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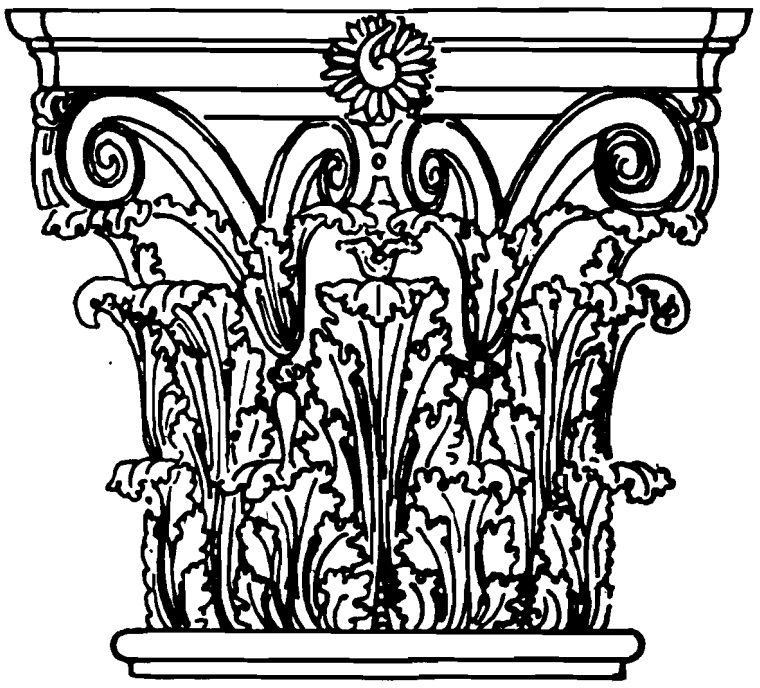

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COPYRIGHT SERVICES

Throughout its century-long history the Copyright Office has survived some difficult years, but never one comparable to fiscal 1978.

The new copyright law of the United States, which came into effect on January 1, 1978, shifted the philosophical basis for protection of authors' rights in this country and changed the entire legal framework through which that protection is achieved. One of the many effects of the new law was to transform the work of the Copyright Office. Everything the office had been doing had to be changed. Old responsibilities were substantially enlarged, and many new duties and services were created.

The new law presented the Copyright Office with an enormous challenge, and in meeting it the entire staff of the office demonstrated a truly remarkable devotion to duty. One can hope that the Copyright Office never again has to face the transitional problems and growing pains it met and surmounted in 1978, but if it ever does, the achievements of that year will be an inspiring example to follow.

One decision resulting from the new law has been to publish the annual report of the Copyright Office in two versions aimed at somewhat different groups of readers. In this chapter of the Librarian's annual report we shall concentrate on the effects of the new law's first year upon the Copyright Office as a whole and upon its individual organizational units. A broader and more detailed report of the year's copyright developments will be found in the *Annual Report of the Register of Copyrights for Fiscal Year 1978,* published separately in accordance with section 701(c) of the new statute.

OPERATIONS AND SERVICES

Reorganization

The Copyright Office was reorganized in January 1978 to provide for the additional responsibilities brought by revision of the copyright law and to enable it to deal as effectively as possible with its increased workload. The sectional structures of the Cataloging Division and the Examining Division were realigned to correspond with the classification system adopted for registering claims under the new law. The Information and Reference Division, replacing the former Reference Division, enlarged its functions to meet the expanded informational and training needs of the office. The Acquisitions and Processing Division continued the functions of the former Service Division with

greatly expanded acquisitions responsibilities assigned to the Copyright Office by the new law.

The new Licensing Division was established to implement sections of the law pertaining to compulsory licenses—those dealing with the secondary transmissions of radio and television programs, making and distributing phonorecords of nondramatic musical works, public performance by means of coin-operated phonorecord players, and the use of published nondramatic musical, pictorial, graphic, and sculptural works, and nondramatic literary works, in connection with noncommercial broadcasting. A second new division, the Records Management Division, was created to bring together under one administrative head the Copyright Office's historic responsibilities for maintenance, service, and preservation of records related to the copyright registration process and to recognize these records as an important management concern.

The administrative structure of the office was also revised to provide for two assistant registers of copyrights, rather than a single deputy register, both assistants reporting to the register of copyrights. The office was fortunate to have able, experienced executives to fill these posts. Waldo H. Moore, assistant register of copyrights for registration, oversees the divisions primarily involved in the registration process and acts as the register's deputy as required. Michael R. Pew, assistant register of copyrights for automation and records, has jurisdiction over divisions concerned with automation applications, licensing activities, and records administration. Mr. Pew has continued also to carry the principal responsibilities of executive officer of the department.

Workload and Problems Encountered

While the Copyright Office anticipated and planned for an influx of claims under the old law near the conclusion of calendar year 1977, it could not have foreseen the extraordinary crush of work that immediately confronted its staff from the beginning of revision implementation in January 1978. The unfamiliarity of the public with the new law and the new application forms combined to create a backlog of cases requiring correspondence or awaiting replies. Before the 1976 law, an estimated 85 percent of copyright applications and deposits could be acted upon without correspondence. The complexities of the new law, particularly the provisions concerning copyright registration, altered this situation dramatically: for at least the first half of 1978 less than 20 percent of the applications and deposits received could be passed without first writing to the applicant to correct errors or elicit missing information. This exploding workload required temporary details throughout the Copyright Office.

Frequent meetings of division chiefs, section and unit heads, and other officers involved in the registration process were called to explore new possibilities for work simplification and acceleration. Procedures were streamlined and less-essential steps postponed in an effort to speed the registration process and the issuance of certificates. The public proved remarkably understanding throughout this difficult period, and by the end of the fiscal year the backlog had begun to diminish.

Acquisitions and Processing Division

One of the principal effects of the reorganization of the Copyright Office in fiscal 1978 was the demise of the Service Division and its rebirth as the Acquisitions and Processing Division. There were those in the division who regretted losing the familiar name of "Service," an apt description for an operation dedicated to assisting and benefiting others. However, like the characters in the television commercials for its more famous namesake, the office's new "A&P" might be said to deal with "Price" (the accounting and fiscal control activities of the office) and "Pride" (the efficient processing and control of the entire registration workflow). And the A&P Division had special reasons for pride in 1978.

There was, first, the huge influx of work in December 1977, resulting from the public's rush to get registrations under the old law and at the old fee. Then there was the deluge of requests for application forms and information concerning the new law. Next, after January 1, 1978, came the flood of new-law applications, most of which required correspondence. For a time the volume of work going into the processing pipeline remained quite heavy while completed output fell off to a dribble, and this meant the buildup of a tremendous backlog of cases awaiting final resolution.

Physical control of the office's workload became increasingly difficult, and searching for cases in process became a nightmare.

Throughout this period the staff of the Acquisitions and Processing Division managed not only to cope with a crushing workload but, by massive infusions of ingenuity, dedication, and stamina, they began to restore the day-to-day processing activities of the division to currency. This was by far the division's greatest accomplishment during the year.

There were other bright spots in the A&P picture. The many promises of automated in-process control began to be realized as the deposit account subsystem of the Copyright Office In-Process System (COINS) became operational. This system, which is described in more detail in this chapter in connection with the office's automation activities, was an unqualified success and a tribute to the dedication and competence of the staff of the Fiscal Control Section and its Accounting Unit.

Another important accounting change was made necessary by the new statutory requirement that the first $3 million of Copyright Office fees be credited to the Library of Congress appropriation to be used for Copyright Office salaries and expenses. For this purpose the Library of Congress sought and obtained General Accounting Office approval for the Copyright Office to take credit for fees as they are received, rather than waiting until after a certificate has finally been issued. This new procedure was implemented in August 1978, and the $3 million target was achieved. In addition, virtually all of an additional $500,000 needed to cover a supplemental appropriation for the Copyright Office was credited to the Library's appropriation. While obviously more realistic from a budget standpoint, the new reporting procedure is also consistent with the long-range automation plans of the office.

The new copyright law has greatly strengthened the provisions for the mandatory deposit of copies and recordings for the collections of the Library of Congress. The stiffened requirements and stronger penalties for failure to comply, combined with the Copyright Office's resolve to expand its support to the Library, resulted in a complete overhaul of the old Compliance Section. Moved from the Reference Division only last year, the section was split into two units: Compliance Records, which records the works submitted in compliance with the mandatory deposit provisions of section 407 of the law and provides administrative support to the entire section, and Identification and Search, which issues demands for deposit of works identified by its own staff or recommending officers elsewhere in the Library, pursuing each case until it is resolved. The section's expanded horizons were reflected in its new name: Deposits and Acquisitions.

The response to compliance demands issued under the new law has been excellent, with nearly all cases being resolved within the statutory three-month period, which begins with the demand. At year's end there were fewer than ten outstanding demand cases that had passed the statutory limit; these were being evaluated, with the expectation that some would be referred to the Department of Justice for prosecution.

Examining Division

Although the coming of the new law affected every operation in the Copyright Office, perhaps no single organizational unit felt its impact more directly, broadly, and fundamentally than the Examining Division. Tens of thousands of policies, practices, and procedures—some going back to passage of the 1909 act or even further—had to be pulled up by the roots and, after thorough analysis and reevaluation, either replaced or changed. It was only through the efforts of a dedicated and flexible staff that the Examining Division was able to meet this unprecedented challenge.

Even before the new law took effect the Examining Division was undergoing major structural changes to align itself with an entirely new system for classifying works. In registering a claim to copyright under the old law, an applicant had to select the proper class for the work from some eighteen overlapping classes. Under authority delegated to the Copyright Office under the new law, the administrative categories were reduced to a basic four—nondramatic literary works (class TX), works of the performing arts (class PA), works of the visual arts (class VA), and sound recordings (class SR). This simplification in turn called for a substantial organizational realignment in the Examining Division. The old Book Section became the Literary Section, with responsibility for processing

all claims on nondramatic textual material, including periodicals and unpublished literary works. The Arts Section became the Visual Arts Section, with responsibility for photographs, sculpture, paintings, prints, reproductions of works of art, maps, and technical drawings. The Music Section became the Performing Arts Section, with responsibility not only for music claims but also for dramatic works, choreographic works, pantomimes, sound recordings, motion pictures, and other audiovisual works. The Renewals and Assignments Section was renamed Renewals and Documents Section but otherwise remained substantially intact. The Multimedia Section, on the other hand, was absorbed into other sections of the Examining Division. It had been formed under the old law primarily to eliminate workflow and correspondence problems when materials comprising two or more different classes had to be moved from section to section for examination; with the reduction of these classes of works, the original purpose for establishing the Multimedia Section no longer existed.

The second major undertaking in late 1977 was the establishment of a set of Examining Division practices involving the application of the new law. In a series of all-day meetings chaired by the register, issues which could arise in the examination of claims were discussed, and from these meetings a set of preliminary practices was developed. Another major task in preparing for the transition was clearing up as many pending claims as possible before the new law went into effect. Written guidelines were prepared for transitional cases, new guide letters were developed, no-reply case procedures were altered, and the division undertook a special project to process "old fee" items.

Almost as soon as the first applications were received under the new law, the Examining Division began to recognize the immensity of the problems facing it. Most of the claims received during the first weeks were submitted on the old forms with fees at the old rate and therefore required correspondence. Many remitters knew nothing about the new law, and those that did often had trouble completing the new forms. Correspondence rates soared. This problem became particularly acute in registering periodical claims, as the correspondence rate jumped seven to eight times what it had been under the former law.

In addition to informing the remitters of the new law's requirements, the Examining Division's own staff had to be thoroughly trained in order to ensure knowledgeable, efficient service. Among other things, this meant that for a time all correspondence and claims had to be reviewed before final action was taken; while this review process was necessary, it was costly in diverting supervisory personnel from the normal processing of claims.

