Nimmer on Copyright

MELVILLE B. NIMMER
DAVID NIMMER

LexisNexis

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Neil P. Myers, J.D. at ..... 1-800-424-0651 Ext. 3247
Email: ..... neil.myers@lexisnexis.com
Valri Nesbit, J.D., LL.M. at ..... 1-800-424-0651 Ext. 3343
Email: ..... valri.nesbit@lexisnexis.com
Outside the United States and Canada please call ..... (908) 464-6800

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844
Outside the United States and Canada, please call ..... (518) 487-3000
Fax Number ..... (518) 487-3584
Customer Service Website ..... http://www.lexisnexis.com/custserv/

For information on other Matthew Bender Publications, please call

Your account manager or ..... (800) 223-1940
Outside the United States and Canada, please call ..... (518) 487-3000

Library of Congress Card Number 64–1725

ISBN 978-0-8205-1465-9

Cite this publication as:

[Vol. no.] Melville B. Nimmer and David Nimmer, Nimmer on Copyright § [sec. no.] (Matthew Bender, Rev. Ed.)
Example:
2 Melville B. Nimmer and David Nimmer, Nimmer on Copyright § 7.21[B][2] (Matthew Bender, Rev. Ed.)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW BENDER

Volume 9 Table of Contents

APPENDIX 15

Supplementary Register's Report on the General Revision of the U.S. Copyright Law (1965)

HOUSE COMMITTEE PRINT
(89th Congress, 1st Session)

MAY 1965

Printed for the use of the House Committee on the Judiciary

[iii] CONTENTS

[V] FOREWORD

The House Committee on the Judiciary has heretofore issued four prints in the "Copyright Law Revision" series, covering the progress of the revision program from the initial *Report of the Register of Copyrights* issued in July 1961 up to the preparation of the bill (H.R. 11947 and S. 3008, 88th Cong.) introduced on July 20, 1964. The discussions and comments on the 1964 bill are in the process of being assembled for issuance as part 5 in the series.

The 1964 bill was modified in the light of these discussions and comments, and a new bill was introduced on February 4, 1965 (H.R. 4347 and S. 1006, 89th Cong.). The Register of Copyrights has now submitted his *Supplementary Report* which explains the 1965 bill in detail. Because of its immediate importance in connection with forthcoming hearings on the 1965 bill, the *Supplementary Report* is being issued at this time as part 6 in the "Copyright Law Revision" series, preceding the release of part 5.

In issuing this material the committee neither approves nor disapproves any of the views expressed therein. It is believed that this material will be valuable, both now and in the future, to all persons concerned with the copyright law.

EMANUEL CELLER,
Chairman, Committee on the Judiciary.

[May 26, 1965]

---

* Editor's note: This material is omitted in reprint.

** Editor's note: This material is omitted in reprint.

[VII] LETTERS OF TRANSMITTAL

THE LIBRARIAN OF CONGRESS,
Washington, D.C., May 13, 1965.

THE HONORABLE JOHN W. MCCORMACK,
Speaker of the House of Representatives,
Washington, D.C.

SIR: In 1955, under an authorization by Congress, the 3opyright Office undertook a program of studies and legislative drafting aimed at the general revision of the copyright law, title 17 of the United States Code. So far this program has produced: a series of 35 studies, all but one of which were published in the form of committee prints issued by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary; the 1961 *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, containing detailed recommendations for a revised statute; the 1963 preliminary draft of a revision bill, issued for discussion by the Panel of Consultants on General Revision of the Copyright Law; three volumes of transcripts of discussions and written comments on the 1961 *Report* and the 1963 preliminary draft; the copyright law revision bill of 1964 (H.R. 11947, H.R. 12354, S. 3008, 88th Cong., 2d sess.); and the copyright law revision bill of 1965 (H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, S. 1006, 89th Cong., 1st sess.). A volume of discussions and comments on the 1964 bill is still in preparation, and will be issued as "Copyright Law Revision, Part 5."

As explained in the attached letter of transmittal from the Register of Copyrights, the Copyright Office has prepared a *Supplementary Report* to accompany the 1965 bill. This report not only contains a detailed explanation of the provisions of the pending bills, but also includes, as an appendix, a comparative table consisting of a section-by-section reprint of the present law, the 1965 and 1964 bills, and the preliminary draft of 1963.

I am pleased to submit this *Supplementary Report of the Register of Copyrights on General Revision of the U.S. Copyright Law* to you and to the Vice President for consideration and use by the Congress.

Very truly yours,
L. QUINCY MUMFORD,
Librarian of Congress.

Enclosures:

Transmittal letter from Register of Copyrights.

