

COMMITTEE REPORT
HOUSE

FURTHER:

2/14/83

Date: 3/11/83

Mr. Speaker:

The Committee on FINANCE has had HCR 9

Calling for erection of a suitable memorial to honor veterans of all wars involving the United States on the site presently occupied by "Nimbus".

under consideration and reports it back as follows:

- do pass do not pass
- do pass with attached amendments(s)
- replace with CS for HCR 9 (Finance) same title
 new title
- and recommends individual recommendations
- AND attaches a "Letter of Intent" New Fiscal Note
- reports it back without recommendation Zero Fiscal Note Attached
- referred to the _____ Committee

MEMBERS SIGNING
DO PASS

MEMBERS HAVING
OTHER RECOMMENDATIONS:

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]

[Signature] (No Rec)

[Signature] (No Rec)

[Signature]

[Signature]

[Signature]

[Signature]

[Signature]
CHAIRMAN

Original sponsors: Bettisworth, Cato,
Phillips and Flood

1 IN THE HOUSE

BY THE FINANCE COMMITTEE

2 CS FOR HOUSE CONCURRENT RESOLUTION NO. 9 (Finance)

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 Calling for erection of a suitable
6 memorial to honor veterans of all wars
7 involving the United States on the site
8 presently occupied by "Nimbus".

9 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 WHEREAS military personnel who served in wars involving the United
11 States should be honored in Alaska; and

12 WHEREAS military personnel who served at least 180 days active duty
13 with a United States military organization during time of war, or were
14 discharged sooner as a result of illness or injury in service in a war in
15 which the United States participated, deserve special recognition; and

16 WHEREAS a memorial to honor these persons would be appropriately
17 visible to the public if placed by the State Court and Office Building in
18 Juneau, Alaska; and

19 WHEREAS the sculpture "Nimbus", currently located on the grounds of
20 the State Court and Office Building in Juneau, could be located elsewhere;

21 BE IT RESOLVED by the Alaska State Legislature that the sculpture
22 "Nimbus" should be removed from the grounds of the State Court and Office
23 Building in Juneau and be replaced with a suitable memorial honoring mili-
24 tary personnel who served 180 days or more active duty with a United States
25 military organization during time of war or were discharged sooner as a
26 result of illness or injury in service in a war in which the United States
27 participated; and be it

28 FURTHER RESOLVED that a committee be established consisting of a rep-
29 resentative of the Veterans of Foreign Wars, a representative of the

1 American Legion, a representative from the Vietnam Veterans of Alaska, the
2 director of the Alaska State Council on the Arts or the designee of the
3 director, the mayor of the City and Borough of Juneau or the mayor's
4 designee, a member of the House of Representatives of the Alaska State
5 Legislature, appointed by the speaker of the house, and a member of the
6 Alaska State Senate, appointed by the president of the senate, to meet and
7 make recommendations to the legislature within 45 days on

8 (1) the disposition of "Nimbus";

9 (2) the type of memorial to be constructed; and

10 (3) the time frame for construction of the memorial; and be it

11 FURTHER RESOLVED that the memorial should be commissioned to an
12 Alaskan artist.

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSHCR 9 (Finance)
 Title Erection of a suitable memorial to honor veterans of all wars/site presently
 Requested by occupied by "Nimbus". Date 3/11/83
House Finance Committee

II. FISCAL DETAIL

Agency Affected Legislative Affairs Agency
 Program Category Affected Legislature
 BRU, Program, Or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 3/11/83 PREPARED BY Al Adams, Chairman
 AGENCY House Finance Committee
 Original: Legislative Finance PHONE 465-3706
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/82)

The following individuals are expected to testify on HCR 9:

Rep. Bob Bettisworth, Prime Sponsor

Pete Kelly, Vietnam Veterans of Alaska

Dick Rountree from the Department of Military Affairs will not be in town, but states that the Department favors the bill.

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CSHCR 9 (Finance)
 Title Erection of a suitable memorial to honor veterans of all wars/site presently
 Requested by occupied by "Nimbus". Date 3/11/83
House Finance Committee

II. FISCAL DETAIL

Agency Affected Legislative Affairs Agency
 Program Category Affected Legislature
 BRU, Program, Or Subprogram(s) Affected _____
 (Note: If more than one budget component is affected, separate line-item
 amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-	-0-	-0-

FUNDING (Thousands of Dollars)

GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

IV. DATE 3/11/83 PREPARED BY Al Adams, Chairman
 AGENCY House Finance Committee
 Original: Legislative Finance PHONE 465-3706
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/82)

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. CS FOR HOUSE CONCURRENT RESOLUTION NO. 9 (Finance) am
 Title Calling for erection of a suitable memorial to honor veterans of all wars involving
the United States on the site presently occupied by "Nimbus".

Requested by: Senate State Affairs Committee Date: 05/13/83

II. FISCAL DETAIL

Agency Affected Legislature
 Program Category Affected General Government
 BRU, Program, Or Subprogram(s) Affected Legislative Council
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES		2.5				
200 TRAVEL		6.7				
300 CONTRACTUAL		0.5				
400 COMMODITIES		0.2				
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		9.9				

FUNDING (Thousands of Dollars)

GENERAL FUND		9.9				
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

FULL TIME						
PART TIME						
TEMPORARY		1				

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

- Assumption 1: Temporary/part-time clerical - @\$10.30/hr x 4 hrs daily for 60 working days = \$2,472.00
- Assumption 2: 3 meetings - Travel 4 roundtrip tickets for 4 members from Anchorage to Jnu = \$3,840.00
 Per diem @\$80 x 4 members for 2 days x 3 meetings ----- = \$1,920.00
 Per diem @\$80 x 4 members for 1 day x 3 meetings ----- = \$ 960.00 \$2,880.00
 Total Travel & per diem \$6,720.00
- Assumption 3: An office in the Capitol will be used at no charge. Credit card toll calls \$500.00
- Assumption 4: Office supplies, etc. ----- \$200.00
- Assumption 5: Use existing legislative office equipment at no charge.

IV. DATE 05-13-83 PREPARED BY Wally Harrison, Director, Admin. Services
 AGENCY Legislative Affairs Agency
 Original: Legislative Finance PHONE 465-3850
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)
 33-001 (Rev. 12/82)

THE LEGISLATURE OF THE STATE OF ALASKA
THIRTEENTH LEGISLATURE

FISCAL NOTE

I. REQUEST

Bill/Resolution No. House Concurrent Resolution No. 9
 Title Veteran's Memorial in place of "Nimbus"
 Requested by House State Affairs Date 04 Jan 1983

II. FISCAL DETAIL

Agency Affected Military Affairs
 Program Category Affected Public Protection
 BRU, Program, Or Subprogram(s) Affected Life & Property Protection
 (Note: If more than one budget component is affected, separate line-item amounts and funding for each component in the analysis section.)

EXPENDITURES (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
100 PERSONAL SERVICES						
200 TRAVEL						
300 CONTRACTUAL						
400 COMMODITIES						
500 EQUIPMENT						
600 LAND & STRUCTURES						
700 GRANTS, CLAIMS, ETC.						
TOTAL		-0-	-0-	-0-		

FUNDING (Thousands of Dollars)

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
GENERAL FUND						
FEDERAL FUNDS						
OTHER (Specify Source)						

POSITIONS

	FY 83	FY 84	FY 85	FY 86	FY 87	FY 88
FULL TIME						
PART TIME						
TEMPORARY						

III. ANALYSIS (See Fiscal Note Preparation Instruction, Section III)

No apparent fiscal impact.

IV. DATE 04 Jan 1983 PREPARED BY *Dick* Dick Rountree
 AGENCY Military Affairs

Original: Legislative Finance PHONE 465-4601
 cc: Budget and Management
 Prime Sponsor (First Legislator Named)

"publication by the government" within meaning of former section 8 of this title which provided that "publication by the government" of a copyrighted document did not abridge or annul the copyright. *Bell v. Combined Registry Co.*, C.A.111, 1970, 530 F.2d 104, certiorari denied 97 S. Ct. 530, 420 U.S. 1001, 50 L.Ed.2d 612.

Speeches, which contained copyright notice, which were made by vice admiral in United States Navy to private organizations on vice admiral's own time and

which concerned matters removed from official duties of vice admiral who prepared speeches on his own time and only used government facilities for purpose of duplicating the same to obtain security clearance and to distribute copies thereof to press and others, did not form a part of his official duties and were private property of vice admiral who was entitled to copyright therein. *Public Affairs Associates, Inc. v. Rickover*, D.C.11.C.105, 268 F.Supp. 444.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546.

Historical Note

Notes of Committee on the Judiciary, House Report No. 94-1476. *General Scope of Copyright.* The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106 [this section]. These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201 [section 201 of this title], each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106 [this section], and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 [this section] is made "subject to sections 107 through 118 [sections 107 through 118 of this title]," and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 [this section] are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any ques-

tions as to the liability of co-infringers. For example, a person who lawfully acquires an authorized motion picture would be an infringer if he or she engages in the renting of it to others for purposes of authorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106 [this section], which confer the exclusive rights of reproduction, performance and display, and adaptation, encompass every kind of copyrighted work. These rights encompassed in section 106 [this section] are exclusive rights encompassed in section 106 [this section] and are generally referred to as rights of copying, adaptation, and publishing. A violation of infringement may violate the rights at once, as where a person reproduces, adapts, and sells another person's copyrighted work as a publishing venture. Infringement occurs when any one of the rights is violated; where, for example, a person reproduces copies without selling them, or where, for example, a person sells copies without advertising them, or where, for example, a person does with their reproduction references to "copies or phonorecords" although in the plural, are included throughout the bill to conform with the singular (1 U.S.C. § 1 [section 1, General Provisions]).

Reproduction.—Read together with the relevant definitions in section 101 of this title, the phrase "to reproduce the copyrighted work in copies or phonorecords" means the production of a material object in which the work is duplicated, transcribed, or simulated in a fixed form by any means now known or later invented. It can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Under the present law, a work would be infringed by reproduction in whole or in any substantial part, or by duplicating it exactly or by imitation or simulation. Works or variations from the original work would still be an infringement as long as the author's "expressions" are taken. An exception to this principle, applicable to the reproduction of copyrighted sound recordings, is provided in section 114 [section 114 of this title].

"Reproduction" under clause (1) of section 106 [cl. (1) of this section] is distinguished from "display" under clause (5). For a work to be "displayed," its fixation in a tangible medium must be "sufficiently permanent"

tions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106 (this section), which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated; where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1 [section 1 of Title 1 General Provisions]).

Reproduction.—Read together with the relevant definitions in section 101 [section 101 of this title], the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114 [section 114 of this title].

"Reproduction" under clause (1) of section 106 (cl. (1) of this section) is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable

to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

Preparation of Derivative Works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106 (cl. (2) of this section), overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 [section 101 of this title] refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art production, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2) [cl. (2) of this section], the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in Information Storage and Retrieval Systems.—As section 117 [section 117 of this title] declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

Public Distribution.—Clause (3) of section 106 (cl. (3) of this section) establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 109 [section 109 of this title] makes clear, however, the copyright owner's rights under section 106(3) (cl. (3) of

this section] cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of Public Performance and Display. Performing Rights and the "For Profit" Limitation.—The right of public performance under section 100(4) [cl. (4) of this section] extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 100(4) [cl. (4) of this section], which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114 [section 114 of this title].

Right of Public Display.—Clause (5) of section 100 [cl. (5) of this section] represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graph-

ic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

Definitions. Under the definitions of "perform," "display," "publicly," and "transmit" in section 101 [section 101 of this title], the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101 [section 101 of this title]. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 115 [sections 107 through 115 of this title].

To "perform" a work, under the definition in section 101 [section 101 of this title], includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audio visual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need

be maintained. The purely aural performance of a motion picture track, or of the sound portions of a audiovisual work, would constitute a performance of the "motion picture or audiovisual work"; but, where so the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or other device or process." Since "copies" are defined as including the material "in which the work is first embodied," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than "performance") to show their "images nonsequentially." In addition to the direct showings of a copy of a "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, showing of an image on a cathode tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101 [section 101 of this title], a performance or display is "public" if it takes place "at an open to the public or at any place where a substantial number of persons of a normal circle of a family or social acquaintances is gathered." The principal purposes of the definition was to make clear that, contrary to a decision in *Metro-Goldwyn-Mayer v. Wyatt*, 21 F.2d 503 (D.Md.1932), performances in "public" places such as clubs, hotels, summer camps, and schools are "public performances" subject to copyright control. The term "a normal circle" would include an individual living alone, so that a gathering to the individual's social acquaintance would normally be regarded as "public." Routine meetings of businesses

Amount of fines for certain violations of copyright law, see section 506 of the Copyright Code.
Construction of words denoting "public" in several provisions.

cluding the picture or exclusive work

ditions of... 101 of... public per... cover... ing, but... that rend... or con... ts, for ex... when le... asting... nsmits his... simultane... broad... transmi... e televi... retransmit... hers; and... whenever... embodying... nterests... a receiving... which the... s transmit... or would it... display" u... e actionab... were doc... on 101 [sec... other per... addition to... exempted... control und... sections 10...

er the defini... of this... erary work... sic, dancing... e work, and... or pantom... accomplished... of any de... all kinds of... or amplifying... any sort of... type of elec... l any other... yet in use or

" in relation... er audio vis... unges in any... nds accompa... wing of por... filmstrip, or... sequential to... rather than a... r order need

maintained. The purely aural performance of a motion picture sound track or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance on the phonorecord would not constitute a performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of a work, "either directly or by means of film, slide, television image, or any other device or process." Since "copies" is defined as including the material object in which the work is first fixed, the right of public display applies to material works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual pieces nonsequentially." In addition to direct showings of a copy of a work, "display" would include the projection of a change on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101 [section 101 of this title], a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O.Bull. 25 (D.Md.1932), performances in "semi-public" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and gov-

ernmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 [section 101 of this title] makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106 [cls. (4) or (5) of this section].

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether or the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

Effective Date. Section effective Jan. 1, 1978, except as otherwise expressly provided, see section 102 of Pub.L. 94-553, set out as a note preceding section 101 of this title.

Cross References

- Amount of fines for certain willful infringements of sound recordings or motion pictures, see section 506 of this title.
- Capital asset as not including copyright, see section 1221 of Title 20, Internal Revenue Code.
- Construction of words denoting number, gender, etc., see section 1 of Title 1, General Provisions.

Note 1

- Copyright royalties as personal holding company income, see section 513 of Title 26, Internal Revenue Code.
- Importation of copies or phonorecords as infringement of exclusive right to distribute, see section 602 of this title.
- Preemption of other laws relating to exclusive rights within general scope of copyright, see section 301 of this title.
- Reproduction, compilation, and distribution for research of regularly scheduled newscasts or on-the-spot coverage of news events by Librarian of Congress, see section 170 of Title 2, The Congress.
- Transfer of exclusive rights comprised in copyright, see section 201 of this title.
- Violator of exclusive rights guaranteed by this section as infringer of copyright, see section 501 of this title.

