

COPYRIGHT LAW REVISION

STUDIES

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OF THE
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STUDIES 26-28

26. The Unauthorized Duplication of Sound Recordings



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FOREWORD

This committee print is the ninth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

The present committee print contains the following three studies prepared by members of the Copyright Office staff: No. 26, "The Unauthorized Duplication of Sound Recordings," by Barbara A. Ringer, Assistant Chief of the Examining Division; No. 27, "Copyright in Architectural Works," by William S. Strauss, Attorney-Adviser; and No. 28, "Copyright in Choreographic Works," by Borge Varmer, Attorney-Adviser.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,
*Chairman, Subcommittee on Patents, Trademarks, and Copyrights,
Committee on the Judiciary, U.S. Senate.*

COPYRIGHT OFFICE NOTE

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in directing their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,
*Chief of Research,
Copyright Office.*

ARTHUR FISHER
*Register of Copyrights,
Library of Congress.*

L. QUINCY MUMFORD
Librarian of Congress.

STUDIES IN EARLIER COMMITTEE PRINTS

First print:

1. The History of U.S.A. Copyright Law Revision from 1901 to 1954.
2. Size of the Copyright Industries.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
4. The Moral Right of the Author.

Second print:

5. The Compulsory License Provisions in the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

Third print:

7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries
10. False Use of Copyright Notice.

Fourth print:

11. Divisibility of Copyrights.
12. Joint Ownership of Copyrights.
13. Works Made for Hire and on Commission.

Fifth print:

14. Fair Use of Copyrighted Works.
15. Photoduplication of Copyrighted Material by Libraries.
16. Limitations on Performing Rights.

Sixth print:

17. The Registration of Copyright
18. Authority of the Register of Copyrights to Reject Applications for Registrations.
19. The Recordation of Copyright Assignments and Licenses.

Seventh print:

20. Deposit of Copyrighted Works.
21. The Catalog of Copyright Entries.

Eighth print:

22. The Damage Provisions of the Copyright Law.
23. The Operation of the Damage Provision of the Copyright Law: An Exploratory Study.
24. Remedies Other Than Damages for Copyright Infringement.
25. Liability of Innocent Infringers of Copyrights.

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STUDY NO. 26
THE UNAUTHORIZED DUPLICATION OF
SOUND RECORDINGS
BY BARBARA A. RINGER
February 1957

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THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS

I. STATEMENT OF THE PROBLEM

Remember that we are not dealing with the old question of the *Pianola* case—can a record infringe? We are asking—can you infringe a record?—CHAFEE.¹

At the present stage of their technological development, sound recordings² ordinarily embody three distinct contributions:

1. *The contribution of the authors.*—This includes the musical or literary works performed on the record, together with the contributions of various secondary authors such as arrangers, translators, and editors.

2. *The contribution of the performers.*—This includes the contributions of all the various instrumental musicians, singers, actors, or speakers whose particular performance is captured on the record.

3. *The contribution of the record producer.*—This includes the contributions of the sound engineers, directors, and other personnel responsible for capturing, editing, and mixing the sounds reproduced on the record.

The right of an author to control sound recordings of his work is outside the scope of this paper. What we are concerned with are the rights of performers and record producers to prevent unauthorized duplication of their own contributions to the record.³ The rights of authors will be discussed, but only to show the way in which the granting of new rights to performers or recorders would affect them.

There are three general ways in which a sound recording may be used for commercial purposes: "dubbing" (i.e., repressing, recapturing, or other means of duplication on another record),^{3a} public communication (over juke boxes, loud speakers, etc.), and broadcasting. While the importance of the problems of public communication and broadcasting certainly cannot be minimized, this paper is concerned solely with rights against the unauthorized dubbing of sound records.⁴

¹ Chafee, *Reflections on the Law of Copyright*, 45 COL. L. REV. 719, 734 (1945).

² As used in this paper, the term "sound recordings" is intended to embrace all of the various devices in which sound is captured and from which it can be reproduced: phonograph disks, electronic tape and wire recordings, piano rolls, sound tracks, and the like.

³ The rights of performers and record manufacturers to control the unauthorized exploitation of a specific record must be distinguished from rights to control the imitation or simulation of a style or method of performance. In this paper we are dealing with the situation where the actual sounds captured on one record are reproduced on another record, either by mechanical repressing or by recapturing the specific sounds through acoustic or electronic means. We are not dealing with the situation where the sounds captured on one record are imitated on another record by the production of new sounds, even where the imitation is so slavish as to make the records nearly identical. Failure to draw this distinction resulted in confusion and misunderstandings during the legislative hearings. See note 354, *infra*.

^{3a} The term "dubbing" as used in this paper is intended to cover all means by which the specific sounds contained in one record are reproduced on another record—repressing, electrical transcription, acoustical duplication, etc. The term has a different meaning in other industries; for example, in motion picture parlance, "dubbing" refers to the addition or substitution of new sounds in a sound track. See note 338 *infra*.

⁴ Professor Chafee has defined the problem as follows:

"... a record is itself reproduced on another record, either by physical pressing or by the aid of electrical devices; the imitator can sell his records more cheaply, since he pays nothing to the orchestra and has a lower manufacturing cost. Assume that there is no infringement of the composer's copyright, either because of a license from him or because the music itself is in the public domain."

Chafee, *supra* note 1, at 733.

It is in this area that, at least in the United States, the most immediate industry problems have arisen and the most recent litigation and legislative efforts have taken place.⁵

The problem to be treated by this paper may arise in a variety of fact situations. Fairly typical examples might include the following:

1. A so-called record pirate duplicates a popular recording, presses copies, and sells them commercially.⁶
2. Two American record producers manufacture and sell pressings of the same recordings made from European masters; there is a dispute as to who holds legal title to the American rights.⁷
3. A broadcaster makes a kinescope recording of a dramatic television program, which employed commercial sound recordings as background music.⁸

II. PRESENT LAW IN THE UNITED STATES

A. PROTECTION UNDER THE PRESENT FEDERAL COPYRIGHT STATUTE

1. *May records be copyrighted directly?*

The copyright law of the United States⁹ has been enacted under the power granted Congress by the Constitution¹⁰ to secure to authors, for limited times, the exclusive right to their writings. If a record or a recorded performance were not considered the "writing of an author" it could never constitutionally be given any protection under a Federal copyright statute.

Section 4 of the copyright statute¹¹ states that the works for which copyright may be secured " * * * shall include all the writings of an author." Since this terminology is the same as the constitutional language, one might assume that the present copyright law covers everything that can ever be copyrighted. Thus, if a sound recording can be considered a "writing" in the constitutional sense, it might be argued that recordings are copyrightable under the present law.¹²

On the other hand, recordings are not listed among the classes of work for which copyright registration may be made,¹³ nor are there any other provisions in the statute specifically dealing with records as copyrightable material.¹⁴ Since the present statute is ambiguous, it is necessary to examine its history to determine the legislative intent.

⁵ See Note, *Piracy on Records*, 5 STAN. L. REV. 433, 433-443 (1953); *Miller v. Goody*, 139 F. Supp. 176, 185-186 (S.D.N.Y. 1956).

⁶ See, e.g., Note, *Piracy on Records*, 5 STAN. L. REV. 433 (1953); *Miller v. Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956); *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

⁷ See, e.g., *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657 (2d Cir. 1955).

⁸ For a discussion of this and similar problems see Kupferman, *Rights in New Media*, 19 LAW & CONTEMP. PROB. 172, 177-179 (1954).

⁹ 17 U.S.C. (1947).

¹⁰ U.S. CONST., Art. I, § 8.

¹¹ 17 U.S.C. § 4 (1947).

¹² Two commentators advanced this argument in 1938: Bass, *Interpretive Rights of Performing Artists*, 42 DICK. L. REV. 57, 68 (1938); Note, 38 COL. L. REV. 181, 182-183 (1938). Professor Chafee has stated: "I should enjoy seeing the issue tested in the courts by a *mandamus* proceeding." Chafee, *supra*, note 1, at 734.

¹³ 17 U.S.C. § 5 (1947). After classifying thirteen types of works for purposes of registration, this section provides that "the above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title, . . ." One commentator has stated that this section furnishes "ample authority" for the proposition that recordings are not copyrightable, through "its failure to include records in the list of 'works' subject to copyright." Note, 7 BAYLOR L. REV. 442, 443 (1955).

¹⁴ The notice and deposit provisions, 17 U.S.C. §§ 12, 13, 19, 20 (1947), would present particularly difficult problems with respect to phonograph records. See *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657 (2d Cir. 1955).

Early in the 1900's, as a side effect of the sudden popularity of sound recording devices, the principal piano roll and phonograph record manufacturers began to encounter some piracy.¹⁵ To combat the unauthorized copying of their products, the manufacturers first attempted to copyright them under the statute then in effect.¹⁶ The piano roll manufacturers succeeded in securing registrations, presumably on the theory that the perforations on the rolls (and also on some perforated disks) were visible and hence constituted "arrangements."¹⁷ The phonograph record manufacturers failed to obtain registrations since their recordings were unintelligible to the eye.¹⁸

It was reported that in 1905 the leading phonograph record manufacturer, the Victor Talking Machine Co., was prepared to present a bill to Congress to end the unauthorized copying of its records.¹⁹ Upon being informed of the movement then underway for general copyright law revision, this effort was postponed, and a representative of the company thereafter attended the conferences on revision held at the Library of Congress.²⁰

On May 31, 1906, Representative Currier introduced H.R. 19853,²¹ the first of the general revision bills which led to the act of 1909. The bill had some ambiguous sections dealing with the rights of authors in recordings of their compositions, but sound records were nowhere mentioned as copyrightable works. On June 6, 1906, the first day of hearings on the bill, Mr. Horace Pettit of the Victor Talking Machine Co., testified on the problems of piracy in the phonograph record industry.²² Mr. Pettit argued that the bill as introduced actually made records copyrightable, since it purported to cover "all the works of an author."²³ However, he acknowledged that this was "somewhat doubtfully expressed," and that the matter should be clearly specified.²⁴ He emphasized the artistic nature of recorded performances, and urged the committee to accept several suggested amendments, including the addition of "talking-machine records" as class (j) under section 5.²⁵

Mr. Pettit was joined in his efforts by Charles S. Burton, representative of the Melville Clark Piano Co., a leading manufacturer of piano rolls.²⁶ During the hearings held in December 1906, Mr. Burton submitted to the committee a bill in which the copyrightability of sound recordings was specified in considerable detail.²⁷

¹⁵ *Hearings Before Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess., at 27, 154 (June 1906); *Hearings Before Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess., at 255 (Dec. 1906). See *Victor Talking Mach. Co. v. Armstrong*, 132 Fed. 711 (S.D.N.Y. 1904).

¹⁶ 26 STAT. 1106 (1891).

¹⁷ *Hearings* (Dec. 1906), *supra* note 15, at 307-309; *Hearings Before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess., at 345-347 (1908). Statistics presented to the committees indicated that the Aeolian Company registered claims to copyright in 2,288 perforated disks and rolls up to January 18, 1908. *Id.* at 345.

¹⁸ *Id.* at 265.

¹⁹ *Hearings* (June 1906), *supra* note 15, at 154.

²⁰ *Ibid.*

²¹ H.R. 19853, 59th Cong., 1st Sess. (1906).

²² *Hearings* (June 1906), *supra* note 15, at 27-30, 147-148.

²³ *Id.* at 28-29.

²⁴ *Id.* at 27.

²⁵ *Id.* at 27, 30, 58-59.

²⁶ *Id.* at 195-196; *Hearings* (Dec. 1906), *supra* note 15, at 36, 253-255.

²⁷ *Id.* at 413. Section 6 of the draft specified that the subject matter of copyright should include:

6. Devices, appliances, and contrivances for reproducing to the ear, speech or music, including:
 - (a) Interchangeable controllers for determining the music produced on automatic musical instruments or players.
 - (b) Interechangeable devices produced by the voice or by the audible playing of a musical instrument for reproducing the matter thus vocalized or rendered audible.
 - (c) Interchangeable telephonic or telegraphic records automatically produced by the sound-recording or transmitting devices of telephone or telegraph.

The author-publisher groups took little or no interest in these efforts.²⁸ However, as the controversy over authors' rights in recordings and the compulsory licensing provision began to rage, a new factor emerged. One of the chief arguments of the record producers against extending to authors the right to control recordings of their compositions was that such a provision would be unconstitutional; the manufacturers argued that the authors could not control recordings unless they were "writings" and that recordings could not be regarded as "writings" since they were not visually intelligible.²⁹ The manufacturers could not consistently maintain this argument while at the same time urging copyright for their own recordings, and most of the manufacturers therefore seemed to back away from supporting any antidubbing provision.³⁰

Throughout 1907 and early 1908 a series of general revision bills were introduced;³¹ none contained language recognizing sound recordings as copyrightable works. On February 24, 1908, the Supreme Court handed down its celebrated opinion in *White-Smith Music Publishing Company v. Apollo Company*,³² holding that a sound recording was not a "copy" and that authors had no right to control recordings of their works under existing law. At the hearings the following month the record producers, interpreting this decision rather broadly, argued that it supported their claim of unconstitutionality for any copyright statute dealing with aural works.³³ In fact Mr. Pettit discreetly withdrew his proposal for conferring copyright in recordings, stating that the *White-Smith* decision caused him to doubt its constitutionality.³⁴

Toward the end of the hearings Mr. Frank L. Dyer, representing the Edison Manufacturing Co. and other phonograph record manufacturers, adopted a pragmatic attitude on the question. While urging the unconstitutionality of a copyright law governing records,³⁵ he submitted a separate draft bill dealing exclusively with the question, including several elaborate provisions conferring copyright in records as such.³⁶ He said that he believed his bill would be held

²⁸ The hearings contain only two direct references to the proposals by either authors or publishers. The first appeared in a letter to the committees from George W. Furniss, Chairman of the Copyright Committee of the Music Publishers' Association. Mr. Furniss stated:

We believe that the talking machine people should have as good protection as ourselves on their original or characteristic works embodying the personalities and instrumentation of their artists, bands, orchestras, etc., employed by them.

Hearings (June 1906), *supra* note 15, at 154. On the other hand Nathan Burkan, counsel of the same organization, pointed to the manufacturers' efforts to secure legislation and make it illegal to copy or counterfeit records; he argued that this was basically inconsistent with the manufacturers' claim that they should be able to continue using copyrighted compositions without permission from the copyright owners. Mr. Burkan felt that this was "a case of whose ox is being gored." *Hearings* (1908), *supra* note 17, at 214-215.

²⁹ See, e.g., *Hearings* (June 1906), *supra* note 15, at 119-120, 140-141; *Hearings* (Dec. 1906), *supra* note 15, at 382. The fallacy in this argument was pointed out by Mr. Burkan, who stated that the provision in the bills granting owners of copyright in musical compositions the right to control the recording of their compositions "... does not propose to make phonographic devices a subject-matter of copyright; it does not define the subject-matter of copyright at all." He added that the measure's "constitutionality does not depend upon the question of whether phonographic devices are writings, but whether the securing to the author of the right to make and sell these devices for reproducing his writings is covered by the words 'secure' and 'exclusive rights' that are employed in the constitutional clause in question." *Id.* at 212.

³⁰ See, e.g., *Hearings* (June 1906), *supra* note 15, at 138; *Hearings* (Dec. 1906), *supra* note 15, at 287-288, 290-331, 332.

³¹ S. 8190, 59th Cong., 2d Sess. (1907); H. R. 243, 60th Cong., 1st Sess. (1907); S. 2499, 60th Cong., 1st Sess. (1907); S. 2900, 60th Cong., 1st Sess. (1907); H. R. 11794, 60th Cong., 1st Sess. (1908).

³² 209 U. S. 1 (1908).

³³ For example, Albert H. Walker, counsel for the Victor Company, stated: "... the Supreme Court says these perforated rolls are not copies. If not, they are not writings." *Hearings* (1908), *supra* note 17, at 273-279.

³⁴ *Id.* at 284-275.

³⁵ *Id.* at 302-308.

³⁶ *Id.* at 297. The draft bill purported to grant a "mechanical copyright" to "the manufacturer of any device or appliance adapted to mechanically reproduce to the ear the whole or material part of a literary or dramatic work or musical composition." The right was granted only if use of the copyrighted literary, dramatic, or musical work was authorized, and was to last no longer than the mechanical rights in the composition recorded. Deposit and registration were required, and the right was apparently subject to a compulsory license.

unconstitutional but, if its constitutionality were upheld, he felt that the record companies should have the benefit of a copyright in their own productions.

Following the 1908 hearings a final series of bills was introduced.³⁷ There included H.R. 28192, which was enacted on March 4, 1909.³⁸ None of these bills contained any provision recognizing a copyright in sound recordings. The final report on the bill stated:

It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.³⁹

This language certainly sounds conclusive although, as Judge Learned Hand has pointed out,⁴⁰ it is open to more than one interpretation.⁴¹

Between 1909 and 1955 no court was ever called upon for a square holding on the copyrightability of records or performances, but a body of "dicta and authoritative assumptions"⁴² developed around the question. *Fonotipia Limited v. Bradley*,⁴³ which involved a cause of action arising before 1909 and was decided on grounds of unfair competition, contains a startling dictum on the subject. The opinion states, without hesitation or attempt at analysis, that—

* * * since the 1st day of July, 1909, any form of recording or transcribing a musical composition, or rendition of such composition, has been capable of registration, and the property rights therein secured under the copyright statute
* * *⁴⁴

The court adds that—

* * * the questions raised in the present case may be avoided as to future compositions by copyrighting the original rendition of the song, provided the singer has the right to use it for that purpose * * *⁴⁵

These statements are certainly refutable,⁴⁶ and it seems clear that the dictum may safely be discounted today.

In 1912, the court in *Aeolian Co. v. Royal Music Roll Co.*⁴⁷ stated that "music rolls or records are not strictly matters of copyright."⁴⁸ This view was adopted by the Copyright Office which consistently refused to accept sound recordings for copyright registration,⁴⁹ and was reiterated in dicta appearing in at least three opinions during

³⁷ H.R. 21592, 60th Cong., 1st Sess. (1908); H.R. 21984, 60th Cong., 1st Sess. (1908); H.R. 22071, 60th Cong., 1st Sess. (1908); H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 24782, 60th Cong., 2d Sess. (1908); H.R. 25162, 60th Cong., 2d Sess. (1909); H.R. 27310, 60th Cong., 2d Sess. (1909); H.R. 28192, 60th Cong., 2d Sess. (1909); S. 9440, 60th Cong., 2d Sess. (1909).

³⁸ 35 STAT. 1075 (1909).

³⁹ H.R. REP. NO. 2222, 60th Cong., 2d Sess. 9 (1909).

⁴⁰ See *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657, 664-665 (2d Cir. 1955) (dissenting opinion). Judge Hand pointed out that in context the language of the report is dealing with §1 (e) of the copyright statute—that is, with rights of copyright owners in musical compositions.

⁴¹ Opponents of the bill had argued that it would deprive owners of patents in recording devices of vested property rights, since they would no longer be free to record any song they wished; the language might have been intended to emphasize that the authors were being given no control over the physical devices. See H.R. REP. NO. 7083, pt. 2, 59th Cong., 2d Sess. 7 (1907).

⁴² Note, *supra* note 13, at 442.

⁴³ 171 Fed. 961 (E.D.N.Y. 1909).

⁴⁴ *Id.* at 963.

⁴⁵ *Ibid.*

⁴⁶ See HOMBURG, LEGAL RIGHTS OF PERFORMING ARTISTS (Spelser transl. 1934; Spelser's addendum at pp. 143-144).

⁴⁷ 196 Fed. 926 (W.D.N.Y. 1912).

⁴⁸ *Id.* at 927.

⁴⁹ See quotation from a 1935 letter of the Register of Copyrights in *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 438 n. 2; 194 Atl. 631, 633-634 n. 2 (1937); the letter stated: "There is not and never has been any provision in the Act for the protection of an artist's personal interpretation or rendition of a musical work not expressible by musical notation in the form of 'legible' copies although the subject has been extensively discussed both here and abroad." See also Hess, *Copyrightability for Acoustic Works in the United States*, 4 GEISTIGES EIGENTUM 183, 183-184 and n. 2, 3 (1939). The new Copyright Office regulations, in effect as of August 11, 1956, state that ". . . the Copyright Office does not register claims to exclusive rights in mechanical recordings themselves, or in the performances they reproduce." Regulations of the Copyright Office, 21 FED. REG. 6021 (1956).

the thirties and forties.⁵⁰ With two exceptions,⁵¹ virtually every commentator on the subject assumed or stated that performances and recordings are uncopyrightable,⁵² and this was the universal assumption during the hearings on bills which would have conferred a copyright on such works.⁵³

Professor Chafee dealt with this problem in a 1945 article, and reached a reasoned conclusion.⁵⁴ Discarding the old argument that a work must be intelligible to sight in order to be considered a "writing," Professor Chafee offered the opinion that records are "writings" within the meaning of the Constitution, and are therefore potentially copyrightable.⁵⁵ At the same time, he concluded that records are not copyrightable under the present statute, for reasons he stated as follows:

What seems to me a stronger argument against the present copyrightability of records is that they do not fit well into the machinery of the 1909 Act. The ideal of convenience may limit the possible scope of the statutory word "writings." Who is to get the copyright, Toscanini or RCA-Victor? Should the man who copies a Toscanini record pay only a flat 2-cent royalty under section 1(e) or be treated like a copyist of sheet music and pay \$1 per record under section 25(b)? Is there room in Washington to store all those records? Perhaps Congress should face such questions squarely before the Copyright Office takes on this new and burdensome task.⁵⁶

But if recordings are "writings" in the constitutional sense, how can they fail to be covered by a statute that purports to embrace "all the writings of an author"? Professor Chafee faced up to this dilemma, and resolved it on the authority of a quotation from Justice Holmes, who said: "* * * words may be used in a statute in a different sense from that in which they are used in the Constitution."⁵⁷ The upshot of Professor Chafee's reasoning is stated by him as follows:

A word in a statute must be read in connection with the purpose of the law and the machinery which Congress has set up. We hesitate about extending the word to situations which will make the machinery work badly. The Constitution, however, establishes the framework of government. It contemplates that the machinery will be set up by Congress in order to carry out specific purposes. It is plain that such words as "Commerce" and "Income" consequently have a broader scope in the Constitution than they may possess in a particular statute. The same difference may be true of "Writings." The copyright clause of the Constitution should be construed so as to permit Congress to protect by appropriate devices any literary or artistic work which deserves such protection.⁵⁸

Ten years later, the Court of Appeals for the Second Circuit embodied Professor Chafee's conclusion in their decision in *Capitol Records, Inc. v. Mercury Records Corporation*,⁵⁹ holding:

⁵⁰ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937); *RCA Mfg. Co., Inc. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), cert. denied, 311 U.S. 712 (1940); *Jerome v. Twentieth Century-Fox Film Corporation*, 67 F. Supp. 736 (S.D.N.Y. 1946), aff'd, 165 F. 2d 784 (2d Cir. 1948); cf. *Ingram v. Bowers*, 57 F. 2d 65 (2d Cir. 1932). For example, in the *Waring* case the court stated (327 Pa. 433, 437-438, 194 Atl. 631, 633):

The property rights claimed by plaintiff are admittedly not the subject of protection under existing copyright laws. The Act of March 4, 1909, . . . enumerates the various literary and artistic productions which may be copyrighted, including books, lectures, dramatic and musical compositions, works of art, photographs, and motion pictures. The creator of such a work may protect his property rights therein, but the statute does not recognize any right of a performing artist in his interpretative rendition of a musical composition, or in the acting of a play, composed by another.

⁵¹ See note 12 *supra*.

⁵² For example, a commentator writing in 1940 deemed the point "settled." Note, *Rights of Recording Orchestras Against Radio Stations Using Records for Broadcast Purposes*, 2 WASH. & LEE L. REV. 85, 86, (1940).

⁵³ See Section III, *infra*.

⁵⁴ Chafee, *supra* note 1, at 733-737.

⁵⁵ *Id.* at 734.

⁵⁶ *Id.* at 735.

⁵⁷ *Lamar v. United States*, 240 U.S. 60, 65 (1916).

⁵⁸ Chafee, *supra* note 1, at 735-736.

⁵⁹ 221 F.2d 657 (2d Cir. 1955). See discussions in Kaplan, *Performer's Right and Copyright: The Capitol Records Case*, 69 HARV. L. REV. 409 (1956); Nimmer, *Copyright 1955*, 43 CALIF. L. REV. 791, 801-806 (1955); Nimmer, *Copyright Publication*, 56 COL. L. REV. 185, 192-194 (1956); Notes, 7 BAYLOR L. REV. 442 (1955), 58 COL. L. REV. 128 (1956); 3 U.C.L.A. L. REV. 113 (1956).

* * * first, that Congress, before the 1909 amendment, intended that one who performed a public-domain musical composition should not be able to obtain copyright protection for a phonographic record thereof, and, second, that nothing in the 1909 amendment indicated any change in that intention.⁶⁰

Judge Learned Hand, who dissented on other grounds, agreed that, although records are "writings" under the Constitution, they "could not have been copyrighted under the Act."⁶¹ The majority opinion was based primarily upon the difficulty of adapting sound recordings to the deposit and notice requirements of the present law.⁶² Judge Hand, whose analysis on this point is more searching, based his conclusion upon Professor Chafee's reasoning that to accord a statutory copyright in recordings would be "to ignore the very specific provisions of section 1(e) regulating the infringement of 'musical compositions' by mechanical 'reproduction.'"⁶³

Whatever may be its fate as authority for the other questions it attempts to decide, it seems probable that the *Capitol Records* case represents an authoritative ruling on at least two points: (1) That recorded performances are potentially copyrightable under the Constitution, and (2) they are not covered by the present copyright statute.

