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This article comprises a brief but comprehensive presentation of the history and evolution of the law of musical copyright; it is particularly designed for the practitioner seeking a general view of musical copyright law before proceeding on to more specialized problems. After a discussion of the English and American history of musical copyright, the article examines the common law and statutory aspect of the subject, and concludes by discussing the international rules and conventions governing musical copyright.

I. Introduction

To discuss in an adequate manner the many facets of the history and development of musical copyright would require a sizeable volume. Obviously, space and time limitations require that the present discussion be nothing more than a panoramic view of the entire landscape. Specific points of interest to many may well be blurred or not visible at all. It is for others to apply the field glass to such particular matters; the purpose of this paper is merely to furnish a view of the overall background and development of mnsical copyright.

Those who are familiar with Leoncavallo's famous opera *I Pagliacci* will recall the opening prologue, which set the stage, so to speak, for the performance to follow. This paper serves a similar purpose. Those wishing to learn the details of the various specific aspects of musical copyright will give their eager attention to each of the individual performers who are participating today in our copyright operetta.

II. History

Music is one of man's oldest forms of activity. Men indulged in singing long before they learned to read and write. The bards of old composed their songs, sang them to those who would listen, and passed them down to succeeding generations. Due no doubt to the fact that the bards of those days did not have available such marvels as radios, phonograph records, television, electronic amplifiers, motion pictures, tape rccorders, and other media of preserving and transmitting sounds, they

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enjoyed a somewhat solitary prominence. Nevertheless the bards went on composing and singing and apparently were content with passing their art along to their successors without any real hope for commercial realization thereof, or for a place in posterity.

When printing was invented, a new possibility presented itself—the means for the realization of a desire for exclusivity. This realization may be said to have resulted in what was probably the first law containing the seed of copyright protection.[1] It was promulgated in the Republic of Venice in 1491, and in effect granted a monopoly to printers, not authors, and thus was not strictly a copyright law. Nevertheless, it recognized an exclusive right in a printed book, and it was only a matter of time before the ownership of the newly recognized right was ultimately granted to the creator of the work. In 1498, one Ottaviano Dei Petrucci, a Venetian printer, obtained the exclusive right for twenty years of printing "figured music." He possessed the reputation of being quite a perfectionist in the printing of music; he must have been quite a businessman as well, because he is reputed to have later left Venice and returned to his birthplace, Fossombrone, where he obtained a patent from Pope Leo X which gave him a fifteen year monopoly on the printing of music in the Roman states.[2]

At about the same period of history, a similar form of privilege was evolving in England. In effect it was based upon political influence; if one had enough of that, a patent could be obtained from the Crown granting the exclusive right to print certain works. In the year 1556, however, this was changed by the establishment of the Stationers' Company.[3] By royal decree, this body was given the exclusive right over all printing in the realm. The principal purpose of its establishment was to control the press; the Crown felt compelled to see to it that no libelous, seditious or heretical books saw the light of day.[4] This monopoly, like the one in Venice, belonged to printers, not authors. But by the establishment of a register in which the member printers were required to record the books they were publishing, each was enabled to ascertain what particular works his competitors were publishing. Thus there grew up a basis for the acknowledgement of the rights of others, a further evolution in the beginnings of our present-day copyright laws.

The enforcing agent of the Crown for the various decrees restricting printing was the Star Chamber. When this was abolished, in 1640, there began to appear some books not to the liking of the Crown, and Parliament subsequently enacted various Licensing Acts, which required all books to be properly licensed. The last of these Licensing Acts expired

1. SHAFTER, MUSICAL COPYRIGHT 16-17 (2d ed).
2. *Ibid.*
3. *Id.* at 19.
4. HOWELL, THE COPYRIGHT LAW 2 (3d ed. 1952).

in 1694,[5] and thereafter a number of previously unlicensed printers invaded the arena, thereby arousing some resentment on the part of the printers of the Stationers' Company. Considering itself duly aggrieved, the Company petitioned Parliament to grant to it all printing rights in perpetuity. The result was the enactment of the Statute of Anne in 1710,[6] which for the first time granted statutory protection to authors, but only for a specified limited time. Perhaps the printers considered that the statute gave them most of what they wanted and apparently some of them may have even believed that the right was granted in perpetuity, since the courts issued many injunctions even after the expiration of the term of protection set forth in the statute.[7] However, in 1774, in the famous case of *Donaldson v. Becket*,[8] the House of Lords ruled that the statute extinguished all common law rights in published works, though leaving untouched the common law rights in works that were not published.

A few years after this decision, the United States came into existence, its Constitution specifically providing for the granting of a limited exclusive right to authors and inventors "to promote the progress of science and useful arts."[9] It is interesting to note that one of the first enactments of the first Congress was the copyright law of 1790.[10] This law, however, did not include musical compositions within its scope; protection for such works was not granted until the passage of the Act of 1831.[11] The latter statute protected only published music and did not include protection for the performing right. This right was not recognized until 1897, when an amendment to the copyright law, encompassing all public performances of a copyrighted musical composition, was passed.[12]

In 1909, when the present copyright law was enacted,[13] a number of changes affecting music were made in the law. For the first time, unpublished music was brought under statutory copyright protection. The performing right was limited to performances "for profit." Several rights (*e.g.*, the making of an arrangement) were specifically spelled out in the statute. Probably the most significant innovation was the creation of the compulsory recording license. In the words of the congressional committee reporting the bill which became the 1909 law, the compulsory license provision was "the subject of more discussion and has taken more of the time of the committee than any other provision in the bill."[14] This was due to

5. DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 58 (1879).
6. 8 Anne, c. 19.
7. DRONE, *op. cit. supra* note 5, at 71.
8. 4 Burr. 2408, 98 Eng. Rep. 257, 2 Bro. P.C. 129, 1 Eng. Rep. 837 (H.L. 1774).
9. U.S. CONST. art. 1, § 8.
10. Act of May 31, 1790, ch. xv, 1 Stat. 124.
11. Ch. xvi, 4 Stat. 436.
12. Act of Jan. 6, 1897, ch. IV, 29 Stat. 481.
13. 34 Stat. 1075 (1909), 17 U.S.C. (1958).
14. H. R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909).

the fear that an international music trust would control the exclusive right of recording, and that this "might be as injurious to the composer as it would be to the public."[15] The committee therefore saw in the compulsory license provision "a law which would give to the composer the exclusive right to prohibit the reproduction of his music by mechanical means on the part of anybody if he desired, to secure to him adequate compensation from all reproducers if he did not desire to exercise this exclusive right to prohibit and to prevent the establishment of a great trade monopoly."[16]

In brief, this innovation afforded to the copyright proprietor of a musical composition the exclusive right to permit his composition to be recorded. But once he permitted the composition to be recorded, anyone else could obtain a license to make a recording thereof by paying the statutory royalty rate of two cents and adhering to the prescribed formalities. In practice, the recording companies today rarely use this statutory right, but rely instead on a license secured by contract, which generally permits a recording at less than the statutory rate, and without the statutory form of reporting the royalties.[17]

In passing, it may be noted that for all practical purposes the courts have generally considered that under the statute both published and unpublished works possess the same rights; consequently, no attempt will be made hereafter to distinguish between the two types of compositions unless the purposes of this discussion so require. Two cases illustrate this similarity of rights:

(1) *Shilkret v. Musicraft.*[18] With respect to mechanical reproduction rights, this case held that an unpublished composition enjoyed the same rights as a published work, notwithstanding that the language of the law specified that it included "only compositions *published* and copyrighted after July 1, 1909" (emphasis added), which might seem to restrict the right to published works.

(2) *Marx v. United States.*[19] With respect to the duration of the copyright term of an unpublished work, this case held that the term begins on the date on which the application for registration is received in the Copyright Office. This was held notwithstanding the statutory language that the duration is computed from the day of first *publication.* Since an unpublished work obviously has no date of publication,

15. *Id.* at 8.
16. *Id.* at 9.
17. Burton, *Business Practices in the Copyright Field,* in 7 COPYRIGHT PROBLEMS ANALYZED 112-13 (1952).
18. 131 F.2d 929 (2d Cir. 1942).
19. 96 F.2d 204 (9th Cir. 1938).

the court in effect interpreted the statutory language in a manner designed to give the same length of protection for both types of works.

An apparent exception to the above generalization concerning the rights enjoyed by both types of works is found in *Edward B. Marks Music Corp. v. Continental Record Co.*[20] This case involved the question whether a musical composition originally published in 1902, prior to the effective date of the current law, but renewed under the present law, enjoyed the mechanieal reproduction right. The court held that it did not because of the specific language referred to above, limiting that right to works "published and copyrighted *after* July 1, 1909." The argument had been made that even though the original publication may have been made prior to that date, the renewal under the current law being a new, independent right gave rise to the application of the mechanical right provision from and after the date of renewal. The court, however, considered that the specific language of the statute militated against this construction.

III. Common Law Rights

Section 2 of the copyright law[21] provides that "nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor." This statutory provision specifically preserves common law rights in unpublished works; just what this means in practical effect may now be considered.

Mention was made earlier that in England the famous case of *Donaldson v. Becket*[22] settled the law in that country to the effect that when copyright protection was secured under the statute, all common law rights were thereby lost. This doctrine was followed in the United States by the equally famous case of *Wheaton v. Peters.*[23] The common law right referred to was simply the right of first publication; as long as an author or composer retained his literary or musical creation it belonged to him in perpetuity and he could go to court to restrain any unauthorized publication thereof. However, as soon as he published the work, he lost this common law right. If he published his work in accordance with the requirements of the copyright law, he thereby acquired statutory protection. If the work was published without meeting the requirements of the copyright law, he then lost forever all of his statutory rights as well as common law rights therein.

20. 222 F.2d 488 (2d Cir. 1955).
21. 17 U.S.C. § 2 (1958).
22. See note 8 *supra* and accompanying text.
23. 33 U.S. (8 Pet.) 591 (1834).

It has long been held that a performance in public did not constitute publication sufficient to cause the loss of the common law rights.[24] Thus, one might obtain perpetual right in a musical composition so long as it remained unpublished. Hence, prior to the date of the first statutory recognition of performing rights for musical compositions in 1897, it was not at all uncommon for the producers of operas and other musical productions to keep the original musical scores under lock and key as a means of preventing piratical competing productions.[25]

One aspect of the danger of attempting to rely on such perpetual common law rights rather than obtaining statutory protection may be illustrated by the case of *Egner v. E. C. Schirmer Music Co.*[26] The famous Army song, "The Caissons Go Rolling Along," was composed in 1908 by an Army officer, Edmund L. Gruber. The song was played and sung in army camps for many years. In 1918 there was published the sheet music of a composition, "The U. S. Field Artillery March," by John Philip Sousa, who had incorporated most of the Caisson song therein. Gruber apparently knew of this, but took no steps to protest. In 1921 two employees of the Military Academy at West Point compiled a song book of popular West Point songs, including therein the Caisson song with the express permission of Gruber. In 1930, some 22 years after composing it, Gruber finally applied for copyright registration. In the ensuing legal struggle over the rights to the composition, the court held that the inclusion of the song in the 1921 West Point compilation with the consent of Gruber caused the loss of any copyright protection, since it constituted a publication without the required statutory notice. The court reasoned that the compilers were mere licensees and as such did not possess authority to obtain copyright for that particular composition when their songbook was copyrighted. Thus, the publication of the songbook, absent any statutory copyright protection, resulted in the loss of all rights, both common law and statutory, in the Caisson song.[27]

