BOOK REVIEWS


In the land where many lawyers are called upon to help the illusion-makers whose movies and TV programs, stories and music, provide the world with entertainment, the members of the Los Angeles Copyright Society found themselves faced with a hard and uncommon reality: an accumulation of excess funds. As the philanthropic foundations keep telling us, how to spend uncommitted money to the best advantage is not an easy question to answer. The Society solved its problem by financing this volume of collected articles on Copyright and Related Topics.

That a group of copyright practitioners considered this the best way to use their surplus is hardly surprising; that they so decided brings a glow of warmth to their fellows who know the special intellectual fascination of what Justice Story called "the metaphysics of the law."¹ (Professor Chafee opens the first article in this volume with the sentence "Copyright is the Cinderella of the law.") At any rate, their choice comports well with the growing importance of copyright as a factor in industry and culture, concomitant with the information explosion, new media of communication, and the spread of learning and leisure, all of which is reflected in the expansion of interest in copyright within the legal profession.

This interest has been heightened by the current effort to rewrite the entire Copyright Law, title 17 of the United States Code, which, except for a few relatively minor amendments, has not been revised since the horse-and-buggy days of 1909. After more than nine years of preparatory studies, proposals, and discussions,² the

¹ In the celebrated case of Folsom v. March, 9 Fed. Cas. 342, 344 (No. 4901) (C.C.D. Mass. 1841), Mr. Justice Story said: "Patents and copyrights approach, nearer than any other class of cases belonging to forensic discussions, to what may be called the metaphysics of the law, where the distinctions are, or at least may be, very subtle and refined, and, sometimes, almost evanescent...." Others have often repeated this characterization of copyright.

² Thirty-four studies of copyright problems were published in a series of pamphlets headed Copyright Law Revision issued by the Senate Committee on the Judiciary during 1960 and 1961. Staff of Senate Comm. on the Judiciary, 86th Cong., 2d Sess.,
Copyright Office drafted a bill for the general revision of the Copyright Law on which a subcommittee of the House Judiciary Committee has held extensive hearings. Hearings have also begun on the Senate side.

Copyright and Related Topics is an anthology of sixteen previously published articles, to which the individual authors of ten have added, for this volume, a short supplement on the subsequent history of their subjects. The editors have wisely appended a comprehensive 22-page bibliography of articles published between 1950 and 1963. Except for two earlier "classics," the articles chosen for the anthology were published during that period.

The selection of articles was made by an editorial board which includes the names of some of the leading copyright practitioners and teachers. In a preface the chairman of the board, Averill C. Pasarow of Beverly Hills, California, tells us that they sought to select "those articles which lawyers active in the practice of entertainment law refer to most often," with "emphasis on more current materials likely to be of greatest use to the practitioner," and with the hope "that this collection will be of interest not only to the so-called 'copyright bar' but to lawyers who only occasionally have matters in the field." It would be fruitless to quarrel with these criteria or to "second-guess" the board's choices. No doubt a stronger bias toward the philosophical foundations of the law, or its historical development, or an exploratory critique, or a probing of its economic impact or social consequences, or what not, would have brought forth some different choices. Not that any of these viewpoints—including the what not—are completely lacking from the sixteen articles in this collection. But whatever the criteria, surely no two persons choosing independently could be expected to come up with identical lists. In fine, while anyone familiar with the bibliography might pick out an item or two that he would prefer over one or

Copyright Law Revision ( ). A Report of the Register of Copyrights and four other pamphlets on Copyright Law Revision containing revision proposals, transcripts of meetings, and letters of comment, were issued by the House Committee on the Judiciary between July 1961 and September 1965.

H.R. 4347, S. 1006, 89th Cong., 1st Sess., identical bills introduced Feb. 4, 1965. The House Subcommittee held hearings between May 26 and September 2, 1965; the transcript of the hearings has been published by the Government Printing Office. Hearings before a subcommittee of the Senate Judiciary Committee were begun August 18-20, 1965, and are expected to be resumed.

another of the articles chosen, the board's selection on the whole has much to commend it.

