Monthly Review of the
WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO)
and the United International Bureaux for the Protection of Intellectual Property (BIRPI)

Copyright

7th year - No. 7
JULY 1971

Contents

WORLD INTELLECTUAL PROPERTY ORGANIZATION

Series of Lectures

(Montreux, June 22 to 25, 1971)

From June 22 to 25, 1971, the International Bureau of WIPO organized a series of lectures at Montreux (Switzerland) on "Current Trends in the Field of Intellectual Property."

Nearly six hundred participants, coming from some forty countries, attended the lectures, which were intended to give persons interested an opportunity to acquaint themselves with contemporary problems in the field of intellectual property.

The lectures were given on recent developments and future prospects:

1. In relation to patents
   (a) on the national level
   — in the countries of the European Economic Community, by Mr. J.B. van Benthem, President of the Patent Office, The Hague;
   — in the Socialist countries, by Mr. Mark M. Boguslavsky, Professor at the "State and Law" Institute, Academy of Science, Moscow;
   — in Latin America, by Mr. Ernesto D. Aracama-Zorraquin, Professor at the Catholic University and at the National University of Buenos Aires;
   — in Africa, by Mr. Denis Ekani, Director General of the African and Malagasy Industrial Property Office, Yaoundé;
   — in the United States of America and Canada, by Mr. William E. Schuyler, Jr., Commissioner of Patents, Washington;
   — in Japan, by Mr. Shoichi Inouyé, President of the Sky Aluminium Company, Tokyo;
   — in India, by Mr. S. Vedaraman, Controller-General of Patents, Designs and Trade Marks, Bombay;
   — in the United Kingdom, by Mr. Edward Armitage, Comptroller-General of Patents, Designs and Trade Marks, London;
   (b) on the international level
   — the Patent Cooperation Treaty (PCT), by Mr. George R. Clark, General Patent Counsel, Sunbeam Corporation, Chicago;
   — the European Patent Conventions in general, by Mr. Kurt Haertel, President of the Patent Office, Munich;
   — the role of the International Patent Institute in the European Patent Conventions, by Mr. Guillaume Finniss, Director General of the International Patent Institute, The Hague.
2. In relation to the protection of new plant varieties, by Mr. Leslie James Smith, Controller of Plant Variety Rights, London.
3. In relation to copyright
   (a) on the national level
   — in French-speaking countries, by Mr. Jean-Loup Tournier, Director General of the Society of Authors, Composers and Music Publishers, Paris;
   — in English-speaking countries, by Miss Barbara Ringer, Assistant Register of Copyrights, Washington;
   — in other countries, by Mr. Valerio De Sanctis, Attorney-at-Law, Rome;
   (b) on the international level
   — in the field of the revisions of the Berne and Universal Copyright Conventions, by Mr. Eugen Ulmer, Professor at the University of Munich;
   — in the field of communications satellites, by Mr. Georges Straschnov, Director of the Department of Legal Affairs of the European Broadcasting Union, Geneva;
   — in the field of phonograms and video-cassettes, by Mr. Stephen Stewart, Director-General of the International Federation of the Phonographic Industry, London.
4. In relation to trademarks
   (a) on the national level
   — in Canada and the United States of America, by Mr. Christopher Robinson, Q.C., Barrister, Ottawa;
   — in Latin America, by Mr. David Rangel Medina, Attorney-at-Law, Mexico;
   — in Western Europe, by Mr. Rudolf Blum, Secretary General of the International Association for the Protection of Industrial Property, Zurich;
   — in the Socialist countries other than the Soviet Union, by Mr. Stojan Pretnar, Director of the Federal Patent Office, Belgrade;
   — in the Soviet Union, by Mr. V.I. Ilyin, Deputy Head of External Relations Division, Committee for Inveutions and Discoveries attached to the Council of Ministers of the USSR, Moscow;
   — in Africa and Asia, by Mr. S.H. Gursahani, Chairman, Trade Marks Owners Association of India, Bombay;
   (b) on the level of the international registration of marks, by Mr. W. Oppenhoff, President of the German Association for Industrial Property and Copyright, Cologne.
5. In relation to international classifications in the field of patents, trademarks and industrial designs, by Mr. François Savignon, Director of the National Institute of Industrial Property, Paris.

All the lectures will be published — in the lauguage of delivery — in a booklet to appear shortly (see the flyer inserted in this issue).

BILATERAL AGREEMENTS

HUNGARY—U. S. S. R.

Exchange of Notes concerning the prolongation of the validity of the Convention on the Reciprocal Protection of Copyright

EMBASSY OF THE UNION
OF SOVIET SOCIALIST REPUBLICS

Ministry of Foreign Affairs
of the Hungarian People's Republic
Budapest

Note

The Embassy of the Union of Soviet Socialist Republics presents its compliments to the Ministry of Foreign Affairs of the Hungarian People's Republic and has the honor to confirm hereby the following agreement entered into by the two Parties:

Considering that the Convention on the Reciprocal Protection of Copyright, concluded between the Union of Soviet Socialist Republics and the Hungarian People's Republic on November 17, 1967 *, has brought about an increase in beneficial cooperation in the field of the mutual exchange of cultural values;

Considering also that a prolongation of the term of validity of the Convention will further the future development and extension of the cooperation between the Union of Soviet Socialist Republics and the Hungarian People's Republic in this field,

The two Parties have agreed to prolong the validity of the Convention for a period of seven years; that period shall begin on January 1, 1971, and the prolongation of the Convention shall consequently be extended until January 1, 1978.

The Embassy of the Union of Soviet Socialist Republics takes the opportunity to renew to the Ministry of Foreign Affairs of the Hungarian People's Republic the assurances of its highest consideration.

Budapest, March 2, 1971.