As the mountain of correspondence and unfinished business continued to grow during the early months of 1978, it became obvious that emergency measures would have to be taken. In February staff members from elsewhere in the office began to assist the Examining Division directly, and in the summer months the interim practices were reevaluated in a series of all-day meetings with a view toward expediting the examination and recordation process.

The issues discussed during these meetings were difficult. While the office was clearly obligated to maintain a legally sufficient record, the size of the workload facing the Examining Division impelled it to cut back on anything other than essential correspondence and paperwork. The interim practices were revised to take account of this emergency, and a manual was prepared and made available to the staff in mid-August. By the end of the fiscal year there was evidence that the emergency measures were taking effect and that the backlog of material was beginning to shrink.

Cataloging Division

The changes that had to be absorbed and implemented by the Copyright Cataloging Division in fiscal 1978 were by far the greatest the division had encountered since its organization in the 1940s. There were two fundamental reasons for the changes. First, of course, there was the new copyright law. But of equal importance was a management decision to make the division's cataloging product compatible with the cataloging practices of the Library of Congress Processing Services. This decision, which in some ways may prove even more significant than the new copyright law for the future of copyright cataloging, paves the way for eventually adding hundreds

of thousands of copyright entries to national and international data bases.

Whatever form they took, the changes in the division and its work were all radical. The whole division was completely reorganized. The division's cataloging rules were completely revised. The organization and pattern of publication of the *Catalog of Copyright Entries* was altered substantially. The automated cataloging system, COPICS, was completely redesigned and supplanted by a new system, COPICS II. And, as a result of the new law, a substantial amount of cataloging information was added to all copyright entries.

Problems abounded at every step of the way, not the least of which were derived from uneven workflow, balky computers, inadequate space, and understaffing. The staff met and surmounted each problem as it arose; in the words of Robert D. Stevens, the division chief: "To state that the response of the division staff to the challenges posed by the multiplicity of changes and problems was outstanding is, it should be understood, meiosis not braggadocio."

The changes in copyright registration classes resulting from the law of 1976 caused major changes in the flow of work to the Cataloging Division, which in turn required an internal reorganization geared to work flow. This provided a valuable opportunity to make some additional changes designed to bring the organization into better correspondence with parallel units in the Library of Congress proper. A Serials Unit was created to catalog and record all serially published materials, thereby improving the flow of publications to the Library's Serial Record Division, and an Audiovisual Section was created to catalog motion pictures, sound recordings, and mixed-media works. A major aim in both cases was to establish cores of specialized cataloging expertise in the Copyright Office and to establish better workflow and relationships with parallel specialized units elsewhere in the Library.

With one exception, the reorganization of the Cataloging Division to correspond to workflow has been highly successful in reducing sorting and routing operations. As it turned out, the task of breaking receipts of "literary works" into separate catagories of serials and monographs has proved to be more burdensome and time consuming than was anticipated and will need further study and changes in procedure during the coming year.

The need, deriving from the new copyright law, to incorporate additional copyright facts in the cataloging records was seen as an opportunity to review all elements of the cataloging record. A major policy decision was made to adopt the *Anglo-American Cataloging Rules (AACR)* and to follow International Standard Book Description practices for all types of material. Beginning with all materials registered after January 1, 1978, the descriptive portion of copyright cataloging entries includes bibliographic data based essentially on the work itself, in the same order and format and with the standardized punctuation required by the rules for International Standard Book Description and chapter 6 of the *AACR*.

For some nonprint materials not covered in AACR, the division has examined the drafts of AACR 2 and consulted specialists elsewhere in the Library in the formulation of the necessary rules. As a consequence, in such areas as the cataloging of motion pictures and multimedia sets the division has pioneered in the framing and application of special cataloging rules. New data—such as date of creation, information about the relationship of the work in hand to previously registered works, statements showing the employee for hire relationship to the work, the need for providing for group registrations and for correction of registration data—also required the writing of cataloging rules and the integration of these rules with the rules for bibliographic description.

A reexamination of the pattern of publication and frequency of issue of the parts of the *Catalog of Copyright Entries (CCE)* suggested the desirability of eliminating some of the smaller parts as separate publications. At the same time, it became obvious that the largest parts should be issued more frequently because these parts had grown so large as to make the semiannual issuances clumsy to handle and difficult to edit. Institution of a separate catalog of renewal registrations was also called for. The changes will occur with the publication of calendar year 1978 catalogs. The 1977 catalogs of *Dramas and Works Prepared for Oral Delivery* and *Prints and Labels* are the final issues of these titles. Henceforth, dramas will be included in the *Performing Arts Catalog* and prints and labels in the *Visual Arts Catalog*. From January 1978 on, the eight parts of the *CCE* will be:

Non-Dramatic Literary Works

Serials and Periodicals
Performing Arts
Motion Pictures
Visual Arts
Maps
Sound Recordings
Renewals

The *Non-Dramatic Literary Works* and *Performing Arts* catalogs will be published quarterly. All other parts of the *CCE* will be published semiannually.

One of the major achievements of the Copyright Office in recent years has been the development and implementation of a complete automated on-line cataloging system known as COPICS. The new law and the need for radical changes in the catalog entries for copyright registrations required such major changes in COPICS that the system had to be redesigned and reprogrammed almost from scratch. The new system, which was named COPICS II to distinguish it from its progenitor, became operational in fiscal 1978.

Introducing a new automated system is never easy, and COPICS II was no exception to this rule. However, despite the multitude of problems, COPICS II can be called a genuine success. Not only was the scope of the automated system greatly expanded to accommodate new entries and new data elements, but, in addition, a number of new features were added to the system to make the work of cataloging easier and to provide additional controls and data.

Information and Reference Division

The staff members of the Information and Reference Division are the front-line troops of the Copyright Office, and it was they who felt the first shock waves from the impact of the new law. It seemed for a time that everyone in the country wanted application forms and information about the new statute, and that all their requests arrived in I&R at the same time. In the face of an enormous influx of letters, personal visitors, and telephone calls, the division did more than merely maintain its reputation for courteous and knowledgeable service to the public. The staff's energy, enthusiasm, and informed intelligence permitted the office to meet an unprecedented challenge; they also provided the public with exceptional personal service during a period that was confused and difficult for everyone concerned with copyright law.

The officewide reorganization left the old and much-honored Reference Division with a new name—Information and Reference Division—that better identifies the broad range of functions it performs. The newly reorganized division is divided into three sections: Information and Publications, Reference Search, and Certifications and Documents.

The Information and Publications Section (I&P) was substantially reorganized and expanded to meet the voracious demands of the public for information, answers to questions, and printed matter. The figures for the year speak for themselves. Some fifty-four hundred people came in person to Crystal City to seek assistance from I&P, including many writers, composers, performers, publishers, producers, figures from the entertainment industries, librarians, educators, scholars and researchers, government officials and foreign representatives. The section answered a total of nearly sixty-four thousand telephone inquiries and, by coincidence, a total of almost exactly sixty-four thousand letters. In an effort to improve information telephone assistance, hours were increased from 8 A.M. to 7 P.M. Monday through Friday (except legal holidays), and a telephone recorder was installed so forms and circulars could be ordered after hours.

As a part of the reorganization of the Information and Publications Section, a Publications Unit was created to assist in the preparation of all Copyright Office publications. The responsibilities of this unit include graphics design, exhibits, writing, editing, printing, and control. During the fiscal year the new unit was responsible for getting the millions of application forms, circulars, announcements, and other publications redesigned, printed, and distributed to the public. One telling statistic: solely as a result of individual requests, the office's mailing list more than doubled in size, from eight thousand to eighteen thousand.

At the heart of the Information and Reference Division's responsibilities is the Reference Search Section, which is charged with searching the vast public records of the Copyright Office and providing search reports and answers to reference inquiries to the public on request. Nearly twelve thousand searches were completed during the year, and these ranged in size from simple searches requiring one hour or less to long,

complex searches–such as the one completed in 1978 for all the works of a famous composer, requiring 285 hours and covering roughly seventeen hundred separate items. Various provisions of the new law have combined to increase the complexity of searching and the legal importance of search reports; these factors, combined with severe dislocations in workflow and card production during the year, had a direct impact on the work of the Reference Search Section in 1978. Despite the problems, however, the section maintained its work on a current basis, and generously assisted other organizational units in the Copyright Office in coping with the revision backlog. Most noteworthy of all, the entire staff collaborated in a remarkable achievement: a thirty-chapter procedural manual describing the work of the section in organized detail and providing the groundwork for the section's future development.

Little-known but crucial public services of the Copyright Office are to provide certified documents made from the office's records and to comply with requests for inspection of copies of works deposited for copyright registration and retained in the office's collections. These services are provided by the third of I&R's sections, the Certifications and Documents Section (C&D). The new law had a direct impact on C&D's work, and nearly every aspect of it increased; the section responded to the requests of more than fifteen hundred visitors, answered nearly four thousand telephone inquiries, replied to thirty eight hundred letters, and sent out some eighty-seven hundred copies of documents of various kinds.

Records Management Division

The second of two new divisions created as part of the reorganization of the Copyright Office and implementation of the new copyright law, the Records Management Division, began to function in May 1978. The new division consists of three sections–the Preservation Section, the Records Storage Section, and the Card Catalog Section–and more than fifty employees brought together from the records management operations of the former Service and Reference Divisions. It is responsible for planning a comprehensive program for maintaining, preserving, and making available for use the enormous body of records of copyright registration, catalog cards, and deposit copies under Copyright Office jurisdiction.

In addition to carrying on its regular preservation and maintenance work, the new division devoted its first few months of operation to appraisal of existing resources and planning for the future under the new statute's expanded emphasis on copyright records. Existing responsibilities of the Preservation Section in the microform or other reproduction of various records, notably deposit copies, will be expanded. One of the two units of the Records Storage Section, the Deposit Copies Storage Unit, increased its collections of copyright deposits by more than 277,000 items during the year and substantially reorganized its holdings and its records pertaining to them; among other things, it installed a computer terminal for the electronic posting of storage data. The other unit of the Records Storage Section, the Records Maintenance Unit, took the brunt of one of the major paperwork requirements of the new law–the obligation to issue certificates of registration as facsimiles of the applications filed. The Filing and Revising Unit of the Card Catalog Section filed some 1,231,000 cards during the year while absorbing a new filing procedure and new filing rules.

Licensing Division

The Licensing Division is a completely new organizational unit within the Copyright Office, established to handle the four compulsory licenses in the copyright law, which are for secondary transmissions by cable systems, for making and distributing phonorecords, for public performances on coin-operated phonorecord players (commonly known as "jukeboxes"), and for the use of certain works in connection with noncommercial broadcasting.

The first three months of fiscal 1978 were devoted to intensive preparatory work. During this period most of the staff members of the division were hired and trained, detailed workflow procedures were developed, and a complex accounting system was established.

Under the statutory provisions governing cable and jukebox performances (sections 111 and 116 of Title 17), cable and jukebox operators must submit royalty fees to the Copyright Office. The office is directed to account for the fees and, after

deducting its "reasonable costs," to deposit the balance in an interest-bearing account with the Treasury of the United States for later distribution by the Copyright Royalty Tribunal. In November 1977 a conference was held with the Office of Management and Budget, followed by several meetings with the staff of the Library's Financial Management Office, and in March 1978 accounts were formally established in the U.S. Treasury for jukebox and cable operations.