Insofar as the sixteen articles present didactic summations of statutory and case law on various subjects—and several of them are almost solely of that character—I shall not attempt to review them individually. Nor do I think this is the place to express my opinions about the analytical observations and arguments found to a greater or lesser extent in most of the articles. Rather, with legislative revision occupying the center of the copyright stage today, I propose to focus attention on the discussions in the articles of questions which have required consideration in the revision program.

Because the following six articles in the collection do not fit within this arbitrary framework, they will not be mentioned further in the present review: "The Right to Privacy" by Samuel D. Warren and Louis D. Brandeis; "Motion Picture Rights: United States and International" by Joseph S. Dubin; "Privacy and Privilege in Literary Titles" by Victor S. Netterville and Barry L. Hirsch; "The Right of Publicity" by Melville B. Nimmer; "Originality in the Law of Intellectual Property" by Judge Leon R. Yankwich; "Extension of Restitutional Remedies in the Tort Field" by Kenneth H. York. I hasten to add that the absence of further reference to these articles is no reflection on their special merit or value in the broad field of copyright and related topics.

Of particular interest in the context of copyright law revision is the first article in the collection, Zechariah Chafee's "Reflections on the Law of Copyright." Its main force was to urge, twenty years ago, a "thoroughgoing revision of the Copyright Act," based on six "ideals" which he realized cannot be achieved completely (and which are even in conflict at some points). The essence of his ideals is indicated in his captions: (1) "Complete coverage" (to embrace works of authorship in new as well as in previously known forms); (2) "A single monopoly" (to extend the author's rights to new methods of exploiting works); (3) "Protection should be international"; (4) "Protection should not go substantially beyond the purposes of protection" (so as not to burden the public unduly, an ideal which produces dilemmas in relation to number (2)); (5) "The protection given the copyright-owner should not stifle independent creation by others" (who borrow from earlier works within bounds); and (6) "The legal rules should be convenient to handle" (though this ideal of simplicity and certainty, requiring rough-and-
ready solutions, "will prevent us from completely realizing some of the other ideals").

There is obviously room for dispute as to whether these ideals are honored in any proposed new statutory specifications—especially those dealing with the scope of protection, where Chafee's second and fourth ideals tug in opposite directions. I think it is fair to say, however, that the present revision bill⁶ is framed to advance the copyright statute toward their attainment.

Chafee's observations on the vicissitudes of the revision process still ring true twenty years later. "Every attempt to overhaul our antiquated Copyright Act," he said, "arouses as much emotional heat as a coal-strike." "Every...proposed reform becomes a quarrel over a brief clause. Broad principles tend to be buried under bitterly contested narrow issues. We do not see the wood for the trees." Fortunately, in the current revision effort, several years devoted to give-and-take discussion of controversial issues have brought peace to some of the hottest battlegrounds and there are hopeful portents of settlement on the remaining fronts.

Other articles in the collection deal in greater depth with particular problems encountered in revising the law. Seymour M. Bricker, in "Renewal and Extension of Copyright," reviews the intricate tangle of the renewal system under the present law. He suggests that this traditional feature of our copyright law has caused so much more trouble than its supposed, but dubious, benefits might be worth, that we should abandon it in the new law. The revision bill now pending does so for future copyrights.⁷ At the same time, the bill seeks to preserve in substance the benefit that the renewal system was intended to give authors and their families: the opportunity to renegotiate, after a period of years, the contracts under which they transfer their copyrights initially.⁸

One of the most difficult concepts of the copyright law to define with any degree of precision is the subject of Saul Cohen's article, "Fair Use in the Law of Copyright." Cohen strives valiantly to extract from the court decisions a set of criteria for determining what is "fair use." In the supplement to his article he characterizes this judge-made doctrine as "a useful and important limitation

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⁶See note 3 supra.
⁷But the bill keeps existing renewal rights and expectancies intact by maintaining the present renewal system for copyrights subsisting before the new law takes effect. See H.R. 4347, S. 1006, supra note 3, at § 304.
⁸See H.R. 4347, S. 1006, supra note 3, at § 203.
in the public interest on the rights of copyright proprietors,” and he adverts to its growing importance with the widespread use of new and still newer copying machines.