Supplementary Report.

[VIII] Office of the Register of Copyrights,

Copyright Office,
The Library of Congress,
Washington, D.C., May 13, 1965.

Honorable L. Quincy Mumford,
Librarian of Congress,
Washington, D.C.

Sir: This report is a supplement to the *Report of the Register of Copyright on the General Revision of the U.S. Copyright Law,* submitted to the Congress in July 1961. As explained in the preface, the purpose of the *Supplementary Report* is to set forth the reasons for changing a number of the recommendations in the 1961 *Report,* and to clarify the meaning of the provisions of the copyright law revision bill of 1965.

The *Supplementary Report* represents an effort to state, as frankly as we can, the thinking behind the language of the 1965 bill and, in many cases, the arguments for and against particular provisions. We also point to language in the 1965 bill which requires further study, and it should be clear that we envisage the possibility of amendments as the legislative inquiry proceeds. What success the revision program has achieved so far is the result of a willingness on the part of a number of people to enter into a continuing dialog in which alternative solutions were scrutinized and debated. A decade of this kind of thorough exploration has convinced me that, while the problems in copyright law revision have no simple or ineluctable solutions, none of them are irreconcilable.

In the last 5 years my colleagues on the Copyright Office General Revision Steering Committee, now including George D. Cary, the Deputy Register of Copyrights, Abe A. Goldman, General Counsel, Barbara A. Ringer, Assistant Register of Copyrights for Examining, and Waldo H. Moore, Chief of the Reference Division, have spent endless hours on revision. A temporary illness has forced me

to the sidelines since March, but in my absence George Cary has actively and effectively carried the work forward. The very difficult task of putting precisely what we had in mind into words, both in the *Report* of 1961 and the *Supplementary Report* of 1965, has fallen to the gifted pens of Barbara Ringer and Abe Goldman.

I am proud to submit this *Supplementary Report* to you for transmittal to the Congress, as a part of our continuing obligation to work toward the formulation of a new copyright law.

Sincerely yours,
ABRAHAM L. KAMINSTEIN,
Register of Copyrights.

Enclosure:

Supplementary Report.

[IX] PREFACE

THE PROGRAM FOR GENERAL REVISION SINCE 1961

Introduction.—While some consider it strange that it took this long and others marvel that it got this far, the program for general revision of the copyright law has finally entered its legislative phase. The program started with a study phase which began in 1955 and lasted 6 years. This first phase ended in July 1961, when we submitted to Congress the *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law,** containing detailed recommendations for an omnibus statute. The next phase, which was devoted to discussion, debate, and drafting, lasted for 3 years and culminated in the introduction of a revision bill in both Houses of the 88th Congress for purposes of further discussion and comment.

Then followed an interim period of about 6 months during which the Copyright Office redrafted the bill in the light of the detailed comments and suggestions it had received. The final, legislative phase of the program began on February 4, 1965, when Senator McClellan and Representative Celler introduced the bill with the

* Citations to the *Report*, and to the later collections of comments and discussions published in connection with the program for general revision, will be found in App. A.

expectation of active congressional consideration during the current session of the 89th Congress. This supplementary report is intended both as an end product of the drafting phase and as an introduction to the legislative phase of the revision program.

The Development of a Draft Bill.—The *Register's Report* of 1961 was intended as a means and not as an end. Its tentative recommendations were considered carefully and advanced seriously, but their purpose was not to state a final Copyright Office position or even to argue the ultimate merits of a particular point of view. The purpose of the *Report* was to furnish a tangible core around which opinions and conclusions could crystallize; thus forming the basis for agreement on the principles to be embodied in a bill. Despite the criticism provoked by some of its proposals, and despite the radical differences between its recommendations and the bill now pending, I believe the *Report* accomplished what it set out to do.

We had expected the *Report* to be controversial, but I cannot honestly say that we were prepared for the fervent opposition to some of its major recommendations. At the same time the *Report* had the effect of prodding a good many people out of their seemingly list[X]less attitude toward copyright revision. At 4 full-day meetings of the Panel of Consultants on General Revision, held from September 1961 to March 1962, to discuss the *Report*'s recommendations in detail, there was little evidence of apathy or indifference. And, along with the free-swinging attacks and complaints, there were also a number of constructive, well-reasoned arguments. Most of the statements at the Panel meetings, as well as a substantial body of written comments, deserved and received serious consideration.

The focal point of opposition to the *Report* was its proposal on the start and length of the copyright term, which lay at the heart of the entire revision program. We had recommended that copyright begin with the "public dissemination" of a work—a concept that would include public performance as well as the distribution of copies and sound recordings—and that it last for a first term of 28 years, renewable for a second term of 48 years. There was very little support for these recommendations, and there was strong sentiment favoring copyright from creation of the work, and the term most common in foreign copyright laws, based on the life of the author and a period of 50 years after his death.

