints affecting the nature and operation of the U.S. music performing rights organizations; and (3) to comment briefly on public attitudes — i.e. the attitudes of exploiters and consumers — toward payments for music performing rights and toward the performing rights organizations against the background of the restraints described.

As this article is designed for non-U.S. readers, it paints with a broad brush, emphasizing features of the U.S. system which differ significantly from the features found generally in other systems. These include, most obviously, the presence of at least three licensing organizations (rather than the usual single one) which enjoy no actual or quasi-governmental status and are in active competition with each other. They include vigorous antitrust regulation by governmental and private action. They include the role of Congress and state legislatures in restricting collection and/or payment in various ways, and legislative resort to compulsory licensing and official fee-regulating machinery. Also included are judicial attitudes and rulings on copyright generally and performing rights in particular. Finally, some attention is given to certain self-imposed limitations observed by the U.S. organizations. All these features are operative today, of course, in a context where new technology, while providing opportunities, is eroding the substance of authors' rights through progressive loss of control over reproduction.

Despite the many restraints and limitations affecting performing rights in the U.S., purportedly for the public benefit, the U.S. public remains largely unaware of these or unmoved by them. Exploiters and users have not shown particular willingness to accept the principle or obligations of payment to authors for their work. There is an evident, urgent need for a massive national, and even international, educational effort regarding authors' rights if these attitudes are to be changed and a viable system of authors' rights developed and maintained both in the U.S. and in the world as a whole.

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## II. Genesis of the U.S. Music Performing Right

It is interesting to compare the origin of the music performing right in each of the three nations (England, the USA and France) which first adopted laws protecting authors' rights. In all three countries, performance rights for dramatic works were recognized by statute earlier than those in nondramatic music. In France, the dramatic performing right was recognized as early as 1791 and a society concerned with this right (*Société des auteurs et compositeurs dramatiques*, SACD) was formed in 1829. A celebrated litigation brought by Victor Parizot and other French composers in 1847 over uncompensated use of their music at the café-concert "Les Ambassadeurs" led to the creation in 1851 of SACEM, the French music performing rights society. In England, performing rights in dramatic works were recognized in 1833; those for music were established in 1842. The United States lagged in such matters. It was not until 1856 that the dramatic public performing right was expressly provided for in U.S. law and the music performing right was not added until 1897. Even after this, it was some time until the U.S. music performing right was effectively enforced — as it could hardly be without the existence of some special machinery, which neither the 1897 Act nor its successors provided. It is a curious fact that the first British and U.S. music performing rights organizations (PRS and ASCAP) were both established in 1914, long after the French precedent.

When the U.S. Copyright Law was revised in 1909, Congress redefined the nondramatic music right, limiting it to one of "public performance *for profit*" (sec. 1(e)). The dramatic right was not so limited. Interestingly, when performing rights were finally extended to nondramatic literary works in 1952, a "for profit" limitation was also imposed with respect to such works. This drastic curb endured until 1978, the effective date of the new, and currently applicable, Copyright Revision Act of 1976 which, in an important measure, did away with the limitation.

## III. U.S. Performing Rights Organizations

### A. General

The need for music performing rights organizations has been generally acknowledged. Without the aid of such an organization, a composer, author or music publisher in a country of any size would not have the capability of finding out whether, and if so where and when, his or her work is being performed publicly with or without authority. Most would be hard pressed also to administer the multiple bur-

dens of monitoring, licensing, and collecting and distributing fees. Such burdens would divert attention from their primary work of composing, writing, editing, promoting, etc. They would generally be unable to carry the high costs of infringement litigation against the many users who resist payment. Moreover, the clearing-house service provided by such organizations makes easier the task of honest users seeking licenses — especially bulk licenses — to perform protected works without risking infringement. And the public has, after all, a vital interest in convenient access to music at fair rates under fair license arrangements.

Foreign observers are inevitably startled to learn that the United States, in lieu of the usual single, monolithic agency, currently has no less than three vigorously competing entities of widely diverse character.<sup>1</sup> While other organizations have from time to time licensed nondramatic musical performing rights in the USA, and others may appear, the three principal organizations which dominate the U.S. licensing field today are — in the order of their emergence — ASCAP, SESAC and BMI. Some of the special characteristics of each are discussed below.

### B. Structure and Size

The American Society of Composers, Authors and Publishers (ASCAP), the first U.S. music performing rights organization, is an unincorporated nonprofit membership association established under the laws of the State of New York. Its members are composers, lyricists and music publishers. The Society's affairs are managed by a Board of Directors, consisting of 12 writers (elected by writer members) and 12 publishers (elected by publisher members), three of each representing so-called "serious" or symphonic music. Membership meetings are held regularly. Today's membership numbers some 25,800 writers and some 9,600 publishers. To be eligible for full membership, a writer need have created no more than one work which has been regularly published or commercially recorded or performed via ASCAP-licensed media. ASCAP's domestic and foreign receipts in 1984 exceeded 208,000,000.

The ASCAP of today has changed in major respects in structure and operation since 1914. Its current character reflects the results of governmental antitrust challenges and consent decrees and challenges by the users of its music, including successively emerging and powerful new industries — mo-

<sup>1</sup> Canada also diverges from the customary pattern, having two competing organizations: CAPAC and PRO/CANADA. Brazil, too, has multiple organizations.

tion picture, recording, radio, television, cable, and so on. Battles continue in many sectors, especially as new technology develops. Even where it is acknowledged that public performance must be paid for, the struggle continues over how much should be paid. ASCAP also has been and will be affected by the shape and activities of the second major U.S. performing rights organization, BMI.

While it was the third of the U.S. organizations to be established, BMI is now an entity of major importance and a significant ASCAP rival. Most publishers today find it essential to maintain at least two separate business entities, one a member of ASCAP, one affiliated with BMI. BMI was the offspring of confrontation between ASCAP and the broadcasters in the late 1930's, culminating in a boycott of ASCAP music. It was created by broadcasters to establish a new source of contemporary music as an alternative to ASCAP whose licensing terms were judged unacceptable. The repertoire of SESAC, the third organization, was deemed too limited to fill the need.

BMI is a corporation whose stock is entirely owned by broadcasters. While the networks were among its initial shareholders, no BMI shares are presently held by the networks. A 1969 article on BMI by its Senior Vice-President states:

BMI stock was issued to broadcasting stations at five dollars a share with a clear understanding that the company would never pay dividends and that the sale of the stock would be restricted so as to keep it out of the hands of people who might want to obtain control of the organization for the purpose of lessening its competitive capacity. BMI has never paid dividends. The stock is still valued at five dollars a share. It does not appreciate in value. It gives no special privileges to stockholders. Today there are approximately 500 stockholders, most of whom are broadcasters, retired broadcasters or broadcasters' estates, all of whom, in effect, hold their stock in trust.<sup>2</sup>

The ownership of a performing rights organization by broadcasters — primary users of its music — is a situation not replicated in any other such organization.<sup>3</sup> Such ownership, as will appear, has not prevented broadcasters from suing ASCAP and BMI together on grounds of antitrust violation, an extraordinary situation on its face. While no writer or publisher is a member of BMI's governing board or has any voice in its management, BMI urges that this allows it greater objectivity in fixing rates and making decisions on repertoire and on its other "not for profit" activities.

BMI's approximately 45,000 writers and 28,000 publishers are designated as "affiliates," rather than "members." In contrast to ASCAP's initial but now-abandoned restrictive membership policies,

BMI from the outset adopted an "open door" policy designed to give any legitimate writer or publisher access to the performing rights marketplace. It began with a monitoring or logging system broader than ASCAP's (now broadened also) designed to identify performances of types of music not reached in ASCAP surveys. BMI reports domestic and international receipts of some 150,000,000 for the fiscal year ending June 30, 1985.

As with ASCAP, so the present shape of BMI reflects the effect of contests with users who resist payment or fight vigorously to minimize fees and with new industries that seek to perform music without paying for it. BMI, as will appear, has its own antitrust consent decrees and restraints to live with, and its own special continuing need as a user-owned organization fairly to reconcile this status with the interests of its affiliates.

If third in size, SESAC was a relatively early competitor of ASCAP in the marketing of performing rights, antedating by nine years BMI's entry into operation. It was founded in 1930 and incorporated in 1931 by Paul Heinecke, a former music publisher belonging to ASCAP. He had organized Associated Music Publishers (an earlier performing rights organization, later purchased by BMI). Originally, SESAC's name stood for Society of European Stage Authors and Composers, Inc., its catalog being based on American performing rights to European music — including music controlled by the Society of Spanish Authors and Composers, the Society of German Stage Authors, and the Polish Composers Organization. After a drive begun in 1932, most broadcasters of the time became SESAC licensees. Wartime difficulties over European rights led SESAC to seek out American music not hitherto represented and to specialize in so-called "country and gospel" music. SESAC is now simply an arbitrary trade name for an organization representing both European and American works, the latter now embracing pop, rock, R&B, soul and jazz, as well as "classical" material.

SESAC has always been a private, family-owned corporation. Originally all its affiliates were publishers but, beginning in the early 1970's, writers were admitted and there are now roughly 1,800 writer and roughly 1,130 publisher affiliates. Neither writers nor publishers participate in the management of SESAC, which is conducted by an administrative staff. In this aspect, SESAC like BMI is unusual among the world's performing rights organizations. SESAC invites would-be affiliates to submit inquiry forms and a sample recording of music. As to its review of submissions, SESAC describes itself as "highly selective" in its affiliation of writers and publishers — a position that differs, it would seem, from the "open door" policies that now characterize both ASCAP and BMI.

<sup>2</sup> Zavin, "BMI", The Complete Report of the First International Music Industry Conference, 131, 132 (1969).

<sup>3</sup> Compare IV. *infra*, as to movie industry ownership of ASCAP publishers.

SESAC's size and annual intake (over five and one-half million dollars in 1984-85) have permitted it to work with a "low profile" and its character and operations have been relatively unaffected by ASCAP and BMI wars with government and users. It is not bound by any consent decree. It is not a litigation-oriented enterprise, though it does bring infringement suits against stations that perform SESAC material without license.

### C. Scope of Activities and Methods of Operation

As explained further below, ASCAP members and BMI affiliates now grant to their respective organizations the nonexclusive right to license *non-dramatic public performances* of their works. Note that ASCAP is not empowered to and does not purport to collect fees for dramatico-musical performances of its members' works, or so-called "mechanical fees" based on the making and sale of records and cassettes of members' works. BMI's contracts with its affiliates give it some relatively limited or "ephemeral" rights in both these areas. In contrast to European societies neither organization collects fees from movie exhibitors when film music controlled by either is publicly performed in an exhibited film.

SESAC, alone among the United States performing rights organizations, calls upon its publisher-affiliates by contract to transfer to it *all rights* in publications they control, save the "right to publish, print, vend and distribute copies of the publications." Thus, the transfer is of various exclusive rights and covers dramatico-musical works. As to works covered, SESAC in fact secures so-called grand (dramatic) rights and from most publishers mechanical and synchronization rights as well. Under SESAC's agreements with writers, the latter grant SESAC all rights of public performance and rights to license the same, but a proviso reserves to the writer the power to issue nonexclusive licenses to music users to publicly perform "for profit" any of his publications. SESAC's writers assign to it limited or "ephemeral" recording and synchronization rights, including the right to license these in connection with public performance by radio and television, although (in contrast to the publishers) these rights are assigned on a nonexclusive basis. Through its subsidiary, Music Royalties Limited, SESAC offers services in relation to mechanical and synchronization rights similar to those offered by the Harry Fox Agency.

The three organizations license the rights described above and collect license fees therefor. The principal licensees are broadcasters, including networks and non-network-affiliated local television

stations, and radio stations. Other licensees include such non-broadcaster users as bars, restaurants, taverns, nightclubs, background music services, hotels, motels and purveyors of live concerts. Fees are also collected under compulsory licenses established in the 1976 Copyright Revision Act for cable television, jukeboxes and public broadcasting. The Copyright Royalty Tribunal, a governmental agency located in Washington, D.C., oversees the adjustment of rates and the allocation of fees among claimants, under these compulsory licenses.

ASCAP, BMI and SESAC all have relationships with foreign societies which collect and remit fees for performances of their respective catalogs in foreign jurisdictions. The catalogs of the foreign societies, in turn, are licensed in the United States through the U.S. organizations. SESAC also has agreements with foreign mechanical rights organizations.