Regarding the suggestion that the copyright statute should provide for fair use and delineate its scope, he opines: “It is doubtful whether any such... provision [in general terms] makes matters more certain. It is difficult to conceive of a more specific provision which would lay down a workable rule without being arbitrary.” Ultimately, he believes, we must rely upon the good judgment of the courts to apply the doctrine justly in particular cases.

An earlier draft of a revision bill attempted to state broadly the areas and criteria of fair use. After it had suffered the cross-fire of attack by those who cried “too broad” and others “too narrow,” the fair use provision was trimmed down in the present revision bill to recognize the principle of fair use without attempting to indicate its scope.

In “Magazine Rights”—A Division of Indivisible Copyright,” Harry G. Henn, in the course of a comprehensive review of copyright in relation to magazine publishing, elucidates several problems of copyright ownership that have called for reexamination in formulating a revised statute. He gives particular attention to the troublesome concept of “indivisibility,” the premise that the bundle of an author’s rights to the various uses of a work in different media is owned as a single totality, so that a purported transfer of some rights only, being less than the whole, is a license rather than an assignment. Practical requirements have falsified this premise and have produced ways, though often clumsy, of going around it. The principle that a copyright is divisible into a number of rights capable of separate transfers of ownership is embodied in the current revision bill. Professor Henn also explains some of the problems of ownership and notice arising in relation to works made for hire and contributions to collective works, with which the revision bill has had to deal.

One of the outstanding innovations in the revision bill is the extension of copyright to sound recordings as works in themselves

10 H.R. 4347, S. 1006, supra note 3, at § 107.
11 H.R. 4347, S. 1006, supra note 3, at §§ 201 (d), 501 (b), and the definition of “copyright owner” in § 101.
12 H.R. 4347, S. 1006, supra note 3, at §§ 201 (b), (c), 403, and definitions of “work made for hire” and “collective work” in § 101.
distinct from the musical or literary material recorded. Benjamin Kaplan’s article, “Professor’s Rights and Copyright: The Capitol Records Case,” explores thoroughly the question of protecting sound recordings. In doing so he probes into the general problems of protecting unpublished works under the federal copyright statute, and of preempting the field in relation to state law. Here we can find foreshadowings of the recent decisions of the Supreme Court in the Sears and Compco cases which have so much agitated a substantial segment of the bar.

Professor Kaplan sees strong reasons to protect sound recordings against duplication, but notes conceptual and practical obstacles to protecting them against performance and imitation. The revision bill makes these same distinctions, providing protection for this new class of works against duplication only.

In his article on “UCC Protection in the United States: The Coming into Effect of the Universal Copyright Convention,” Edward A. Sargoy gives special attention to one of Professor Kaplan’s subjects, the protection of unpublished works. Sargoy considers the subject broadly in the context of the obligation of the United States under the Universal Copyright Convention to protect unpublished works without formalities. He is a staunch advocate of a “single federal system” in which the federal statute would apply to all copyrightable works in their unpublished state as well as after publication.

Another aspect of the question of protecting unpublished works is the topic of Herman F. Selvin’s article, “Should Performance Dedicate?” He attacks the narrow concept of “publication” which, under the present law, allows “unpublished” works to enjoy perpetual protection under the common law even when presented to the public in performances. The cause for his complaint would vanish under the “single federal system” advocated by Sargoy and many others, which is provided for in the revision bill.