In order to be able to deduct the appropriate operating expenses from each of the two categories of royalties collected, the division estimated that, throughout the calendar year, approximately 56 percent of staff time would be spent on cable activities and approximately 39 percent on jukebox licensing. The remaining 5 percent was allocated to certain recording functions under the other two compulsory licensing provisions in the statute (sections 115 and 118). Applying these percentages to the $387,000 budget of the Licensing Division for calendar year 1978, $150,746 was deducted from the receipts from jukebox licenses and $215,311 from the amount deposited by cable systems.

Under section 116, jukebox operators are required to apply for their compulsory licenses during January of each year, and on or before March 1 of the year they must place certificates issued by the Copyright Office on their players. The Licensing Division must issue certificates within twenty calendar days of receipt of an acceptable application and remittance. The first problem the division faced was getting the printed application forms and instructions (form JB) into the hands of jukebox operators throughout the country so that they could meet the statutory deadlines. Through the Amusement and Music Operators Association, the national trade association of vending machine operators, and also through the help of various state trade associations and several of the major jukebox distributors, the division was able to distribute approximately thirty-six thousand applications and forty-nine thousand continuation sheets to operators during the first part of 1978. At the same time the division issued a press release, directed especially to trade journals, informing the operators of their potential liability under the copyright law.

Receipts of jukebox applications, though never as heavy as expected, peaked around the middle of February and continued throughout the year. Their processing was accomplished through the use of an automated "batch" system. After being examined in the Licensing Division, the applications were batched and keypunched, and a first report was issued, using the computer at the Computer Service Center. This report was proofread in the division and, if all of the players, names, and addresses of the operators listed were correct when compared with the original application, the computer tapes were run again and certificates were produced for each player listed in the report. A certificate is a two-part three-by-five-inch printout of the name and address of the operator and the specific information for one player and is designed to fit into the title strips of licensed jukeboxes. A certificate for each licensed jukebox was sent to the operator at the end of this process.

This off-line system got us through the year, but it left a great deal to be desired. With the assistance of the Automated Systems Office of the Library, the Licensing Division is in the process of converting the batch system to an on-line system, using cathode ray tube (CRT) terminals which will be located in the division and attached to the Copyright Office minicomputers. Certificates will be printed on a daily basis, as applications are accepted, using printers attached to the CRTs.

The number of jukebox certificates issued during the fiscal year totaled 137,222. This amounted to about one-third of the 400,000 figure which had been estimated by representatives of the industry as the total number of jukeboxes in the United States. To increase voluntary compliance from those operators unaware of the new law's requirements, the Licensing Division issued an information circular and an additional press release during the year. However, as time went on, it was hard to escape the conclusion that there was a certain amount of noncompliance with the statutory requirements, that at least some of it was deliberate.

Even though section 111, the statutory provision establishing the compulsory license for retransmissions of copyrighted works by cable systems, is extraordinarily complex and detailed, it leaves a great deal to be fleshed out in regulations and administrative practice by the Copyright Office and the Copyright Royalty Tribunal. As a result of rulemaking proceedings during fiscal 1977, proposed regulations on cable were issued

on December 1, 1977, and were later issued in final form.

Under the statute, cable systems in the United States are required semiannually to file detailed statements of account and to pay into the Copyright Office royalty fees computed under complicated statutory formulas. Although not expressly required to do so by the statute, the Copyright Office decided to provide forms for use in filing statements of account. This decision was encouraged by both cable operators and copyright owners, to ensure ease and consistency in reporting. Nearly two months of concentrated effort was needed to design the forms, draft the accompanying instructions, and prepare corresponding revisions in the regulations. The results, forms CS/SA-1, CS/SA-2, and CS/SA-3, were mailed to cable operators during the first week of July. The first accounting period closed June 30, 1978, and the statements of account were due in the Licensing Division no later than August 29, 1978. Between August 21 and August 29 most of the 3,667 statements of account were received by the division. The month of September was spent depositing these cable receipts, and at the beginning of October, examination in depth was begun.

Copyright Office Library

The Copyright Office has, in its library, one of the most complete collections of copyright reference materials in the world. In addition to monographs, treatises, texts, law reports, articles, and bibliographies—including historical as well as current materials, published and unpublished materials, standard and rare materials, and English-language and foreign-language materials—the Copyright Office Library's collections include much documentary and archival material bearing on copyright and related subjects: studies, reports, memoranda, clippings, briefs, transcripts, documentation for international meetings, legislative materials, and so on.

In its origins the library was intended primarily to serve the immediate legal research needs of the Register's and General Counsel's Offices and staffs. The present and potential functions of the library were thoroughly reassessed during the reorganization of the office as a whole. It was agreed that the role of the library should be substantially broadened in scope; its purpose should be to serve not only the legal staff of the Copyright Office but also the office's entire staff and, moreover, the research needs of the copyright bar and public. Accordingly, the library was shifted from the General Counsel's Office and placed under the direction of the assistant register of copyrights for automation and records. At the same time, the word "Law" was dropped from the library's name and it was renamed the Copyright Office Library.

As reorganized, the Copyright Office Library now provides all types of reference services to the Copyright Office staff and copyright-related reference services to the public. In addition, the library is the center of extensive bibliographic and research activities. Every two years the Copyright Office Library compiles and publishes the *Decisions of the United States Courts Involving Copyright (Copyright Office Bulletin).* Volume 40 of the *Bulletin,* covering cases decided in 1975-76, was published in 1978. During fiscal 1978 the library prepared cases appearing in 1977 and 1978 for publication in volume 41 of the *Bulletin* and also neared completion of the monumental task of preparing for publication all U.S. copyright cases reported between 1789 and 1908. A comprehensive legislative history of the new copyright law was also nearing completion as the fiscal year ended.

A new and extremely valuable development during the fiscal year was the regular biweekly publication of the *Copyright Office Bibliographic Bulletin,* a collection of abstracts summarizing recent cases, legislative matters, articles, books, news stories, and foreign-language publications involving copyright. The *Bulletin,* which is a rich source of contemporaneous information and legal scholarship, is distributed in the Copyright Office, and most of the abstracts are later published in the *Bulletin of the Copyright Society of the U.S.A.* As part of this expanded program, members of the Copyright Office staff with foreign-language skills have read books and periodicals in foreign languages and prepared abstracts for publication in both bulletins.

During the year the Copyright Office Library received two substantial gifts. The first consists of a collection of all of the studies on copyright law prepared by law students for the Nathan Burkan Competition from 1939 to 1977 and submitted to the American Society of Composers, Authors, and

Publishers (ASCAP) by law schools throughout the country for entry in the national competition. The twelve hundred papers, which were all prize-winners at the law schools where they were written, cover nearly every copyright subject imaginable. Donated by ASCAP and by Herman Finkelstein, ASCAP's general counsel before his retirement, the collection is in the process of being indexed and will be an invaluable research tool for copyright scholars for generations to come.

The second important gift consists of the reference and documentary materials formerly in the collections of the National Commission on Technological Uses of Copyrighted Works (CONTU). This body of materials, which was donated to the Copyright Office Library after the commission made its final report to Congress, consists primarily of studies, reports, and periodicals and should serve as an important reference for scholars studying photocopying and computer uses.

Automation: The COINS System

Of the three major automation efforts in the Copyright Office in fiscal 1978, two have already been discussed in some detail: the complete revision of the automated cataloging system and its rebirth as COPICS II and the automated system for processing jukebox certificates developed in the Licensing Division. The third is a massive, five-year project aimed at providing automated control over the entire registration workflow and accounting operations of the Copyright Office. Phase 1 of this new system, which was given the acronym COINS (Copyright Office In-Process System), became fully operational, and substantial progress was made in planning, programming, and testing the second phase during the year.

The ultimate goal of the COINS System is fourfold:

□ To record, upon receipt, all material received in the Copyright Office in connection with any service requiring a fee, including registrations, recordation of transfers and other documents, and searches, but not including cable and jukebox licensing and requests for general information or application forms; the system will ensure that the office has a record controlling the workflow of the great bulk of material it receives and accounting control over all monies deposited in connection with that material from the date of receipt.

□ To track the path of the material through the office, so that the whereabouts of a particular case can be located immediately and without manually searching through piles of applications and correspondence envelopes.

□ To generate a variety of statistical and accounting reports showing production and backlogs throughout the office.

□ To pinpoint disruptions and bottlenecks in production and workflow.

The framework of this plan was formulated in 1976, with the expectation that it would become fully operational by the end of fiscal 1982. The accomplishments in fiscal 1978 represented a giant step toward the ultimate goal.

Phase 1 of the COINS system involved the automation of the office's deposit accounts, the arrangement under which applicants are able to make advance deposits and draw against their balance for registrations and other services. In order to validate the new system, the old manual procedure functioned in parallel with the new automated procedure for seven weeks, from Halloween to Christmas, 1977. This parallel testing not only allowed confidence in the new system to grow but also provided an opportunity to reevaluate and revise existing procedures. When it became fully operational on December 23, 1977, phase 1 of COINS marked the first entry of the Library of Congress into so-called "distributed processing" using minicomputers dedicated to a particular purpose. In operation, the automated deposit account system has proved highly reliable and flawlessly accurate.

In August 1978 phase 2 of COINS began pilot operation in the Renewals and Documents Section of the Examining Division. Phase 2 is a correspondence management system enabling the office to track all cases requiring correspondence throughout the entire time they remain pending. By means of bar-code labels and wand readers, the progress of every case requiring correspondence is recorded as it works its way toward final disposition, and the entire office can determine immediately, through video terminals, where the case is

and the actions taken with respect to it. Reports of production statistics showing problems and delays in correspondence are an immediate by-product of the new system. As the year ended phase 2 of COINS was being expanded in other sections of the Examining Division and work on phase 3, aimed at initial automated control over all in-process and fiscal activities of the office, was under way.

Copyright Office Staff: Activities, Recognition, Transition

At the close of fiscal 1978 the staff of the Copyright Office totaled 573 members, and not one of them had been untouched by the various cataclysms that hit the office during the year. Most made contributions far beyond their normal duties and responsibilities, and the office's accomplishments in 1978 are a tribute to the flexibility and dedication of the entire staff.

As might be expected in a year when the entire Copyright Office was reorganized, there were a number of changes in management positions. Among the key appointments: Michael Pew was appointed assistant register of copyrights for automation and records; Marybeth Peters was appointed chief of the Information and Reference Division; John Heard was named chief of the Records Management Division; and Catherine LaTour was appointed Copyright Office librarian.

The Copyright Office was also an integral part of the reorganization of the Library of Congress as a whole. The national copyright system was expressly recognized as one of the four great missions of the Library: "to serve the Congress, to serve the nation's libraries, to serve as the national registrar to protect the rights of the creative-artistic community, and to serve the whole community of learning." As part of this reorganization plan, the Librarian announced on April 13, 1978, that in addition to her present title as register of copyrights, Barbara Ringer would also hold the title of Assistant Librarian for Copyright Services. On September 25, 1978, Ms. Ringer was presented the Gold Medal of the Confederation Internationale des Societes D'Auteurs et Compsiteurs in recognition of her "numerous and eminent services . . . for the cause of copyright. . . ."

The Copyright Office lost a deeply revered colleague in the death, on September 10, 1977, of Abraham L. Kaminstein, register of copyrights from 1960 to 1971. A program in his memory was given by the Emerson String Quartet on December 16, 1977, in the Coolidge Auditorium of the Library of Congress. Alan Latman of the New York University Law Center, executive director of the Copyright Society of the U.S.A., opened the program with a eulogy to Mr. Kaminstein and a review of his enormous and invaluable contributions to the development and adoption of the 1976 revision of the U.S. copyright law. In paying tribute also to his substantial contributions in the international copyright arena, Mr. Latman remarked upon "his perceptiveness and thorough understanding of the practical and theoretical problems" that could separate nations. "His good humor, his patience, his gentleness, and his humanity helped accomplish the impossible." Another former colleague and career officer, William P. Siegfried, died on February 9, 1978. Mr. Siegfried, assistant register of copyrights from 1946 until 1965, participated in the reorganization and modernization of the Copyright Office during that period and received many special commendations for his excellence in directing the general operations of the office.

