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WORKS MADE FOR HIRE IN INTERNATIONAL COPYRIGHT LAW

*by Richard Colby**

This comment with respect to aspects of authors' rights and the employment relationship under the United States Copyright Act of 1976 will also consider United States law in relation to different concepts of laws of other nations.

Professor Mario Fabiani of Rome University has written on Latin legal principles of protection of the rights of salaried authors, stating that:

The Latin legal concept entails that the right in the work belongs in the first place to the author while the Anglo-Saxon concept of origin relies on a *factio juris* in the sense of an assignment by legal right to the employer (legal assignment) or else of a legal presumption of assignment (legal presumption).

Professor Fabiani has suggested the "initiation of studies on the problems relating to the protection of salaried authors."¹ This article may, perhaps, advance that study.

INTRODUCTION

The United States concept of copyright has a Constitutional, and hence a legislative base, somewhat in contrast to the "droit d'auteur,"² as so firmly expressed in France's Law of March 11, 1957 on Literary and Artistic Property.³

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The views expressed in this article have been prepared by the author solely in his personal capacity, and do not necessarily represent the position of any organization with which the author is associated. Mr. Colby is Chairman for 1982 and 1983 of the American Bar Association's Section of Patent, Trademark and Copyright Law Subcommittee on Employment for Hire of its Committee on Authors; Senior Distribution & Marketing Counsel of Twentieth Century-Fox Film Corporation; and former Chairman of the Copyright Committee of the Motion Picture Association of America, Inc.

1. XV Unesco Copyright Bulletin 20, 21, 24 (1981).
2. Monta, *The Concept of "Copyright" Versus the "Droit D'Auteur,"* 32 S. CAL. L. REV. 177 (1959).
3. XIX Revue Internationale Du Droit D'Auteur 503 (1958).

Article 1 of the French Law provides that:

The author of an intellectual work shall, by the mere fact of its creation, enjoy an exclusive incorporeal property right in the work, effective against all persons."⁴

The United States Constitution sets forth the principle that:

The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.⁵

This the United States Congress has done most recently in the 1976 Copyright Act ("the Act") generally effective January 1, 1978.⁶ In some highly significant respects United States law has come much closer to international concepts, particularly in establishing the term of copyright, other than for a "work made for hire,"⁷ as, generally, "consisting of the life of the author and fifty years after the author's death,"⁸ running until "the end of the calendar year in which (the term) would otherwise expire."⁹

Following Anglo-Saxon concepts of the common law, as enunciated in the Constitution of the United States, the Act provides that:

Copyright in a work protected under this title vests initially in the author or authors of the work.¹⁰

In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.¹¹

The Preamble to the Statute of Anne of 1710 described the Statute as:

An Act for the Encouragement of Learning, for the Encouragement of Learned Men to Compose and Write useful Books, and for Preventing the Reprinting of Books and other Writings, without the Consent of the Authors or Proprietors

4. *Id.*

5. U.S. Const. art. I, § 8.

6. Public Law 94-553, Title 17 of the United States Code.

7. 17 U.S.C. § 101, and § 302(c). The copyright of a work made for hire generally "endures for a term of seventy-five years from the year of its first publication" [distribution], running until "the end of the calendar year in which (the term) would otherwise expire."

8. 17 U.S.C. § 302(a).

9. 17 U.S.C. § 305.

10. 17 U.S.C. § 201(a).

11. 17 U.S.C. § 201(b).

of such Books and Writings . . .¹²

As has been noted by Professors Alan Latman and Robert A. Gorman: This was the celebrated Statute of Anne (8 Anne c. 19, 1710), the first statute of all time specifically to recognize the rights of authors and the foundation of all subsequent legislation on the subject of copyright both here and abroad.¹³

In the United Kingdom, the employer is also generally considered the first owner of copyright,¹⁴ with specific consequences set forth in U.K. Copyright Act, 1956.¹⁵

INTERNATIONAL LAW

Before reviewing the American statutory definition of a "work made for hire," and its effects and implications, we may note the inter-relationship of an author's rights, for example, under French law and under Italian law, particularly in relation to a motion picture.¹⁶

As previously noted by the writer,¹⁷ although Article 14 of France's Law of 1957, and Article 44 of Italy's Copyright Law do not include the producer/employer (the motion picture production company) among statutory authors, it is believed that Article 17 of French Law, and Article 45 of Italian Law, permit the producer to secure the copyright on the motion picture, thereby *protecting* the rights of all authors as well as the producer.¹⁸

Article 14 of the French Law describes the co-auteurs of a cinematographic work made in collaboration to include:

1. The author of the script.
2. The author of the adaptation.

12. For historical review of copyright law in England, see Copinger and Skone James on Copyright, Paragraphs 21-45 (12th ed. 1980).