In dealing with parties who seek to perform their music, ASCAP and BMI offer many different kinds of licenses, which have in common the fact they are "blanket" licenses, granting access to the entire ASCAP or BMI repertory, including new works added during the license term. Broadcasters may choose between a "blanket" license or a "per program" license. Both are blanket licenses in that they allow access to the whole repertoire of the relevant society. "Blanket" license fees are based on a percentage of all revenues from sponsors after deductions. The "per program" license fee, however, calls for a higher percentage based on net receipts from sponsors of only those programs using the relevant organization's music. An array of "blanket" licenses is available to non-broadcast users, with fees based on a number of objective variables applicable to the licensee.

SESAC's licenses for public performance are "blanket" licenses, requiring monthly payments and authorizing use of any SESAC work as often as needed, live or recorded. Its fees from broadcasters are not based on percentages of receipts but on certain "determinants," including the market population of the area served, and the station's own rate card. Non-broadcast licensee's fees are based on standard factors applicable to the type of facility concerned. While license fees have not generally been negotiated through industry-wide committees, but individually with the users, users that are similarly situated pay similar fees to SESAC.

There are differences between the three societies in their methods of monitoring performances and distributing fees. In this regard, ASCAP distributes the license fees it collects, deducting only its administrative costs (currently 18-19% of its gross annual revenue). ASCAP resorts to diverse logging, sampling and monitoring techniques to find out what is being performed in a given period and, thus, who

should receive the fees collected. Logs and cue sheets are used for complete coverage of network television programming. Local television and radio program samples are taped for review. Concert licensees submit programs and major background music services submit logs. General licensees (bars, taverns, etc.) are not surveyed but fees for their uses are distributed on the basis of a "proxy" of featured radio and television uses, as revealed by the sampling in those areas. Distributable revenues are distributed one-half to publishers and one-half to writers, who may receive payment on "current performance" basis or (if they so elect after an initial period) on a basis that combines current performance with averaging over a period of years.

BMI also receives daily network logs. It monitors all local radio and television stations in the course of a year using what is styled a "randomly selected stratified probability sample" covering, in each quarter's logging, stations varying in size and type of location. A census, rather than a sample basis, is employed to cover syndicated shows and films on all local stations. In contrast to ASCAP's analysis of actual tapes of local stations, BMI methods stress station logs. As to its mode of distributing fees collected, BMI publishes a rate schedule informing affiliates of the *minimum* rates applicable to each type of broadcast performance. As a nonprofit organization, it distributes quarterly all available income (less operating costs, taxes and a "reasonable reserve") and fees paid are usually substantially higher than the rates specified in the schedule. The system calls for identical royalty payments to affiliated writers and publishers for the performance of a given work.

Given SESAC's size and intake, resort to exterior services to conduct sampling surveys is deemed prohibitively expensive. SESAC does receive, and make payments based on, network logs as well as pay-TV logs and educational television and radio cue sheet data. Local performances on radio and television are spot-checked. Radio performances are monitored daily through Billboard Information Network (B.I.N.). Various other factors also play a role in the SESAC formula and in its application to determine the quarterly payments allocable to each affiliate, with publisher and writer receiving 50% each of the fees for most uses. These factors include various types of information from the major trade publications such as "chart activity" (reports on sales of the top recordings), with bonuses awarded for certain kinds of chart results.

#### IV. Development of the U.S. Performing Right

The music performing right has been the focus of intense struggle since ASCAP's birth in 1914. From

the beginning of ASCAP's efforts, there was resistance — rooted in incredulity, lack of comprehension, a want of sympathy for the right and a consequent unwillingness to pay for it. Each commercially significant group, already existent or newly emerging over the years with new technology, has fought, first, to deny the validity of the right or its applicability to the use in question; second, to escape its impact if applicable; and, third, to pay as little as possible for its use, often by harassing or seeking to reduce or destroy the power of any entity with the temerity to try to enforce such a right.

ASCAP as the first, and for a time the only, substantial U.S. performing rights organization bore the brunt of early efforts to establish the principle that public performance of protected nondramatic music for profit must be paid for. The 1909 Act with its "for profit" limitation on the right was then the governing law. The case of *Herbert v. Shanley*,<sup>4</sup> carried all the way to the U.S. Supreme Court, was an early victory of tremendous import for ASCAP and creators. Not only did it approve a compensable nondramatic performing right in a song ("Sweethearts" by Victor Herbert) drawn from a dramatico-musical work ("Sweethearts"), it also gave a narrow reading to the "for profit" limitation, requiring Shanley's restaurant to pay Victor Herbert for the use of his music to entertain diners who were not directly charged for the music provided with the meal. Later cases made clear that incidental performance of music — whether in a restaurant, movie theater or dance hall, on the radio or in hotels — without consent and proper payment (if demanded), was an actionable infringement of copyright. To be sure, that principle is still — today — a focus of conflict in particular applications. But *Herbert v. Shanley* has provided a sturdy enduring foundation for ASCAP's work.

Over the years, ASCAP, and later BMI, did battle with each developing user industry: with the movies (particularly the exhibitors) in both silent and "talkie" eras; with radio; with television; with jukebox owners, cable operators and public broadcasters. The adversaries keep coming. Old ones find new grounds for resistance; new industries raise new problems.

Among the strategies employed by resistant users faced with ASCAP's aggressive early demands were (1) pooling funds to fight the society in the courts and elsewhere, (2) assembling repertoires of unprotected music, (3) seeking changes in the federal copyright law to exempt particular users or uses or to curb particular activities of the performing rights organizations, (4) participating in ASCAP, as the motion picture industry did through ownership of

<sup>4</sup> 242 U.S. 591 (1917).

ASCAP publisher members, (5) seeking state legislation to outlaw, impede or harass ASCAP, BMI, etc. within state borders or to press Congress for copyright law changes, (6) contesting coverage and payment "to the last ditch," in court and out, sometimes with baseless defenses, and thereafter resisting collection of judgments, (7) challenging ASCAP's and BMI's structure, status, licenses and license terms under the antitrust laws both before the Justice Department and in the courts, (8) boycotting the broadcast of ASCAP music, as most broadcasters successfully did for one year beginning October 1, 1940, (9) establishing a broadcaster-owned-and-operated competitor to ASCAP, namely BMI, effective February 15, 1940, and (10) pressing Congress for protective compulsory licensing arrangements.<sup>5</sup> Some of the principal strategies among these will be discussed later.

## V. Restraints on U.S. Organizations

ASCAP, BMI and SESAC — three organizations which, as we have seen, vary significantly in structure and in scope and mode of operation — are subject to a substantial number of special restraints. These restraints do not affect all three equally, and some may have (at least so far) no impact at all on one or another of the three. But one must be aware of all of them if the operation of music performance licensing in the U.S. is to be understood. Some of them affect quite directly the relations between the U.S. organizations and their foreign counterparts and the services the former can render the latter. A number of the restraints may be or seem special to the United States and to have no parallels in other nations whose societies do business with ASCAP, BMI and SESAC. Some restraints, however, are now emerging as potentially significant in other sectors of the world — in particular, for example, antitrust laws with their pressures to ensure competition, and (regrettably) perhaps also the compulsory license and comparable devices.

### A. Competition

As is well known, the basic policy of the United States economic system and the legal framework that supports it favor free competition. Numerous compromises and practical adjustments have been made in the system and governmental regulation dominates important areas so that the system falls far short of total laissez-faire. But in many areas, government regulation is partial, minimal or vir-

tually nonexistent. Insofar as regulation is absent, the operative premise is that free competition is to be encouraged as the best means to secure the welfare of the consumer — by keeping prices down, stimulating initiative, making possible reasonable profit and encouraging quality. Monopoly, beyond the more familiar right to real and personal property, is sometimes a necessary condition of accomplishing certain ends, but is viewed as generally undesirable — leading to high prices, to lack of innovation and choice and to undesirable concentrations of political and economic power. Even a constitutionally-sanctioned property right, such as copyright (deemed by some a natural right), may be viewed as a questionable "monopoly" and treated strictly and with suspicion. Judicial and other official actions often reflect this attitude.

The first special restraint to be noted as affecting the three U.S. organizations is, thus, the necessity that they must compete effectively against one another to endure. No single organization is in sole control of copyrighted, performable music.

There is certainly competition between the three organizations for composers, publishers and music. The modes of dealing with, and the benefits offered to, their respective members and affiliates do differ as between the organizations, and the members and affiliates have choices they would not have if only one such entity existed. It seems also true that, in this situation, no one entity can risk outrageously high price terms that could isolate it and damage its relative competitive position. And it is also doubtful that any one entity would be able to survive an extended effort to gain a greater market share by reducing its prices significantly below those of its competitors. The writers and publishers of that entity, for example, might well resent efforts to sell their works more cheaply than those of their counterparts in other organizations and might be led to desert one entity for another. It would thus seem to follow that the margin for price differentiation between the major organizations vis-à-vis consumers and users may be relatively constricted as a practical matter.

A key fact often overlooked in theoretical discussions of competition or music performing rights "monopolies" in the USA is the existence of a vast, ever-increasing public domain of music — popular, classical, folksong, etc. — to which all consumers and users have free access. Nor is the public domain in the United States composed only of older music. Failures to comply with statutory formalities of notice and renewal which have been a condition of U.S. copyright for many years, and even abandonments or purposeful dedications of copyright, mean that many recent works are likewise available for free use. Moreover, older public domain music can be rearranged, decked out in the new garb currently

<sup>5</sup> See, e.g. H. Warner, *Radio and Television Rights*, 341–42, 366–69 (1953).

in fashion and then exert its appeal all over again in a modern guise. Added to all this is the music of foreign nations with which the U.S. has no treaty or other agreement requiring that U.S. copyright protection be accorded to the published works of their nationals. Thus, any "monopoly power" over music enjoyed by any or all of the three existing organizations is at best a highly diluted one. Can it be argued then that the competition element in this area was never as important as claimed? For certain purposes, some musical works may be regarded by users as fungible.

With at least three organizations and a vast public domain all in competition, no one organization is indispensable to the public and none by itself can choke off the supply of viable music to the public or risk a boycott by actions that alienate consumers or users to the point where a boycott is activated. On the other hand, one may pose the question whether it would be easier and less expensive for users to deal with one organization for all music performing needs than it is to deal with three, or more, or to embark in addition on direct licensing with multiple creators who will surely be driven in due course to organize themselves into some kind of protective collectivity to confront the power of major users. Does the existence of three organizations rather than one lead to higher costs for the consumer or user and to less return for the composers and authors (and the publishers assisting them)? Does the existence of three methods, machineries and staffs to monitor U.S. music performances multiply the resources and expense devoted to a single basic task? Economies of scale in staffs, in litigation against infringers, are lost. And, that we have three organizations in the USA with which major users find it necessary to deal, is no guarantee that the number of such organizations may not proliferate further. Do the recent claims of the Italian Book Company and of Latin American publishers to a share of music performing royalties arising from jukebox uses presage a new proliferation of rights organizations? Against these factors must be weighed the value of whatever real choices the differentiated organizations offer their members or affiliates.

A final point must be made here. To the competition already described as affecting and restraining the operations of ASCAP, BMI and SESAC in the United States must be added the competition afforded (under the consent decrees and/or the contracts of the organizations) by the availability of direct licensing — that is the securing by the user of a performing license directly from the composer and/or publisher of the work concerned. In all cases, a would-be user may bypass the licensing organization in favor of an effort to deal with rights-retaining writers or publishers. How this situation arose

and why, its significance for the three organizations, and its merits, are discussed later.

### B. Antitrust Laws

Here, the main concern is a brief examination of the restraints imposed on the performing rights societies by U.S. antitrust laws<sup>6</sup> which have been invoked either by private parties in private litigation or in suits brought by the U.S. Government, or implemented in several landmark "consent decrees" evolved by the Department of Justice with ASCAP and BMI.<sup>7</sup> Antitrust restraints on U.S. performing rights organizations have had more to do than any other factor with shaping the operations of ASCAP and BMI today. Even SESAC, never involved in any consent decree, must mind the antitrust signposts erected through the years in the field of music performing rights. For foreign observers, an understanding of this aspect of performing rights history in the United States is indispensable to comprehension of the U.S. system.

