

# An Overview of Copyright and the Copyright Bill

THOMAS C. BRENNAN\*

As we approach 1976, there is some danger that a visit to New Hampshire by a member of a Senator's staff may be misinterpreted. I therefore wish to announce that I am not an advance man for Senator McClellan or any other member of the Senate although I do believe that Senator McClellan would do well in New Hampshire.

In doing my homework for this appearance, I read a short biography of Franklin Pierce. I learned that in his tenure in the House of Representatives he served on the committee which handled patent and copyright legislation. The author of the biography indicates that he was very conscientious in working on private patent relief bills. There is no indication in the biography of any involvement with copyright bills, but I would imagine, because of his close ties with Nathaniel Hawthorne, that he was acquainted with the problems of authors.

In the American legal system, the concept of copyright is not derived from any natural right of the author. It rests exclusively on the language of the Federal Constitution. It is clear from the view of the Founding Fathers with respect to the evils of monopoly, and some copyright experiences in the Mother Country, that the

---

\* Chief Counsel, United States Senate Committee on the Judiciary, Subcommittee on Patents, Trademarks, and Copyright, Washington, D.C.

principal purpose of copyright is not to reward the author but to foster scholarship and research and thus promote the public good. The grant of exclusive rights to the author is viewed as a useful means of promoting this public purpose.

### *U.S. Copyright Law*

The existing United States copyright law is essentially the Act of 1909. There have been a number of amendments made to the Act, some of which have expanded the types of works which are eligible for copyright protection. The most recent of these expansions relates to the granting of copyright protection for recordings and tapes. But throughout this century, it has been left to the Copyright Office by regulations, and to the Federal courts, to attempt to apply the archaic language of the Act of 1909 to the evolving forms of technology and communications. Until recently this worked fairly well and the courts, unlike patent proceedings, have been willing to undertake appropriate expansions of the rights of authors. More recently, however, this effort has completely collapsed as will be discussed later in respect to cable television and library photocopying. The Congress has been engaged in the copyright revision project for over a decade. Even before the Congress became involved, there was extensive preliminary work by the staff of the Copyright Office.

Were it not for one issue, the Copyright Bill would have been enacted in the late 1960's. The one issue which has contributed to the delay in the passage of the bill is the multi-faceted cable television controversy. It became clear in the late 1960's that any resolution to the cable television issue required a balancing of the communications and copyright aspects of that problem. And, unfortunately, progress in the Congress had to await developments in other forums, including the adoption in 1962 by the Federal Communications Commission of a new cable television regulatory scheme. During the same period, there were two Supreme Court cases which dealt with the liability of cable television under the Act of 1909, and which held that cable is not liable under that statute. During this ten-year period, both the House of Representatives and the Senate, in different Congresses, had passed Copyright Revision Bills. As you know, the Constitution requires that a bill pass both Houses of Congress in the same Congress.

The Senate passed the bill in September of last year, that is, late in the 93d Congress, and the game plan for the current 94th

Congress is to process the bill through both Houses of the Congress. What I will attempt to do in this opening presentation is give a broad review of the structure of the Bill and the major issues, to lay a foundation for the subsequent presentations. Although most of this conference will focus on issues in dispute, it is probably well to recognize that most provisions of S. 22 are relatively non-controversial. And, I would like to mention a few of them because otherwise I don't think anyone will make reference to them.

From the time of the original copyright statute of 1790, the United States has had a dual system of copyright protection. There has been the Federal statute and there has also been Common Law protection for unpublished works. The pending bill in Section 301 would end the dual system of protection and establish a single Federal system. Section 301 and the commentary on that subject makes clear that the Congress is providing a rather sweeping preemption of State and Common Law protection.

A second area which is probably non-controversial relates to so-called formalities. These are such things as the copyright notice that must be given to the public, and the various procedures for securing copyright registration. Some of the provisions in the Act of 1909 are rather detailed and a copyright owner or creator may suffer a total loss of his rights because of an inadvertent failure to comply with some technicality of the statute. So the purpose in this Bill is to considerably relax these formalities.

Third, we provide in Sections 110 and 112 for a number of exemptions from copyright liability for different types of performances of copyrighted works. These relate primarily to classroom instruction, instructional television, and religious services. This bill would repeal the so-called juke box exemption. One of several mistakes made by the Congress in 1908 was its treatment of what was then known as coin-operated machines. The Congress was persuaded that these coin-operated machines were simply a novelty or toy and they had no significant commercial impact. The Congress did not anticipate the development of the juke box industry, which has become a half billion dollar a year industry. Up till now, the juke box industry is not making any direct copyright payment to the creators of the music that is performed on their machines. This bill would eliminate that juke box exemption. The repeal of the exemption is not controversial although there is some dispute as to the amount of the payment.