Library References

Copyrights — 30, 39.

C.J.S. Copyright and Literary Property §§ 01, 02.

Notes of Decisions

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1. Common law

The common law right to a monopoly in the publication of an author's productions was superseded by statute in this country as well as in England. *Holmer v. Hurst*, N.Y.1899, 19 S.Ct. 606, 607, 174 U.S. 82, 43 L.Ed. 604.

- Common law copyright protects against unauthorized copying, publishing, vending, performing and recording. *Letter Edged in Black Press, Inc. v. Public Bldg. Commission of Chicago*, D.C.Ill. 1970, 320 F.Supp. 1303.

The common law of copyright protected author only until first publication, whereas peculiar right conferred by statutory copyright is to multiply copies after publication to exclusion of others. *Carew v. Melrose Music*, D.C.N.Y.1950, 92 F.Supp. 971.

Property rights in a literary production before publication were exclusively in the author, both at common law and under this title. *Herry v. Hoffman*, 1937, 180 A. 516, 125 Pa.Super. 201.

2. Constitutionality

Constructing the exclusive right given to authors to dramatize their works, as extending to the public exhibition of moving pictures of the incidents of a copyrighted work did not render former section 1 of this title invalid as exceeding the power given to Congress by U.S. Const. Art. 1, § 8, cl. 5, to secure to authors for a limited time the exclusive right to their writings. *Kalem Co. v. Harper Bros.*, N.Y.1911, 32 S.Ct. 20, 222 U.S. 55, 50 L.Ed. 92.

3. Construction

Court did not permit general policy of former section 1 of this title to be obscured by drastic technological changes that have arisen since its enactment. *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, C.A.Okl.1974, 497 F.2d 285, certiorari denied 95 S.Ct. 801, 419 U.S. 1120, 42 L.Ed.2d 819.

Former section 1 of this title granted valuable rights to persons who created

subject matter which was copyrighted and useless technicalities were not to be allowed to cut down benefits conferred. *U. S. v. Hacker*, C.C.A.N.Y.1943, 134 F. 533.

Former section 1 of this title should have been reasonably construed, in view to effecting purpose intended, not unduly extended to include privilege not intended nor so narrowly construed as to destroy rights Congress intended grant. *Metro-Goldwyn-Mayer Illustrating Corporation v. Bijou Theatre Co.* C.A.Mass.1932, 59 F.2d 70.

Former section 1 of this title, which granted exclusive rights in copyright publications, might have applied to situations, not anticipated by Congress and when fairly construed, such situations came within its intent and meaning. *Remick v. American Automobile Accessories Co.*, C.C.A.Ohio 1925, 5 F.2d 411, A.L.R. 1511, certiorari denied 40 S.Ct. 269 U.S. 556, 70 L.Ed. 22.

4. Purpose

A fundamental purpose of the exclusive right of public performance granted by former section 1 of this title was to protect copyright proprietors against invasion of the market for their work. *United Artists Television, Inc. v. Eightly Corp.*, C.A.N.Y.1967, 377 F.2d reversed on other grounds 88 S.Ct. 392 U.S. 390, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 303 U.S. 902, 21 L.Ed. 2d 190.

Purpose of this title is to protect original designs from copying, not to give to the proprietor any right to exclude others from the market place for such items. *Herbert Rosenthal Jewelry v. Honora Jewelry Co., Inc.*, D.C.N.Y. 378 F.Supp. 485, affirmed 569 F.2d 69.

The purpose and effect of former section 1 of this title was to secure to right owner the exclusive right to multiply copies. *Fawcett Publications v. Hot Pub. Co.*, D.C.N.Y.1942, 40 F. 717.

5. Law governing

An author's right to monopoly publications is measured and determined by this title. *American Code Co. v. Singer*, C.C.A.N.Y.1922, 282 F. 820; also, *Bentley v. Tibbals*, N.Y.1915, 247, 139 C.C.A. 48; *Loew's Inc. v. Superior Court of Los Angeles County*, 37 P.2d 983, 18 Cal.2d 419.

The measure of the rights and remedies of a copyright proprietor is

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Subject matter which was copyrightable, but useless technicalities were not to be allowed to cut down benefits conferred. *C.S. v. Backer*, C.C.A.N.Y.1043, 134 F.2d 11.

Former section 1 of this title should have been reasonably construed, with view to effecting purpose intended, and be unduly extended to include privileges not intended nor so narrowly construed as to destroy rights Congress intended to grant. *Metro-Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co.*, C.C.Mass.1032, 50 F.2d 70.

Former section 1 of this title, which granted exclusive rights in copyrighted publications, might have applied to new situations, not anticipated by Congress and when fairly construed, such situations came within its intent and meaning. *Benick v. American Automobile Accessories Co.*, C.C.A. Ohio 1925, 5 F.2d 411, 40 U.L.R. 1511, certiorari denied 46 S.Ct. 19, 29 U.S. 556, 70 L.Ed. 22.

1. Purpose
 A fundamental purpose of the exclusive right of public performance granted by former section 1 of this title was to protect copyright proprietors against dilution of the market for their works. *United Artists Television, Inc. v. Fort-Litchly Corp.*, C.A.N.Y.1067, 377 F.2d 872, reversed on other grounds 88 S.Ct. 2084, 20 U.S. 300, 20 L.Ed.2d 1170, rehearing denied 88 S.Ct. 65, 303 U.S. 902, 21 L.Ed. 2190.

Purpose of this title is to protect original designs from copying, not to convey to the proprietor any right to exclude others from the market place for similar items. *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., Inc.*, D.C.N.Y.1974, 15 F.Supp. 485, affirmed 509 F.2d 61.

The purpose and effect of former section 1 of this title was to secure to copyright owner the exclusive right to multiply copies. *Fawcett Publications v. Elton Pub. Co.*, D.C.N.Y.1042, 46 F.Supp. 177.

1. Law governing
 An author's right to monopoly of his publications is measured and determined by this title. *American Code Co. v. Beninger*, C.C.A.N.Y.1022, 282 F. 829. See, also, *Bentley v. Tibbals*, N.Y.1015, 223 F.2d 135 C.C.A. 48; *Loew's Inc. v. Superior Court of Los Angeles County*, 1941, 115 P.2d 953, 18 Cal.2d 410.

The measure of the rights and liabilities of a copyright proprietor must be

found in language of this title. *Miller v. Goody*, D.C.N.Y.1054, 125 F.Supp. 348.

6. Power of Congress
 Congress has the power to prescribe the conditions on which an exclusive right in an author shall be enjoyed. *Wheaton v. Peters*, Pa.1834, 33 U.S. 591, 8 Pet. 591, 8 L.Ed. 1035.

Unlike owner of patent, owner of copyright is not given by statute any exclusive right to use the work, though he does have exclusive right to "print, reprint, publish, copy and vend the copyrighted work". *Time, Inc. v. Bernard Gels Associates*, D.C.N.Y.1008, 203 F.Supp. 130.

7. Patent rights distinguished
 A copyright of a book merely secures to author exclusive right of printing and publishing book and does not give author exclusive property of art described therein, but author, if he desire to acquire exclusive right to art recited, must attain patent therefor. *Alfred Bell & Co. v. Catalda Fine Arts*, C.A.N.Y.1051, 191 F.2d 49.

8. Absolute nature of rights
 Composer's copyright is absolute right to prevent others from copying his work. *Granite Music Corp. v. United Artists Corp.*, C.A.Cal.1970, 532 F.2d 718.

9. Exclusiveness of rights
 "Literary property" is in essence a right to exclude to a greater or lesser extent, others from making some or all use of the expressed thoughts of an author. *Capitol Records v. Mercury Records Corp.*, C.A.N.Y.1955, 221 F.2d 657.

Copyright is not identical with copyrighted work, but exists separately from it as intangible right to exclude all others from printing, publishing, copying or vending the work. *Lantern Press, Inc. v. American Publishers Co.*, D.C.N.Y.1970, 419 F.Supp. 1267.

Copyright proprietor has exclusive right to publish, copy and vend compositions. *Austin v. Steiner*, D.C.Ill.1002, 207 F.Supp. 376.

A copyright monopoly merely gives the copyright possessor the exclusive right to exploit the form of his expression. *Greenble v. Noble*, D.C.N.Y.1957, 151 F. Supp. 45.

10. Separate and independent nature of rights
 The printing and publishing rights, mechanical reproduction rights, and pub-

lic performance for profit rights acquired by writer of a musical composition upon compliance with former section 10 of this title were separate and independent and they could have been retained by the owner or disposed of by him to others either singly or in their entirety. *Schwartz v. Broadcast Music, Inc.*, D.C. N.Y.1050, 180 F.Supp. 322.

11. Statutory nature of rights

Copyrights and the rights flowing therefrom are entirely creatures of statute. *Loew's Inc. v. Columbia Broadcasting System*, D.C.Cal.1955, 131 F.Supp. 165, affirmed 230 F.2d 532, affirmed 78 S.Ct. 607, 350 U.S. 43, 2 L.Ed.2d 583, rehearing denied 78 S.Ct. 770, 350 U.S. 934, 2 L.Ed.2d 704. See, also, *Mura v. Columbia Broadcasting System, Inc.*, D.C.N.Y.1005, 245 F.Supp. 537; *Miller v. Goody*, D.C.N.Y.1034, 125 F.Supp. 348.

12. Reproduction

Reception of radio broadcast and its translation into sound constitutes reproduction, not mere audition, of original program. *Buck v. Jewell-La Salle Realty Co.*, Mo.1031, 51 S.Ct. 410, 253 U.S. 191, 75 L.Ed. 971.

This title created a new property right giving to the author after publication the exclusive right to multiply copies for a limited period. *Callga v. Inter Ocean Newspaper Co.*, Ill.1909, 30 S.Ct. 38, 215 U.S. 182, 54 L.Ed. 150.

Statutory copyright does not give monopoly over idea or musical phrase, but merely protects against unlawful reproduction of original work. *Granite Music Corp. v. United Artists Corp.*, C.A.Cal. 1970, 532 F.2d 718.

The exclusive right to copy copyrighted architectural plans belongs to the architect, even though the plans give him no unique claim on any feature of the structure they detail. *Imperial Homes Corp. v. Lamont*, C.A.Fla.1972, 459 F.2d 895.

A copyright confers the exclusive right to copy the copyrighted work and right not to have others copy it. *Alfred Bell & Co. v. Catalda Fine Arts*, C.A.N.Y.1951, 191 F.2d 90.

A copyright in any form, whether statutory or at common law, is a monopoly consisting only in the power to prevent others from reproducing the copyrighted work. *RCA Mfg. Co. v. Whiteman*, C.C. A.N.Y.1940, 114 F.2d 86, certiorari denied 61 S.Ct. 393, 311 U.S. 712, 85 L.Ed. 463.

The exclusive right to multiply or control copies of a literary work or composi-

tion is only derived from the copyright statute of different governments. *Atlas Mfg. Co. v. Street & Smith*, Mo.1013, 204 F. 398, 122 C.C.A. 568, 47 L.R.A.,N.S., 1002, appeal dismissed 34 S.Ct. 73, 231 U.S. 345, 58 L.Ed. 202, certiorari denied 34 S.Ct. 323, 231 U.S. 755, 58 L.Ed. 468.

Reproductions of copyrighted article cannot be made without consent of creator. *Grove Press, Inc. v. Greenleaf Pub. Co.*, D.C.N.Y.1965, 247 F.Supp. 518.

A copyright grants an author the exclusive right of multiplying copies of what he has written or printed. *Richards v. Columbia Broadcasting System, Inc.*, D.C.D.C.1958, 161 F.Supp. 510. See, also, *Mazer v. Stein*, Md.1954, 74 S.Ct. 460, 347 U.S. 201, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 910, 98 L.Ed. 1090; *Independent Film Distributors Limited v. Chesapeake Industries, Inc.*, C.A.N.Y.1958, 250 F.2d 951; *Leon v. Pacific Telephone & Telegraph Co.*, C.C.A.Cal. 1937, 91 F.2d 484; *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, C.C.A.N.Y.1922, 281 F. 83, certiorari denied 42 S.Ct. 464, 250 U.S. 591, 60 L.Ed. 1074; *Robbs-Merrill Co. v. Straus*, N.Y.1900, 147 F. 15, 77 C.C.A. 607, 15 L.R.A.,N.S. 766, affirmed 25 S.Ct. 722, 210 U.S. 330, 52 L.Ed. 1080; *Munson v. New York*, C.C.N.Y.1880, 3 F. 335, reversed on other grounds 8 S.Ct. 622, 124 U.S. 601, 31 L.Ed. 589; *Doran v. Sunset House Distributing Corp.*, D.C.Cal.1961, 197 F.Supp. 940, affirmed 304 F.2d 251; *Lawrence v. Dana*, C.C.Mass.1806, Fed. Cns.No.8,136.

Copyright proprietor's right is limited to right to make or use copies of protected material, and such protection is absolute and copyrighted art under protection of valid copyright cannot be copied for any purpose without consent of proprietor. *Stein v. Rosenthal*, D.C.Cal.1952, 103 F.Supp. 227, affirmed 205 F.2d 633.

13. Creation of other works

A copyright owner's sole liberty of printing, publishing and vending copyrighted work means liberty to make use of corporeal object by means of which author expressed himself, not the sole liberty to create other works, though identical, especially works on same period in history. *Oxford Book Co. v. College Entrance Book Co.*, C.A.N.Y.1935, 98 F.2d 688.

14. Preparation of derivative copies

A manufacturer of a phonograph record comprising poem set to music was not making another "version" of the poem within former section 1(b) of this title.

Corcoran v. Montgomery Ward & Co., C.C.A.Cal.1941, 121 F.2d 572, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

Memoranda sheets prepared by a teacher for the use of his students from a copyrighted work constituted "copies" or "other versions" of the work and an infringement. *Macmillan Co. v. King*, D.C. Mass.1914, 223 F. 802.

A book containing a brief résumé of the plot of certain copyrighted operas was not "any other version thereof" within the meaning of former section 1 of this title so as to constitute an infringement of the copyrighted work. *Hilliard v. Mason*, N.Y.1913, 210 F. 277, 135 C.C.A. 125.

Act Mar. 3, 1891, c. 565, 26 Stat. 1107 which amended R.S. § 4052, made the exclusive right of authors and their assigns to dramatize and translate any of their copyrighted works a part of the copyright itself. *Atlas Mfg. Co. v. Street & Smith*, Mo.1013, 204 F. 398, 122 C.C.A. 568, 47 L.R.A.,N.S., 1002, certiorari denied 7 S.Ct. 323, 231 U.S. 755, 58 L.Ed. 409, petition denied 34 S.Ct. 602, 232 U.S. 724, 5 L.Ed. 815.