Changes on matters of substance as fundamental and as important as these could not be undertaken lightly. It required a good deal of time to absorb and analyze the body of comments we received and to come to decisions as to which recommendations we were going to abandon or revise and what new recommendations we were going to make. Moreover, the intensity and force of the controversy stirred up by the *Report* made it imperative that we remain detached from the conflicts while we were reviewing the issues in dispute. There was a period during which the revision program, on the surface at least, appeared to be in a state of suspended animation. What we were doing in the Copyright Office at this time, in addition to allowing the flames to burn down a little, was trying to decide what the next steps in copyright law revision ought to be; but our apparent inactivity and our silence as to our intentions made some people very restless, and there were suggestions that we were being stubborn or aloof.

The hardening of opposition and the aura of controversy that surrounded the *Report* became apparent toward the end of 1961, and it is no exaggeration to say that during 1962 the revision program went through a serious crisis. Fortunately, the program emerged from this stormy period considerably stronger and better founded than before. For its part the Copyright Office was quite properly spurred on to reach decisions, and to speed up its action toward preparing a finished bill. On the part of those who did the spurring, there was a new realization of the immensity of this task. On all sides there was increased respect, understanding, and a recognition of the need for [XI] flexibility and compromise. Although we have been over some bumpy roads since 1962, from that time on I have never doubted that we were traveling forward.

In November 1962, I announced that the Copyright Office was prepared to change its position on some debatable questions and to draft alternative language on others. I indicated, for example, that the Office contemplated revising its recommendations concerning "public dissemination" in the light of the justifiable criticism that had been directed against it, that the Office's draft bill would be based on the concept of a single federal system of copyright from creation, and that it would present alternative proposals with respect to the length of the copyright term.

During the following year, beginning in January 1963 and ending in January 1964, the Office held another series of 7 full-day meetings

and an eighth 2-day meeting with a greatly enlarged Panel of Consultants consisting, in effect, of anyone with sufficient interest to be heard on the subject. At each meeting we presented preliminary drafts, including alternatives in some cases, covering virtually all of the provisions of a new law. These draft provisions were prepared on the basis of an intensive analysis and evaluation of the comments received on the appropriate section of the *Register's Report*, and of any equivalent language in foreign laws and previous revision bills.

Like the *Register's Report*, the preliminary draft was an experimental device for provoking discussion and suggestions. In many of the sections we were trying out ideas, and throughout the draft we deliberately laid out the provisions in more detail than necessary in order to direct attention to as many problems of content and language as possible.

Again, although various provisions of the preliminary draft attracted considerable adverse criticism and opposition at the time, the draft as a whole served its intended purpose. It laid the foundation for a consensus on some of the issues previously in controversy. It elicited a large number of meaningful and constructive comments and suggestions, both at the Panel meetings and in written statements. It also formed the basis for meetings, discussions, and exchanges of correspondence with the various subcommittees of American Bar Association Committee 304 (under the notably competent chairmanship of John Schulman), and with many interested organizations and individuals. All of this contributed materially to the bill.

During the 6 months following the last of the Panel meetings on the preliminary draft the Copyright Office undertook a complete review and revision of the draft, section by section. Every comment or suggestion we had received was given consideration. On questions of substance the Office reviewed all of the policy arguments that had [XII] been presented, and in some cases modified the provisions of the draft or adopted an entirely new approach. On matters of language there was very extensive redrafting and boiling down of wordage with the thought of making the bill as brief, simple, and clear as the inherently complex subject matter permits. The outcome of all this concentrated effort was the copyright law revision bill of 1964, introduced in both Houses of Congress on July 20, 1964.

A full week of discussions on the new bill, including a 2-day meeting of the Panel of Consultants, were held in New York early in August 1964. On the whole the response was gratifying: a great many of the earlier detailed substantive issues and technical drafting questions had simply dropped out of the discussions. At the same time it became clear that several major issues remained to be settled, and this was borne out by the written and verbal comments made to the Copyright Office during the remaining months of 1964. Not all of these issues were capable of reconciliation, but part of the Office's effort in redrafting the bill was to work toward fair and acceptable compromises on as many of them as possible.