It is not necessary to review here all the voluminous detail of antitrust litigation and related activity of early decades. It is enough to focus on the amended consent decree of 1950 which, with some later amendments, regulates much of ASCAP's present organization and functioning. Some initial reference to the *Alden-Rochelle* case,<sup>8</sup> to the earlier ASCAP consent decree of 1941 and to the BMI consent decrees is, however, essential.<sup>9</sup>

In the late 1930's, the opposition of broadcasters, movie exhibitors and other users to ASCAP's bold demands intensified to a critical degree. We have already listed many of the countermeasures taken. The broadcasters boycotted ASCAP; BMI was born. Judicial disapproval was clearly expressed. In De-

<sup>6</sup> Principally, the Sherman Act of July 2, 1890, codified at 15 U.S.C. § 1–7, which now provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal..."

<sup>7</sup> A "consent decree," issued by a court and developed by government officials in consultation with the parties, is a means of resolving antitrust claims without a trial or admission of wrongdoing. In effect, the government agrees not to press antitrust charges in return for the accused party's agreement to conduct its affairs in accordance with the terms of the decree.

<sup>8</sup> *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

<sup>9</sup> The ASCAP consent decrees are: *U.S. v. ASCAP*, CCH 1940–43 Trade Cases, 56,104 (S.D.N.Y. 1941) [hereinafter cited as "ASCAP 1941 Consent Decree"]; CCH 1950–51 Trade Cases 62,595 (S.D.N.Y. 1950) [hereinafter cited as "ASCAP 1950 Consent Decree"]; CCH 1960 Trade Cases 69,612 (S.D.N.Y. 1960). The BMI consent decrees are: *U.S. v. BMI*, CCH 1940–43 Trade Cases 56,096 (E.D. Wisc. 1941); CCH 1966 Trade Cases 71,941 (S.D.N.Y. 1966).

ember 1940, the Department of Justice, having heard much complaint, announced it would proceed under the antitrust laws against ASCAP, BMI, CBS and NBC. The last three named defendants were released when BMI signed a civil consent decree, but the U.S. filed a comprehensive criminal antitrust suit against ASCAP on February 5, 1941. On February 26, 1941, ASCAP signed a consent decree,<sup>10</sup> abjuring or revising practices complained of in the Government's charges, and the Government's criminal suit was dropped. Thereupon ASCAP began the "life under consent decree" which endures to this day. A few highlights of this 1941 decree may be mentioned. ASCAP's exclusive right to license was reduced. It was not to discriminate between similarly situated users. It was to license certain users "at the source" (i.e. radio networks and makers of electrical transcriptions for broadcast), so that, for example, the license to a network would cover a network's affiliated stations. Per program licenses, on certain conditions, had to be offered radio broadcasters. Per piece licensing was to be available to users other than broadcasters. Some reform of ASCAP's internal organization and procedures was mandated, including a modification of membership rules to make eligible for membership any professional composer or author with one regularly published composition. In this regulated setting, new license terms offered by ASCAP to the broadcasters were accepted as fair in 1941, and again in 1949.

Bitter difficulties later developed, however, between ASCAP and a group of movie theater operators who pursued a private antitrust suit against ASCAP, seeking treble damages and injunctive relief, in the famous *Alden-Rochelle* case.<sup>11</sup> The decision in this case on July 19, 1948, dealt ASCAP perhaps its gravest blow, ruling that its activities were generally barred by the antitrust laws. Extensive fact findings and conclusions in a strongly worded opinion proved very influential for ASCAP's future. Spurred by *Alden-Rochelle* and other factors, the U.S. Government reopened its earlier 1941 decree and evolved the 1950 amended consent decree (amended again in 1960 in respects not pertinent here) which provides the basic charter for ASCAP operations.

On March 14, 1950, when the 1950 amended consent decree was promulgated, the *Alden-Rochelle* judgment was vacated. Following is a description of some still effective features of the 1950 consent decree, as reported (in 1958 Congressional Hearings) by Victor Hansen, then Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice:

The changes contained in the amended judgment sought to add protection to users, including two new mediums, television and wired-music systems (such as Muzak). The new judgment took the approach that has been called open-door and open-window to ASCAP's internal operations. The major changes made in the 1941 decree were in substance as follows: ASCAP members were given the unrestricted right to license their own works. Membership requirements were eased so that a writer applicant need have only one composition regularly published, and a publisher applicant need only have its publications distributed on a commercial scale for one year and bear the normal risk of the publishing business. Subject to contractual obligations of ASCAP, a member might withdraw and take his compositions with him. Thus the right of ingress and egress was adequately protected.

The principle of licensing at the source was applied [to network television as it has earlier to network radio — Ed.]... to wired-music service, and motion picture production; i.e., members were required to license performance rights when the synchronization rights were licensed. ASCAP was prohibited from licensing theater operators for performances of ASCAP music on film.<sup>12</sup> The compulsory licensing provisions were extended to cover television broadcasting and ASCAP was required to use its best efforts to give its licensees a genuine economic choice among the various types of licenses.

An important provision of the amended judgment protects users from any exorbitant demands by ASCAP for the use of an admittedly necessary collection of compositions. The amended judgment provides for compulsory licensing of performing rights and for court determination of what constitutes a reasonable royalty if the applicant and ASCAP are unable to agree in preliminary negotiations. This right to secure licenses at reasonable royalties given users of ASCAP music has been invoked many more times than has the comparable right given in other judgments in connection with patent licenses.

The 1950 amended judgment eliminated the subjective standards to be used to determine the basis of distribution of revenues to its members. It required ASCAP to distribute its revenues primarily on the basis of objective surveys periodically made.<sup>13</sup>

The 1950 amended decree contains a few other significant restraints, including *inter alia*: a prohibition against licenses (except for motion pictures) of more than five years' duration;<sup>14</sup> and required maintenance of a list of the ASCAP repertoire available for inspection.<sup>15</sup> A further consent decree provision,<sup>16</sup> discussed later, bars ASCAP from licensing

<sup>10</sup> ASCAP 1941 Consent Decree, *supra* note 9.

<sup>11</sup> *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

<sup>12</sup> Statement of March 18, 1958, in House Select Comm. on Small Business, Subcomm. No. 5, Hearings, Policies of American Society of Composers, Authors, and Publishers, 138-141 (March/April 1958).

<sup>13</sup> ASCAP 1950 Consent Decree, *supra* note 9, Art. IV(d).

<sup>14</sup> *Id.*, Art. XIV.

<sup>15</sup> *Id.*, Art. IV(A).

"any rights in copyrighted musical compositions other than rights of public performance on a nonexclusive basis," and restricts ASCAP's concerns to nondramatic (small) rights.<sup>17</sup>

BMI is also governed by a 1941 consent decree, revised in 1966, but the BMI decrees do not include many of the restraints imposed on ASCAP, other than, for example, certain source-licensing requirements (movie exhibitors are not referred to) and the bar against discrimination. Under 1966 revisions, BMI must allow its affiliates to engage in nonexclusive direct licensing. BMI's agreements with its affiliates are held to five years' duration. There is no provision for judicial rate-fixing.

So far we have mainly described restraints imposed by the government via antitrust suits and consent decrees. But note that private suits — e.g. the *Alden-Rochelle* case — have played a major part in triggering government action. And, in recent years, private suits on antitrust grounds against both ASCAP and BMI have dominated the stage. The two competitors have found themselves linked in common defense against some of the most powerful of economic interests — first, the mammoth CBS network (supported by the other networks) and, second, the local television broadcasters. So far, ASCAP and BMI have won important victories. Because these have made front-page news across the world they will only be briefly described here. Generally such private suits, involving antitrust questions, have challenged the antitrust legality of blanket licenses offered by ASCAP and BMI. At root, these disputes have arguably concerned the amount of fees to be paid and have represented efforts by users to reduce the fees. To the extent the latter is true, such disputes, at least in ASCAP's case, might better (more cheaply and expeditiously) have been dealt with in the judicial forum provided in ASCAP's consent decree. But the plaintiffs concerned pitched their efforts at securing new types of licenses geared more precisely to their actual uses of music, an objective beyond mere rate-fixing. They have thus preferred to bypass ASCAP's judicial rate-fixing machinery. The treble damages available to a victor in private antitrust litigation, and a calculation that high litigation costs favor the economically more powerful party, may also have influenced the choice among avenues of attack.

Private antitrust claims may arise not only as modes of attack but also as defenses to infringement suits (e.g. for unlicensed performances). An example is *K-91 Inc. v. Gershwin Pub. Corp.*, 372 F.2d 1 (9<sup>th</sup> Cir. 1967), cert. denied, 398 U.S. 1045 (1968), in which a radio station defended an infringement action by urging that ASCAP and/or its members

were violating the antitrust laws. This defense has generally failed for want of proofs necessary to sustain such a claim. The language of the Court of Appeals in *K-91* forms an apt prelude to the two major cases referred to earlier. In sharp terms, the *K-91* Court commented:

We agree...that the activities of ASCAP do not constitute a combination in restraint of trade or a monopoly within the meaning of the Sherman Act. ASCAP is certainly a combination, but not every combination is a combination in restraint of trade or a monopoly. ASCAP cannot be accused of fixing prices because every applicant to ASCAP has a right under the consent decree to invoke the authority of the United States District Court for the Southern District of New York to fix a reasonable fee whenever the applicant believes that the price proposed by ASCAP is unreasonable, and ASCAP has the burden of proving the price reasonable. In other words, so long as ASCAP complies with the decree, it is not the price fixing authority. We cannot agree with the contention that the danger of unreasonable activity that might arise from ASCAP's activities makes everything that it does a violation of the antitrust laws, when those of its potential activities that might have this effect are prohibited by the decree. No contention is here made that ASCAP's actual activities do not comply with the decree. In short, we think that as a potential combination in restraint of trade, ASCAP has been "disinfected" by the decree.<sup>18</sup>

Notwithstanding such language, CBS soon thereafter, in 1969, began what became a gigantic "marathon" suit against both ASCAP and BMI. It sought "per use" licensing, and a ruling that the blanket and per program licenses offered by both organizations were illegal under the antitrust laws. This litigation, lasting 12 years, included a crucial decision by the Supreme Court of the United States to the effect that blanket licensing was not illegal *per se*, but must be tested under a "rule of reason" analysis.<sup>19</sup> In an ultimately authoritative ruling in April 1980, the Court of Appeals for the Second Circuit upheld the challenged licenses, concluding that CBS had "failed to prove that the existence of the blanket license has restrained competition."<sup>20</sup> It was crucial that CBS failed to show it had no realistically available alternative to the blanket licenses. The available alternative emphasized was that of a direct license from the copyright owner. When the Supreme Court refused to review this ruling, CBS concluded five-year blanket license agreements with ASCAP and BMI which will expire December 31, 1985. CBS has now renewed its blanket license from BMI for a further term of years.

<sup>18</sup> 372 F.2d at 4.

<sup>19</sup> *BMI v. CBS, Inc.*, 441 U.S. 1 (1979). In *BMI v. Moor-Law Inc.*, 527 F. Supp. 758 (D. Del. 1981), aff'd without opinion, 691 F.2d 490 (3d Cir. 1982), where a night-club owner defended an infringement action on antitrust grounds, the court upheld blanket licensing via a classic "rule of reason" analysis, rejecting *inter alia* a claim that it created an unlawful tying arrangement ("tying" the licensing of wanted music with music not wanted).

<sup>20</sup> *CBS, Inc. v. ASCAP*, 620 F.2d 930 (2d Cir. 1980), cert. denied, 450 U.S. 970 (1981).

<sup>17</sup> *Id.*, Art. II(B).

An earlier lower court opinion ruling against ASCAP and BMI in this great case encouraged other plaintiffs, including religious broadcasters<sup>21</sup> and, most importantly, certain local television stations who had filed suit in November 1978, in what became known as the *Buffalo Broadcasters* case.<sup>22</sup> *Inter alia*, the Buffalo plaintiffs eventually argued that for them — in contrast to CBS — there was no realistically available alternative to the blanket license, that they were unable to obtain direct licenses. Harking back to *Alden-Rochelle*, they called for a compulsory combining of synchronization and performing rights in packaged shows at the producer level and for delivery of both rights by the producer to the stations — in effect, “licensing at the source” as decreed in 1948 for motion pictures. Victorious at the district court level, plaintiffs’ arguments were rejected firmly and unanimously by the Court of Appeals (2d Circuit) and the Supreme Court refused review. Again, the Court of Appeals found a failure to show that blanket licensing was an unlawful restraint of trade when tested by the standard of reasonableness. The availability of other types of licenses — per program or direct — was a key factor. These two cases were of major import to ASCAP and BMI, bringing a halt to the religious broadcasters’ suit. The result should, for a time at least, discourage further antitrust claims.