Exclusive right of copyright owner of musical composition to make a version and arrangement, is limited to printing, reprinting, etc., and does not include the right to mechanical reproduction which is distinct from such right to print, etc., and also from the right to publicly perform for profit. *Edward B. Marks Music Corp. v. Foulton*, D.C.N.Y.1948, 70 F.Supp. 694, affirmed 171 F.2d 605.

15. Sale or other transfer of ownership

Under former section 1 of this title which gave copyright owner the exclusive right to "print, reprint . . . or vend" his work, addition of "vend" did not enlarge scope of the copyright as to protect owner of copyright on performance of sale of phonograph records embracing the poem as set to music. *Corcoran v. Montgomery Ward & Co.*, C.C.A.C. 1941, 121 F.2d 572, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

The copyright holder had the exclusive right to sell his copyrighted work. *Allegrini v. Allegrini*, D.C.Pa.1924, 2 F. 810.

Each author or proprietor of a painting may acquire by copyright the sole liberty of copying and reading the same. *DeJonge & Co. v. Breuker, etc., Co.*, 1911, 101 F. 35, 111 C.C.A. 567, affirmed 5 S.Ct. 6, 235 U.S. 33, 59 L.Ed. 113.

Corcoran v. Montgomery Ward & Co., C. C.A. Cal. 1941, 121 F.2d 572, certiorari denied 121 F.2d 82 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 250.

Memoranda sheets prepared by a teacher for the use of his students from a copyrighted work constituted "copies" or "other versions" of the work and an infringement. *Macmillan Co. v. King, D.C. Mass. 1914, 223 F. 802.*

A book containing a brief résumé of the plot of certain copyrighted operas was not "any other version thereof" within the meaning of former section 1 of this title so as to constitute an infringement of the copyrighted work. *Hickford v. Mason, N.Y. 1913, 210 F. 277, 127 C.C.A. 125.*

Act Mar. 3, 1891, c. 565, 26 Stat. 1107, which amended R.S. § 4952, made the exclusive right of authors and their assigns to dramatize and translate any of their copyrighted works a part of the copyright itself. *Atlas Mfg. Co. v. Street & Smith, Mo. 1913, 204 F. 398, 122 C.C.A. 508, 67 L.R.A., N.S., 1002, certiorari denied 34 S.Ct. 323, 231 U.S. 755, 58 L.Ed. 468, petition denied 34 S.Ct. 602, 232 U.S. 724, 58 L.Ed. 815.*

Exclusive right of copyright owner of a musical composition to make a version and arrangement, is limited to printing, printing, etc., and does not include the right to mechanical reproduction which is distinct from such right to print, etc., and also from the right to publicly perform for profit. *Edward B. Marks Music Corp. v. Foulton, D.C.N.Y. 1948, 79 F.Supp. 94, affirmed 171 F.2d 905.*

15. Sale or other transfer of ownership
Under former section 1 of this title, which gave copyright owner the exclusive right to "print, reprint . . . copy and vend" his work, addition of "vend" did not enlarge scope of the copyright so as to protect owner of copyright on poem from sale of phonograph records embodying the poem as set to music. *Corcoran v. Montgomery Ward & Co., C.C.A. Cal. 1941, 121 F.2d 572, certiorari denied 121 F.2d 82 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.*

The copyright holder had the exclusive right to sell his copyrighted work. *Pellegriani v. Allegrini, D.C.Pa. 1924, 2 F.2d 62.*

Each author or proprietor of a painting may acquire by copyright the sole liberty of copying and vending the same. *Louis L'Esjange & Co. v. Breuker, etc., Co., Pa. 1911, 191 F. 35, 111 C.C.A. 507, affirmed 35 S.Ct. 6, 235 U.S. 33, 59 L.Ed. 113.*

Selling to subscribers only, and not generally to dealers, was protected by this title. *Henry Hill Pub. Co. v. Smythe, C.C. Ohio 1886, 27 F. 914.*

This title includes right to vend and publish as protected right, as complement to preservation of right to copy. *Blazon, Inc. v. Deluxe Game Corp., D.C.N.Y. 1965, 208 F.Supp. 416.*

Exclusive right to vend copyrighted material resides in owner of copyrights. *Shapiro, Bernstein & Co. v. Bleeker, D.C. Cal. 1965, 243 F.Supp. 969.*

Former section 1 of this title gave person owning copyright not only exclusive right to copy but also to vend the copyrighted work. *Shapiro, Bernstein & Co. v. Bleeker, D.C. Cal. 1963, 224 F.Supp. 595.*

Grant of an exclusive copyright confers on holder an exclusive right to vend copyrighted work and implies prohibition of unauthorized sales. *Platt & Munk Co. v. Playmore, Inc., D.C.N.Y. 1902, 218 F.Supp. 267.*

A mere offer to sell an infringing book, without more, did not constitute a "vend" within meaning of former section 1 of this title. *Greenlee v. Noble, D.C.N.Y. 1957, 151 F.Supp. 45.*

A "copyright" embraces the right of one to make copies of a literary work and to publish and vend the work to the exclusion of others. *Brunner v. Stix, Baer & Fuller Co., 1944, 151 S.W.2d 643, 352 Mo. 1225.*

16. Lease

The legal effect of a "copyright" is to create in the owner an exclusive property right with the incidental power to lease or license the use thereof by others on stipulated terms. *Westway Theatre v. Twentieth Century-Fox Film Corporation, D.C.Md. 1940, 30 F.Supp. 830, affirmed 113 F.2d 932.*

17. Public performance—Generally

Singers and actors have an exclusive right in their art and may prohibit an unauthorized public performance of reproductions thereof. *Waring v. Dunlap, D.C.N.C. 1939, 26 F.Supp. 335.*

18. — Literary works

Producing the words of a narrative poem in combination with music was not a "dramatization" of the poem, and hence did not infringe author's copyright. *Corcoran v. Montgomery Ward & Co., C.C.A. Cal. 1941, 121 F.2d 572, certiorari denied 121 F.2d 82 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.*

Doggerel verse entitled "Plain Bull" which described a cowboy's attempt to brand a maverick bull, having action in plenty but lacking dialogue and perceptible plot, was a "narrative poem" and not a "dramatic work" within former section 1 of this title. *Id.*

Right to dramatize book was a part of existing copyright under R.S. § 4052, as amended by Act Mar. 3, 1891, § 1, 26 Stat. 1100. *Stephens v. Howells Sales Co.*, D.C.N.Y.1920, 16 F.2d 805.

An exclusive right to dramatize a novel "for presentation on the stage" meant an exclusive right to dramatize a spoken play and did not comprehend the independent right to dramatize the novel for a moving picture play. *Klein v. Beach*, D.C.N.Y.1916, 232 F. 240, affirmed 239 F. 109, 151 C.C.A. 282.

Under former section 5 of this title the rights to dramatize a novel in the usual form and in the form of a motion picture play were separable, and there could be a copyright for each dramatization. *Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation*, N.Y.1915, 220 F. 448, 137 C.C.A. 42.

The filing of the title of a magazine for copyright and the insertion of the proper notice secured a copyright of a story published therein and protected the right to dramatize the same where the publisher was the owner of both the story and the dramatic rights. *Dunn v. Kirk La Shelle Co.*, N.Y.1910, 175 F. 902, 99 C.C.A. 392, 20 Ann.Cas. 1173, 41 L.R.A., N.S., 1002.

Copyright owner of book has right to produce the book in dramatic form and can sue to enjoin an infringing play even if he is not at that time producing a play or, if he is producing a play, without showing that the infringing play will injure his play. *Douglas Intern. Corp. v. Baker*, D.C.N.Y.1971, 335 F.Supp. 282.

Copyright owner's exclusive right to dramatize a nondramatic work includes monopoly in presentation of such work in dramatic form on radio broadcast. *Warner Bros. Pictures v. Columbia Broadcasting System*, D.C.Cal.1951, 102 F.Supp. 141, affirmed in part reversed in part on other grounds 210 F.2d 945, certiorari denied 75 S.Ct. 532, 348 U.S. 971, 99 L.Ed.2d 750.

An author has the exclusive right to dramatize his works. *Gillette v. Stoll Film Co.*, 1922, 200 N.Y.S. 787, 170 Misc. 850.

19. — Musical works

Those who listen to radio broadcast of a copyrighted musical composition do not "perform" the composition. *Twentieth Century Music Corp. v. Aiken*, Pa.1975, 95 S.Ct. 2040, 422 U.S. 151, 45 L.Ed.2d 84.

The radio reception of broadcast of copyrighted musical compositions did not constitute a "performance" of the copyrighted songs and restaurant owner, who presented music to his customers by the use of a radio set to which were connected loudspeakers located in the restaurant ceiling, did not infringe copyright holders' exclusive right, under former section 1 of this title, to perform the copyrighted work publicly for profit. *Twentieth Century Music Corp. v. Aiken*, Pa.1975, 95 S.Ct. 654, 410 U.S. 1007, 42 L.Ed.2d 663.

Acts of hotel proprietor in making available to guests, through radio receiving set and loud speakers, hearing of copyrighted musical composition, constituted "performance". *Buck v. Jewell-La Salle Realty Co.*, Mo.1931, 51 S.Ct. 410, 283 U.S. 191, 75 L.Ed. 971.

That no detailed choice of selections was given hotel proprietor operating radio receiving set and loud speakers did not prevent rendition of copyrighted music from constituting "performance". *Id.*

Single rendition of musical selection may result in several public "performances", and novelty of means of performance does not lessen duty of courts to protect copyright monopoly. *Id.*

Defendants' concert, in which story line of rock opera was preserved by performing 20 of 23 selections from the opera in identical sequence as in copyrighted opera, with one exception, and in which singers entered and exited, maintained specific roles, and occasionally gestured, was a "dramatic" performance, even though there was no scenery, costumes or intervening dialogue, and plaintiff, who owned the rights for stage productions and dramatic presentations, was entitled to have defendants preliminarily enjoined from performing the songs in sequence, from using costumes, scenery or intervening dialogue, and from referring to the opera in their advertising. *Robert Stigwood Group Limited v. Sperber*, C.A.N.Y.1972, 457 F.2d 50.

The song, "Kiss Me Again", was not a dramatic composition as it stands, though former section 1 of this title gave the copyright owner the right to dramatize a nondramatic work. *Witmark v. Pastime Amusement Co.*, D.C.S.C.1924, 28 F. 470, affirmed 2 F.2d 1020.

The right of public performance in connection with copyrighted music positions includes separate and rights, among others the right of cation, motion picture rights, rights, recording rights, and radio-duction rights. *Remick Music Co. Interstate Hotel Co. of Neb.*, I. 1944, 58 F.Supp. 523, affirmed 174, certiorari denied 67 S.Ct. 622, S. 809, 91 L.Ed. 691, rehearing de S.Ct. 709, 330 U.S. 554, 91 L.Ed. 129, also, *Buck v. Swanson*, D.C.Neb. F.Supp. 377, reversed on other gro S.Ct. 909, 313 U.S. 406, 85 L.Ed. 7 A.Lit. 1434.

That musical compositions were ighted and published as individu- ties, and that units out of musica: were copyrighted and published se- ly from the copyrights of the- shows of which they were parts, permit them to be performed publ- profit without the license or con- copyright owners. *Remick Musi- v. Interstate Hotel Co. of Neb.*, I. 1944, 58 F.Supp. 523, affirmed 174, certiorari denied 67 S.Ct. 622, S. 809, 91 L.Ed. 691, rehearing de S.Ct. 709, 330 U.S. 554, 91 L.Ed. 1290.

A radio station was not free to copyrighted musical composition because it was taken from a pub- record. *Associated Music Publi- Iels Memorial Radio Fund*, D.C.N. 46 F.Supp. 820, affirmed 141 F.2d e- thorial denied 65 S.Ct. 120, 323 I- 59 L.Ed. 613.

Copyright owner may exclude- ers from performing musical com- publicly for profit. *Buck v. Hi- Country Club*, D.C.Iowa 1937, 17- 645.

Former section 1 of this title- the copyright proprietor the- right to perform copyrighted- compositions in public for profit. *Robbins Music Corporation*, 1942, 8.2d 337.

20. — Dramatic works

Under former section 1 of th- which gave the holder of a copyri- exclusive right to perform or r- the copyrighted work publicly if- ma, and gave the exclusive right- form the copyrighted work publ- profit if it was a musical comp- the holder of the copyright of- constituting a part of a drama- and those claiming under him, l- exclusive right to present it p- *Green v. Luby*, C.C.N.Y.1909, 17-

SUBJECT MATTER AND SCOPE 17 § 106

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for in making... radio... ers, hearing... position... ck v. Jew... 51 S.Ct. 418, 59
e of select... r operat... d speaker... copyright... "performance"
musical... ublic "per... ys of perfor... y. Id.
which stor... ed by per... m the op... copyright... and in... ed, main... usually... formance... ry, cost... plaintiff... ge production... is, was... larly... gs in sequ... ery or inter... referring to... Robert... Sperber, C.A.
in", was... as it... this title... right to... Witmark... D.C.S.C. 1974, 20

The right of public performance in connection with copyrighted musical compositions includes separate and distinct rights among others the right of publication, motion picture rights, stage recording rights, and radio reproduction rights. Remick Music Corp. v. Interstate Hotel Co. of Neb., D.C.Neb., 157 F.Supp. 523, affirmed 157 F.2d 622, 329 U.S. 622, 61 L.Ed. 691, rehearing denied 370 U.S. 330, 330 U.S. 854, 91 L.Ed. 1290. See, also, Buck v. Swanson, D.C.Neb., 1939, 33 F.2d 377, reversed on other grounds 61 U.S. 313, 313 U.S. 406, 85 L.Ed. 1426, 130 S.Ct. 1431.
Musical compositions were copied and published as individual units out of musical shows copyrighted and published separately, the copyrights of the entire shows of which they were parts, did not entitle them to be performed publicly for profit without the license or consent of the copyright owners. Remick Music Corp. v. Interstate Hotel Co. of Neb., D.C.Neb., 157 F.Supp. 523, affirmed 157 F.2d 622, 329 U.S. 622, 61 L.Ed. 691, rehearing denied 370 U.S. 330, 330 U.S. 854, 91 L.Ed. 1290.
A radio station was not free to use a copyrighted musical composition merely because it was taken from a phonograph record. Associated Music Publishers v. Memorial Radio Fund, D.C.N.Y., 1942, 141 F.2d 852, affirmed 141 F.2d 852, certiorari denied 65 S.Ct. 120, 323 U.S. 709, 40 L.Ed. 613.
The copyright owner may exclude all others from performing musical composition for profit. Buck v. Hillsgrove Club, D.C.Iowa, 1937, 17 F.Supp. 103.
Former section 1 of this title gave to the copyright proprietor the exclusive right to perform copyrighted musical compositions in public for profit. Gay v. Music Corporation, 1942, 38 N.Y. 2d 111.
— Dramatic works
Under former section 1 of this title the holder of a copyright in a dramatic work had the exclusive right to perform or represent the copyrighted work publicly. If a dramatic work gave the exclusive right to perform the copyrighted work publicly for profit and it was a musical composition, the holder of the copyright of a song claiming a part of a dramatic sketch, had the exclusive right to present it publicly. Luby v. Luby, C.C.N.Y., 1909, 177 F. 257.