13. Latman and Gorman, Copyright for the Eighties (1981).

14. § 4(4) and § 13. The "maker" of a cinematograph film is "entitled" to any copyright in the film. The "maker" is "the person by whom the arrangements necessary for the making of the film are undertaken."

15. Copinger and Skone James on Copyright ¶ 346 (12th ed. 1980); and text at notes 34 and 35 *infra*.

16. Colby, *Copyright Protection for Cinematographic Works Under the Universal Copyright Convention*, XV Unesco Copyright Bulletin 198, 238, 278 (1962).

17. *United States Copyright Renewals and French Authors*, 33 *Revue Internationale Du Droit D'Auteur* 58 (1961); *Legal Aspects of Motion Picture Production in Europe*, 8 *Journal of The Copyright Society of the U.S.A.* 85 (1960).

18. Colby, *International Copyright Protection*, 44 *Revue Internationale Du Droit D'Auteur* 98 (1964); X *New York Law Forum* 45 (1964); Abridged with a Forward and Comments by C.J. Bannon of the New South Wales Bar, 37 *The Australian Law Journal* 20 (1963).

3. The author of the dialogue.
4. The author of the musical compositions.
5. The director (*réalisateur*).

Article 44 of the Italian Law describes the co-authors of a cinematographic work to include:

1. The author of the subject.
2. The author of the scenario.
3. The composer of the music.
4. The artistic director.

Under Article 17 of the French Law:

17. The "producer" of a cinematographic work is the physical person or legal entity who takes the initiative and responsibility for the production of work.

The authors of a cinematographic work, except for the author of the musical compositions, with or without words, shall be bound to the producer by a contract which, in the absence of a clause to the contrary, shall constitute the transfer to his benefit of the exclusive right of cinematographic exploitation, without prejudice to the rights recognized to the author by the provisions of Part II, and especially Articles 26 and 35.

Under Article 45 of the Italian Law:

45. Within the limits indicated in (subsequent) Articles, the exercise of the rights of economic utilization of a cinematographic work shall belong to the person who has organized the production of the said work.

The person who is indicated in the cinematographic film as the producer shall be deemed to be the producer of the cinematographic work. If the work is registered according to the second paragraph of Article 103, the presumption established by the said Article shall prevail.¹⁹

It is the writer's opinion that, through the bridge of International Copyright Treaties, such as the Universal Copyright Convention and the Berne Union, the legal concepts evidenced by the foregoing expressions of *le droit d'auteur* are, and have been, reconcilable with American legal principles, within the framework of contracts, particularly through collective bargaining labor agreements.²⁰

Many of the concepts advocated in Latin jurisprudence are dealt

19. XIX *Revue Internationale Du Droit D'Auteur* 505 (1958); 1 *Publishing, Entertainment, Advertising and Allied Fields Law Quarterly* 283 (1961).

20. *See, especially*, the 1973, 1977 and 1981 Writers Guild of America Agreements.

with in United States Copyright Law on the basis of the principles of equity in order to achieve a fair assessment of the interests concerned. In many substantive areas of concern to all interested in authors' rights and copyright, there has developed a remarkable reconciliation between Latin and Anglo-Saxon jurisprudence.

That there exist such basic foundations as the Berne Union and the Universal Copyright Convention encourages reliance on hope for the future of the amity and the comity of international copyright law.

