

## COPYRIGHT AND NEW TECHNOLOGIES

### **White-Smith Publishing Co. v. Apollo Co., 209 U.S. 1 (1908)**

DAY, Justice:

The actions were brought to restrain infringement of the copyrights of two certain musical compositions, published in the form of sheet music, entitled, respectively, "Little Cotton Dolly" and "Kentucky Babe." The appellee, defendant below, is engaged in the sale of piano players and player pianos, known as the "Apollo," and of perforated rolls of music used in connection therewith. The appellant, as assignee of Adam Geibel, the composer, alleged compliance with the copyright act, and that a copyright was duly obtained by it on or about March 17, 1897. The answer was general in its nature, and upon the testimony adduced a decree was rendered, as stated, in favor of the Apollo Company, defendant below, appellee here.

The action was brought under the provisions of the copyright act, § 4952, giving to the author, inventor, designer or proprietor of any book, map, chart, dramatic or musical composition the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and vending the same. The Circuit Courts of the United States are given jurisdiction under § 4970 to grant injunctions according to the course and principles of courts of equity in copyright cases. The appellee is the manufacturer of certain musical instruments adapted to be used with perforated rolls. The testimony discloses that certain of these rolls, used in connection with such instruments, and being connected with the mechanism to which they apply, reproduce in sound the melody recorded in the two pieces of music copyrighted by the appellant.

The manufacture of such instruments and the use of such musical rolls has developed rapidly in recent years in this country and abroad. The record discloses that in the year 1902 from seventy to seventy-five thousand of such instruments were in use in the United States, and that from one million to one million and a half of such perforated musical rolls, to be more fully described hereafter, were made in this country in that year.

It is evident that the question involved in the use of such rolls is one of very considerable importance, involving large property interests, and closely touching the rights of composers and music publishers. The case was argued with force and ability, orally and upon elaborate briefs.

Without entering into a detailed discussion of the mechanical construction of such instruments and rolls, it is enough to say that they are what has become familiar to the public in the form of mechanical attachments to pianos, such as the pianola, and the musical rolls consist of perforated sheets, which are passed over ducts connected with the operating parts of the mechanism in such manner that the same are kept sealed until, by means of perforations in the rolls, air pressure is admitted to the ducts which operate the pneumatic devices to sound the notes. This is done with the aid of an operator, upon whose skill and experience the success of the rendition largely depends. As the roll is drawn over the tracker board the notes are sounded as the perforations admit the atmospheric pressure, the perforations having been so arranged that the effect is to produce the melody or tune for which the roll has been cut.

Speaking in a general way, it may be said that these rolls are made in three ways. First. With the score or staff notation before him the arranger, with the aid of a rule or guide and a graduated schedule, marks the position and size of the perforations on a sheet of paper to correspond to the order of notes in the composition. The marked sheet is then passed into the hands of an operator who cuts the apertures, by hand, in the paper. This perforated sheet is inspected and corrected, and when corrected is called "the original." This original is used as a stencil and by passing ink rollers over it a pattern is prepared. The stenciled perforations are then cut, producing the master or templet. The master is placed in the perforating machine and reproductions thereof obtained, which are the perforated rolls in question. Expression marks are separately copied on the perforated music sheets by means of rubber stamps. Second. A perforated music roll made by another manufacturer may be used from which to make a new

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record. Third. By playing upon a piano to which is attached an automatic recording device producing a perforated matrix from which a perforated music roll may be produced.

It is evident, therefore, that persons skilled in the art can take such pieces of sheet music in staff notation, and by means of the proper instruments make drawings indicating the perforations, which are afterwards outlined and cut upon the rolls in such wise as to reproduce, with the aid of the other mechanism, the music which is recorded in the copyrighted sheets.

The learned counsel for the parties to this action advance opposing theories as to the nature and extent of the copyright given by statutory laws enacted by Congress for the protection of copyright, and a determination of which is the true one will go far to decide the rights of the parties in this case. On behalf of the appellant it is insisted that it is the intention of the copyright act to protect the intellectual conception which has resulted in the compilation of notes which, when properly played, produces the melody which is the real invention of the composer. It is insisted that this is the thing which Congress intended to protect, and that the protection covers all means of expression of the order of notes which produce the air or melody which the composer has invented.

Music, it is argued, is intended for the ear as writing is for the eye, and that it is the intention of the copyright act to prevent the multiplication of every means of reproducing the music of the composer to the ear.