This title secures to an author the exclusive right to dramatize which includes the right to produce the drama as a spoken play or as a picture play. Underhill v. Scheuck, 1921, 187 N.Y.S. 589, 114 Misc. 520.

The representation of a dramatic work, which has never been printed nor copyrighted, if made without license of the proprietor, is a violation of his right, and may be restrained by injunction, although such representation is from a copy obtained by a spectator attending a public representation by the proprietor for money, and afterwards writing it from memory. Tompkins v. Halleck, 1882, 133 Mass. 32, 43 Am.Rep. 480.

21. — Motion pictures and other audiovisual works

Importation of "distant signals" from one community into another does not constitute a "performance" under this title; thus, a community antenna television system does not lose its status as a nonbroadcaster and thus a non-performer" for copyright purposes when the signals it carries are those from distant rather than local sources. Teleprompter Corp. v. Columbia Broadcasting System, Inc., N.Y. 1974, 94 S.Ct. 1120, 415 U.S. 394, 39 L.Ed.2d 415.

One who manually or by human agency merely actuated electrical instrumentalities, whereby inaudible elements that were omnipresent in air were made audible to persons who were within hearing, did not "perform" within meaning of former section 1 of this title. Fortnightly Corp. v. United Artists Television, Inc., N.Y. 1968, 85 S.Ct. 2034, 392 U.S. 390, 20 L.Ed.2d 1176, rehearing denied 89 S.Ct. 65, 393 U.S. 602, 21 L.Ed.2d 190.

Defendant, which by community antenna television systems received, reproduced, and transmitted by cables to paying subscribers television programs received from television stations, which had licenses from plaintiff to telecast copyrighted moving pictures, did not "perform", within purview of former section 1(c) and (d) of this title copyrighted motion pictures. Id.

Under former section 1 of this title, the owners of copyright of motion picture film acquire the right to exhibit the picture and to grant an exclusive or restrictive license to others to exhibit it. Interstate Circuit v. U. S., Tex. 1930, 50 S.Ct. 407, 306 U.S. 203, 83 L.Ed. 610.

Relay importation of distant signals did not constitute "performance" for purposes of determining infringement under former section 1 of this title. Twentieth

Note 21

Century Music Corp. v. Aiken, C.A.Pa. 1974, 500 F.2d 127, affirmed 65 S.Ct. 2040, 422 U.S. 151, 45 L.Ed.2d 54.

Motion picture photoplay was a "dramatic work" within former section 1(d) of this title. Universal Pictures Co. v. Harold Lloyd Corp., C.C.A.Cal.1947, 162 F.2d 351.

Copyright of motion picture photoplay gave monopoly of remake rights to owner of copyright. *Id.*

The copyright of a dramatization covers a photoplay presentation of the same subject. U. S. v. Motion Picture Patents Co., D.C.Pa.1915, 225 F. 800, appeal dismissed 38 S.Ct. 578, 247 U.S. 524, 62 L.Ed. 1248.

Moving picture rights are rights to form of dramatization. G. Ricordi & Co. v. Paramount Pictures, D.C.N.Y.1950, 92 F.Supp. 537, modified on other grounds 159 F.2d 469, certiorari denied 72 S.Ct. 77, 342 U.S. 849, 96 L.Ed. 641.

Term "motion picture rights" means silent, sound, talking and all motion picture rights of every type and nature. *Id.*

Moving picture "shorts," consisting of comedy material with meager plot, used to fill in between longer features, were within this title so as to render unauthorized use of such "shorts" infringement, since reduction even of meager plot to motion picture was "dramatization". Vitaphone Corporation v. Hutchinson Amusement Co., D.C.Mass.1937, 19 F.Supp. 359, remanded on other grounds 63 F.2d 176, mandate conformed to 25 F.Supp. 520.

22. Public display

An exhibition of a series of photographs of persons and things, arranged on films as moving pictures and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work, and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the

copyright of the author. Kalem Co. v. Harper Bros., N.Y.1911, 32 S.Ct. 20, 222 U.S. 55, 50 L.Ed. 92, Ann.Cas.1013A, 1285.

23. Antitrust violations

Where motion picture film exhibitor by force of its monopoly of "first-run theaters" in principal cities of Texas and threat to use its monopoly position against owner of copyright of motion picture film induced the owner to impose restrictions regarding admission price and against double feature programs, on subsequent-run exhibitors, the copyright owner's protection under former section 1 of this title did not relieve the contract from illegality under section 1 of Title 15. Interstate Circuit v. U. S., Tex.1939, 59 S.Ct. 467, 306 U.S. 208, 53 L.Ed. 610.

Owners may not use their copyrights to deter competition or to extend monopoly or to break down competition in other areas. Lawlor v. National Screen Service Corp., C.A.Pa.1959, 270 F.2d 146, certiorari denied 80 S.Ct. 670, 362 U.S. 922, 4 L.Ed.2d 742.

The rights acquired by publishers of copyrighted books under this title did not justify them in combining and agreeing that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. Mines v. Scribner, C.C.N.Y.1906, 147 F. 927.

Owners of a number of copyrighted works may not combine their copyrights by agreement or arrangement, even for purpose of preserving property rights. Alden-Rochelle, Inc., v. American Society of Composers, Authors and Publishers, D.C.N.Y.1948, 80 F.Supp. 889.

Necessities or conveniences of patentee or copyright owner do not justify use of the monopoly of the patent or copyright to create another monopoly. *Id.*

This title does not grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws. Alfred Bell & Co. v. Catalda Fine Arts, D.C.N.Y.1947, 74 F.Supp. 973.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the

use made of a work in any particular case shall be considered shall include—

(1) the purpose and character of the use, such use is of a commercial nature or for promotional purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion copied in relation to the copyrighted work as a whole;

(4) the effect of the use upon the market for or value of the copyrighted work.

Pub.L. 94-553, Title I, § 101, Oct. 1976

Historic

Notes of Committee on the Judiciary, House Report No. 94-1470. General Background of the Problem. The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107 [this section]. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 24 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a news reel or broadcast, of a work located at the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition

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Arts Alaska, Inc.

619 Warehouse Avenue • Suite 220
Anchorage, Alaska 99501 • (907)279-1558

SERVICE CONTRACT

This contract, effective as of the 23rd day of December, 1976, between Arts Alaska, Inc. (hereinafter called the "Corporation"), and Robert Murry (hereinafter called the "Artist").

WITNESSETH THAT: Whereas the Corporation is entering into this contract for professional services; and Whereas, the Corporation has the authority to enter into this contract by the approval of the Board of Directors of Arts Alaska, Inc.;

NOW THEREFORE, the parties hereto agree as follows:

Article I. The Services to be Performed.

The Artist is hereby commissioned to undertake and complete a metal sculpture for the Juneau courthouse plaza per the design to be submitted to the Alaska State Council on the Arts and reviewed by the judging panel. The work of art will be delivered and installed at the site at the expense of the Artist.

All materials used shall be selected, applied and treated in order to be reasonably protected against damage. Full instructions will be provided for the continued maintenance of the work of art.

The Artist will view the site of the planned space for the work of art at his own expense, prior to beginning the project.

The artist will be invited to participate in the unveiling ceremony. All

Service Contract
Robert Murry
Page Two

costs for such participation will be the responsibility of the Artist should he choose to participate.

Article II. The Period of Performance.

The period of performance under this contract shall commence on January 1, 1977, and expire on September 1, 1978. Performance may be extended for additional periods by the mutual written agreement of the parties.

Article III. Consideration.

In full consideration of the Artist's performance hereunder, the Corporation shall pay the Artist a total amount for the completed and accepted Work of Art of FORTY THOUSAND AND NO/100 DOLLARS (\$40,000), and not more.

From the above amount, the Artist shall arrange and pay, or otherwise provide for all services, supplies and equipment for services, labor, materials, travel, hotel and subsistence, transportation, storage, fees, rentals, insurances, taxes, and all other cost and expenses required to complete the Project to the satisfaction of the Corporation.

Payment on account of the Cost of the Project shall be made as follows:

\$4,000 at the signing of the contract.

\$16,000 when the proposal submitted by the Artist is approved by the selected panel.

\$16,000 when notified that the piece is fabricated and ready for shipment.

\$4,000 upon final installation and acceptance by the State of Alaska.

Article IV. Additional Contract Provisions.

Appendix A attached hereto and made a part hereof sets forth special

Service Contract
Robert Murry
Page Three

conditions for the project.

Appendix B attached hereto and made a part hereof sets forth additional general provisions of this contract.

Article V. Changes.

Appendix C attached hereto and made a part hereof, sets forth any changes or additions that were made in this contract prior to its execution. (If appendix C is not attached hereto, there have been no such changes or additions).

Article VI. Special and General Conditions for the Project.

All articles of the attached General Conditions for the project shall be part of this agreement as if written herein in full.

By signing, the Artist declares that he has read and is in accord with the agreement and the terms identified in the General Conditions. If countersigned, this contract shall serve as an instrument of agreement.

IN WITNESS WHEREOF, the parties have executed this contract.

ARTIST

By: Robert Murry
DATE: 18 Jan. 77

ARTS ALASKA, INC.

By: Roy H. Nelson
Executive Director
DATE: 12/23/76

Permanent address of Artist

First floor
66 Grand St.
New York, N.Y. 10013
Social Security # 092-42-3051

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Robert Murry
Page Four

APPENDIX A

Special Conditions for the Project

- A. The Artist will visit the project site to survey and evaluate its visual, environmental and background characteristics.
- B. After consideration of the desires, views and expectations of the selection committee a written outline description of the work-of-art as you envision it along with drawings and/or maquettes showing the intended form, shall be prepared and submitted with a site plan noting the proposed location of the sculpture.
- x C. Site preparation specifications will be provided at such time as the proposal is accepted by the committee.
- D. The Selection Committee will review the proposal and recommend acceptance and/or modifications. Upon their acceptance the project will proceed as outlined. Should agreement not be accomplished this contract can be terminated by the Board of Directors of Arts Alaska, Inc. In such event the total compensation to the Artist will be the initial payment of \$4,000.
- E. The Artist is required to meet with the Selection Committee at the time of the review of the proposal. All expenses for travel and per diem related to this meeting will be paid by the Corporation or the Alaska State Court System.
- F. The Artist will obtain and pay, or otherwise provide for the services of professional consultants to assist in the preparation and documentation of data related to stress, climatic and organic damage, and firm and secure mounting.
- G. The Artist will provide all required facilities, equipment and labor to transport and to install the sculpture. After the installation all debris shall be removed from the site and all damage to the surrounding areas shall be repaired and rendered invisible.

APPENDIX B

General Conditions for the Project

- From Art*
- A. In the performance of the Project, the Artist shall be obligated to observe and conform to all applicable codes, ordinances, regulations, statutes and laws. *The Corporation will provide the Artist with copies of any such restrictive codes, etc.*
- B. Portions of the Project may be sublet by the Artist at his expense, subject to prior written approval by the Corporation. Approval shall not be unreasonably withheld. All work shall be undertaken by the Artist personally or under his personal supervision.
- C. The Work on the Project shall commence immediately after signing of the agreement by all parties concerned and shall be pursued with reasonable dispatch and without interruptions, except when caused by forces beyond the Artist's control. It shall be so organized as to assure completion of the Project on or before the date stated in the agreement.
- D. All payments on account of the Project shall be subject to the receipt of a signed request for payment from the Artist, certifying that the work under this agreement is progressing as planned and in accordance with the agreement.
- E. Final payment will be made only when the completed work of art has been accepted by the Corporation with the concurrence of the Project Selection Committee.
- F. Actual payment process may take up to two weeks before transmittal of payment to the Artist.
- G. The Corporation reserves the right to suspend at any time and for any reason for any given or indefinite time the services to be rendered under this agreement upon written notice to the Artist. *The Corporation will be responsible for storage charges incurred during such delay.*
- From Art*
- H. The work under this agreement may be terminated by either party, subject to a written notice submitted fourteen (14) days before termination, provided that attempts to reconcile the reason for cancellation have been undertaken but have failed. Upon termination, payment on account of the Project shall be made in proportion to the work completed, ~~provided the Artist will submit to the Corporation all work performed up to the effective date of cancellation in an orderly manner, and every effort will be considered for completing the work per the original design.~~
- I. The Corporation shall not be liable for payment for any additional services, unless such services and the cost thereof have been previously approved in writing. Any term of this agreement may be amended by a written Amendment to the Agreement, signed by both parties, subject to the authorization of the Board of Directors where required.

Service Contract
Robert Murry
Page Six

J. All drawings, models or maquettes shall remain the Artist's property. The copyright in the Work of Art, however, belongs to the Corporation, and no more copies than are required in the Project may be made ~~or caused to be made by anyone without prior written approval from the Corporation.~~

RM RBH

K. All aspects of the Project shall be guaranteed by the Artist against faulty execution or defective or inferior materials, equipment or workmanship for one (1) calendar year after completion and acceptance of the Project by the Corporation, during which period the Work of Art shall be repaired, restored or replaced at the Artist's expense, *with the exception of the painted surface.*

RM RBH

L. It is understood that under the terms of the Contract, the Artist is an "Independent Contractor" who shall indemnify and save harmless the Corporation and the State of Alaska from and against any and all manner of actions, liabilities, and claims of any person arising out of or in connection with the performance of the services to be performed by the Artist under this Contract. Any work under this Agreement shall not be construed as employment with the State of Alaska or Arts Alaska, Inc. The Artist will be required to obtain and pay for his gross income license and be responsible for payment of income, social security, and other taxes.

M. The artist shall not assign or transfer any interest in this Agreement without the prior written consent of the Corporation; provided, however, that claims for money due or to become due from The Corporation under this agreement may be assigned to a bank, trust company, or other financial institution without such approval. Notice of any such assignment or transfer shall be furnished promptly to the Corporation.

N. In the event that the Artist dies before the date fixed for completion or becomes permanently incapacitated and/or unable to complete the work on the Project, ~~the Corporation may within thirty (30) days after notice thereof, elect in writing to pay a proportionate share of the agreed price for work completed to the satisfaction of the Corporation, and acquire the unfinished work. This Agreement shall then be cancelled and the Corporation be entitled to the return of such part of the price above the proportionate share, as the Artist has already been paid.~~

RM RBH

the heirs or executors will make every effort to complete the project per the original design.