A different type of common law problem was presented to the court in *Supreme Records, Inc. v. Decca Records, Inc.*[28] This case indicates that no common law right exists in an arrangement of a musical composition recorded under license of a copyright proprietor, which arrangement is dissociated from the copyrighted work itself. Both plaintiff and defendant had licenses from the copyright owner of a musical composition to make recordings thereof. Plaintiff brought an unfair competition action for

24. Ferris v. Frohman, 223 U.S. 424, 435 (1912) (citing a number of common law decisions); McCarthy & Fischer, Inc. v. White, 259 Fed. 364 (S.D.N.Y. 1919).

25. SHAFTER, *op. cit. supra note* 1, at 119.

26. 139 F.2d 398 (1st Cir. 1943), *cert. denied*, 322 U.S. 730 (1944).

27. In 1957 a bill, H.R. 5782, 85th Cong., 1st Sess., was introduced in Congress to pay General Gruber's widow the sum of $10,000 tax exempt, in full settlement of all claims respecting the composition. No action on the bill was taken.

28. 90 F. Supp. 904 (S.D. Cal. 1950).

damages, alleging that defendant copied its own recording arrangement of the composition. The court pointed out that the composer was not a party to this action and remarked that in this respect the case was unique. Plaintiff claimed no rights in the copyrighted musical composition per se; rather, it contended that it possessed rights in the special manner in which it had recorded the composition, rights which could be asserted against its competitor even though the arrangement itself did not give rise to any rights which it might assert against the public. The court denied this contention, stating that it was evident from a study of the copyright law that

> Congress did not intend to give recognition to the right of arrangement, dissociated from the work *itself*, to which the author claims the right. Otherwise, a right could be segmentized and portions of it could be asserted by persons who do not claim *direct* ownership of a musical composition, but merely certain *subsidiary* rights.[29]

As stated previously, as long as a work remains unpublished, the common law rights remain intact. For many years it was customary to sell and distribute phonograph records on the assumption that, since under *White-Smith Music Publishing Co. v. Apollo Co.*[30] the record was not a "copy" of the previously copyrighted composition, the sale thereof without any copyright notice thereon did not constitute such publication as to destroy all rights in the recorded composition. But supposing that the recorded musical composition had never been copyrighted, could it reasonably be maintained that the sale of the record of the uncopyrighted composition was in fact sufficient publication to destroy the common law rights in the composition? This question was dealt with in a case some ten years ago, a case which must have caused a few tremors in the music publishing industry. It began as a simple infringement case involving the composition "Yancey Special," in which it was alleged that the defendant's "Long Gone" was the culprit. In holding that there was no infringement, Judge Igoe, in *Shapiro, Bernstein & Co. v. Miracle Record Co.*, said:

> I might also add that the evidence is that Lewis abandoned his rights, if any, to a copyright by permitting his composition to be produced on phonograph records and sold some time before copyright. It seems to me that production and sale of a phonograph record is fully as much of a publication as production and sale of sheet music. I can see no practical distinction between the two. If one constitutes an abandonment, so should the other.[31]

Although Judge Igoe's statement was dictum, its possible impact upon the music industry was so great that counsel filed a motion for a new trial. After argument on the motion for a new trial, the court stated that publication was not necessarily a technical definition but was more of a practical

29. *Id.* at 909. (Italicized in original.)
30. 209 U.S. 1 (1908).
31. 91 F. Supp. 473 (E.D. Ill. 1950).

question. It reiterated its reasoning that the wide dissemination of phonograph records was as a practical matter the equivalent of a wide sale of sheet music. The court referred to *RCA Manufacturing Co. v. Whiteman*,[32] which had held that common law rights in the performance of a musical composition ended with the sale of the records, and added that the reasoning in that case applied with equal force to the case at bar.

Some four years later, the same problem arose in a case originating in the southern district of New York. In *Mills Music, Inc. v. Cromwell Music, Inc.*,[33] Judge Leibell by way of dictum indicated that he also thought that the manufacture and sale of phonograph records could constitute a publication of the musical composition, which would destroy the common law rights. But he offered the suggestion that if a statutory copyright had been obtained prior to the time of the manufacture and sale of the records, the sale of the records would have no effect on the rights of the composer, since his rights would then be based upon the statute.

If Judge Igoe could argue that the logic of *Whiteman*, which involved common law rights in a performance rather than in a musical composition itself, would apply in *Miracle Records*, it would likewise seem that the same logic would also extend to common law rights in a musical arrangement embodied in a recording. And so the court held in *McIntyre v. Double-A Music Corp.*[34] In that case the court listed *Whiteman* as one of the authorities for its holding that the distribution of phonograph records containing an arrangement destroyed any rights that may have existed in the arrangement. But the court apparently failed to realize that some three years previously in *Capitol Records, Inc. v. Mercury Records, Corp.*,[35] which involved an artistic performance of a musical composition, a court had considered that *Whiteman* no longer was the law in New York. The majority felt that *Whiteman* had been over-ruled by *Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp.*,[36] with the result that the sale of phonograph records of performances by musical artists did not constitute a "publication" which would result in the loss of any common law rights in the performance. Judge Hand, in a dissenting opinion, indicated his displeasure with the view that sale was not a publication; in his opinion, such a holding could only mean that a perpetual monopoly was created. At the same time he expressed the realization of the harsh result that would ensue under his view. He did not think, however, that his end result was unjust, because the alternative was a monopoly unlimited in time and use.