2. May records be protected indirectly under the copyright statute?

(a) *The compulsory licensing provision.*—Three years after enactment of the copyright statute of 1909 the Aeolian Co., then the leading manufacturer of perforated music rolls, sued a competitor for the unauthorized "copying and duplicating" of Aeolian's products.⁶⁴ The plaintiff had manufactured its rolls under licenses from the owners of copyright in the music reproduced, and suit was brought for copyright infringement under the Federal statute. The court acknowledged that "such music rolls or records are not strictly matters of copyright."⁶⁵ Nevertheless, the court granted a preliminary injunction; it held that, while section 1(e) permits a manufacturer to make his own records of a copyrighted composition without express permission, it does not authorize the duplication of a licensee's records.⁶⁶ The plaintiff, who was a mere licensee of the copyright owner, was granted an independent right of action under a provision of the copyright law allowing "any party aggrieved" to file a bill in equity in a Federal district court.⁶⁷

The *Aeolian* decision appears to represent an unsuccessful attempt to bring a case of unfair competition under the Federal copyright statute.⁶⁸ If the ruling represented good law, its practical effect would be to give the manufacturers of sound records the equivalent of a copyright in most of their popular recordings. Although the de-

⁶⁰ *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F.2d 657, 661 (2d Cir. 1955). Judge Dimock wrote the majority opinion.

⁶¹ *Id.* at 665.

⁶² *Id.* at 660-661.

⁶³ *Id.* at 665.

⁶⁴ *Aeolian Co. v. Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912).

⁶⁵ *Id.* at 927.

⁶⁶ *Ibid.* The holding was expressed as follows:

The provision of the statute (section 1e) that "any other person may make similar use of the copyrighted work" becomes automatically operative by the grant of the license; but the subsequent user does not thereby secure the right to copy the perforated rolls or records. He cannot avail himself of the skill and labor of the original manufacturer of the perforated roll or record by copying or duplicating the same, but must resort to the copyrighted composition or sheet music, and not pirate the work of a competitor who has made an original perforated roll.

⁶⁷ 35 STAT. 1084 (1909), 17 U.S.C. § 112 (1947), as amended, 65 STAT. 710 (1951).

⁶⁸ In speaking of "skill and labor" and of pirating "the work of a competitor," the court seems clearly to have been thinking in terms of unfair competition. But this would have required action under State law rather than under the Federal copyright statute.

cision has not been overruled and has been cited with approval by several commentators,⁶⁹ it is open to severe criticism.⁷⁰ It would seem safe to argue that the *Aeolian* case does not represent the present law of the United States.⁷¹

(b) *Sound tracks*.—The status of motion picture sound tracks under the present copyright law presents a very delicate and special problem. When motion pictures were added to the list of copyrightable works in 1912⁷² the talking picture, with integrated sound track, had not been invented. After the introduction of sound films the courts held that “talkies” were “nothing more than a forward step in the same art,”⁷³ and that use of a copyrighted work on a sound track constituted an infringement.⁷⁴ But whether the sound track of a copyrighted motion picture would itself be protected against copying or dubbing is still open to speculation.⁷⁵

Some significance may be attached to a 1946 dictum by Judge Leibell, who drew a sharp distinction between ordinary sound reproducing devices (such as “a music roll or victrola record”) and sound films.⁷⁶ His opinion implies that “talkies” may be considered copyrightable as an integrated whole “because they are so clearly of the genus ‘motion picture.’”⁷⁷ The report of the Senate Committee on Foreign Relations dealing with the Universal Copyright Convention⁷⁸ may likewise shed some light on this problem. However, while it is possible to argue that the Federal copyright law may extend protection to sound tracks when they are synchronized with the visual portion of a motion picture, the extent of copyright protection for a sound track when used separately as a purely aural work is a much more doubtful question.

B. PROTECTION UNDER LOCAL STATUTES

1. State statutes

There are no State statutes recognizing rights in sound recordings or recorded performances. On the contrary, three States have enacted statutes which may deny a musical performer or record producer any rights against unauthorized dubbing after the recording has been

⁶⁹ See, e.g., HOWELL, *THE COPYRIGHT LAW* 150 (3d ed. 1952); 2 SOCOLOW, *THE LAW OF RADIO BROADCASTING* 1185 (1939); Dubin, *Copyright Aspects of Sound Recordings*, 26 SO. CALIF. L. REV. 139, 142 (1953); Strauss, *Unauthorized Recording of Radio Broadcasts*, 11 FED. COMM. B. J. 193, 195 n.15 (1950).

⁷⁰ For an extensive critical analysis of the *Aeolian* case see Note, *Piracy on Records*, 5 STAN. L. REV. 433, 443-445 (1953).

⁷¹ It might be argued that the reasoning behind the decision in the *Capitol Records* case is in basic conflict with the *Aeolian* rule. See notes 59-63 *supra*, and text thereto.

⁷² 37 STAT. 488 (1912).

⁷³ *L. C. Page & Co. v. Fox Film Corporation*, 83 F. 2d 196, 199 (2d Cir. 1936).

⁷⁴ *Foreign & Domestic Music Corp. v. Licht*, 196 F. 2d 627 (2d Cir. 1952); *Jerome v. Twentieth Century-Fox Film Corporation*, 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd*, 165 F. 2d 784 (2d Cir. 1948); *Encore Music Publications, Inc. v. London Film Productions, Inc.*, 89 U.S.P.Q. 501 (S.D.N.Y. 1951).

⁷⁵ For an interesting discussion of the problems likely to be encountered in the near future with the development of video tape recording see Meagher, *Copyright Problems Presented by a New Art*, 30 N.Y.U.L. REV. 1081 (1955).

⁷⁶ *Jerome v. Twentieth Century-Fox Film Corporation*, 67 F. Supp. 736, 742 (S.D.N.Y. 1946), *aff'd*, 165 F. 2d 784 (2d Cir. 1948).

⁷⁷ *Id.* at 741.

⁷⁸ S. EXEC. REP. NO. 5, 83d Cong., 2d Sess. (1954). The report asserted that the protecting coverage of the Universal Copyright Convention “clearly embraces not only the older, silent types of motion pictures with the subtitles and dialogue printed on the film, but also sound motion pictures including the integrated soundtrack portions thereof.” This was true despite the fact that Article VI of the Universal Copyright Convention refers to copies of a protected work as capable of being “read or otherwise visually perceived.” The report concludes that it is “abundantly clear that nothing in the present convention will result in the loss of any protection for the integrated sound portion of a motion picture which it now enjoys.”

placed on sale.⁷⁹ The statutes were passed in the wake of the *Waring* decisions,⁸⁰ and were obviously aimed at preventing the collection of performance royalties from broadcasters, cafe owners, and similar secondary users.⁸¹ Nevertheless, the language of the statutes may well be broad enough to prevent a common law action for dubbing in North Carolina, South Carolina, and Florida.

As part of a concerted drive by the record industry against disk piracy, bills making unauthorized dubbing a penal offense were introduced in the New York Legislature in 1952, 1953, and 1955.⁸² The 1952 and 1953 bills, which were identical, provided that the rerecording of a phonograph record without the consent of the owner, and with the intent to use the dubbed record for sale or public performance for profit, constituted a misdemeanor. The bills also provided that any person who knowingly sold copies of the dubbed records would likewise be subject to criminal liability. The 1955 bill was virtually identical with the earlier measures, but contained an added clause permitting broadcasters to make their own recordings of programs embodying recorded music.⁸³

The first two bills were passed without opposition, but were vetoed by Governor Dewey.⁸⁴ The 1955 bill was also passed, but failed to become law because it was not signed by Governor Harriman.

2. Municipal ordinances

Los Angeles apparently has the distinction of having the only provision in the United States prohibiting unauthorized dubbing and sale of dubbed phonograph records.⁸⁵ The ordinance, which was passed in

⁷⁹ N.C. GEN. STAT. c. 66, §§ 68-28 (1943); S.C. CODE, § 6841 (1942); FLA. STAT. ANN. §§ 543.02, 543.03 (1943). The text of the provision reads as follows:

When any phonograph record or electrical transcription upon which musical performances are embodied, is sold in commerce for use within this state, all asserted common law rights to further restrict or to collect royalties on the commercial use made of any such recorded performances by any person are hereby abrogated and expressly repealed. When such article or chattel has been sold in commerce, any asserted tangible rights shall be deemed to have passed to the purchaser upon the purchase of the chattel itself, and the right to further restrict the use made of phonograph records or electrical transcriptions, whose sole value is in their use, is hereby forbidden and abrogated.

Nothing in this section shall be deemed to deny the rights granted any person by the United States copyright laws. The sole intentment of this enactment is to abolish any common law rights attaching to phonograph records or electrical transcriptions whose sole value is in their use, and to forbid further restrictions or the collection of subsequent fees and royalties on phonograph records and electrical transcriptions by performers who were paid for the initial performance at the recording thereof.

⁸⁰ *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *Waring v. WDA3 Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937). See notes 124-129, *infra*, and text thereto.

⁸¹ See Diamond and Adler, *Proposed Copyright Revision and Phonograph Records*, 11 AIR L. REV. 29, 44 (1940); Note, *Rights of Performers and Recorders Against Unlicensed Record Broadcasts*, 49 YALE L. J. 559, 561 (1940).

⁸² No. 2267 (In Senate, February 19, 1952); No. 2681 (In Assembly, February 19, 1952); No. 188 (In Senate, January 13, 1953); No. 347 (In Assembly, January 13, 1953); Nos. 965, 3299, 3514 (In Senate, January 25, 1955); Nos. 1224, 3627, 3818 (In Assembly, January 25, 1955). The text of the 1952 and 1953 bills reads as follows:

Any person who:

1. Shall directly or indirectly by any means, knowingly transfer or cause to be transferred any sounds recorded on a phonograph record, disc, wire, tape, film or other article on which sounds are recorded, with intent to sell, or cause to be sold, or to use or cause to be used for profit through public performance, such article on which such sounds are so transferred, without the consent of the owner; or

2. Shall sell any such article with the knowledge that the sounds thereon have been so transferred thereon without the consent of the owner, shall be guilty of the misdemeanor.

As used in this section, the word "person" shall mean any individual, partnership, corporation or association; and the word "owner" shall mean the person who owns the master phonograph record, master disc, master tape, master film or other device used for reproducing recorded sounds on phonograph records, discs, tapes, films or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.

⁸³ The added clause read as follows:

Nothing in this Act shall apply to any person engaged in broadcasting who makes any such transfer, or to the article resulting from such transfer, where the transfer is made for the purpose of recording a program if such person has the right to broadcast the sounds recorded on the original phonograph record, disc, wire, tape, film, or other article.

⁸⁴ See Note, *Piracy on Records*, 5 STAN. L. REV. 433, 440 (1953); BILLBOARD, Aug. 7, 1954, p. 18. The latter item stated: "Both times Dewey let it be known that he believed relief from piracy should come thru Federal legislation."

⁸⁵ MUNICIPAL CODE OF THE CITY OF LOS ANGELES § 42.19.1 (1948).

1948, reads as follows:

SEC. 42.19.1. PHONOGRAPH RECORDS—REPRODUCTION RIGHTS

It shall be unlawful for any person to manufacture or reproduce for sale any phonograph records without the written consent of the owner of the reproduction rights thereto, or to knowingly distribute for sale or keep for sale phonograph records which have been manufactured or reproduced without the written consent of the person owning the reproduction rights thereto.

C. COMMON LAW PROTECTION AGAINST IMITATION

Before discussing common law theories for the protection of a recording against duplication or repressing, it may be worthwhile to distinguish the situation in which the general style or characteristics of the record are imitated, mimicked, satirized, or burlesqued in another record.⁸⁶ This paper is concerned with rights against the actual reproduction of one record upon another, whether by repressing or by recapturing the sounds electrically or acoustically. It is important to differentiate this situation from that in which one recorded performance is imitated in another recorded performance, even where the style of performance and manner of interpretation is followed so closely as to be virtually indistinguishable. In the second case a new performance has taken place, and American courts have been extremely reluctant to grant protection in this area.⁸⁷ In a 1950 California case⁸⁸ involving similarities in the manner in which a musical composition was performed on two phonograph records, one of the grounds for denial of relief was that there are no property rights in a general style of performance.⁸⁹ On the other hand, if the plaintiff could show real fraud or passing off, it is likely that he could enjoin the sale of a record imitating his own.⁹⁰

D. COMMON LAW THEORIES FOR PROTECTION AGAINST DUBBING

1. *In general*

It seems clear on the basis of the foregoing analysis⁹¹ that, for all intents and purposes, sound recordings are given no protection under the Federal copyright statute. Performers and record producers must look to the laws of the various States for any recogni-

⁸⁶ A footnote to the majority opinion in *Waring v. WDAS Broadcasting Station, Inc.*, states:

It has been said that the owner of the production rights of a play cannot enjoin an imitation of the actors and stage business: [citations omitted]. Such imitations, while they may resemble the original, are not identical with it. In the present case, however, it is not a copy or imitation but the exact reproduction of the performance itself, transcribed by a mechanical process, for which protection is sought. 327 Pa. 433, 438-439 n. 3, 194 Atl. 631, 634 n. 3 (1937). See Young, *Copyright Law—Musical Style Piracy—Possible Methods of Legal Protection for the Musical Stylist*, 28 KY. L.J. 447 (1940).

⁸⁷ Cf. *Bloom & Hamlin v. Nixon*, 125 Fed. 977 (E.D. Pa. 1903); *Savage v. Hoffman*, 159 Fed. 584 (S.D.N.Y. 1908); *Green v. Minzensheimer*, 177 Fed. 286 (S.D.N.Y. 1909); *Murray v. Rose*, 30 N.Y.S. 2d 6 (Sup. Ct. 1941).

⁸⁸ *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904 (S.D. Cal. 1950). For a discussion of this case see Burton, *Business Practices in the Copyright Field*, in SEVEN COPYRIGHT PROBLEMS ANALYZED 87, 114-115 (1952).

⁸⁹ *Supreme Records, Inc. v. Decca Records, Inc.*, 90 F. Supp. 904, 908-909 (S.D. Cal. 1950). Judge Yankwich stated his conclusion as follows (*Id.* at 909):

There is a line of cases which holds that what we call generically by the French word *représentation*,—which means to perform, act, impersonate, characterize, and is broader than the corresponding English word,—is not copyrightable or subject to any right recognized under the law of unfair competition. . . .

If recognition were given to the right of ownership in a musical arrangement, we would have to disregard all these cases. We would have to hold that Mr. Charles Laughton, for instance, could claim the right to forbid anyone else from imitating his creative mannerisms in his famous characterization of Henry VIII, or Sir Laurence Olivier could prohibit anyone else from adopting some of the innovations which he brought to the performance of Hamlet.

⁹⁰ Cf. *Jones v. Republic Productions, Inc.*, 112 F.2d 672 (9th Cir. 1940); *Lone Ranger, Inc. v. Cox*, 124 F.2d 650 (4th Cir. 1942); *Lone Ranger, Inc. v. Currey*, 79 F. Supp. 190 (M.D. Pa. 1948); *Chaplin v. Amador*, 93 Cal. App. 358, 269 Pac. 544 (1928); *Goldin v. Clarion Photoplays, Inc.*, 202 App. Div. 1, 195 N.Y. Supp. 455 (1st Dep't 1922).

⁹¹ See Section II.A., *supra*.

tion of rights in their recordings.⁹² These laws consist almost entirely of judge-made common law. They differ widely from State to State, and are often conflicting and irreconcilable.⁹³

The body of case law dealing with protection for recordings and recorded performances is entirely a product of the 20th century,⁹⁴ although it was necessarily built upon older concepts. In attempting to secure recognition of rights in their recordings,⁹⁵ performers and record manufacturers have relied upon two principal legal theories: (1) "common law copyright" (also called literary property right, common law property right, and intellectual property), and (2) unfair competition.

Common law copyright and unfair competition both involve the recognition of property rights, and this has led some courts to confuse the two concepts and to speak interchangeably of them.⁹⁶ Essentially, however, the two theories are quite different:

- a. A work may be protected by a common law copyright only if it constitutes an original intellectual creation. The work need not be eligible for a statutory copyright, but it must embody some creative intellectual or artistic contribution. A common law copyright confers complete protection against unauthorized use, and this protection ordinarily lasts as long as the work remains unpublished.⁹⁷
- b. The theory of unfair competition recognizes a property right in business assets which have been acquired by the expenditure or investment of money, skill, time, and effort. The work need not be original, new, or creative to be protected. The concept of unfair competition does not confer a monopoly, but protects only against unfair use in business. It is not affected by publication.⁹⁸

It is entirely possible for the same person to assert two separate common law property rights in a sound recording—both a common law copyright and a right against unfair competition.⁹⁹ Before one can attempt to analyze the problem, however, it is essential that the two concepts be sharply distinguished.

In addition to cases involving protection of recordings on theories of common law copyright or unfair competition, situations may arise

⁹² The American judicial system provides for a Federal judiciary, which exists in addition to the courts of each State. The Federal courts deal not only with cases involving Federal statutes, but also with controversies in which the parties are citizens of different States. Before 1938 it was assumed that in these "diversity of citizenship" cases the Federal courts could apply the so-called "Federal common law" and were not bound by any State court precedents. Following the Supreme Court decision in *Eric Railroad Co. v. Tompkins*, 304 U.S. 64 (1933), however, the Federal courts are required to apply the law of the State where the district court in which the action was brought happened to be located. This has presented the courts in cases involving performers' rights and rights in sound recordings with problems of extreme complexity; see, e.g., *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657 (2d Cir. 1955); *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), cert. denied, 351 U.S. 926 (1956). The court may be called upon to determine (1) the State conflict of laws rule, (2) which State laws apply, (3) what the various State laws are, and (4) how to resolve conflicts among the applicable State laws. See, in particular, Section II.D.2.d., *infra*.

⁹³ This lack of uniform standards was apparently the underlying basis for Judge Learned Hand's dissent in the *Capitol Records* case, note 92 *supra*, at 664. Judge Hand concluded that, since recorded performances are "writings" and are constitutionally eligible for copyright protection, the question should be one of Federal law. He felt that failure of Congress to include performances in the Federal statute should not give the States the power to create a perpetual monopoly and thus defeat the constitutional requirement that protection be granted only for "limited times." Judge Hand conceded that this conclusion might be regarded as harsh, and implied that copyright legislation is needed to correct the situation. For an interesting discussion of this position see Kaplan, *supra* note 59.

⁹⁴ The phonograph was not invented until 1877, and the vogue for sound reproducing devices did not become general until more than a decade later.

⁹⁵ The cases dealing with recordings and recorded performances involve not only protection against dubbing but also rights against unauthorized broadcasting and public communication. This paper is concerned solely with dubbing, but it is essential to refer to cases dealing with other types of uses in order adequately to cover the problem. It is certainly arguable that a decision upholding a right to enjoin unauthorized broadcasting likewise furnishes a precedent for an injunction against dubbing. The opinions themselves tend to emphasize the nature of the right rather than the type of use to be restrained.

⁹⁶ See, e.g., *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 433 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951).

⁹⁷ See Comment, *Protection of Intellectual Property* 35 ILL. L. REV. 546 (1941); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N.C. L. REV. 202 (1941).

⁹⁸ See Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940).

⁹⁹ For example, an opera impresario might have a common law copyright in a recording of an operatic performance derived from employment agreements or assignments from the performers and his own creative contributions, and at the same time a right against unfair competition derived independently from his investment of time, money, skill, and effort in the production.

in which the special facts warrant recovery on other grounds. These additional theories of protection need be mentioned only by name: (a) Right of privacy;¹⁰⁰ (b) interference with contract relations;¹⁰¹ (c) interference with employer-employee relations;¹⁰² (d) quantum moruit;¹⁰³ and (e) moral right.¹⁰⁴

2. Common law copyright in sound recordings

(a) *Protection of a recorded performance.*—It appears settled that the contributions of performing artists to a sound recording constitute an original intellectual creation,¹⁰⁵ and are therefore eligible for common law copyright protection.¹⁰⁶ There are no decisions denying this proposition,¹⁰⁷ and it has been strongly reiterated in recent cases.¹⁰⁸

¹⁰⁰ Judge Maxey's concurring opinion in *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 456, 194 Atl. 631, 642 (1937), contains the strongest assertion ever made in favor of a right of privacy to protect performers against unauthorized use of their recorded performances. His view was "that the plaintiff is entitled 'to decide whether, and when, and how, and for whose advantage,' his rendition of musical compositions shall be mechanically reproduced." He felt that "the right to restrict the use of these discs to private use is undoubtedly his." *Id.* at 461, 194 Atl. at 644. This opinion has been widely criticized, however and it is generally agreed that the right of privacy has little application in this area. See Baer, *Performer's Right to Enjoin Unauthorized Broadcasts of Recorded Renditions*, 19 N.C.L. REV. 202, 210-211 (1941); Note, 20 ORE. L. REV. 372, 376 (1941). Cf. *ROA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956); *Sherwood v. McGowan*, 3 Misc. 2d 235 (N.Y. Sup. Ct. 1956). *But see* *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956). See also Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

¹⁰¹ *Metropolitan Opera Association, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 483, 498-499 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951). *Contra*: *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940).

¹⁰² Cf. *Darmour Productions Corporation v. Herbert M. Baruch Corporation*, 135 Cal. App. 351, 27 P. 2d 664 (1933).

¹⁰³ Cf. *Peterson v. KMTR Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. Super. Ct. July 7, 1949).

¹⁰⁴ See Judge Frank's concurring opinion in *Granz v. Harris*, 198 F. 2d 585, 589 (2d Cir. 1952); *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956).

¹⁰⁵ In *ROA Mfg. Co. v. Whiteman*, 28 F. Supp. 787, 791 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), Judge Leibell stated that, even before the invention of the phonograph, a performer had a common law copyright in his rendition; he asserted that "during all this time the right was always present, yet because of the impossibility of violating it, it was not necessary to assert it."

¹⁰⁶ In the United States, the only serious arguments against recognition of performers as creative artists came at various Congressional hearings from authors, publishers, broadcasters, motion picture producers, juke box operators, and similar special groups, who felt they stood to lose from a recognition of performers' rights. See Section III, *infra*. Various European authorities have argued against the creative nature of performances; see, e.g., AUDINET, LES CONFLITS DU DISQUE ET DE LA RADIODIFFUSION EN DROIT PRIVE 29-30 (1938); ESCHOLIER, LE PHONOGRAPHE ET LE DROIT D'AUTEUR 135-140 (1930); MAK, RIGHTS AFFECTING THE MANUFACTURE AND USE OF GRAMOPHONE RECORDS 105-115 (1952); Baum, *Protection of Records, Protection of Artists, and Copyright*, 5 GEISTIGES EIGENTUM 1 (1939); de Sanctis, The "Neighboring Rights," 53 REVISTA DEL DIRITTO COMMERCIALE 167 (Copyright Society Translation Service No. 4a) (1956).

¹⁰⁷ The following cases may be cited in support of the proposition, through some of them do not involve rights in sound recordings of performances, but deal with analogous situations as indicated: *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937); *Noble v. One Sixty Commonwealth Avenue, Inc.*, 19 F. Supp. 671 (D. Mass. 1937); *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *RCA Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *National Ass'n of Performing Artists v. Wm. Penn Broadcasting Co.*, 38 F. Supp. 531 (E.D. Pa. 1941); *Long v. Decca Records, Inc.*, 76 N.Y.S. 2d 133 (Sup. Ct. 1947); *Peterson v. KMTR Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. Super. Ct. July 7, 1949) (motion picture of aquasade in which plaintiffs performed); *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 483 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951) (recording of radio broadcast of live performance); *Granz v. Harris*, 98 F. Supp. 906 (S.D.N.Y. 1951), *aff'd and modified*, 198 F. 2d 585 (2d Cir. 1952); *Rogers v. Republic Productions, Inc.*, 104 F. Supp. 328 (S.D. Cal. 1952), *rev'd on other grounds*, 213 F. 2d 662 (9th Cir. 1954) (broadcast of motion picture in which plaintiff was actor); *Autry v. Republic Productions, Inc.*, 104 F. Supp. 918 (S.D. Cal. 1952), *aff'd and modified*, 213 F. 2d 667 (9th Cir. 1954) (broadcast of motion picture in which plaintiff was actor); *Capitol Records, Inc. v. Mercury Records Corporation*, 109 F. Supp. 839 (S.D.N.Y. 1952), *aff'd*, 221 F. 2d 657 (2d Cir. 1955); *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956) (broadcast of motion picture of plaintiff's prize fight); *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

¹⁰⁸ In the *Capitol Records* case (221 F. 2d 657, at 660) the majority opinion states:

There can be no doubt that, under the Constitution, Congress could give to one who performs a public domain musical composition the exclusive right to make and vend phonograph records of that rendition.

In his dissent, Judge Learned Hand agreed fully with the majority on this point, stating (at 664):

Musical notes are composed of a "fundamental note" with harmonics and overtones which do not appear on the score. There may indeed be instruments—e.g. percussive—which do not allow any latitude, though I doubt even that; but in the vast number of renditions, the performer has a wide choice, depending upon his gifts, and this makes his rendition pro tanto quite as original a "composition" as an "arrangement" or "adaptation" of the score itself, which § 1(b) makes copyrightable. Now that it has become possible to capture these contributions of the individual performer upon a physical object that can be made to reproduce them, there should be no doubt that this is within the Copyright Clause of the Constitution.