O. A program of regular maintenance will be planned by the Corporation for the State of Alaska that is acceptable to the artist.

RM RBH

D.I.

WASHINGTON
DC 20506



Agency advised by the
National Council on the Arts

October 10, 1978

John B. Chenoweth
Legislative Counsel
Legislative Affairs Agency
Pouch Y
Juneau, Alaska

Dear Mr. Chenoweth:

The controversy surrounding the Juneau Art in Public Places project entitled "Nimbus" has come to our attention.

As you may already be aware, there do not presently exist any restrictions or conditions in Endowment grant provisions relating to removal or relocation of commissioned works from their proposed sites. However, reference should be made to the copyright laws of the United States, which indicate that the creator of a work retains rights regarding the manner and location of public exhibition of his work. (See Title 17, §106(5) of the United States Code Annotated.)

In any event, the proposed disposition of the piece in question is of concern to us, since the project was made possible by a Federal grant program. Any action, especially destruction of the piece, which would undermine the purposes and intent behind the Federal Art in Public Places program could not be viewed with indifference by the Endowment.

Of course, we at the Endowment are sensitive to local concerns. We therefore hope an equitable resolution of this matter can be effected, hopefully one which takes into account the rights and interests of all involved parties, including the creator of the work.

Sincerely,

Robert Wade
General Counsel

cc: Roy Helms

*As a veteran and numerous-warrior, I understand you
I thought you might be interested in my effort in this regard.
Maybe we could try re-selling it to some Eastern gallery.*

Dear Governor Sheffield,

I was gratified to hear that you have accepted the resignations of the entire State Council for the Arts. As an individual Alaskan, I would like to make a suggestion to you which could correct two injustices, beautify Juneau and win the gratitude of the vast majority of Juneau-ites -- at no cost to the State.

As you may know, "Nimbus" -- the misshapen piece of bluish metal in our court building's plaza -- may have been the old Art Council's worst error of judgement. A big-name Eastern "sculptor" was (lavishly) commissioned, and the resulting "Nimbus" outrage filled the EMPIRE's "Letters to the Editor" section longer than anything else since. (My own letter read, "A piece of junk is a piece of junk is a") Maybe most galling was the stipulation that "Nimbus" had to be re-sold rather than simply scrapped if found to be unacceptable. There was even a petition against Nimbus -- ignored by the Arts Council, of course. Even now "a Nimbus" means a snob-appeal boondoggle.

A local resident, Ed Way, did the "Hard Rock Miners" bronze sculpture for the new *Marine Park*. It is a brilliant and moving tribute to those men whose honest sweat originally built this town. Ed is an acquaintance of mine, and his business sense has never kept pace with his artistic skill and vision. Forging the sculpture in California, Ed "went over" his original bid (by more than \$20,000!), believing Juneau-ites would support (and expecting our Borough Assembly would compensate) his commitment.

When Ed petitioned the Assembly for compensation last week, Bill Overstreet led the (unpopular) vote against it. Bill's opposition was basically out of a sense of fiscal duty, not wanting to set a dangerous precedent for other contractors.

COULD YOU, AS ALASKA'S GOVERNOR, INTERCEDE IN THIS UNFORTUNATE SITUATION AND OFFER TO SELL "NIMBUS" SO THAT THE PROCEEDS COULD BE USED TO HELP FULLY RECOMPENSE ED WAY FOR HIS/OUR "HARD ROCK MINERS"? --ASSUMING SOMEONE MIGHT BUY SUCH SCRAP, OF COURSE.

I do not know the legal status of Nimbus, but such an action could be a beautiful and appreciated gesture appropriate to the new beginning you intend for Alaska.

Thank you for your time and for your consideration of my idea.

Respectfully,

ov. Sheffield,

I discussed this with Bill last night. He instead prefers a private fundraising, wanting to leave government out of it. However, a private effort may not raise much "after the fact", and a good excuse to get rid of Nimbus should be used. More importantly, this situation is a bronzen opportunity to re-emphasize that Alaskan art should be.

"publication by the government" within meaning of former section 8 of this title which provided that "publication by the government" of a copyrighted document did not abridge or annul the copyright. *Hell v. Combined Registry Co.*, C.A.III, 1976, 536 F.2d 161, certiorari denied 97 S. Ct. 530, 420 U.S. 1001, 50 L.Ed.2d 612.

Speeches, which contained copyright notice, which were made by vice admiral in United States Navy to private organizations on vice admiral's own time and

which concerned matters removed from official duties of vice admiral who prepared speeches on his own time and only used government facilities for purpose of duplicating the same to obtain security clearance and to distribute copies thereof to press and others, did not form a part of his official duties and were private property of vice admiral who was entitled to copyright therein. *Public Affairs Associates, Inc. v. Rickover*, D.C.D.C.1967, 268 F.Supp. 444.

§ 106. Exclusive rights in copyrighted works

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Pub.L. 94-553, Title I, § 101, Oct. 19, 1976, 90 Stat. 2546.

Historical Note

Notes of Committee on the Judiciary, House Report No. 94-1476, *General Scope of Copyright*. The five fundamental rights that the bill gives to copyright owners—the exclusive rights of reproduction, adaptation, publication, performance, and display—are stated generally in section 106 (this section). These exclusive rights, which comprise the so-called "bundle of rights" that is a copyright, are cumulative and may overlap in some cases. Each of the five enumerated rights may be subdivided indefinitely and, as discussed below in connection with section 201 [section 201 of this title], each subdivision of an exclusive right may be owned and enforced separately.

The approach of the bill is to set forth the copyright owner's exclusive rights in broad terms in section 106 (this section), and then to provide various limitations, qualifications, or exemptions in the 12 sections that follow. Thus, everything in section 106 (this section) is made "subject to sections 107 through 118 [sections 107 through 118 of this title]," and must be read in conjunction with those provisions.

The exclusive rights accorded to a copyright owner under section 106 (this section) are "to do and to authorize" any of the activities specified in the five numbered clauses. Use of the phrase "to authorize" is intended to avoid any ques-

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tions as to the liability of copyright infringers. For example, a person who lawfully acquires an authorized motion picture would be an infringer if he or she engages in the renting of it to others for purposes of an unauthorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106 (this section), which all rights under a copyright in a work of performance and display, except every kind of copyrighted work whose exclusive rights encompassed by the clauses, though closely related, are independent; they can generally be characterized as rights of copying, adaptation, and publishing. A single act of infringement may violate all three rights at once, as where a person produces, adapts, and sells a person's copyrighted work as a publishing venture. Infringement occurs whenever any one of the rights is violated: where, for example, a person produces copies without selling them, or a retailer sells copies without the permission of the copyright owner to do with their reproduction. References to "copies or phonorecords" although in the plural, are intended and throughout the bill to be singular (1 U.S.C. § 1 [section 1, General Provisions]).

Reproduction.—Read together relevant definitions in section 101 of this title, the phrase "to produce the copyrighted work or phonorecords" means the production of a material object in which the work is duplicated, transcribed, or simulated in a fixed form if it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." Under the present law, a work would be infringed by its reproduction in whole or in any substantial part, or by duplicating it exactly or by imitating or simulating it. Works or variations from the original work would still be an infringement as long as the author's "expressions" are taken. An exception to this principle, applicable to the reproduction of copyrighted sound recordings, is fixed in section 114 [section 114 of this title].

"Reproduction" under clause (1) of section 106 (this section) is distinguished from "display" under clause (5). For a work to be "displayed," its fixation in a tangible medium must be "sufficiently permanent"

tions as to the liability of contributory infringers. For example, a person who lawfully acquires an authorized copy of a motion picture would be an infringer if he or she engages in the business of renting it to others for purposes of unauthorized public performance.

Rights of Reproduction, Adaptation, and Publication. The first three clauses of section 106 [this section], which cover all rights under a copyright except those of performance and display, extend to every kind of copyrighted work. The exclusive rights encompassed by these clauses, though closely related, are independent; they can generally be characterized as rights of copying, recording, adaptation, and publishing. A single act of infringement may violate all of these rights at once, as where a publisher reproduces, adapts, and sells copies of a person's copyrighted work as part of a publishing venture. Infringement takes place when any one of the rights is violated: where, for example, a printer reproduces copies without selling them or a retailer sells copies without having anything to do with their reproduction. The references to "copies or phonorecords," although in the plural, are intended here and throughout the bill to include the singular (1 U.S.C. § 1 [section 1 of Title 1, General Provisions]).

Reproduction.—Read together with the relevant definitions in section 101 [section 101 of this title], the right "to reproduce the copyrighted work in copies or phonorecords" means the right to produce a material object in which the work is duplicated, transcribed, imitated, or simulated in a fixed form from which it can be "perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." As under the present law, a copyrighted work would be infringed by reproducing it in whole or in any substantial part, and by duplicating it exactly or by imitation or simulation. Wide departures or variations from the copyrighted work would still be an infringement as long as the author's "expression" rather than merely the author's "ideas" are taken. An exception to this general principle, applicable to the reproduction of copyrighted sound recordings, is specified in section 114 [section 114 of this title].

"Reproduction" under clause (1) of section 106 [cl. (1) of this section] is to be distinguished from "display" under clause (5). For a work to be "reproduced," its fixation in tangible form must be "sufficiently permanent or stable

to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." Thus, the showing of images on a screen or tube would not be a violation of clause (1), although it might come within the scope of clause (5).

Preparation of Derivative Works.—The exclusive right to prepare derivative works, specified separately in clause (2) of section 106 [cl. (2) of this section], overlaps the exclusive right of reproduction to some extent. It is broader than that right, however, in the sense that reproduction requires fixation in copies or phonorecords, whereas the preparation of a derivative work, such as a ballet, pantomime, or improvised performance, may be an infringement even though nothing is ever fixed in tangible form.

To be an infringement the "derivative work" must be "based upon the copyrighted work," and the definition in section 101 [section 101 of this title] refers to "a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted." Thus, to constitute a violation of section 106(2) [cl. (2) of this section], the infringing work must incorporate a portion of the copyrighted work in some form; for example, a detailed commentary on a work or a programmatic musical composition inspired by a novel would not normally constitute infringements under this clause.

Use in Information Storage and Retrieval Systems.—As section 117 [section 117 of this title] declares explicitly, the bill is not intended to alter the present law with respect to the use of copyrighted works in computer systems.

Public Distribution.—Clause (3) of section 106 [cl. (3) of this section] establishes the exclusive right of publication: The right "to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending." Under this provision the copyright owner would have the right to control the first public distribution of an authorized copy or phonorecord of his work, whether by sale, gift, loan, or some rental or lease arrangement. Likewise, any unauthorized public distribution of copies or phonorecords that were unlawfully made would be an infringement. As section 106 [section 106 of this title] makes clear, however, the copyright owner's rights under section 106(3) [cl. (3) of

this section] cease with respect to a particular copy or phonorecord once he has parted with ownership of it.

Rights of Public Performance and Display. Performing Rights and the "For Profit" Limitation.—The right of public performance under section 106(4) [cl. (4) of this section] extends to "literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works and sound recordings" and, unlike the equivalent provisions now in effect, is not limited by any "for profit" requirement. The approach of the bill, as in many foreign laws, is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other non-profit uses.

This approach is more reasonable than the outright exemption of the 1909 statute. The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "non-profit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

The exclusive right of public performance is expanded to include not only motion pictures, including works recorded on film, video tape, and video disks, but also audiovisual works such as filmstrips and sets of slides. This provision of section 106(4) [cl. (4) of this section], which is consistent with the assimilation of motion pictures to audiovisual works throughout the bill, is also related to amendments of the definitions of "display" and "perform" discussed below. The important issue of performing rights in sound recordings is discussed in connection with section 114 [section 114 of this title].

Right of Public Display.—Clause (5) of section 106 [cl. (5) of this section] represents the first explicit statutory recognition in American copyright law of an exclusive right to show a copyrighted work, or an image of it, to the public. The existence or extent of this right under the present statute is uncertain and subject to challenge. The bill would give the owners of copyright in "literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graph-

ic, or sculptural works", including the individual images of a motion picture or other audiovisual work, the exclusive right "to display the copyrighted work publicly."

Definitions. Under the definitions of "perform," "display," "publicly," and "transmit" in section 101 [section 101 of this title], the concepts of public performance and public display cover not only the initial rendition or showing, but also any further act by which that rendition or showing is transmitted or communicated to the public. Thus, for example: a singer is performing when he or she sings a song; a broadcasting network is performing when it transmits his or her performance (whether simultaneously or from records); a local broadcaster is performing when it transmits the network broadcast; a cable television system is performing when it retransmits the broadcast to its subscribers; and any individual is performing whenever he or she plays a phonorecord embodying the performance or communicates the performance by turning on a receiving set. Although any act by which the initial performance or display is transmitted, repeated, or made to recur would itself be a "performance" or "display" under the bill, it would not be actionable as an infringement unless it were done "publicly," as defined in section 101 [section 101 of this title]. Certain other performances and displays, in addition to those that are "private," are exempted or given qualified copyright control under sections 107 through 118 [sections 107 through 118 of this title].

To "perform" a work, under the definition in section 101 [section 101 of this title], includes reading a literary work aloud, singing or playing music, dancing a ballet or other choreographic work, and acting out a dramatic work or pantomime. A performance may be accomplished "either directly or by means of any device or process," including all kinds of equipment for reproducing or amplifying sounds or visual images, any sort of transmitting apparatus, any type of electronic retrieval system, and any other techniques and systems not yet in use or even invented.

The definition of "perform" in relation to "a motion picture or other audio visual work" is "to show its images in any sequence or to make the sounds accompanying it audible." The showing of portions of a motion picture, filmstrip, or slide set must therefore be sequential to constitute a "performance" rather than a "display", but no particular order need

be maintained. The purely aural performance of a motion picture track, or of the sound portions of a audiovisual work, would constitute a performance of the "motion picture or audiovisual work"; but, where so the sounds have been reproduced separately on phonorecords, a performer from the phonorecord would not constitute performance of the motion picture audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or other device or process." Since "copies" are defined as including the material "in which the work is first embodied," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a "work," "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, showing of an image on a cathode tube, or similar viewing apparatus connected with any sort of information and retrieval system.

Under clause (1) of the definition "publicly" in section 101 [section 101 of this title], a performance or display is "public" if it takes place "in an open to the public or at any place where a substantial number of persons of a normal circle of a family or social acquaintances is gathered." The principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-May Distributing Corp. v. Wyatt*, 21 F.2d 203 (D.Md.1932), performances in public places such as clubs, hotels, parties, summer camps, and school "public performances" are subject to copyright control. The term "public" in this context would include an individual living alone, so that a gathering to the individual's social acquaintances would normally be regarded as "public." Routine meetings of businesses

Amount of fines for certain violations, see section 503 of the Copyright Act of 1909 and the Copyright Code.