United States law respects the original creation of the mind. Indeed, in the spirit of the Constitution, copyright exists "To promote the Progress of Science and useful Arts."²¹

WORKS MADE FOR HIRE

Under the United States Copyright Act, a "work made for hire" includes: (a) *a work prepared by an employee within the scope of his or her employment*. This provision of the Act, found in Definitions § 101, follows traditional law and carries forward the principles of the 1909 Act, covering the normal situation applicable to a salaried employee. Since collective bargaining agreements may apply or become applicable to the employment relationship, it is the writer's opinion that the Act should not be changed in this area. Most, if not substantially all, creative employees who prepare copyrightable material are represented in Guild or Union negotiations and have an opportunity therein (as well as in the initial employment itself) to establish different or modified results, and in fact have had occasion to do so.

This principle is embodied in § 201(b) of the Act to the effect that "the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."

As stated in the Congressional Report supporting the Act:

The work-made-for-hire provisions of this bill represent a carefully balanced compromise . . . well established in American copyright law, and to exchange that for the uncertainties of the shop right doctrine would not only be of dubious value to employers and employees alike, but might also reopen a number of other issues.²²

A "work made for hire" also may include: (b) *a work specially*

21. U.S. Const. art. I, § 8.

22. H. Rep. No.94-1476 (1976) at 121.

ordered or commissioned for use (in the specific categories listed). If the parties "expressly agree in a written instrument signed by them that the work shall be considered a work made for hire," such a specially ordered or commissioned work is deemed a "work made for hire," the copyright to which is owned by the person who specially ordered or commissioned the work.

As stated by the Committee on the Judiciary of the House of Representatives, the status of such works "was a major issue" in the development of the definition of works made for hire and "represents a compromise which, in effect, spells out those specific categories of commissioned works that can be considered 'works made for hire' under certain circumstances."²³ This represents a delicate statutory balance, relying on private negotiation between the parties and their representatives.

The question has been raised from time to time whether the definition of a "work made for hire" in § 101(1) of the Act is adequate, and whether there is any difficulty in determining whether there is an employer-employee relationship.

Keeping in mind that the 1909 United States Copyright Act lacked definition, merely referring, for example, in § 26 to "works made for hire," and in § 24 to "an employer for whom such work is made for hire," consideration should be given to the fact that the 1976 Act has defined the term as:

a work prepared by an employee *within the scope of his or her employment* . . .²⁴

As stated in the 1961 Copyright Law Revision Report [Blue Book] of the United States Register of Copyrights:

Instead of the phrase "works made for hire," it was proposed in previous revision bills to substitute "works created by an employee within the regular scope of his employment." We would adopt this more precise language as a definition of "works made for hire."²⁵

Case law has proven adequate, even under the 1909 Act, to reach reasonable conclusions on the scope of this language, as summarized in Study 13 of the Copyright Law Revision Studies²⁶ published in 1958, and, of course, in many law review articles.

23. *Id.*

24. 17 U.S.C. § 101.

25. U.S. Register of Copyrights, Copyright Law Revision Report 87 (1961).

26. See text at note 33 *infra*.

The Register's 1965 Supplementary Report [Yellow Book] reminds us that:

The definition now in section 101 represents a carefully worked out compromise aimed at balancing legitimate interests on both sides.²⁷

Also, *Epoch Producing Corp. v. Killiam Shows, Inc.*,²⁸ noted that:

The right of the employer to direct and supervise the manner in which the work is performed has been deemed the "crucial question" and the "hallmark of 'an employment for hire' relationship." Consequently, when an alleged employer does not have the right to direct, control, or supervise the work of an author, there exists no employment relationship. Several factors to be considered in this regard include whether the author's work was edited by his employer and whether there was any control over the style and content of the work.

Finally, the fact that the work was created at the instance, expense, time and facilities of the employer has been considered as pertinent factors in establishing an employment relationship.²⁹

The Congress of the United States has elected to define the term in a way thought to permit the Courts to accommodate competing interests, more importantly, "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Section 201(b) of the Act is referred to as ". . . one of the basic principles of the present law."³⁰

This principle of law has particular application to the exclusionary provisions of § 203 and § 304(c) of the Act, dealing with the new statutory concept relating to termination of transfers under certain circumstances. Both § 203 and § 304(c) expressly exclude from their application any work made for hire. As stated in H. Rep. 94-1476:

The right of termination would not apply to "works made for hire," which is one of the principal reasons the definition of that term assumed importance in the development of the

27. U.S. Register of Copyrights, Copyright Law Revision, Supplementary Report, Part 6, at 66 (1965).

28. 522 F.2d 737 (1975).