See also *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956); *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

Thus, as long as none of the records reproducing his performance have been sold or distributed, it seems clear that a performer may enjoin the unauthorized duplication of his recording.¹⁰⁹

The majority opinion in the famous *Waring* case¹¹⁰ implies that, in order to establish a common law copyright in a recorded performance, the rendition must be of more than ordinary esthetic value.¹¹¹ This attempt to engraft a subjective artistic standard upon the law of common law copyright has been criticized more widely than any other single aspect of the opinion,¹¹² and has not been adopted in other cases. In fact, in a recent case involving the rights of a prizefighter, the court specifically held that "the quality of the performance can-[not] supply the criterion."¹¹³

(b) *Protection of a sound recording as such.*—Only one American case has ever considered the question of whether the contributions of a record producer are sufficiently artistic or creative to warrant protection under a common law copyright.¹¹⁴ The lower court in the *Whiteman* case held that, while the contributions of the manufacturer were essential to the proper reproduction of a performance, they were not creative in themselves.¹¹⁵ The *Whiteman* case was reversed on appeal upon other grounds,¹¹⁶ but its conclusion on this point finds some inferential support in the recent *Capitol Records* decision.¹¹⁷ Thus, it seems doubtful at present whether a record producer may protect his own contributions against dubbing on the theory of common law copyright.

(c) *Ownership of the common law copyright.*—When a performer agrees, under an employment or personal service contract, to make a particular recording, the ownership of common law copyright in his recording is governed by the terms of his contract.¹¹⁸ If he specifically retains some or all of these rights, it may be possible for him to

¹⁰⁹ *Waring v. Dunlea*, 26 F. Supp. 338 (E. D. N. C. 1939).

¹¹⁰ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

¹¹¹ *Id.* at 440-442, 194 Atl. at 634-635. The majority opinion implied that "the ordinary musician does nothing more than render articulate the silent composition of the author," and indicated that, in order to claim protection, the performer must "elevate interpretations to the realm of independent works of art."

¹¹² See, e. g., Judge Maxey's concurring opinion in the *Waring* case, *supra* note 110, at 456, 194 Atl. at 642; Bass, *Interpretative Rights of Performing Artists*, 42 DICK. L. REV. 57 (1938); Traicoff, *Rights of the Performing Artist in his Interpretation and Performance*, 11 AIR L. REV. 225 (1940); Notes, 20 NEB. L. REV. 79 (1941), 86 PA. L. REV. 217 (1937).

¹¹³ *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481, 490 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956).

¹¹⁴ The creative character of a recording as such has been the subject of a great deal of discussion, both in the United States and abroad. In the Congressional hearings dealing with this subject, the record producers have emphasized the artistic nature of their contribution to a recording, and have urged that protection be accorded to them rather than to the performers; see notes 261, 273-276, 322, 336-337, *infra*, and text thereto. These views have found support in several articles; see, e. g., Baum, *supra* note 106; Diamond and Adler, *supra* note 81; Littauer, *The Present Legal Status of Artists, Recorders and Broadcasters in America*, 3 GEISTIGES EIGENTUM 217, 230 (1938); Note, *Rights of Performers and Recorders Against Unlicensed Record Broadcasts*, 49 YALE L.J. 559, 566 (1940). But see ESCHOLIER, *op. cit. supra* note 106, at 139; Hirsch Ballin, *Related Rights*, 18 ARCHIV FÜR-FILM-FUNK-UND THEATERRECHT 310 (Copyright Society Translation Service 1955, no. 4a) (1954); Plaisant, *Vers la protection mondiale des "droits voisins"*, 3 REVUE INTERNATIONALE DU DROIT D'AUTEUR 74, 99 (1964); STRASCHNOV, *LE DROIT D'AUTEUR ET LES DROITS CONNEXES EN RADIO-DIFFUSION* 59-63 (1948).

¹¹⁵ *RCA Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939). Judge Leibell stated that this was "one of the most controverted issues" in the case (*Id.* at 792).

¹¹⁶ 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). In the decision on appeal, Judge Learned Hand made several assumptions for the sake of argument, including the assumption that a common law copyright arises from "the skill and art by which a phonographic record maker makes possible the proper recording of . . . performances upon a disc." Judge Hand was careful to specify, however, that this assumption was "far more doubtful" than his previous assumption that the performances of an orchestra conductor are entitled to common law copyright. *Id.* at 88.

¹¹⁷ *Capitol Records, Inc. v. Mercury Records Corporation*, 109 F. Supp. 330 (S.D.N.Y. 1952), *aff'd*, 221 F. 2d 657 (2d Cir. 1955). Both the trial and appeal courts considered that any rights of the record manufacturer were acquired by him through assignment from the performing artists.

¹¹⁸ *Rogers v. Republic Productions, Inc.*, 104 F. Supp. 328 (S.D. Cal. 1952), *rev'd on other grounds*, 213 F. 2d 662 (9th Cir. 1954); *Autry v. Republic Productions, Inc.*, 104 F. Supp. 913 (S.D. Cal. 1952), *aff'd and modified*, 213 F. 2d 667 (9th Cir. 1954); *Capitol Records, Inc. v. Mercury Records Corporation*, 109 F. Supp. 330 (S.D.N.Y. 1952), *aff'd*, 221 F. 2d 657 (2d Cir. 1955); *Sherwood v. McGowan*, 3 Misc. 2d 235 (N.Y. Sup. Ct. 1956).

assert them in the future.¹¹⁹ Or, if he specifically grants all of his common law rights, he can no longer claim any property in his performance.¹²⁰ If the contract is silent or inconclusive on the point, there appears to be a split of authority; several courts have held that all property rights in the performances are conveyed unless the performer specifically reserves them,¹²¹ while there is also some authority to the effect that a performer may enjoy any use of his recorded performance "not contemplated at the time of its creation."¹²²

(d) *Effect of publication on common law copyright in sound recordings.*—Under the present law of the United States, publication of a work that is potentially capable of being copyrighted destroys common law copyright in the work completely; unless statutory copyright is secured upon publication, the work enters the public domain. Publication is generally considered to be an act which, by its nature, unrestrictedly places copies of a work before the public. However, it seems clear that the public performance of a work is not a publication, even when the performance takes place before an audience of millions.¹²³

The entire question of common law copyright in sound recordings therefore turns upon two crucial questions:

(1) Does the unrestricted sale or public distribution of records constitute a general publication of the recorded performance?

(2) If so, does the publication of a work that cannot be copyrighted under the Federal statute throw that work into the public domain?

The case law dealing with these questions is a maze of conflicting opinions. A chronological review of the most important decisions may be the simplest way of analyzing the problem.

(1) The *Waring* case (1937).¹²⁴ The earliest and most famous case to deal with the problem involved the unauthorized broadcasting of phonograph records reproducing performances by plaintiff's orchestra. The Pennsylvania court acknowledged that the unrestricted sale of phonograph records would ordinarily amount to a general publication of the performance and would destroy the common law copyright. It held, however, that the use of the legend "Not licensed for radio broadcasts" on the records created an "equitable servitude"¹²⁵ which limited the publication and preserved the performer's right to restrain unauthorized broadcasts. Since, at least by its

¹¹⁹ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937); *Waring v. Dunlea*, 26 F. Supp. 338 (E.D.N.C. 1939); *RCA Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F. 2d 88 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *National Ass'n of Performing Artists v. Wm. Penn Broadcasting Co.*, 38 F. Supp. 531 (E.D. Pa. 1941); *Granz v. Harris*, 198 F. 2d 585 (2d Cir. 1952); *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

¹²⁰ *Lillic v. Warner Bros. Pictures, Inc.*, 139 Cal. App. 724, 34 P. 2d 835 (1934); *Noble v. One Sixty Commonwealth Avenue, Inc.*, 19 F. Supp. 871 (D. Mass. 1937); *RCA Mfg. Co. v. Whiteman*, 28 F. Supp. 787 (S.D.N.Y. 1939), *rev'd on other grounds*, 114 F. 2d 88 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940); *Rogers v. Republic Productions, Inc.*, 104 F. Supp. 328 (S.D. Cal. 1952), *rev'd on other grounds*, 213 F. 2d 662 (9th Cir. 1954); *Autry v. Republic Productions, Inc.*, 104 F. Supp. 918 (S.D. Cal. 1952), *aff'd and modified*, 213 F. 2d 667 (9th Cir. 1954); *Sherwood v. McGowan*, 3 Misc. 2d 235 (N.Y. Sup. Ct. 1955).

¹²¹ *Ingram v. Bowers*, 87 F. 2d 65 (2d Cir. 1932); *Crunit v. Marcus Loew Booking Agency*, 162 Misc. 225, 293 N.Y. Supp. 63 (Sup. Ct. 1936); *Long v. Decca Records, Inc.*, 76 N.Y.S. 2d 133 (Sup. Ct. 1947); *Peterson v. K.M.T.R. Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. Super. Ct. July 7, 1949).

¹²² *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481, 487 (3d Cir. 1956), *cert. denied*, 351 U.S. 928 (1956).

¹²³ See Selvin, *Should Performances Be Dedicated?* 42 CALIF. L. REV. 40 (1954).

¹²⁴ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937). The *Waring* decision produced a storm of comment in the legal periodicals; a few of the better discussions of the case appear in the following: Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N. C. L. REV. 202 (1941); Bass, *Interpretative Rights of Performing Artists*, 42 DICK. L. REV. 57 (1938); Littauer, *The Waring Case*, 32 T. M. BULL. (N. S.) 377 (1937); Littauer, *The Present Legal Status of Artists, Records and Broadcasters in America*, 3 GEISTIGES EIGENTUM 217 (1938); Notes, 18 B. U. L. REV. 441 (1938), 38 COL. L. REV. 181 (1938), 49 YALE L. J. 559 (1940).

¹²⁵ See Chafee, *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928).

terms, the legend appearing on the records in the *Waring* case related only to broadcasting, it is possible to argue that plaintiff would have had no right to enjoin dubbing on the theory of common law copyright.¹²⁶

(2) The *Dunlea* case (1939).¹²⁷ In this case, which also involved unauthorized broadcasting, a Federal court sitting in North Carolina apparently adopted the *Waring* rule.¹²⁸ As a result of this decision, three States passed statutes stating that the sale of phonograph records results in the loss of common law property rights in the performance reproduced.¹²⁹

(3) The *Whiteman* case (1940).¹³⁰ This case also involved unauthorized broadcasting, and was decided by a Federal court sitting in New York. In a decision written by Judge Learned Hand, the court rejected the "equitable servitude" theory of limited publication; it held that the public sale of phonograph records destroys common law copyright in the performance, and that the use of the records themselves could not be restricted. A clear inference may be drawn from this decision that the dubbing of phonograph records could not be enjoined on the theory of common law copyright.¹³¹ For a number of years, the *Whiteman* case was regarded as representing good law in New York and in other jurisdictions outside of Pennsylvania.¹³²

(4) The *Metropolitan Opera* case (1950).¹³³ Here an opera company, a record company holding a license from the opera company, and a broadcaster sued to restrain the commercial sale of unauthorized records reproduced from operatic broadcasts. Suit was brought in the State courts of New York, and relief was granted to all three plaintiffs. The decision is based primarily on the theory of unfair competition, but includes what appears to be a holding that the opera performances are protected by a common law copyright and that protection had not been lost by performance and broadcast. No consideration was given to the effect of the record company's sale of its own recordings.

(5) The *Granz* case (1952).¹³⁴ This suit involved a contract dispute and was brought in a Federal court sitting in New York by a jazz im-

¹²⁶ As one commentator has pointed out, "the court did not consider whether *Waring's* rights in the records outside the restriction had been dedicated by publication"; Note, 7 BAYLOR L. REV. 442, 444 (1955). However, several of the records involved in the *Whiteman* case bore no restrictive legends at all, and the lower court still found recovery on the ground that since a phonograph record is by its nature intended simply for home use, a purchaser necessarily has notice that the record may be used only for home performances. *RCA Mfg. Co. v. Whiteman*, 28 F. Supp. 787, 792-793 (S. D. N. Y. 1939), *rev'd*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). The court in the *Ettore* case likewise adroitly sidestepped the problem of restrictive notices on the records. *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481, 490-491 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956).

¹²⁷ *Waring v. Dunlea*, 26 F. Supp. 338 (E. D. N. C. 1939). See Notes, 10 AIR L. REV. 315 (1939), 37 ILL. L. REV. 245 (1942).

¹²⁸ The opinion is extremely confusing, and the basis for the decision is unclear.

¹²⁹ See Section II.B.1. and notes 80-81 *supra*.

¹³⁰ *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). For discussions of this case see, among others: Notes, 9 DUKE B.A.J. 57 (1941); 35 ILL. L. REV. 546 (1941); 26 IOWA L. REV. 384 (1941); 26 WASH. U.L.Q. 272 (1941). For an excellent discussion of the lower court decision and the background of the problem, see Note, 49 YALE L. J. 559 (1940).

¹³¹ In fact, this was one of the bases of the decision. In rejecting the "equitable servitude" theory, Judge Hand pointed out that the restrictive legend on the records referred only to broadcasting, which would logically mean that anyone could dub the records. This, he felt, would result in an absurd situation, and he expressed his conclusion as follows:

If "the common-law property" in the rendition be gone, then anyone may copy it who chances to hear it, and may use it as he pleases. It would be the height of "unreasonableness" to forbid any uses to the owner of the record which were open to anyone who might choose to copy the rendition from the record. . . . Thus, even if *Whiteman* and *RCA Manufacturing Company, Inc.*, have a "common-law property" which performance does not end, it is immaterial, unless the right to copy the rendition from the records was preserved through the notice of the restriction. 114 F. 2d 86, 89 (2d Cir. 1940).

¹³² See, e.g., Comment, *Recent Developments in Performers' Literary Property Law*, 1953 U.C.L.A. INTRA. L. REV. 13.

¹³³ *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 483 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951). See Young, *Plagiarism, Piracy and the Common Law Copyright*, in COPYRIGHT LAW SYMPOSIUM 205, 211-212 (ASCAP, 1954); Note, 64 HARV. L. REV. 682 (1951).

¹³⁴ *Granz v. Harris*, 98 F. Supp. 906 (S. D. N. Y. 1951), *aff'd and modified*, 198 F. 2d 585 (2d Cir. 1952). See Schauer, *supra* note 132.

presario against a licensee. The action included a claim of unauthorized re-recording, and the trial court held specifically that "if the plaintiff had any common law property in the musical productions it did not survive the sale of the subject masters."¹³⁵ The appeals court accepted this holding on the authority of the *Whiteman* rule, and the *Metropolitan Opera* case was not even cited.

(6) The *Capitol Records* case (1955).¹³⁶ Here the U.S. Court of Appeals for the Second Circuit dealt with what was essentially an unauthorized dubbing situation.¹³⁷ A majority of the court ruled that the case must be decided on the basis of the law of New York. It held that the *Metropolitan Opera* case, rather than the *Whiteman* case, represents New York law on the point. By means of an extremely controversial line of reasoning,¹³⁸ the court construed the *Metropolitan Opera* case as holding that—

where the originator, or the assignee of the originator, of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records.¹³⁹

Although the opinion is not altogether clear, the case appears to hold that, unlike works that are subject to statutory copyright, recorded performances are protected by a perpetual common law copyright which cannot be lost by publication.¹⁴⁰

(7) The *Ettore* case (1956).¹⁴¹ The most recent case in the Federal courts involving protection for performers dealt with a professional fighter's right to restrain television broadcasts of an old film of one of his fights. The case was tried in the Third Circuit of the U.S. Court of Appeals, and the court found it necessary to apply the laws of Pennsylvania, Delaware, New Jersey, and New York. The court considered the *Waring*, *Whiteman*, *Metropolitan Opera*, and *Capitol Records* decisions and held that, under the laws of all four States, the common law copyright in the filmed performance had not been lost by general distribution of the film. The decision tended to dismiss the "equitable servitude" aspect of the *Waring* decision, and held that the *Whiteman* case was "expressly overruled" by *Capitol Records*.¹⁴² One judge dissented on the ground that there had been a general publication of the performance, and that plaintiff's common law copyright had thereby been lost.¹⁴³

¹³⁵ *Granz v. Harris*, 98 F. Supp. 906, 910 (S.D.N.Y. 1951), *aff'd and modified*, 198 F. 2d 585 (2d Cir. 1952).
¹³⁶ *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657 (2d Cir. 1955). See Kaplan, *Performer's Right and Copyright; The Capitol Records Case*, 69 HARV. L. REV. 409 (1956); Nimmer, *Copyright 1955*, 43 CALIF. L. REV. 791, 801-806 (1955); Nimmer, *Copyright Publication*, 56 COL. L. REV. 185, 188-194 (1956); Notes, 56 COL. L. REV. 126 (1956), 3 U.C.L.A.L. REV. 113 (1955).

¹³⁷ The *Capitol Records* case, note 136 *supra*, involved classical recordings made in Germany. The original owner, who had secured the performer's rights by assignment, had transferred exclusive American rights to plaintiff and exclusive Czechoslovakian rights to defendant. The plaintiff sought an injunction to prevent defendant from selling records in the United States.

¹³⁸ It is certainly arguable that the majority of the court stretched the *Metropolitan Opera* case to its ultimate limit in order to reach a desired result. One commentator has suggested that the court used the *Metropolitan Opera* case as an excuse for departing from the position it had taken in the *Whiteman* case; Note, 3 U.C.L.A.L. REV. 113 (1955). Another commentator concludes that the court's reasoning was "unjustified" and "inadequate." Nimmer, *Copyright 1955*, 43 CALIF. L. REV. 791, 803-804 (1955).

¹³⁹ *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657, 683 (2d Cir. 1955).
¹⁴⁰ It was this aspect of the case that apparently troubled Judge Hand most. His dissent emphasizes his feeling that the decision gives the States the unduly wide power to grant perpetual protection to performances, and thus to "defeat the overriding purpose of the [Constitutional] Clause, which was to grant only for 'limited Times' the untrammelled exploitation of an author's 'Writings.'" *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657, 667 (2d Cir. 1955) (dissenting opinion). For an excellent discussion of this question, see Kaplan, *supra* note 136.

¹⁴¹ *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956). See Note, 10 RUTGERS L. REV. 741 (1956).

¹⁴² *Id.* at 488.
¹⁴³ Judge Hastie's dissenting opinion also questions whether the concept of common law copyright should be extended into the field of sports to accord an athlete rights in his "performance." *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481, 496 (3d Cir. 1956) (dissenting opinion).

(8) The *Gieseeking* case (1956).^{143a} A recent New York case involving the dubbing situation is indicative of recent judicial trends in this area. The complaint alleged violation of plaintiff's right of privacy and unfair competition. The court denied a motion to dismiss, holding that the complaint stated a cause of action on both grounds. In the course of his opinion, Judge Lupiano cited the *Capitol Records* decision and stated:

A performer has a property right in his performance that it shall not be used for a purpose not intended, and particularly in a manner which does not fairly represent his service. The originator or his assignee of records of performances of an artist does not, by putting such records on public sale, dedicate the right to copy or sell the record.^{143b}

3. Protection of sound recordings on the theory of unfair competition

Traditionally, three elements were essential in order to establish a common law case of unfair competition:¹⁴⁴

(1) Plaintiff and defendant must have been engaged in competition with each other;

(2) Defendant must have appropriated a business asset that plaintiff had acquired by the investment of skill, money, time, and effort; and

(3) Defendant must have fraudulently "passed off" or "palmed off" the appropriated asset as the plaintiff's, thereby confusing the public as to the source of the goods.

In an early case involving the counterfeiting of one company's phonograph records by another, the court found all three of the prescribed elements, and thus had no difficulty in granting an injunction on the ground of unfair competition.¹⁴⁵ Similarly today, as long as competition, misappropriation, and passing off can all be found in a case, it is clear that almost all courts would allow recovery against unauthorized dubbing.¹⁴⁶

It is unlikely that all three of these elements will be present in an ordinary dubbing case, however. "Passing off" is particularly difficult to establish, since there is rarely any incentive for the appropriator to represent the recording as anything except exactly what it is. Likewise, while the record manufacturer ordinarily has no difficulty in showing that he is in competition with the appropriator, performers frequently find it difficult to establish this factor. Thus, in order to reach results which they considered equitable, the courts have tended

^{143a} *Gieseeking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171 (Sup. Ct. 1956).

^{143b} *Id.* at 172-173.

¹⁴⁴ See Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289 (1940). One case stated the traditional rule very simply as follows: "A cause of action of that kind arises where one sells as his goods those of a competitor and an essential element is that the parties are competitors." *Peterson v. KMTR Radio Corp.*, 18 U.S.L. WEEK 2044 (Cal. Super. Ct. July 7, 1949).

¹⁴⁵ *Victor Talking Mach. Co. v. Armstrong*, 132 Fed. 711 (S.D.N.Y. 1904). Plaintiff in this case argued that it had a property right in its recordings which could be protected against unauthorized appropriation, regardless of the factor of "passing off." Since the court found the existence of "passing off," it declined to discuss this "novel and interesting question." *Id.* at 712. Cf. *Asolian Co. v. Royal Music Roll Co.*, 196 Fed. 926 (W.D.N.Y. 1912); *Victor Talking Mach. Co. v. Max Hesslein Opera Disc Co.* (E.D.N.Y. 1923) (unreported; no opinion filed).

¹⁴⁶ In *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940), Judge Hand, while rejecting a claim of unfair competition, stated his view of the concept as follows (at 90):

Nor need we say that insofar as radio announcers declare, directly or indirectly, that the broadcast of a Whiteman record is the broadcast of a Whiteman performance, that conduct is a tort which Whiteman could enjoin. That would indeed be "unfair competition."

In *Granz v. Harris*, 98 F. Supp. 906 (S.D.N.Y. 1951), *aff'd and modified*, 198 F. 2d 585 (2d Cir. 1952), the plaintiff-impresario, who had contracted to permit defendants to issue recordings of his performances, was held to have lost all literary property rights in the performances when the records were sold. However, his contract required that the records contain a legend attributing the performances to him. The Court of Appeals held that, under this contractual provision, the defendants would be guilty of unfair competition if they issued, without authority, abbreviated records which were attributed to the plaintiff.

to broaden the boundaries of unfair competition. This is particularly true in the area of sound recordings.¹⁴⁷

In the fountainhead case of *International News Service v. Associated Press*,¹⁴⁸ the Supreme Court sought to extend the traditional view of unfair competition by discarding the requirement for fraud, misrepresentation, or "passing off." The court held that, when a news service "misappropriated" the uncopyrighted news dispatches of a competitor and used them as its own, it was guilty of unfair competition on what has come to be known as the misappropriation or free ride theory. This decision had been anticipated several years earlier in *Fonotipia Limited v. Bradley*,¹⁴⁹ a case involving dubbing of phonograph records; the court in that case specifically held that there had been no "passing off," and granted an injunction solely on the ground of misappropriation.¹⁵⁰

Although the *Associated Press* case contained some broad language, later cases have largely confined the decision to the field of news gathering, with one notable exception. The "misappropriation" doctrine has been widely applied in the entertainment field, and has formed the basis for several decisions involving sound recordings.¹⁵¹

The most significant extensions of the *Associated Press* rule with respect to records are found in the *Waring*¹⁵² and *Metropolitan Opera*¹⁵³ decisions, both of which have already been discussed in connection with common law copyright.¹⁵⁴ The majority of the court in the *Waring* case chose to make unfair competition an alternative ground for the decision; on the authority of the *Associated Press* case it held that, despite the absence of fraud, deception, or passing off, the appropriation of plaintiff's "musical genius and artistry" amounted to unfair competition.¹⁵⁵ The majority held that competition existed between the plaintiff orchestra leader and the defendant broadcasting station, although the concurring opinion questions whether this is logically possible.¹⁵⁶

The *Metropolitan Opera* case extended the boundaries of unfair competition even further. Here recovery against the manufacturer of unauthorized records of operatic broadcasts was allowed to the opera

¹⁴⁷ See Callmann, *Copyright and Unfair Competition*, 2 LA. L. REV. 648 (1940); Oberst, *Use of the Doctrine of Unfair Competition to Supplement Copyright in the Protection of Literary and Musical Property*, 29 KY. L.J. 271 (1941); Note, *Piracy on Records*, 5 STAN. L. REV. 433 (1953).

¹⁴⁸ 248 U.S. 215 (1918).

¹⁴⁹ 171 Fed. 951 (E.D.N.Y. 1909).

¹⁵⁰ Since the court was under the delusion that recorded performances were made copyrightable by the statute of 1909, and since it was clearly swayed by this notion, the decision is somewhat questionable on its face. See notes 43-46 *supra*, and text thereto. The case has apparently been overruled, at least in part, by *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914 (2d Cir. 1952).

¹⁵¹ In *Federal Trade Commission v. Orient Music Roll Co.*, 2 F.T.C. 176 (1910), the Federal Trade Commission issued a cease and desist order against a music roll manufacturer who had been duplicating a competitor's rolls; there does not appear to have been any element of "passing off" in the case. See the account of *Columbia Records Inc. v. Paradox Industries, Inc.*, an action brought in the New York Supreme Court in 1952, in Note, *Piracy on Records*, 5 STAN. L. REV. 433, 436-441 (1953).

¹⁵² *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 194 Atl. 631 (1937).

¹⁵³ *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 583 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951).

¹⁵⁴ See Section II.D.2, *supra*.