Construction of words denoting "public" in the Copyright Code.

cluding the picture or exclusive copyrighted work

initions of "publicly," and section 101 of this title cover not showing, but that rendered or communications, for example, when he transmitting his simultaneous broadcast transmits the television retransmits others; and whenever he embodying imitates the receiving which the transmitter would it "display" use the act would be done section 101 [section in other performance, in addition to exempted or control under sections 107

er the definition of this title literary work music, dancing dramatic work, and or pantomime accomplished of any detail kinds of or amplifying any sort of type of electrical any other yet in use or

" in relation to audio visual images in any form and accompanying of photographic filmstrip, or sequential to rather than a or order need

maintained. The purely aural performance of a motion picture sound track, or of the sound portions of an audiovisual work, would constitute a performance of the "motion picture or other audiovisual work"; but, where some of the sounds have been reproduced separately on phonorecords, a performance from the phonorecord would not constitute performance of the motion picture or audiovisual work.

The corresponding definition of "display" covers any showing of a "copy" of the work, "either directly or by means of a film, slide, television image, or any other device or process." Since "copies" are defined as including the material object "in which the work is first fixed," the right of public display applies to original works of art as well as to reproductions of them. With respect to motion pictures and other audiovisual works, it is a "display" (rather than a "performance") to show their "individual images nonsequentially." In addition to the direct showings of a copy of a work, "display" would include the projection of an image on a screen or other surface by any method, the transmission of an image by electronic or other means, and the showing of an image on a cathode ray tube, or similar viewing apparatus connected with any sort of information storage and retrieval system.

Under clause (1) of the definition of "publicly" in section 101 [section 101 of this title], a performance or display is "public" if it takes place "at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered." One of the principal purposes of the definition was to make clear that, contrary to the decision in *Metro-Goldwyn-Mayer Distributing Corp. v. Wyatt*, 21 C.O.Bull. 24 (D.Md.1932), performances in "semi-public" places such as clubs, lodges, factories, summer camps, and schools are "public performances" subject to copyright control. The term "a family" in this context would include an individual living alone, so that a gathering confined to the individual's social acquaintances would normally be regarded as private. Routine meetings of businesses and gov-

ernmental personnel would be excluded because they do not represent the gathering of a "substantial number of persons."

Clause (2) of the definition of "publicly" in section 101 [section 101 of this title] makes clear that the concepts of public performance and public display include not only performances and displays that occur initially in a public place, but also acts that transmit or otherwise communicate a performance or display of the work to the public by means of any device or process. The definition of "transmit"—to communicate a performance or display "by any device or process whereby images or sound are received beyond the place from which they are sent"—is broad enough to include all conceivable forms and combinations of wired or wireless communications media, including but by no means limited to radio and television broadcasting as we know them. Each and every method by which the images or sounds comprising a performance or display are picked up and conveyed is a "transmission," and if the transmission reaches the public in any form, the case comes within the scope of clauses (4) or (5) of section 106 [cls. (4) or (5) of this section].

Under the bill, as under the present law, a performance made available by transmission to the public at large is "public" even though the recipients are not gathered in a single place, and even if there is no proof that any of the potential recipients was operating his receiving apparatus at the time of the transmission. The same principles apply whenever the potential recipients of the transmission represent a limited segment of the public, such as the occupants of hotel rooms or the subscribers of a cable television service. Clause (2) of the definition of "publicly" is applicable "whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times."

Effective Date. Section effective Jan. 1, 1978, except as otherwise expressly provided, see section 102 of Pub.L. 94-533, set out as a note preceding section 101 of this title.

Cross References

- Account of fines for certain willful infringements of sound recordings or motion pictures, see section 506 of this title.
 Capital asset as not including copyright, see section 1221 of Title 26, Internal Revenue Code.
 Construction of words denoting number, gender, etc., see section 1 of Title 1, General Provisions.

Note 1

- Copyright royalties as personal holding company income, see section 513 of Title 26, Internal Revenue Code.
- Importation of copies or phonorecords as infringement of exclusive right to distribute, see section 602 of this title.
- Preemption of other laws relating to exclusive rights within general scope of copyright, see section 301 of this title.
- Reproduction, compilation, and distribution for research of regularly scheduled newscasts or on-the-spot coverage of news events by Librarian of Congress, see section 170 of Title 2, The Congress.
- Transfer of exclusive rights comprised in copyright, see section 201 of this title.
- Violator of exclusive rights guaranteed by this section as infringer of copyright, see section 501 of this title.

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1. Common law

The common law right to a monopoly in the publication of an author's productions was superseded by statute in this country as well as in England. *Holmes v. Hurst*, N.Y.1899, 19 S.Ct. 606, 607, 174 U.S. 82, 43 L.Ed. 904.

— Common law copyright protects against unauthorized copying, publishing, vending, performing and recording. *Letter Edged in Black Press, Inc. v. Public Bldg. Commission of Chicago*, D.C.Ill. 1970, 320 F.Supp. 1303.

The common law of copyright protected author only until first publication, whereas peculiar right conferred by statutory copyright is to multiply copies after publication to exclusion of others. *Carew v. Melrose Music*, D.C.N.Y.1950, 92 F.Supp. 971.

Property rights in a literary production before publication were exclusively in the author, both at common law and under this title. *Berry v. Hoffman*, 1935, 189 A. 516, 125 Pa.Super. 261.

2. Constitutionality

Constructing the exclusive right given to authors to dramatize their works, as extending to the public exhibition of moving pictures of the incidents of a copyrighted work did not render former section 1 of this title invalid as exceeding the power given to Congress by U.S. Const. Art. 1, § 8, cl. 8, to secure to authors for a limited time the exclusive right to their writings. *Kalem Co. v. Harper Bros.*, N.Y.1911, 32 S.Ct. 20, 222 U.S. 55, 56 L.Ed. 92.

3. Construction

Court did not permit general policy of former section 1 of this title to be obscured by drastic technological changes that have arisen since its enactment. *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, C.A.Okla.1974, 427 F.2d 285, certiorari denied 95 S.Ct. 801, 349 U.S. 1120, 42 L.Ed.2d 810.

Former section 1 of this title granted valuable rights to persons who created

subject matter which was copyrighted and useless technicalities were not to be allowed to cut down benefits conferred. *U. S. v. Backer*, C.C.A.N.Y.1943, 134 F.2d 533.

Former section 1 of this title should have been reasonably construed, in view to effecting purpose intended, not unduly extended to include private view not intended nor so narrowly construed as to destroy rights Congress intended to grant. *Metro-Goldwyn-Mayer Distributing Corporation v. Hjou Theatre Co.*, C.A.Mass.1932, 59 F.2d 70.

Former section 1 of this title, which granted exclusive rights in copyrighted publications, might have applied to situations, not anticipated by Congress and when fairly construed, such situations came within its intent and meaning. *Remick v. American Automobile Accessories Co.*, C.C.A.Ohio 1925, 5 F.2d 431, A.L.R. 1511, certiorari denied 46 S.Ct. 269 U.S. 550, 70 L.Ed. 22.

4. Purpose

A fundamental purpose of the exclusive right of public performance granted by former section 1 of this title was to protect copyright proprietors against invasion of the market for their works. *United Artists Television, Inc. v. Aghtly Corp.*, C.A.N.Y.1967, 377 F.2d 100, reversed on other grounds 88 S.Ct. 392 U.S. 390, 20 L.Ed.2d 1170, rehearing denied 89 S.Ct. 65, 303 U.S. 902, 21 L.Ed. 190.

Purpose of this title is to protect original designs from copying, not to confer to the proprietor any right to exclude others from the market place for similar items. *Herbert Rosenthal Jewelry v. Honora Jewelry Co., Inc.*, D.C.N.Y. 378 F.Supp. 485, affirmed 569 F.2d 65.

The purpose and effect of former section 1 of this title was to secure to the right owner the exclusive right to multiply copies. *Fawcett Publications v. Hot Pub. Co.*, D.C.N.Y.1942, 46 F.2d 717.

5. Law governing

An author's right to monopoly in publications is measured and determined by this title. *American Code Co. v. Singer*, C.C.A.N.Y.1922, 282 F. 820, also, *Bentley v. Tibbals*, N.Y.1915, 247, 138 C.C.A. 48; *Loew's Inc. v. Board of Los Angeles County*, 9 F.2d 983, 18 Cal.2d 410.

The measure of the rights and duties of a copyright proprietor are

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Subject matter which was copyrightable, and unless technicalities were not to be allowed to cut down benefits conferred. *C. S. v. Backer*, C.C.A.N.Y.1913, 131 F.2d 111.

Former section 1 of this title should have been reasonably construed, with view to effecting purpose intended, and not unduly extended to include privileges not intended nor so narrowly construed as to destroy rights Congress intended to grant. *Metro-Goldwyn-Mayer Distributing Corporation v. Bijou Theatre Co.*, C.C.A.Mass.1932, 59 F.2d 70.

Former section 1 of this title, which created exclusive rights in copyrighted publications, might have applied to new creations, not anticipated by Congress and when fairly construed, such situations came within its intent and meaning. *Benick v. American Automobile Accessories Co.*, C.C.A. Ohio 1925, 5 F.2d 411, 40 A.L.R. 1511, certiorari denied 46 S.Ct. 19, 22 U.S. 556, 70 L.Ed. 22.

c. Purpose

A fundamental purpose of the exclusive right of public performance granted by former section 1 of this title was to protect copyright proprietors against dilution of the market for their works. *United Artists Television, Inc. v. Fortnightly Corp.*, C.A.N.Y.1967, 377 F.2d 872, reversed on other grounds 88 S.Ct. 2081, 22 U.S. 390, 20 L.Ed.2d 1170, rehearing denied 89 S.Ct. 67, 303 U.S. 992, 21 L.Ed. 2d 150.

Purpose of this title is to protect original designs from copying, not to convey to the proprietor any right to exclude others from the market place for similar items. *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co., Inc.*, D.C.N.Y.1974, 75 F.Supp. 485, affirmed 568 F.2d 61.

The purpose and effect of former section 1 of this title was to secure to copyright owner the exclusive right to multiple copies. *Fawcett Publications v. Elletts Pub. Co.*, D.C.N.Y.1912, 40 F.Supp. 77.

d. Law governing

An author's right to monopoly of his publications is measured and determined by this title. *American Code Co. v. Beninger*, C.C.A.N.Y.1922, 282 F. 829. See, also, *Bentley v. Tibbals*, N.Y.1915, 223 F. 247, 138 C.C.A. 48; *Loew's Inc. v. Superior Court of Los Angeles County*, 1941, 115 P.2d 983, 18 Cal.2d 419.

The measure of the rights and liabilities of a copyright proprietor must be

found in language of this title. *Miller v. Goody*, D.C.N.Y.1951, 125 F.Supp. 318.

6. Power of Congress

Congress has the power to prescribe the conditions on which an exclusive right in an author shall be enjoyed. *Wheaton v. Peters*, Pa.1834, 33 U.S. 591, 8 Pet. 591, 8 L.Ed. 1055.

Unlike owner of patent, owner of copyright is not given by statute any exclusive right to use the work, though he does have exclusive right to "print, reprint, publish, copy and vend the copyrighted work". *Time, Inc. v. Bernard Gels Associates*, D.C.N.Y.1968, 293 F.Supp. 130.

7. Patent rights distinguished

A copyright of a book merely secures to author exclusive right of printing and publishing book and does not give author exclusive property of art described therein, but author, if he desire to acquire exclusive right to art recited, must attain patent therefor. *Alfred Bell & Co. v. Catalda Fine Arts*, C.A.N.Y.1951, 191 F.2d 99.

8. Absolute nature of rights

Composer's copyright is absolute right to prevent others from copying his work. *Granite Music Corp. v. United Artists Corp.*, C.A.Cal.1976, 532 F.2d 718.

b. Exclusiveness of rights

"Literary property" is in essence a right to exclude to a greater or lesser extent, others from making some or all use of the expressed thoughts of an author. *Capital Records v. Mercury Records Corp.*, C.A.N.Y.1955, 221 F.2d 657.

Copyright is not identical with copyrighted work, but exists separately from it as intangible right to exclude all others from printing, publishing, copying or vending the work. *Lantern Press, Inc. v. American Publishers Co.*, D.C.N.Y.1976, 419 F.Supp. 1267.

Copyright proprietor has exclusive right to publish, copy and vend compositions. *Anstlin v. Steiner*, D.C.Ill.1962, 207 F.Supp. 770.

A copyright monopoly merely gives the copyright possessor the exclusive right to exploit the form of his expression. *Greenble v. Noble*, D.C.N.Y.1957, 151 F. Supp. 45.

10. Separate and independent nature of rights

The printing and publishing rights, mechanical reproduction rights, and pub-

lic performance for profit rights acquired by writer of a musical composition upon compliance with former section 10 of this title were separate and independent and they could have been retained by the owner or disposed of by him to others either singly or in their entirety. *Schwartz v. Broadcast Music, Inc.*, D.C. N.Y.1050, 150 F.Supp. 322.

11. Statutory nature of rights

Copyrights and the rights flowing therefrom are entirely creatures of statute. *Loew's Inc. v. Columbia Broadcasting System*, D.C.Cal.1055, 131 F.Supp. 105, affirmed 230 F.2d 532, affirmed 78 S.Ct. 607, 350 U.S. 43, 2 L.Ed.2d 583, rehearing denied 78 S.Ct. 770, 350 U.S. 934, 2 L.Ed. 2d 764. See, also, *Mura v. Columbia Broadcasting System, Inc.*, D.C.N.Y.1005, 245 F.Supp. 587; *Miller v. Goody*, D.C.N.Y.1954, 125 F.Supp. 348.

12. Reproduction

Reception of radio broadcast and its translation into sound constitutes reproduction, not mere audition, of original program. *Buck v. Jewell-La Salle Realty Co.*, Mo.1031, 51 S.Ct. 410, 283 U.S. 191, 75 L.Ed. 971.

This title created a new property right giving to the author after publication the exclusive right to multiply copies for a limited period. *Callga v. Inter Ocean Newspaper Co.*, Ill.1000, 30 S.Ct. 38, 215 U.S. 182, 51 L.Ed. 150.

Statutory copyright does not give monopoly over idea or musical phrase, but merely protects against unlawful reproduction of original work. *Granite Music Corp. v. United Artists Corp.*, C.A.Cal. 1970, 532 F.2d 718.

The exclusive right to copy copyrighted architectural plans belongs to the architect, even though the plans give him no unique claim on any feature of the structure they detail. *Imperial Homes Corp. v. Lamont*, C.A.Fla.1972, 458 F.2d 805.