29. *Id.* at 744, as quoted in Angel and Tannenbaum, *Works Made for Hire Under S.22*, 22 N.Y.L. Sch. L. Rev. 209, 223 (1976).

30. H. Rep. No. 94-1476 (1976) at 121.

bill.³¹

TERMINATION OF TRANSFERS AND LICENSES UNDER § 203 AND § 304(C) OF THE ACT

These Sections reflect a careful statutory balance, resulting from Congressional consultation with all interested parties who had been sought out, consulted and heard from during the development, drafting and adoption of the Act.

The right under § 304(c) to terminate pre-Act transfers with respect to the nineteen-year extension of the duration of the copyright renewal term, *subject to the right to continue to utilize derivative works previously made under authority of the grant*, would seem to be a fair balance of interests as between the public interest, authors and users.

The right under § 203 to terminate post-Act transfers may be exercised during the period of five years beginning thirty-five years after the grant of rights, *subject to the right to continue to utilize derivative works previously made under authority of the grant*. The thirty-five-year period would, again, seem to represent a reasonable period, and was the result of long and studious consideration during the legislative process.

The notice concept—termination is not automatic—and the mechanics of such notice requirements, together with the applicable regulations, seem to be appropriate.

*Works made for hire are not subject to the termination of rights provisions of the Act. Indeed, as noted above, this was "one of the principal reasons the definition of that term assumed importance in the development of the bill."*³²

BACKGROUND

As stated in one of the classic Studies made by the U.S. Copyright Office preparatory to revision of the 1909 Act:

A subsidiary question is raised if copyright is to be vested initially in the employer. Should he be designated somewhat artificially as the "author" or merely as the first owner of copyright? Prior revision bills have differed on this point, as do foreign laws. The choice of designation should be made with appreciation of the consequences, noted earlier, which may be incident to the status of authorship, regardless of questions of copyright ownership. For example, whether the

31. *Id.* at 125.

32. *Id.*

employer or employee is deemed to be the author may determine the eligibility of a work for protection where its eligibility depends upon the nationality of the author, or may determine the duration of copyright under a system where the term is based on the life of the author.³³

As indicated in the previous section of this paper dealing with statutory termination of transfers and licenses, the Congress acted purposefully in continuing the traditional rule in the United States that the employer is "considered the author," with full regard to the related consequences affecting termination rights, duration and nationality of the work.

Although the Anglo-Saxon concept, and more particularly the American rule, is sometimes referred to as a "fictio juris" or as "artificial" or as a "fiction," inquiry into the purposes and results of this legal structure is crucial to analysis of the subject of this study.

In the major underlying Report of the United States Copyright Office to the Congress, the Register of Copyrights, pointing out that this legal structure is the simple and convenient mechanism to achieve legislative decisions, said in 1965 that:

In the course of drafting, however, it became clear that there are great advantages of convenience and simplicity in assimilating employers to "authors" for all purposes. It was also pointed out that failure to identify the employer as "author" might have unintended consequences as, for example, with respect to the protection of motion pictures in foreign countries. Thus, *since the advantages of making the employer an "author" for purposes of the statute outweigh any conceptual difficulties involved in doing so*, subsection (b) of section 201 provides that, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title. . . ."³⁴

Melville B. Nimmer, Professor of Law at the University of California, Los Angeles, has pointed out that:

Under Section 201(b) of the current Act the parties may agree that the employee rather than the employer "owns all rights comprised in the copyright," but the proviso that "the employer or other person for whom the work was prepared is

33. Study No. 13, Borge Varmer, *Works Made For Hire And On Commission* (1958), reprinted in 1 *Studies on Copyright*, Arthur Fisher Memorial Ed. 717, 732 (1963).