¹⁵⁵ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 453, 194 Atl. 631, 640 (1937). Several commentators have praised this as the soundest aspect of the decision; see, e.g., 2 LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 736 (1938); Rea, *Rights of Recording Orchestras Against Radio Stations Using Records for Broadcast Purposes*, 2 WASH. & LEE L. REV. 85, 99 (1940); Notes, 6 GEO. WASH. L. REV. 237, 240 (1938), 26 GEO. L.J. 504, 505 (1938), 61 HARV. L. REV. 171, 172 (1937); 15 N.Y.U.L.Q. REV. 275, 276-277 (1938), 23 WASH. U.L.Q. 283, 284 (1938). One commentator questioned whether this ground for the holding was necessary, in view of the decision on common law copyright; see Note, 86 U. OF PA. L. REV. 217, 219 (1937). Other commentators felt that the unfair competition holding was open to criticism; see, e.g., Callmann, *Copyright and Unfair Competition*, 2 LA. L. REV. 648, 659 (1940).

¹⁵⁶ *Waring v. WDAS Broadcasting Station, Inc.*, 327 Pa. 433, 463, 194 Atl. 631, 645 (1937) (concurring opinion).

company, to the broadcaster, and to a record company which had an exclusive license from the opera company. The case purported to hold that neither passing off nor direct competition is required to establish unfair competition today.¹⁵⁷ Since the court found both of these elements in the case, the decision cannot be regarded as conclusive on the point. However, the recent *Gieseking* case appears to hold that, under the *Metropolitan Opera* rule, unfair competition existed in a simple dubbing situation where neither passing off nor direct competition were present.^{157a}

The extension of unfair competition beyond its traditional boundaries in this field has not been without its opponents, notably Judge Learned Hand. Judge Hand has consistently warned of the danger of attempting to protect something under unfair competition that cannot be protected under common law or statutory copyright, thereby doing violence to the constitutional purpose and the congressional intent. Speaking for the court in *RCA Mfg. Co. v. Whiteman*,¹⁵⁸ he held that something more than mere misappropriation is required to establish unfair competition.¹⁵⁹ He stated:

"Property" is a historical concept; one may bestow much labor and ingenuity which inures only to the public benefit; "ideas," for instance, though upon them all civilization is built, may never be "owned." The law does not protect them at all, but only their expression; and how far that protection shall go is a question of more or less; an author has no "natural right" even so far and is not free to make his own terms with the public. In the case at bar if Whiteman and RCA Manufacturing Company, Inc., cannot bring themselves within the law of common law copyright, there is nothing to justify a priori any continuance if their control over the activities of the public to which they have seen fit to dedicate the larger part of their contribution.¹⁶⁰

Judge Hand's views were shared by the dissenting judge in the recent *Ettore* case,¹⁶¹ but the weight of authority appears to lean toward broader and broader protection for recordings on the theory of unfair competition.¹⁶²

¹⁵⁷ On the requirement for passing off, the court in the *Metropolitan Opera* case has this to say:

With the passage of those simple and halcyon days when the chief business malpractice was "palming off" and with the development of more complex business relationships and, unfortunately, malpractices, many courts, including the courts of this state, extended the doctrine of unfair competition beyond the cases of "palming off." The extension resulted in the granting of relief in cases where there was no fraud on the public, but only a misappropriation for the commercial advantage of one person of a benefit or "property right" belonging to another. *Metropolitan Opera Ass'n, Inc. v. Wagner-Nichols Recorder Corp.*, 101 N.Y.S. 2d 483, 489 (Sup. Ct. 1950), *aff'd*, 107 N.Y.S. 2d 795 (App. Div. 1951).

The court's statement with respect to the requirement of competition is as follows (*Id.* at 492):

The modern view as to the law of unfair competition does not rest solely on the ground of direct competitive injury, but on the broader principle that property rights of commercial value are to be and will be protected from any form of unfair invasion or infringement and from any form of commercial immorality, and a court of equity will penetrate and restrain every guise resorted to by the wrongdoer. The courts have thus recognized that in the complex pattern of modern business relationships, persons in theoretically non-competitive fields may, by unethical business practices inflict as severe and reprehensible injuries upon others as can direct competitors.

^{157a} *Gieseking v. Urania Records, Inc.*, 155 N.Y.S. 2d 171, 173 (Sup. Ct. 1956).

¹⁵⁸ 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940).

¹⁵⁹ To the same effect, see Judge Hand's remarks in his dissent in *Capitol Records, Inc. v. Mercury Records Corporation*, 221 F. 2d 657, 664 (2d Cir. 1955), and his opinion in *G. Ricordi & Co. v. Haendler*, 194 F. 2d 914 (2d Cir. 1952).

¹⁶⁰ *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86, 90 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940).

¹⁶¹ *Ettore v. Philco Television Broadcasting Corporation*, 229 F. 2d 481, 496 (3d Cir. 1956), *cert. denied*, 351 U.S. 926 (1956).

¹⁶² Several commentators have questioned the wisdom of too broad an extension of the doctrine of unfair competition. See, e.g., Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1319-1320 (1940); Baer, *Performer's Right to Enjoin Unlicensed Broadcasts of Recorded Renditions*, 19 N.C.L. REV. 202, 210 (1941); Notes, 9 FORD. L. REV. 425, 427 (1940), 5 STAN. L. REV. 433, 449-456 (1953). Baer expressed his view as follows (*supra*, at 210):

Dishonest and fraudulent business practices frequently are and should be curbed by the courts as unfair competition. Our problem, however, is neither one of fraud nor dishonesty but rather a doubtful question of ethics on which reasonable men may differ. Enjoining as "unfair competition" what to the court appears unethical will not only create practical obstacles in the application of such a policy but is sure to result in uncertainty due to a contrariety of decisions. A further objection to the use of the injunction on the unfair competition theory is that the court thereby creates a perpetual monopoly in favor of the unpatented or uncopyrighted work in excess of any monopoly afforded by the patent and copyright acts. If monopolistic protection is to be given the performer in his rendition, Congress and not the courts should declare and fix the limits of that monopoly.

E. SUMMARY

From the foregoing analysis it may be possible to draw some general and very tentative conclusions concerning the present law in the United States:

1. Aside from the special case of motion picture sound tracks, there is essentially no statutory protection for sound recordings in the United States.

2. Courts in dubbing cases must apply state common law rules. Most States have no law on the subject, and the decisions that do exist are contradictory in various respects. Where a conflict of law situation is presented, it may be necessary for a court to determine and reconcile the laws of several States.

3. Common law copyright and unfair competition are the two principal theories upon which dubbing may be enjoined. The two concepts are frequently confused in the decisions.

4. Common law copyright.

(a) It appears settled that a recorded performance is sufficiently creative to warrant common law copyright protection, but a recording as such probably would not meet this requirement under the present decisions.

(b) Until recently there was a split of authority as to whether the sale of phonograph records destroyed common law rights. The authority of the cases holding that common law copyright protection is forfeited upon the sale of records appears to have been considerably weakened by recent decisions.

(c) Recent decisions indicate that common law copyright protection for a recorded performance may be unlimited both in duration and in scope.¹⁶³

5. Unfair competition.

(a) Rights against unfair competition have been recognized in both the performer and the record producer.

(b) The present tendency of the courts appears to lean toward discarding the traditional requirements of passing off and direct competition, and to enjoin unfair competition where there has simply been a "misappropriation" or a "free ride."

(c) In appropriate cases, protection against dubbing on the theory of unfair competition may be unlimited in both scope and duration.

¹⁶³ The recent copyright decision in *Miller v. Goody*, 139 F. Supp. 176 (S.D.N.Y. 1956), offers an interesting basis for comparison. In an earlier phase of the action a performer's widow joined with various musical copyright proprietors in bringing suit against a "record pirate." A consent decree was obtained, and the copyright proprietors proceeded separately against a vendor who had been selling the piratical records. The court held that the copyright statute offered no protection against the vendor of records made in violation of the compulsory licensing provision. In the course of his opinion, Judge Kaufman referred to the fact that the suit by the performer's widow against the vendor was still pending, and discussed the question of rights in recorded performances, citing the *Capitol Records* decision. *Id.* at 180-181, n. 5-6.

Query: if a common law copyright confers a complete monopoly, might a court be required to recognize rights in a recorded performance which the copyright statute would force him to deny to the work performed?

III. LEGISLATIVE PROPOSALS SINCE 1909

A. DEVELOPMENTS, 1909-24

During the years immediately following enactment of the 1909 statute, only one bill affecting rights in sound recordings was submitted to Congress.¹⁶⁴ This measure¹⁶⁵ would have added a proviso to section 5, following the list of copyrightable works:

And provided further, That nothing in this Act shall be construed to give, directly or indirectly, copyright to any work created or designed for production, reproduction, exhibition, or use in, upon, or through the medium of any patented machine, device, or apparatus.

The bill was introduced in 1912 and was probably intended as an antimonopoly measure aimed at the motion picture industry, but its language seems broad enough to cover sound reproducing devices. No action on the bill was recorded.

B. THE PERKINS BILL, 1925

The first bill ever introduced in Congress which specifically included sound recordings as copyrightable works was H.R. 11258, submitted by Representative Perkins on January 2, 1925.¹⁶⁶ This was one of the first of a long series of general revision bills aimed at permitting the United States to enter the Berne Copyright Union. It was drafted by Thorvald Solberg, the Register of Copyrights,¹⁶⁷ and it was sponsored by the Authors' League.¹⁶⁸

The bill included in the list of copyrightable works:

(q) Phonographic records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced.¹⁶⁹

The bill linked sound records with motion pictures and listed them both as forms of "adaptations" or "arrangements."¹⁷⁰ It specified that the record manufacturer should be the first owner of copyright in the recording but added the following proviso:

Provided, however, That where such motion picture, or such phonographic record or perforated roll or other contrivance, is based in whole or in part upon a work in which copyright subsists, then, during the term of copyright in such work, * * * the copyright in such phonographic record, roll, or other contrivance shall include only the exclusive right to make, copy, and vend it: *And provided further*, That the copyright in * * * such phonographic record, roll, or other contrivance, shall be held subject to all the rights of the owner of the copyright in any work upon which such * * * phonographic record, roll, or other contrivance is based.¹⁷¹

Thus, if the record reproduced a copyrighted work, the rights of the manufacturer were limited to making, copying, and vending; the implication was that public performance and broadcasting rights would accrue to records reproducing public domain material. The term of copyright in the record was to be 50 years from the date the contrivance was "first sold, offered for sale, or otherwise publicly

¹⁶⁴ In 1921 a resolution was introduced in the Senate to preserve motion pictures and sound records of unusual historical interest in a government archive. The resolution assumed that motion pictures were copyrightable and that recordings were not. S.J. RES. 262, 66th Cong., 3d Sess. (1921).

¹⁶⁵ H.R. 21776, 62d Cong., 2d Sess. (1912).

¹⁶⁶ H.R. 11258, 68th Cong., 2d Sess. (1925). The bill was introduced in the Senate by Senator Ernst on February 17, 1925 as S. 4355, 68th Cong., 2d Sess. (1925).

¹⁶⁷ *Hearings Before House Committee on Patents on H.R. 11258*, 68th Cong., 2d Sess. 12 (1925).

¹⁶⁸ *Id.* at 53.

¹⁶⁹ H.R. 11258, 68th Cong., 2d Sess. § 9 (1925).

¹⁷⁰ *Id.* § 10.

¹⁷¹ *Id.* § 7.

distributed,"¹⁷² and the bill took pains to specify the form in which records were to be deposited in the Copyright Office.¹⁷³

Hearings on the Perkins bill were held in January and February 1925.¹⁷⁴ No one spoke directly either in favor of or in opposition to the provisions governing copyright in recordings, and the provisions were hardly mentioned throughout the testimony. In fact, J. G. Paine of the Victor Talking Machine Co. stated that the record manufacturers had not asked for statutory protection, and were not sure they wanted it.¹⁷⁵ He asserted that the bill merely protected against dubbing, and that the manufacturers already had protection against dubbing under the common law theory of unfair competition.

During the hearings Nathan Burkan, counsel for ASCAP and other author-publisher groups, testified at length in opposition to the compulsory licensing provisions. In the course of his arguments he stressed the inequality in recording rights between the author, who was limited to 2 cents per record, and the performer, who could bargain freely for his remuneration.¹⁷⁶ He argued that, if the compulsory license should be retained for authors, it should also be attached to the rights of record manufacturers in their records; "what is sauce for the goose is sauce for the gander."¹⁷⁷

On December 17, 1925, Representative Perkins introduced his bill again in the 69th Congress,¹⁷⁸ but no further action was taken on it.

C. THE VESTAL BILLS, 1926-31

On March 17, 1926, Representative Vestal introduced H.R. 10434,¹⁷⁹ the first of his general revision bills. Like the Perkins bill, this measure extended statutory copyright to "phonographic records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced,"¹⁸⁰ and it contained a special provision dealing with the form in which records were to be deposited in the Copyright Office.¹⁸¹ However, the Vestal bill did not assimilate recordings to "adaptations" and "arrangements," and there was no special provision prescribing the duration of copyright in a record.¹⁸² Most important, the Vestal bill did not contain any provision limiting rights in sound recordings of copyrighted works to making, copying, and vending; there was apparently nothing to prevent the owner of copyright in a record from enjoining not only dubbing but also unauthorized broadcasting and public performance of the record.¹⁸³

Hearings on H.R. 10434 were held in April 1926.¹⁸⁴ Again there was hardly any discussion of the provision making sound recordings

¹⁷² *Id.* § 23.

¹⁷³ *Id.* § 46.

¹⁷⁴ *Hearings, supra* note 167.

¹⁷⁵ *Id.* at 303.

¹⁷⁶ *Id.* at 163, 167, 176-190. For the answers by the record manufacturers to these arguments, see *id.* at 233-234, 238-242, 250-251, 301-304, 328-330, 336, 343-344, 377-378.

¹⁷⁷ *Id.* at 180.

¹⁷⁸ H.R. 5841, 69th Cong., 1st Sess. (1925).

¹⁷⁹ H.R. 10434, 69th Cong., 1st Sess. (1926).

¹⁸⁰ *Id.* § 37.

¹⁸¹ *Id.* § 38.

¹⁸² The bill provided that ". . . where the author is not an individual, the term shall be fifty years from the date of completion of the creation of the work." *Id.* § 13.

¹⁸³ At the hearings Mr. Solberg, the Register of Copyrights, testified as to the differences between the Perkins and Vestal bills. He pointed out that the Vestal bill "contains no express provisions regarding . . . phonographic records" and that "these articles are merely included in the list of classes of works made subject matter of copyright and for which application for copyright registration may be made." *Hearings Before House Committee on Patents on H.R. 10434*, 69th Cong., 1st Sess. 233-234 (1926).

¹⁸⁴ *Hearings, supra* note 163.

copyrightable, and the representative of the Aeolian Co. almost seemed unaware that the bill contained such a provision.¹⁸⁵ On the subject of dubbing he had this to say:

I will tell you this—I am not telling that for public consumption, but there are serious difficulties. I have given a great deal of thought as to how we could stop a man who dubbed our rolls. Fortunately, we have not been bothered very particularly about that. The Victor Co. have; but they get them under certain theories of unfair competition.¹⁸⁶

The author-publisher groups repeated their arguments that the compulsory licensing provision unjustly discriminated against the author, when compared with the performer's freedom to bargain,¹⁸⁷ but this was hotly disputed by the record companies.¹⁸⁸

Representative Vestal introduced his bill again in the 70th Congress,¹⁸⁹ but no further action was taken on it. During the hearings held in 1928, 1929, and 1930¹⁹⁰ on bills dealing with the compulsory licensing provisions, the author-publisher representatives advanced and developed a line of argument they had used before. They pointed out that the record manufacturers were effectively protected against dubbing by the common law,¹⁹¹ and for this reason their contracts with the performers were truly exclusive—no one but Victor could issue a Caruso recording, for example.¹⁹² Consequently, the performer could bargain freely for any remuneration he could get,¹⁹³ and some performers were paid as much as 25 cents per record.¹⁹⁴ In contrast, the copyright law prevented the author from bargaining freely for his recording rights; a ceiling of 2 cents per record was imposed and, since exclusive contracts were legally impossible, no one would ever pay an author more than the statutory fee.¹⁹⁵ The inequality of this situation was stressed, and it was contended that the compulsory license should either be abolished or should be imposed on author and record manufacturer alike.¹⁹⁶

In attempting to answer this argument the record manufacturers contended that the situations were entirely different.¹⁹⁷ Unlike the author, whose copyright gave him sources of remuneration in addition to recording, the performer had no copyright and was paid only for making the record.¹⁹⁸ The performer's rights were personal, and were regulated as a matter of labor.¹⁹⁹ The suggestion that a ceiling be placed on the recording royalties paid to performers was treated as slightly ridiculous.²⁰⁰

The Vestal bill was introduced once more on December 9, 1929,²⁰¹ but no further action was taken on this version. On May 22, 1930, Representative Vestal introduced H.R. 12549,²⁰² a new version of his

¹⁸⁵ *Id.* at 318-319.

¹⁸⁶ *Id.* at 319.

¹⁸⁷ *Id.* at 75, 115-116.

¹⁸⁸ *Id.* at 218-220, 318-322.

¹⁸⁹ H.R. 8912, 70th Cong., 1st Sess. (1928).

¹⁹⁰ *Hearings Before the House Committee on Patents on H.R. 10655*, 70th Cong., 1st Sess. (1928); *Hearings Before the House Committee on Rules on H.R. 13458*, 70th Cong., 2d Sess. (1929); *Hearings Before the House Committee on Patents on H.R. 9639*, 71st Cong., 2d Sess. (1930).

¹⁹¹ *Hearings* (1930), *supra* note 190, at 10-11, 27, 29.

¹⁹² *Id.* at 27.

¹⁹³ *Hearings* (1928), *supra* note 190, at 7; *Hearings* (1930), *supra* note 190, at 3.

¹⁹⁴ *Hearings* (1930), *supra* note 190, at 27.

¹⁹⁵ *Hearings* (1928), *supra* note 190, at 7, 67.

¹⁹⁶ *Id.* at 7; *Hearings* (1929), *supra* note 190, at 53; *Hearings* (1930), *supra* note 190, at 29.

¹⁹⁷ *Hearings* (1928), *supra* note 190, at 71, 161.

¹⁹⁸ *Id.* at 71, 159.

¹⁹⁹ *Id.* at 71, 161.

²⁰⁰ *Id.* at 61, 161.

²⁰¹ H.R. 8990, 71st Cong., 2d Sess. (1929).

²⁰² H.R. 12549, 71st Cong., 2d Sess. (1930).

general revision bill. Sound recordings were still enumerated among the classes of copyrightable works,²⁰⁵ but the language of the provision had been changed substantially:

(q) Phonographic records, perforated rolls, and other similar contrivances, by means of which sounds may be mechanically recorded for purposes other than public performance, exhibition, or transmission: *Provided*, Anything to the contrary in this Act notwithstanding, that the copyright in such phonographic records, rolls, or contrivances shall consist solely of the exclusive right to print, reprint, publish, copy, and vend said phonographic records, rolls, and contrivances, and that any such copyright and each and every right thereunder, shall be subject to each and every right of the owner of the copyright in any existing or previously existing work, written on said records, rolls, or other contrivances, at all times, in the absence of express contract to the contrary.²⁰⁴

By its terms, this provision made copyrightable only those recordings that had not been made for "public performance, exhibition, or transmission"; it thus purported to exclude from its scope both sound tracks²⁰⁵ and recordings made for broadcasting. Protection under the provision was expressly limited to making, copying, and vending, and the rights of the record manufacturer were made subject to the rights of the owner of copyright in the work recorded.

No hearings on the new Vestal bill were held in the House of Representatives. The measure was reported favorably by the Committee on Patents on May 28, 1930,²⁰⁶ June 13, 1930,²⁰⁷ and June 24, 1930.²⁰⁸ None of the reports contain any reference to the provisions dealing with copyright in sound recordings. The bill was debated in the House on January 12, 1931, at which time Representative Busby offered an amendment striking out paragraph (q), thereby omitting sound recordings from the list of copyrightable works.²⁰⁹ In connection with this amendment Chairman Vestal of the Committee on Patents stated:

The committee has gone over this proposition and had an amendment to strike it out. We are perfectly willing that this amendment shall be agreed to.²¹⁰

Representative Stafford pointed out that, in addition to striking out paragraph (q) it would be advisable to strike out the next paragraph, which purported to cover "works not specifically hereinabove enumerated." He stated:

The last paragraph is all-pervasive and covers everything imaginable. You are agreeing to strike out paragraph (q), relating to phonographic records, and if you are sincere in your desire why not strike out the omnibus clause which takes in everything? I do not think the gentlemen of the committee have allowed anything to escape them.²¹¹

Both amendments were agreed to and, when it passed the House on the following day, the bill contained no provisions dealing with copyright in sound recordings.

The Vestal bill was then referred to the Senate, where hearings were held on January 28 and 29, 1931.²¹² Once again there was hardly any discussion of the problem of copyright in sound recordings, and there

²⁰⁵ There was also a section prescribing the form in which phonograph records were to be deposited in the Copyright Office. *Id.* § 38.

²⁰⁴ *Id.* § 37.

²⁰⁶ The paragraphs enumerating motion pictures were broadened to read as follows (*ibid.*):

(l) Motion-picture photoplays, with or without sound and/or dialogue;

(m) Motion pictures other than photoplays, with or without sound and/or dialogue;

²⁰⁷ H. R. REP. NO. 1687, 71st Cong., 2d Sess. (1930).

²⁰⁸ H. R. REP. NO. 1898, 71st Cong., 2d Sess. (1930).

²⁰⁹ H. R. REP. NO. 2016, 71st Cong., 2d Sess. (1930).

²¹⁰ 74 CONG. REC. 2034 (1931).

²¹¹ *Ibid.*

²¹² *Ibid.*

²¹³ *Hearings Before Senate Committee on Patents on H. R. 18549*, 71st Cong., 3d Sess. (1931).

was no clear statement of why the provision had been dropped from the bill. There was some indication, however, that the amendment may have been prompted by a fear that the provision would have been held unconstitutional.²¹³

During the hearings Frank D. Scott, a representative of radio and phonograph manufacturers, offered a rather elaborate amendment which would have restored sound recordings to the list of copyrightable works.²¹⁴ The recordings were to be regarded as "new works" similar to adaptations; the manufacturer was to be deemed as author and first owner of copyright, but his rights were subject to those of owners of copyright in the works recorded.²¹⁵ The proposed copyright would have included not only the exclusive rights to make, copy, and vend the records, but also rights of public performance for profit and—

such other of the exclusive rights enumerated in section 1 of this act as or may be necessary to the complete protection of the copyright proprietor of said records.

In support of his amendment, Mr. Scott stated:

[W]e say we should at least be protected to the point of being able to prevent some fly-by-night fellow coming in and stealing the product we have paid for. There cannot be any objection to that.²¹⁶

There was no further discussion of these suggestions, and the Vestal bill never reached the Senate floor.

D. THE SIROVICH BILLS, 1932

Throughout February and the first half of March 1932, a series of hearings were held before the House Committee on Patents.²¹⁷ These dealt with the general subject of copyright law revision, but without reference to any specific bill. It was on this occasion that, for the first time, the question of copyright in recordings became a real issue at the hearings. The reason, it seems clear, was the increasing use of recorded music in radiobroadcasting.

Representative Sirovich, the new chairman of the committee, expressed himself as being in favor of extending copyright protection to the record companies.²¹⁸ Letters filed by Arthur E. Garmaize on behalf of Columbia Phonograph Co., Inc.,²¹⁹ and by other record manufacturers,²²⁰ urged copyright for records, pointing out that the laws of many other countries afford such protection. Louis G. Caldwell, attorney for the National Broadcasters' Association, opposed granting copyright protection to records on the ground that it would be seriously prejudicial to small broadcasting stations.²²¹

²¹³ *Id.* at 132.

²¹⁴ *Id.* at 128-129, 268-269. Paragraph (q) would have read:

(q) Records, and/or recordings of sound and/or pictures, either separately or in coordination, perforated rolls and other similar contrivances other than as enumerated in subsection (l) and (m) hereof.

²¹⁵ *Ibid.*

²¹⁶ *Id.* at 132.

²¹⁷ *Hearings Before the House Committee on Patents on General Revision of the Copyright Law*, 72d Cong., 1st Sess. (1932).

²¹⁸ *Id.* at 19.

²¹⁹ *Id.* at 238. Mr. Garmaize suggested enactment of the following provision:

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sound may be reproduced, in like manner as if such contrivances were musical, literary, or dramatic works, and the person who was the owner of the original plate matrix or negative at the time when such plate matrix or negative was made shall be deemed to be the author of the work.

²²⁰ *Id.* at 240.

²²¹ *Id.* at 193.

In March 1932, as a result of these hearings, Chairman Sirovich introduced three new general revision bills in quick succession.²²² These bills were quite similar and each purported to make sound recordings copyrightable, but there were certain variations in language.

None of the Sirovich bills included sound recordings in the specific enumeration of copyrightable works, but each contained an omnibus clause that was intended to incorporate them by reference.²²³

H.R. 10364

(o) composite works mentioned in section 4 and not enumerated above;

H.R. 10740

(m) miscellaneous works embodying literary, artistic, or scientific creations of authors, including composite works mentioned in section 4 not enumerated above and any copyrightable works not otherwise classified.

H.R. 10976

(m) miscellaneous writings including works mentioned in section 4 not enumerated above. The foregoing specifications shall not be held to limit the subject matter of copyright as defined in section 1 of this Act.