On the other hand, it is contended that while it is true that copyright statutes are intended to reward mental creations or conceptions, that the extent of this protection is a matter of statutory law, and that it has been extended only to the tangible results of mental conception, and that only the tangible thing is dealt with by the law, and its multiplication or reproduction is all that is protected by the statute.

Before considering the construction of the statute as an independent question the appellee invokes the doctrine of *stare decisis* in its favor, and it is its contention that in all the cases in which this question has been up for judicial consideration it has been held that such mechanical producers of musical tones as are involved in this case have not been considered to be within the protection of the copyright act; and that, if within the power of Congress to extend protection to such subjects, the uniform holdings have been that it is not intended to include them in the statutory protection given. While it may be that the decisions have not been of that binding character that would enable the appellee to claim the protection of the doctrine of *stare decisis* to the extent of precluding further consideration of the question, it must be admitted that the decisions, so far as brought to our attention in the full discussion had at the bar and upon the briefs, have been uniformly to the effect that these perforated rolls operated in connection with mechanical devices for the production of music are not within the copyright act. It was so held in *Kennedy v. McTammany*. The decision was written by Judge Colt in the First Circuit; the case was subsequently brought to this court, where it was dismissed for failure to print the record. In that case the learned judge said:

“I cannot convince myself that these perforated sheets of paper are copies of sheet music within the meaning of the copyright law. They are not made to be addressed to the eye as sheet music, but they form a part of a machine. They are not designed to be used for such purposes as sheet music, nor do they in any sense occupy the same field as sheet music. They are a mechanical invention made for the sole purpose of performing tunes mechanically upon a musical instrument.”

Again the matter was given careful consideration in the Court of Appeals of the District of Columbia in an opinion by Justice Shepard, in which that learned justice, speaking for the court, said:

“We cannot regard the reproduction, through the agency of a phonograph, of the sounds of musical instruments playing the music composed and published by the complainants, as the copy or publication of the same within the meaning of the act. The ordinary signification of the words ‘copying,’ ‘publishing,’ etc., cannot be stretched to include it.

“It is not pretended that the marking upon waxed cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph.

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“Conveying no meaning, then, to the eye of even an expert musician and wholly incapable of use save in and as a part of a machine specially adapted to make them give up the records which they contain, these prepared waxed cylinders can neither substitute the copyrighted sheets of music nor serve any purpose which is within their scope. In these respects there would seem to be no substantial difference between them and the metal cylinder of the old and familiar music box, and this, though in use at and before the passage of the copyright act, has not been regarded as infringing upon the copyrights of authors and publishers.”

The question came before the English courts in *Boosey v. Whight*, and it was there held that these perforated rolls did not infringe the English copyright act protecting sheets of music. Upon appeal Lindley, Master of the Rolls, used this pertinent language:

“The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music, *i.e.*, of the bars, notes, and other printed words and signs on these sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music.

“The plaintiff’s rights are not infringed except by an unauthorized copy of their sheets of music. We need not trouble ourselves about authority; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiff’s sheets of music.

“The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or enable the machines or instruments to produce the music indicated on the plaintiff’s sheets. In this sense the defendant’s perforated rolls have been copies from the plaintiff’s sheets.

“But is this the kind of copying which is prohibited by the copyright act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the meaning of the copyright act? A sheet of music is treated in the copyright act as if it were a book or sheet of letter press. Any mode of copying such a thing, whether by printing, writing, photography, or by some other method not yet invented, would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to play an instrument from a sheet of music which appears to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing.”

Since these cases were decided Congress has repeatedly had occasion to amend the copyright law. The English cases, the decision of the District Court of Appeals, and Judge Colt’s decision must have been well known to the members of Congress; and although the manufacture of mechanical musical instruments had not grown to the proportions which they have since attained they were well known, and the omission of Congress to specifically legislate concerning them might well be taken to be an acquiescence in the judicial construction given to the copyright laws.

This country was not a party to the Berne convention of 1886, concerning international copyright, in which it was specifically provided:

“It is understood that the manufacture and sale of instruments serving to reproduce mechanically the airs of music borrowed from the private domain are not considered as constituting musical infringement.”

But the proceedings of this convention were doubtless well known to Congress. After the Berne convention the act of March 3, 1891, was passed. Section 13 of that act provides:

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“SEC. 13. That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefits of copyright on substantially the same basis as to its own citizens; and when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the President of the United States by proclamation made from time to time as the purposes of this act may require.”