32. 114 F.2d 86 (2d Cir. 1940).
33. 126 F. Supp. 54 (S.D.N.Y. 1954).
34. 166 F. Supp. 681 (S.D. Cal. 1958).
35. 221 F.2d 657 (2d Cir. 1955).
36. 199 Misc. 786, 101 N.Y.S.2d 483 (Sup. Ct. 1950), *aff'd*, 279 App. Div. 632, 107 N.Y.S.2d 795 (1951).

While this brief discussion does nothing more than touch a few of the interesting aspects of common law rights in musical compositions, it does illustrate the unsettled nature of the law and points up a difficulty encountered when one has to rely solely on common law protection.

IV. Statutory Protection

A. Introduction

Perhaps one may best obtain a bird's-eye view of the scope of protection under the copyright law by briefly examining the statutory grants in their numerical order as they appear in that law. However, it should be noted at the outset that in order to be subject to copyright protection, a musical composition must show evidence of some creative originality. Thus, in the case involving the musical composition "Yancey Special," it was claimed that the infringement lay in the copying of the bass. Although the court noted that the bass in the allegedly infringing composition was identical to that in plaintiff's copyrighted work, it held there was no infringement because the bass was merely "a mechanical application of a simple harmonious chord"; it was held to be "too simple to be copyrightable."[37]

Another example of uncopyrightability concerned an unpublished musical composition entitled "Tic Toc," which consisted of the words "Tic Toc, Tic Toc, Time for Muehlebach" scored to the notes "C" and "G" in the key of "C."[38] The plaintiff admitted that the words "Tic Toc" were in the public domain and also that the words "Time for Muehlebach" had been used in prior uncopyrighted material. Plaintiff claimed, however, that the music together with the combination of the words with the music constituted copyrightable matter. The court had no hesitancy in holding that the jingle was not copyrightable, saying:

> If all that an author of a musical composition does is to add a mechanical application of sound to a word that is itself not copyrightable, and adds the same to a descriptive phrase already dedicated to the public domain, without the use of even the most simple harmonious chords, he has no musical composition subject to copyright.[39]

The court added:

> That the music claimed for his jingle is too simple to be copyrightable, that it is a mere copy of what has been in the public domain of all music for centuries, and that it may be reproduced, mechanically, by a clock, and is, therefore, standing alone, not fit material or subject for copyright, should need no fortifying authority.[40]

37. Shapiro, Bernstein & Co. v. Miracle Record Co., *supra* note 31, at 474.
38. Smith v. Muehlebach Brewing Co., 140 F. Supp. 729 (S.D. Mo. 1956).
39. *Id.* at 731.
40. *Ibid.*

With this basic concept in mind, the principal statutory rights affecting music will now be examined.

B. Rights Under Section 1(a)

Section 1(a)[41] affords the copyright proprietor the exclusive right to "print, reprint, publish, copy and vend the copyrighted work." The rights of printing, reprinting and publishing appear to be generally self-explanatory; they are continuing rights and exist throughout the life of the copyright. These rights form the basis for the publication of sheet music, a right which does not today enjoy the commercial success it did in years gone by, and so our discussion may well be devoted to items of more immediate interest.

The right to vend is not a continuing right, and refers only to the right of first sale.[42] An interesting case in which a claim to this right arose involved the unauthorized use by defendant of plaintiff's copyrighted poem when the words of the poem were put to music and recorded. One of plaintiff's arguments was that the sale of the defendant's records, since they embodied his copyrighted words, constituted a violation of his exclusive rights to "vend" the words.[43] The court, however, held it was bound by the Supreme Court decision in *White-Smith Music Publishing Co. v. Apollo Co.*,[44] which held that a similar mechanical device did not constitute a "copy" of the copyrighted work and consequently was not protected by copyright. The court therefore considered it inappropriate that the vending of something not protectible under the copyright law could infringe in the manner alleged. It should be noted that under an amendment to section 1(c) of the copyright law in 1952,[45] a copyright proprietor of a poem would today possess the exclusive recording right, and the above case would require a different conclusion with respect to this particular point.

The right of copying, as the word implies, affords protection to the copyright owner against unauthorized copying of his work. In the case of music, the transposition of a composition from the key of three flats to one flat was held to constitute copying.[46] It is not necessary that the copying be conscious; it is nonetheless copying if it is done from memory. The court in *Edwards & Deutsch Lithographing Co. v. Boorman*,[47] had this to say on the point:

41. 17 U.S.C. § 1(a) (1958).
42. Bobbs-Merrill v. Straus, 210 U.S. 339 (1908) (construing a similar word in a prior statute); Fawcett Publications v. Elliott Publishing Co., 46 F. Supp. 717 (S.D.N.Y. 1942).
43. Corcoran v. Montgomery Ward & Co., 121 F.2d 572 (9th Cir. 1941), *cert. denied*, 314 U.S. 687 (1941).
44. Note 30 *supra*.
45. 66 Stat. 752 (which became effective on Jan. 1, 1953).
46. Hein v. Harris, 175 Fed. 875 (C.C.S.D.N.Y. 1910).
47. 15 F.2d 35 (7th Cir. 1926).