The Copyright Law Revision Bill of 1965

With his usual wisdom and foresight, Arthur Fisher, my predecessor as Register of Copyrights who died in 1960, planned the revision program as a long-range project involving nearly unlimited amounts of time and effort. He realized that unless we first knew what we were talking about and then drafted a bill that was general enough to be comprehensible and detailed enough to hold water, there would be little purpose in bringing a bill to the point of congressional hearings. Most important, he recognized the need for reconciling the fierce conflicts between the many special interests in the field; he knew that stubborn opposition on a few fundamental issues could doom this revision program as surely as it has all of the past efforts. To bring the program to this point we have had to explore every question, analyze every argument, discuss, consult, confer, and look for workable compromises on issues that some people claimed were irreconcilable.

It has been said that laws, like children, often turn out to be quite different from what their parents expected, and it is possible that Arthur Fisher might not recognize the bill now pending in Congress as the culmination of his efforts. There have been a great many changes, some of them on matters of fundamental importance, from the recommendations in the *Register's Report*.

While the actual drafting of the bill was done by the Copyright Office without direct consultation with anyone outside the Government, we have consistently tried to obtain and consider the viewpoints of [XIII] every group concerned in copyright. Most of the changes in the bill were made because the Copyright Office was persuaded that, on balance, the arguments for them were valid. Other changes represent carefully worked-out compromises in

the public interest, between legitimate but opposing points of view; while they may not represent the ideal solution to a particular problem, I believe that these compromises are necessary, desirable, and worthy of support. I also hope I am correct in my conviction that all the changes reflect, not vacillation or indifference, but a painstaking, persistent, open-minded effort to achieve the best copyright statute we can get. This was Arthur Fisher's goal, and for that reason I believe he would be proud of what has been accomplished so far.

The introduction of bills for hearings in 1965 is, of course, a milestone in the revision program, but it is not the end of the road. It should be obvious by now that neither the bill nor this supplementary report represents any final statement of the fixed views of the Copyright Office. Our purpose is the enactment and implementation of a good, clear, practical copyright law that will reward authors and thereby encourage the arts and humanities; and we are aware that further changes will undoubtedly need to be considered.

Scope of This Supplementary Report

A number of the recommendations in the *Register's Report* of 1961 have been incorporated without substantial change in the Copyright Law Revision Bill of 1965. Except where they have been retained in the face of strong opposition, there seems no point in repeating the reasoning behind these recommendations. The main purpose of this supplementary report is to explain why we modified or completely changed many of our earlier recommendations and, in a few cases, why we have included provisions on points not covered by the 1961 *Report*.

We have decided not to burden this supplement by attempting to trace in detail how the language and content of the current bill evolved through the intermediate stages of the preliminary draft of 1963 and the bill of 1964. The comparative tables in Appendix B, which show the language of the present law, the 1965 and 1964 bills, and the 1963 draft on every provision, can be used for this purpose. Taken together with the original *Register's Report* of 1961, this supplementary report is intended to explain the thinking that went into the 1965 bill and to illuminate some of its language.

The Continuing Problem of Copyright Law Revision

At the groundbreaking ceremony for the John F. Kennedy Center for the Performing Arts on December 2, 1964, President Johnson

[XIV] opened his remarks by recalling President Kennedy's memorable address at Amherst College the month before his death, in which he said:

> I look forward to an America which will reward achievement in the arts as we reward achievement in business or statecraft.
>
> I look forward to an America which will steadily raise the standards of artistic accomplishment and which will steadily enlarge cultural opportunities for all of our citizens.
>
> And I look forward to an America which commands respect throughout the world not only for its strength but for its civilization as well.

President Johnson pointed to the Kennedy Center as symbolizing "our belief that the world of creation and thought are at the core of our civilization":

> Only recently in the White House, we helped commemorate the 400th anniversary of Shakespeare. The political conflicts and ambitions of his England are known to the scholar and the specialist. But his plays will forever move men in every corner of the world. The leaders that he wrote about live far more vividly in his words than in the almost forgotten facts of their own rule.
>
> Our civilization, too, will survive largely in the works of our creation. There is a quality in art which speaks across the gulf dividing man from man, nation from nation and century from century. * * *
>
> [I]t is important to know that the opportunity we give to the arts is a measure of the quality of our civilization. It is important to be aware that artistic activity can enrich the life of our people; which is the central object of government. It is important that our material prosperity liberate and not confine the creative spirit.

This unreserved recognition by the heads of our Government of the importance of creative endeavor in our national life is one of the most striking and encouraging of the trends that have emerged since 1961. At the same time it would be delusive to assume that there has been any general realization on the part of Government officials or the public that copyright is no less than the life's blood of this endeavor. Too many people still think of copyright law as the esoteric sporting ground of an "elite cadre," and regard its

impact as confined to a handful of unimportant industries and special interests. They have not yet seen that the interrelation between copyright and the communications revolution is fully as important to our age as the interrelation between copyright and the revolution brought on by the printing press was to an earlier one. Somehow people must be made to realize that the copyright statute of a country not only shapes its cultural and intellectual development, but actually penetrates into the lives and thinking of every citizen.