A copyright confers the exclusive right to copy the copyrighted work and right not to have others copy it. *Alfred Bell & Co. v. Catalda Fine Arts*, C.A.N.Y.1951, 191 F.2d 99.

A copyright in any form, whether statutory or at common law, is a monopoly consisting only in the power to prevent others from reproducing the copyrighted work. *RCA Mfg. Co. v. Whiteman*, C.C.A.N.Y.1940, 114 F.2d 80, certiorari denied 61 S.Ct. 303, 311 U.S. 712, 85 L.Ed. 403.

The exclusive right to multiply or control copies of a literary work or composi-

tion is only derived from the copyright statute of different governments. *Atlas Mfg. Co. v. Street & Smith*, Mo.1913, 201 F. 398, 122 C.C.A. 598, 47 L.R.A.,N.S., 1002, appeal dismissed 31 S.Ct. 73, 231 U.S. 345, 59 L.Ed. 202, certiorari denied 34 S.Ct. 323, 231 U.S. 755, 58 L.Ed. 408.

Reproductions of copyrighted article cannot be made without consent of creator. *Grove Press, Inc. v. Greenleaf Pub. Co.*, D.C.N.Y.1005, 247 F.Supp. 518.

A copyright grants an author the exclusive right of multiplying copies of what he has written or printed. *Richards v. Columbia Broadcasting System, Inc.*, D.C.D.C.1058, 161 F.Supp. 510. See, also, *Mazer v. Stein*, Md.1951, 74 S.Ct. 400, 347 U.S. 201, 98 L.Ed. 630, rehearing denied 74 S.Ct. 637, 347 U.S. 949, 98 L.Ed. 1000; *Independent Film Distributors, Limited v. Chesapeake Industries, Inc.*, C.A.N.Y.1059, 250 F.2d 951; *Leon v. Pacific Telephone & Telegraph Co.*, C.C.A.Cal. 1937, 91 F.2d 484; *Jeweler's Circular Pub. Co. v. Keystone Pub. Co.*, C.C.A.N.Y.1922, 281 F. 83, certiorari denied 42 S.Ct. 401, 259 U.S. 591, 60 L.Ed. 1074; *Bobbs-Merrill Co. v. Strauss*, N.Y.1900, 117 F. 15, 77 C.C.A. 607, 15 L.R.A.,N.S. 700, affirmed 28 S.Ct. 722, 210 U.S. 330, 52 L.Ed. 1080; *Munson v. New York*, C.C.N.Y.1880, 3 F. 338, reversed on other grounds 8 S.Ct. 622, 124 U.S. 601, 31 L.Ed. 586; *Dorran v. Sunset House Distributing Corp.*, D.C.Cal.1961, 197 F.Supp. 940, affirmed 304 F.2d 251; *Lawrence v. Dunn*, C.C.Mass.1809, Fed. Cas.No.8,130.

Copyright proprietor's right is limited to right to make or use copies of protected material, and such protection is absolute and copyrighted art under protection of valid copyright cannot be copied for any purpose without consent of proprietor. *Stein v. Rosenthal*, D.C.Cal.1952, 103 F.Supp. 227, affirmed 205 F.2d 633.

13. Creation of other works

A copyright owner's sole liberty of printing, publishing and vending copyrighted work means liberty to make use of corporeal object by means of which author expressed himself, not the sole liberty to create other works, though identical, especially works on same period in history. *Oxford Book Co. v. College Entrance Book Co.*, C.C.A.N.Y.1938, 98 F.2d 688.

14. Preparation of derivative copies

A manufacturer of a phonograph record comprising poem set to music was not making another "version" of the poem within former section 1(5) of this title.

Corcoran v. Montgomery Ward & Co., C.C.A.Cal.1941, 121 F.2d 572, certiorari denied 62 S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

Memoranda sheets prepared by a teacher for the use of his students from a copyrighted work constituted "copies" or "other versions" of the work and an infringement. *Macmillan Co. v. King*, D.C. Mass.1914, 223 F. 862.

A book containing a brief résumé of the plot of certain copyrighted operas was not "any other version thereof" within the meaning of former section 1 of this title so as to constitute an infringement of the copyrighted work. *Ricordi v. Mason*, N.Y.1913, 210 F. 277, 125 C.C.A. 125.

Act Mar. 3, 1891, c. 505, 26 Stat. 1107 which amended R.S. § 4952, made the exclusive right of authors and their assigns to dramatize and translate any of their copyrighted works a part of the copyright itself. *Atlas Mfg. Co. v. Street & Smith*, Mo.1913, 204 F. 308, 122 C.C.A. 598, 47 L.R.A.,N.S., 1002, certiorari denied 7 S.Ct. 323, 231 U.S. 755, 58 L.Ed. 408, petition denied 34 S.Ct. 602, 232 U.S. 721, 5 L.Ed. 815.

Exclusive right of copyright owner of musical composition to make a version and arrangement, is limited to printing, reprinting, etc., and does not include the right to mechanical reproduction which distinct from such right to print, etc., and also from the right to publicly perform for profit. *Edward B. Marks Mus. Corp. v. Foulton*, D.C.N.Y.1948, 70 F.Supp. 604, affirmed 171 F.2d 905.

15. Sale or other transfer of ownership

Under former section 1 of this title which gave copyright owner the exclusive right to "print, reprint . . . copy and vend" his work, addition of "vend" did not enlarge scope of the copyright as to protect owner of copyright on poem from sale of phonograph records embodying the poem as set to music. *Corcoran v. Montgomery Ward & Co.*, C.C.A.Cal. 1941, 121 F.2d 572, certiorari denied 62 Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

The copyright holder had the exclusive right to sell his copyrighted work. *Legrini v. Allegrini*, D.C.Pa.1924, 2 F. 610.

Each author or proprietor of a poem may acquire by copyright the sole liberty of copying and vending the same. *Le Dejeune & Co. v. Breiker, etc., Co.*, 1911, 101 F. 35, 111 C.C.A. 567, affirmed S.Ct. 0, 235 U.S. 33, 50 L.Ed. 113.

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Supp. 516. See
1051, 74 S.Ct. 460,
30, rehearing de-
S. 949, 98 L.Ed.
lm Distributors.
Industries, Inc.
t; Leon v. Pacifi-
h Co., C.C.A.Cal.
r's Circular Pub.
a, C.C.A.N.Y.1922,
ded 42 S.Ct. 404,
1; Hobbs-Merrill
147 F. 15, 77 C.C.
0, affirmed 25 S.
Ed. 1080; Mun-
Y.1880, 3 F. 335,
s 8 S.Ct. 622, 124
Doran v. Sunset
p., D.C.Cal.1901,
ed 304 F.2d 231;
Mass.1869, Fed.

right is limited
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D.C.Cal.1952, 163
F.2d 633.

sole liberty of
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C.C.A.N.Y.1938.

live copies
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music was not
of the poem
b) of this title.

Coreoran v. Montgomery Ward & Co., C.
C.A.Cal.1941, 121 F.2d 572, certiorari de-
ned 62 S.Ct. 300, 314 U.S. 687, 80 L.Ed.
30.

Memoranda sheets prepared by a teach-
er for the use of his students from a
copyrighted work constituted "copies" or
"other versions" of the work and an in-
fringement. Macmillan Co. v. King, D.C.
Mass.1914, 223 F. 802.

A book containing a brief résumé of
the plot of certain copyrighted operas
was not "any other version thereof"
within the meaning of former section 1
of this title so as to constitute an in-
fringement of the copyrighted work. Ri-
cardi v. Mason, N.Y.1913, 210 F. 277, 127
C.C.A. 125.

Act Mar. 3, 1801, c. 565, 20 Stat. 1107,
which amended R.S. § 4952, made the ex-
clusive right of authors and their assigns
to dramatize and translate any of their
copyrighted works a part of the copy-
right itself. Atlas Mfg. Co. v. Street &
Smith, Mo.1913, 201 F. 398, 122 C.C.A. 508,
67 L.R.A.,N.S., 1002, certiorari denied 34
S.Ct. 323, 231 U.S. 755, 58 L.Ed. 468, peti-
tion denied 34 S.Ct. 602, 222 U.S. 724, 58
L.Ed. 815.

Exclusive right of copyright owner of a
musical composition to make a version
and arrangement, is limited to printing,
reprinting, etc., and does not include the
right to mechanical reproduction which is
distinct from such right to print, etc.,
and also from the right to publicly per-
form for profit. Edward B. Marks Music
Corp. v. Foulton, D.C.N.Y.1948, 70 F.Supp.
69, affirmed 171 F.2d 905.

15. Sale or other transfer of ownership
Under former section 1 of this title,
which gave copyright owner the exclusive
right to "print, reprint . . . copy
and vend" his work, addition of "vend"
did not enlarge scope of the copyright so
as to protect owner of copyright on poem
from sale of phonograph records embody-
ing the poem as set to music. Coreoran
v. Montgomery Ward & Co., C.C.A.Cal.
1941, 121 F.2d 572, certiorari denied 62 S.
Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

The copyright holder had the exclusive
right to sell his copyrighted work. Pe-
trivani v. Allegrini, D.C.Pa.1924, 2 F.2d
60.

Each author or proprietor of a painting
may acquire by copyright the sole liberty
of copying and vending the same. Louis
Fajzage & Co. v. Brenker, etc., Co., Pa.
1911, 191 F. 35, 111 C.C.A. 567, affirmed 35
S.Ct. 6, 235 U.S. 33, 59 L.Ed. 113.

Selling to subscribers only, and not
generally to dealers, was protected by
this title. Henry Hill Pub. Co. v.
Smythe, C.C.Ohio 1880, 27 F. 914.

This title includes right to vend and
publish as protected right, as complement
to preservation of right to copy. Blazon,
Inc. v. Deluxe Game Corp., D.C.N.Y.1905,
208 F.Supp. 416.

Exclusive right to vend copyrighted
material resides in owner of copyrights.
Shapiro, Bernstein & Co. v. Bleeker, D.C.
Cal.1905, 243 F.Supp. 999.

Former section 1 of this title gave per-
son owning copyright not only exclusive
right to copy but also to vend the copy-
righted work. Shapiro, Bernstein & Co.
v. Bleeker, D.C.Cal.1903, 224 F.Supp. 595.

Grant of an exclusive copyright confers
on holder an exclusive right to vend
copyrighted work and implies prohibition
of unauthorized sales. Platt & Munk Co.
v. Playmore, Inc., D.C.N.Y.1902, 218 F.
Supp. 207.

A mere offer to sell an infringing book,
without more, did not constitute a "vend-
ing" within meaning of former section 1
of this title. Greenble v. Noble, D.C.N.
Y.1957, 151 F.Supp. 45.

A "copyright" embraces the right of
one to make copies of a literary work
and to publish and vend the work to the
exclusion of others. Brunner v. Stix,
Baer & Fuller Co., 1944, 151 S.W.2d 643,
352 Mo. 1225.

16. Lease

The legal effect of a "copyright" is to
create in the owner an exclusive property
right with the incidental power to lease
or license the use thereof by others on
stipulated terms. Westway Theatre v.
Twentieth Century-Fox Film Corporation,
D.C.Md.1910, 30 F.Supp. 830, affirmed 113
F.2d 932.

17. Public performance—Generally

Singers and actors have an exclusive
right in their art and may prohibit an
unauthorized public performance of re-
productions thereof. Waring v. Dunlap,
D.C.N.C.1930, 2f F.Supp. 338.

18. — Literary works

Producing the words of a narrative
poem in combination with music was not
a "dramatization" of the poem, and hence
did not infringe author's copyright. Cor-
coran v. Montgomery Ward & Co., C.C.A.
Cal.1941, 121 F.2d 572, certiorari denied 62
S.Ct. 300, 314 U.S. 687, 80 L.Ed. 550.

Doggerel verse entitled "Pig'n Bull" which described a cowboy's attempt to brand a maverick bull, having action in plenty but lacking dialogue and perceptible plot, was a "narrative poem" and not a "dramatic work" within former section 1 of this title. *Id.*

Right to dramatize book was a part of existing copyright under R.S. § 4052, as amended by Act Mar. 3, 1891, § 1, 20 Stat. 1190. *Stephens v. Howells Sales Co.*, D. C.N.Y.1920, 16 F.2d 805.

An exclusive right to dramatize a novel "for presentation on the stage" meant an exclusive right to dramatize a spoken play and did not comprehend the independent right to dramatize the novel for a moving picture play. *Klein v. Beach*, D.C.N.Y.1910, 232 F. 210, affirmed 230 F. 108, 151 C.C.A. 282.

Under former section 5 of this title the rights to dramatize a novel in the usual form and in the form of a motion picture play were separable, and there could be a copyright for each dramatization. *Photo-Drama Motion Picture Co. v. Social Uplift Film Corporation*, N.Y.1915, 220 F. 418, 137 C.C.A. 42.

The filling of the title of a magazine for copyright and the insertion of the proper notice secured a copyright of a story published therein and protected the right to dramatize the same where the publisher was the owner of both the story and the dramatic rights. *Dam v. Kirk La Shelle Co.*, N.Y.1910, 175 F. 902, 90 C.C.A. 392, 20 Ann.Cas. 1173, 41 L.R.A., N.S., 1002.

Copyright owner of book has right to produce the book in dramatic form and can sue to enjoin an infringing play even if he is not at that time producing a play or, if he is producing a play, without showing that the infringing play will injure his play. *Douglas Intern. Corp. v. Baker*, D.C.N.Y.1971, 335 F.Supp. 282.

Copyright owner's exclusive right to dramatize a nondramatic work includes monopoly in presentation of such work in dramatic form on radio broadcast. *Warner Bros. Pictures v. Columbia Broadcasting System*, D.C.Cal.1951, 102 F.Supp. 141, affirmed in part reversed in part on other grounds 216 F.2d 915, certiorari denied 75 S.Ct. 532, 318 U.S. 971, 90 L.Ed.2d 750.

An author has the exclusive right to dramatize his works. *Gillette v. Stoll Film Co.*, 1922, 200 N.Y.S. 787, 170 Misc. 850.

10. — Musical works

Those who listen to radio broadcast of a copyrighted musical composition do not "perform" the composition. *Twentieth Century Music Corp. v. Alken*, Pa.1975, 95 S.Ct. 2010, 422 U.S. 151, 45 L.Ed.2d 81.

The radio reception of broadcast of copyrighted musical compositions did not constitute a "performance" of the copyrighted songs and restaurant owner, who presented music to his customers by the use of a radio set to which were connected loudspeakers located in the restaurant ceiling, did not infringe copyright holders' exclusive right, under former section 1 of this title, to perform the copyrighted work publicly for profit. *Twentieth Century Music Corp. v. Alken*, Pa.1975, 95 S. Ct. 654, 410 U.S. 1007, 42 L.Ed.2d 663.