> One may copy from memory. It is not necessary to such act that the copied article be before him at the time. Impressions register in our memories, and it is difficult at times to tell what calls them up. If the thing covered by a copyright has become familiar to the mind's eye, and one produces it from memory and writes it down, he copies just the same, and this may be done without conscious plagiarism.[48]

C. Rights Under Section 1(b)

With respect to music, perhaps the most important right referred to in section 1(b)[49] is the right to "arrange or adapt it if it be a musical work." This right belongs to the copyright proprietor and he may make an arrangement of his work or may permit others to make the arrangement. It should not be overlooked, however, that the arrangement, being an entirely new work, is also subject to copyright protection and if a copyright proprietor permits another to arrange one of his works, there should be complete understanding concerning the ownership of the copyright in the arrangement. Thus, if a proprietor of a copyrighted musical composition authorizes another to make an orchestral arrangement, and to copyright said arrangement in the name of the arranger, the proprietor of the original work may not prevent sales of the orchestral arrangement as an infringement.[50]

An arrangement of an old song in the public domain is copyrightable, and one who uses that copyrighted version without permission is liable as an infringer, although he is of course entitled to utilize the public domain version without liability. In *Italian Book Co. v. Rossi*,[51] a Sicilian sailor who played what he remembered of an old Sicilian folk song, and improvised what he did not remember, copyrighted the version which was written down at his request; this arrangement was sold to the plaintiff. Action was brought against an alleged infringer, who protested that the song was in the public domain. In holding the defendant an infringer, the court said, with respect to the sailor's copyrighted arrangement:

> No doubt he had heard some variation of the old song and was trying to remember it, but the product differed in words and music from any version of it that has been proved, although the theme was the same and the music quite similar. To the extent of such differences he was the author of the new arrangement of the words and music of an old song.[52]

If a piano arrangement is lawfully made from an unpublished version of a melody, may one who copies the melody escape an infringement charge by the owner of the copyrighted piano arrangement on the ground that the original melody was not copyrighted, but only the piano arrange-

48. *Id.* at 37.
49. 17 U.S.C. § 1(b) (1958).
50. Edmonds v. Stern, 248 Fed. 897 (2d Cir. 1918).
51. 27 F.2d 1014 (S.D.N.Y. 1928).
52. *Ibid.*

ment? This question arose in connection with the composition "Rum and Coca Cola." The court held that there was no reason for the defendant's believing that the unpublished melody had been dedicated to the public, and therefore rejected the argument that the plaintiff could not maintain an action for infringement of the original melody.[53]

D. Rights Under Section 1(e)

From the dollars and cents viewpoint, perhaps the most important source of income to composers and publishers today is the performing rights royalties.[54] It may be desirable, therefore, to look into the origin and development of this right, which appears in section 1(e) of the copyright law.[55]

In 1909, at the time of the enactment of the copyright law, the most important source of income to composers was from the sale of sheet music. However, with the advent of the phonograph record and radio and television, this source of income has dwindled. On the other hand, the right to perform a musical composition publicly for profit, which had little meaning in 1909, has attained great significance in recent years.

It must be remembered that in the early days of section 1(e) there was no organized means by which a composer or publisher could collect royalties for the public performance of a musical composition. Moreover, it was not clear just what was meant by the term "public performance for profit."

The practical impossibility of an individual composer or publisher collecting royalties from around the country for such performances may well be imagined. The well-known composers Victor Herbert and John Philip Sousa experienced the unpleasant sensation of finding that their compositions were being played without their permission in restaurants, hotels, and other public places, and they were unable to obtain any compensation therefor. In an attempt to take some action against this unauthorized performing of their compositions, discussions were held early in 1914 at Luchow's restaurant in New York City; these meetings culminated in the founding of the American Society of Composers, Authors and Publishers, known generally as ASCAP.[56] The Society at first concentrated on legal action to obtain a definitive ruling as to the meaning and extent of the right of "public performance for profit."

Early attempts by individual publishers or composers to obtain a court ruling on this point had resulted in such cases as *John Church Co. v.*

53. Baron v. Leo Feist, Inc., 173 F.2d 288 (2d Cir. 1949).

54. This seems to have amounted to approximately $40 million in 1959—$30 million to ASCAP and $10.5 million to BMI. See Variety, Feb. 17, 1960, for report on ASCAP, and BMI, TWENTY YEARS OF SERVICE TO MUSIC 10 (1960), for statement of BMI income.

55. 17 U.S.C. § 1(e) (1958).

56. ASCAP, THE ASCAP STORY (1951 ed.) (pages unnumbered).

Hilliard Hotel Co.[57] and *Herbert v. Shanley Co.*[58] In both these cases copyrighted musical compositions were performed publicly in a hotel and restaurant, respectively, where there was no charge for admission, or other direct pecuniary charge. The courts held the performance not to be "for profit," saying that persons went into these places primarily for refreshment, not to hear music. However, when the Supreme Court reviewed these cases, a different result ensued. Mr. Justice Holmes, in a memorable decision, commented as follows:

> If the rights under the copyright are infringed only by a performance where money is taken at the door, they are very imperfectly protected . . . . The defendants' performances are not eleemosynary. They are part of a total for which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order, is not important. It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation or disliking the rival noise give a luxurious pleasure not to be had from eating a silent meal. If music did not pay it would be given up. If it pays it pays out of the public's pocket. Whether it pays or not the purpose of employing it is profit aud that is enough.[59]

In the following years, numerous legal actions were brought to protect the performing rights, and as a result the courts held that music played in dance halls, cabarets, theaters, and over the radio were public performances for profit.[60]

In 1931, the Supreme Court was confronted with the question whether multiple performances could exist in the same broadcast. It decided this question in the affirmative. In *Buck v. Jewell-LaSalle Realty Co.*,[61] it is reported that a hotel had furnished musical entertainment to its guests through speakers installed in the public rooms and in the private rooms as well. The "tuning in" of the radio broadcast by the hotel master set was held to constitute a "public performance for profit." In this particular situation the broadcaster did not have permission to perform the musical compositions in question, and the Supreme Court did not decide whether the performance on the part of the hotel in "tuning in" would have infringed the performing rights where the broadcasts had been authorized by the copyright proprietors. Justice Brandeis stated in a footnote that if the broadcaster had been properly licensed, the hotel might have been con-

57. 221 Fed. 229 (2d Cir. 1915), *rev'd on other grounds sub nom.* Herbert v. Shanley, 242 U.S. 591 (1917).