But it seems clear that the struggles between ASCAP and BMI and the broadcasters will continue, though the form or forum may alter. The latter have amply shown (*a*) the strength of their conviction that the blanket license is too costly and (*b*) an unrelenting determination to find a way to pay less by paying only for what they actually use. At this time, two points deserve emphasis.

First, it may be expected that the broadcasters and other users will heed the judicial stress on the direct licensing alternative.<sup>23</sup> CBS, it is known, is

actively seeking direct licensing agreements with composers, publishers and producers. It is reported to have adopted a policy of pressing the producers of its packaged programs to secure music performance rights directly from their composers and publishers along with “synch” rights (“licensing at the source”). One arrangement proposed<sup>24</sup> is an option for CBS to acquire television performance rights in exchange for a fee to be negotiated if the network (in the absence, presumably, of blanket licensing) decides to exercise its option. If 60 days of negotiation on the option yield no agreed fee, the amount of fee (stipulated as the “competitive market value” of the performing right) will be arbitrated in Los Angeles at CBS expense. Whether, and if so when and how far, these tactics will succeed bears watching. Direct licensing could at some point become a serious problem for the performing rights societies. Note that the broadcasters’ efforts may continue in other ways, too. For example, current reports in *Variety*<sup>25</sup> of court proceedings and intra-mural maneuvers indicate that the defeated Buffalo plaintiffs (some of them BMI shareholders) may be taking their battle into the shareholders’ meetings and boardroom of BMI.

But the most daunting restraint or limitation emerging from these antitrust cases for ASCAP and BMI is the sheer financial cost in earned music dollars of the public and private legal proceedings that have gone on without respite for decades. It is a supreme irony that legal expenses approaching 15–20,000,000 of music moneys will find their way into the coffers of law firms rather than into the pockets of the creators the U.S. Constitution and Copyright Act seek to encourage. Even as it grudgingly appropriates donations or grant moneys for the National Endowment for the Arts for composers and other artists, Congress seems oblivious to the legal burden and costs the existing antitrust laws impose on composers and authors. There is a clear need for authors to combine to deal with the great economic powers that would use their work. Unionization — as in the Writers Guilds — secures exemption from antitrust laws and costs, but at the sacrifice of copyright ownership and authorship. There is a strongly arguable need for a *sui generis* status for organizations of or for artists, if suitable

<sup>21</sup> *Alton Rainbow Corp. v. ASCAP*, 78 Civ. 352 (S.D.N.Y.).

<sup>22</sup> *Buffalo Broadcasting Co. v. ASCAP*, 546 F. Supp. 274 (S.D.N.Y. 1982), rev’d 744 F.2d 917 (1984), cert. denied, \_\_\_ U.S., 105 S. Ct. 1181 (1985).

<sup>23</sup> “Licensing at the source,” discussed in the consent decrees and, e.g. in the *Buffalo Broadcasters* case, *ibid.*, is a device fraught with danger for the interests of the authors and composers seeking fair compensation for their work. Generally, no one can be certain when a film, or a network radio or television show or a “wired music” compilation is prepared, what the economic returns on the whole or its parts will ultimately be. In this state of uncertainty “at the source,” the typically weak bargaining power of the composer is at its weakest. He may be forced, as a practical matter, to accept lump-sum compensation for his work that bears no relation to the quality or success of the work. Unless the composer has sufficient power to bargain successfully for fair “residual” payments proportioned to actual uses, or for a short, renegotiable grant of rights, his prospects for obtaining such terms are dim.

There exists no screen composers union at present to secure these for him in relation to “works for hire.” Typically producer contracts today leave to the author the ASCAP or BMI payments which will reflect multiple uses. Without this, the purposes of copyright law to secure fair compensation to individual creators for actual use may be almost wholly frustrated.

<sup>24</sup> Sobel, “CBS Tests Its Clout,” 1984 *Entertainment, Publishing and the Arts Handbook*, 209, 211 (1984).

<sup>25</sup> See, e.g. *Variety*, June 26, 1985, at 88.

safeguards are provided for the public against internal abuses, restrictive practices and unreasonable charges. The consent decrees, the Copyright Royalty Tribunal, arbitration panels, the ASCAP monitors, the ASCAP judicial rate-setting mechanism — all these suggest avenues for achieving safeguards. One minimum need is for speedy, efficient, expert, inexpensive dispute-settling machinery to eliminate the waste of precious arts dollars in litigation.

### *C. National Legislative Restraints Beyond Antitrust*

In addition to the restraints on musical performing rights imposed by general national legislation — such as the antitrust laws — which are not expressly or exclusively aimed at the musical field, there are specific legislative restraints on music performance rights in the present Copyright Act itself.

The framers of the 1976 Act recognized there was no justification for continuing the unqualified "for profit" limitation that hedged the performing right for nondramatic music in the earlier Act. The growth of huge, highly subsidized "nonprofit" organizations (e.g. public broadcasting) exploiting music on a major scale without payment dramatized the inequity of an exemption difficult to justify from its inception. § 106(4) of the 1976 Act provides an unqualified right of public performance.

Alas, what is promised by the broad terms of § 106(4) is retracted in significant ways, for example, in § 110(1)-(4) and (6). The right is further reduced substantially in potential value by the addition of three compulsory licensing schemes (discussed later in this paper) to the previously existing compulsory mechanical provision. New exemptions have recently been added by Congress to those already in § 110 — e.g. § 110(10). New groups stand in the wings, pressing for special exclusions, and new compulsory licensing schemes await legislative consideration.

#### *1. § 110 Exemptions in 1976 and Later*

The text of § 110 as enacted in 1976 gave eloquent evidence of the power of certain lobbying groups in American society to persuade Congress they should be exempted from paying composers for performance of their music. It demonstrated congressional willingness to heed — or inability to resist — pleas by special interests to give away the intangible property of composers. Congress would surely flinch from any such disposition of the products of industrial concerns more traditionally labeled as commercial.

§ 110, as of 1976, exempted: use of musical works by nonprofit educational institutions for

face-to-face instruction (§ 110(1)); certain broadcasting of musical works for systematic instructional purposes (involving governmental bodies or nonprofit educational institutions) primarily to classrooms, to the disabled or others unable to attend classes or members of governmental bodies (§ 110(2)); use of musical and even dramatico-musical religious works in services at places of religious worship or assembly (§ 110(3)); performances of nondramatic musical works when promoters, performers and organizers are not paid, if there is no admission charge or the proceeds are exclusively for religious, educational or charitable purposes (§ 110(4));<sup>26</sup> communication of a transmitted performance received by the public on a single home-type receiver unless a charge is made to hear it or there is further transmission to the public (§ 110(5)); and musical performances by a government body or a nonprofit agricultural or horticultural organization during annual fairs conducted by any of them (concessionaires, etc. are not exempted) (§ 110(6)). There are also exemptions for vendors who play in public at their shops the music they are selling (§ 110(7)) and for the handicapped (§ 110(8)-(9)). In 1982, a further exemption was added for veterans and fraternal organizations (§ 110(10)). Dance studios have also sought relief. Further efforts to extend educational and religious exemptions are a possibility.

Works created by composers and authors are the product of labor and it would seem that compensation should be paid for their use. Why should creators be singled out by law to donate their work to educational, religious, or fraternal groups or veterans that pay for their other materials and services<sup>27</sup> or to the tax-supported governmental bodies (referred to in § 110(2) and (4))? It is easier to explain such things on grounds of dubious history and undoubtedly lobbying power than to excuse or justify them. There is no certainty that the creators' line of defense can be held as different groups — be they dance studios or others — come before Congress in turn to clamor for exemption.

#### *2. Compulsory Licenses and Rate Tribunals*

Who could have foreseen the ultimate implications of the precedent set when Congress in 1909 created the first statutory compulsory licensing scheme for so-called mechanical (recording) rights

<sup>26</sup> This exemption may not apply if the copyright owner files objection. *N.B.* that there is, however, no provision for notice to the owner.

<sup>27</sup> Note that the composer is not granted here any privilege to object to the performance as he is in § 110(4), illusory as that provision may prove as a practical matter.

— enacted as a result of fears probably baseless in 1909 and surely so today? An opportunity to do away with this particular device in the 1976 Act was lost when composers and publishers, in return for better fees, gave up the effort to undo a scheme to which they had become accustomed and on which the U.S. recording industry had come to depend — or so it argued — and for whose continuance it fought vehemently.

The multiplication of such licenses in the 1976 Act has created serious restraints on American performing rights organizations. Arguments advanced for compulsory licensing have included: avoidance of excessive transaction costs; avoidance of a threatened monopoly (§ 1(e) of the 1909 Copyright Act); providing a clearing-house mechanism where none existed previously (public broadcasting); and subsidizing a user industry claimed to be unable to pay market rates (cable). And it may be that without such devices the now licensed user industries would contribute nothing to the copyright. On the other hand, the evils attributed to compulsory licenses are familiar. Fixing statutory fees for a privately produced commodity is, of course, an anti-competitive anomaly in a competitive system.<sup>28</sup> Payment for popular works is barred by statute from rising beyond the fixed rate, whatever the market demand. In addition, compulsory licenses impair the creator's ability to prescribe the terms on which his personal creation reaches the public. The quality of uses is placed largely beyond the creative control. Finally, the compulsory license device further de-personalizes the relations between creative individuals and society, putting the artist in a measure at the mercy of governmental organizations. Was it not a major purpose of copyright or *droit d'auteur* to liberate authors from dependance on public control or subsidy or private patronage?<sup>29</sup>

In the 1976 Act, the compulsory licensing device was extended to three types of music performance uses which had previously wholly or partly escaped any contribution to the copyright. In each case, as Barbara Ringer succinctly reminds us, the establishment of compulsory licensing "...was preceded by a complex exemption from copyright liability and ... enormous industries had been built upon a founda-

tion of free use of copyrighted works"<sup>30</sup> — with, one might add, a major concomitant power in these industries to make their will felt in the legislatures. In the case of jukeboxes, the blame for this state of affairs rested on Congress's enactment of a little noticed statutory provision in the 1909 Act (§ 1(e)), exempting from payment the performance of music on "coin-operated machines." What may have seemed a trifling matter in 1909 became a major exemption over the years. Even the compromising of the license fee in the 1976 Act at the low initial rate of 8 per box did not prevent obdurate resistance to payment. In the case of cable retransmission, the blame rests with right holders who failed to assert their interests early, and with Supreme Court decisions<sup>31</sup> which gave a strained reading to the Copyright Act in a seeming effort to save what was perceived as an "infant industry" — an industry that proved so redoubtably strong in Congress as to delay the entire Copyright Revision effort for many years. The eventual cable compulsory licensing compromise enacted in 1976 is now outmoded and has been judged less fair to copyright holders today than it was then.<sup>32</sup> In the case of the public (noncommercial) broadcasters, an enormous volume of unpaid-for public performance of music developed in the shelter of the "for profit" limitation of the 1909 Act, discussed above. With the removal of that limitation, the public broadcasters pleaded in the closing stages of copyright revision for a compulsory license. The license scheme finally adopted for their benefit was anomalously applied only to published nondramatic music and pictorial, graphic and sculptural works. Interestingly, this particular compulsory license scheme laid unusual stress on efforts by interested parties to achieve voluntary rate agreements.<sup>33</sup>

If one bears in mind the drawbacks of compulsory licensing, but is mindful also of the circumstances that led to them and of the nature of congressional processes, there is something to be said for Ms. Ringer's assessment:

<sup>28</sup> See S. Stewart, *International Copyright and Neighbouring Rights*, 495–96 (1983).

<sup>29</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968); *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).

<sup>30</sup> See, e.g. Cassedy, "As the World Turns: Copyright Liability of Satellite Resale Carriers," 9 Columbia-VLA J. of Art & the Law 89, 115 (1984); Ass'n of the Bar of the City of New York, "Report on Compulsory Licensing for Cable Television," reprinted in 12 J. of Arts Management and Law 29 (1983); and Hatfield and Garrett, "A Reexamination of Cable Television's Compulsory Licensing Royalty Rates: the Copyright Royalty Tribunal and the Marketplace," 30 *Journal of the Copyright Society of the USA*, 433 (1983).

