THE 1965 REVISION OF THE U.S. COPYRIGHT LAW

Austin Clarkson

NEXT TO INCOME TAX and jay-walking, the least unbroken law is surely that of copyright, if only because the copyright law presently in force was passed in 1909 and tailored to the Gutenberg, rather than to the Marconi, era. The drafters of the 1909 statute could not have foreseen that authors' rights would soon be threatened by juke boxes, microfilm, videotape recorders, communication satellites, and computerized storage and retrieval of information. They did not anticipate that within 50 years some works of authorship would be primarily fixed by magnetic tape or by a set of punched cards that program a computer. Nor did they imagine that the notion of an "original" would be virtually smothered by a million Mona Lisa's, or that copying techniques would place "first editions" within the reach of everyone. Revision of the copyright law has had to accommodate the technological blitz of the last half century, to right inequities, and to attempt to make some provision for the shape of things to come. It may not be so very long before households with any cultural pretensions whatever subscribe to the Microfilm of the Month Club, or own cans of magnetic tape (for use on their home computer) marked *The English Novel 1700–1950*, and *The Annual Supplement of New Music for 1995* (in four parts: one each for Europe, the Americas, Africa, and Asia).

The level of respect and recognition accorded by the members of a high culture to its finest and most valuable artifacts is inevitably mirrored in its copyright law. That the present U.S. copyright law has survived, coelacanthlike, so long attests to nothing more than that an immobilizing inertia afflicts some aspects of culture; that it has been permitted to survive in such condition is a national, if not international, scandal. In past decades, rampant apathy, complacency, and criminal self-interest have successfully thwarted reform. And even now, the revision bill of 1965 is gravely threatened by the juke-box profiteers and their allies who object to paying royalties on recorded performances,

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AUSTIN CLARKSON is an instructor of music at Columbia University.

and by the "non-profiteers" on the fringes of the educational establishment who self-righteously assert that all materials used for the moral, spiritual, and intellectual betterment of the populace should be donated free of charge.

Copyright law influences the entire intellectual health of the community. It not only affects writers, composers, performers, artists, scientists, teachers, and students, but in the modern world it plays an increasingly important role in international relations. As Abraham L. Kaminstein, Register of Copyrights, points out in the Preface to his *Supplementary Report on the 1965 Revision Bill*: "It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes."[1] The following digest of some leading aspects of the 1965 Copyright Law Revision Bill is presented in the belief that our readers have a large stake in seeing an equitable, honorable, and effective copyright bill signed into law. Since the revision bill will almost certainly be taken up in the next session of Congress there is still time for interested individuals and groups to acquaint themselves with the bill and to make their opinions known on Capitol Hill.

Preparatory studies for the revision of the antiquated copyright law were initiated in 1955 and resulted six years later in a report submitted by the Register of Copyrights. The report's more controversial recommendations stung hitherto lethargic parties into violent opposition. After another three years of discussion, debate, hearings, and redrafting, the revision bill of 1964 was submitted for further comment. The final, legislative, phase began this year when Senator McClellan and Representative Celler introduced the Copyright Law Revision Bill to the 89th Congress on February 4 for active consideration. The Register of Copyrights filed a supplementary report in May which

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[1]*Copyright Law Revision, Part 6; Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill.* Washington, D.C., 1965, p. xv. (For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C., 20402. Price $1.00.)

summarizes the revision program and presents the bill in its most up-to-date form. The ensuing summary is made from this supplementary report with a view to interesting a readership concerned with matters musical and educational. Those who desire more complete information are urged to purchase the report itself.

A. THE SUBJECT MATTER OF COPYRIGHT

1. The present reference to "all the writings of an author" as the general subject matter of copyright has been replaced by the phrase "original works of authorship." This phrase maintains the established standards of originality without implying any further requirements of esthetic value, novelty, or ingenuity.

2. The revision bill takes a giant step forward by requiring that protected works be fixed in any tangible medium of expression now known or later developed, from which works can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Improvisations and unrecorded performances would not be subject to statutory protection but would continue to be protected at common law until such time as they are fixed. No particular form of fixation is required as long as the work is capable of being retrieved. A musical composition, for example, would be copyrightable if it is written or recorded in words or any kind of visible notation, in Braille, on a phonograph disk, on a film sound track, on magnetic tape, or on punch cards. It will now be possible for composers of tape music, concrete music, and programs for a computer to copyright their works without having to reduce them, as is presently necessary, to some bogus musical script.