A fifth area about which there is general agreement, and Dean

Rines already alluded to this, is the treatment of the new technology. The Congress has found it hard enough to deal with juke boxes, electrostatic copying machines, and cable television systems. It is neither anxious nor equipped to undertake to resolve in this bill the copyright implications of the evolving new technology. On the other hand, we agree with Dean Rines, that it would not be in the public interest to indefinitely delay any action to await the resolution of those issues. Consequently, the bill initially provided for the creation of a national commission to study these problems relating to new technology and to make appropriate recommendations to the Congress for changes in copyright law and procedures. But even this disposition was overtaken by events. While the general bill was bogged down in fighting over the CATV problems, technology was moving forward. At the end of 1974, the Congress decided that it was in the public interest to establish the commission at once rather than wait for the adoption of S. 22. Consequently, you will not find any reference in S. 22 to the creation of the national commission. Unfortunately, as technology moved ahead, it had already, to some extent, overtaken the mandate that was given to the commission in the adopted public law; however, the nature of commissions is such that they will do whatever they choose to do and there's nothing in the law which will restrict their activities. Dean Rines made some unkind remarks about commissions, he spoke primarily about the patent commission, but I think it would apply equally well to a number of other commissions. I suggest, however, that there is one important contrast between the copyright commission and the patent commission. The copyright commission is structured to provide a forum whereby knowledgeable individuals can come together and hopefully achieve useful compromises; whereas with the patent commission, although there were, I believe, two patent attorneys on the commission, most of the members of the commission had no prior experience with the patent system and very little conception of what would have been workable recommendations. So much for the non-controversial sections of the bill.

### *The Revision Bill*

The most important chapter of the bill is Chapter I. It sets forth the rights which are granted under the statute. Section 106 of Chapter I is the place you look initially to find what exclusive rights

are granted to the copyright owner. These can be summarized essentially as five exclusive rights with respect to the use of a copyrighted work: the right to reproduce, to adapt, to publish, to perform, and to display. Having given with the right hand in Section 106, the Congress then proceeds with the left hand (maybe I'm getting myself in trouble by referring to the left but I think it's appropriate), in Sections 107 through 117 of Chapter I to place various qualifications on the rights granted in Section 106.

If I had to select one section of the bill which I would describe as perhaps a keystone, I would choose Section 107 which deals with the problem of fair-use. This requires a little background. The Act of 1909 was concerned almost entirely with the grant of rights to the creator and the copyright owner. Very little was said about the users, although there are a few limited special exemptions. Consequently, there evolved through the courts the doctrine of fair-use, which in substance provides that it is not an infringement of the rights of the copyright owner to make under certain conditions limited use, for purposes of research and scholarship, of a copyrighted work. What are these conditions? Section 107 essentially attempts to codify the case law on fair-use so that if you look at Section 107 you will find a four-fold test which should be used in determining whether or not a particular use may be permissible as a fair use. The four-fold test involves the purpose of the use, the nature of the work, the amount being copied and the impact of the copying upon the commercial market for the work.

I don't have time in this once-over-lightly to apply these criteria to particular illustrations. The theory in Section 107 under fair-use is to continue to permit practices which have been authorized under court interpretations of the Act of 1909. With respect to traditional types of classroom instruction, such as a teacher making multiple copies for members of a class of short excerpts from a larger work, those practices would generally be permissible under the fair-use approach in Section 107. That's the easy part of the problem. It becomes much more difficult when you deal with the use of audio-visual materials and off-the-air taping of radio and television programs. Some critics of the bill, such as law professors, have said that the approach in 107 is a cop-out, that all the Congress is doing is passing the buck. I suggest to the authors of such learned commentaries that it is not possible for the Congress either in the language of the statute or in the history or commentary of the bill to resolve each of the hundreds of problems that could be involved in the application of the fair-use doctrine.

Closely related to the fair-use problem in Section 107 is treatment of library photocopying in Section 108 and decision of the Supreme Court in the recent case of *Williams & Wilkins v. United States*. All I have time now to do is to indicate how Section 108 came about and in a very superficial manner indicate the substance of that section. We began with the view that nothing should be said in the bill about library photocopying, that it should be left to the application of the criteria of Section 107, and that if the library could fit their practices into the criteria of 107, it was fair-use, and that was adequate to resolve the issue. For various reasons, that easy resolution has not proved feasible, and the problem was magnified by the filing of the Williams & Wilkins' law suit. First, Senators added a provision which would authorize the reproduction of out-of-print works if the owner of the copyright had not made provisions for the reproduction of the work. Then the libraries indicated they required a provision which would authorize the making of a single copy of a work. Now, what is a single copy? Having gone down that road, we had to provide some guidelines as to what was meant by a single copy. Then we were concerned about multiple copying and systematic reproduction. So there was language added to the bill which says that in spite of everything which comes before this, if what you are doing is systematic reproduction, this exemption does not apply. I personally would have been happier if we had taken the cop-out and just stuck with the language in Section 107.

### *Performance Royalty*

I want to turn now to an issue which is extremely fascinating but one which did not survive in the bill as passed by the Senate. This is the so-called performance royalty. The issue with respect to the performance royalty is whether radio stations and other commercial users of recorded music should make a direct copyright payment to the owners of the copyright in the record and the recording artists whose services are used on the record. Although radio and television stations make substantial copyright payments, none of these payments goes directly to the owner of the copyright in the record or the recording artist.