<sup>31</sup> An interesting account of this compulsory license and its implementation will be found in Korman and Koenigsberg, "The First Proceeding Before the Copyright Tribunal: ASCAP and the Public Broadcasters," 1 *Communications and the Law*, 15 (1979).

<sup>28</sup> In the case of the mechanical compulsory license, for example, a fee set in 1909 was allowed by Congress to stand unchanged for decades. Moreover, through the years, the statutory rate operated as a "ceiling" in lopsided bargaining that generally resulted in a rate well below that authorized by statute.

<sup>29</sup> See Macaulay's speech delivered in the House of Commons on February 5, 1841, reprinted in T. Macaulay, *Prose and Poetry* 733–34 (G. Young ed., 1952). See, also, *Harper & Row, Publishers, Inc. v. Nation Enterprises*, \_\_\_ U.S. \_\_\_, 105 S. Ct. 2218, 2230 (1985).

Given the strength of the special interest pressures generated in these situations, the establishment of any degree of copyright control — even one subject to a compulsory license — must be considered something of an accomplishment.<sup>34</sup>

At the base of the problem here, as discussed later, is the weakness of right holders' interests in the American legislatures.

The provision in the 1909 Act for a fixed mechanical license fee with no means of adjustment in changing economic circumstances was eliminated in the 1976 Act. While there are more compulsory licenses, the license fees are now subject to review, adjustment and settlement by a statutory five-member Copyright Royalty Tribunal (CRT), subject to judicial review. This is itself another restraint, to be sure, and one exercised by a governmental agency, but at least it offers hope that fees may change as economic circumstances change.

The CRT's determinations have generally withstood judicial review so far despite serious problems of personnel and resources. Particular licensee interests (e.g. jukebox, cable) have been seriously dissatisfied with judicially approved CRT rulings. There is continuing danger of a successful appeal to the legislature by such disgruntled licensee groups to upset CRT rulings or the CRT itself.<sup>35</sup> For example, the jukebox operators turned recently to Congress for legislation providing for a one-time payment — and no more — to copyright owners. The performing rights organizations were forced to mobilize a major effort of persuasion and to enter into a bargain, yielding some part of fees approved as reasonable by the CRT and the reviewing courts, in exchange for better compliance with the law. Cable interests have already turned to Congress to roll back compulsory license fees mandated by the CRT.

Given what we have said about compulsory licensing, it is disturbing to observe an apparently growing readiness of Congress to see the device as a panacea for adjusting the divergent interests of copyright holders and users wherever these may clash in new contexts. Such licenses may be found in pending or proposed legislative measures for performers' royalties, for dealing with audio and video home taping. Some of these would resort to arbitration procedures rather than utilize the CRT.

### 3. General Restraints

At the root of the legislative incursions on music performing rights in § 110 as adopted in 1976, or

thereafter, or now pending or proposed, and at the root of the proliferation of compulsory licenses, there is a cardinal problem which restraints and curbs in law, or in fact, all the activities of the American performing rights organizations. This is the poor bargaining position, and the lack of supporting constituent and vote power, of the minoritarian interest of creators in U.S. legislatures. The American Congress and state legislatures, unlike European parliaments operating under the control of prime ministers and cabinets, are "open" legislatures whose members are, with a few notable exceptions, largely uninformed about and frequently unsympathetic to the need, and appropriate measures, for protection of creators. These legislators are highly vulnerable to pressures from majoritarian interests or from powerful economic groups or consumer groups whose numerically substantial memberships translate into major blocs of votes at election time. Since Theodore Roosevelt, the Executive has shown little interest in copyright. The threat of adverse legislative action is a "sword of Damocles" poised perpetually over the heads of ASCAP, BMI and SESAC. It is a restraint that deters their full realization of rights the law undoubtedly gives the creators of music. A powerful user group that becomes mutinous, rather than merely sullen, may provide the motive power for new and destructive legislative inroads on existing rights. And it is necessary to be wary lest even smaller groups — alienated too far — be led to combine in a "critical mass" of power to elicit damaging action by lawmakers. A recent example of the continuing threat of legislative incursions was a threatened congressional bill to exempt altogether, or extend the existing exemption for, radio broadcasts relayed to the public over loudspeakers by commercial establishments.<sup>36</sup> The source of this threat was a retail merchants association in a midwestern state complaining to its Senator in Congress. Substantial and costly counter-efforts in Washington, D.C. and locally by the rights organizations have been required and have so far held off the threat.

### D. State Legislation

As part of a program of attacks on ASCAP beginning in the 1930's, the broadcasters secured enactment of a number of restrictive state statutes. Such a statute might prohibit ASCAP from operating in any way within a particular state, or might bar blanket licenses as opposed to per piece licensing and set up onerous administrative requirements involving fees, or it might impose taxes on the business of collecting music performance fees (while exempting

<sup>34</sup> See S. Stewart, *supra* note 30, at 496.

<sup>35</sup> On this latter point, see H.R. 2752 and H.R. 2784, 99th Cong., 1st sess. (1985).

<sup>36</sup> See 17 U.S.C. § 110 (5).

collection by individual copyright owners). One type of statute required any collector of performance fees, other than the composer, to obtain a state licence both for itself and its investigators and to pay annual taxes (as high as 25%) on gross receipts. ASCAP's struggles with these state acts were closely intertwined with mounting questions about the legality of ASCAP operations under the federal antitrust laws, culminating in the consent decrees discussed in B. above. Following the consent decrees, damaging state legislation began to be repealed or modified. It has now become a relatively minor element in the general pattern of restraints on U.S. performance licensing activity, though some few states<sup>37</sup> still retain burdensome and largely useless filing requirements.

But it would be a mistake to ignore the fact that restrictive state legislation remains available as a weapon of harassment for disgruntled groups — old or new — resistant to paying performance fees or offended by pressures from collective licensors. And apart from adopting adverse legislation of their own, state legislatures can also, for example, be mobilized to put pressure on Congress to enact or change national legislation.<sup>38</sup>

State lawmakers — and their constituents — especially in states other than in New York, California or Tennessee, are, in general, poorly informed about copyright and unsympathetic to the interests of creators of music. The state legislatures are thus particularly responsive to pleas of local users of music who are generally far more numerous, vocal and politically powerful than the creators or publishers of music within the state.

#### *E. Judicial Restraints*

We deal here with judicial decision-making — mostly statutory interpretations by federal courts —

<sup>37</sup> Kansas, Nebraska, New Mexico, North Dakota, Wyoming.

<sup>38</sup> This is neatly illustrated by a recent Washington State legislative resolution, promoted by local establishments, calling on Congress to prohibit what are described as "fines imposed by ASCAP" for use of broadcast music to give pleasure to customers on commercial premises. See House Joint Memorial No. 7 introduced in 1985 (but not so far adopted) in the Legislature of the State of Washington, which recites in part:

"Now, therefore, Your Memorialists respectfully pray that the President and Congress recognize the necessity of allowing commercial establishments to transmit radio broadcasts through loudspeakers without violating copyright law, and take the necessary steps to pass legislation to accomplish this purpose."

Be it resolved, that copies of this Memorial be immediately transmitted to the Honorable Ronald Reagan, President of the United States Senate, the Speaker of the House of Representatives, and each member of Congress from the State."

as a source of restraints on the music performing rights organizations and the rights they enforce. The effects of judicial applications of the antitrust laws have been discussed. Of concern at this point are non-antitrust judicial actions that directly or indirectly affect and may restrict the scope and enforcement of music performing rights in the USA. The risk of unfavorable judicial decisions exists of course in virtually all nations, though the volume of U.S. litigation and the attitudes of U.S. courts toward copyright pose some special problems in the American system.

The subject of American judicial treatment of copyright in general and performing rights in particular is so large that one can do no more here than touch on a few highlights.

#### *1. Decisions Establishing Perimeters and Enforceability*

ASCAP's early litigation, we have seen, won judicial approval for a relatively generous view of the statutory right of public performance for profit. Many of the cases involved non-broadcast users, such as restaurants, dance halls, bars and other commercial establishments. BMI in recent years has borne a share of the voluminous litigation of this kind, brought to induce non-broadcast users to pay for music performed by them.<sup>39</sup> SESAC, though involved in some important early cases, has not been particularly active in litigation for some time. The high cost of court proceedings to enforce rights inevitably imposes major restraints on the efforts of the organizations to secure general compliance in a nation as large as the U.S.<sup>40</sup>

#### *2. Some Recent Decisions on New Uses of Performing Rights*

While early cases created a firm foundation for enforcing the music performing right, and later antitrust cases by contrast threatened the rights organizations (ASCAP in particular), more recent cases have gone in at least two main directions in the Supreme Court of the United States. On the one hand, there have been the notable recent victories by ASCAP and BMI in antitrust litigation, first with the CBS television network and later in the *Buffalo* case (see V.B. *supra*.) But the Supreme Court of the United States, and lower federal courts, have on a number of occasions shown reluctance to interpret the performing right as set out in the Copyright Sta-

<sup>39</sup> For an excellent recent example, see *BMI v. Moor-Law Inc.*, 527 F. Supp. 758 (D. Del. 1981).

<sup>40</sup> For data on ASCAP-BMI enforcement activity, see VI. *infra*.

tute broadly enough to encompass particular new technological uses involving the right. In the *Fortnightly*<sup>41</sup> and *Teleprompter*<sup>42</sup> cases, the Supreme Court drew back from reading the term "performance" to include cable retransmissions. Similarly, in the *Aiken* case,<sup>43</sup> the Court interpreted "public performance" narrowly in a situation where performances broadcast on radio were used to entertain customers of commercial establishments. Despite a 1976 legislative attempt to draw a new, clear line in the *Aiken* area, disputes continue regarding that line.<sup>44</sup> One may note that in dealing with other examples of new technology not involving performing rights, the Supreme Court seemed either unable to come to any decision — see *Williams & Wilkins*<sup>45</sup> (wholesale photocopying), where the Court was evenly split — or after argument and reargument, unable to steel itself — see *Sony-Betamax*<sup>46</sup> (home audiovisual taping for library purposes) — to take a firm step into the future, even though the 1976 statutory language clearly indicates a congressional intention that the new Copyright Act should be read to encompass new uses. In the famous (or infamous, depending on one's view) *Sony-Betamax* case, Mr. Justice Blackmun, speaking for four dissenters, noted the Court's apparent tendency in these cases to "evoke the hard questions" and leave them to a Congress where the minoritarian interest of creators must confront, in unequal contest, the clamor of users and consumers. The *Sony-Betamax* majority opinion contains language which, if taken literally in later cases, can make the path of future litigation more difficult for copyright holders. Most recently, in *Harper & Row, Publishers, Inc. v. Nation Enterprises*,<sup>47</sup> the Court seemed to readjust its perspective in dealing with a vital fair use issue.

Of course, the explosion of new technology (e.g. satellites, computers, as well as new phenomena already mentioned) should perhaps be identified by itself as a factor imposing restraints or raising obstacles to the viability of authors' rights, including rights of performance. Insofar as the courts prove reluctant to read the Copyright Law to cover new

uses, the performing rights organizations are once more faced with struggling in Congress for the principle of fair compensation for authors. It must be said that the Supreme Court and other federal courts have not uniformly shown understanding of or sympathy for the authors' interest — disguised as it sometimes is by the appearance of large industrial employers (e.g. the movie companies) as plaintiffs to vindicate the copyright interest. A strain of adverse attitudes toward copyright persists — in some judicial quarters — where it is seen as a monopolistic privilege restrictive of a free economy, to be read narrowly and allowed grudgingly, if at all.<sup>48</sup>

### 3. Judicial Decisions on Copyright Generally

There is a steady flow of judicial opinions that do not deal directly with the performing right, but may adversely affect its scope and impact, and prove to be restraints on the work of the rights organizations in certain ways. Thus strict decisions invalidating copyrights for noncompliance with formalities wipe out performing rights as well as other elements of the copyright.<sup>49</sup> Extensions of the "work for hire" concept may shift authorship and rights, including the performing right, from the creative individual whom copyright fundamentally seeks to protect to an entrepreneur.<sup>50</sup> Continuing confrontations between copyright and First Amendment claims may affect the scope of the performing right.<sup>51</sup> But in the

<sup>48</sup> The varying attitudes of the Supreme Court may be seen in its vacillation as to copyright precedents and principle. In decisions hostile to copyright, the Court refers to *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948) stating that:

"The copyright law, like the patent statute, makes reward to the owner a secondary consideration ... the sole interest of the United States and the primary object in conferring the monopoly lie in the general benefits derived by the public from the labors of authors."