58. 229 Fed. 340 (2d Cir. 1916).

59. Herbert v. Shanley Co., 242 U.S. 591, 594-95 (1917).

60. *E.g.*, Harms v. Cohen, 279 Fed. 276 (E.D. Pa. 1922); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924); Jerome H. Remick & Co. v. American Auto. Accessories Co., 5 F.2d 411 (6th Cir. 1925); Jerome H. Remick & Co. v. General Elec. Co., 16 F.2d 829 (S.D.N.Y. 1926).

61. 283 U.S. 191 (1931).

sidered as having an implied license to receive and distribute the broadcast.

Following such decision, the performing rights organizations, because of Justice Brandeis' footnote, placed a limitation into their licenses to broadcasters which prohibited the latter from granting to anyone else the right to perform their music publicly for profit. A case which involved such a license was *Society of European Stage Authors & Composers Inc. v. New York Hotel Statler Co.*[62] The main difference in this case was that there were no speakers in the public rooms of the hotel, and the speakers in the private rooms permitted the guests to select one of two programs received by the master set. The court, however, found that there was a public performance for profit, noting that the limitation in the license was a "redundancy."

A subsequent case involved a radio station operated by a nonprofit organization, broadcasting approximately two-thirds of its programs without commercial sponsorship, and only one third commercially sponsored. In that case,[63] notwithstanding that the infringing performance occurred on the sustaining portion of the program, the court held in effect that it was a performance which, although not in itself a direct source of revenue, is nevertheless "for profit" where it contributes indirectly to the commercial value of other revenue-producing activities.

A recent application of this doctrine occurred in *Leo Feist, Inc. v. Lew Tendler Tavern, Inc.*[64] There music was played by means of phonograph transcriptions and relayed to a client's restaurant over leased telephone wires where it could be heard by customers of the restaurant. The court found no difficulty in holding that this was nonetheless a public performance for profit.

It should be noted in passing that the copyright law lists two exceptions to the performance right, namely, performances on juke boxes,[65] and those of religious or secular works where the performance is for charitable or educational purposes and "not for profit."[66] Only a few cases have been brought by publishers or performing rights organizations to obtain a definitive ruling on the so-called juke box exception.[67] However, because of procedural inadequacies these cases shed no light on the problem. Most of the efforts to nullify this exception have been directed to legislation which would remove it, none of which, however, has been successful.[68]

62. 19 F. Supp. 1 (S.D.N.Y. 1937).

63. Associated Music Publishers Inc. v. Debs Memorial Radio Fund Inc., 141 F.2d 852 (2d Cir. 1944).

64. 162 F. Supp. 129 (E.D. Pa. 1958), *aff'd.*, 267 F.2d 494 (3d Cir. 1959).

65. 17 U.S.C. § 1(e) (1958).

66. 17 U.S.C. § 104 (1958).

67. *E.g.*, Buck v. Wm. B. Kelly, 7 U.S.P.Q. 164 (D. Mass. 1930); Irving Berlin, Inc. v. Anziano, 4 F.R.D. 33 (S.D.N.Y. 1944).

68. For a sampling of the pros and cons, see *Hearings on H.R. 5921*, 86th Cong., 1st Sess. (1959).

The second exception, the performance of religious or secular works where the performance is for charitable or educational purposes and not for profit, has rarely been litigated. However, in one case,[69] the court interpreted the meaning of the language of section 104 as follows:

> We think it was to permit certain high-class religious and educational compositions to be performed at public concerts where an admission fee is charged, provided the proceeds are applied to a charitable or educational purpose.[70]

E. Rights Under Section 7

Mention should be made of what is often referred to as the "new work" doctrine. Section 7 of the copyright law[71] provides for copyright in certain types of "new works." Primarily these involve compilations, abridgements, and arrangements of works that are in the public domain or of copyrighted works when they are produced with the consent of the proprietor, and of works that are republished with new matter. In essence, what is provided for is that any work, whether in the public domain, or with the consent of the existing copyright proprietor, may be susceptible of such additional intellectual labor upon it that the one performing this work may be able to obtain copyright protection. The section provides, however, that when such new work is published, it does not in any way extend any existing copyright nor does it imply an exclusive right in the use of such original works. In short, protection is afforded only to the new material added by the author; any previous work in the public domain that may be utilized is not thereby removed from the public domain, nor, if the new work embodies a previously copyrighted work, is the copyright in the pre-existing work extended in any way.

A case which illustrates this problem is *G. Ricordi & Co. v. Paramount Pictures, Inc.*[72] Long wrote and copyrighted a novel entitled "Madame Butterfly." He later authorized Belasco to write a play based upon the novel, which play likewise was copyrighted. The copyright in the novel was renewed, but not that in the play. During the original term of copyright, both Long and Belasco authorized plaintiff to prepare an opera based upon the novel and play, which opera was also copyrighted. Long and Belasco also authorized defendant's predecessors to produce a motion picture from the novel and play. Plaintiff brought a declaratory judgment action with respect to the motion picture rights in the opera. The court held that any rights which plaintiff obtained from Long and Belasco expired with the end of the first term of copyright in the absence of a new grant for the renewal term. Thus, in effect, the court held that what-

69. John Church Co. v. Hilliard Hotel Co., *supra* note 57.
70. *Id.* at 230.
71. 17 U.S.C. § 7 (1958).
72. 189 F.2d 469 (2d Cir. 1951), *cert. denied*, 342 U.S. 849 (1951).

ever was "new" in plaintiff's opera was protected for the full term of the opera copyright, but that any portion of the opera that appeared in the novel did not belong exclusively to it. Since the defendant possessed the motion picture rights in the renewal copyright of the novel, it could properly assert that the plaintiff could not make general use of the story of the novel for a motion picture version of its opera. Because the copyright in the play was not renewed, the plaintiff, as well as the defendant, was entitled to use whatever was copyrightable new matter therein.