The first problem with the performance royalty is: does the Congress have the authority under the Constitution to grant such protection? The Constitution speaks of the writings of an author. Do records and tapes qualify as the writings of an author? I

suggest, ladies and gentlemen, that all respectable authority holds that records and tapes do qualify as the writings of an author. However, there was a very distinguished dissenter to this point of view, namely Senator Sam Ervin, and as we all know, Senator Ervin was regarded as the Senate's leading authority on the Constitution. Senator Ervin advanced what I can only describe as a novel argument. He had previously voted in favor of legislation to grant copyright protection to records and tapes. Consequently, he could not dispute the fact that the Congress had acted and that the courts had upheld the creation of a copyright in records and tapes. But Senator Ervin said that for the Congress to require broadcasters to pay a fee for the use of such records was unconstitutional as going beyond the powers of the Congress. Then we had a novel constitutional argument advanced by a Senator from Nebraska who said it was unconstitutional for the Senate to even consider this issue because it is clearly a revenue measure and the Constitution provides that revenue measures must originate in the House of Representatives. Now, I think everyone here knows that the Constitution was speaking of taxation and not the payment of copyright royalties by broadcasters. Fortunately, for the opponents of the performance royalty, the weakness of their constitutional objections was offset by effective lobbying techniques of radio and television broadcasters and other opponents of the performance royalty.

Consequently, if you look in S. 22 you will not find any reference to the performance royalty. My personal view is that there is considerable justification for the creation of a performance royalty. The radio stations contend that they are making indirect payments to the artists and the owner of the copyright because they play the records and that by playing the records they give exposure to the artist and the song and that this leads to increased sales for the record and, if the artist makes concert appearances, it improves the attendance at his public appearances. I believe this argument has some, but very little, foundation in reality. A number of radio stations play so-called standards or middle-of-the-road music and when we hear a record that was released in 1950 or 1960 we do not rush down to our neighborhood record shop to purchase the record. With respect to those stations that play top-40, or current hits, they are unwilling to run the risk of losing an audience by playing a record that has not been already established in the public mind as a hit. I also suggest for some of my broadcaster friends that they do seem to have an inconsistent position. They object to

having to pay for the use of program materials but they are very vocal, and I think correct, in contending that the cable industry should pay for the material which the cable industry picks up.

This brings me to Section 111 of this bill. There will be several presentations on the cable issues later in the conference and all I will do now is indicate what the bill provides.

Section 111 reverses the two Supreme Court decisions which held under the Act of 1909 that the cable industry was not required to pay copyright royalties for the material in the broadcast signals which they pick up. The bill grants cable television a compulsory license to carry whatever signals are authorized pursuant to the regulations of the Federal Communications Commission. It then specifies certain criteria which must be met by cable systems, including the payment of reasonable copyright royalties. The Congress, in S. 22, would establish an initial fee schedule, but Chapter 8 of the bill provides the mechanism for periodic review and adjustment of those rates.

### *Conclusion*

I want to comment on what I would describe as the one overriding trend in the progress of this bill and it is one which I do not like. That is the trend toward a compulsory license. This pernicious practice can be traced back to the Act of 1909. There is one compulsory license granted in the Act of 1909 which relates to what is known as the mechanical royalty. The mechanical royalty is the payment which a record company makes to the owner of the copyright in a song which is used on a record or tape. The Congress provided in the Act of 1909, because of a concern with the danger of monopoly, that if the copyright owner allows a single record company to record its composition, it must, upon payment of a specified fee, allow any other qualified record company to make a new recording of that composition.

I'll skip now from 1909 to the mid-1960's. The Copyright Office submitted to the Congress a report which is the foundation for subsequent Congressional action on the bill. The Copyright Office took the very sound position that a compulsory license could be justified only if there was an overriding public interest, and in their initial report to the Congress the Office decided that there was no overriding public interest in preserving this mechanical royalty compulsory license. However, that was not the end of the story. Two industries, the music publishing industry and the recording

industry, had grown rather comfortable with their working arrangements under the mechanical royalty compulsory license and, consequently, the Congress was told that the mechanical royalty license should be preserved in the pending bill. Then the juke box operators started objecting and they said, "Alright, now we are willing to pay something. We recognize that the exemption in the Act of 1909 is not justified. But we are all small businessmen and we can't be concerned checking whether the rights for a particular song are controlled by ASCAP, BMI or some independent creator. If we are going to be protected, we need a compulsory license." When the House of Representatives passed the bill there was added a juke box compulsory license. Then the cable people came to us and said, "We don't originate these programs, we are simply transmitting what we receive from the networks and the independent broadcasters. There is no practical way for us to secure rights to this program material." So, Congress in S. 22 and predecessor bills, gave the cable television industry a compulsory license. Now when we get back to Washington there is waiting a new proposal. The public broadcasting people say, "You can't treat public broadcasting less favorably than you're treating the juke box industry. What's good for the juke box industry is good for public broadcasting."

That, in a rather superficial view, gives you the background for the subsequent lectures. Thank you very much.