In decisions favoring the copyright, the Court relies on the language of *Mazer v. Stein*, 347 U.S. 201 (1954) to the effect that:

"The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and Useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered."

It is interesting to compare with these judicial statements, the comment by James Madison on the U.S. Constitution's copyright clause (of which he was the draftsman) that, with respect to copyright protection for authors, "the public good fully coincides ... with the claims of individuals," *The Federalist No. 43*, at 309 (B. Wright ed., 1961).

<sup>49</sup> See, e.g. *Original Appalachian Artworks, Inc. v. The Toy Loft, Inc.*, 684 F.2d 821 (11th Cir. 1982).

<sup>50</sup> See, e.g. *Aldon Accessories Ltd. v. Speigel, Inc.*, 738 F.2d 548 (2d Cir. 1984).

<sup>51</sup> See, e.g. *Keep Thomson Governor Comm. v. Citizens for Gullen Comm.*, 457 F. Supp. 957 (D.N.H. 1978).

<sup>41</sup> *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968).

<sup>42</sup> *Teleprompter Corp. v. CBS, Inc.*, 415 U.S. 394 (1974).

<sup>43</sup> *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975).

<sup>44</sup> See, e.g. *Sailor Music v. The Gap Stores, Inc.*, 668 F.2d 84 (2d Cir. 1981), cert. denied, 456 U.S. 945 (1982); and *Springsteen v. Plaza Roller Dome, Inc.*, 602 F. Supp. 1113 (M.D.N.C. 1985).

<sup>45</sup> *Williams & Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Claims 1973), aff'd without opinion by an equally divided court, 420 U.S. 376 (1975).

<sup>46</sup> *Sony Corporation of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>47</sup> \_\_\_ U.S. \_\_\_, 105 S. Ct. 2218 (1985).

recent *Harper & Row* case, cited *supra*, the Court's statements give some hope that the First Amendment interest underlying copyright will be increasingly recognized and invoked to damp down largely avoidable and unreal conflicts between copyright and free speech values.<sup>52</sup>

Perhaps the greatest copyright battleground under the 1976 Act today is "fair use." One is led to wonder whether in the end it was wise to incorporate this doctrine expressly into the new statute where it seems openly to invite judicial expansion at the expense of copyright despite legislative history disclaiming any such congressional intention. The substance of the performing right can be threatened by too generous readings of "fair use" whether in the context of parody, or incidental use, or new use, or noncommercial use, or insistence on showings of harm before copyright interests can be honored, or otherwise. This means that performing rights organizations must continuously be alert against possibly harmful implications in all manner of copyright decisions proliferating in the federal courts of 50 states and the District of Columbia as well as in the Supreme Court of the United States. Eternal vigilance and speed of intervention are the price of any effort to maintain, with any hope of success, the integrity of the U.S. performing right. The cost is great and, in itself, a major burden on the organizations.

Note that much of the time, the American rights organizations must conduct their litigation in quiet low-keyed ways that will not provoke extravagant decisions in their favor (whether in terms of damages sought or principles asserted). Lapses may result in pressures for redress in Congress or in the state legislatures which, as earlier seen, may easily be mobilized for attacks on copyright.

#### *F. Some Additional Restraints*

Discussion of the restraints under which the American organizations function would not be complete without mention of certain limitations they themselves, or some of them, have chosen to place on the scope of their own operations; and of certain additional limitations primarily traceable to the way in which the American rights organizations have evolved.

#### *1. Reproduction Rights*

ASCAP, in its contracts with its members, does not take from them any rights over reproduction of musical performances. It has neither the right to record performances on phonorecords nor the

so-called "synch" right to record performances on sound tracks in timed relation with audiovisual works. BMI's contracts with its affiliates today provide in pertinent part:

4. Except as otherwise provided herein, you hereby grant to us for the period:

- (a) All the rights that you own or acquire publicly to perform, and to license others to perform, anywhere in the world, any part or all of the works.
- (b) The nonexclusive rights to record, and to license others to record, any part or all of any of the works on electrical transcriptions, wire, tape, film or otherwise, but only for the purpose of performing such work publicly by means of radio and television or for archive or audition purposes and not for sale to the public or for synchronization (i) with motion pictures intended primarily for theatrical exhibition or (ii) with programs distributed by means of syndication to broadcasting stations.
- (c) The nonexclusive right to adapt or arrange any part or all of any of the works for performance purposes, and to license other to do so.<sup>53</sup>

It should, of course, be noted at this point that under § 112 of the 1976 Copyright Act transmitting organizations (such as radio or television broadcasters) which are entitled to transmit a performance to the public may now make one copy of their transmission for their own retention and use and for archival purposes.

SESAC, we have noted, in contracts with affiliated publishers requires assignment to it of exclusive non-publishing reproduction rights, including both recording and "synch" rights; from writers, it takes such rights, for limited or "ephemeral" uses, on a nonexclusive basis. In this area it competes (a) with the Harry Fox Office which, under the umbrella of the National Music Publishers Association, acts as a broker negotiating mechanical and "synch" licenses for both nondramatic and dramatico-musical uses, including film uses, and (b) with publishers or composers who license such uses themselves.

Since 1950, ASCAP's consent decree (Article IVA) has expressly limited its field of activity to performing rights. It cannot arguably expand in the direction of reproduction rights, unless the decree is amended. BMI's limited activity in this area is defined by § 4(b) of its contract, *supra*. BMI's 1960 consent decree (IVB) expressly bars it from commercial publication and recording and from commercial distribution of publications or recordings.

#### *2. Dramatico-Musical (Grand) Rights*

Apart from mechanical and "synch" reproduction rights, it seems more remarkable that ASCAP

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<sup>52</sup> \_\_\_ U.S. \_\_\_, 105 S. Ct. 2218 (1985).

<sup>53</sup> BMI at one time had a publishing arm or arms engaged in the publication of sheet music (an activity BMI has now discontinued).

(in contrast to SESAC and, in a lesser degree, to BMI) has always restricted its concern with music performing rights to the nondramatic or "small" performing rights. With French SACEM or British PRS as models, one might expect this. But in France there was in existence, before SACEM began, a society devoted to effectuating dramatic rights — i.e. SACD. In the USA, there is no really comparable single organization. Thus there might seem to have been some incentive for ASCAP to cover the dramatico-musical area in whole or in part. But in times before radio and television and widespread sound recording, such rights could practicably be controlled by publisher or writer members who were in sole possession of the substantial and arduous-to-copy materials needed to produce a dramatico-musical work. A fresh look at this problem may be in order today.

BMI, we have seen, required and still requires its affiliates to assign to it some measure, at least, of the dramatico-musical performing rights. Thus the latest BMI writers contract provides in pertinent part:

5. (a) The rights granted to us by sub-paragraph (a) of paragraph 4 hereof shall not include the right to perform or license the performance of more than one song or aria from a dramatic or dramatico-musical work which is an opera, operetta, or musical show or more than five minutes from a dramatic or dramatico-musical work which is a ballet if such performance is accompanied by the dramatic action, costumes or scenery of that dramatic or dramatico-musical work.
- (b) You, together with the publisher and your collaborators, if any, shall have the right jointly, by written notice to us, to exclude from the grant made by sub-paragraph (a) of paragraph 4 hereof performances of works comprising more than thirty minutes of a dramatic or dramatico-musical work, but this right shall not apply to such performances from (i) a score originally written for and performed as part of a theatrical or television film, (ii) a score originally written for and performed as part of a radio or television program, or (iii) the original cast, sound track or similar album of a dramatic or dramatico-musical work...<sup>54</sup>

SESAC requires from its publishers all dramatico-musical performing rights, though its writers apparently retain nonexclusive rights, to license their publications in this as in other areas.

Over the years, and with new technology, the problem of control over certain dramatico-musical performances has altered. Control based on possession of essential musical and other materials is now diluted, if not seriously undermined, by the ability of licensees without detection to make and retain copies of materials in their hands as lessees. Moreover, an opera, operetta or musical show may be

available on records, cassettes or audio or video tapes. Insofar as individual publishers or writers manage and license use of the materials, detection of unauthorized copying or of unlicensed live or broadcast performances (perhaps at remote locations) may be virtually impossible. The task of monitoring, licensing and collecting for radio, television, cable or other broadcast performances of the dramatico-musical works thus poses today, in a considerable degree, the same kind of problem for copyright holders that originally led to the formation of "small rights" organizations. Admittedly, licensing and fees here pose specialized problems different from small rights. But it is arguably time to reappraise and perhaps revise the jurisdiction of all the performing rights organizations, with their elaborate monitoring capacities, in relation to grand rights. ASCAP under Article IV(A) and II (B) of its 1950 consent decree<sup>55</sup> may only traffic in the nondramatic or small performance right. But it might consider monitoring broadcast performances of dramatico-musical works in its surveys and perhaps seek amendment of the decree to permit some coverage of such works. BMI could expand the scope of its coverage in this area, and SESAC improve its methods for monitoring unlicensed use of the grand rights it takes by contract. The fact that BMI (in some degree) and SESAC have contracted for grand rights without objection so far, should embolden all to try to fill more effectively an existing gap in protection. Publishers or writers always retain the capability of direct licensing. But failure to provide effective policing mechanisms throughout the area of grand rights can only encourage public and exploiter ignorance or disregard of rights all should be educated to recognize and pay for.

### 3. Other Performance or Display Rights

One final area of performing rights — even though non-musical in nature — has, for that reason no doubt, been neglected so far by music performing rights organizations, though they include authors among their members or affiliates. Indeed it has been neglected by all organizations. The area is that of the live or broadcast public performance of nondramatic literary works and (except for public broadcasting's rights under § 118) the display of pictorial, graphic and sculptural work. It may be that implementation of these rights calls for new organizations<sup>56</sup> or clearing houses or some adaptation or

<sup>54</sup> Section "Fourth" of the latest BMI Publishers contract contains substantially identical language.

<sup>55</sup> ASCAP 1950 Consent Decree, *supra* note 9.

<sup>56</sup> In recent years, at least two new collecting and clearing house organizations have been established in the United States: Visual Artists and Galleries Association (VAGA) for rights of artists and galleries, and the Copyright Clearance Center (CCC) for reproduction of periodical articles.

collaboration by existing organizations (since, again, duplication of monitoring and staffing costs only wastes precious earned arts dollars). No specific recommendation is offered here. But the reason for mentioning these relatively unexploited performing rights at this point is to indicate another area in which a failure adequately to assert compensable authors' rights may contribute to general public and exploiter failure to recognize artistic labors as meriting compensation when used. When the fruits of certain artistic labors are made available gratis, public misunderstanding and resentment may be expected to increase in relation to other artistic works — e.g. nondramatic music performances — when payment is demanded for their use.

## VI. Public Attitudes

We have now reviewed the main limitations or restraints affecting the operation of performing rights organizations in the U.S., some not encountered, or if so only rarely, in other parts of the world where authors' rights are protected.

What, if any, impact have these U.S. restraints and limitations had on U.S. public attitudes toward payment for music performing rights? The aim of a number of the restraints has, after all, been, in major part, to produce greater public access to, and lower user costs for, music performance. Have the beneficiaries of these measures — the public, the users — been led by them to anything like appreciation — grudging or otherwise — of their impact, or to a greater willingness to pay in the measure called for by the current U.S. system?

To this last question, the answer of this observer would have to be a clear "no." To be sure, the answer is based largely on personal impressions, some experience of the music business, readings and reports from the "legislative" front, as well as on enforcement figures detailed later and on considerations drawn from the previous account of restraints and struggles. Serious social science research should be undertaken in this area — as indeed across the whole field of authors' rights and their acceptance and enforcement. Attitudinal and comprehension surveys, as well as economic studies and statistical data to verify or correct what are now largely impressions, should be carried out. But the answer (if not its dimensions) seems plain, even without such studies.