Section 4, referred to in each of these provisions, was the same in H.R. 10364 and H.R. 10740:

Copyright shall subsist in compilations, abridgments, translations, dramatizations, adaptations, and arrangements, including those for sound disk records, sound film records, electrical-transcription records, and perforated rolls, and arrangements and compilations for radio broadcasting and television, notwithstanding such works are based in whole or in part upon works in the public domain and/or copyright works provided the consent of the copyright owner has been secured; * * *

Some of the evident ambiguities in this section were removed when the provision appeared in H.R. 10976:

Translations and compilations, abridgments, adaptations, and arrangements, including sound disk records and perforated rolls, and arrangements and compilations for radio broadcasting and television or other versions of works, shall be regarded as new works and copyright shall subsist therein, notwithstanding such works are based in whole or in part upon works in the public domain and/or copyright works provided the consent of the copyright owner has been secured; * * *

Each of the bills contained a special provision dealing with deposit of records in the Copyright Office.²²⁴ The bills specified that the "performance (except by broadcasting)" of a record was free from copyright control;²²⁵ the owner of copyright in a sound recording was thus given rights against broadcasting as well as against dubbing and the sale of dubbed copies.

Hearings on H.R. 10976, the third of these bills, were held toward the end of March 1932.²²⁶ Strong opposition to the proposal for copyright in records was voiced by Henry A. Bellows of the National Association of Broadcasters, who argued that it would impose a "real hardship" on small radio stations.²²⁷ However, Mr. Bellows indicated that he would have no objection to the provision if it were confined to dubbing and if broadcasters were excluded from its effect.²²⁸ Nathan Burkan, counsel for ASCAP, attacked the provision on the

²²² H.R. 10364, 72d Cong., 1st Sess. (1932); H.R. 10740, 72d Cong., 1st Sess. (1932); H.R. 10976, 72d Cong., 1st Sess. (1932).

²²³ The provision appears in § 3 of each bill.

²²⁴ The provision appears in § 18 of H.R. 10364 and H.R. 10740, and in § 19 of H.R. 10976.

²²⁵ The provision appears in § 11(e) of H.R. 10364 and H.R. 10740, and in § 12(e) of H.R. 10976.

²²⁶ *Hearings Before the House Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. (1932).

²²⁷ *Id.* at 154.

²²⁸ *Id.* at 157.

ground that it was unconstitutional and that it would result in a multiplicity of claims.²²⁹

H.R. 10976 was reported on April 5, 1932,²³⁰ but no further action was taken on it. On May 7, 1932, Chairman Sirovich introduced H.R. 11948,²³¹ a slightly revised version of the bill; the provision stating that copyright was to subsist in records as "new works" was qualified by the phrase "to the extent that they are original."²³² More hearings were held on May 12, 1932,²³³ at which Mr. Burkan elaborated his arguments against the provision.²³⁴ He contended that records were mechanical devices, and were not constitutionally copyrightable; that the provision was an illegal attempt to extend the life of expired patents, and that it "will result in a duplication of remedy, a multiplicity of suits, and possible bankruptcy of even an innocent infringer."²³⁵

Another amended version of the Sirovich bill was introduced on May 16, 1932,²³⁶ and reported on May 18, 1932.²³⁷ Still another version was introduced on June 2, 1932.²³⁸ No further action on any of these measures is recorded.

E. DEVELOPMENTS, 1933-35

After the flurry of activity in 1932, efforts to revise the copyright law subsided for several years. A general revision bill introduced by Senator Dill in 1933²³⁹ contained no provisions dealing specifically with copyright in sound recordings. The same was true of the well-known Duffy bill,²⁴⁰ which was introduced on May 13, 1935, and which passed the Senate on July 31, 1935. This measure, however, contained an extremely broad definition of "writings,"²⁴¹ which caused some to assume that it embraced sound recordings within its scope.²⁴² At the 1936 hearings this was unequivocally denied by one of the drafters of the bill,²⁴³ among others.²⁴⁴

F. GENERAL REVISION, 1936-38: THE SIROVICH, DALY, AND GUFFEY BILLS

The Daly bill,²⁴⁵ which was introduced on January 27, 1936, contains the most comprehensive and detailed provisions governing copyright in recordings or recorded performances ever placed before Congress. Throughout the bill the terms "interpreter" and "performer" are linked with the word "author," and the terms "rendition," "performance," and "interpretation" are assimilated to the word "work." The definition of copyrightable subject matter was broadened as follows:

²²⁹ *Id.* at 190.

²³⁰ H. R. REP. NO. 1008, 72d Cong., 1st Sess. (1932).

²³¹ H. R. 11948, 72d Cong., 1st Sess. (1932).

²³² *Id.* § 4.

²³³ *Hearings Before the House Committee on Patents on H.R. 11948*, 72d Cong., 1st Sess. (1932).

²³⁴ *Id.* at 126-127, 136.

²³⁵ *Id.* at 136.

²³⁶ H. R. 12094, 72d Cong., 1st Sess. (1932).

²³⁷ H. R. REP. NO. 1361, 72d Cong., 1st Sess. (1932).

²³⁸ H. R. 12425, 72d Cong., 1st Sess. (1932).

²³⁹ S. 342, 73d Cong., 1st Sess. (1933).

²⁴⁰ S. 3047, 74th Cong., 1st Sess. (1935).

²⁴¹ *Id.* § 4. The provision read as follows:

That the works for which copyright may be secured under this act shall include all the writings of an author, whatever the mode or form of their expression.

²⁴² See *Hearings Before the House Committee on Patents on Revision of Copyright Laws*, 74th Cong., 2d Sess. 112-115 (1936).

²⁴³ *Id.* at 334-335, 342.

²⁴⁴ *Id.* at 681, 685, 1344.

²⁴⁵ H. R. 10632, 74th Cong., 2d Sess. (1936).

That the works for which copyright may be secured under this Act shall include all the writings of an author, whatever the mode or form of their expression, and all renditions and interpretations of a performer and/or interpreter of any musical, literary, dramatic work, or other compositions, whatever the mode or form of such renditions, performances, or interpretations.²⁴⁶

This definition, which implied that the bill covered unrecorded performances, was narrowed somewhat by the statement appearing in the enumeration of copyrightable works:

(n) The interpretations, renditions, readings, and performances of any work, when mechanically reproduced by phonograph records, disks, sound-track tapes, or any and all other substances and means, containing thereon or conveying a reproduction of such interpretations, renditions, readings, and performances.²⁴⁷

The Daly bill defined the exclusive rights to be accorded to copy-righted performances as follows:

(h) To perform, or have performed for public performance and/or profit, any rendition or interpretation of a work by any mechanical means, same to include re-recording or recapturing of and by any mechanical production or rendition or interpretation by any process, means, or method. These rights are not intended to interfere or curtail the right of the authors of any composition or work used for such rendition or interpretation, and are created to be in addition to same, and to protect such persons who render or interpret them.²⁴⁸

The domestic manufacturing and affidavit requirements were extended to recorded performances,²⁴⁹ and the bill required that the copyright notice appear on the record label.²⁵⁰ Where a work was created within the scope of employment, the employer was deemed an "assignee" in the absence of an agreement to the contrary.²⁵¹ The terms "interpreters" and "performers," and the rights accorded them, were further defined as follows:

Interpreters and performers under this Act shall include interpreters, performers, actors, lecturers, and conductors, and the rights afforded them for their renditions, interpretations, and performances shall not be construed to interfere with the rights accorded authors and composers, and said rights are free and independent of each other, and the establishing or maintenance of the rights of one shall not include those of the other class.²⁵²

On February 24, 1936, Representative Sirovich introduced a new general revision bill, H.R. 11420,²⁵³ which contained some ambiguous provisions according a degree of protection to performances. Neither recordings nor performances were listed in the enumeration of copyrightable works,²⁵⁴ nor did they appear in the section dealing with "adaptations" and "arrangements."²⁵⁵ On the other hand, in a section titled "works not copyrightable," the Sirovich bill seemed to extend copyright by negative implication to performances and recordings when written consent had been obtained from the owner of copyright in the work recorded:

In no event shall copyright under this Act extend to—

(d) Renditions, interpretations, mechanical and electrical recordings and transcriptions, in respect of any work the author of which shall not have con-

²⁴⁶ *Id.* § 3.

²⁴⁷ *Id.* § 5.

²⁴⁸ *Id.* § 1.

²⁴⁹ *Id.* §§ 13, 14.

²⁵⁰ *Id.* § 15.

²⁵¹ *Id.* § 29.

²⁵² *Id.* § 32.

²⁵³ H.R. 11420, 74th Cong., 2d Sess. (1936). This is virtually identical with H.R. 11374, 74th Cong., 2d Sess. (1936), which Representative Sirovich had introduced three days earlier and which had been withdrawn, apparently because of typographical errors.

²⁵⁴ H.R. 11420, 74th Cong., 2d Sess. § 5 (1936).

²⁵⁵ *Id.* § 6.

sented in writing to the securing of copyright in such renditions, interpretations, recordings, and transcriptions by another; but the consent of the copyright owner to use his work for renditions, interpretations, mechanical and electrical transcriptions, or recordings and the securing of copyright therein by another shall not deprive, diminish, restrict, or in any wise prejudice any right or remedy secured to an author by this Act in any work used for such rendition, interpretation, electrical transcription, or recording.²⁵⁵

Likewise, the following paragraph was added to the list of exclusive rights protected by the bill:

(g) To perform publicly for profit the particular rendition or interpretation of a musical composition by the performer or interpreter thereof by any mechanical means, including recording or recapturing of it by any mechanical reproduction by any process, means, or method.²⁵⁷

The reference to "musical composition" in this section implies that protection extended solely to interpretations of musical works; but this, like many other things in the Sirovich bill, was far from clear.

These provisions of both the Daly and Sirovich bills attracted a good deal of attention, and were the subject of much comment during the extended hearings held in February, March, and April, 1936.²⁵⁸ The bills as drafted were generally criticized as much too vague and broad. Purely as a question of principle, however, the idea of protection for performers was urged by the National Association of Performing Artists,²⁵⁹ the American Federation of Musicians,^{259a} and various individual performers and orchestra leaders.²⁶⁰ The record companies argued strongly in favor of a copyright to be vested in the manufacturer, rather than in the performer.²⁶¹ Virtually all of the other groups opposed protection either for the performer or the manufacturer;²⁶² leading opponents were ASCAP,²⁶³ the broadcasting organizations,²⁶⁴ the Music Publishers Association,²⁶⁵ the jukebox manufacturers,²⁶⁶ and the motion picture producers.²⁶⁷

The arguments of the performers centered around the unfair use of their recordings by radio,²⁶⁸ and the extraordinary problems of technological unemployment among instrumental musicians resulting from the new inventions.²⁶⁹ It appeared to be assumed generally that ordinary dubbing of sound recordings could be effectively prevented at common law on the theory of unfair competition,²⁷⁰ but, in addition to controlling broadcasting and public performance, the performers were concerned with preventing unusual types of dubbing—particularly the practice of re-recording commercial records for broadcasting purposes.²⁷¹ The performers maintained that they were intellectual

²⁵⁵ *Id.* § 7.

²⁵⁷ *Id.* § 1.

²⁵⁸ *Hearings, supra* note 242.

²⁵⁹ *Id.* at 655-662, 673-683.

^{259a} *Id.* at 662-664, 668-672, 684-687.

²⁶⁰ *Id.* at 664-666, 672-673, 679-680, 695.

²⁶¹ *Id.* at 618-622, 625, 632-645, 1363-1367.

²⁶² An exception is found in a memorandum filed by Gabriel L. Hess and Edward A. Sargoy as counsel for the National Distributors of Motion Pictures, *id.* at 1344-1346. The memorandum criticizes the pending bills as too broad, but appears to favor extending copyright to a recorded rendition, if protection is limited to the sole right of public performance for profit.

²⁶³ *Id.* at 112-115, 651-653, 1083-1086, 1121-1122.

²⁶⁴ *Id.* at 400-401, 439-440, 486-489.

²⁶⁵ *Id.* at 560-562.

²⁶⁶ *Id.* at 800-802.

²⁶⁷ *Id.* at 1011, 1181-1182. See also *Hearings Before Senate Committee on Foreign Relations on Executive E*, 73d Cong., 2d Sess. 23-24 (1937).

²⁶⁸ *Id.* at 655-662.

²⁶⁹ *Id.* at 662-664, 668-672.

²⁷⁰ *Id.* at 113, 639, 653, 1181.

²⁷¹ *Id.* at 655-656.

creators, and that only under the copyright law could they obtain effective protection.²⁷²

The recording companies did not dispute the performers' claims, but argued that, like motion pictures,²⁷³ a record is an artistic creation²⁷⁴ and that protection should vest in the record producer.²⁷⁵ They stressed that the interests of the performer could be better protected by contract.²⁷⁶ Their arguments emphasized the prejudicial effect of endless repetition of their records in radio broadcasting,²⁷⁷ and the fact that records had already been protected under the laws of many other countries.²⁷⁸

The opponents of the principle of copyright in sound recordings attacked the idea as rather fantastic, as unconstitutional, as dangerous, or as seriously prejudicial to their legitimate interests. They urged that something as nebulous as a performance could not conceivably be accorded legal protection,²⁷⁹ and that since performances are neither creative nor tangible, they could not be considered "writings."²⁸⁰ They urged the danger of new "power trusts"²⁸¹ and of new licensing societies which could cut off the people's supply of music,²⁸² and they stressed the practical difficulties in having to obtain licenses from more than one copyright holder.²⁸³ The author-publisher groups argued that the creation of new rights in recordings would represent an unwarranted abridgment of their rights.²⁸⁴

Neither the Sirovich nor the Daly bill was reported. In the next session of Congress, on March 3, 1937, Representative Daly introduced a modified version of his earlier bill. While this measure, H.R. 5275,²⁸⁵ contained a number of changes in language, its provisions with respect to copyright in recorded performances remained substantially the same. The subject matter to be protected was defined as follows:

(p) The rendition and/or performance of any work when reproduced by any means on phonograph records, disks, sound tracks, tapes, or on any and all other substances or by any other means whatsoever containing thereon or conveying a reproduction of such rendition and/or performance.²⁸⁶

The exclusive rights accorded to a recorded performance were not specified separately, but the following limitation was imposed:

The right granted to an author of a rendition when reproduced by any of the means described in subdivision (p) of section 5 of this Act shall not interfere with, curtail, limit, or infringe any of the rights of the author of any composition or work used or employed in said rendition when so reproduced, and such rights to authors of renditions are created to be in addition to the rights of the authors of a work or composition and are solely for the protection of said authors of renditions; the rights granted to the author of the rendition shall not carry with them any right to the use or reproduction of any composition or work employed in such rendition.²⁸⁷

²⁷² *Id.* at 670, 677, 688-690.

²⁷³ *Id.* at 622, 626, 645-647, 677, 1365-1366.

²⁷⁴ *Id.* at 619-622, 625, 1364-1365.

²⁷⁵ *Id.* at 621-622, 635, 1366.

²⁷⁶ *Id.* at 1366.

²⁷⁷ *Id.* at 622, 633.

²⁷⁸ *Id.* at 632-633, 1364.

²⁷⁹ *Id.* at 400-401, 486, 560-562.

²⁸⁰ *Id.* at 112, 440, 487-488, 653, 1011, 1121-1122.

²⁸¹ *Id.* at 114.

²⁸² *Id.* at 439-440, 486-489, 1085-1086.

²⁸³ *Id.* at 601, 1083, 1085-1086.

²⁸⁴ *Id.* at 113-114, 651-653, 1083, 1121.

²⁸⁵ H.R. 5275, 75th Cong., 1st Sess. (1937).

²⁸⁶ *Id.* § 6.

²⁸⁷ *Id.* § 1.

The manufacturing,²⁸⁸ affidavit,²⁸⁹ and notice²⁹⁰ requirements were retained, and the bill again provided that an employer for hire was to be considered the owner of the work.²⁹¹

The following provision, which was entirely new, was added to the bill:

The performer of a rendition of any composition or work in any form whatsoever shall be deemed an author and such rendition when reproduced by any means whatsoever shall be considered a writing; but shall not constitute a publication which shall divest any rights existing at common law and/or under the provisions of this Act.²⁹²

This provision has been criticized as a "clumsy attempt to extend * * * [common law] property rights indefinitely."²⁹³

The revised Daly bill was introduced in the Senate as the Guffey bill²⁹⁴ on April 22, 1937, but no further action was taken on either measure. Nevertheless, even though hearings were not held, the bills attracted a good deal of attention.²⁹⁵ The 1937 report of the Committee on Copyrights of the American Bar Association, Section of Patent, Trade-Mark, and Copyright Law took a stand opposing the bills, partly because of their "attempt to protect performing rights of an intangible nature."²⁹⁶ In a "Special Addendum to the Report of the Committee on Copyright,"²⁹⁷ Edward A. Sargoy agreed that the Daly and Guffey bills were unacceptable because of their loose language. He suggested, however, that the principle of copyright in recorded renditions was worthy of further study, and that consideration should be given to "the possibility of granting limited copyright property rights to a *fixed tangible recordation of a performance.*"²⁹⁸ He advanced the idea of a copyright "limited solely to (1) the right to make and vend duplicate 'recordings' and (2) to *mechanical* use of the copyrighted 'recording' itself for the purpose solely of public communication for profit."²⁹⁹ In its 1938 report³⁰⁰ the Committee indicated that it was split on this question, although "most of the members are of the opinion that such provisions are nebulous, speculative and impractical."³⁰¹ Mr. Sargoy again filed a "special addendum"³⁰² in which he restated his views.

²⁸⁸ *Id.* § 13.

²⁸⁹ *Id.* § 14.

²⁹⁰ *Id.* § 15.

²⁹¹ *Id.* § 28.

²⁹² *Id.* § 30.

²⁹³ Note, *Revision of the Copyright Law*, 51 HARV. L. REV. 906, 916 (1938).

²⁹⁴ S. 2240, 75th Cong., 1st Sess. (1937).

²⁹⁵ See 2 LADAS, *INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 870-873 (1938); Hess, *Copyrightability for Acoustic Works in the United States*, 4 GEISTIGES EIGENTUM 183, 198 (1939); Littauer, *The Present Legal Status of Artists, Recorders and Broadcasters in America*, 3 GEISTIGES EIGENTUM 217, 232 (1938); Diamond and Adler, *Proposed Copyright Revision and Phonograph Records*, 11 AIR L. REV. 29 (1940); Tralcoff, *Rights of the Performing Artist in his Interpretation and Performance*, 11 AIR L. REV. 225 (1940); Note, *The Guffey Bill for the Amendment of the American Copyright Act*, 3 GEISTIGES EIGENTUM 166 (1938); Note, *Revision of the Copyright Law*, 51 HARV. L. REV. 906, 915-916 (1938).

²⁹⁶ American Bar Association, Section of Patent, Trade-Mark and Copyright Law, *Committee Reports* 12 (1937).

²⁹⁷ *Id.* at 14.

²⁹⁸ *Id.* at 18.

²⁹⁹ *Ibid.*

³⁰⁰ American Bar Association, Section of Patent, Trade-Mark and Copyright Law, *Committee Reports* (1938).

³⁰¹ *Id.* at 77-78. See also *id.* at 80.

³⁰² *Id.* at 80.

G. DEVELOPMENTS, 1939-41: THE DALY, McGRANERY, AND THOMAS BILLS

On January 3, 1939, Representative Daly resubmitted his revised bill to the 76th Congress,³⁰³ but no further action was taken on it. Three months later, on March 8, 1939, he submitted H.R. 4871, a new revision of the bill.³⁰⁴ The provisions dealing with copyright in performances were essentially the same as in the earlier Daly bills, but some of the language had been revised in an effort to meet objections and, apparently, to adopt some of Mr. Sargoy's suggestions.³⁰⁵ For example, a performance was now recognized as a form of "adaptation," and could be copyrighted only if it had been "recorded and may be captured and reproduced and/or communicated to others."³⁰⁶ The provision specifying the exclusive rights to be accorded a recorded performance was restored to the bill in the following form:

(h) To communicate to the public for profit a copyrighted recodation of a rendition or performance and/or any duplicated, reproduced, or recaptured rendition or performance if transmitted or communicated by any apparatus mechanically or electrically operated: *Provided, however,* That such rights shall be limited to the making and vending of copies of such recorded renditions and performances and the limited public communication right thereof as contained in this subsection.³⁰⁷

Likewise, the section prescribing the basis of protection and defining the authorship of a performance had been reworded:

(a) The author of a rendition of any composition or work reproduced or captured in any form shall be deemed an author and such rendition when reproduced or captured by any means in tangible form shall be considered a writing.

(b) That in cases of joint renditions the conductor, or leader, shall be considered and deemed the author and be entitled to the protection provided by this Act.³⁰⁸

The new Daly bill still attempted to wrestle with the problem of publication and phonograph records; it added an exception to the provision defining "publication":

* * * but in the case of recorded renditions, such sale and/or dissemination of such fixed rendition shall not constitute a publication which shall divest the rights of the author of such rendition in and to the rights of public communication for profit.³⁰⁹

Significantly, and in contrast with the earlier versions, the new Daly bill did not include any provision conferring copyright upon an employer for hire.

Representative Daly died 5 days after he had introduced H.R. 4871, and the bill was reintroduced by Representative McGranery on May 4, 1939.³¹⁰ Neither bill saw any further action in Congress, but they were the subject of extensive discussion in the American Bar Association Copyright Committee's 1939 report.³¹¹ The Committee withheld approval of the bills because of defects in their drafting, but unanimously approved the principle of copyright for recorded per-

³⁰³ H.R. 926, 76th Cong., 1st Sess. (1939).

³⁰⁴ H.R. 4871, 76th Cong., 1st Sess. (1939).

³⁰⁵ See notes 287-299, 302 *supra*, and text thereto.

³⁰⁶ H.R. 4871, 76th Cong., 1st Sess. § 6 (1939).

³⁰⁷ *Id.* § 1.

³⁰⁸ *Id.* § 29.

³⁰⁹ *Id.* § 62(a).

³¹⁰ H.R. 6160, 76th Cong., 1st Sess. (1939).

³¹¹ American Bar Association, Section of Patent, Trade-Mark and Copyright Law, *Committee Reports*

13-18 (1939).

formances.³¹² The report asserted that, since their rights are recognized as paramount, authors and composers need have no "concern over the potential competition in the use of the new version," but implied that, to avoid prejudice to authors, it would be necessary to repeal the compulsory licensing provisions.³¹³ As for authorship, the report concluded that it "should be determined as a matter of contract between the respective parties contributing to the composite result, continuing the assumption of the present act that an employer for hire has capacity for authorship."³¹⁴

H.R. 5791,³¹⁵ which was introduced by Representative Schulte on April 17, 1939, represented an entirely new approach to the problem. This was entitled "A bill to amend the Communications Act of 1934 so as to prohibit and penalize the unauthorized mechanical reproduction of music and other wire- and radio-program materials" and its essential provisions read as follows:

It is hereby declared to be unlawful for any person, without the consent in writing of the performer or performers of said music or other program material, (a) to record or otherwise mechanically reproduce or cause to be recorded or otherwise mechanically reproduced within the United States, for profit or gain, any music or other program material of any kind transmitted in any manner mentioned or described in section 2(a); or (b) to offer for sale, sell, lease, or license, or to have in his possession for the purpose of sale, lease, or license, any record or other mechanical reproduction of music or other program material of any kind transmitted as aforesaid.

The measure was necessarily limited to protection against the recapturing of broadcasts, but it would have protected sound recordings against one type of dubbing. On June 6, 1939, Representative McGranery introduced the same bill with an added sentence exempting "recording for private, personal, civic, or political use" and "recording of any address or talk on subjects of a public nature."³¹⁶ No further action was taken on either bill, and they were never reintroduced.

During 1939 various groups submitted memorandums bearing on copyright in sound recordings to the Committee for the Study of Copyright (the so-called Shotwell committee),³¹⁷ which was then engaged in drafting a general revision bill.³¹⁸ The performers sought copyright protection for their own products, which they insisted are "intellectual and artistic"; they stressed the inadequacy of common law protection in this area. The record manufacturers argued that copyright for performers was not in their best interests, and that records should be copyrighted just like motion pictures.

The broadcasters argued that records are not works of authorship and hence are not constitutionally copyrightable; they stressed the serious losses they would incur if records were made copyrightable. The author-publisher groups argued strongly that records are not

³¹² *Id.* at 16. The report stated:

Your committee is of the opinion that whether recorded upon a visual track for communication through the sense of sight, or recorded upon a sound track for communication through the sense of hearing, independently or in synchronization, originality of authorship may be thus expressed in a fixed, permanent, tangible, identifiable form, capable of being read or communicated intelligibly to others. Such recordings are a species of "writing" within the constitutional limitation, whether the labors of human intelligence so captured and expressed consist or the ordinary literary, dramatic or musical concepts, or of the rendition or performing interpretation through which they may be conveyed.

³¹³ *Id.* at 17.

³¹⁴ *Id.* at 18.

³¹⁵ H. R. 5791, 76th Cong., 1st Sess. (1939).

³¹⁶ H. R. 6695, 76th Cong., 1st Sess. (1939).

³¹⁷ The committee was formed under the auspices of the National Committee of the United States of America on International Intellectual Cooperation for the purpose of preparing the way for better international copyright relations. See Goldman, *The History of U.S.A. Copyright Law Revision From 1901-1954*. (Study No. 1 in the present series of committee prints)

³¹⁸ The memorandums were not published, but are in the collections of the Copyright Office.

writings, that manufacturers are not authors, and that records are adequately protected at common law; they contended that copyright in records would be unfair and prejudicial since manufacturers would not be subject to a compulsory license, and since a multiplicity of licenses would result.