The court in *American Code Co. v. Bensinger*[73] stated the "new work" problem in this manner:

> If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and, adding thereto materials which are the result of his own efforts, publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. It is necessary, however, to keep in mind the distinction between copyrightability and the effect and extent of the copyright when obtained. The degree of protection afforded by the copyright is measured by what is actually copyrightable in it; that is, by the degree and nature of the original work.[74]

It goes without saying, of course, that the "new work" portion must of itself be sufficient to sustain a copyright. In the case involving the song entitled "My Melancholy Baby,"[75] a second version was published shortly after the original, both versions being copyrighted. The second version, however, differed from the first only in the addition of another chorus in march time but using identical lyrics and music except for a slight variation in the bass of the accompaniment. The court held that this second version did not constitute a copyrightable "new work."

V. INTERNATIONAL ASPECTS

The foregoing illustrates a few of the problems one might encounter in obtaining and enforcing copyright protection in the United States for his musical compositions. In considering the protection of American works in foreign countries, one might be tempted to recall, with some nostalgia, those days when the world was smaller and protection outside of the United States was generally considered unimportant. But today one constantly reads of the use of American music in other countries, of the reception given in those countries to American dance bands and symphony orchestras, not to mention the riots that are sometimes caused by the

73. 282 Fed. 829 (2d Cir. 1922).
74. *Id.* at 834.
75. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 73 F. Supp. 165 (S.D.N.Y. 1947).

performance of American "rock and roll" music. These events are some evidence of the popularity of American music overseas and a reminder of the importance of protection of American music in foreign countries. A short discussion of the history of efforts to afford protection in foreign countries may therefore be in order.

The "days when" the world was smaller may be pinpointed as the years preceding 1891. In the 101 years following the enactment of the first copyright law in the United States, American citizens per se enjoyed no governmental means of obtaining copyright protection abroad; foreign composers were likewise denied protection in this country. During those years, it was common practice to "pirate" foreign works in this country, and no doubt there was some pirating of United States works abroad. The general pattern of the 1891 legislation[76] was to extend the right to protection in the United States to foreign nationals on a *quid pro quo* basis; that is, if the foreign country granted protection to United States nationals, then the United States law would be available to them. The President was required to issue a proclamation when he found that such reciprocal conditions existed.

In 1909, the same general pattern was incorporated into the new law. Specifically, section 9(a)[77] permitted an alien author or proprietor who was domiciled in the United States at the time of first publication of his work to obtain protection for such work. It has been held that domicile is composed of two things:[78] (1) residence in the new locality and (2) the intention to remain there. In a case where a Canadian citizen came to New York, brought almost all of his property with him, resided there with the intention to remain, became engaged to a New York girl, and the musical composition composed by him was published while he so resided in New York, the court found no objection to the copyright on the ground of eligibility.[79]

It should be noted in passing that the langnage of the statute, by requiring the alien author to be domiciled in this country at the time of "first publication" of his work, seemingly would deny copyright protection to a domiciled alien for his *unpublished* composition. At least one court[80] has held such an author not eligible for protection. On the basis of this decision, in order for a domiciled alien author to obtain statutory protection for his unpublished composition there would have to be a presidential proclamation issued with respect to the country of which he was a national.

76. Act of March 3, 1891, ch. 565, 26 Stat. 1106.
77. 17 U.S.C. § 9(a) (1958).
78. G. Ricordi & Co. v. Columbia Graphophone Co., 258 Fed. 72 (S.D.N.Y. 1919).
79. *Ibid.*
80. Leibowitz v. Columbia Graphophone Co., 298 Fed. 342 (S.D.N.Y. 1923).

Under section 9(b),[81] there are three situations in which a nondomiciled alien author may obtain protection in the United States:

> (1) when the country of which he is a national grants proteetion to United States nationals on substantially the same basis as to its own citizens;
>
> (2) when the country grants protection substantially equal to the protection of the United States law; or
>
> (3) when the country is a party to an international copyright agreement to which the United States may become a party.

In each of the three cases, the existence of the reciprocal conditions must be determined by the issuance of a presidential proclamation. This action of the President is a condition precedent to the right of a foreign national to obtain United States copyright protection.[82]

It should be noted that the issuance of a proclamation under section 9(b) would not of itself afford to the foreign national the mechanical reproduction rights of section 1(e), which have been previously discussed. This results from the requirement contained in section 1(e) that foreign nationals shall not be entitled to that particular right unless the foreign country grants substantially similar rights to United States citizens. This provision in effect requires the issuance of a separate proclamation specifically mentioning the section 1(e) rights where a general section 9(b) proclamation has been issued previously or, in the alternative, a definite statement in the proclamation that both 1(e) and 9(b) rights are involved.[83]

In the years following 1909, the United States entered into bilateral reciprocal copyright relations with almost forty countries on the basis of the procedure provided in section 9(b).[84] While in many of these instances the mechanical reproduction rights were also granted, in others they were not.

To anyone familiar with the paper work necessary before the presidential proclamation is issued, it is clear that such procedures require many months of study, negotiation, and drafting. Such lengthy, time-consuming procedures have seemed unnecessary to some, primarily those familiar with the operation of the so-called Berne Convention. Although numerous attempts made to modify the United States law sufficiently to enable it to adhere to that convention were unsuccessful, brief reference should be made to its salient features in view of its standing in the world copyright community.