Competition as a restraint is most appreciated, perhaps, by creators and publishers who thereby achieve a choice of organizations. With the present competition, we noted, no one entity can any longer choke off the supply of contemporary music, or make outrageous demands. Users and public gain from this state of affairs. But the option for any one

entity to lower prices may be inhibited, and users are now faced with paying three entities (replicating costs to be recouped) rather than one. Do they pay more as a result, we asked, of the triopoly? Are smaller users more burdened by having to deal with a number of organizations? Economic studies are needed here to appraise actual effects.

In the antitrust area, the consent decrees have surely served the public interest in many ways, reducing abuses and promoting fairer operations and rates. Judicial rate-fixing, *inter alia*, provides a model, perhaps to be used more broadly if better dispute-settling machinery cannot be devised. But users have not been entirely satisfied with this recourse. They have sought a tribunal that cannot only settle rates but deal with the types of licenses offered under the consent decrees. They have resorted to treble damage private suits, at astronomical costs, that have satisfied no one and cut deeply into the moneys available for music. The contest will surely go on, as users seek licenses tailored and priced more precisely to actual use. Blanket licensing will require continuing reappraisal, as users look for alternatives they believe fairer. That composers must somehow combine to deal effectively with major users seems clear. Elsewhere, I have suggested a need to consider *sui generis* treatment under the antitrust laws for certain types of artists' organizations, with public safeguards (against mismanagement, restrictive practices and unfair prices) that can be enforced speedily by efficient expert tribunals without the high costs of antitrust litigation. Thus far, users — despite antitrust curbs imposed on the organizations — are unreconciled and hostile, if not to authors' rights or payment, at least to the rates asked. Some of the measures just proposed could benefit them. But it may be, of course, that industrial users, necessarily striving always to pay less for rights, can never be brought wholly to acceptance, especially in an area where, as noted later, there is no basic generally accepted standard regarding fair compensation.

For both the general public and many users, the failure of competition and antitrust curbs to create favorable public attitudes is predictable. Most are unaware they are or may be enjoying, due to U.S. restraints, special privileges of access or low cost unavailable in other nations with different systems. Most have no standard of comparison with other nations to inform their judgment. U.S. user attitudes toward the principle and the rates of payments are based almost entirely on domestic experience (or lack of it). If ASCAP and BMI have been "disinfected" by the consent decrees in some degree, these — coupled as they are with memories of ASCAP's early demands and its movie industry ties and BMI's broadcaster ties — have not wholly cleansed the "image" of the organization in the minds of

courts, users, legislators or some of the public, however unjust this may be. And what, in the end, is a fair price for music, whoever charges it?

Does lack of the governmental or quasi-governmental status enjoyed by the collection society in some European countries (it is a "public monopoly" in Italy, a "private association subject to regulatory control" in West Germany)<sup>57</sup> make more difficult the task of the American organizations which must strive to collect fees without the cachet of authority enjoyed by an "arm of government"? Washington State commercial interests, it will be recalled, object to "fines" imposed by a private organization.<sup>58</sup> Perhaps, then, the private character of the U.S. organizations is a handicap. But would not government status also trigger undesirable side effects — controls, more immediate pressure on Congress by dissidents, etc.?

The "open" majoritarian American legislative process we have described (whether in the 1976 Copyright Act, or in later amendments or threats of amendment, or in the actions of state legislatures) threatens as nothing else does the precarious position of arts interests. Only three of 50 states — California, New York and Tennessee — contain very substantial centers of U.S. art effort and so can be said to have substantial voting communities that support those interests. Legislators, as is well known, often tend to reflect constituent sentiment rather than to shape it. Considering this, it is, in fact, surprising that creative interests fared as well as they did in the 1976 Copyright Revision — gaining, for example, reduction in the not-for-profit exemption, lengthened copyright duration, a new termination right and less barbaric sanctions for lapses in formalities. Much of this is owed to a few effective advocates, and to heroic registers of copyrights and courageous senators and representatives who have stood fast for artists and their rights. But the inroads on performing rights in § 110, in compulsory licenses, and in later enacting or looming exemptions demonstrate that arts interests must focus future attention on our legislators and those who maintain them in office.

In the courts, we have seen, along with some major victories, the results for creators have been mixed. Damaging majority statements in the *Sony-Betamax* case<sup>59</sup> give cause for deep concern about future judicial attitudes toward copyright. Sympathetic statements in *Harper & Row*<sup>60</sup> restore some hope. Justifiable fear of judicial "evasion of

the hard questions" haunts the scene, however, as ease of duplication under new technologies threaten to make authors victims of a judicial and public preference for convenience and freedom of access to artistic work over fairness and payment. Judicial evasions will move questions back to the unpersuaded legislatures. Academic scholars of "low protectionist bias" have not encouraged the courts to resolve copyright doubts in favor of creative interests.<sup>61</sup>

It was suggested that performing rights organizations re-examine their own attitudes toward some of the limits (some self-imposed) within which they operate, as well as toward collaboration with other musical and non-musical sectors of the arts community. Authors rights embrace more than nondramatic music performing rights and public respect for one right may be affected by non-respect for others.

Data requested by the writer from the major performing rights organizations as to the annual volume of litigation engaged in to enforce the music performing right seem to confirm earlier judgments about public and user resistance to copyright some 70 years after *Herbert v. Shanley*.<sup>62</sup> ASCAP reported that 751 matters, mostly infringement suits against non-broadcaster commercial users (taverns, bars, restaurants, shops, etc.) who resist licensing, were referred to counsel for action in 1984, an increase from 364 matters 10 years earlier. BMI reported over 450 infringement suits actually brought yearly against similar defendants (including almost 200 per year against unlicensed jukebox operators) and, in addition, reported over 100 arbitration proceedings against delinquent licensees. This, too, represents a significant increase over the years. These figures could of course be explained by increased ASCAP-BMI enforcement efforts, or greater litigiousness of defendants, or an increase in users, or more effective monitoring, or other causes not due to public or user attitudes. But it would be difficult to infer from them that any greater willingness to pay for music performance has resulted from the restraints examined.

## VII. Conclusion

One imperative need seems to emerge from this discussion of U.S. performing rights organizations and the attitudes towards them. It is not new. The

<sup>57</sup> Mestmäcker, "Performing Rights Organizations in the Common Market," *International Business Lawyer* (February 1985) at 71.

<sup>58</sup> See *supra* note 38.

<sup>59</sup> 464 U.S. 417 (1984).

<sup>60</sup> \_\_\_ U.S. \_\_\_, 105 S. Ct. 2218 (1985).

<sup>61</sup> See, generally, B. Kaplan, *An Unhurried View of Copyright* (1967) and Breyer, "The Uneasy Case for Copyright," 84 Harv. L. Rev. 281 (1970).

<sup>62</sup> 242 U.S. 591 (1917).

tocsin has been sounded eloquently by others.<sup>63</sup> But it is more urgent than ever before, and grows more urgent each day.

It is the need to educate the public — users and consumers, national and even international — regarding the work of creative artists and the necessity that they be fairly compensated for that work. Especially is this need a dire one at this time when new technology threatens to overwhelm traditional modes of securing protection and payment for artists' work unless public action is taken. As long as the public remains as uninformed as it is about artists' problems, its attitudes cannot be expected to stir or support legislative action on those problems.

The reasons for public and user ignorance, incomprehension, disregard and hostility lie partly in the failure of the performing rights, and all other, arts organizations to carry out the educative effort essential to a change of attitude. They stem partly too from the difficulty of that task, especially perhaps in the United States.

First, to speak only of music performance, it must be recognized that society in general is disposed to think of music in hand as free for all to use. It is a concept difficult for users, the public — and even lawyers — to grasp, that one who has purchased or acquired a device containing or emitting copyrighted performable music — be it sheet music, or tape or record, or film, or broadcast — should pay a further fee for performing rights in certain conditions. Not only is the concept difficult to grasp, it seems bizarre. As one writer comments:

For the most part our economy is predicated on the principle that an individual who purchases a commodity may use it as he sees fit and the seller is precluded from attaching conditions on its use. Thus the owner of an automobile may convert the same into a commercial enterprise, viz. taxicab, without the payment of an additional fee to the Ford Motor Company, etc.<sup>64</sup>

If ASCAP, BMI or SESAC attempts to collect a fee from a merchant for relaying broadcast music to his customers, it is seen, in the words of the Washington State Resolution quoted earlier as an unjustifiable "fine." The notion that there is an intangible creator's right of performance ("splittable," in addition, from other intangible rights such as rights of reproduction/copying) inhering in something in the hands of others must be explained and justified if it is not to be misunderstood, resented and resisted.

Second, there is a common impression that creating music is not labor and that a completed piece

of music is not a product of labor. It is "play."<sup>65</sup> Not untypical is the remark "so you're an artist — how nice! — and do you also work?"<sup>66</sup> Moreover, art is something a true artist is "impelled" to generate, regardless of external rewards. It comes easily to the gifted. From all this, it follows that the artists' product should be available without payment, or at least not much payment. The "sacrificial days" of creative effort mentioned in *Mazer v. Stein*<sup>67</sup> should indeed be just that: "sacrificial." When one successful seeker of the performance exemption in § 110(10) was asked why he was willing to pay for the beer he and his fellows drank but not for the performance of music, the reply was "music is different."<sup>68</sup> At this point, it is well to recall Dr. Johnson's view that "no man but a blockhead ever wrote except for money," and Macaulay's statement:

It is desirable that we should have a supply of good books; we cannot have such a supply unless men of letters are liberally remunerated; and the least objectionable way of remunerating them is by means of copyright.<sup>69</sup>

In sum, it must be brought home to all that creating worthwhile music, poetry, books or paintings is mostly hard work, the fruit of labor that deserves to be paid for when used. Paying a gifted creator for use of his work enables him to continue working and — hopefully — to live by his art.

Third, is it wholly fanciful to suggest that the U.S. public (in particular, those official and unofficial sectors of it that shape public policy) displays less concern for its creative artists and their work and for other works of the mind, than does the public in, say, Britain, France, or many other European nations? It is questionable whether the justifications for copyright protection<sup>70</sup> have been accepted to a comparable degree in the U.S., whether one looks to economics or to "property right" or *droit moral* arguments.<sup>71</sup> *Quaere*, also, whether there is adequate

<sup>65</sup> "I loaf and invite my soul..." W. Whitman, "Song of Myself," 1. 4, in *Leaves of Grass* (1855).

<sup>66</sup> G. Wassall, N. Alper and R. Davison, *Art Work: Artists in the New England Labor Market* at iv (1983).

<sup>67</sup> 347 U.S. 201, 219 (1954).

<sup>68</sup> Cramer, "New Technology and Its Effects on Music," *Music Clubs Magazine* (Autumn 1980) at 17.

<sup>69</sup> 3 J. Boswell, *Life of Samuel Johnson* 19 (G. Hill ed., L. Powell rev. ed. 1934–1950) and T. Macaulay, *supra* note 29.

<sup>70</sup> See the cogent summary in S. Stewart, *supra* note 30, at 1–2.

<sup>71</sup> For example, arguments based, respectively, on the need of investment and recoupment to stimulate production and the "public goods" character of the product, on the premise that a creator has a "right of property" (natural or legal) in his creation rather than a narrow privilege/monopoly interest, and on the premise (*droit moral*) that a work of art is the expression of a creative personality to be protected as such. There have been recent stirrings in relation to *droit moral* — see, e.g. *Gilliam v. ABC, Inc.*, 538 F.2d 14, 24–25 (2d Cir. 1967) and the recent "moral rights" statutes: California Art

<sup>63</sup> See, e.g. Ladd, "Securing the Future of Copyright: a Humanist Endeavor," to be reprinted in 9 Columbia–VLA J. Art & The Law (1985) and Stewart, "International Copyright in the 1980's," 28 *Bull. Copyright Soc'y of the USA*, 351 (1981).