Acts of hotel proprietor in making available to guests, through radio receiving set and loud speakers, hearing of copyrighted musical composition, constituted "performance". *Buck v. Jewell-La Salle Realty Co.*, Mo.1931, 51 S.Ct. 410, 251 U.S. 191, 75 L.Ed. 971.

That no detailed choice of selections was given hotel proprietor operating radio receiving set and loud speakers did not prevent rendition of copyrighted music from constituting "performance". *Id.*

Single rendition of musical selection may result in several public "performances", and novelty of means of performance does not lessen duty of courts to protect copyright monopoly. *Id.*

Defendants concert, in which story line of rock opera was preserved by performing 20 of 23 selections from the opera in identical sequence as in copyrighted opera, with one exception, and in which singers entered and exited, maintained specific roles, and occasionally gestured, was a "dramatic" performance, even though there was no scenery, costumes or intervening dialogue, and plaintiff, who owned the rights for stage productions and dramatic presentations, was entitled to have defendants preliminarily enjoined from performing the songs in sequence, from using costumes, scenery or intervening dialogue, and from referring to the opera in their advertising. *Robert Stigwood Group Limited v. Sperber*, C.A.N. Y.1972, 457 F.2d 50.

The song, "Kiss Me Again", was no a dramatic composition as it stands, though former section 1 of this title gave the copyright owner the right to dramatize a nondramatic work. *Wiltmark v. Pastime Amusement Co.*, D.C.S.C.1924, 235 F. 470, affirmed 2 F.2d 1020.

The right of public performance connection with copyrighted musical compositions includes separate and rights, among others the right of action, motion picture rights, rights, recording rights, and radio-duction rights. *Remick Music Co. Interstate Hotel Co. of Neb.*, 1 1944, 58 F.Supp. 523, affirmed 17 744, certiorari denied 67 S.Ct. 622, S. 809, 91 L.Ed. 691, rehearing de S.Ct. 700, 330 U.S. 854, 91 L.Ed. 125 also, *Buck v. Swanson*, D.C.Neb. F.Supp. 377, reversed on other grounds S.Ct. 609, 313 U.S. 406, 85 L.Ed. 1 A.L.R. 1431.

That musical compositions were copyrighted and published as individual titles, and that units out of musical were copyrighted and published separately from the copyrights of the shows of which they were parts, permit them to be performed publicly without the license or consent of copyright owners. *Remick Music Co. v. Interstate Hotel Co. of Neb.*, 1 1944, 58 F.Supp. 523, affirmed 17 744, certiorari denied 67 S.Ct. 622, S. 809, 91 L.Ed. 691, rehearing de S.Ct. 700, 330 U.S. 854, 91 L.Ed. 1290.

A radio station was not free to copy copyrighted musical composition because it was taken from a phonograph record. *Associated Music Publishers Memorial Radio Fund*, D.C.N. 46 F.Supp. 829, affirmed 141 F.2d 613, certiorari denied 65 S.Ct. 120, 323 U.S. 89 L.Ed. 613.

Copyright owner may exclude others from performing musical compositions publicly for profit. *Buck v. Hill Country Club*, D.C.Iowa 1937, 17 613.

Former section 1 of this title gave the copyright proprietor the right to perform copyrighted musical compositions in public for profit. *Robbins Music Corporation*, 1912, 8,2d 337.

10. — Dramatic works

Under former section 1 of this title which gave the holder of a copyright an exclusive right to perform or to cause the copyrighted work to be performed publicly for profit, if the author, and gave the exclusive right to perform the copyrighted work publicly for profit if it was a musical composition, the holder of the copyright of a dramatic work and those claiming under him, had an exclusive right to present it publicly. *Green v. Luby*, C.C.N.Y.1909, 177

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51 S.Ct. 410, 70

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the right of public performance in
connection with copyrighted musical com-
positions includes separate and distinct
rights among others the right of publi-
cizing, motion picture rights, stage
rights, recording rights, and radio repro-
duction rights. Remick Music Corp. v.
Interstate Hotel Co. of Neb., D.C.Neb.,
1934, 58 F.Supp. 523, affirmed 157 F.2d
799, 330 U.S. 554, 91 L.Ed. 1296. See,
Buck v. Swanson, D.C.Neb.1939, 33
F.Supp. 377, reversed on other grounds 61
S.Ct. 929, 313 U.S. 406, 85 L.Ed. 1426, 136
L.L.R. 1431.

That musical compositions were copy-
righted and published as individual enti-
ties and that units out of musical shows
were copyrighted and published separate-
ly from the copyrights of the entire
shows of which they were parts, did not
prevent them to be performed publicly for
profit without the license or consent of
the copyright owners. Remick Music Corp.
v. Interstate Hotel Co. of Neb., D.C.Neb.,
1934, 58 F.Supp. 523, affirmed 157 F.2d
799, 330 U.S. 554, 91 L.Ed. 1296.

A radio station was not free to use a
copyrighted musical composition merely
because it was taken from a phonograph
record. Associated Music Publishers v.
The Memorial Radio Fund, D.C.N.Y.1942,
19 F.Supp. 829, affirmed 141 F.2d 852, cer-
tiorari denied 65 S.Ct. 129, 323 U.S. 766,
11 L.L.R. 613.

Copyright owner may exclude all oth-
ers from performing musical composition
publicly for profit. Buck v. Hillsgrove
Country Club, D.C.Iowa 1937, 17 F.Supp.
142.

Former section 1 of this title gave to
the copyright proprietor the exclusive
right to perform copyrighted musical
compositions in public for profit. Gay v.
Remick Music Corporation, 1942, 38 N.Y.
2d 371.

— Dramatic works

Former section 1 of this title
gave the holder of a copyright the
exclusive right to perform or represent
the copyrighted work publicly if a dra-
matic work gave the exclusive right to per-
form the copyrighted work publicly for
profit if it was a musical composition,
the holder of the copyright of a song
constituting a part of a dramatic sketch,
and those claiming under him, had the
exclusive right to present it publicly.
Witmark v. Luby, C.C.N.Y.1909, 177 F. 287.

This title secures to an author the ex-
clusive right to dramatize which includes
the right to produce the drama as a spo-
ken play or as a picture play. Underhill
v. Schenck, 1921, 187 N.Y.S. 589, 114 Misc.
520.

The representation of a dramatic work,
which has never been printed nor copy-
righted, if made without license of the
proprietor, is a violation of his right,
and may be restrained by injunction, al-
though such representation is from a
copy obtained by a spectator attending a
public representation by the proprietor
for money, and afterwards writing it
from memory. Tompkins v. Halleck,
1882, 133 Mass. 32, 43 Am.Rep. 480.

21. — Motion pictures and other au- diovisual works

Importation of "distant signals" from
one community into another does not
constitute a "performance" under this ti-
tle; thus, a community antenna televi-
sion system does not lose its status as a
nonbroadcaster and thus a non "per-
former" for copyright purposes when the
signals it carries are those from distant
rather than local sources. Teleprompter
Corp. v. Columbia Broadcasting System,
Inc., N.Y.1974, 51 S.Ct. 1129, 415 U.S. 394,
30 L.Ed.2d 415.

One who manually or by human agency
merely actuated electrical instrumentall-
ties, whereby inaudible elements that
were omnipresent in air were made audi-
ble to persons who were within hearing,
did not "perform" within meaning of
former section 1 of this title. Fortnightly
Corp. v. United Artists Television,
Inc., N.Y.1968, 88 S.Ct. 2031, 392 U.S. 390,
20 L.Ed.2d 1170, rehearing denied 89 S.Ct.
65, 393 U.S. 902, 21 L.Ed.2d 199.

Defendant, which by community anten-
na television systems received, repro-
duced, and transmitted by cables to pay-
ing subscribers television programs re-
ceived from television stations, which had
licenses from plaintiff to telecast copy-
righted moving pictures, did not "per-
form", within purview of former section
1(e) and (g) of this title copyrighted mo-
tion pictures. Id.

Under former section 1 of this title,
the owners of copyright of motion pic-
ture film acquire the right to exhibit the
picture and to grant an exclusive or re-
strictive license to others to exhibit it.
Interstate Circuit v. U. S., Tex.1939, 59
S.Ct. 467, 306 U.S. 208, 83 L.Ed. 610.

Relay importation of distant signals
did not constitute "performance" for pur-
poses of determining infringement under
former section 1 of this title. Twentieth

Notes 21

Century Music Corp. v. Alken, C.A.Pa. 1974, 500 F.2d 127, affirmed 65 S.Ct. 2040, 422 U.S. 151, 45 L.Ed.2d 64.

Motion picture photoplay was a "dramatic work" within former section 1(d) of this title. Universal Pictures Co. v. Harold Lloyd Corp., C.C.A.Cal.1947, 162 F.2d 354.

Copyright of motion picture photoplay gave monopoly of remake rights to owner of copyright. *Id.*

The copyright of a dramatization covers a photoplay presentation of the same subject. *U. S. v. Motion Picture Patents Co.*, D.C.Pa.1915, 225 F. 800, appeal dismissed 38 S.Ct. 578, 247 U.S. 524, 62 L.Ed. 1248.

Moving picture rights are rights to form of dramatization. *G. Ricordi & Co. v. Paramount Pictures*, D.C.N.Y.1950, 92 F.Supp. 537, modified on other grounds 150 F.2d 400, certiorari denied 72 S.Ct. 77, 342 U.S. 810, 90 L.Ed. 641.

Term "motion picture rights" means silent, sound, talking and all motion picture rights of every type and nature. *Id.*

Moving picture "shorts," consisting of comedy material with meager plot, used to fill in between longer features, were within this title so as to render unauthorized use of such "shorts" infringement, since reduction even of meager plot to motion picture was "dramatization". *Vitaphone Corporation v. Hutchinson Amusement Co.*, D.C.Mass.1937, 10 F.Supp. 359, remanded on other grounds 93 F.2d 170, mandate conformed to 28 F.Supp. 520.

22. Public display

An exhibition of a series of photographs of persons and things, arranged on films as moving pictures and so depicting the principal scenes of an author's work as to tell the story, is a dramatization of such work, and the person producing the films and offering them for sale for exhibitions, even if not himself exhibiting them, infringes the

copyright of the author. *Kalem Co. v. Harper Bros.*, N.Y.1911, 32 S.Ct. 20, 222 U.S. 55, 56 L.Ed. 02, Ann.Cas.1913A, 1285.

23. Antitrust violations

Where motion picture film exhibitor by force of its monopoly of "first-run theaters" in principal cities of Texas and threat to use its monopoly position against owner of copyright of motion picture film induced the owner to impose restrictions regarding admission price and against double feature programs, on subsequent-run exhibitors, the copyright owner's protection under former section 1 of this title did not relieve the contract from illegality under section 1 of Title 15. *Interstate Circuit v. U. S.*, Tex.1930, 50 S.Ct. 407, 300 U.S. 208, 83 L.Ed. 610.

Owners may not use their copyrights to deter competition or to extend monopoly or to break down competition in other areas. *Lawlor v. National Screen Service Corp.*, C.A.Pa.1950, 270 F.2d 140, certiorari denied 80 S.Ct. 670, 302 U.S. 922, 4 L.Ed.2d 742.

The rights acquired by publishers of copyrighted books under this title did not justify them in combining and agreeing that no member of the association should sell any books to a blacklisted purchaser who was known to cut prices. *Mines v. Scribner*, C.C.N.Y.1900, 147 F. 927.

Owners of a number of copyrighted works may not combine their copyrights by agreement or arrangement, even for purpose of preserving property rights. *Aiken-Rochelle, Inc. v. American Society of Composers, Authors and Publishers*, D.C.N.Y.1948, 80 F.Supp. 888.

Necessities or conveniences of patentee or copyright owner do not justify use of the monopoly of the patent or copyright to create another monopoly. *Id.*

This title does not grant to copyright owners the privilege of combining in violation of otherwise valid state or federal laws. *Alfred Bell & Co. v. Catalda Fine Arts*, D.C.N.Y.1947, 74 F.Supp. 973.

§ 107. Limitations on exclusive rights: Fair use

Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the

use made of a work in any particular case to be considered shall include—

(1) the purpose and character of the use, such as whether the use is of a commercial nature or is for non-profit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion copied in relation to the copyrighted work as a whole;

(4) the effect of the use upon the market for or value of the copyrighted work.

Pub.L. 94-553, Title I, § 101, Oct. 19

Historic

Notes of Committee on the Judiciary, House Report No. 94-1476. General Background of the Problem. The judicial doctrine of fair use, one of the most important and well-established limitations on the exclusive right of copyright owners, would be given express statutory recognition for the first time in section 107 [this section]. The claim that a defendant's acts constituted a fair use rather than an infringement has been raised as a defense in innumerable copyright actions over the years, and there is ample case law recognizing the existence of the doctrine and applying it. The examples enumerated at page 21 of the Register's 1961 Report, while by no means exhaustive, give some idea of the sort of activities the courts might regard as fair use under the circumstances: "quotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a news reel or broadcast, of a work located in the scene of an event being reported."

Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition

Introduced: 1/20/83
Referred: State Affairs and
Finance

BY BETTISWORTH, CATO,
PHILLIPS AND FLOOD

1 IN THE HOUSE

2 HOUSE CONCURRENT RESOLUTION NO. 9

3 IN THE LEGISLATURE OF THE STATE OF ALASKA

4 THIRTEENTH LEGISLATURE - FIRST SESSION

5 Calling for erection of a suitable
6 memorial to honor veterans of all wars
7 involving the United States on the site
8 presently occupied by "Nimbus".

9 BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

10 WHEREAS military personnel who served in wars involving the United
11 States should be honored in Alaska; and

12 WHEREAS military personnel who served at least 180 days active duty
13 with a United States military organization during time of war, or were
14 discharged sooner as a result of illness or injury in service in a war in
15 which the United States participated, deserve special recognition; and

16 WHEREAS a memorial to honor these persons would be appropriately
17 visible to the public if placed by the State Court and Office Building in
18 Juneau, Alaska; and

19 WHEREAS the sculpture "Nimbus", currently located on the grounds of
20 the State Court and Office Building in Juneau, could be located elsewhere;
21 and

22 WHEREAS moving the sculpture "Nimbus" and constructing a memorial to
23 military personnel could be financed through public contributions;

24 BE IT RESOLVED by the Alaska State Legislature that the sculpture
25 "Nimbus" should be removed from the grounds of the State Court and Office
26 Building in Juneau and be replaced with a suitable memorial honoring mili-
27 tary personnel who served 180 days or more active duty with a United States
28 military organization during time of war or were discharged sooner as a
29 result of illness or injury in service in a war in which the United States

1 participated; and be it

2 FURTHER RESOLVED that this project be financed through public contri-

3 butions.