We move on into a different area, where a separate bill for the protection of ornamental designs of useful articles is intended to supplement the copyright and patent laws in meeting the problem considered in the article entitled “Borderland—Where Copyright

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14 H.R. 4347, S. 1006, supra note 3, at §§ 102 (7), 112.
15 H.R. 4347, S. 1006, supra note 3, at §§ 301 and 302 (a).
and Design Patent Meet,” by Richard W. Pogue. He devotes much of his analysis to that phase of the problem dealt with by the Supreme Court in Mazer v. Stein:17 copyright protection of a work of art when it is applied to a useful article. By setting the doubts on this score the Court has narrowed the twilight zone between copyrightable art and noncopyrightable ornamentation, but it has not extended protection to the large area of industrial designs that do not qualify as works of art. Similarly, the copyright revision bill reflects the Court’s advance but does not purport to move into the territory beyond.18 The separate design bill seeks to occupy that territory, following a pattern suggested by Pogue.

A note on “Monetary Recovery for Copyright Infringement” and a Comment on “Accountability Among Co-Owners of Statutory Copyright,” both from the Harvard Law Review, complete the collection. The first comprises an expository digest of holdings interpreting and applying the somewhat abstruse provisions of the copyright statute for the award of compensatory damages, the infringer’s profits, statutory damages, and costs in infringement suits.19 Of prime importance to copyright owners as a practical matter has been the statutory damages to be awarded, within a stated minimum and maximum range, in lieu of actual damages and profits. The revision bill maintains this concept of statutory damages, as well as the other remedies now available, with some modifications in specifics.20

The Comment concerning co-owners is a perceptive analysis of the decisions on the rights and liabilities of the co-owners of undivided interests in a copyright, among themselves and in relation to their assignees and licensees. Except for defining a “point work,” of which the authors are co-owners, in a manner that differs from a recent decision,21 the revision bill makes no special provisions governing the rights and liabilities of co-owners, thus leaving the judicial rulings undisturbed.

18 H.R. 4347, S. 1006, supra note 3, at § 111.
20 H.R. 4347, S. 1006, supra note 3, at §§ 504-05. But cf. H.R. 4347, S. 1006, supra note 3, at § 411, which withholds statutory damages and attorney’s fees for infringements commenced before registration of the copyright.
21 H.R. 4347, S. 1006, supra note 3, at §§ 101 (definition of “joint work”), 201 (a). The decision referred to is the “12th Street Rag” case, Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 221 F.2d 569 (2d Cir.), modified, 223 F.2d 252 (2d Cir. 1955).
Now for a final word concerning Copyright and Related Topics as a whole: The enactment of a new copyright statute, though it would effect many important changes in the present law, would do little to detract from the value of the articles in this collection; they will continue to serve as instructive and provocative guides on some of the most fundamental principles underlying the copyright system. The new law will be best understood, of course, by those who can see its roots and the forces of reason and experience that made it grow as it did. As for the articles on "related topics"—the development of rights and remedies respecting privacy and the use of titles, names, symbols, personalities, spectacles, and ideas having promotional or trade value—they also have much of lasting interest in tracing the theories on which the law in these adjacent fields is evolving.

In sum, this volume of selected articles will provide, for those who are not specialists in the copyright field, an informative and stimulating tour of the country. And the specialist, who may have read most of the articles individually in the past, is likely to find that two or three of them escaped him before and that others are well worth re-reading; for him too this volume offers the convenience of placing within ready reach some of the choicest material on the subject.

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The Dean of the Harvard University Graduate School of Public Administration has written a long essay considering the impact of the scientific-technological revolution on the American politico-economic structure. In The Scientific Estate Dean Price asks "the fundamental question: how is science, with all its new power, to be related to our political purposes and values, and to our economic and constitutional system?" The problems posed and the answers suggested form a provocative and important book deserving wide readership—not only by scientists; but also by lawyers, political scientists and economists. Commenting on the book, scientist Dael

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