By proclamation of the President July 1, 1891, the benefit of the act was given to the citizens of Belgium, France, British possessions and Sweden, which countries permitted the citizens of the United States to have the benefit of copyright on the same basis as the citizens of those countries. On April 30, 1892, the German Empire was included. On October 31, 1892, a similar proclamation was made as to Italy. These countries were all parties to the Berne convention.

It could not have been the intention of Congress to give to foreign citizens and composers advantages in our country which according to that convention were to be denied to our citizens abroad.

In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory.

Musical compositions have been the subject of copyright protection since the statute of February 3, 1831, and laws have been passed including them since that time. When we turn to the consideration of the act it seems evident that Congress has dealt with the tangible thing, a copy of which is required to be filed with the Librarian of Congress, and wherever the words are used (copy or copies) they seem to refer to the term in its ordinary sense of indicating reproduction or duplication of the original. Section 4956 provides that two copies of a book, map, chart or musical composition, etc., shall be delivered at the office of the Librarian of Congress. Notice of copyright must be inserted in the several copies of every edition published, if a book, or if a musical composition, etc., upon some visible portion thereof. Section 4965 provides in part that the infringer “shall forfeit every sheet thereof, and one dollar for every sheet of the same found in his possession,” etc., evidently referring to musical compositions in sheets. Throughout the act it is apparent that Congress has dealt with the concrete and not with an abstract right of property in ideas or mental conceptions.

We cannot perceive that the amendment of § 4966 by the act of January 6, 1897, providing a penalty for any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, can have the effect of enlarging the meaning of the previous sections of the act which were not changed by the amendment. The purpose of the amendment evidently was to put musical compositions on the footing of dramatic compositions so as to prohibit their public performance. There is no complaint in this case of the public performance of copyrighted music; nor is the question involved whether the manufacturers of such perforated music rolls when sold for use in public performance might be held as contributing infringers. This amendment was evidently passed for the specific purpose referred to, and is entitled to little consideration in construing the meaning of the terms of the act theretofore in force.

What is meant by a copy? We have already referred to the common understanding of it as a reproduction or duplication of a thing. A definition was given by Bailey, J., in *West v. Francis*, quoted with approval in *Boosey v. Whight*. He said: “A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original.”

Various definitions have been given by the experts called in the case. The one which most commends itself to our judgment is perhaps as clear as can be made, and defines a copy of a musical composition to be “a written or printed record of it in intelligible notation.” It may be true that in a broad sense a mechanical instrument which reproduces a tune copies it; but this is a strained and artificial meaning. When the combination of musical sounds is reproduced to the ear it is the original tune as conceived by the author which is heard. These musical tones are not a copy which appeals to the eye. In no sense can musical sounds which reach us through the sense of hearing be said to be copies as that term

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is generally understood, and as we believe it was intended to be understood in the statutes under consideration. A musical composition is an intellectual creation which first exists in the mind of the composer; he may play it for the first time upon an instrument. It is not susceptible of being copied until it has been put in a form which other can see and read. The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.

Also it may be noted in this connection that if the broad construction of publishing and copying contended for by the appellants is to be given to this statute it would seem equally applicable to the cylinder of a music box, with its mechanical arrangement for the reproduction of melodious sounds, or the record of the graphophone, or to the pipe organ operated by devices similar to those in use in the pianola. All these instruments were well known when these various copyright acts were passed. Can it be that it was the intention of Congress to permit them to be held as infringements and suppressed by injunctions?

After all, what is the perforated roll? The fact is clearly established in the testimony in this case that even those skilled in the making of these rolls are unable to read them as musical compositions, as those in staff notation are read by the performer. It is true that there is some testimony to the effect that great skill and patience might enable the operator to read his record as he could a piece of music written in staff notation. But the weight of the testimony is emphatically the other way, and they are not intended to be read as an ordinary piece of sheet music, which to those skilled in the art conveys, by reading, in playing or singing, definite impressions of the melody.

These perforated rolls are parts of a machine which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious combination. But we cannot think that they are copies within the meaning of the copyright act.

It may be true that the use of these perforated rolls, in the absence of statutory protection, enables the manufacturers thereof to enjoy the use of musical compositions for which they pay no value. But such considerations properly address themselves to the legislative and not to the judicial branch of the Government. As the act of Congress now stands we believe it does not include these records as copies or publications of the copyrighted music involved in these cases.