The motion picture producers and distributors took a stand in favor of copyright in sound records, but with some reservations. They argued that there was essentially no difference between a visual recording, a sound recording, or a combination of the two, and that all three types of works should be considered copyrightable. They insisted that protection should extend solely to the actual reproduction of a recorded performance, and that there should be no rights against imitators or mimics. They felt that the authorship problem should be solved by an employer for hire provision like that in the present law.

The Shotwell committee bill, S. 3043,³¹⁹ was introduced by Senator Thomas on January 8, 1940; it contained no provision recognizing copyright in sound recordings. The reasons for this omission are explained in a letter-memorandum from the executive secretary of the Shotwell committee which was printed in the Congressional Record.³²⁰ With respect to performers, the committee felt that "thought has not yet become crystallized on the subject," and that "no way could be found at the present time for reconciling the serious conflicts of interests arising in this field."³²¹ As for the claims of record manufacturers, the letter states that "there is considerable opposition to giving copyright in recordings for they are not commonly creations of literary or artistic works but uses of them."³²² Despite all the preparatory work, there were no hearings or further action on the Thomas bill.

H.R. 9703,³²³ which was introduced by Representative McGranery on May 8, 1940, was a general revision measure substantially the same as the last Daly bill.³²⁴ The changes in wording were for purposes of clarification and simplification, and none of them appeared to alter the meaning of the provisions dealing with copyright in records. The bill was reintroduced in the 77th Congress by Representative Sacks,³²⁵ but no further action on either measure is recorded.

H. "ACOUSTIC RECORDING" BILLS, 1942-51

After the adverse decision in the *Whiteman* case,³²⁶ the performers turned to Congress in an effort to secure effective recognition of their rights. Six bills were introduced between 1942 and 1951; they were virtually identical,³²⁷ and would have amended the copyright law to provide for a copyright in "acoustic recordings."

The first bill of the series, H.R. 7173,³²⁸ was introduced by Representative Sacks on June 1, 1942. It would have amended the last

³¹⁹ S. 3043, 76th Cong., 3d Sess. (1940).

³²⁰ 86 CONG. REC. 77 (1940).

³²¹ *Id.* at 78.

³²² *Ibid.*

³²³ H.R. 9703, 76th Cong., 3d Sess. (1940).

³²⁴ See notes 303-309 *supra*, and text thereto.

³²⁵ H.R. 3997, 77th Cong., 1st Sess. (1941).

³²⁶ *RCA Mfg. Co. v. Whiteman*, 114 F. 2d 86 (2d Cir. 1940), *cert. denied*, 311 U.S. 712 (1940). See notes 130-132, 158-160 *supra* and text thereto.

³²⁷ Some of the bills contained provisions for repeal of the jukebox exemption, but with respect to copyright in sound recordings the texts are the same.

³²⁸ H.R. 7173, 77th Cong., 2d Sess. (1942).

two paragraphs of section 5, enumerating the classes of copyrightable works, to read as follows:

(l) Motion pictures, with or without sound.

(m) Recordings which embody and preserve an acoustic work in a fixed permanent form on a disc, film, tape, record, or any and all other substances, devices, or instrumentalities, by any means whatever, from or by means of which it may be acoustically communicated or reproduced.

The exclusive rights accorded to acoustic recordings were described in an amendment to section 1:

(f) To make or to procure the making, if the copyrighted work or any component part thereof be an acoustic recording, of any duplicated or recaptured recording thereof on a disc, film, tape, wire, record, or other device or instrumentality, by or from which in whole or in part, the sound recorded on the copyrighted work may in any manner, or by any method, be reproduced or communicated acoustically; to publish and vend such recordings of sound; and to communicate and reproduce the same acoustically to the public, for profit, by any method or means utilizing any such recording in, or as part of, any transmitting or communicating apparatus: *Provided*, That except if the recorded sound be part of a copyrighted motion picture, no exclusive right other than contained in this subsection (f) shall exist in respect of any acoustically recorded work.

Recordings were assimilated to "adaptations," and the following proviso was to be added to section 6 [7] of the copyright statute:

Provided, That acoustic recordings of any copyrighted musical work made pursuant to the provisions of subsection (e) of section 1 upon payment to the copyright proprietor of the royalty specified in such subsection whenever the owner of such musical copyright has used or permitted or knowingly acquiesced in the use of such copyrighted musical work upon the parts of instruments serving to reproduce the same mechanically, shall not be regarded as new works subject to copyright under the provisions of this title unless the proprietor of such musical copyright has consented to the securing of copyright in such recording.

The bill contained an amendment of section 11 [12] dealing with the deposit of unpublished records, and would have added a rather unusual provision to section 12 [13], which pertains to the deposit of published works:

For the purpose of this title, any duplicated or recaptured recording on a disc, film, tape, wire, record, or other device or instrumentality, by or from which, in whole or in part, the sound recorded on the copyrighted work may in any manner, or by any method, be reproduced or communicated acoustically, shall be deemed a copy of the work.

Despite the fact that a record was to be deemed a copy, there were no provisions dealing with the copyright notice to appear on such works. An amendment to section 15 [16] would have made records subject to the manufacturing requirements.

Substantially identical bills were introduced by Representative Scott in 1943,³²⁹ by Representative Buckley in May, 1945,³³⁰ and by Senator Myers in June, 1945.³³¹ None saw any legislative action. The 1946 report of the American Bar Association Committee on Copyrights³³² includes an extensive analysis of the policy questions raised by the bills, but states that the committee did not feel that it had "adequate enough access to the facts on which to base recommendations of approval, disapproval or modification."³³³

³²⁹ H. R. 1570, 78th Cong., 1st Sess. (1943).

³³⁰ H. R. 3190, 79th Cong., 1st Sess. (1945).

³³¹ S. 1206, 79th Cong., 1st Sess. (1945).

³³² American Bar Association, Section of Patents, Trade-Mark and Copyright Law, *Committee Reports* 14-17 (1946).

³³³ *Id.* at 17.

The bill was introduced again on January 23, 1947, by Representative Scott as H.R. 1270,³³⁴ and hearings were held in May and June, 1947.^{334a} The performers, who were the only group favoring the bill, repeated their charges of flagrant piracies and economic prejudice, and insisted upon the creative nature of a performance, its paramount importance to the popularity of a record, and the inadequacy of common law protection.³³⁵

The record manufacturers were opposed to the bill, principally because they felt that copyright should be accorded to manufacturers rather than performers, and because of various technical defects in the measure.³³⁶ They emphasized the creative nature of a recording and argued the constitutionality of copyright in records, but pointed out the practical difficulties involved in granting copyright to an indefinite group of performers.³³⁷ The manufacturers were especially opposed to the provision requiring the author's consent before the recording could be copyrighted; they claimed that, if consent were denied, the recording would fall into the public domain, and the manufacturer would lose the common law right he now has to restrain dubbing.³³⁸

The author-publisher groups offered what was perhaps the strongest opposition to the measure.³³⁹ Like all the opponents of the bill they pointed out that the bill was "hopelessly ambiguous," since it did not identify who was to be accorded the copyright.³⁴⁰ They felt that the aim of the bill was to prevent the broadcasting and public performance of records and that this, coupled with the compulsory licensing provisions of the present law, put the author in an unjustly inferior position.³⁴¹ They repeated their arguments that performers are not authors, and that records are material objects and not "writings."³⁴² The broadcasters joined in these arguments, and added that penalizing radio stations for the use of records would be unfair, since broadcasting is actually the principal factor in making a record popular.^{342a} Concerted opposition was also voiced by the tavern owners,³⁴³ the jukebox operators and manufacturers,³⁴⁴ the Authors' League,³⁴⁵ and the motion picture producers and distributors.³⁴⁶ The Copyright Office expressed opposition to the bill because of its technical deficiencies,³⁴⁷ and the State Department urged that the manufacturing requirements not be extended into a new area.³⁴⁸

The 1947 hearings introduced a new factor which had not been present at previous hearings. The American Federation of Musicians had supported earlier bills to accord a property right in record-

³³⁴ H.R. 1270, 80th Cong., 1st Sess. (1947).

^{334a} *Hearings Before the Subcommittee on Patents, Trade-Marks, and Copyrights of the House Committee on the Judiciary on H.R. 1269, H.R. 1270, and H.R. 2670*, 80th Cong., 1st Sess. (1947).

³³⁵ *Id.* at 6-16, 20-22, 203-231.

³³⁶ *Id.* at 53-59, 285-291.

³³⁷ *Ibid.*

³³⁸ *Id.* at 54. The testimony of Miss Isabelle Marks of Decca Records on this point is significant:

Now, if we could not get permission from the copyright owner of the material, that particular recording would fall into the public domain, anybody could copy it and we would be in a worse position than we are today because today, at least, we have a common-law right in that record and nobody under the common-law could "dub" that record . . . I mean record it physically or make another record from it.

³³⁹ *Id.* at 18-19, 24-53, 61-76, 84-86, 267-285, 292-294.

³⁴⁰ *Id.* at 25-26, 51, 85, 265, 269, 290, 293.

³⁴¹ *Id.* at 18-19, 26-28, 49-50, 267-270.

³⁴² *Id.* at 26, 43-44, 52, 86, 267, 271-272, 276-278, 279-280, 293-294.

^{342a} *Id.* at 77-84.

³⁴³ *Id.* at 124, 131-132.

³⁴⁴ *Id.* at 109, 117-118, 255-263.

³⁴⁵ *Id.* at 279-283.

³⁴⁶ *Id.* at 292.

³⁴⁷ *Id.* at 263-266.

³⁴⁸ *Id.* at 266-267.

ings.³⁴⁹ However, as one commentator has put it, after 1940 "the Federation has maintained a discreet silence on the entire matter."³⁵⁰ During the early forties the activities of the AFM had created considerable opposition, and at the hearings there was an undercurrent of concern that, if the bill became law, Mr. Petrillo would "dictate the terms of the licensing between the members of his organization," who were then said to number around 129,000.³⁵¹ This doubtless played a part in defeating the bill.

The Scott bill was reported unfavorably,³⁵² and with it died the efforts toward securing copyright in sound recordings. Representative Scott introduced the measure again in 1951,³⁵³ but it received no attention and no action was taken on it.

I. SUMMARY

Legislative attempts to make sound records copyrightable go back as far as 1906, and reached their climax between 1925 and 1947. Before the impact of radio broadcasting was really felt, these provisions attracted very little attention. As the importance of radio in the music publishing and recording industries grew, there was a proportionate increase in the pressure to secure copyright in sound records, and in the concerted opposition to such proposals on the part of author and user groups. The performers and manufacturers each sought protection for themselves and opposed it for the others. The author-publisher groups claimed that the proposals would unfairly discriminate against them, and the broadcasting and jukebox interests were strongly opposed to additional payments and licenses. The motion picture interests were favorably inclined toward limited protection for recorded performances. The AFM backed away from its original support of the proposals, and later expressed no opinion on the question.

Throughout the hearings there was a great deal of confusion between protection against the actual reproduction of a particular recording and protection against imitation or mimicry of a general style or manner of performance.³⁵⁴ These and other technical deficiencies of the bills were widely criticized. Virtually all of the opponents of the measure attacked their constitutionality on the grounds that performances and recordings are not creative, and are labor rights or mechanical objects rather than "writings." Essentially, however, the arguments, pro and contra, were dictated by economic self-interest, and revolved around the problem of radio broadcasting. There was practically no direct opposition to the principle of protection of sound recordings against unauthorized dubbing.

³⁴⁹ See note 259a *supra*.

³⁵⁰ Countryman, *The Organized Musicians*, 16 U. CHI. L. REV. 239, 262 (1949). This article contains an excellent discussion of the AFM's role in the field of performers' rights. The Federation's present program is directed at benefitting the large number of musicians displaced by recording devices, rather than the relatively small number who make recordings. As time has passed, the interests of these two groups appear to have come into basic conflict. The solution to the problem offered by the AFM "trust fund" device, under which recording companies pay royalties for records manufactured into a fund, which is distributed to union locals for the employment of musicians in live performances.

³⁵¹ *Hearings supra* note 334a, at 209-212, 218.

³⁵² 93 CONG. REC. D406 (1947).

³⁵³ H. R. 2464, 82d Cong., 1st Sess. (1951).

³⁵⁴ This confusion permeated both the 1936 and 1947 hearings, and resulted in considerable testimony about the uncopyrightability of "style" that was essentially beside the point. See, e.g., *Hearings, supra* note 334a, at 35-38, 61-76, 274-276. This factor evidently had some effect on the members of the committee (*id.* at 68, 214), despite assurances by the proponents of the bill that it did not extend to imitations or burlesques (*id.* at 214).

IV. LAWS OF FOREIGN COUNTRIES^{354a}

Of the 85 countries whose copyright laws are compiled in the recent publication "Copyright Laws and Treaties of the World."³⁵⁵ 51 (including the United States) appear to have no statutory provisions affording protection to recordings or recorded performances. These 51 countries are:

Afghanistan	Guatemala	Netherlands ³⁵⁸
Albania	Haiti	Nicaragua
Andorra	Hashemite Kingdom of	Norway ³⁵⁸
Belgium	Jordan	Panama
Bolivia	Honduras	Peru
Brazil	Iceland	Philippines
Bulgaria	Indonesia	Portugal ³⁵⁹
Cambodia	Iraq	Rumania
Chile	Iran	San Marino
Costa Rica	Korea	Saudi Arabia
Cuba	Laos	Sweden
Ecuador	Liberia	U.S.S.R.
Egypt	Libya	United States
El Salvador	Luxembourg	Venezuela
Ethiopia	Monaco	Vietnam
Finland	Mongolia	Yemen
France ³⁵⁶	Nepal	Yugoslavia
Greece ³⁵⁷		

As in the case of the United States, however, many of these countries have laws or statutes prohibiting unfair competition or conduct *contra bonos mores*. It is entirely possible that, in an appropriate case, these laws could be invoked to enjoin the unauthorized dubbing of sound recordings.

The laws of the 34 countries that recognize copyright in recordings may be grouped for convenience into five rough categories:

A. NO SPECIAL PROVISIONS

The laws of five countries (Republic of China,³⁶⁰ Dominican Republic,³⁶¹ Lebanon,³⁶² Syria,³⁶³ and Thailand.³⁶⁴) simply lump sound

^{354a} This section of the report is indebted to recent comparative law studies on neighboring rights prepared by the UNESCO Secretariat, in the beginnings of which the writer had a part. A portion of these studies has been published: 9 UNESCO COPYRIGHT BULLETIN 9 (1956). The remaining studies were distributed as documentation (No. IGC/1/5) at the first session of the Intergovernmental Copyright Committee held at Paris in June, 1956.

³⁵⁵ Published by UNESCO and The Bureau of National Affairs, Inc., 1956.

³⁵⁶ French case law appears to recognize a broad "moral right" of the performer, and dubbing of recorded performances has been enjoined on this ground. In two recent cases the names of the performing artists were used on the dubbed records without their permission; the decisions were based upon a violation of the performer's personal rights, rather than upon a misappropriation of property. Civil Tribunal Seine, Dec. 19, 1953 and March 8, 1954. LA SEMAINE JURIDIQUE 8114 (May 19, 1954).

³⁵⁷ The Greek Copyright Statute (Law No. 2387 of June 29, 1920, as amended by Law No. 4301 of August 6, 1929) contains some ambiguous provisions which might be construed to accord a copyright in sound recordings. Recordings are not listed specifically in the enumeration of copyrightable works (art. 1), but article 16 provides for penalties against a person who knowingly "publishes or multiplies by printing or by any other means and in any form, literary works or works of art or phonograph records * * *". It is not clear whether this refers to phonograph records as infringing articles or as articles capable of being infringed.

³⁵⁸ Prior to 1931, the Norwegian copyright statute (sec. 5 of Law of July 25, 1910) specifically recognized copyright protection for sound recordings as "adaptations". The present statute (Law of June 6, 1930) does not contain such a provision, and it has been held that recordings are not now copyrightable in Norway. Gramophone Company Limited v. Norsk Rikskringkasting, Civil Tribunal Oslo, March 22, 1938, REVUE INTERNATIONALE DE LA RADIOELECTRICITE 210 (1938); Electric Musical Industries v. Lindberg Radio A.S., Supreme Court, June 11, 1955, cited in E.B.U. BULL. 613 (1955). In the second case however, the court stated that the manufacturer could restrain dubbing under the Unfair Competition Act of 1922.

³⁵⁹ The Portuguese copyright statute (Decree of May 27, 1927) contains some ambiguous provisions which have led at least one commentator to assume that recordings are copyrightable in Portugal; see 2 LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 1082 (1938). It is unlikely that this is the case, however.

³⁶⁰ Law of April 27, 1944. Article 1(3) mentions "recordings, photographs and cinematographic films."

³⁶¹ Law of March 17, 1947. Article 3(e) mentions "plastic works, photographs, photogravures, phonographic records, microfilms and microphotographs."

³⁶² Decree No. 2385 of January 17, 1922, as amended. Article 138 mentions "rolls, discs and perforated cardboard, etc., for talking machines and mechanical musical instruments."

³⁶³ The Syrian copyright statute is identical with that of Lebanon, note 362 *supra*.

³⁶⁴ Act of June 10, 1931.

recordings with other copyrightable works, thereby protecting them against unauthorized dubbing. Three of these statutes include no special provisions restricting or defining the protection to be accorded them. The Chinese statute contains a provision limiting the duration of copyright in recordings to 10 years.³⁶⁵ The statute of Thailand does not list recordings in the omnibus enumeration of copyrightable works,³⁶⁶ but contains a section providing that the term of copyright for "records, perforated rolls and other contrivances by means of which sounds may be mechanically reproduced" shall be 30 years from the date the original plate was made.³⁶⁷

B. RECORDINGS TREATED AS "ADAPTATIONS"

Another group of eight statutes treats recordings as a form of "adaptation" or "arrangement," and accords them copyright as "secondary" or "derivative" works. The countries in this group are: Denmark,³⁶⁸ German Federal Republic,³⁶⁹ Hungary,³⁷⁰ Japan,³⁷¹ Liechtenstein,³⁷² Mexico,³⁷³ Poland,³⁷⁴ and Switzerland.³⁷⁵

It seems clear that all of these statutes protect recordings against unauthorized dubbing, but with certain limitations. Several of the statutes appear to require some degree of artistic merit in order for

³⁶⁵ Law of April 27, 1944, art. 9.

³⁶⁶ Act of June 16, 1931, § 4.

³⁶⁷ *Id.* § 17.

³⁶⁸ Law of April 26, 1933, § 5. The provision reads as follows:

Any person who translates, dramatizes or in some other manner transforms a work, or adapts it for motion pictures or mechanical instruments, shall have the same right, with respect to his translation, transformation or adaptation, as an author.

³⁶⁹ Act of June 19, 1901, as amended by Act of May 22, 1910. The following paragraph was added to § 2 by the 1910 amendment:

Where a literary or musical work is recorded by personal performance on contrivances for instruments serving to reproduce it mechanically for the ear, the contrivance thus made shall be considered equivalent to an adaptation of the work. The same rule shall apply where the recording is made by perforating, punching, arranging of pins or by similar activity, provided such activity is to be considered artistic. Under the first sentence, the performing artist, and under the second sentence, the person making the recording shall be considered the adapter.

³⁷⁰ Law of December 29, 1921, § 8. The provision reads as follows:

Translations, adaptations, including those intended for mechanical performance . . . if requiring an artistic activity, arrangements, abridgements, and elaborations, as well as indirect appropriations, transformations or utilizations of original works, including utilizations for the purpose of a cinematographic work . . . and also compilations of different works . . . shall enjoy the same protection as original works, but without prejudice to the rights of the author of the original work.

³⁷¹ Law No. 39 of March 4, 1899, as amended. Article 22(7) reads as follows:

A person who has lawfully adapted the work of a third person to instruments for the mechanical reproduction of sounds shall be deemed an author, and shall have copyright only in connection with such instruments.

³⁷² Law of October 26, 1928. The provision appears in article 4 and reads as follows:

When a literary or musical work is adapted by the personal action of performers to instruments serving to recite or to perform the work mechanically, such adaptation shall constitute a reproduction protected by law. The same shall apply in the case of adaptation by perforation, stamping, embossing, or by any other analogous process, in so far as such adaptation can be considered to be an artistic production. In all cases, the right of the owner of the copyright in the original work shall remain reserved.

³⁷³ Law of December 31, 1947, as amended. Article 6 reads as follows:

Provided they themselves have some originality, then, to that extent, translations, adaptations, compilations, arrangements, abridgments, dramatizations; the phonetic reproductions of the performances of performers, singers and orators; photographic and cinematographic reproductions; and all other versions of scientific, literary or artistic works shall be protected, but may only be published when authorized by the owner of the copyright in the basic work.

Provided they themselves have some originality, then, to that extent, versions mentioned in the preceding paragraph derived from a work in the public domain shall be protected; but such protection shall not include the right to exclusive use of the basic work or of other new versions of the same work.

³⁷⁴ Law of July 10, 1952. Article 3 reads, in part, as follows:

1. Copyright shall also subsist in works based on the work of another person. This provision shall apply, in particular, to translations, adaptations, transformations into another artistic medium, musical arrangements and adaptations for mechanical musical instruments, and films.

2. Copyright (secondary copyright) in adaptations of the work of another person shall be subject to the authorization of the author of the original work unless the copyright in the original work has expired. The authorization shall cease to be valid if the adaptation has not appeared within five years from the date of the authorization.

3. Any adapted work shall bear an indication of the name of the author of the original work.

³⁷⁵ Law of Dec. 7, 1922, art. 4. The provision is identical with that appearing in the Liechtenstein statute, note 372 *supra*.

the recording to be copyrightable.³⁷⁶ The Polish law is limited, by its terms, to "adaptations for mechanical musical instruments." The Mexican statute permits a broadcaster to make rerecordings of sound records for the sole purpose of transmission, without the necessity for permission or payment.³⁷⁷

None of the statutes is completely clear as to whether copyright is accorded in the first instance to the performer or to the record manufacturer. Court decisions have established that the right belongs to the performer in Germany,³⁷⁸ Switzerland,³⁷⁹ and Hungary,³⁸⁰ and the same is probably true in Liechtenstein and Mexico. However, these decisions also indicate that, unless expressly reserved, the performers' rights are transferred to the manufacturer by implied assignment at the time the record is made. A Danish case has held that copyright in a recording is conferred directly upon the manufacturer,³⁸¹ and since their statutes are similar to that of Denmark, the same situation may prevail in Japan and Poland.

C. THE "BRITISH COMMONWEALTH" GROUP

The British Copyright Act of 1911,³⁸² which has been adopted in 10 other countries with minor variations, contains explicit provisions conferring full copyright protection upon sound recordings. The nations in this group are: Australia,³⁸³ Canada,³⁸⁴ Ceylon,³⁸⁵ India,³⁸⁶ Ireland,³⁸⁷ Israel,³⁸⁸ New Zealand,³⁸⁹ Pakistan,³⁹⁰ Union of Burma,³⁹¹ Union of South Africa,³⁹² and United Kingdom. Dubbing is clearly regarded as an infringement of copyright in these countries.

The basic provision appearing in the British Copyright Act of 1911³⁹³ reads as follows:

Copyright shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act to reside within the parts of His Majesty's

³⁷⁶ The leading Hungarian decision on this subject confirms that a recording must embody "individual artistic activity" to be copyrightable. *Telefon-hirmondo v. The Gramophone Co., Ltd.*, Supreme Court of Hungary, May 24, 1935, *REVUE INTERNATIONALE DE LA RADIOÉLECTRICITÉ* 58 (1936).

³⁷⁷ Law of December 31, 1947, as amended, art. 64.

³⁷⁸ Landgericht, Berlin, May 28, 1935, *LE DROIT D'AUTEUR* 126 (1935); Kammergericht, Berlin, Feb. 10, 1936, *INTER-AUTEURS* 290 (1936); Bundesgerichtshof, Nov. 21, 1952, *GEWERBLICHER RECHTSSCHUTZ UND URHERBERRECHT* 140 (1953); Bundesgerichtshof, May 18, 1955, *DER BETRIEBSBERATER* 460 (1955).

³⁷⁹ Federal Tribunal, July 7, 1936, *REVUE INTERNATIONALE DE LA RADIOÉLECTRICITÉ* 235 (1937).

³⁸⁰ *Telefon-hirmondo v. The Gramophone Co., Ltd.*, *supra* note 376.

³⁸¹ *Skandinovisk Gramophone Society v. State Radio*, 134, *REVUE INTERNATIONALE DE LA RADIOÉLECTRICITÉ* 375 (1936).

³⁸² Copyright Act, 1911, 1 & 2 GEO. 5, c. 46, §§ 19(1), 19(2)(b)(ii), 35(1).

³⁸³ Act of Nov. 20, 1912, as amended.

³⁸⁴ 2 REV. STAT. CANADA 2003, §§ 2(r), 4(3), 19(3), 19(10) (1952).

³⁸⁵ Ceylon Independence Act, 1947, 11 GEO. 6, c. 7, § 4. The Independence Act also contained a provision (para. 10 of 2d sched.) which dealt specifically with the status of Ceylon under the British Copyright Act of 1911 (1 & 2 GEO. 5, c. 46), and the consequences if Ceylon should repeal the Copyright Act. This provision has been repealed by the new British Copyright Act of 1956 (4 & 5 ELIZ. 2, c. 74, §56, 9th sched.).