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MINISTRY OF FOREIGN AFFAIRS
OF THE HUNGARIAN PEOPLE'S REPUBLIC

To the Embassy of the Union
of Soviet Socialist Republics
Budapest

Note

The Ministry of Foreign Affairs of the Hungarian People's Republic presents its compliments to the Embassy of the Union of Soviet Socialist Republics and has the honor to acknowledge receipt of the Note received today from the Embassy, expressed in the following terms:

EMBASSY OF THE UNION
OF SOVIET SOCIALIST REPUBLICS

Ministry of Foreign Affairs
of the Hungarian People's Republic
Budapest

The Embassy of the Union of Soviet Socialist Republics presents its compliments to the Ministry of Foreign Affairs of the Hungarian People's Republic and has the honor to confirm hereby the following agreement entered into by the two Parties:

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The Embassy of the Union of Soviet Socialist Republics takes the opportunity to renew to the Ministry of Foreign Affairs of the Hungarian People's Republic the assurances of its highest consideration.

Budapest, March 2, 1971.

The Ministry of Foreign Affairs of the Hungarian People's Republic recognizes the contents of this Note to be binding also on the Hungarian Contracting Party.

The Ministry of Foreign Affairs of the Hungarian People's Republic takes this opportunity to assure the Embassy of the Union of Soviet Socialist Republics of its highest consideration.

Budapest, March 2, 1971.

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* See *Copyright*, 1968, p. 63.

NATIONAL LEGISLATION

BELGIUM

Extract from the Law of October 10, 1967, containing the Civil Procedure Code

Chapter VIII — Seizure in Infringement Cases [1]

1481. — Patentees or persons claiming under them and owners of copyright may, with the judge's authorization, obtained on application, cause a description to be made, by one or more experts appointed by the judge, of the apparatus, machines, works and all other articles and processes alleged to constitute infringement, together with any plans, documents, calculations or writing which may prove the infringement alleged, and any instruments which have served directly in the manufacture proceeded against.

The competent judge may, by the same order, prohibit the disposal of the infringing articles by the persons in possession thereof, authorize the custody of the articles, place the articles under seal and, in the case of acts giving rise to financial gains, authorize the seizure for safekeeping of the money.

The order shall be notified before the operations are begun.

1482. — The application shall elect as a domicile one of the communes in which the description is to be made. The patent and, where appropriate, documentary evidence shall accompany the application.

1483. — The judge may require the applicant to deposit security. In such case the judge's order shall be issued only on proof of such deposit.

1484. — The parties may be present or represented at the description, with the special authorization of the competent judge.

1485. — If the doors are locked, or in case of refusal to open, the bailiff shall proceed as provided under Section 1504.

1486. — The expert shall take an oath placed at the foot of the description, in the following words: " I swear that I have fulfilled the task assigned to me, in honor and conscience, and with exactness and integrity; so help me God."

1487. — The report shall be deposited at the registrar's office. Copies shall immediately be sent by the experts, by registered mail, to the party requesting seizure, to the defendant, and to the person in whose possession the articles are.

1488. — If, within a month of the date on which the copies were sent, as appearing on the postmark, or the date of the seizure for safekeeping of the gains, the description is not followed by an action on the merits brought before the court [of first instance] [2] within whose jurisdiction the description was made, the order issued by the judge under Section 1481 shall automatically cease to have effect, and the applicant may neither rely on its contents nor make it public, without prejudice to any damages which may be claimed.

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[1] Pursuant to Section 5 of the Law of October 10, 1967, containing the Civil Procedure Code *(Code judiciaire)*, Chapter VIII entered into force on November 1, 1970.

[2] *Law of July 15, 1970, Section 40:* " In Section 1488 of the said Code, the words 'of first instance' shall be deleted."

CORRESPONDENCE

Letter from the United States

I. Legislative Developments

Since our last "Letter"[1] there have been some new legislative developments although the overall picture of copyright law revision remains beclouded and uncertain.[2]

1. As did the 90th Congress before it,[3] the 91st Congress ended without taking any major action with regard to copyright revision. Indeed, the promise of Senator McClellan, Chairman of the Subcommittee for Patents, Trademarks and Copyrights of the Senate Judiciary Committee, that at least the full committee would report out the revised bill S. 543 did not materialize.[4] It thus became necessary for the sixth time to pass a Copyright Extension Bill under which renewal copyrights which are still in force at the present time will now remain valid until December 31, 1971.[5] This extension bill, S. J. Res. 230, which has been emphatically stated to be the last one, will affect an additional 7,000 copyrights which would have run out in the absence of interim legislation, in addition to about 80,000 renewable copyrights which have already been saved from expiration by the five previous bills. It has been estimated that in the absence of this sixth extension, some 55,000 musical compositions and some 22,000 books, periodicals, dramatic works and other writings would have fallen into the public domain at the end of the year 1970.

The changes which S. 543, the revised copyright bill, had proposed, as compared with H. R. 2512, the original copyright revision bill,[6] were pointed out last year in some detail.[7] These included, *inter alia*, some complicated provisions for regulation of copyright problems in the community antenna television (CATV) industry.[8] The continued difficulties in this industry and the uncertainty as to what position the Federal Communications Commission, which claims administrative jurisdiction over CATV, would take on these issues have primarily prevented any action by the full Committee on the Judiciary of the Senate on S. 543.

On February 8, 1971, Senator McClellan again introduced a Copyright Revision Bill, S. 644,[9] which, in all substantial aspects, is identical to S. 543, but which includes a few "clarifying" amendments. In introducing the bill, Senator McClellan said:

> The subcommittee was assured last summer by the Chairman of the Federal Communications Commission that prior to the convening of the 92nd Congress the Commission would adopt appropriate CATV rules. The Commission did not act, partly due to the lack of a full membership of the Commission. The Chairman of the Commission has now again assured me that the Commission will proceed expeditiously to reach some determination concerning those aspects of the cable television question coming within its jurisdiction.[10]

As will be gathered from the statement of Senator McClellan on the floor of the Senate on February 8, 1971,[11] an amendment has been added giving nonprofit organizations the right, under certain circumstances, to copy programs of copyrighted works of a religious nature. Also included is an express prohibition against unauthorized "dubbing" of the sound track of motion pictures. The bill itself, which has just become available at the time of this writting, has now again been referred to the Judiciary Committee and, more specifically, to the Subcommittee on Patents, Trademarks and Copyrights. Senator McClellan in his remarks expressed the view, which had previously been eloquently expressed by Congressman Celler,[12] that "Authors, composers, performing artists, and other creators are entitled to expect this Congress to pass a progressive and equitable copyright law."[13]

One other significant development deserves special mention here. In the realization that any actual progress in the international field would continue to be handicapped unless the United States were willing to adapt its domestic copyright law in at least some major respects to the basic philosophy of the Berne Convention, the American Bar Association, at its recent Midyear Meeting in Chicago, adopted a resolution through its House of Delegates, which in effect recommends the enactment of what has become known as a "barebones statute", under which, *inter alia*, the term of copyright would be changed to the life of the author plus fifty

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1 *Copyright*, 1969, p. 185.