34. Copyright Law Revision, Part 6, Supplementary Report of the Register of Copyrights [Yellow Book] at 66.

considered the author for purposes of this title" is not subject to variation by agreement between the parties. Is it unconstitutional to thus confer authorship status upon the employer "regardless of circumstances?" Probably not, since the employer is not thereby favored over the employee regardless of the intent of the parties. They may agree that the "rights comprised in the copyright" are effectively owned by the employee. *The other legal consequences of authorship status, which are not subject to contrary agreement by the parties, do not favor the employer over the employee. They go rather to the copyrightability of the work, and to the term of protection. The same results could have been achieved even if the employee rather than the employer were deemed the "author."* The fiction of the employer as author was employed for these purposes not in order to achieve substantive results that could not have been otherwise achieved, but rather because of the "convenience and simplicity" of this manner of achieving such results (italics added).³⁵

Indeed, the same sophisticated analysis appears in the other statutes referred to in this paper—in France, in Italy and in the United Kingdom. *The question is: what are the consequences, and how are the rights and obligations of the auteur balanced?*

THE U.K. REDWOOD CASE

Of particular interest in international copyright law, in relation to works made for hire, including certain types of commissioned works, is the 1980 decision in the *Redwood* case in the House of Lords.³⁶

At issue were questions as to the application of the reversionary provisions of Section 5(2) of U.K. Copyright Act, 1911 ("the 1911 Act"), as and to the extent continued in force by U.K. Copyright Act, 1956 ("the 1956 Act"). Under the Acts of 1911 and 1956, certain assignments of copyright and grants of interests therein made by an author between July 1, 1912 and June 1, 1957, automatically revert to the

35. Nimmer on Copyright, § 1.06[C], at page 1-41 (1981).

36. *Chappel & Co. Ltd. v. Redwood Music Ltd., and Redwood Music Ltd. v. Francis Day and Hunter Ltd.* 2 All E.R. 817 (1980). In the courts below, see *Redwood Music Ltd. v. B. Feldman & Co. Ltd.* in the Court of Appeal (1979) RPC 385; and, in the Queen's Bench Division of the High Court of Justice, *Redwood Music Ltd. v. Francis Day and Hunter Ltd.* (1978) RPC 429; *Redwood Music Ltd. v. B. Feldman & Co. Ltd.* (1979) RPC 1; *Redwood Music Ltd. v. Chappel & Co. Ltd.* (1980) RPC 337; and *Redwood Music Ltd. v. Chappel & Co. Ltd.* (1982) RPC 109.

author's "legal representatives as part of his estate" twenty-five years after the death of the author.³⁷

There are three specific exceptions to the operation of this reversion clause.

Excluded are:

- (A) Collective works, if separately copyrightable, or a license to publish a work or part of a work as part of a collective work; and
- (B) Certain works specially ordered or commissioned, such as photographs and portraits; and
- (C) Works made by a person under a contract of service where the work was made in the course of such employment.³⁸

Redwood decided that a musical work was not a collective work within the meaning of the foregoing exception, even if the lyrics were written by one person and the music was composed by another person; therefore the reversion clause applied to the musical works before the Court.

The House of Lords also held that a particular United States contract, under which a deceased author's statutory successors granted U.S. renewal rights to a publisher, was too narrowly drawn to include, in the words of Section 5(2), "the reversionary interest in the copyrights expectant," the twenty-five year balance of the U.K. copyright term, which reverted to the author's legal representatives.³⁹

One of the Lords Justice, Lord Keith of Kinkel, noted that, while preferring to reserve his opinion for another day, some collective works might "engender" a separate copyright, "distinct from the copyrights in the individual parts" of the collective work, and would, therefore, come within the exception and not revert. Lord Keith referred to examples such as a "literary text and illustrations closely intermingled . . . or a complicated work comprising musical and literary components such as an opera."⁴⁰ Although potentially involving additional issues, we may

37. Section 5(2) of the 1911 Act, quoted in *Redwood* and reprinted in the Appendix to Copinger and Skone James on Copyright (12th ed. 1980); the transitional provisions of the 1956 Act, in relation to Section 5(2) of the 1911 Act are discussed in *Redwood*, especially (1979) RPC 1, and at Paragraph 419 of Copinger and Skone James on Copyright.