³⁸⁶ Act of Feb. 24, 1914, as amended.

³⁸⁷ Act of May 20, 1927, as amended, §§ 169(1), 169(2)(b)(ii), 177(1).

³⁸⁸ Extension of Palestine Order, March 21, 1924, as modified.

³⁸⁹ Act of Nov. 22, 1913, as amended, §§ 2(1), 25(1), 25(2)(b)(ii).

³⁹⁰ Act of Feb. 24, 1914, as amended.

³⁹¹ Union of Burma (Adaptation of Laws) Order, Jan. 4, 1948.

³⁹² Act of April 7, 1916, as amended.

³⁹³ The provisions have been incorporated with virtually no changes in the laws of Australia, Ceylon, India, Israel, New Zealand, Pakistan, Union of Burma, and Union of South Africa. The provisions in the Canadian statute have been rearranged, but are essentially the same. The changes in the Irish statute do not involve matters of substance.

dominions to which this Act extends if it has established a place of business within such parts.

Under this provision, copyright is accorded in the first instance to the owner of the original plate from which the records are reproduced, and lasts for 50 years from the manufacture of the plate. The scope of the provision has been held to embrace sound tracks,³⁹⁴ and to cover recordings of all types of works, whether musical or non-musical³⁹⁵ and whether copyrighted or not.³⁹⁶ While the statute subjects copyrighted musical compositions to compulsory licensing, there is a provision specifically exempting copyrighted recordings from the requirement of a compulsory license.³⁹⁷

On November 5, 1956, the royal assent was given to the British Copyright Act of 1956.^{397a} The new statute is expected to come into force in the United Kingdom early in 1957, after the necessary order has been issued by the Board of Trade. Thus, while the provisions of the Act of 1911 will presumably continue for the time being in the other 10 nations listed above, they will be superseded shortly in the United Kingdom.^{397a(1)}

The provisions dealing with sound recordings^{397b} are considerably more numerous, elaborate, and detailed in the new Act.^{397c} Copyright is accorded in the first instance to the "maker"^{397d} of the sound recording,^{397e} except where the recording is specially commissioned.^{397f} Both unpublished and published recordings are protected,^{397g} and copyright in published recordings lasts for 50 years "from the end of the calendar year in which the recording is first published."^{397h}

Certain acts may be restricted under a copyright, "whether a record embodying the recording is utilized directly or indirectly in doing them,"³⁹⁷ⁱ and these acts include "making a record embodying the recording,"^{397j} Unauthorized importation is also regarded as infringement if done with knowledge;^{397k} the same is true of unauthorized sale, hire, offering for sale or hire, and commercial exhibition, if done for purposes of trade or if detrimental to the copyright owner's interests.^{397l} The statute specifies that these rights are separate from, and shall not be prejudicial to, rights in the work recorded,^{397m} and an exception is made in favor of use for educational purposes.³⁹⁷ⁿ

³⁹⁴ Wellington Cinema Co. v. Performing Right Society, Ltd., 172 I.C. 408 (Bom. 1936).

³⁹⁵ Gramophone Company v. Stephen Cawardine and Co., [1934] 1 Ch. 450.

³⁹⁶ *Ibid.*

³⁹⁷ Copyright Act, note 382 *supra*, § 19(2)(b)(ii).

^{397a} Copyright Act, 1956, 4 & 5 E.L.Z. 2, c. 74.

^{397a(1)} The statute contains transitional provisions governing recordings made before the effective date of the new Act. *Id.* 7th sched.

^{397b} The term "sound recording" is defined as "the aggregate of the sounds embodied in, and capable of being reproduced by means of, a record of any description, other than a sound-track associated with a cinematograph film." *Id.* § 12(9). The term "record" is defined as "any disc, tape, perforated roll or other device in which sounds are embodied so as to be capable (with or without the aid of some other instrument) of being automatically reproduced therefrom." *Id.* § 48(1). Sound tracks are assimilated to "cinematograph films" under § 13(9) with the proviso that, if the sounds embodied in the sound track are also embodied in a record which was not derived from a sound track, use of the record would not constitute infringement of the film.

^{397c} *Id.* § 12, 13(9), 16, 18(3), 20(7), 41(5), 45, 48(1), 6th sched., 7th sched.

^{397d} With respect to the making of a record the statute provides as follows:

For the purposes of this Act a sound recording shall be taken to be made at the time when the first record embodying the recording is produced, and the maker of a sound recording is the person who owns that record at the time when the recording is made. *Id.* § 12(8).

^{397e} *Id.* § 12(4).

^{397f} *Ibid.*

^{397g} *Id.* § 12(1), 12(2).

^{397h} *Id.* § 12(3).

³⁹⁷ⁱ *Id.* § 12(5).

^{397j} *Id.* § 12(5)(a).

^{397k} *Id.* § 16(2).

^{397l} *Id.* § 16(3), 16(4).

^{397m} *Id.* § 16(5), 16(7).

³⁹⁷ⁿ *Id.* § 41(5).

Perhaps the most important changes in the new Act with respect to dubbing of sound recordings are found in two provisions dealing with the marking of copies. The statute provides that, in the case of records which have been issued to the public in the United Kingdom, no suit for infringement can be maintained unless, from the time of first issuance, the records or their containers "bore a label or other mark indicating the year in which the recording was first published."^{397o} This requirement would not apply if the issuance had been unauthorized, or if the owner had taken reasonable steps to insure that the records were properly marked.^{397p} The statute also provides that, if from their first issuance the records were marked with the name of the maker, the year of first publication, and the country of first publication, the marking would constitute prima facie evidence of these facts in any action for infringement.^{397q}

Neither the British Copyright Act of 1911 nor any of the other ten copyright statutes in this group accord any sort of protection to the performers whose renditions are captured on the records. A penal statute in the United Kingdom protects performances against unauthorized use, but it has no counterpart in any of the other countries in the group. This statute, the Dramatic and Musical Performers' Protection Act of 1925,³⁹⁸ is confined to performances of dramatic and musical works. As originally enacted, the act makes it a criminal offense to rerecord or copy a lawfully produced commercial sound recording, or to sell the dubbed copies, without the written consent of the performers.

Since the statute makes violation conditional upon the consent of the performers, it actually gives performers exclusive rights in their performances. However, the law does not confer a copyright or property right, and the remedies it prescribes are penal rather than civil.³⁹⁹ It appears that the statute, as originally enacted, requires the written consent of every performer whose performance is reproduced on the recording,⁴⁰⁰ but a defendant who did not know of the requirement for written consent has been acquitted under the statute.⁴⁰¹

The new British copyright statute, which will come into force shortly, makes some important changes in the Dramatic and Musical Performers' Protection Act of 1925.^{401a} Exceptions to the requirements of the statute are provided when the performance is used for reporting current events, or when the use is simply incidental.^{401b} Likewise, the amendment abrogates the requirement for written consent of every performer, and makes consent on the part of an authorized representative of the performers binding.^{401c}

^{397o} *Id.* § 12(6).

^{397p} *Ibid.*

^{397q} *Id.* § 20(7).

³⁹⁸ 15 & 16 GEO. 5. c. 46.

³⁹⁹ *Musical Performers' Protection Association, Limited v. British International Pictures, Limited*, 46 T.L.R. 485 (1930).

⁴⁰⁰ *Id. Cf. Gaumont British Distributors, Limited v. Henry*, 2 K.B. 711 (1939).

⁴⁰¹ *Gaumont British Distributors, Limited v. Henry*, 2 K.B. 711 (1939).

^{401a} Copyright Act, 1956, 4 & 5 ELIZ. 2, c. 74, § 45 and 6th sched. See notes 397a-397q *supra*, and text thereto. The most important changes in the Act of 1925 will be the addition of performers in films as a protected group, and the explicit statement that unauthorized broadcasting of live performances is prohibited.

^{401b} Copyright Act, 1956, note 401a *supra*, pt. 2 of 6th sched.

^{401c} *Ibid.*

D. THE "LATIN AMERICAN" GROUP

The statutes of four Latin American countries (Argentina,⁴⁰² Colombia,⁴⁰³ Paraguay,⁴⁰⁴ and Uruguay⁴⁰⁵) contain similar provisions conferring a limited degree of copyright protection upon performers. All of these statutes are ambiguous, and while it seems likely that they cover dubbing, this is not altogether clear.

The statutes each draw a sharp distinction between what might be called the "moral right" and the "pecuniary right" of the performer. The performer (or, in the case of a chorus or orchestra, the conductor) is given a "right to oppose" a dissemination of his performance if the form of the dissemination would be injurious or prejudicial to his artistic interests. This provision would probably cover the dubbing situation, if the dubbed copies were inferior in quality.

The statutes also give the performer a right to remuneration if his performance is recorded or filmed. The provisions do not specify whether this right extends to unauthorized copies of lawful recordings, but there appear to have been decisions supporting this view.⁴⁰⁶ The provisions may mean that a performer could not prohibit dubbing of his recordings, although he could demand remuneration for their use.

The statute of Argentina lists "phonographic records" in the omnibus enumeration of copyrightable works,⁴⁰⁷ and the Colombian statute lists "productions made by means of mechanical instruments destined for the rendering of sounds" in the equivalent section.⁴⁰⁸ Nevertheless, it is doubtful whether these provisions can be regarded as conferring any independent rights upon the record manufacturer, and there is a court decision in Argentina tending to confirm this view.⁴⁰⁹ The statute of Uruguay originally contained a provision according "equal rights" in a phonograph record to the authors, the performers, and the record manufacturer, as "collaborators."⁴¹⁰ This provision was repealed,⁴¹¹ and it seems clear that manufacturers are now given no rights under the copyright statute of Uruguay.

E. THE "RELATED RIGHTS" GROUP

The copyright laws of six nations (Austria,⁴¹² Czechoslovakia,⁴¹³ the Holy See,⁴¹⁴ Italy,⁴¹⁵ Spain,⁴¹⁶ and Turkey⁴¹⁷) have fairly detailed

⁴⁰² Law of Sept. 28, 1933, art. 56. The provision, which is identical with that appearing in the statute of Uruguay and is typical of the other statutes, reads as follows:

The performer of a literary or musical work has the right to demand a remuneration for any of his performances which are broadcast or retransmitted by means of radiotelephony or television, or which are recorded or printed on a disc, film, tape, wire or any other medium capable of being used for sound or visual reproduction. If an agreement cannot be reached, the amount of the remuneration shall be established in a summary proceeding by the competent judicial authority.

The performer of a literary or musical work can oppose the dissemination of his performance if the reproduction thereof has been made in such a form as to produce serious or unjust prejudice to his artistic interests.

If the performance has been given by a choir or orchestra, the right of opposition shall belong to the conductor.

⁴⁰³ Law of Dec. 26, 1946, art. 43.

⁴⁰⁴ Law No. 94 of July 5-10, 1951, arts. 37-42.

⁴⁰⁵ Law of Dec. 15 and 17, 1937, as amended by Law of Feb. 15-25, 1938, arts. 36-39.

⁴⁰⁶ See cases cited in the UNESCO study mentioned in note 354a *supra*, (Doc. No. IGC/1/5) pp. 7-8 nn. 21-22, pp. 93-94 nn. 3, 16.

⁴⁰⁷ Law of Sept. 28, 1933, art. 1.

⁴⁰⁸ Law of Dec. 26, 1946, art. 2.

⁴⁰⁹ R.C.A. Victor Argentina v. Casullo, Buenos Aires Court of Appeal, Sept. 4, 1936, LE DROIT D'AUTOUR 71 (1937).

⁴¹⁰ Law of Dec. 15 and 17, 1937, art. 29, par. 2.

⁴¹¹ Law of Feb. 15-25, 1938.

⁴¹² Act of April 9, 1936, as amended, Part 2.

⁴¹³ Law of Dec. 22, 1953, Part 6.

⁴¹⁴ Act of June 7, 1929.

⁴¹⁵ Law No. 633 of April 22, 1941, as amended, Part 2.

⁴¹⁶ Decree of July 10, 1942.

⁴¹⁷ Law of Dec. 10, 1951, Part 6.

and extensive provisions dealing with recordings or recorded performances. While these provisions appear as part of the copyright statute, the rights they recognize are treated as somewhat separate from, although related to, copyright proper. In several cases the provisions appear in a separate section or part of the statute entitled, for example, "Related Rights" or "Rights Connected With the Exercise of Copyrights."

1. *Czechoslovakia*.—It is not at all clear whether the Czech statute accords any rights against the unauthorized dubbing of sound recordings. The provisions dealing with the rights of record producers do not cover the dubbing situation.⁴¹⁸ The provisions covering the rights of performing artists are ambiguous, but may accord soloists an exclusive right in the copying of their recorded performances.⁴¹⁹

The statute also recognizes a form of moral right on behalf of performers.⁴²⁰

2. *Spain*.—Performers are not protected in Spain, but a special decree grants a copyright in "phonographic adaptations, transformations and reproductions" to "the phonograph record company."⁴²¹ The producer is given the right to "refuse to grant permission for the copying or reproduction of records" when it believes the dubbing "would prejudice its artistic reputation or its financial interests."⁴²²

3. *Italy (and the Holy See)*.—The Italian copyright statute, which is also in effect in the Holy See, clearly accords the manufacturer an exclusive right against the unauthorized dubbing and commercial sale of his records.⁴²³ A form of moral right on behalf of the record manufacturer is also specifically recognized.⁴²⁴ The statute does not confer a similar exclusive right on the performer,⁴²⁵ but gives him a "right to equitable remuneration" from anyone who copies his recorded performance.⁴²⁶ The performers are also accorded moral rights under the statute.⁴²⁷

4. *Austria and Turkey*.—The Austrian and Turkish statutes, though different in wording, each accord "exclusive rights" against the unauthorized dubbing of a sound recording both to the performers^{427a} and to the record producer.⁴²⁸ Both statutes also recognize moral rights on behalf of the performers,⁴²⁹ and provide exceptions in favor of recordings made for news reporting⁴³⁰ and personal use.⁴³¹

V. INTERNATIONAL TREATIES AND CONVENTIONS

A. MULTILATERAL CONVENTIONS NOW IN FORCE

1. *International Copyright ("Berne") Conventions*.—The original Berne Convention in 1886 and its first two revisions (the Paris Convention of 1896 and the Berlin Convention of 1908) contained no

⁴¹⁸ Law of Dec. 22, 1953, § 92.

⁴¹⁹ *Id.* § 83.

⁴²⁰ *Id.* § 90.

⁴²¹ Decree of July 10, 1942, arts. 1, 2.

⁴²² *Id.* art. 3.

⁴²³ Law No. 633 of April 22, 1941, as amended, art. 72.

⁴²⁴ *Id.* art. 74.

⁴²⁵ Performers protected under the Italian statute include persons who play an important artistic part, conductors of an orchestra or choir, and entire orchestras or choirs, if their performance is more than a mere accompaniment. *Id.* art. 82.

⁴²⁶ *Id.* art. 80.

⁴²⁷ *Id.* arts. 81, 83.

^{427a} Austria: Act of April 9, 1936, as amended, § 66(1); Turkey: Law of Dec. 10, 1951, art. 81.

⁴²⁸ Austria: Act of April 9, 1936, as amended, § 76(1); Turkey: Law of Dec. 10, 1951, art. 84.

⁴²⁹ Austria: Act of April 9, 1936, as amended, § 68; Turkey: Law of Dec. 10, 1951, art. 81.

⁴³⁰ Austria: Act of April 9, 1936, as amended, § 69(1); Turkey: Law of Dec. 10, 1951, art. 37.

⁴³¹ Austria: Act of April 9, 1936, as amended, §§ 69(3), 76(3); Turkey: Law of Dec. 10, 1951, art. 38.

reference to protection for recordings or recorded performances. The Conference of Revision held at Rome in 1928 adopted a "voeu" recommending that the governments "consider the advisability of adopting measures intended to protect the rights of performing artists."⁴³² At the Brussels Conference of Revision held in 1948, the Belgian Government urged adoption of a new article obligating the contracting States to provide protection for performing artists, but leaving the means and conditions of protection open to national treatment.⁴³³ This proposal was abandoned in the face of opposition from the author-publisher interests, but the Conference adopted a "voeu" recommending that the governments "study the means to assure, without prejudice to the rights of the authors, the protection of manufacturers of instruments for the mechanical reproduction of musical works."⁴³⁴ With respect to protection for performers, the Conference adopted another "voeu":

Considering that the interpretations of performers have an artistic character, the Conference recommends that studies on neighboring rights be actively pursued, especially in regard to the protection of performing artists.⁴³⁵

2. *Universal Copyright Convention*.—The Universal Copyright Convention does not specifically refer to the question of protection for performances or recordings. However, some significance may be attached to article VI, which defines "publication" as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or visually perceived."⁴³⁶

3. *Pan-American Copyright Conventions*.—With the exception of the Havana Convention of 1928, none of the various Pan-American Copyright Conventions deal with the problem of protection for recordings or recorded performances; this includes the widely ratified Buenos Aires Convention of 1910, of which the United States is a member, and the Washington Convention of 1946, which is the most recent of the series. However, the Havana Convention of 1928, which comprised a revision of the Buenos Aires Convention, included the following statement in the list of "literary and artistic works" which the contracting States were presumably obligated to protect:

* * * drawings, paintings, sculpture, engravings, lithographic, photographic and cinematographic works, or reproductions by means of mechanical instruments designed for the reproduction of sounds; * * *⁴³⁷ [Emphasis supplied.]

Five Central American countries ratified the Havana Convention: Costa Rica, Ecuador, Guatemala, Nicaragua, and Panama. Not one of the copyright statutes of these countries contains any indication that sound recordings are protected under domestic law. Moreover, four of these countries (all except Panama) are parties to the Washington Convention of 1946 which replaced all previous Inter-American copyright conventions,^{437a} and which did not retain the reference to sound recordings. Thus, if this provision of the Havana Convention has any vitality, it seems that its effect would be confined to a very small number of cases.

⁴³² Actes de la Conférence, Voeu V (Int'l Copr. Union, Rome Conf. of Revision) 350 (1928).

⁴³³ Documents de la Conférence, Proposal for Article 11 quater (Int'l Copr. Union, Brussels Conf. of Revision) 308 (1948).

⁴³⁴ Actes de la Conférence, Voeu VI (Int'l Copr. Union, Brussels Conf. of Revision) 428 (1948).

⁴³⁵ *Id.* Voeu VIII.

⁴³⁶ See note 78 *supra*.

⁴³⁷ Art. 2 of the Convention.

^{437a} CANYES, COLBORN & PIAZZA, COPYRIGHT PROTECTION IN THE AMERICAS 181 (2d ed. 1950).

B. PROPOSED MULTILATERAL CONVENTIONS

Efforts to secure the international recognition of the rights of performers, record producers, and broadcasters (the so-called neighboring or related rights), which began in the late 1920's, have resulted in several draft conventions. In 1939, a committee of experts meeting at Samaden, Switzerland, produced a draft convention which was to be annexed to the Berne Convention; this would have given the producers of "phonographic disks or similar instruments reproducing voices or sounds" the exclusive right "to prohibit the reproduction of their recordings directly or indirectly without their authorization, by any means or process of recording whatever."⁴³⁸ The famous "Rome draft," which was produced by a "mixed committee of experts" in 1951, also gave "the manufacturers of phonographic records and similar instruments" the exclusive right "to authorize the reproduction of their phonographic records and similar instruments by whatever means or process of recording."⁴³⁹ The Rome draft also contained a provision protecting performers against unauthorized recording of their performances, but it is unclear whether this would have extended to dubbing as well as clandestine recording of live performances.⁴⁴⁰

The International Labor Organization has recently published a revised version of the Rome draft, which was prepared as the result of meetings held in July 1956, under the auspices of the ILO and attended by representatives of various organizations of performers, record manufacturers, and broadcasters. The "revised Rome draft" gives rights against dubbing both to the performer and to the record manufacturer. The manufacturer's right is stated as it was in the original Rome draft.⁴⁴¹ The performer's right with respect to dubbing is much more clearly specified in the revised draft; he is given:

* * * the right to authorise the recording by any means for commercial purposes or for communication to the public of the broadcast or recording of his recitation, presentation, or performance.⁴⁴²

The revised draft also contains special provisions dealing with recordings made for broadcast purposes.⁴⁴³

Another international proposal for dealing with the so-called "neighboring" rights was presented in the "Draft Agreement for the Protection of Certain Rights Called Neighboring on Copyrights," prepared in March 1957, by a committee of experts convened at Monaco jointly by the Berne Bureau (which administers the Berne Copyright Conventions) and UNESCO. As to the dubbing of sound recordings, this Monaco draft would give both to "performing artists" (art. 2) and to "recorders" (art. 3) the right "to authorize or prohibit the copying" of their "phonograms" (i.e., "exclusively aural" recordings). This protection would extend to "off-the-air copying of the broadcast of a phonogram."

⁴³⁸ Art. 7 of the draft; French version in 52 LE DROIT D'AUTEUR 71 (1939).

⁴³⁹ Art. 6; text in Joint Committee of Experts for the Protection of Related Rights (Int'l Copr. Union Rome Conf.) (1951).

⁴⁴⁰ *Id.* art. 4.

⁴⁴¹ Report of the Secretariat (I.L.O. Doc. GB 131/I.C./D5/12) 5 (1956).

⁴⁴² *Id.* at 2.

⁴⁴³ *Id.* at 2-3.

VI. REVIEW OF BASIC PROBLEMS

A. THE BASIS OF PROTECTION

It is generally recognized that unauthorized dubbing constitutes a problem in the sound recording industry,⁴⁴⁴ and that some legal protection against it is desirable.⁴⁴⁵ At present, the only protection available in the United States (aside from one municipal ordinance) must be sought under State common law. The drawbacks of this type of protection are well known—limited jurisdiction, lack of uniformity, uncertainty of outcome, ineffectiveness of available remedies, and danger of retaliatory State legislation.

Moreover, if the courts continue to extend the boundaries of unfair competition and common law copyright in the area of sound recordings, the result may be that an uncopyrightable work receives more protection than one that qualifies for copyright. At best, this result would be anomalous and undesirable; at worst, it could threaten to undermine the entire concept of copyright. It could apparently be prevented only by bringing sound recordings under the Federal copyright law, and imposing whatever limitations may be necessary on their protection.

Several alternatives to common law protection have been suggested:

1. Uniform State statutes;
2. Action by the Federal Trade Commission;
3. Federal criminal statute;
4. Federal copyright statute.

The practical problems of achievement and administration presented by the first two suggestions may outweigh their advantages. As for the third, a statute imposing criminal liability in the absence of someone's consent gives that person an exclusive right of authorization—in other words, a *de facto* copyright. It is possible to argue that a right of this kind should appropriately be granted as an integrated part of the Federal copyright law.

B. THE CONSTITUTIONALITY OF COPYRIGHT IN SOUND RECORDINGS

Attacks on the constitutionality of a statute granting copyright in sound recordings have usually involved four basic arguments:

1. Records are not "writings" since (a) they are not legible, (b) the Supreme Court has held that they are not "copies," and (c) they are "material objects" or "mechanical devices" and thus belong under patent rather than copyright protection.
2. Protection for a recording would violate the author's "exclusive right" in the work that has been recorded.
3. Performers cannot be regarded as "authors" since their contributions do not amount to original intellectual creations.
4. Record manufacturers cannot be regarded as "authors" since their contributions do not amount to original intellectual creations.

Recent decisions, together with the weight of opinion of the many commentators on this subject, seem to have weakened, if they have not destroyed, the force of the first three of these arguments.⁴⁴⁶ However, although the record manufacturers have persuasively defended

⁴⁴⁴ See note 5 *supra*.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ See notes 105-113 *supra*, and text thereto.

the artistic nature of their activities, the fourth argument represents a more doubtful question.⁴⁴⁷ Certainly, a statute expressly conferring copyright on recorded performances would be much less vulnerable on constitutional grounds than one which granted copyright to manufacturers or was silent as to the beneficiary of protection.

C. THE BENEFICIARY OF PROTECTION

One of the most frequently repeated criticisms of the "acoustical recording" bills in the 1940's was directed at their failure to identify either the performer or the record company as the beneficiary of protection. The performers have argued that their contribution to a record is far more creative and artistic than that of the manufacturer, and that copyright should be accorded to them in the first instance. The manufacturers have argued that a performers' copyright would be impractical because of the difficulty in indentifying all of the beneficiaries, and that the artists' interests would be better served by their reliance on royalty contracts. The manufacturers have stressed the artistic nature of their contribution to the records, and base their claims on an analogy to the present copyright in motion pictures.

Judged solely from the creative viewpoint, the claims of the performers appear to outweigh those of the manufacturers. On the other hand, various practical considerations lend weight to the manufacturers' claims. Compromise solutions might include (a) treating the performers and the record company as "joint authors" or (b) granting copyright in the performance but protecting the manufacturer as "employer for hire" or "implied assignee." Whatever solution is found to this problem, it seems important that it be clearly expressed in the legislation.

D. IMPACT ON SECONDARY USERS

The ordinary commercial users of recorded music—broadcasters, jukebox operators, cafe owners, etc.—could presumably find little objection to the principle of copyright in recordings, if it was strictly limited to the dubbing situation. However, they may fear that, once the principle of copyright is firmly established, the exclusive rights of the copyright owner will be extended to include broadcasting and public communication. On the other hand, it might be argued that sound recordings are now in a position to claim protection against all these types of uses under the present court decisions, and that broadcasters and other secondary users would actually stand to gain from a copyright statute confined to dubbing.