2 For a report on revision by a member of the Senate Subcommittee on Patents, Trademarks and Copyrights as of May 15, 1970, see Senator Quentin N. Burdick, "Copyright Law Revision", 17 *Bulletin Copyright, Society* 377 (1970).

3 See Derenberg, "Letter from the United States", *Copyright*, 1969, p. 185.

4 *Ibid.*

5 Public L. 91-555, 91st Cong., 2d Sess. (1970).

6 90th Cong., 1st Sess. (1967). Passed by the House in April, 1967.

7 "Letter from the United States", *Copyright*, 1969, pp. 185 *et seq.*

8 See on this subject, Chazen-Ross, "Federal Regulation of Cable Television", 88 *Harvard L. Rev.* 1820 (June 1970); Leland L. Johnson, *The Future of Cable Television: Some Problems of Federal Regulation*, Rand Corp., Santa Monica, Cal. (1970); Botein, "The FCC's Proposed CATV Regulations", 55 *Cornell L. Rev.* 244 (1970); Childs, "The FCC's Proposed CATV Regulations", 21 *Stanford L. Rev.* 1685 (June 1969); Dreher, "Community Antenna Television and Copyright Legislation", 17 *Copyright Law Symposium* 102 (1969); Holmes, "Copyright Laws — CATV — A Plea for Legislative Revision", 47 *No. Car. L. Rev.* 914 (1969); Johnson, "The Regulation of Community Antenna Television", 23 *Arkansas L. Rev.* 432 (1969); "CATV — Utility or Not", 84 *Public Utilities Fortnightly* 66 (1969); "CATV: Wave of the Communications Future?", 194 *Publishers Weekly* 23 (1968), and Finkelstein, "The Courts and the Congress: Music and CATV", 3 *ASCAP Today* 16 (1968).

9 92nd Cong., 1st Sess.

10 McClellan, "Remarks on S. 644 — Introduction of a Bill Relating to General Revision of the Copyright Law", Congressional Record S. 962, February 8, 1971.

11 *Ibid.*

12 Celler, "Legislative Delay Inevitable for Overburdened Copyright Bill", *Authors Guild Bulletin*, p. 9 (December-January 1971).

13 Note 10 *supra.*

years, and certain other basic changes would be made. The resolution reads in part:

> Be it resolved, in order that the United States may participate in a meaningful manner in the diplomatic conference scheduled for July of 1971 for the revision of the Berne and Universal Copyright Conventions and without affecting or withdrawing from the position taken by the Section of Patent, Trademark and Copyright Law in 1965 and by the American Bar Association in 1966, that the American Bar Association favors in principle the prompt enactment of legislation amending The Copyright Law of the United States, Title 17, United States Code, to embody at least the following: (1) A single Federal system of copyright; (2) A basic term consisting of the life of the author plus fifty years after his death, with an extension of subsisting copyrights, and for works made for hire, the term of seventy-five years from publication.[14]

2. Senator McClellan also introduced S. 656, entitled "A bill . . . to provide for the creation of a limited copyright in sound recordings for the purpose of protecting against unauthorized duplication and piracy of sound recordings, and for other purposes".[15] This bill would give immediate and effective relief against "dubbing" and piracy of sound recordings which has become so rampant in recent months that it has been thought advisable to propose separate legislation outlawing these practices. In introducing this legislation, Senator McClellan stated: "It has been estimated that as many as 18,000 illegal tapes are being produced each day depriving the record industry, its distributors and performing artists of an estimated $100 million annually in tape sales."[16]

3. Senator McClellan also reintroduced on February 8, 1971, S. 647, the Federal Unfair Competition Bill,[17] which had been previously before the Congress on numerous occasions and under which unfair practices, including record piracy, would be considered as misappropriation and unfair competition even in the absence of specific coverage by the Copyright Act, so that if this legislation were enacted — as this writer has hoped for many years it would be — the devastating effect of the United States Supreme Court's decisions in *Sears* and *Compco*[18] would be mitigated.[19]

[14] BNA's *Patent, Trademark & Copyright Journal*, No. 14. 2-11-71, A-4 [A. B. A.], Recommendation 2.

[15] 92nd Cong., 1st Sess., introduced February 8, 1971. Identical with S. 4592 introduced December 18, 1970 (91st Cong., 2d Sess.).

[16] McClellan, "Remarks on Introduction of a Bill to Protect Against Piracy of Sound Recordings", Cong. Res. S. 963, February 8, 1971. It may be of interest to call attention to a letter written by the Librarian of Congress to the Chairman of the Senate Committee on the Judiciary, Senator James O. Eastland, urging with some minor modifications the enactment of the record piracy bill introduced in December 1970 (see note [15] *supra*). The Librarian said: "I am fully and unqualifiedly in favor of the purpose the bill is intended to fulfill. The recent and very large increase in unauthorized duplication of commercial records has become a matter of public concern in this country and abroad. With the growing availability and use of inexpensive cassette and cartidge tape players, this trend seems certain to continue unless effective legal means of combatting it can be found. Neither the present Federal Copyright Statute nor the common law or statutes of the various states are adequate for this purpose. The best solution, an amendment of the copyright law to provide limited protection against unauthorized duplication, is that embodied in S. 4592."