Special mention should also be made of the retirement during the year of Wilma S. Davis, attorney-adviser in charge of the Copyright Office Law Library. During her twenty-four years of service to the Library of Congress, Ms. Davis was often asked to undertake special projects, including the establishment of the Copyright Office Law Library in 1952. Responsible for many of the publications issued by the Copyright Office, Ms. Davis will be missed by the Copyright Office and the copyright community at large.

COPYRIGHT OFFICE REGULATIONS

Throughout the new copyright law there are clauses expressly requiring or authorizing the register of copyrights to flesh out general statutory provisions with detailed regulations on particular points. Section 702 gives the register general regulatory authority with respect to "the administration of the functions and duties made the

responsibility of the Register under this title." Section 701(d) makes all actions taken by the register (except those involving reproduction of copyright deposit copies) subject to the Administrative Procedure Act.

Fiscal 1978 was by far the most active regulatory year in the history of the Copyright Office. Proposals were published, written comments were elicited, hearings were held, interim and final regulations were adopted, and a constant review and revision process was carried on in the light of actual experience. The groundwork was laid for detailed regulations governing every aspect of the office's work. As the year ended, it had become apparent that the adoption of Copyright Office regulations is not a single act but a continuing responsibility of massive proportions.

The general categories of subject matter covered by proposed, interim, or final regulations issued in fiscal 1978 include applications for registration and registration procedures, mandatory deposit requirements, deposit requirements for registration, deposit requirements for motion pictures, renewal of copyright, corrections and amplifications of copyright registrations, import statements, recordation of transfers and other documents, methods of affixation and position of copyright notice, voluntary license to permit reproduction for use of the blind and physically handicapped, warning of copyright for use by libraries and archives, notices of objection to certain noncommercial performances, implementation of the Freedom of Information and Privacy Acts, cable television transmissions, performances on coin-operated machines, and the compulsory license for recording musical compositions. These regulatory actions will be summarized in detail in the separately published *Annual Report of the Register of Copyrights for Fiscal Year 1978.*

LEGISLATIVE DEVELOPMENTS

Performance Royalty for Sound Recordings

Congressional activity in the copyright field, which had reached a fever pitch between 1974 and 1976, fell back to less than normal in 1977 and 1978. The only legislative proposal given active consideration by Congress in fiscal 1978 involved something that might be considered part of the unfinished business of omnibus copyright revision: the scope of performance rights in sound recordings.

Efforts to create a legal performance right for sound recordings date back to the 1920s, even before recorded music became the staple of radio broadcast programming. In recent years, during the last phases of the general revision effort, serious consideration was given in both houses of Congress to proposals for establishing a limited performance right in the form of compulsory license, with payments to performers and producers of copyrighted sound recordings. Ultimately it was decided that the problem required further study, and section 114(d) of the revision statute directed the register of copyrights to submit a report to Congress

> setting forth recommendations as to whether [section 114] should be amended to provide for performers and copyright owners... any performance rights in [their copyrighted sound recordings]. The report should describe the status of such rights in foreign countries, the views of major interested parties, and specific legislation or recommendations, if any.

To fulfill this obligation, the register named a staff of Copyright Office attorneys, under the direction of Harriet L. Oler, to organize and execute a comprehensive, objective study of the problem, aimed at providing Congress with a body of reliable information that would help it to legislate intelligently and effectively on the subject. The office requested public comments on the question in May 1977. Nearly two hundred written responses were received from interested parties, including broadcasters, jukebox operators, record manufacturers and performers throughout the United States. The office held public hearings in Arlington, Virginia, on July 6 and 7, 1977, and in Beverly Hills, California, on July 26, 27, and 28, 1977. Some twenty-five interested parties testified at these hearings to offer their views on the principle of performance rights protection and on the specific provisions of the pending Danielson bill for performance rights, H.R. 6063, 95th Cong., 1st Sess. (1977).

The Washington firm of Ruttenberg, Friedman, Kilgallon, Gutchess and Associates was commissioned to prepare an independent analysis of the potential domestic economic effect of enacting performance rights legislation following the com-

pulsory licensing scheme embodied in H.R. 6063. These findings were announced and made available to the public in early November 1977. Public comments and reply comments to the economic findings were invited through December 1977, and nineteen responses were received. Thereafter, the Ruttenberg firm was asked to respond to the comments.

The Copyright Office also commissioned Prof. Robert Gorman of the University of Pennsylvania Law School to prepare an exhaustive independent study of labor union involvement with the performance rights question during the past thirty years.

The Copyright Office staff prepared a thorough legal study of domestic case law from the 1930s to the present, considering constitutional, statutory, and common law issues raised by broadcasters and other opponents of performance rights. The report additionally reviewed the long legislative history of efforts in the United States to enact performance rights legislation and included a bibliography of domestic and foreign materials on performance in sound recordings. With respect to performance rights in sound recordings under foreign and international laws, Copyright Office staff members visited Canada, Denmark, Austria, United Kingdom, the Federal Republic of Germany, France, and Switzerland and interviewed forty-five government and industry representatives to learn their practical experiences with performance rights and to study various foreign systems of collecting and distributing royalty payments from the public performance of sound recordings. These findings, along with profiles of performance rights in eight other foreign countries, were incorporated in the register's report. The report also included an analysis of international protection for performance rights under the 1961 International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (the Rome Convention).

The Copyright Office submitted its basic "Report on Performance Rights in Sound Recordings" to Congress on January 3, 1978. Several addenda to the report, including a draft bill to create a public performance right for copyrighted sound recordings, were submitted in March 1978. The basic report, together with all of the addenda and transcripts of the office's hearings on the subject, have been published by the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice as a committee print.

The House Subcommittee held public hearings on the subject in Beverly Hills, California, on March 29 and 30, 1978, and in Washington on May 24 and 25, 1978. At the Washington hearings the register of copyrights, Barbara Ringer, testified to the office's conclusion, based on the report, that the principle of copyright protection for the public performance of copyrighted sound recordings is desirable and that no legal barriers impede its enactment. The register affirmed that "arguments to the contrary can no longer be justified in the face of extensive commercial use of recordings, with resulting profits to users and harm to creators." She summarized the office's efforts to study the question as thoroughly and objectively as possible and concluded by reviewing the Copyright Office's draft legislation, which followed the earlier Danielson bill with several clarifying provisions and other amendments.

Other Legislative Activities

Of the bills introduced in the first session of the 95th Congress, only one—H.R. 8098 (1977), sponsored by Reps. Gladys Spellman and Donald Fraser—would have amended the new copyright statute before it actually came into effect. The Spellman bill was aimed at amending section 110(9) of the new law to expand the exemptions provided in that clause for certain broadcasts intended for reception by blind people and others with physical handicaps impairing their reading ability. No action was taken on this measure during the 95th Congress.

Retransmission of copyrighted programming by cable television systems was the most difficult issue in the general revision of the copyright law, and the solutions reached in the new statute were based on a number of underlying assumptions deriving from existing regulations of the Federal Communications Commission. These assumptions were thrown into some doubt by the introduction of a bill for the omnibus revision of the Communications Act, H.R. 13015, 95th Cong., 2d Sess. (1978). Introduced by Reps. Lionel Van Deerlin and Louis Frey, the bill proposes a complete restructuring of federal regulation through

replacement of the Federal Communications Commission with a new agency, the Communications Regulatory Commission. The bill also provides for deregulation, at the federal level, of the activities of cable companies. Progress of this legislation will be closely watched by the Copyright Office, since passage of a general revision of the U.S. communications law is certain to affect the compulsory licensing system established by section 111 of the copyright law.

A narrower cable issue was raised by S. 3324, 95th Cong., 2d Sess. (1978). Introduced by Sen. Mike Gravel, the bill would exempt from liability translator services operating on a delayed basis in areas outside of the continental United States. Translators are low-power broadcasting stations that receive incoming signals of a television station off the air and simultaneously amplify and "translate" them to a different frequency for retransmission to the service area. The present law exempts nonprofit translators under section 111(a)(4) where the secondary transmissions are simultaneous. Under Senator Gravel's proposal, the concept of a limited exemption for delayed retransmissions as embodied in section 111(e) would be recognized for translator services operating on a delayed basis.

Several bills were introduced proposing tax incentives for donations in the fields of the arts and humanities. H.R. 10445, 95th Cong., 2d Sess. (1978), introduced by Rep. Frederick Richmond, would allow a tax credit for charitable contributions of literary, musical, or artistic property under certain circumstances. Similarly, H.R. 10429, 95th Cong., 2d Sess. (1978), introduced by Rep. Manuel Lujan, would establish more favorable provisions for determining the amount of a charitable deduction of literary, musical, or artistic property. Finally, a bill introduced by Representative Richmond and twenty-four others, H.R. 12346, 95th Cong., 2d Sess. (1978), would revise the federal income tax form to encourage financial contributions to the National Endowment for the Arts and the National Endowment for the Humanities.

A bill to create an American version of the European concept of le droit de suite, H.R. 11403, 95th Cong., 2d Sess. (1978), was introduced by Reps. Henry Waxman, Frederick Richmond, and Robert Drinan. Under the proposal, whenever a work of visual art is sold for more than $1,000, a royalty of 5 percent of the selling price would be paid into a new organization, the National Commission on the Visual Arts, which in turn would distribute the royalty to the artist. This bill, like Representative Drinan's earlier proposal for legislation recognizing the moral rights of visual artists, H.R. 8261, 95th Cong., 1st Sess. (1977), reflects the growing concern among artists and their representatives over the protection of rights in their works.

INTERNATIONAL DEVELOPMENTS

The United States and the Berne Convention

While fiscal 1978 was a busy year on a number of international copyright fronts, the most important events might be grouped under the heading of "Berne overtures." It seems likely that future copyright historians will mark 1978 as the year in which concerted efforts to achieve U.S. adherence to the International Convention for the Protection of Literary and Artistic Property (the Berne Convention) began anew.

The Berne Convention, oldest, most prestigious, and most comprehensive of international copyright agreements, has grown enormously since its inception in 1886. Its influence has been incalculable: it has not only established a massive network of international relations underlying dealings in copyrighted material across borders but has also determined the substantive provisions of the domestic copyright laws of the countries adhering to it. Those countries, known collectively as the "Berne Union," have never included the United States.

Earlier attempts at general revision of the U.S. copyright law, dating as far back as 1924, have almost always been tied directly to the efforts to bring the United States into a worldwide multilateral copyright treaty. Until 1955 there was only one treaty of this sort: the Berne Convention. As long as our law remained unrevised, the Berne Union remained closed to us, and we had to rely for our international copyright relations on an unsatisfactory patchwork of presidential proclamations, bilateral arrangements, and regional treaties.

The coming into force in 1955 of the Universal Copyright Convention (UCC), with the United States as one of its original members, changed the situation. The immediate goal for copyright

reformers in this country became general revision for its own sake and not for the sake of enabling us to adhere to Berne. Berne Union membership remained for many a highly desirable ultimate goal but a less urgent one. With the final achievement of a new U.S. copyright act, greatly modernizing our copyright law and fulfilling many of the requirements of the Berne Convention, the question of U.S. adherence to Berne has been squarely raised at the public level.

On June 5-7, 1978, Register of Copyrights Barbara Ringer and Copyright Office General Counsel Jon A. Baumgarten attended a meeting in Geneva to study the new U.S. copyright law and its compatibility with the Berne Convention. This meeting, the first of its kind, consisted of copyright experts from various countries, invited in their private capacities. The meeting was called at the initiative of the World Intellectual Property Organization (WIPO), the secretariat of the Berne Union.