E. IMPACT ON VENDORS

If expressed in their traditional form, the exclusive rights conferred by an antidubbing statute would probably be "to make, copy, and vend" the recordings. Standing alone, this might well mean that a retail vendor could be liable for statutory damages and to seizure and destruction of his stock, even if he had no reason to suspect that the records were piratical. Unless some special provision were included limiting the liability of innocent vendors, it seems likely that retail record dealers would be among the opponents of a copyright bill including antidubbing provisions.

⁴⁴⁷ See notes 114-117 *supra*, and text thereto.

F. IMPACT ON AUTHORS AND COPYRIGHT OWNERS

1. *In general.*—Aside from their constitutional objections, most of the main arguments of the authors—multiplicity of licensing, danger of new collecting agencies, restrictive control of performances—do not apply to an antidubbing statute. As in the case of the broadcasters, they may fear that copyright control would gradually be extended to other uses, but again it is possible that recent court decisions broadening the scope of common law copyright and unfair competition could be considered an even greater danger.

2. *The compulsory licensing problem.**—Under the present copyright law, the recording rights of copyright owners of musical compositions are subject to a compulsory license; once the owner has licensed his work for recording, anyone else may record it for a statutory fee of 2 cents per record. It is highly unlikely that any such limitation could ever be imposed upon rights against the dubbing of records. This fact provides the author-publisher groups with three grounds of attack:

(a) The author is unfairly discriminated against because he can never receive more than 2 cents per record, while the performer can bargain freely for his services.

(b) Under the compulsory licensing provisions, a record manufacturer may record a song without permission from the copyright owner. Under the proposed legislation he could then secure copyright in his recording and prohibit rerecordings a right that is denied the author of the song.

(c) The compulsory licensing provisions were intended to prevent a monopoly in the record industry. The proposed legislation would foster such a monopoly, since the largest companies have long-term exclusive contracts with the most popular recording artists.

In answer, the record manufacturers have advanced the following arguments:

(a) In 1909 the compulsory licensing provision was imposed on a right then being recognized for the first time. In contrast, rights of record manufacturers against dubbing have been consistently recognized under the common law. To impose a compulsory licensing provision upon a copyright in records would constitute a deprivation of recognized property rights. It would also countenance dubbing, a practice the courts have condemned as a social evil.

(b) The performer is a much more important factor in the success of a record than the song. It would be unjust to impose a ceiling on the amount a performer can receive for making a record.

(c) Authors receive royalties from many sources in addition to the sale of records: sheet music, public performance, broadcasting, motion pictures, etc. Performers and record companies receive remuneration for a recording solely through the sale of records, and it would be unfair to impose a compulsory license on their one source of revenue.

In the course of their efforts to secure copyright legislation, the performers urged that compulsory licensing provisions be repealed,

*For an extended discussion of the compulsory license see Studies 5 and 6 in the present series of committee prints.

thereby removing the cause for the authors' claim of unequal treatment. The record manufacturers may be more reluctant to agree to this suggestion, since the compulsory licensing provision was created for their benefit.

One suggested solution to this dilemma was to make copyright in recordings conditional upon the consent of the copyright owner, and provisions to this effect were embodied in several of the bills. Unfortunately, the results of this proposal seemed to please no one. The authors-publishers had two main objections:

(a) The requirement for consent in the first instance does not alter the fact that, once he has secured his copyright, the manufacturer can prevent copying of his records—a right that is still denied to the author.

(b) The requirement is illusory, since the record companies are in a superior bargaining position. If the copyright owner withholds permission, the record manufacturer will simply record another song.

The objections of the record manufacturers can be summarized as follows:

(a) The provision would make it essential for the record company to obtain a copyright, since otherwise his work would fall into the public domain and he would lose the common law antidubbing rights he now has.

(b) Since it is imperative for the manufacturer to secure a copyright, and since the author can give or withhold consent as he chooses, he may sell his consent for whatever he can get. This would allow him to discriminate against one company and in favor of another. It would also virtually do away with the principle of compulsory licensing, since the copyright owner could charge anything he wished in exchange for his consent.

VII. SUMMARY OF ISSUES

1. Should the Federal copyright statute provide protection against the unauthorized dubbing of sound recordings?
2. Who should be the beneficiaries of this protection—the performers, the record manufacturers, or both?
3. Should the legislation embody any effort to resolve the problems presented by the compulsory licensing provision?
4. What formalities, if any, should be provided for sound recordings?
 - (a) Should registration for unpublished and/or published recordings be permitted or required?
 - (b) What should be the form of the copies deposited?
 - (c) Should a copyright notice be required for published records?
 - (d) If so, what should be the form and position of the notice?
 - (e) Should the manufacturing provisions be extended to recordings?
5. What should be the duration of copyright in a sound recording?
6. Should there be a special provision covering rerecordings made by a broadcasting organization for its own broadcast or archival purposes?
7. Should remedies for infringement include:
 - (a) Specified minimum damages?
 - (b) Seizure and destruction of infringing copies?
 - (c) Criminal penalties?

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
THE UNAUTHORIZED DUPLICATION OF
SOUND RECORDINGS

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON THE UNAUTHORIZED DUPLICATION OF SOUND RECORDINGS

By Herman Finkelstein

APRIL 17, 1957.

I do not know whether I have previously commented on Barbara A. Ringer's paper. It is an excellent summary of the subject. Answering the specific issues raised at page 50:

1. Should the Federal copyright statute provide protection against the unauthorized dubbing of sound recordings?

Answer. I see no objection to a law which will prohibit unauthorized dubbing of sound recordings. I am not prepared, at this time, to comment on whether or not this should be a part of the copyright law.

2. Who should be the beneficiaries of this protection—the performers, the record manufacturers, or both?

Answer. This question omits the idea that the author of the work may be one of the beneficiaries of the protection.

3. Should the legislation embody any effort to resolve the problems presented by the compulsory licensing provision?

Answer. I am opposed to any compulsory licensing of phonograph records. However, if the compulsory license applies to the author, then it should also apply to other beneficiaries of the right, if that right is embodied in the copyright law or if it proceeds on copyright principles.

4. What formalities, if any, should be provided for sound recordings?

(a) Should registration for unpublished and/or published recordings be permitted or required?

(b) What should be the form of the copies deposited?

(c) Should a copyright notice be required for published records?

(d) If so, what should be the form and position of the notice?

(e) Should the manufacturing provisions be extended to recordings?

Answer. I am opposed to formalities as a condition for copyright. If protection is on noncopyright principles, I should want to examine the proposed legislation.

5. What should be the duration of copyright in a sound recording?

Answer. I am not prepared to answer this question at this time. It would have to be examined in the light of the new British law.

6. Should there be a special provision covering rerecordings made by a broadcasting organization for its own broadcast or archival purposes?

Answer. I do not think that this belongs in the copyright law.

7. Should remedies for infringement include:

(a) Specified minimum damages?

(b) Seizure and destruction of infringing copies?

(c) Criminal penalties?

Answer. My answer to (a), (b), and (c) should be in the affirmative if protection is granted on copyright principles.

HERMAN FINKELSTEIN.

By Ralph S. Brown, Jr.

OCTOBER 17, 1957.

The problem as narrowly stated in Miss Ringer's helpful study excludes, as I understand it, the clandestine recording of live performances.

There seems to be no substantial argument in favor of tolerating the unauthorized copying of records. I suppose that if a record is out of print, and there is a demand which the original manufacturer is not willing to supply, then some social purpose is served by a state of the law which makes possible unauthorized copies. However, the ordinary run of commercial piracy cannot honestly

claim this justification. The unavailability of works that are "out of print" should be dealt with, if at all, by a general scheme of compulsory licensing, and is no justification for permitting an especially flagrant form of misappropriation.

On these assumptions, I believe there should be some protection against this form of unauthorized copying, and, since I am opposed to unconfined judicial expansion of misappropriation remedies, I am inclined to believe that the problem can and should be dealt with by statute.

A modification of the "acoustic recording" bills of 1942-51, described on pages 34-7 of the Ringer study, seem to me to have some merit. This much of the language quoted on page 35 seems to cover the right that deserves protection.

"(f) To make or to procure the making, if the copyrighted work or any component part thereof be an acoustic recording, of any duplicated or recaptured recording thereof on a disc, film, tape, wire, record, or other device or instrumentality, by or from which, in whole or in part, the sound recorded on the copyrighted work may in any manner, or by any method, be reproduced or communicated acoustically; to publish and vend such recordings of sound;"

The passage that I have quoted stops short of creating any right against the performance of such recordings, and therefore does not bring in by the back door the whole question of performers' rights, a matter which should be dealt with on its own merits.

The question who may obtain and enforce this right seems to me best resolved by conferring it on the manufacturer. The British Act of either 1911 or 1956 contains language appropriate for this purpose. I concede that the manufacturer's contributions to the recording are less significant than those of the composers or the performers. The usual alternative, to create a right in performers, seems to me impractical because of the multiple parties that may be involved. For the problem at hand the interest of the performers in preventing piracy seems to me to be in complete harmony with the performer's interest. If performers wish to protect themselves against doubledealing by the manufacturer they should be able to insist on a covenant from him that he will obtain this copyright, and enforce it. I am not impressed by the arguments against recognizing the manufacturer as an author, or classifying a record as a writing.

I think that matters of registration, notice, duration, and remedies, should fall into the general pattern of the act, whatever that turns out to be. There probably should be an exception, however, for "re-recordings made by a broadcasting organization for its own broadcast or archival purposes."

RALPH S. BROWN, Jr.

By Ralph S. Brown, Jr.

DECEMBER 20, 1957.

Since sending you on October 17 my comments on "Unauthorized Duplication of Sound Recordings," I have read Professor Ulmer's study of the Monaco draft on neighboring rights, and reread the earlier papers by you and Dr. Bogsch. These lead me to wonder whether the matter of unauthorized dubbing should be separated from the larger question of performers' rights. I am inclined to think that it should not be. In any broader treatment of the problems, I would withdraw my recommendation that the right to prevent unauthorized copying of records should be vested in the manufacturer (by which I meant the entrepreneur who produces the recording, not the person who does the mechanical pressing, if they are not the same). The significant creative function in a performance is, after all, that of the performers. The difficulties that lie in recognizing rights in multiple parties should be met and resolved; this, as Professor Ulmer's study shows, is quite possible.

RALPH S. BROWN, Jr.

By Harry G. Henn

FEBRUARY 24, 1958.

The following are my comments on the copyright revision study entitled "The Unauthorized Duplication of Sound Recordings," by Barbara A. Ringer, Assistant Chief, Examining Division, Copyright Office.

Miss Ringer's study, in my opinion, is excellent. Its organization is clear; its citation of authorities (as of its issue) exhaustive; and its conclusion well balanced.

Until I read Miss Ringer's study, I was not aware that the term "dubbing" was used in the recording industry in the sense in which she uses the term. Since

the term has, I understand, at least one different meaning in the recording industry, i.e., addition or substitution of new sounds (not to mention possible different meanings in other industries—footnote 3a), consistent use of the term “duplication” might have been preferable. Of course, she does define the term “dubbing” in the sense in which she uses it.

On page 2 of the study typical examples of duplication of sound recordings are listed. Undoubtedly, Miss Ringer was referring to typical commercial examples, since by far the most prevalent practice of copying is by individuals from the playing for broadcasts of recordings.

* * * * *

With respect to the summary of issues, it is my present feeling that the Federal copyright statute should not provide protection against the unauthorized duplication of sound recordings, at least as part of the present copyright law revision program. If statutory copyright protection is extended to sound recordings, it perhaps ought to comprehend unauthorized uses in addition to duplication. The case-law development in Federal and State courts appears to be proceeding in the right direction. Continued reliance on common-law theories under State law would result in greater flexibility, would provide more background for any future statutes then deemed necessary, would not extend Federal and thereby limit State jurisdiction, and, from the point of view of copyright law revision, would avoid introducing into the copyright law revision program, additional complication and controversy.

HARRY G. HENN.

By *Edward A. Sargoy*

MARCH 11, 1958.

I must apologize for my long delay in commenting on Barbara Ringer's study “The Unauthorized Duplication of Sound Recordings,” particularly since it is such an excellently done work on a topic which has always had a special interest for me, and thus deserved better of me.

Her opening quote from the late Zechariah Chafee's “Reflections on the Law of Copyright” in the 1945 Col. Law Review, to the effect that the question is whether you can infringe a record, could not be more apt.

I think the fine analysis and treatment of the subject goes far beyond the seemingly simple implication of her title “The Unauthorized Duplication of Sound Recordings,” and her early statement that while the rights of authors would be discussed in respect of sound recordings, the study was primarily concerned with the rights of performers and record producers to prevent unauthorized duplication of their own contributions to the recording.

I think she has given us a really much broader picture of the situation as to the fixing, preservation, and distribution of the products of intellectual or artistic labor recorded in acoustic forms than she has purported to, under the present statute as well as under various aspects of common law protection including unfair competition. I also fully appreciate her legislative history of the matter in Congress with most of which, at least since 1930, I was in direct and intimate touch at the time in the course of consideration by bar association committees. Her comparative law discussion in respect of various individual countries, and under international conventions and treaties, and her dissection of the reactions of various interests concerned illuminatingly complete a study of which the Copyright Office can be proud.

The guts of the problem to me, however, has always been broader than the study has posed it. Are we ready, under a statutory Federal system, and not necessarily the present one, to recognize that a fixed permanent medium of recording the expressed product of the intellectual and artistic labor so that it can be examined, identified, preserved, transferred and reproduced identically, separate and apart from the personality of its creator is a “writing” within the constitutional meaning of Article I, section 8. This is not only so as to the intellectual content of the material so recorded, but also as to the fixation of a particular interpretive rendition, or both. We are now in an electronic era when this can be done, and ideas developed in the 18th and 19th centuries are no longer so pertinent. For the last 25 years, I have been urging, as an abstract proposition, that I could see no objection under the Constitution to copyrightability for works in exclusively acoustic form, either as to intellectual content, or as to rendition, or both. I still bear the wounds from the slings and arrows of those who could not see how a work could be described as a “writing,” if in an acoustic fixation on disc, wire, or tape

which could not be read visually; who felt that such a record was merely a device protectable perhaps only under patent; and that in any event how could a performing interpretation, even if captured in a particular fixation be deemed an artistic work of authorship. I always felt that it was perhaps subconscious economic predilections that motivated such nonacceptance in principle of copyrightability for acoustically recorded works as "writings."

I was chairman of the copyright committee of the ABA during the latter 1930's when the Daly, McGranery, and like bills were pending, to give a species of copyrightability to fixations of interpretive renditions in acoustic records. While I and my committee disapproved of the bills as such, as poorly drawn, I presented the following resolution in behalf of my committee, which was adopted by the section and by the Association in 1939. I quote from the "Digest of Proceedings" of the American Bar Association, Section of Patent, Trademark, and Copyright Law, at the 1939 San Francisco meeting as follows (p. 11):

"7. COPYRIGHTABILITY FOR ACOUSTIC WORKS—H.R. 926, H.R. 4871, AND H.R. 6160

"On motion of Mr. Sargoy, the Section adopted the following resolution:

"*Resolved*, That while not approving the specific bills proposed in such regard in the 76th Congress, 1st session, and known as H.R. 926, H.R. 4871, and H.R. 6160, the principle is approved of providing under the copyright statute a limited copyrightability for writings expressed in a fixed, identifiable, acoustic recordation capable of intelligible dissemination through the sense of hearing, precisely to the same extent as, and neither more nor less than, the copyrightability and protection now afforded by the existing copyright law to works of authorship tangibly captured and expressed in fixed visual recordations such as motion picture films."

Shortly before that I had assisted the late Gabriel L. Hess in an article entitled "Copyrightability for Acoustic Works in the United States," 4 *Geistiges Eigentum* 183 where the same position was taken.

I think there is no longer any genuine doubt today, in the light of what the majority of the court, as well as the dissenting Judge Hand, and Chafee before them, had to say in the *Capitol Records* case, about acoustic recordings being copyrightable as "writings," if Congress chose to put them into title 17. It would certainly seem that there is common law property in them under the *Waring* doctrine, and under the overruling of the *Whiteman* case by *Capitol Records*, even though the latter did so on unfair competition.

This is not to say that I am presently for the inclusion in a new title 17 of works expressed in acoustic form either as to their intellectual content, or the fixation of a particular interpretive rendition, or both. All that I want to emphasize is that there is no legal principle to my thinking which would prevent bringing the acoustic form into the purview of a Federal copyright statute, and that the situation calls for exploration. If there is objection to so doing, it should be justified on socioeconomic principles.

Although the foregoing resolution was adopted by the ABA in 1939, neither I nor other members of my committee ever thereafter felt that the matter should be further pressed, as we were not really convinced that the socioeconomic aspects of the matter had ever fully been explored. These bills were renewed in later years, but no action ever taken. When I wrote the copyright committee report for the annual meeting in Atlantic City in 1946, I posed the problem as below indicated. Interest, however, seemed to have waned, and we were never able to get an answer to them. In the 1946 committee report, at pages 15-17, I said:

"H.R. 3190 was thereupon referred back to the committee for further study and report in respect of the social and economic interests involved, with a view to a detailed report in such regard.

"To initiate such study, analyze the legal problems involved, and ascertain the possible impact of such legislation upon the social and economic interests affected, without taking a position on the desirability or undesirability of the legislation, the chairman of your committee drafted a detailed memorandum thereon for distribution to the members of your committee as well as to members of a like committee on copyrights of another bar association.

"To indicate the complexity of the problems and the diversity of the economic interests affected, the following is an apt illustration. It is merely a set of questions put as the conclusion of the above memorandum as requiring possible exploration. The questions are:

"(1) Will it serve the interest of the individual members of the public generally to establish a system by which they may secure statutory copyright in copyrightable works expressed and preserved in acoustic recordings?"

“(a) Shall this copyright cover source materials which have heretofore been protected only when expressed and preserved in manuscript form, with rights against translation, plagiarism, dramatization, novelization, adaptation, arrangement, public performance, new versions, etc.?”

“(b) Shall this copyright give only a limited protection to a particular captured performing interpretation or rendition of either protected or public domain source materials?”

“(c) Shall this copyright protect both source material and recorded performing interpretation, as in the case and to the extent of copyrighted visual recordings, e.g., motion picture films?”

“(2) What will be the effect upon the hundreds of radio broadcasting stations using records almost exclusively, rather than living performers? If such recordings become independently copyrightable and subject to licensing, these radio stations may have to pay a license fee to the copyright owner of the recorded version, or his agent or society, in addition to the license fee already paid for the right to perform the music recorded, if the recording is a rendition of copyrighted music.

“(3) What will be the effect upon the establishments operating some three-quarters of a million jukeboxes to entertain and attract patrons, and which use millions of records annually, if such records were to become subject to copyright control as records?”

“(4) [Discussion of jukebox situation.]

“(5) What will be the effect upon the copyright owners of music, and the agencies or societies which market their public performing rights, if the owners of the copyrighted recordings should similarly organize in societies to market public performing rights to the records, in similar manner as performing rights musical societies market their performing rights? Under the Buckley-Myers bill, the music copyright owner has a paramount interest and can therefore determine terms and conditions on which copyright may be secured in a recorded version of his copyrighted musical composition, since he can withhold the right to secure such copyright. Will this control be merely theoretical, or can it practically be exercised? As to those copyrights secured in recorded versions of musical compositions in the public domain, there would be no question of the music owners having any control.

“(6) How will the problems of authors and composers, with their publishers be settled in determining who shall have the right to copyright, or to consent to copyright, in the new recorded versions of their copyrighted source materials?”

“(7) How will the respective rights of the individual performers (and their unions), conductors or directors (and their societies), and entrepreneurs who produced the performing interpretation by scouting and securing the various talents, and the manufacturers of the records, be apportioned or determined in respect of the work copyrighted? Will labor unions or other organizations controlling various talents contributed to the performance have an element of control over this new right?”

“(8) Does the foregoing problem present any situation different from that determined under the present act in respect of settling the respective interests of writers, editors, adaptors, actors, directors, photographers, scene and costume designers, producers, and their respective unions, guilds, societies and associations, all of whose creative and artistic talents enter into the production of a visual recording, copyrightable under the present act as a motion picture film?”

“(9) What will be the attitude of manufacturers of record players, manufacturers, and retail vendors of records?”

“If it were possible for the members of your committee to obtain the attitudes toward this legislation of the various diverse groups of authors, publishers, distributors, manufacturers, users, etc. of these recordings, in the musical, dramatic, book and periodical publishing, broadcasting, motion picture, juke box and other fields, a considerable step might be taken toward ascertaining their attitudes with respect to general revision of our copyright laws. * * *”

I do not know the social and economic answers, and I would like to see them explored. I do think, however, that some of the underbrush that might otherwise confuse the situation could be clarified.

If it were deemed desirable to give acoustic works statutory protection, I think such should be done in the context of a general revision of the statutory law of the type we have been discussing. You know my thoughts that there should be a single statutory system covering works from their creation through their unpublished and published stages so as to eliminate the dichotomous system of common law protection under State regimes for unpublished works and statutory

protection for published or registered work (with perhaps some special provisions for private letters and documents). The statute could then take over the problem of protection against unauthorized dubbing of records now given under common law principles.

I recognize that there may be a philosophical distinction between the fixation of a particular rendition in a recording, and the intellectual material, the song, musical composition or play likewise contained in the recording. It is true that the rendition must always be a contribution to another basic work of intellectual creation, whether such other work be in the public domain, protected as unpublished, or protected under statutory copyright, while the basic work may be a new composition in its own right, not necessarily derived from prior works, although works protectable by copyright do use material free to all, such as the notes of the scale, the letters of the alphabet, the words in the dictionary, prior works in the public domain, and even prior protected works with the consent of the owner. I think, however, that this is a distinction but without a difference, as far as legal consequences of protection should be concerned. Whether the work be the so-called basic work, or the fixation of a particular interpretive rendition, each is the fruit of intellectual and artistic labor expressed in a concrete fixed identifiable form. If the creator should drop dead immediately thereafter, the product of his intellectual and artistic labor in either case is there for inspection, examination, identification, preservation, transfer, identical duplication, physically in duplicate recordings as well as by identical performances. It is genuinely an article of commerce. The quality of the basic work, or the rendition in principle are not essentially in issue, inasmuch as from the point of view of public acceptance, the artistic contribution of an Elvis Presley to an unknown rock 'n' roll number, or of a Toscanini to an unknown composer, as fixed in a sound track containing their respective interpretive rendition, can transcend the basic work. From the point of view of property recognition, and protection, I do not see why there should be lesser legal consequences in principle in the one case than in the other, subject of course to the paramount rights, if any, and permission of the owner of the basic work.

I think it should be made clear that what we are talking about is a fixation in a sound track of a particular rendition. The property right is in the fixation, and not in the rendition per se. No more than it has been the law in the past, because too ephemeral, to give a performer an exclusive right to his way of performing, I do not think that there should be any such right accorded in the future. The owner of the recorded rendition should not have the right to prevent other performers from imitating or attempting to do the performance in like manner. The property would be in the fixation of one particular rendition, against its identical reproduction in other sound tracks, or the unauthorized use of the sound track publicly to project duplicates of that particular captured performance. I do not think the Daly and McGranery bills intended to protect performances per se, but they were so poorly drawn as to invite effective attack on that basis.

I think that various of the problems that are posed in respect of copyright protection for acoustic works, such as who shall own the fixation, the orchestra leader, the players, or the record manufacturer, compulsory licensing, etc., would be resolved if we were to look at the fixation of an acoustic interpretive rendition, as we have looked for years, under copyright, at the fixation of a visually interpretive rendition in motion picture films. When "Henry V," "Romeo and Juliet," and "Hamlet" are done in cinematographic form, with Shakespeare's public domain lines and story being uttered by famous actors with appropriate gestures, the resulting motion picture is of course copyrightable and copyrighted. The visual images of the interpretive rendition captured on the film would surely be protected under the copyright statute, even though Shakespeare is in the public domain, against duping of the films or unlicensed exhibitions in theatres. This does not mean that any other company would not be free to use the same Shakespeare works for their film productions, and the actors to try to imitate the postures of the former. All the problems that have been posed in respect of acoustic recordings (except compulsory licensing), have existed and been reasonably resolved under the present statute with respect to the visual recording in the form of the motion picture film. Many different artistic talents contribute to the motion picture, such as directors and assistant directors, actors, etc. The answer in the United States has been the definition of the copyright statute which has permitted an employer for hire to be deemed an author. Thus, the entrepreneur becomes the author by making appropriate contracts with all of the contributors to the final result. With such a definition, the matter, in the final analysis, becomes one of contract. If the orchestra leader wants to be the entrepreneur, he

engages the musicians and the recording company. If the record manufacturer wants to be the author it engages the orchestra leader and the musicians. If a third party wants to be the author, he engages all the others.

So far as I can see, the only difference lies in respect of compulsory licensing of recorded music. If this were to be eliminated, I cannot see why a particular fixation of an acoustic interpretive rendition of "Hamlet" or "Beethoven's Fifth Symphony," independently on its own account, cannot be treated and considered in precisely the same way as a visual interpretive rendition by Maurice Evans, or Toscanini would be protected. If the basic work so interpretively rendered is not in the public domain, then the consent of the paramount owner to the new copyright would be necessary, just as the motion picture companies today have to secure the prior consent of the owner of the play, story or other material, if protected at common law or under copyright, before the motion picture film can be made and copyrighted on its own account.

I toss in the above comments, as I said, to clarify the issues involved, rather than to solve them. I would be interested in getting a picture of the socioeconomic aspects of the problem, which I think is the crux of it.

EDWARD A. SARGOY.