[17] 92nd Cong., 1st Sess. For a proposal for an international convention on record piracy, see letter of July 6, 1970, by W. Wallace, Industrial Property and Copyright Department, Board of Trade, to the Directors General of Unesco and WIPO.

[18] *Sears, Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225; *Compco Corp.* v. *Day-Brite Lighting, Inc.*, 376 U. S. 234 (1964).

[19] For a number of recent cases giving relief against record piracy, see below at note [53].

II. Judicial Developments[20]

Copyrightability. Computer Programs. — While the issue of copyrightability of computer programs has remained much discussed,[21] no authoritative ruling has yet been made with regard to this subject. It will be remembered that under the now pending copyright revision bill, the establishment of a separate National Commission is contemplated to study these problems.

Aleatory and "Indeterminate" Music. — The fascinating problems recently presented with regard to claims to copyrightability in so-called avant-garde music have not yet been judicially determined but they have been made the subject of at least one thorough and scholarly study.[22]

Lace Design. — In *Thomas Wilson & Company* v. *Irving J. Dorfman Company*,[23] a federal court not only recognized copyrightability of a particular so-called "pansy" design in an elastic fiber but awarded very substantial damages for its infringement. It was held by Judge Feinberg that under the Constitution, "the required creativity for copyright is modest at best" and that plaintiff's design made by its own staff in the exercise of "an appreciable amount of creative skill and judgment" possessed "more than the 'faint trace' of originality required."

"Chords on a Dial-Type Wheel." — In *Trebonik* v. *Grossman Music Corporation*,[24] an action for copyright infringement of plaintiff's device called "Chord-o-Matic", an Ohio court held plaintiff's set of integrated and coordinated paper dials or wheels used to organize and depict the various fingering for chords in playing the six-string guitar to be "a copyrightable work" and found the copyright infringed by defendant's booklet, *How to Play Rock and Roll Moveable Chords.* With regard to copyrightability the court said:

> Applying this standard, it is apparent that the Chord-o-Matic is a copyrightable work. The chords which it presents are admittedly in the public domain, but it arranges and presents these chords in an original, creative, and even novel way. No one prior to the plaintiff ever attempted to present a categorized system of available guitar chords in a quick

[20] For recent books dealing with copyright, see *Copyright Law Symposium No. 17*, Columbia University Press (1969) and *Copyright Law Symposium No. 18*, Columbia University Press (1970), containing the Natban Burkan Memorial Competition prize essays, and the Report of the Second International Music Industry Conference, *The Music Industry Markets and Methods for the 70's*, Billboard Pub. Co. (1970). For law review articles, see generally, Stephen Breyer, "The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs", 84 *Harvard L. Rev.* 281 (December 1970); Nimmer, "Copyright vs. The First Amendment" (The Inaugural Donald G. Brace Memorial Lecture on Copyright Law), 17 *Bulletin Copyright Society* 255 (April 1970).

[21] See the symposium, "The Law of Software: 1969 Proceedings: Changing Structure and Investment Patterns in the Computer Industry Occasioned by Software Legal Developments", Computer-in-Law Institute, George Washington University (1969); Elmer Galbi, "Proposal for New Legislation to Protect Computer Programming", 17 *Bulletin Copyright Society* 280 (April 1970); Koller, "Computer Software Protection: Report of an Institute Clinic", 13 *IDEA* 351 (Fall 1969); Ramey, "A Copyright Labyrinth: Information Storage and Retrieval Systems", 17 *Copyright Law Symposium* 133 (1969); Iskrant, "The Impact of the Multiple Forms of Computer Programs on their Adequate Protection by Copyright", 18 *Copyright Law Symposium* 92 (1970); Bender, "Trade Secret Protection of Software", 38 *George Washington L. Rev.* 909 (July 1970).

[22] Keziab, "Copyright Registration for Aleatory and Indeterminate Musical Compositions", 17 *Bulletin Copyright Society* 311 (June 1970).

[23] 167 U. S. P. Q. 417 (2d Cir. 1970).

[24] 305 F. Supp. 339 (D. Ohio 1969).

reference system such as a wheel. In addition, no one prior to the plaintiff and his Chord-o-Matic ever attempted any substantial categorization of guitar chords based on a system of root classification, classification by letter, name and kind, and classification as moveable chords, all in one place. Earlier works did teach the fact that chords may be moved along the neck of the guitar by use of the grand barre. Earlier books also undertook to classify chords by root, and some undertook to classify chords by kind and by letter name. None of the earlier works, however, undertook to depict such a large number of chords or to present any comprehensive system of class classifying any substantial number of the available chords.

In finding infringement the court also rejected defendant's " fair use " defense on the ground that the use made by defendants of plaintiff's " Chord-o-Matic " greatly exceeded the scope of copying permitted under the fair use doctrine. The court referred to that doctrine as " one of the most poorly articulated legal principles in the area of copyright law."

Indivisibility of Copyright. — From a legal point of view, probably the most important copyright decision during the past year was the Second Circuit's unanimous decision in the *Goodis* case.[25] It was held at last that copyright in a magazine article should not be held forfeited on the ground that the article did not carry a separate copyright notice even though it appeared that the author and not the magazine had remained the proprietor of the work and that the latter was only a licensee. Judge Lumbard said at the outset:

> We unanimously conclude that where a magazine has purchased the right of first publication under circumstances which show that the author has no intention to donate his work to the public, copyright notice in the magazine's name is sufficient to obtain a valid copyright on behalf of the beneficial owner, the author or proprietor.[26]

And again:

> We are convinced, however, that the doctrine of indivisibility of copyright is a judge-made rule which relates primarily to the requisite interest needed to bring an infringement action.[27]

It was then held that the doctrine of indivisibility had no vitality in cases in which the author himself was the plaintiff:

> We are loath to bring about the unnecessarily harsh result of thrusting the author's product into the public domain when, as here, everyone interested in " Dark Passage " could see Curtis' copyrigbt notice and could not have believed there was any intention by Goodis to surrender the fruits of his labor.[28]