The examination of the U.S. Copyright Act of 1976 in this context was highly instructive. In general the experts agreed that the level of copyright protection under the U.S. law had been raised substantially and is now at roughly the same level as that required by the Berne Convention. However, questions were raised as to whether the United States could be considered in compliance with the specific requirements of Berne on several points, including the scope of performing rights (notably the jukebox provisions of the new law), the length of term and scope of protection for works made for hire, the lack of express protection for the moral rights of authors in the U.S. statute, the problem of possible retroactive protection for works now in the public domain in the United States, and—most serious—the existence of "formalities" (notably copyright notice and registration) as conditions for U.S. copyright protection in certain cases.

The June WIPO meeting was primarily devoted to a technical examination, by experts speaking in a personal capacity and not for their governments, of two extremely complex legal instruments, one international and one national in scope. However, limited as it was, the meeting did seem to bespeak a general recognition of two important considerations: that the chances for further revision of the U.S. copyright statute to remove any question as to compatibility with the Berne Convention are roughly nil, and that the chances for substantive revision of the Rome Convention to accommodate the U.S. law are even less. Even more significant, the meeting produced an intriguing proposal. The suggestion, which originated with the director general of WIPO, was that consideration be given to adopting a protocol to the Berne Convention, binding only on those states that accept it. The protocol would permit a country (such as the United States) that had never belonged to the Berne Union to adhere to the Berne Convention; for a stated period of years that country could apply the provisions on formalities of the Universal Copyright Convention rather than those of the Berne Convention. At the end of the period, the country would either have to resile from the convention or drop its requirements for notice and registration as conditions for copyright protection under any circumstances. This proposal, around which clouds of controversy have already begun to gather, will be the subject of further meetings in 1979.

Joint Meetings of the Governing Bodies of the Universal Copyright Convention and the Berne Convention

Between November 26 and December 6, 1977, the Intergovernmental Copyright Committee (IGCC) of the Universal Copyright Convention held its regular biennial session in Paris. As has been the custom, the biennial meeting of the Berne Convention's Executive Committee (BEC) was held simultaneously with that of the IGCC. In a significant and productive session, the committees worked through a diverse agenda, anticipating much of the work in international copyright of 1978.

Among the subjects of discussion during this session were the slow but steady growth of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, the proposal of WIPO and UNESCO to prepare guidelines for implementing the provisions of the 1976 Brussels Convention to prevent the "poaching" of signals received from communications satellites, the Model Law on Copyright for Developing Countries (1971), the extent to which the special provisions in favor of developing countries written into the 1971

revisions of the Berne and Universal Conventions have been successfully implemented (including the creation of national copyright information centers), a review of ongoing studies of computer usages or computer-assisted creation of works protected by copyright, discussion of problems arising out of the emergence of audiovisual cassettes and discs and cable television, and the legal protection of folklore.

Debate and exchange of views over the thorny issue of copyright treatment of audiovisual cassettes and discs reached the conclusion that the special problem of off-the-air videotaping of television programming was sufficiently urgent to warrant the convening of a special subcommittee to consider the issue. Similarly, the work done in the area of cable television was sufficiently advanced that the committees determined that special subcommittees could profitably meet during 1978 to complete and close this phase of identifying problems and solutions in the area of cable for the guidance of national legislators. As noted below, both the cable and videocassette subcommittees met during 1978.

Of the other issues considered on the committees' agenda, three deserve special attention. First, there were extended discussions of several related topics: the degree of success of the 1971 UCC and Berne concessions in favor of developing countries, the recognition that much more needs to be done in the establishment of national copyright information centers, and the Tunis Model Law. All of the debates on these matters indicate that the copyright aspects of the so-called "North-South Dialog" are still matters of active concern. The secretariats agreed to circulate a detailed questionnaire to all states in order to develop information on steps taken to facilitate copyright licensing between developed and developing states and to convene a working group to consider the realities of the problem and to recommend solutions.

Second, the assumption commonly held that developing states do not share with developed nations a need for effective international copyright and copyright-type protection for their creative works was strongly contradicted by the discussion over the protection of folklore. Within the context of international copyright, the interests of developing states in effective protection of their folklore was examined by a committee of experts meeting in Tunis in the summer of 1977. It was agreed that, with the Tunis meeting as a starting point, further interdisciplinary studies of the problem would be undertaken.

Third, the committees recommended that the World Council for the Welfare of the Blind, in conjunction with other similar organizations serving people with reading and hearing disabilities, carry out a study of the interrelationship between copyright protection and the need for access to copyrighted works by the handicapped.

The most difficult and time-consuming item on the IGCC's agenda was the election held to renew the membership of the committee itself. The terms of six countries, including the United States, were expiring, and of these the following four were reelected: Japan, Senegal, the United Kingdom, and the United States. The Soviet Union was elected to the committee by acclamation and, as the result of further balloting, the Netherlands was elected to fill the sixth slot. Following the election, several delegations observed that the new IGCC did not preserve the balance of geographic and economic diversity required by the convention and asked that amendment of the rules procedure of the IGCC to deal with this problem be considered at the committee's 1979 meeting.

Off-the-Air Video Recording

The entire question of how copyright law treats, reacts to, or fails to account for the special problems arising out of the so-called "videocassette revolution" has been under active study in the international arena since 1975. The issue of copyright and off-the-air taping of television programs is a particularly acute problem in the United States, where video technology is rapidly gaining ground for home entertainment and public instructional use, and was the topic for a meeting held in Paris in September 1978. The United States was represented by Barbara Ringer, the register of copyrights, who was elected to chair the meeting, and Lewis I. Flacks, attorney in the Copyright Office.

As in the case of cable television, the subcommittees recognized quite early in the meeting that the two international copyright conventions do not need revision to deal with the special problems raised by cassette and disc technology. To carry

out their mandate—to explore problems and solutions offered at the national level for the guidance of domestic legislators—the subcommittees, meeting in Paris in September 1978, cataloged yet another inventory of problems.

Perhaps the most significant result of the September meeting was the greatly increased consciousness on the part of all of the participants of how serious a copyright problem is posed by widespread off-the-air video recording. In view of the relative novelty of videocassettes in the marketplace, the subcommittees were anxious to provide some intellectual tools to cope with an emerging issue at the national level.

In the area of home off-the-air recording, recognizing the difficulties of enforcement of rights, the subcommittees expressed great interest in the present approach of the Federal Republic of Germany and proposed legislation in Austria, which impose a levy or surcharge upon the retail price of either the videotape hardware or blank recording cassettes and cartridges, or both. The money collected would go into a fund from which all rightholders would be entitled to some compensation, but how the distribution would be made remains somewhat vague.

The thorny issue of off-the-air taping by educational institutions for classroom use has so far attracted more attention in the United States than that of home taping. The subcommittees expressed the view that domestic legislation should specify a carefully chosen area of fair use requiring neither prior permission nor remuneration. Beyond this area of fair use, however, it would be necessary and desirable to establish public, private, or semipublic clearance mechanisms for the collective administration of other, more extensive or significant economic uses.

Perhaps the most intriguing development at the September meeting was the recognition by the subcommittees that the impact of home audio recording of copyrighted works, principally music, cannot continue to be ignored, and that solutions reached in the video field may be usefully applied to that of audio recordings. Although the home taping of sounds from radio and other sources has been going on on a massive scale for nearly thirty years, the practical problems of enforcement have seemed so stupendous that little complaint has been raised by copyright owners. Now that home video recording has thrown a spotlight on the whole phenomenon, the various interests affected (performers, record producers, composers, lyricists, and publishers) are beginning to come forward with allegations of serious economic injury.

Cable Television

The most difficult issue encountered throughout the efforts to obtain general revision of the U.S. copyright law was the status of retransmissions, by commercial cable systems, of broadcasts containing copyrighted material. The act of 1976 adopted a rather complicated compulsory licensing system as the solution to this problem, and the efforts to implement this system both by the Copyright Office and by the Copyright Royalty Tribunal are still going on.

With the global growth of cable as a major communications medium, other countries are encountering the same kinds of practical problems, legal issues, and controversies that rocked the U.S. copyright revision boat for more than a decade. This makes international meetings on the subject a fascinating, if poignant, experience for American representatives.

On July 3-7, 1978, subcommittees of the IGCC and the BEC (the governing bodies of the two conventions) met in Geneva to exchange information and explore domestic solutions for national legislatures to consider in connection with balancing the copyright needs and interests of all the groups affected by cable television. The United States was represented by Barbara Ringer, the register of copyrights, and by Patrice A. Lyons, attorney-adviser in the Copyright Office. This was the second international meeting devoted to the copyright problems raised by cable television but the first held at an intergovernmental level. The documentation of the 1978 meeting consisted primarily of the report of a working group which met in Paris in June of 1977.

The task of the July 1978 meeting was to consider in detail whether existing international copyright conventions are adequate to cope with legal issues arising out of cable transmissions and retransmissions. Quite early in the proceedings it was agreed that the Universal and Berne Conventions do not require revision for this purpose; the conventions give a great deal of latitude to national legislation in this field, and it was

therefore felt that the focus of the meeting should be to provide an inventory and analysis of problems raised by cable distribution for the use of member states. The task of adopting particular legislative solutions would be left to the member states and they could take into account the particular circumstances of size, economic development, and the nature of broadcasting and cable activities within the country.

The comprehensive inventory of problems developed by the subcommittees was focused primarily upon the Berne Convention, which establishes a more elaborate regime for broadcasting rights than does the UCC. Threshold problems included those arising out of transmissions originated by cable systems and by broadcasters through cable systems. Transmissions originated by cable systems were seen as fully subject to the exclusive rights of the program author; transmissions originated by broadcasters but transmitted to viewers through cable systems were viewed as being subject to national discretion in determining whether broadcast authorization should constitute authorization for cable transmission.

The most serious problems involve retransmissions by cable systems. The subcommittees explored the distinction between simultaneous and nonsimultaneous retransmissions, giving some guidance as to the applicability of the Berne Convention in a variety of circumstances. Referring to the Universal Convention (and texts of Berne before 1948), the subcommittees observed that, although states party to these instruments had more flexibility in how they solved the copyright problem, this flexibility would not go so far as to allow unauthorized taping and retransmission of taped programs. The report states:

> [A]ccording to the general principles of copyright, the nonsimultaneous retransmission of captured transmissions was a new activity distinct from broadcasting and one that required the authorization of the author.

Of special interest was the subcommittees' discussion of the distinctions to be drawn between retransmissions of national as opposed to foreign programs. In this context, the delegate of the United States noted "with great concern"

> arguments put forward that would protect national programming in some manner (as by payment of equitable remuneration from a fund of royalties paid by cable systems in the country) but would leave foreign signals without any protection against, or remuneration for, retransmission by cable within the country. Following those arguments would lead to discrimination not compatible with the principle of national treatment contained in the multilateral copyright conventions.

The subject of how retransmission rights in broadcasting can and should be administered was also examined. The actual and potential growth of nonvoluntary ("compulsory") licensing throughout the world, including the United States as part of the new copyright statute, has been observed; the practical working of these systems have raised many questions of fairness, universality of coverage, and rate-making standards. The subcommittees noted that

> cable systems transmitting whole programs needed authorization of all rights holders involved, and therefore, as a general rule, in the case of simultaneous retransmissions of whole programs only *collective administration* made cable distribution feasible since the exercise of the exclusive right on an individual basis would paralyze or impede it.