3. Another important change is the addition of a new category to the subject matter of copyright: "sound recordings." The revision bill distinguishes between sound recordings (copyrightable works that result from the fixation of a series of sounds) and phonorecords (material objects in which sounds are fixed). Sound recordings as copyrightable works are therefore distinguished from any musical, literary, or dramatic works that are reproduced on phonorecords. Thus, a phonorecord (a disk or tape, for example) of a song would usually constitute a reproduction of two copyrighted works under the bill: the song and the sound recording of it. Where, on the other hand, the composition recorded is a work in the public domain, the phonorecord would reproduce only one copyrighted work: the sound recording.

B. Exclusive Rights Under Copyright

Limitation of the author's exclusive rights is, not surprisingly, the most disputed part of the revision bill and the one most affected by advancing technology. The basic legislative problem is to insure that the law provides the necessary monetary incentive to write, produce, and publish creative works, while at the same time guarding against the danger that these works will not be disseminated and used as fully as they should be because of copyright restrictions. As shown by the iniquitous juke-box exemption, a particular use which at one time may have had little or no economic impact on the author's rights can assume tremendous importance in times to come. An author's rights cannot be tied to present technology so that his copyright loses much of its value because of unforeseen technological advances.

The five basic exclusive rights granted the owner of a copyright are the right (1) to reproduce the work in copies or phonorecords; (2) to prepare derivative works based on the work; (3) to distribute copies or phonorecords of the work to the public; (4) to perform the work publicly; and (5) to exhibit the work publicly.

A source of bitter contention between educational groups and authors and publishers has to do with the relative merits of "fair" or "free" use of copyrighted material by non-profit users such as teachers, librarians, and educational broadcasters. The unrestrained use of photocopying, recording, and other devices can go far beyond the recognized limits of "fair" use (as established by precedent) and may severely curtail the copyright owner's market for copies of his work. Even when the new media (such as non-profit broadcasting, linked computers, etc.) are not operated for profit, they may reach huge audiences and may be expected to displace the demand for authors' works by other users from whom copyright owners derive compensation. The drafters of the revision bill believe that reasonable adjustments between the legitimate interests of copyright owners and those of certain non-profit users are no doubt necessary, but they affirm that the day is past when any particular use of works should be exempted for the sole reason that it is "not for profit." Hence, the revision bill imposes no blanket "for profit" limitation on the right of public performance; exemptions from copyright control are instead spelled out under a number of headings, such as fair use, face-to-face teaching activities, educational

broadcasting, religious services, *et alia*.

1. *Fair use.* The drafters of the revision had fond hopes of at last spelling out the meaning of "fair use" so that it would be unnecessary to continue relying on the complex history of precedent. The 1964 version of the revision bill reads as follows in this regard:

> The fair use of a copyrighted work to the extent reasonably necessary or incidental to a legitimate purpose such as criticism, comment, news reporting, teaching, scholarship, or research is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use, the factors to be considered shall include: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Both sides reacted unfavorably to this language. The author-publisher groups feared that specific mention of uses such as "teaching, scholarship, or research" could be taken to imply that any use even remotely connected with these activities would be a "fair use," while educational groups objected seriously to restrictive language such as "to the extent reasonably necessary or incidental to a legitimate purpose" and "the amount and substantiality of the portion used." A group of educational organizations urged further that the bill adopt a new provision which would specify a number of teaching and scholarly activities as completely exempt from copyright control. In broad terms and with certain exceptions, the proposal would permit any teacher or other person or organization engaged in non-profit educational activities to make a single copy or record of an entire work, or a reasonable number of copies of "excerpts or quotations," for use in connection with those activities. It was argued that these privileges are a necessary part of good teaching and that it is unjustifiable to burden educators with the need to buy copies for limited use or to obtain advance clearances and pay royalties for making copies. Authors, publishers and other copyright owners reacted violently to these proposals on the ground that the market for their works would be severely diminished and that ultimately the economic incentive for the creation and publication of the very works on which education depends would be destroyed. Agreement was evidently impossible to reach, so the drafters regretfully pared the provision down to the bare

clause that "the fair use of a copyrighted work is not an infringement of copyright."