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81. 17 U.S.C. § 9(b) (1958).
82. Bong v. Alfred S. Campbell Art Co., 214 U.S. 236 (1909).
83. Portuondo v. Columbia Phonograph Co., 81 F. Supp. 355 (S.D.N.Y. 1937); Todameriea Musica, Ltda. v. Radio Corp. of America, 171 F.2d 369 (2d Cir. 1948).
84. 17 U.S.C.A. § 9 (Supp. 1961).

The Berne Convention, first formulated in 1886, has undergone several revisions, but some forty-four countries are adherents to one or more of these revisions.[85] The basic concept of that convention is stated in article 4 in the following language:

> Authors who are nationals of any of the Countries of the Union shall enjoy in Countries other than the Country of origin of the work, for their works, whether unpublished or first published in a Country of the Union, the rights which their respective laws do now or may hereafter grant to their nationals, as well as to the rights specially granted by this Convention.[86]

It is stated that the enjoyment of these rights is subject to no formalities.[87] The "country of origin" is so defined as to include a work published simultaneously in a member country and a nonmember country, so that such a work would be deemed to have originated in the member country.[88] It is this so-called "back door" provision on which many United States publishers have expressed their reliance for protection in Europe, rather than the rather complicated bilateral agreements entered into under the provisions of the United States copyright law.[89]

Between the two world wars, a number of bills were introduced in Congress which would have modified the copyright law to the extent necessary to permit the United States to adhere to the Berne Convention, but as previously mentioned, all failed. Thus, after the end of World War II, a new approach was sought in the matter of international copyright relationships. Under the sponsorship of UNESCO, the Universal Copyright Convention was sigued in Geneva in 1952, and came into force in 1955 when the required number of states had ratified it.[90] To date, there are thirty-nine countries which have adhered to it, including the United States, Great Britain, France, West Germany, Italy, Japan, Argentina, Brazil and Mexico.

The operation of the Universal Copyright Convention, or UCC, is basically simple. In essence, each contracting state agrees to protect the works of nationals of other contracting states, and all works first published in those states, without any formalities, except as mentioned below, in accordance with the laws of that particular state. This is known as the "national treatment" doctrine since the foreigu nationals obtain the same treatment as nationals of each country.[91] The statement that the protection is

85. Le Droit d'Auteur, Jan. 1961.

86. Quoted in ROTHENBERG, COPYRIGHT LAW—BASIC AND RELATED MATERIALS 440 (1956).

87. See ROTHENBERG, *op. cit. supra* note 86, at 440 (art. 4(2)).

88. *Ibid.*

89. See *Hearings Before Subcommittee No. 4 of the House Committee on the Judiciary*, 81st Cong., 1st Sess., ser. 4, at 12 (1949); *Hearings on Executive M. and S. 2559*, 83d Cong., 2d Sess. 123-24 (1954).

90. [1955] 3 U.S.T. & O.I.A., T.I.A.S. No. 3324.

91. The United States copyright law was amended in the few respects necessary to

afforded "without any formalities" is subject to some qualification. In order that the United States and some of the Latin American countries would not have to give up their present copyright systems which are based upon certain formalities, the convention provides that any contracting state which requires compliance with formalities as a condition of copyright (such as the United States) "shall regard these requirements as satisfied" as to foreign works if the symbol ©, the name of the copyright proprietor and the year of first publication are placed on all copies of the work at the time of first publication so as to give reasonable notice of copyright.[92] The effect of the Convention therefore is to afford protection to nationals of contracting states when such a notice appears on the work. Conversely, if such a notice appears on a work first published in this country, it is to be accorded protection in all other countries of the UCC without further ado. The present policy of the United States Government is to rely on the UCC for all future copyright relations. Any existing bilateral relations are not abrogated, but remain in force. However, for all practical purposes, they have significance only in those countries which have not yet ratified the UCC.

VI. CONCLUSION

This panoramic view of the law of musical copyright indicates that historically, in the Western world, the exclusive right of composers in their musical compositions developed out of a monopoly originally granted to printers, which had as its purpose the control of the press. Then the concept was shifted to the granting of a limited exclusive right to authors "for the encouragement of learning" and "to the promotion of science and useful arts."

In the United States, although a copyright law was first enacted in 1790, it was not until 1831 that music was included within its protection; and not until 1897 did the performing right become recognized. The 1909 law limited the performing right to public performance for profit, and created the innovation of the compulsory recording license. In addition, the law specifically provided the right to make an arrangement which can be applied to a copyrighted composition or to one in the public domain. The right of public performance for profit, which was of relatively little commercial value in 1909, has now become the tail which wags the dog. On the contrary, the prime right of protection of sheet music, of great significance in 1909, today is of relatively little value. Although not specifically a right restricted to music, the so-called "new work" doctrine has its application in this field, and as the *Ricordi* case amply demonstrates, is not always a matter of simplicity.

implement the Universal Copyright Convention by the addition of section 9(c) in 1954, which became effective Sept. 16, 1955.

92. Art. III. See note 89 *supra*.

In the international field, prior to 1891, the United States law provided no means of protection for works of foreign nationals on a reciprocal basis. Since that date, however, the United States has, by a series of bilateral arrangements and conventions, entered into copyright relations with a considerable portion of the world's literate countries. Today the Universal Copyright Convention is the outstanding means whereunder foreign works are protected in this country and the works of United States nationals receive protection abroad.

Inadequate though this resumé may be with respect to shedding any light on the practical everyday problems of those engaged in any field of musical copyright, it is hoped that the general picture will serve as the basis of a general understanding of the types of problems that beset the field and furnish an inducement to a further, more specialized and detailed treatment of particular problems.