But by "collective administration" the subcommittees did not mean statutory or compulsory licensing. Collective forms of voluntary licensing, quite normal and well-understood in the area of music, are different from either "statutory licenses" (where a given use is permitted upon payment of a statutorily fixed fee, which is pooled and distributed by a public authority to rights holders) or "compulsory licenses" (statutory or judicial requirements that a copyright owner authorize given uses, but having rates set by public authorities only in the event individual agreement on terms is not reached between the parties).

Inter-American Copyright

Inter-American cooperation in intellectual property matters received strong support with the formation, in 1975-76, of the Inter-American Copyright Institute, dedicated to an exchange of views among copyright policy makers and practitioners throughout the Americas. On December 15, 1977, the Executive Council of the ICI held its annual meeting in Washington, D.C. The Copyright Office was honored to host this meeting, during the course of which plans were elaborated to address the growing problems of sound recording and motion picture piracy in the Western Hemisphere.

Double Taxation of Copyright Royalties

On June 19-30, 1978, Patrice A. Lyons represented the Copyright Office as a member of the U.S. delegation to a meeting of governmental representatives, held in Paris to finish preparation of the draft International Convention for the Avoidance of Double Taxation of Copyright Royalties. The draft convention that emerged from this meeting is the product of much compromise, resulting from efforts to accommodate sharply divergent views of developed and developing states as to the proper jurisdictional nexus justifying taxation of income generally.

For the United States, the issue was complicated by our long-standing preference for double taxation to be avoided through a comprehensive network of individually negotiated bilateral agreements rather than a multilateral instrument. This policy reflects the belief that the fairest and most beneficial tax consideration for U.S. nationals can be obtained through bilateral negotiations. It is also justified by the great variety and technicality of tax legislation throughout the world and the difficulty of accommodating a variety of laws within a single multilateral instrument.

The draft convention prepared at the Paris meeting is a fairly straightforward instrument, establishing only a basic obligation to avoid double taxation of copyright royalties by domestic legislation, bilateral agreements, or otherwise, and with a set of "guidelines." The draft convention will be considered at a diplomatic conference to be held in 1979.

International Training Programs

International cooperation in the copyright area emerged as an issue at the second session of the Permanent Committee for Development Cooperation Related to Copyright and Neighboring Rights, held in Geneva in March 1978. Copyright Office General Counsel Jon A. Baumgarten represented the United States at the meeting. Major topics of discussion at the meeting were the educational copyright programs of the World Intellectual Property Organization intended to bridge the gap of knowledge and experience which separate developing states from major publishing and producing countries such as the United States. These training programs, which are also conducted on a large scale by UNESCO, require substantial cooperation and support from member countries of WIPO and UNESCO. Upon his return from the meeting Mr. Baumgarten reported on the serious concerns felt in developing countries that the United States, both at the governmental and private levels, has not been giving adequate support to these programs. Beginning this year the Copyright Office has begun formulating proposals for an expanded international training program, ultimately seeking some affiliation with educational institutions concerned with copyright and international trade and supported generously from private and public funds.

JUDICIAL DEVELOPMENTS

Last year saw a number of interesting and significant court decisions in the field of copyright, and we have singled out four of these as being of special relevance to readers of this chapter of the Librarian's annual report. Three of the cases concern the registration practices of the Copyright Office, and a fourth raises a question that has consumed the attention of many in the library and educational communities: the legality of off-the-air taping of television programs for use in schools. These four important decisions will be reviewed here in some detail; the separately published *Annual Report of the Register of Copyrights* will contain a summary analysis of all copyright and related cases decided in the United States during fiscal 1978.

Registrability of Design Applied to Industrial Use: The Esquire Case

The decisions of the Federal District Court and the U.S. Court of Appeals in *Esquire, Inc. v. Ringer,* 414 F. Supp. 939 (D.D.C. 1976), *rev'd,* 199 USPQ 1 (C.A.D.C. 1978), deal with one of the most complex and controversial questions affecting copyright policy in the United States today: the extent to which the copyright law protects works of industrial design, often of a very high aesthetic quality, when the designs are integrated into utilitarian objects. The issue has

never been whether works of industrial design must have "creativity" or possess "artistic" or "aesthetic" qualities to be copyrightable. Under the law in effect before 1978, the question was whether these admittedly creative industrial products come within the concept of "works of art," the term used in the 1909 statute and the cases decided under it. In the new law, the applicable term has been changed to "pictorial, graphic, and sculptural works," and this phrase is now defined in section 101 of the statute, but the Copyright Office and the courts are still faced with the problem of drawing a line between copyrightable and uncopyrightable designs.

The landmark case of *Mazer v. Stein*, 347 U.S. 201 (1954), settled the threshold question: whether a copyrightable work of art ceases to be protected by copyright when it is embodied in or applied to a utilitarian article. In holding that representational statuettes depicting dancers did not lose their copyright protection because they were intended to be (and were in fact) embodied in industrially produced bases for table lamps, the Supreme Court opened the door to copyright registration for a great many works of two-dimensional and three-dimensional applied design. However, in section 202.10(c) of its regulations, the Copyright Office construed the *Mazer* case to rule out the registrability of three-dimensional designs of useful articles where the only design elements were the shape of the article itself and nothing in the design could be identified separately as a work of art. This distinction has not been embodied in the new copyright statute.

The 1976 case of *Esquire, Inc. v. Ringer*, 414 F. Supp. 939 (D.D.C. 1976) challenged the register's refusal to register the design for an outdoor lighting fixture under the pre-1978 law and regulation. The plaintiff's basic argument was that its design for street lighting equipment was not distinguishable for copyright purposes from the lamp designs involved in the *Mazer* case, and that Copyright Office regulations discriminated against modern art, which is often nonrepresentational and hence not susceptible of passing the test of separability of utilitarian and artistic forms. Judge Gesell agreed that the Register had been wrong in refusing registration, concluding that "there should not be any national standard of what constitutes art, and the pleasing forms of the Esquire fixtures are entitled to the same recognition afforded more traditional sculpture."

Judge Gesell's decision, which aroused great interest in copyright and design circles, was recently reversed by the U.S. Court of Appeals for the District of Columbia, *Ringer v. Esquire, Inc.*, 199 USPQ 1 (C.A.D.C. 1978). A petition for Supreme Court review is currently pending.

To Judge Bazelon, writing for the court of appeals, the issues separating plaintiff's reading of the Copyright Office's regulations from that of the office itself were subtle:

> The Register interprets §202.10(c) to bar copyright registration of the overall shape or configuration of a utilitarian article, no matter how aesthetically pleasing that shape or configuration may be.
>
> Esquire, on the other hand, interprets §202.10(c) to allow copyright registration for the overall shape or design of utilitarian articles, as long as the shape or design satisfies the requirements appurtenant to works of art—originality and creativity.

Judge Bazelon's opinion began with the central concept that "industrial designs are not eligible for copyright." Noting that the Congress had rejected specific legislation for the protection of industrial products a number of times over the last sixty years, Judge Bazelon observed that the recent enactment of the 1976 Copyright Act, without its proposed Title II for the protection of ornamental designs, lent special support to the register's interpretation of the regulation.

In addition to giving weight to past and recent congressional rejection of design legislation, the court concluded that the long-standing administrative interpretation given the regulation by the Copyright Office was persuasive. In so concluding, the court confronted the question, raised in the district court opinion, as to whether the register's application of section 202.10(c) in the present instance could be squared with various registrations for lighting designs that had, in fact, been made over the years, and whether these registrations constituted an "interpretive precedent" requiring registration in the present case.

The question of administrative consistency in the face of applications for registrations of claims to copyright in a wide variety of works is a sensitive but judicially novel one. Judge Bazelon observed that:

The Register's test requires the application of subjective judgment, and given the large volume of copyright applications that must be processed there may be some results that are difficult to square with the denial of registration here. But this does not mean that the Register has employed different standards in reaching these decisions. The available evidence points to a uniform and long-standing interpretation of §202.10(c), and accordingly this interpretation is entitled to great weight.

In holding that the register's refusal to register claims to copyright in the *Esquire* lighting fixtures was proper, the court took cognizance of congressional policy against protection of purely industrial designs, reflected in the exclusion of special design protection under the 1976 Copyright Act. The court examined the legislative history of the new copyright law's treatment of "pictorial, graphic, and sculptural works," stressing that, while the new law did not control the case, the treatment of design protection reflected "Congressional understanding of the scope of protection for utilitarian articles under the old regulation." This understanding was perceived as supporting the distinction between copyrightable applied art and uncopyrightable industrial designs reflected in section 202.10(c). That history was read to represent "unequivocally that the overall design or configuration of a utilitarian object, even if it is determined by aesthetic as well as functional considerations, is not eligible for copyright."

The court of appeals also disagreed with the district court's reading of the Supreme Court's decision in *Mazer v. Stein*, the leading case in the field. In finding that the register's construction of the rule in section 202.10(c) did not conflict with *Mazer v. Stein* the court stressed that, under section 202.10(c) the figurines in *Mazer* were registrable; indeed, the *Mazer* court had noted and approved the long-standing practice of the office in accepting such statuettes as "works of art."

Mazer, to Judge Bazelon, was simply not in point; there the issue was whether admitted "works of art" could still be copyrightable when embodied in utilitarian articles. The Supreme Court concluded that, under the copyright statute, the intended use of a work of art had no significance to the validity of the copyright. In *Esquire*, however, the question was whether the overall shape of an article is copyrightable. The separability test approved in *Mazer* was seen to be properly applied, with correct results in both situations.

Finally, Judge Bazelon disagreed with the district court's finding of discrimination in the application of section 202.10(c) against "modern art." To Judge Gesell, application of the test of separability put a premium upon traditional realistic or ornate designs, whose distinct identity can be more readily perceived as art than the abstract considerations of form, shape, and line that often characterize modern visual arts and infuse contemporary industrial design. The application of the test of section 202.10(c) by the register was perceived by Judge Gesell as violating the principle of *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Under that principle, the merit or lack of merit of a work of art, as evidenced by the commercialism of the use to which it is put, was regarded by Justice Holmes as irrelevant to the existence of copyright protection. To the court of appeals, however, this discrimination, to the extent it exists at all, flowed not from the register's alleged abuse of discretion but from the congressional policy which has traditionally excluded industrial designs from the special statutory definition of "works of art" (now "pictorial, graphic and sculptural works") in the copyright laws.

In a brief concurring opinion, Judge Leventhal confined his separate conclusions to a procedural issue raised in the course of the court's opinion: the propriety of an action in the nature of mandamus where the register's actions admittedly involve an exercise of administrative discretion. The opinion of the Court did not reach the question of the nature of the abuse of discretion necessary to maintain a mandamus action because "under any standard the Register's application of §202.10(c) did not constitute an abuse of discretion."

Registrability of Designs of Typefaces: The Eltra Case

The legal issues that arose in the *Esquire* case were echoed, in part, in *Eltra Corp. v. Ringer*, 194 USPQ 198 (E.D. Va., 1976), *aff'd*, 579 F.2d. 294, 198 USPQ 321 (4th Cir. 1978), petition for rehearing denied (4th Cir., Aug. 1, 1978). Few

works could seem more dissimilar than the street lighting fixtures in *Esquire* and the designs for typefaces (the shape of the various letters, numbers, and symbols in a particular font of type) involved in *Eltra*, but the identity of issues involved in the registrability of both types of works is instructive. Both cases concerned section 202.10(c) of the Copyright Office regulations. Both works, though obviously involving creative effort of different sorts, were characterized as "industrial designs."

In October 1974, largely in response to a reawakening of interest in copyright within the typographical industry and a reexamination of the legal issue within the Copyright Office, the register announced that a hearing would be held on the registrability of typeface designs. The hearing—the first such proceeding in office history—was held on November 6, 1974, and included an inquiry into the office's regulations under which registration for designs of typefaces had been refused under the 1909 statute.