By thus deciding in favor of the plaintiff, one of the numerous technical pitfalls which we have come to look for under the Copyright Act of 1909 appears to have become a matter of the past. Judge Lumbard rightly observed:

> To require full proprietorship by the initial publisher would too often provide a trap for the unwary author who had assumed the publisber would attend to copyrigbting the work in his bebalf.[29]

Copyright Notice. — In addition to the *Goodis* case, the issue of adequacy of copyright notice played an important part in a number of other recent decisions. Thus, it was held in *Herbert Rosenthal Jewelry Corp.* v. *Grossbardt*,[30] again by the Court of Appeals for the Second Circuit, that certain jewelry items were bearing sufficient copyright notice and that the defendant who relied on a photograph of a pin which did not carry the notice should not prevail since there was no evidence that that pin had left the plaintiff's establishment without the notice but that, on the contrary, plaintiff had submitted substantial evidence of careful inspection of all jewelry items which left its possession.

In *Tennessee Fabricating Company* v. *Moultrie Manufacturing Company*,[31] the Fifth Circuit Court of Appeals held that plaintiff's use of " TFC Co." in the copyright notice was sufficient even though plaintiff's correct name did not appear elsewhere on the work. The appellate court noted that plaintiff's trade name and mark appeared in all its advertising and that it did not agree with the district court's " literal application " of the notice requirement.

By far the most spectacular case in this area was the " *Chicago Picasso* " case.[32] This case would certainly seem to be another illustration of the absurdity of the strict notice requirements of our present statute. The plaintiff in this case was successful in obtaining a declaratory judgment invalidating the defendant's copyright in the sculpture, which stands in the plaza of the Civic Center in Chicago and which was given in 1966 by Picasso to the Public Building Commission of Chicago, along with the right of reproduction. Picasso gave the original working model of the sculpture to the Art Institute of Chicago. At least two press showings of the model, at which the press was invited to take photographs, were held. At the first showing the model and an architect's aluminium model were exhibited and at the second showing a twelve-foot six-inch wooden model of the sculpture was also shown. None of these models bore a copyright notice, but the Art Institute posted the following notice:

> The rights of reproduction are the property of the Public Building Commission of Chicago. © 1966. All Rights Reserved.

Despite this notice and in view of the fact that the underlying model had received widespread publicity and had been widely shown without statutory copyright notice, it was held in this declaratory judgment action that the defendant Public Building Commission of Chicago had not acquired a valid copyright on behalf of the City and that consequently the work had passed into the public domain. Although the Commission had issued strict instructions requiring the use of proper copyright notice on " every publication of the work, whether of the maquette, photographs of the maquette, or the ultimate monumental sculpture ", the court found in effect that the Commission had itself acted against its own instructions. To justify its decision, the court concluded as follows:

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[25] *Samuel D. Goodis* v. *United Artists Television, Inc.*, 425 F. 2d 397 (2d Cir. 1970).

[26] *Ibid.* at 399.

[27] *Ibid.* at 400.

[28] *Ibid.*

[29] *Ibid.* at 402. The court was not unanimous in determining whether the contract conveying motion picture rights to Warner Brothers implied the inclusion of television rights. A majority of the court held that the contract language was not clear enough to permit summary judgment on behalf of defendant (Warner Brothers) to authorize the transformation of the movie " Dark Passage " into the television program known as " The Fugitive ".

[30] 428 F. 2d 551 (2d Cir. 1970).

[31] 421 F. 2d 279 (5th Cir. 1970).

[32] *The Letter Edged in Black Press, Inc.* v. *Public Building Commission of Chicago*, 320 F. Supp. 133 (N. D. Ill. 1970).

This decision comports with a strict adherence to the copyright law and is also in consonance with the policy of enriching society which underlies our copyright system. The broadest and most uninhibited reproduction and copying of a provocative piece of public sculpture can only have the end result of benefiting society.

It will be interesting to see whether the City of Chicago through its Public Building Commission will take an appeal from this decision to the Seventh Circuit Court of Appeals.

Speaking of sculpture reference should again be made to the interesting case of *Scherr* v. *Universal Match Corporation*,[33] to which a comment was made in our last "Letter from the United States".[34] Since that time the lower court's decision has been affirmed by the Court of Appeals in a 2 to 1 decision.[35] It may be recalled that the defendant in that case had with the approval of the Army produced and distributed matchbooks bearing a picture of a statue depicting a charging infantryman which is prominently displayed at a Fort Dix, N.J. site. Plaintiffs, two ex-servicemen, were primarily responsible for the design and creation of the statue during their period of service. The Government intervened. The lower court held that, although the statue was not a "publication" of the U. S. Government within the meaning of the 17 U. S. C. Sec. 8 and thus susceptible of copyright, (i) a divestive publication (by exhibition) with improperly placed notice had occurred, *and* (ii) copyright in the statue belonged to the Government as employer-for-hire.

A majority of the Court held, as had the lower court, that a statue or sculpture was "not a publication" of the U. S. Government under Section 8 of the Copyright Act and therefore capable of copyright protection. It was then held, however, that the copyright under these circumstances vested in the Government rather than in the two soldiers who had been requested by the U. S. Army to do this work.

> ... it is strikingly obvious that if an employer-employee relationship between the government and these plaintiffs actually existed, any ownership in the work designed by plaintiffs necessarily belongs to the government. The Army's power to supervise; its exercise, though a limited one, of that power, and the *overwhelming* appropriation of government funds, time and facilities to the project, are all undisputed. These facts contrast sharply with the facts in the cases plaintiffs rely upon to support a contrary conclusion. ... Each of those cases concerns writings of government employees relating to their employment, but written for the most part *during off-duty hours*; whereas plaintiffs created their work of art pursuant to a formal government-commissioned project undertaken at almost complete government expense *during regular duty hours*.