<sup>64</sup> H. Warner, *supra* note 5, at 450.

recognition that successful art can create national assets of value, increasing human understanding of society, or that such art may achieve an international asset value and enhance a nation's status among nations? Professor Chafee wrote in 1945 (in support of copyright) that "authors, musicians, painters are among the greatest benefactors of the race."<sup>72</sup> But others have not shared this view, or at least his deductions from it.<sup>73</sup> That copyright and patent were deemed worthy by the Founding Fathers of special notice in the U.S. Constitution is not, in this observer's experience, a matter of common knowledge even among educated citizens; nor are the history and traditions that brought this about. How many in U.S. society are aware that authors' rights are recognized, with the approval of many nations, in the Universal Declaration of Human Rights and the International Covenant on Human Rights?<sup>74</sup> Even among U.S. lawyers, how many perceive a relation between protection of artistic expression and the generally prized freedom of speech (which surely assumes freedom, and even encouragement, to *create* protected speech). There has long been need for an authoritative statement such as that made only recently in *Harper & Row, Publishers, Inc. v. Nation Enterprises* by Justice O'Connor, for a majority of the Supreme Court:

The Framers of the Constitution intended copyright to be the engine of free expression. By establishing a marketable right to the use of one's expression, copyright supplies the incentive to create and disseminate ideas.<sup>75</sup>

Whether or not one fully shares Professor Chafee's views, it may be that a special educative effort confronts a nation so oriented — an education reaching our schools, colleges and media with such force as to reshape, in a measure, some basic societal habits of thought.

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Preservation Act of 1979, Cal. Civ. Code §§ 987–989 (West Supp. 1984), New York Artists Authorship Rights Act of 1983, N.Y. Arts and Cultural Affairs Law, §§ 14.51–14.59 (McKinney 1984) and Massachusetts Art Preservation Act, Mass. Gen. Laws Ann., c. 231, § 855, and c. 260, § 2C. As to copyright as a property right, compare, for instance, *Baker v. Libbie*, 210 Mass. 599, 604–05, 97 N.E. 109, 111 (1912) with Breyer, *supra* note 61, at 288–89.

<sup>72</sup> Chafee, "Reflections on the Law of Copyright: I," 45 Colum. L. Rev. 503, 507 (1945).

<sup>73</sup> B. Kaplan, *supra* note 61, and Breyer, *supra* note 61.

<sup>74</sup> In the Universal Declaration, see Art. 15, § 1. *N.B.* that visitors to the U.S. sometimes ask why in U.S. villages, towns or cities, there seem to be relatively few streets, plazas, squares, schools named after great domestic authors, poets, composers, artists or intellectual innovators — a phenomenon common in Europe. The U.S. has tended rather to honor in this way its public officials, economic achievers, and sports heroes, with a scattering of performers and creators in the more popular art forms.

<sup>75</sup> \_\_\_ U.S. \_\_\_, 105 S. Ct. 2218, 2230 (1985).

Fourth, any educational effort undertaken must strive especially to reach the users and exploiters of copyright. It is probably natural in a competitive system that industry should try to pay as little as possible for what it buys — whether it be performing rights or some other commodity. So also that is should then charge as much as possible, with as little sharing of revenue with creators as can be managed. It is expectable that what performing rights organizations deem a fair price should be deemed unfair by the buyers. Who is right — considering the market and the objective? To resolve this question, some generally accepted standard would help. It should be based on impartial study of what is needed and viable to attain the objective of copyright: self-sufficiency for the meritorious artist so that he can live by his art at least as decently as other professionals — e.g. teachers — in our society.<sup>76</sup> We do not really know whether copyright does what it should to achieve this goal. We need such knowledge to appraise the existing law and the adequacy of payments made or asked for music performance or other art uses, and for the education of users.

Fifth, of all the mischiefs demanding education of the public and users, one of the most recent, dangerous and insidious has been aptly labeled "consumer politics" by Stephen Stewart who comments:

...the doctrine means that the consumer should have the widest possible access to all copyright material at the lowest possible cost, in many cases, free. Almost everybody in our modern society is a consumer of copyrights in several respects: as a reader of books, newspapers, or other printed copyright material, as a listener to music, as a viewer of television or as a parent of a child at school who should have his school books cheap or free, to name only the most common uses. Thus, put in electoral terms, on most copyright issues the overwhelming majority of voters are on one side and a comparatively very small number of voters, who are copyright owners are on the other side of the argument. Furthermore, only a tiny fraction of this small number of voters, who are copyright owners become millionaires, but it is those few who are constantly in the public eye. No politician, even if he is the opposite of a popularist, could totally ignore this when taking a position on a copyright issue. The counter-argument, as you all know, is that without copyright, the liberty of the subject, including the liberty of speech and the freedom of expression in literature and the arts, would be in danger and ultimately some of the values of western civilizations would be at risk. But this counter-argument is not as obvious as the popularist argument of cheap access to copyright works by the general public.<sup>77</sup>

"Consumer politics" in this sense have mushroomed today when every man, woman, or firm or performing organization is "his, her or its own publisher," equipped at home or in the workplace

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<sup>76</sup> Compare the differing standards of Breyer, *supra* note 61 at 284–91, and T. Macaulay, *supra* note 29.

<sup>77</sup> Stewart, *supra* note 63, at 369–70.

with instruments for display, for performance and for copying, all of them more convenient to employ than arrangements for purchase or rental. It is an international as well as a U.S. problem. That access to art should be free and is a matter of right is increasingly argued everywhere as copyright becomes more difficult to enforce. Fair use is often the rubric under which the argument is made. The *Sony-Betamax* case<sup>78</sup> illustrates this and (in the dissent) some of the arguments in reply. No task is more pressing than to impress upon the public throughout the world that the new technology does not alter the fact that use of art, including music performance, is the use of a product of labor, and that is must be paid for, even if new methods must be found to achieve this end.

Finally, it must be stressed once more that the urgent national and international educational effort needed from WIPO, Unesco and the U.S. and other national performing rights organizations to educate

<sup>78</sup> 464 U.S. 417 (1984).

the public regarding music performance must be undertaken jointly with other arts organizations and across the whole spectrum of the creative arts.<sup>79</sup> All of the arts must cooperate for each to achieve the maximum understanding.

In closing, one can hardly do better than quote and endorse the eloquent words of Stephen Stewart of the United Kingdom:

...The copyright argument needs to be put again and again in differing forms and in all countries. Once this is acknowledged, the task of constantly arguing for the maintenance and development of copyright, which may at times appear repetitive, or even tedious, becomes a necessity, even a noble pursuit, humanist in the best sense of the word.<sup>80</sup>

<sup>79</sup> The beginnings of U.S. joint efforts can be seen in such organizations as the American Copyright Council, American Arts Alliance, and Volunteer Lawyers for the Arts — to name but a few among a growing number of groups. The message to be conveyed, the arguments for authors' rights in the consumer-dominated era now upon us are compellingly reviewed in David Ladd's "Securing the Future of Copyright: A Humanist Endeavor," to be reprinted in 9 Columbia-VLA *Journal of Art & The Law* (1985).

<sup>80</sup> Stewart, *supra* note 63, at 370.

## Activities of Other Organizations

### Council of Europe

#### Committee of Legal Experts in the Media Field

(Strasbourg, September 10 to 13, 1985)

The Committee of Legal Experts in the Media Field, hereinafter referred to as "the Committee," met at the headquarters of the Council of Europe in Strasbourg from September 10 to 13, 1985.

Experts designated by the Governments of the following 17 States, members of the Council of Europe, took part in the work of the Committee: Austria, Belgium, Cyprus, Denmark, Finland, France, Germany (Federal Republic of), Greece, Iceland, Italy, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, United Kingdom. WIPO was represented in an observer capacity by Mr. Mihály Ficsor, Director, Copyright Law Division. Unesco and the Commission of the European Communities, as well as a number of interested international non-governmental organizations, had also delegated observers.

The Committee discussed the following matters:

(1) The Committee examined the draft recommendation on common principles relating to copyright law questions in the field of television by satellite and cable, prepared by a working group. In the course of a detailed examination of the draft, various amendments were agreed upon. The Committee finally approved the draft recommendation and decided to submit it to the Steering Committee on the Mass Media.

(2) The Committee examined the report of the first meeting of the working group on the production, coproduction and distribution of audiovisual programs in Europe. A broad exchange of views was held in which several experts stressed the desirability of action along the lines suggested, which —

according to the majority of experts — did not seem to give rise to any serious problems in the field of copyright and neighboring rights.

(3) The Committee held a hearing with non-governmental organizations on the question of private copying of sound and audiovisual recordings. The results of the discussions will be taken into account by the working group on private copying at its next session.

(4) The Secretariat informed the Committee that the Council for Cultural Cooperation had ap-

proved a draft recommendation on "Copyright and Cultural Policy" and submitted it to the Committee of Ministers for adoption. As the matters dealt with in the text fall directly within the terms of reference of the Committee, it held an exchange of views on the draft recommendation. It was felt advisable that the Committee should be asked officially by the Steering Committee on the Mass Media to give an opinion on the draft recommendation prior to its adoption.

The next meeting of the Committee will be held in Strasbourg in September or October 1986.

## Calendar of Meetings

### WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible changes)

#### 1985

**November 25 to December 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information**

**December 2 to 6 (Paris) — Committee of Governmental Experts on Model Provisions for National Laws on Publishing Contracts for Literary Works (convened jointly with Unesco)**

**December 3 to 6 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property**

**December 11 to 13 (Geneva) — Committee of Experts on the International Registration of Marks**

#### 1986

**January 20 to 24 (Geneva) — International Patent Classification (IPC) Union: Committee of Experts**

**January 27 to 31 (Geneva) — Group of Experts on Model Provisions for National Laws on Employed Authors (convened jointly with Unesco)**

**January 29 to 31 (Geneva) — Madrid Union: Working Group on Links Between the Madrid Agreement and the Proposed (European) Community Trade Mark**

**February 3 to 7 (Geneva) — Paris Union: Committee of Experts on Biotechnological Inventions and Industrial Property**

**April 8 to 11 (Geneva) — Permanent Committee for Development Cooperation Related to Industrial Property**

**April 14 to 18 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information**

**April 28 to May 2 (Paris?) — Committee of Governmental Experts on Audiovisual Works and Phonograms (convened jointly with Unesco)**

**May 5 to 7 (Geneva) — Paris Union: Committee of Experts on Protection Against Counterfeiting**

**May 12 to 14 (Geneva) — WIPO Worldwide Forum on Collective Administration of Authors' Rights**

**May 26 to 30 (Geneva) — Paris Union: Committee of Experts on the Harmonization of Certain Provisions in Laws for the Protection of Inventions**

May 26 to June 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information  
June 4 to 6 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Patent Information for Developing Countries  
June 9 to 13 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning  
September 1 to 5 (Geneva) — Permanent Committee on Patent Information (PCPI) and PCT Committee for Technical Cooperation (PCT/CTC)  
September 8 to 10 (Geneva) — Patent Information Fair  
September 9 to 12 (Geneva) — Governing Bodies (WIPO Coordination Committee, Executive Committees of the Paris and Berne Unions, Assembly of the Berne Union)  
October 13 to 17 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on General Information  
November 24 to December 5 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Group on Search Information  
December 8 to 12 (Geneva) — Permanent Committee on Patent Information (PCPI): Working Groups on Special Questions and on Planning

## UPOV Meetings

### 1986

April 15 and 16 (Geneva) — Administrative and Legal Committee  
April 17 (Geneva) — Consultative Committee  
May 21 to 23 (Hanover) — Technical Working Party on Automation and Computer Programs  
May 26 to 29 (Pontecagnano-Salerno) — Technical Working Party for Vegetables, and Subgroup  
June 3 to 6 (Dublin) — Technical Working Party for Agricultural Crops, and Subgroup  
July 15 to 18 (Wageningen) — Technical Working Party for Ornamental Plants and Forest Trees, and Subgroup  
September 15 to 19 (Wädenswil) — Technical Working Party for Fruit Crops, and Subgroup  
November 18 and 19 (Geneva) — Administrative and Legal Committee  
November 20 and 21 (Geneva) — Technical Committee  
December 1 (Paris) — Consultative Committee  
December 2 and 3 (Paris) — Council

## Other Meetings in the Field of Copyright and/or Neighboring Rights

### Non-Governmental Organizations

### 1986

January 27 and 28 (Cannes) — International Association of Entertainment Lawyers — MIDEM International Lawyers Meeting  
February 1 (Paris) — International Literary and Artistic Association (ALAI) — Executive Committee  
April 24 and 25 (Heidelberg) — International Publishers Association (IPA) — Copyright Symposium  
May 6 to 8 (Brussels) — International Confederation of Societies of Authors and Composers (CISAC) — Legal and Legislation Committee  
September 8 to 12 (Berne) — International Literary and Artistic Association (ALAI) — Congress  
October 12 to 18 (Madrid) — International Confederation of Societies of Authors and Composers (CISAC) — Congress