On June 6, 1975, prompted by testimony at the hearing which suggested the subject should be considered in the context of copyright revision, the register of copyrights wrote Rep. Robert Kastenmeier urging the House Judiciary Subcommittee to hear testimony on typeface design protection as part of its inquiry into the bill for general copyright revision. The subcommittee held a day of hearings on designs protection on July 17, 1975, and the testimony included a discussion of typeface protection.

In 1976 the Copyright Office concluded that, in the face of its long-standing refusal to register claims to copyright in typeface designs, and in view of the fact that the question was under active consideration by Congress, it was not in a position to amend its regulations to permit the registration of "variations of typographic ornamentation." Shortly thereafter, on the basis of the office's refusal to register claims to copyright in one of its typeface designs, the Eltra Corporation sought a writ of mandamus to compel registration. The issue had shifted to the judicial branch.

On October 26, 1976, District Court Judge Bryan decided cross-motions for summary judgment against the plaintiffs. The court declined to rule on the broad question of whether typeface designs in general are works of art and assumed that the designs at issue were works of art. The question was then whether this work of artistic craftmanship was within the statutory phrase of "work of art" or whether it had been excluded from the scope of that term by Congress, the courts, and the long-standing practice of the Copyright Office.

Judge Bryan was not persuaded by arguments that copyright protection for typeface, by the very "alphabetical" nature of the work, could inhibit the free dissemination of ideas through print media. He considered that section 202.10(c) of the office's regulations, insofar as it denied that typeface was a "work of art," was in error, and he then turned to the issue of the office's practice of rejecting these claims. On this point Judge Bryan, despite his assumption that typeface designs are copyrightable subject matter and his opinion that they should be registrable, was unwilling to overturn the office's regulation and direct that it reverse a long-standing practice. He therefore sustained the refusal to register plaintiff's designs.

The opinion of the district court raised many questions, centering on how to reconcile the final holding in the case with the court's flat statement that section 202.10(c) of the regulations, as applied by the office to typeface designs, was not in harmony with the legislation from which it derived. The case was sure to be appealed, and on June 14, 1978, the Fourth Circuit Court of Appeals affirmed the decision of the district court in favor of the Copyright Office's refusal to make registration. The opinion of the court of appeals differs substantially from the views expressed by Judge Bryan in the lower court.

Addressing the central issue first, the court of appeals concluded that, while the district court was correct in upholding the register's rejection of the copyright claim, it had erred in finding that typeface is a "work of art." The court of appeals examined the history of section 202.10(c) of the office's regulations in light of the Supreme Court's decision *Mazer v. Stein* (discussed above in connection with the *Esquire* decision). The appellate court in *Eltra* observed:

> This amended Regulation spelt out a plain distinction and sought to draw a precise line between copyrightable works of applied art and uncopyrightable works of industrial design, as declared in *Mazer*. And the distinction, as expressed in the Regulation, clearly accorded with Congressional intent and understanding, which, after all, is the controlling factor in statutory construction, as demonstrated by the long acquiescence of Congress in the Regulation.

Noting the long history of unsuccessful efforts either to amend the copyright laws to provide protection for typeface or to enact special design legislation under which typeface would be protected, the court said:

> Under Regulation 202.10(c) it is patent that typeface is an industrial design in which the design cannot exist independently and separately as a work of art. Because of this, typeface has never been considered entitled to copyright under the provision of §5(g). And the appellant has recognized this because over the years it, along with others in the trade, has sought repeatedly to induce Congress to amend the law in order to provide copyright protection to typeface.

Having resolved the question of the copyrightability of typeface designs, the court turned to consideration of what has been characterized as "the Constitutional issue." As a part of the Library of Congress, the Copyright Office is in the legislative branch of the federal government. Plaintiff argued that the register's authority with respect to registrations is purely ministerial—that as long as certain basic formalities, expressly provided for in the copyright statute, had been complied with, the register could not refuse registration. Out of plaintiff's argument flowed the corollary notion that, if the register's authority indeed does go much further, involving "executive" discretion in exercise of his or her statutory functions, then the location of the Copyright Office in the legislative branch of government violated the principle of separation of powers underlying the Federal Constitution. In advancing this argument, the plaintiff placed some reliance on the Supreme Court's recent decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), in which the legislation creating the Federal Election Commission had been held unconstitutional.

The court of appeals observed:

> it seems incredible that, if there were a constitutional infirmity in the 1909 Act, it would have so long escaped notice by either the Supreme Court or the bar or that the Supreme Court would have given implicit authorization in ... three decisions ... for the exercise by the Register of the power to issue rules and regulations, as provided in the Act.

The precise nature of plaintiff's reliance upon *Buckley v. Valeo* centered on the Appointments Clause of the U.S. Constitution. The court of appeals concluded, however, that

> [u]nlike the Federal Election Commission ... the Office of the Register of Copyrights is not open to any charge that it is violative of the Appointments Clause. The Register is appointed by the Librarian of Congress, who in turn is appointed by the President with the advice and consent of the Senate. By the nature of his appointment the Librarian is an "Officer of the United States, with the usual power of such officer to appoint such inferior officers [i.e., the Register], as [he or she] think[s] proper."

Plaintiff's attempt to rely upon some language in *Buckley*, to the effect that the activities of the register, an officer of the legislative branch, were by nature "executive" and hence constituted a violation of the separation of powers doctrine, was also rebuffed. Observing that the Librarian performed both "legislative" and "executive" functions, as *Buckley* characterized those powers, the court discounted the significance of the administrative placing of the office in the legislative branch:

> It is no more permissible to argue ... that the mere codification of the Library of Congress and the Copyright Office under the legislative branch placed the Copyright Office 'within the constitutional confines of a legislative agency' than it would be to contend that the Federal Election Commission, despite the 1974 amendment of the Act with reference to the appointment of its members, is a legislative agency unconstitutionally exercising executive administrative authority.
>
> The Supreme Court has properly assumed over the decades since 1909 that the Copyright Office is an executive office, operating under the direction of an officer of the United States and as such is operating in conformity with the Appointments Clause.

Renewal Registration: The Cadence Case

Cadence Industries Corp. v. Ringer, 450 F. Supp. 59 (S.D.N.Y., 1978), was, in the words of the District Court, "the cumulation of a ten-year struggle." Although the case dealt with renewal registrations (registrations of claims to a second term of copyright, made at the end of the first twenty-eight year term), the point at issue did not involve the right to claim renewal or the scope of rights during the renewal period of copyright. The questions presented related to the nature, clarity,

and reliability of the Copyright Office's public records and the evidentiary effect of renewal certificates.

The works involved were various issues of comic books which had been published in the 1930s and 1940s and registered for copyright in the names of the publishers. The renewal section of the copyright statute permits the "proprietor" (that is, the present owner of a copyright) to apply for renewal in four distinct situations, including "composite works" and "works made for hire." It also gives individual authors who were not employees for hire the right to claim renewal in their separate contributions to "periodical, cyclopedic, or other composite works."

The successors in title of the original copyright owners sought to renew the copyrights as "proprietors of copyright in a composite work made for hire." The Copyright Office was willing to accept separate renewal applications for each issue as "proprietor of copyright in a composite work" and as "proprietor of copyright in a work made for hire." However, it refused to register the applications as submitted, taking the view that the basis of the proffered claim as stated was an amalgam of two discrete categories of claimant and, as such, was inherently contradictory.

Ultimately, the issues reduced themselves down to practical questions. The applicant wanted to put the two bases of renewal claim on record without paying two renewal registration fees. The Copyright Office wanted to ensure that a certificate carrying some prima facie effect be consistent on its face.

In an effort to resolve the impasse, which involved a large number of applications, the Librarian of Congress, on behalf of the register, requested that the President seek an attorney general's opinion on the subject. On June 10, 1974, the attorney general rendered an opinion sustaining the central position of the office: "composite works" and "works made for hire" were, the attorney general concluded, "mutually exclusive," and "the Register of Copyrights had the authority to decline registration of a renewal claim asserting these inconsistent bases."

The renewal claimant refused to accept this opinion and brought suit against the register to compel registration of the claims as filed. In *Cadence Industries Corp. v. Ringer*, 450 F. Supp. 59 (S.D.N.Y. 1978), the District Court for the Southern District of New York rejected the attorney general's opinion and ruled against the register. Judge Conner acknowledged that the ownership of rights in individual contributions to periodicals, distinguished from copyright ownership of copyright in the periodical issue as a whole, differed when a proprietor claimed ownership of a "composite work," as opposed to claiming ownership of a "work made for hire." Nonetheless, he questioned whether the categories were mutually exclusive. Speaking practically, Judge Conner observed:

> On their face, the terms 'composite work' and 'work made for hire' would not appear to be mutually exclusive. A publication may obviously be a 'composite work' in the ordinary sense that it consists of the distinguishable contributions of several authors, and at the same time a 'work made for hire' in the ordinary sense that all of such contributors were employees of the publisher.

After examining the holding in *Shapiro, Bernstein and Co. v. Bryan*, 123 F.2d 697 (2d. Cir., 1941), and the definitional practices reflected in the Compendium of Copyright Office Practices, the court concluded that the "ordinary sense" of the two terms was, in effect, the statutory meaning of the terms. The court stressed that overlaps were sure to occur:

> Defendants have cited no court decision or authority on copyright law, and we are aware of none, which has concluded or even suggested that the term "composite work" should or might be interpreted narrowly to exclude publications in which some or all of the contributions were made for hire.

Indeed, the court was struck by the legislative history of the 1909 copyright law, which referred to "composite or cyclopedic works, to which a great many authors *contribute for hire*" [emphasis added], as evidencing the possibility that the terms were not mutually exclusive.

The court reflected:

> when the terms are accorded their ordinary meaning, a 'composite work' can be a 'work made for hire' provided all of the distinguishable contributions were made by employees of the publisher. In that case the proprietor would have all the renewal rights and the authors (in the colloquial sense) and their successors would have none. On the other hand, if the 'composite work' includes the contributions of both employees and non-employees the proprietor would have renewal rights to all portions of the whole except the identifiable contributions of

non-employees, as to which the authors or their successors would have the renewal rights, at least if the copyright thereon had been separately registered. There is no apparent inconsistency in this construction.

Under the copyright statutes in effect before and after 1978, certificates of copyright registration are entitled to consideration as prima facie evidence of the facts they state and of the validity of the copyright in question. It was the position of the Copyright Office that renewal certificates are also entitled to prima facie weight, and that the office was hence precluded from issuing renewal certificates that were contradictory on their face. However, the court, after ruling that the alleged contradiction did not exist, went further. Citing the authority *Epoch Producing Corp. v. Killiam Shows,* 522 F.2d 737 (2d Cir., 1975), it took the view that renewal certificates, unlike original term registration certificates, are not entitled to prima facie evidentiary effect.

Off-the-Air Videotaping: The Erie County BOCES Case

The hotly debated issue of off-the-air videotaping produced a reported decision in 1978. While only a first salvo in what promises to be a long war, the decision in *Encyclopaedia Britannica Educational Corp. v. Crooks,* 197 USPQ 280 (N.D.N.Y., 1978), reflects the strong undercurrent of professional examination and public debate now going on over the subject.

The range of legal issues arising out of the mass marketing of videotape equipment, to individuals for home use or to educators for classroom applications, has been the subject of much comment in scholarly and professional journals and in domestic and international meetings. The implications of the "videocassette revolution" seem staggering. The ease of reproducing and distributing cassettes has already created difficult enforcement problems in the area of motion picture piracy. Widespread home recording of television programs can change distribution practices between television film producers and broadcasters. Educational media producers find that licensing or selling their products for educational broadcasting can shape the available market for the sale of copies for classroom performance in unintended and troubling ways.