Speaking of automation someone observed recently that "invention is the mother of necessity": and in the copyright field this necessity is reaching crisis proportions. In recent years we have seen, among a multitude of technological developments, the introduction of com[XV]munications satellites, the tremendous growth in information storage and retrieval devices, changing patterns in broadcasting including the emergence of educational television and community antenna systems, radical changes in teaching methods by the use of new audio-visual devices, the proliferation of copying machines, and remarkable developments in the use of video tape. Not only is the 1909 statute dismally inadequate to deal with what is happening; we now find that even our 1961 recommendations were not flexible and forward-looking enough.

I realize, more clearly now than I did in 1961, that the revolution in communications has brought with it a serious challenge to the author's copyright. This challenge comes not only from the ever-growing commercial interests who wish to use the author's works for private gain. An equally serious attack has come from people with a sincere interest in the public welfare who fully recognize (in the words of Sir Arthur Bliss) "that the real heart of civilization, the letters, the music, the arts, the drama, the educational material, owes its existence to the author"; ironically, in seeking to make the author's works widely available by freeing them from copyright restrictions, they fail to realize that they are whittling away the very thing that nurtures authorship in the first place. An accommodation among conflicting demands must be worked out, true enough, but not by denying the fundamental constitutional directive: to encourage cultural progress by securing the author's exclusive right to him for a limited time.

Since 1961 I have also acquired a deeper understanding of the importance of American copyright law revision throughout the world. The days when the United States could play a lone hand in international copyright have been over for quite a while, but it is not

enough for us merely to seek and extend as much international cooperation as possible.

It is startling to realize, in an era when copyrighted materials are being disseminated instantaneously throughout the globe, that the United States has copyright relations with less than half of the world's nations. The injustice of this situation to authors here and abroad is obvious, but equally serious to our national interest is the lack of the cultural bridge between countries that copyright furnishes. And, even where copyright relations exist, the lack of uniformity in the scope and standards of protection results in unfairness and endless confusion.

The United States can, if it will, offer leadership in the effort to evolve a truly universal copyright system that takes account of national interests while at the same time offering effective uniformity and a fair reward to all authors. Many of the newly-independent [XVI] nations are at a turning point in the development of their own copyright systems, and suggestions have been made for bridging the gap between the Berne and Universal Copyright Conventions. Copyright law revision is the first necessary step we can take in meeting this tremendous challenge.

ABRAHAM L. KAMINSTEIN,
Register of Copyrights, Copyright Office, The Library of Congress.

[XVII] THE 1965 BILL IN SUMMARY

The following summary is intended to indicate the structure of the 1965 bill and to outline its principal provisions. Since no attempt is made here to describe the background on development of the bill or to analyze its language and content in detail, this summary is necessarily oversimplified. The provisions of the bill are thoroughly reviewed in the chapters of the *Supplementary Report* itself, and the text of the bill will be found in Appendix B.

SUBJECT MATTER OF COPYRIGHT

Basic requirements of copyright. In defining the general subject matter of copyright, section 102 drops the present reference to "all the writings of an author" and substitutes the phrase "original works of authorship." It also requires that protected works be "fixed" in a "tangible medium of expression." The manner or medium of fixation is irrelevant as long as it is tangible enough for the work to be perceived or made perceptible to the human senses, directly or with the aid of any machine or device "now known or later developed."

Categories of copyrightable works. Section 102 also includes an "illustrative and not limitative" listing of seven categories of copyrightable works. This list covers all classes of works that are copyrightable under the present law, designates "pantomimes and choreographic works" as a specific category, and adds a new category of "sound recordings."

National origin. Under section 104, as under the common law at present, protection would be granted to unpublished works without regard to the nationality or domicile of the author. As under the present statute, with relatively minor changes, published works of foreign origin would be protected only if the country of origin were covered by a treaty or a Presidential proclamation. The authority of the President would be broadened, however, to allow him to issue proclamations without regard to reciprocity "whenever he finds it to be in the national interest."

United States Government works. The bill retains the present prohibition against copyright in "publications of the U.S. Government" and expands it to cover any published or unpublished "work of the United States Government," which is defined as "a work prepared by an officer or employee of the United States Government within the scope of his official duties or employment." This definition would [XVIII] permit copyright to be secured in works prepared independently by private persons under a Government contract or grant, but section 105 contains no provision that would allow copyright to be secured in a "work of the United States Government" under any circumstances.