The inability of the producers and users of copyright works to agree on a definition of fair use betrays a lamentable cleavage in our culture. The corrupting effect of evaluating activities according to whether or not one gains money by them and of the defensive attitude that educators are unappreciated and inadequately rewarded have taken their toll of the respect we grant the work of authorship itself. It seems to me that the greatest concessions need to be made by the rank and file of professional non-profiteers who believe that because they are somehow serving the public good, they should be exempted from the need to respect an author's rights. But as educators we should not have to appeal to some higher, even divine, right and hence to demand special treatment under earthly law. If educators have a score to settle with society (and there is plenty of evidence to show that they have) recompense should be levied on the culture as a whole. Educators must apprise everyone of his responsibility to education and not ask authors and publishers to shoulder the collective guilt as scapegoats. If a society truly respects its education it will not only reward its authors for their work, it will ensure that only the best ideas are used and even pay premium prices for them gladly. Society will surely regard its education more highly if its educators in turn respect their materials enough to pay for them at fair and honorable rates rather than scrambling for discount, wholesale, or even fire sale prices.

The Executive Board of the American Musicological Society recently reported to the Congress in favor of the fair use clause and opposed to the proposals of the educational association. Everyone who can should express himself on this issue to his Congressman.

2. *Face-to-face teaching activities.* Performance or exhibition of a work by instructors or pupils in the course of face-to-face teaching activities in a classroom or similar place normally devoted to instruction is exempted from copyright control. There is no limitation on the types of work covered by this exemption, which would mean that a teacher or student in a classroom situation would be free to read from copyrighted text material, to act out a dramatic work, or to perform a musical work, to perform a copyrighted motion picture by showing it to his class, or to exhibit copyrighted text or graphic material by means of projectors. No provision is made to exempt the copy-

ing by office duplicators of an entire work for classroom use. It won't be easy, but teachers will have to evolve a new attitude to copyrighted works if they wish to remain law-abiding citizens.

3. *Educational broadcasting.* Here is another area in which authors and publishers sharply oppose educational groups. Non-profit educational broadcasting is now reaching large audiences and the revision bill argues that these audiences are increasing rapidly, that as a medium for entertainment, recreation, and communication of information, a good deal of educational programming is indistinguishable from commercial programming, and that the time may come when many works will reach the public primarily through educational broadcasting. It concludes that the author's compensation should be determined by the number of people reached, and that it does not seem too much to ask that some of the money now going to support educational broadcasting activities be used to compensate authors and publishers whose works are essential to those activities. Hence, the 1965 bill exempts educational broadcasting made primarily for reception in classrooms and as a regular part of systematic instructional activities of a non-profit educational institution, but does not exempt transmissions intended for the enlightenment, edification, or instruction of the public at large.

C. Federal Pre-emption and Duration of Copyright

1. *Single national system.* Under the present law there is a dual system of protection of works: before publication they are protected under common law, whereas after publication they are protected under Federal statute. The revision would establish a single system of statutory protection for all works whether published or unpublished. The common law would continue to protect works (such as choreography and improvisations) up to the time they are fixed in tangible form, but thereafter they would be subject to exclusive Federal protection under the statute even though they are never published or registered.

2. *Duration of copyright in works created after the new law's effective date.* The present term of copyright is 28 years from first publication or registration, renewable for a second period of 28 years. With respect to works created after it comes into effect, the bill would provide for a term of the author's life plus 50 years, in order to bring it into line with the copyright term in most countries. "Joint works" would be protected for the life of the second author to die plus 50 years after his death. For anonymous works, pseudonymous works, and works made for

hire, the term would generally be 75 years from publication, with a maximum limit of 100 years from creation of the work.

3. *Duration of copyright in pre-existing works under common law protection.* An unpublished work still under common law protection when the statute comes into effect would be brought under the statute and given the same term of copyright as that applicable to works created after the effective date.

4. *Duration of subsisting copyrights.* For copyrights still in their first term when the new law comes into effect, the bill would retain the present renewal provisions but would extend the length of the renewal term from 28 to 47 years (making a total term of 75 years from publication or registration). For copyrights in their renewal term the total term would also be extended to 75 years.