38. Section 5(1) of the 1911 Act; Paragraph 420 of the Copinger and Skone James on Copyright, *supra* note 37 above; Rosen and Silber, *Reversion Under British Copyright Law*, 1 Journal of Copyright, Entertainment and Sports Law of the Tennessee Bar Association 67, 68 (1982).

39. 2 All E.R. 817, 822, 827-28.

40. 2 All E.R. 817, 831.

speculate that a motion picture may be such a "complicated work," not subject to reversion.

The *Redwood* case resulted in a settlement agreement establishing certain mechanisms for its practical application to thousands of musical works that may come within the rule of that case.

As is generally known in the music industry, the settlement includes a provision that United States works which, under the United States Copyright Act, would be deemed to be works made for hire, will be deemed to be contract of employment works for the purposes of the exception in Section 5(1)(b) of the 1911 Act,⁴¹ and will not revert.

THE KAMINSTEIN LEGISLATIVE HISTORY PROJECT

The attention of the Bar is called to the invaluable research help now to be found in *The Kaminstein Legislative History Project: A Compendium and Analytical Index of Materials Leading to the Copyright Act of 1976*, the first four volumes of which [five or six volumes are projected] are now available through The Copyright Society of the U.S.A. and New York University School of Law.⁴²

DIRECTIONS FOR THE EIGHTIES

In the United Kingdom, copyright revision is again under serious consideration. The 1977 Whitford Committee Report⁴³ has, in 1981, now resulted in the Government's Green Paper,⁴⁴ a sixty-one-page Report of considerations and recommendations for change in U.K. Copyright Act, 1956.

The U.K. Government has asked for a wide public comment, stating at page one of the Green Paper that the "purpose of this document is to invite public comment on proposals made for the revision of the law relating to copyright, industrial designs and performers'

41. On the application of U.K. law or U.S. law, *see* *Redwood Music Ltd. v. Francis Day and Hunter Ltd.* (1978) RPC 429, per Goff, J. citing *Campbell Connelly and Co. v. Noble* (1963) 1 All E.R. 237, discussed in Colby, *International Copyright Protection*, 44 RIDA 98 at 129-31, and X New York Law Forum 45, 53-4 (1964). *Campbell Connelly* is quoted at length in 10 Journal of The Copyright Society of the U.S.A., item 96 at 121-24 (1962).

42. The Research materials that are so carefully the subject of this Compendium and Analytical Index are to be found in major libraries, and in the private collections of the consultants who dedicated so many years to the development of the 1976 Act.

43. Report on Copyright and Designs Law (Cmnd. 6732).

44. Reform of the Law relating to Copyright, Designs and Performers' Protection, A Consultative Document (Cmnd. 8302). Reprinted in 28 Journal of The Copyright Society of the U.S.A. 569-629 (1981).

protection."⁴⁵

Indications at present are that interested parties and their representatives have accepted this suggestion of the U.K. Government, and the debate rages, calmly of course.

In the United States, particular issues excite interest in some areas, receiving careful and reflective consideration by the Congress.⁴⁶ Contributing resources to the debate are the legislative history of the 1976 Act, reminding many of the thorough evaluation of alternatives developed during the more than twenty-year study that led to the United States Copyright Act of 1976.⁴⁷

The legislative compromises embodied in the United States Copyright Act, as supplemented by collective bargaining agreements and other agreements with such representative organizations as performing rights societies, continue an American tradition of law, under the United States Constitution.

Emerging developments—reflecting a sense of adherence to reasonable solutions reached as recently as 1976, together with judicial elaboration of Congressional intent in differing fact situations—encourage one to believe in harmonization of the laws of many countries, without loss of traditional principles of law in the United States and in the United Kingdom.

45. *Id.* at 1.

46. For example, *see* the Transcript of the Hearings on October 1, 1982, in Washington, D.C., before the Committee on the Judiciary of the United States Senate, at which the writer was privileged to testify, 72-104, and to submit a twenty-six page Written Statement, on S. 2044, 97th Congress, 2d Session, a Bill to amend the Copyright Act regarding works made for hire.

47. *See* note 42 *supra* and accompanying text. Colby, *Music in Motion Pictures*, 30 Journal of The Copyright Society of the U.S.A. 34 (1982).