The majority of the Court admitted, on the other hand, that it was

> ... somewhat of a strain to classify such a relationship as one of employment voluntarily entered into. Unlike the ordinary employment contract that a talented person might be successful in obtaining from an employer, even the most talented serviceman does not possess the bargaining power to negotiate with the military the terms of his service. On the other hand, plaintiffs here did possess some bargaining power. They were not required to engage in the work they did in order to fulfill their military obligations; they did so volntarily. In all probability they were glad to be relieved of their regular duties and welcomed the opportunity to be engaged in work more akin to their artistic talents.

[33] 160 U. S. P. Q. 216 (S. D. N. Y. 1967).

[34] *Copyright*, 1969, p. 190.

[35] *Scherr* v. *Universal Match Corp.*, 417 F. 2d 497 (2d Cir. 1969).

The Court thereafter affirmed the granting of a summary judgment to the defendant on the ground that the plaintiff soldiers had no standing to sue and that permission to reproduce had been granted to the defendant by the U. S. Army as copyright proprietor.

Copyright Renewal. — In *Jerry Vogel Music Co., Inc.* v. *Edward D. Marks Music Corporation*,[36] the Second Circuit affirmed the lower court in a declaratory judgment action in which a declaration was sought to the effect that an illegitimate child of the lyricist was entitled to share in the renewal right. It was held that under the then applicable New York State Law[37] an illegitimate child had no right of inheritance from his father.[38] The court did not feel called upon to deviate from the famous *De Sylva* decision of the U. S. Supreme Court[39] and to hold with the minority in that case that the meaning of "children" in Section 24 of the Copyright Act should be determined by federal law.

Common Law Copyright Infringement. — In a case which received considerable publicity,[40] a free-lance court reporter alleged common law copyright in the transcript of the inquest into the death of Mary Jo Kopechne, and claimed that he had been deprived of his property rights therein by an order of the Massachusetts Supreme Judicial Court[41] which had delayed the inquest and had prevented him from distributing and selling copies of the transcript. In denying relief, the highest Massachusetts court held the plaintiff not entitled to relief on the ground that the alleged contract was not enforceable and that a transcript prepared by the plaintiff was not subject to common law copyright but, on the contrary, was a public document. Although declaring itself "not unsympathetic" to the plight of free-lance court reporters, the court said:

> From the nature of the court transcripts they would appear to be beyond the protection extended thus far by any reported case, federal or state, interpreting the copyright laws.

Fair Use[42]. — In the interesting case of *Marvin Worth Productions* v. *Superior Films Corporation*,[43] it was alleged that the defendant film producer of the motion picture "Dirtymouth" had relied upon material from two copyrighted books about Lenny Bruce's life. In distinguishing the *Howard Hughes* case,[44] the court held the "fair use" defense inapplicable. It

[36] 164 U. S. P. Q. 33 (2d Cir. 1969).

[37] New York Decedent Estate Law Sec. 83 (14).

[38] New York law was changed in 1965 (E. P. T. L. Sec. 4-1.2(a)(1) and (2)), but the new provisions apply only to the estates of those who died after March 1, 1966.

[39] *De Sylva* v. *Ballentine*, 351 U. S. 570 (1956).

[40] *Lipman* v. *Massachusetts*, 311 F. Supp. 593 (D. Mass. 1970).

[41] *Kennedy* v. *Justice of the District Court of Dukes County, Mass.*, 252 N. E. 2d 201 (Mass. 1969).

[42] For recent law review articles on fair use see the excellent Note, "Education and Copyright Law: An Analysis of the Amended Copyright Revision Bill and Proposals for Statutory Licensing and a Clearing House System", 56 *Virginia L. Rev.* 664 (1970); Harman, "On Seeking Permission", 17 *Bulletin Copyright Society* 383 (August 1970); Mesrobian, "Banditry, Charity, or Equity?", 17 *Bulletin Copyright Society* 389 (August 1970); Halley, "The Educator and the Copyright Law", 17 *Copyright Law Symposium* 24 (1969); Jollifee, "The Copyright Law and Mechanical Reproduction for Educational Purposes", 71 *West Virginia L. Rev.* 347 (April/June 1969); and Casson, "Fair Use: The Advisibility of Statutory Enactment", 13 *IDEA* 240 (Summer 1969).

[43] 319 F. Supp. 1269 (S. D. N. Y. 1970).

[44] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (2d Cir. 1966).

was held that the distribution of "Dirtymouth" was not necessary to serve the public interest in dissemination of information about Bruce and that there had been substantial taking from and reliance on the copyrighted works in the present case.[45]

Copyright Infringement: Damages and Profits. — In one of the more important recent copyright litigations involving infringement of a lace design[46] which is pending on petition for certiorari at the time of this writing, the Second Circuit sustained the lower court's award of damages after a non-jury trial in an amount of $85,000, constituting the defendant's profits as well as damages resulting from lost sales, in reliance on its earlier decision in the *Peter Pan* case.[47] The court emphasized that it would adhere to the "cumulative" rule, i. e., the rationale that the statute was designed "to discourage wrongful conduct" and that, moreover, the court was not required to award "in lieu" damages rather than actual damages and profits[48].

Record Piracy and the Aftermath of Sears and Compco.[49] — As has been indicated, record piracy has been "rampant", particularly since the *Sears* and *Compco* decisions, but more and more courts, particularly state courts, have now held that a distinction must be made between mere product simulation, to which *Sears* and *Compco* apply, and actual dubbing and appropriating of the phonograph record itself.[50] There have been two Illinois State Court cases and two California cases in which under almost identical conditions record pirates were held liable in unfair competition under state law notwithstanding *Sears* and *Compco*.[51] These cases involved outright dubbing on the part of the pirates of either phonograph records or tapes, and such dubbing may have occurred directly from a broadcast. It may, of course, be true that the pirate paid a royalty for the use of copyrighted music but what he was paying nothing for was the outright copying of the recorded performance of a composition for which the producer of the original may have had to spend very substantial amounts of money. To add insult to injury, these pirates, for instance, in the *Spies* case, make it a practice to sell their piratical tapes with the following disclaimer:

> No relationship of any kind exists between [the pirate] and the original recording company nor between this recording and the original recording artists. This tape is not produced under a license of any kind from the original recording company nor the recording artist(s) and neither the original recording company nor artist(s) receives a fee or royalty of any kind from [the pirate]. Permission to produce this tape has not been sought nor obtained from any party whatsoever.[52]

It certainly would not seem to speak well for business morals or ethics if such unfair methods of competition were permitted to continue unchecked and it is reassuring to learn that in the *Tape Industries* case, the bold effort on the part of the pirate to have a state statute prohibiting such practices[53] declared unconstitutional proved unsuccessful. According to the California court the state statute, whether it were deemed a larceny statute or an unfair competition act, was "a tolerable and permissible state regulation directed against theft and appropriation of a saleable product." The court concluded: "The California Legislature is not precluded by the Copyright Clause of the Constitution or the Federal Copyright Laws, from prohibiting the activities of the tape pirates."[54]

The Walt Disney Tape Litigation; the Fortnightly Community Antenna case distinguished. — Finally, it may be noted with some gratification that the U. S. Supreme Court's unfortunate decision in the *Fortnightly* case[55] has been distinguished by a California court in the recent *Walt Disney* case.[56] There the plaintiff owned copyright in certain televised motion picture photoplays. Defendant intercepted the broadcast television signals by means of an antenna, transmitted the signals to a device which rendered them compatible with video machines, and amplified and transferred the signals to video tape which was subsequently used to transmit the recorded programs to subscribers of another defendant's cable television service. Defendants denied any infringement on the ground that the operations were, in effect, the same as those of the CATV systems held non-infringing in *Fortnightly*. However, holding for the plaintiff the court found an important

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[45] For another infringement case involving the issne of "fair use", see *Higgins* v. *Baker*, 309 F. Snpp. 635 (S. D. N. Y. 1969), in which defendant's motion for summary judgment was denied on the gronnd that the issne of "fair nse" presented a question of fact, rather than of law.

[46] See *Thomas Wilson & Company* v. *Irving J. Dorfman Company, Inc.*, 167 U. S. P. Q. 417 (2d Cir. 1970), discussed *supra* at note [23].

[47] *Peter Pan Fabrics, Inc.* v. *Jobela Fabrics, Inc.*, 329 F. 2d 194 (2d Cir. 1964).

[48] For another infringement case in which plaintiff was awarded sizable damages, see *Fedtro, Inc.* v. *Kravex Manufacturing Corp.*, 313 F. Snpp. 990 (E. D. N. Y. 1970).

[49] See *supra* at note [18].

[50] It shonld he meutioned, however, that in cases not falling within this latter category, the effects of *Sears* and *Compco* continue to narrow the scope of relief or the granting of any relief at all in unfair competition cases. See, for instance, *Columbia Broadcasting System, Inc.* v. *De Costa*, 377 F. 2d 316 (1st Cir.) certiorari denied 156 U. S. P. Q. 719 (1967); *Cable Vision, Inc.* v. *KUTV, Inc.* 335 F. 2d 348 (9th Cir. 1964), certiorari denied 144 U. S. P. Q. 780 (1965); recently, *Sinatra* v. *Goodyear Tire and Rubber Co.*, 168 U. S. P. Q. 12 (9th Cir. 1970), certiorari filed February 17, 1971; and *Davis* v. *Trans World Airlines*, 160 U. S. P. Q. 767 (C. D. Cal. 1969). The *De Costa* case involved plaintiff's rights in the "Paladin" character nsed in defendant's television program "Have Gun Will Travel"; the *Cable Vision* case involved the protection of plaintiff local television station KUTV, Inc., in its exclusive rights of first run television programs. The *Sinatra* case involved nse of an alleged imitation of Nancy Sinatra's recorded performance of "These Boots are Made For Walkin'" in a radio and television commercial, and *Davis* case centered around a similarly imitative use of the singing group "The Fifth Dimension" in radio and television commercials.

[51] In Illinois: *Columbia Broadcasting System, Inc.* v. *Spies*, 167 U. S. P. Q. 492 (Ill. Cir. Ct. Cook Co., 1970); *Capitol Records, Inc.* v. *Spies*, 167 U. S. P. Q. 489 (Ill. App. Ct. 1st Dist. 1970); in California: *Tape Industries Association of America* v. *Younger*, 316 F. Supp. 340, 166 U. S. P. Q. 468 (C. D. Calif. 1970), certiorari denied; *Capitol Records, Inc.* v. *Erickson*, 164 U. S. P. Q. 465 (Cal. Dist. Ct. App. 1969). For a case note on this case see "Copyright — Unfair Competition — Unauthorized Reproduction of Another's Recording for Resale Violates State Unfair Competition Doctrine", 23 *Vanderbilt L. Rev.* 840 (1970).

[52] 167 U. S. P. Q. 489, at 494.

[53] Sec. 653(h) Cal. Penal Code.

[54] 166 U. S. P. Q. at 476. It is also reassuring to note that in view of the rampant piracy of phonograph records in the international field a Committee of gorvernmental experts had been convened last March in Paris, at which a British proposal for a separate international treaty for the protection of phonograms was discussed. The Committee adopted a draft text which is to be submitted to a diplomatic conference next Octoher.

[55] *Fortnightly Corporation* v. *United Artists Television, Inc.*, 392 U. S. 390, 88 Snp. Ct. 2084.

[56] *Walt Disney Productions* v. *Alaska Television Network Inc.*, 164 U. S. P. Q. 211 (W. D. Wash. 1969).

difference between the *Community Antenna* case and defendant's activities in the present case. The court said:

The essential difference between the system under examination in *Fortnightly* and that being examined here is the time or storage element. The velocity of electromagnetic signals, either through a metal cable or through any other compatible medium is known by all to be relatively high. The time lapse between the input of a signal and the output of the same, or the resulting signal is not capable of being sensed with normal human perception — it requires other electronic equipment. In the *Fortnightly* system, the time lapse between the transmitting of the television "carrier waves" by the television broadcasting station and the receipt of the corresponding electronic impulses by a subscriber via his television set was, to exaggerate, minimal. All of the *electronic operations* carried out by the defendants' systems are also carried out essentially instantaneously. However, defendants' systems must be separated into a "recording" system and a "playing" system. (The two words in quotes are used for designation only, not characterization.) Between the passage of any particular electronic impulse through the "recording" system and the "playing" system, there passed on the average, one week of time. During that time, the electronic impulses were stored in the character of the magnetic patterns of the video tape mentioned above.