The Board of Cooperative Educational Services (BOCES) of Erie County, New York, was created to provide educational services to over one hundred schools in twenty-one school districts. One of those services included making available to schools educational audiovisual programs, and included among these programs were videotapes of copyrighted television materials made by the Erie County BOCES. The choice of programs by BOCES was fairly straightforward:

When a program of educational value is broadcast on television, BOCES makes a master videotape of the entire film. The vast majority of films it tapes are broadcast by the local public broadcasting channel, WNED-17, but some also are broadcast by commercial stations.

Individual schools followed a standard procedure in requesting tapes. Consulting a catalog of master recordings held in the BOCES tape library, schools submitted written requests for particular titles, including sufficient blank tape for BOCES to use in fixing a copy for the requester. With the exception of one year, BOCES records disclosed the number of copies made for schools but never showed the number of performances or circumstances of the performances. In the words of the court:

The copies are viewed by the students in the classroom, and in most instances then are returned to BOCES for erasure and reuse in videotaping other programs. However, BOCES does not require the schools to return the tapes. A few of the school districts keep the copies for their own videotape libraries. BOCES also does not monitor the use of the tapes by the schools, but presumes they are used solely for educational purposes.... Copies are supplied to the schools at cost, and no admission is charged to the students.

This program of activities was justified by the defendants on the ground that it is

a significant component of the instructional support services provided by BOCES... relied upon by the teachers in planning their school curricula. Since many of the programs are televised when classes are not in session or at times that do not coincide with coverage of the subject in a particular course of study, it is claimed that the students cannot view these programs unless videotapes are available.... The defendants claim that if the program is discontinued, public education would be greatly disrupted.

Plaintiffs, three audiovisual producers and copyright owers, considered their income from sale and licensing of their works both to educational broadcasters and schools to be threatened by the board's videotaping activities, and on October 19, 1977, they brought suit against BOCES alleging infringement of their rights of reproduction, distribution, and public performance under the copyright law of 1909.

The action sought both actual and statutory damages as well as costs and the surrender or destruction of infringing copies. An opportunity for judicial observation on the merits of the case arose in the context of the plaintiffs' motion for a preliminary injunction seeking to prevent BOCES from further videotaping, recopying, distributing, and performance in classrooms. Plaintiffs argued, in support of their motion, that the requirement of a showing of irreparable harm necessary for the granting of a preliminary injunction is presumed in copyright cases where, as here, a prima facie case of infringement had been established.

Defendant opposed the motion on a variety of grounds: (1) that the existence of a clear measure of damages, in the event of plaintiff's success at trial, exists in plaintiff's licensing agreement, compared against BOCES records of copying; (2) that plaintiffs are barred from seeking preliminary injunctive relief because of their allegedly excessive delay in bringing the copyright action, given their awareness of the activities complained of since 1972; and (3) that no infringement was committed, since noncommercial videotaping of television programs for delayed viewing in classrooms, without charge, is a "fair use."

The first two issues were disposed of summarily. Citing the recent case of *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91 (2d Cir., 1977), *cert. den.*, 434 U.S. 1014 (1978), the court agreed with plaintiff that:

> Because injury normally can be presumed, the plaintiff in a copyright case is entitled to a preliminary injunction even without a detailed showing of irreparable harm if the plaintiff demonstrates probable success on the merits or a prima facie case of infringement.

Further, as to the alleged delay in seeking judicial redress, the court concluded that, "on the present record," knowledge of the activities of BOCES did not exist before December 1976, and

> [t]heir delay in raising the infringement question in the courts, caused at least in part by their attempts to reach an out-of-court compromise solution to a difficult and complex problem, should be commended rather than condemned.

Turning to defendant's assertion of the defense of fair use (argued by defendant as diminishing the probability of plaintiff's success at trial and, thus, their right to a preliminary injunction), the court admitted that:

> The question of probable success on the merits poses a more troublesome issue. Educational institutions have been videotaping television broadcasts for strictly educational purposes for some time. The legality of such copying has never been determined, either by the courts or by the legislature. The problem of accommodating the competing interests of both educators and film producers raises major policy questions which the legislature is better equipped to resolve. However, Congress has not as yet provided a legislative solution to the problem, but has left the issue to the courts.

The court listed the four factors used to determine whether a given use was "fair" or infringing under section 107 of the new copyright law. It justified its reference to the new statute in a case arising out of the old 1909 law as proper, since "[s]ection 107 is intended to restate and not change the existing doctrine of fair use." Plaintiff's arguments that the legislative history of the new law demonstrates that the activities of BOCES fall outside of "fair use" were discounted by the court, relying on language in the House Report which

> carefully disclaimed any intent to influence the present judicial doctrine of fair use as it relates to off-the-air taping for noncommercial classroom use, and made it clear that it was leaving open the question of the legality of such a use.

Defendant's elaboration of fair use apparently relied heavily upon the celebrated library photocopying case, *Williams and Wilkins Co. v. United States*, 487 F.2d 1345 (Ct. Cl. 1973), *affirmed by an equally divided court*, 420 U.S. 376 (1975), and the court took the opportunity to reexamine *Williams and Wilkins*. Noting that the purpose and character of the uses in *Williams and Wilkins* was similar to that of BOCES and that educational purposes were as socially significant as the scientific research purposes in *Williams and*

Wilkins, the court turned to the remaining areas of fair use inquiry: substantiality of copying and impact of the defendant's use upon the market for plaintiff's copyrighted works. On these issues the court found the present case clearly distinguishable from *Williams and Wilkins*.

Although copying of complete articles in copyrighted medical journals constituted reproduction of an "entire" work, the court stressed that the copying by BOCES was different: "the potential impact on the copyright owner's market is much greater because the reproduction is interchangeable with the original. The substantiality and extent of BOCES' copying clearly exceeds that of the medical libraries."

The court's examination of the impact of the BOCES activities upon the copyright owners' market must be approached in the context of the motion before the court and the criteria for its granting or denial. The court noted that in *Williams and Wilkins* the holding that plaintiffs failed to demonstrate convincing proof of economic injury flowing from plaintiff's photocopying activities followed a full trial on the merits; in the BOCES motion the standard was different. The court stated:

> Although BOCES has made a noteworthy attempt to show through preliminary discovery that the plaintiffs have not suffered any economic loss or impairment of their market, the plaintiff's affidavits contain allegations to the contrary. These allegations raise substantial questions of fact, which can be decided only after a full trial record has been developed. Since the burden of establishing fair use is on the defendant and since the plaintiff in a copyright case is presumed to suffer irreparable injury, the court must assume for purposes of this motion that the plaintiffs are capable of proving their allegations.

The court did expressly note that the issue of economic harm, an element of fair use, was not being decided, that defendant would have the opportunity to develop its defense at trial, and that the absence of economic harm "would require a reassessment of the fair use defense."

In its closing paragraphs, however, the court expressed itself on the limited issue of distinguishing between the impact of an injunction in the *Williams and Wilkins* and BOCES cases, in language that has aroused concern in educational circles. Finding that the possibility of disruption of educational services due to the injunction could be met by entering into licensing arrangements with plaintiffs, the court said:

> The scope of BOCES' activities is difficult to reconcile with its claim of fair use. This case does not involve an isolated instance of a teacher copying copyrighted material for classroom use but concerns a highly organized and systematic program for reproducing videotapes on a massive scale. BOCES had acquired videotape equipment worth one-half million dollars, uses five to eight full-time personnel to carry out its program, and makes as many as ten thousand tapes per year. For the last twelve years, these tapes have been distributed throughout Erie County to over one hundred separate schools.

The court, finding that plaintiff was entitled to a preliminary injunction, directed that BOCES be enjoined from further videotaping of plaintiff's educational films off-the-air but stopped short of restraining continued distribution by BOCES of tapes already made. As to these latter works, the court concluded that:

> The interests of the plaintiffs will be adequately protected if BOCES, in cooperation with the school district, implements a plan to monitor the use of the tapes in the schools and to require their return and erasure within a specified time period.

Respectfully submitted,

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Number of Registrations by Subject Matter of Copyright, Fiscal Year 1978

Category of material	Completed registrations as of September 30, 1978 [1]			FY 1978 extrapolation [2]		
	Published	Unpublished	Total	Published	Unpublished	Total
Nondramatic literary works						
Monographs	83,391	7,895	91,286	102,909	10,038	112,947
Serials	87,518		87,518	110,863		110,863
Machine-readable works	342	105	447	495	127	622
Total	171,251	8,000	179,251	214,267	10,165	224,432
Works of the performing arts						
Musical works	17,477	73,427	90,904	22,253	92,512	114,765
Dramatic works, including any accompanying music	552	4,167	4,719	683	5,426	6,109
Choreography and pantomimes	2	3	5	2	6	8
Motion pictures and filmstrips	6,289	990	7,279	7,384	1,128	8,512
Total	24,320	78,587	102,907	30,322	99,072	129,394
Works of the visual arts						
Two-dimensional works of fine and graphic art, including prints and art reproductions	7,827	2,569	10,396	9,505	3,287	12,792
Sculptural works	409	93	502	640	144	784
Technical drawings and models	504	294	798	614	363	977
Photographs	723	473	1,196	846	597	1,443
Cartographic works	1,006	8	1,014	1,183	6	1,189
Commercial prints and labels	6,452	9	6,461	7,754	16	7,770
Works of applied art	3,637	318	3,955	5,557	505	6,062
Total	20,558	3,764	24,322	26,099	4,918	31,017
Sound recordings	5,994	1,096	7,090	7,528	1,533	9,061
Multimedia works	430	18	448	524	25	549
Grand total	222,553	91,465	314,018	278,740	115,713	394,453
Renewals			17,924			21,247
Total, all registrations			331,942			415,700

[1] To institute more current accounting practices, the method of reporting has been changed. As a result, statistics for fiscal year 1978 cover only eleven calendar months.

[2] An extrapolated figure has been included in these totals which represents the twelve-month figure under previous reporting practices. Also included are an estimated fifty thousand registrations which were in-process and had not completed the registration cycle on September 30, 1978.

Disposition of Copyright Deposits, Fiscal Year 1978 [1]

Category of material	Deposited for copyright registration: Added to copyright collection	Deposited for copyright registration: Forwarded to other departments of the Library	Deposited for copyright registration: Acquired or deposited without copyright registration	Total
Nondramatic literary works				
Monographs, including machine-readable works	91,524	[2] 83,153	4,371	179,048
Serials		175,036	12,687	187,723
Total	91,524	258,189	17,058	366,771
Works of the performing arts				
Musical works; dramatic works, including any accompanying music; choreography and pantomimes	93,347	18,200	246	111,793
Motion pictures and filmstrips	1,532	[3] 9,368		10,900
Total	94,879	27,568	246	122,693
Works of the visual arts				
Two-dimensional works of fine and graphic art, including prints and art reproductions; sculptural works; technical drawings and models; photographs; commerical prints and labels; works of applied art	33,490	3,689		37,179
Cartographic works	8	2,012		2,020
Total	33,498	5,701		39,199
Sound recordings	6,972	5,876	125	12,973
Total, all deposits [4]	226,873	297,334	[5] 17,429	541,636

[1] To institute more current accounting practices, the method of reporting has been changed. As a result, statistics for fiscal year 1978 cover only eleven calendar months.

[2] Of this total, 24,600 copies were transferred to the Exchange and Gift Division for use in its programs.

[3] Includes motion pictures returned to remitter under the Motion Picture Agreement.

[4] Extra copies received with deposit and gift copies are included in these figures. Totals include transfer of multimedia materials in any category.

[5] Of this total, 1,569 copies were transferred to the Exchange and Gift Division for use in its programs.