The decrees of the Circuit Court of Appeals are  
*Affirmed.*

HOLMES, Justice, concurred:

In view of the facts and opinions in this country and abroad to which my brother Day has called attention I do not feel justified in dissenting from the judgment of the court, but the result is to give to copyright less scope than its rational significance and the ground on which it is granted seem to me to demand. Therefore I desire to add a few words to what he has said.

The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is *in vacuo*, so to speak. It restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit. It is a prohibition of conduct remote from the persons or tangibles of the party having the right. It may be infringed a thousand miles from the owner and without his ever becoming aware of the wrong. It is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, it is one which hardly can be conceived except as a product of statute, as the authorities now agree.

The ground of this extraordinary right is that the person to whom it is given has invented some new collocation of visible or audible points,—of lines, colors, sounds, or words. The restraint is directed

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against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way that he had the wit to devise. The restriction is confined to the specific form, to the collocation devised, of course, but one would expect that, if it was to be protected at all, that collocation would be protected according to what was its essence. One would expect the protection to be coextensive not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the result which gives to the invention its meaning and worth. A musical composition is a rational collocation of sounds apart from concepts, reduced to a tangible expression from which the collocation can be reproduced either with or without continuous human intervention. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute is too narrow ought to be made so by a further act, except so far as some extraneous consideration of policy may oppose. What license may be implied from a sale of the copyrighted article is a different and harder question, but I leave it untouched, as license is not relied upon as a ground for the judgment of the court.

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### **17 U.S.C. § 115(a) (2004)**

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording.

(2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner.

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### **Herbert v. Shanley, 242 U.S. 591 (1917)**

HOLMES, Justice:

These two cases present the same question: whether the performance of a copyrighted musical composition in a restaurant or hotel without charge for admission to hear it infringes the exclusive right of the owner of the copyright to perform the work publicly for profit. The last numbered case was decided before the other and may be stated first. The plaintiff owns the copyright of a lyric comedy in which is a march called "From Maine to Oregon." It took out a separate copyright for the march and published it separately. The defendant hotel company caused this march to be performed in the dining room of the Vanderbilt Hotel for the entertainment of guests during meal times, in the way now common, by an

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orchestra employed and paid by the company. It was held by the Circuit Court of Appeals, reversing the decision of the District Court, that this was not a performance for profit within the meaning of the act.

The other case is similar so far as the present discussion is concerned. The plaintiffs were the composers and owners of a comic opera entitled "Sweethearts," containing a song of the same title as a leading feature in the performance. There is a copyright for the opera and also one for the song which is published and sold separately. This the Shanley Company caused to be sung by professional singers, upon a stage in its restaurant on Broadway, accompanied by an orchestra. The District Court after holding that by the separate publication the plaintiffs' rights were limited to those conferred by the separate copyright, a matter that it will not be necessary to discuss, followed the decision in 221 Fed. Rep. 229, as to public performance for profit. The decree was affirmed by the Circuit Court of Appeals.

If the rights under the copyright are infringed only by a performance where money is taken at the door they are very imperfectly protected. Performances not different in kind from those of the defendants could be given that might compete with and even destroy the success of the monopoly that the law intends the plaintiffs to have. It is enough to say that there is no need to construe the statute so narrowly. 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 and that is enough.

*Decrees reversed.*

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### **Fortnightly Corp. v. United Artists Television, Inc., 392 U.S. 390 (1968)**

STEWART, Justice:

The petitioner, Fortnightly Corporation, owns and operates community antenna television (CATV) systems in Clarksburg and Fairmont, West Virginia. There were no local television broadcasting stations in that immediate area until 1957. Now there are two, but, because of hilly terrain, most residents of the area cannot receive the broadcasts of any additional stations by ordinary rooftop antennas. Some of the residents have joined in erecting larger cooperative antennas in order to receive more distant stations, but a majority of the householders in both communities have solved the problem by becoming customers of the petitioner's CATV service.

The petitioner's systems consist of antennas located on hills above each city, with connecting coaxial cables, strung on utility poles, to carry the signals received by the antennas to the home television sets of individual subscribers. The systems contain equipment to amplify and modulate the signals received, and to convert them to different frequencies, in order to transmit the signals efficiently while maintaining and improving their strength.