The court correctly held that the "recording" system used by the defendants "captured the impulses and put them in such form that they were capable of being perceived, with proper equipment, innumerable times, and after any passage of time, subject only to the limitations imposed by the characteristics of the plastic tape upon which the iron particles were mounted." And again:

While the defendants did not make the video tape available on a widespread basis, the tapes were *capable* of being sold to any cable television system with the proper equipment. Such a distribution could, and no doubt would, be in direct competition with the owner of the copyrighted material contained, albeit hidden, therein.

Walter J. DERENBERG

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[3] *Ibid.*, 1970, p. 261.
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CALENDAR

WIPO Meetings

September 6 to 10, 1971 (London) — International Patent Classification (IPC) — Working Group IV of the Joint ad hoc Committee *

September 6 to 18, 1971 (Geneva) — Committee of Experts for the International Classification of Indnstrial Designs
Invitations: Memher countries of the Locarno Uniou — *Observers:* Memher countries of the Paris Union

September 13 to 17, 1971 (The Hague) — International Patent Classification (IPC) — Working Group I of the Joint ad hoc Committee *

September 21 and 22, 1971 (Geneva) ** — WIPO Headquarters Building Subcommittee
Members: Argentina, Cameroon, France, Germany (Fed. Rep.), Italy, Japan, Netherlands, Soviet Union, Switzerland, United States of America

Septemher 22 to 24, 1971 (Geneva) — ICIREPAT — Plenary Committee

September 27 to Octoher 1, 1971 (Berne) — International Patent Classification (IPC) — Working Group II of the Joint ad hoc Committee *

Septemher 27 to Octoher 2, 1971 (Geneva) — WIPO Coordination Committee, Executive Committees of tbe Paris and Berne Unions, Assembly and Committee of Directors of the National Industrial Property Offices of the Madrid Union, Council of the Lishon Union, Assembly of the Locarno Union

Octoher 4 to 11, 1971 (Geneva) — Committee of Experts on the International Registration of Marks
Object: Preparation of the Revision of the Madrid Agreement or of the Conclusion of a New Treaty — *Invitations:* Member countries of the Paris Union and organizations concerned

October 11 to 15, 1971 (Geneva) — ICIREPAT — Technical Committee for Computerization

Octoher 13 to 15, 1971 (Geneva) — ICIREPAT — Advisory Board for Cooperative Systems

Octoher 18 to 22, 1971 (Geneva) — ICIREPAT — Technical Committee for Shared Systems

Octoher 18 to 29, 1971 (Geneva) — International Conference of States (Diplomatic Conference) on the Protection of Phonograms
Note: Meeting convened jointly with Unesco

October 25 to 29, 1971 (Geneva) — International Patent Classification (IPC) — Working Group V of the Joint ad boc Committee *

Octoher 25 to 29, 1971 (Geneva) — ICIREPAT — Technical Committee for Standardization

Novemher 1 and 2, 1971 (Geneva) — Intergovernmental Committee Established by the Rome Convention (Neighboring Rights)
Note: Meeting convened jointly with the International Labonr Office and Unesco

Novemher 3 to 6, 1971 (Geneva) — Executive Committee of the Berne Union — Extraordinary Session

November 9 to 12, 1971 (Geneva) — International Patent Classification (IPC) — Burean of the Joint ad boc Committee *

Novemher 15 to 18, 1971 (Geneva) — International Patent Classification (IPC) — Joint ad hoc Committee *

Novemher 22 to 26, 1971 (Geneva) — Committee of Experts for tbe International Classification of the Figurative Elements of Marks
Invitations: Memher countries of the Nice Union — *Observers:* Member countries of the Paris Union and international organizations concerned

December 6 to 8, 1971 (Geneva) — Patent Cooperation Treaty (PCT) — Interim Advisory Committee for Administrative Questions
Members: Signatory States of the PCT

December 8 to 10, 1971 (Geneva) — Patent Cooperation Treaty (PCT) — Standing Subcommittee of the Interim Committee for Technical Cooperation
Members: Anstria, Germany (Fed. Rep.), Japan, Soviet Union, Sweden, United Kingdom, United States of America, International Patent Institute — *Observer:* Brazil

December 13 to 15, 1971 (Geneva) — ICIREPAT — Technical Coordination Committee

December 13 to 18, 1971 (Cairo) — Arah Seminar on Treaties Concerning Indnstrial Property
Object: Discussion on the principal multilateral treaties on indnstrial property and tbe WIPO Convention — *Invitations:* States memhers of tbe Arab Leagne — *Observers:* Intergovernmental and international non-governmental organizations concerned — *Note:* Meeting convened jointly witb the Indnstrial Development Centre for Arab States (IDCAS)

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* Meeting convened jointly witb the Council of Enrope.
** Dates to be confirmed later.

Meetings of Other International Organizations concerned with Intellectual Property

September 9 and 10, 1971 (West Berlin) — International League Against Unfair Competition — Study Mission on German Restrictive Trade Practices Law

September 14 to 17, 1971 (Nice) — Union of Enropean Patent Agents — General Assembly

November 3 to 6, 1971 (Geneva) — Unesco — Intergovernmental Copyright Committee

International Conference for the Setting Up of a European System for the Grant of Patents (Lnxemhonrg):

September 13 to 17, 1971 — Working Party I

October 11 to 22, 1971 — Working Party I

November 15 to 19, 1971 — Working Party I

November 29 to December 3, 1971 — Working Party II