During 1960, when this proceeding began, the petitioner's systems provided customers with signals of five television broadcasting stations, three located in Pittsburgh, Pennsylvania; one in Steubenville, Ohio; and one in Wheeling, West Virginia. The distance between those cities and Clarksburg and Fairmont ranges from 52 to 82 miles. The systems carried all the programming of each of the five stations, and a customer could choose any of the five programs he wished to view by simply turning the knob on his own television set. The petitioner neither edited the programs received nor originated any programs of its own. The petitioner's customers were charged a flat monthly rate regardless of the amount of time that their television sets were in use.

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The respondent, United Artists Television, Inc., holds copyrights on several motion pictures. During the period in suit, the respondent (or its predecessor) granted various licenses to each of the five television stations in question to broadcast certain of these copyrighted motion pictures. Broadcasts made under these licenses were received by the petitioner's Clarksburg and Fairmont CATV systems and carried to its customers. At no time did the petitioner (or its predecessors) obtain a license under the copyrights from the respondent or from any of the five television stations. The licenses granted by the respondent to the five stations did not authorize carriage of the broadcasts by CATV systems, and in several instances the licenses specifically prohibited such carriage.

The respondent sued the petitioner for copyright infringement in a federal court, asking damages and injunctive relief. The issue of infringement was separately tried, and the court ruled in favor of the respondent. On interlocutory appeal under 28 U.S.C. § 1292 (b), the Court of Appeals for the Second Circuit affirmed. We granted certiorari, 389 U.S. 969, to consider an important question under the Copyright Act of 1909, 35 Stat. 1075, as amended, 17 U.S.C. § 1 *et seq.*

The Copyright Act does not give a copyright holder control over all uses of his copyrighted work. Instead, § 1 of the Act enumerates several "rights" that are made "exclusive" to the holder of the copyright. If a person, without authorization from the copyright holder, puts a copyrighted work to a use within the scope of one of these "exclusive rights," he infringes the copyright. If he puts the work to a use not enumerated in § 1, he does not infringe. The respondent's contention is that the petitioner's CATV systems infringed the respondent's § 1 (c) exclusive right to "perform . . . in public for profit" (nondramatic literary works) and its § 1 (d) exclusive right to "perform . . . publicly" (dramatic works). The petitioner maintains that its CATV systems did not "perform" the copyrighted works at all.<sup>13</sup>

At the outset it is clear that the petitioner's systems did not "perform" the respondent's copyrighted works in any conventional sense of that term, or in any manner envisaged by the Congress that enacted the law in 1909. But our inquiry cannot be limited to ordinary meaning and legislative history, for this is a statute that was drafted long before the development of the electronic phenomena with which we deal here. In 1909 radio itself was in its infancy, and television had not been invented. We must read the statutory language of 60 years ago in the light of drastic technological change.

The Court of Appeals thought that the controlling question in deciding whether the petitioner's CATV systems "performed" the copyrighted works was: "How much did the [petitioner] do to bring about the viewing and hearing of a copyrighted work?" Applying this test, the court found that the petitioner did "perform" the programs carried by its systems. But mere quantitative contribution cannot be the proper test to determine copyright liability in the context of television broadcasting. If it were, many people who make large contributions to television viewing might find themselves liable for copyright infringement—not only the apartment house owner who erects a common antenna for his tenants, but the shopkeeper who sells or rents television sets, and, indeed, every television set manufacturer. Rather, resolution of the issue before us depends upon a determination of the function that CATV plays in the total process of television broadcasting and reception.

Television viewing results from combined activity by broadcasters and viewers. Both play active and indispensable roles in the process; neither is wholly passive. The broadcaster selects and procures the program to be viewed. He may produce it himself, whether "live" or with film or tape, or he may obtain it from a network or some other source. He then converts the visible images and audible sounds of the program into electronic signals, and broadcasts the signals at radio frequency for public reception. Members of the public, by means of television sets and antennas that they themselves provide, receive the broadcaster's signals and reconvert them into the visible images and audible sounds of the program. The effective range of the broadcast is determined by the combined contribution of the equipment employed by the broadcaster and that supplied by the viewer.

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<sup>13</sup> The petitioner also contends that if it did "perform" the copyrighted works, it did not do so "in public."



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The television broadcaster in one sense does less than the exhibitor of a motion picture or stage play; he supplies his audience not with visible images but only with electronic signals. The viewer conversely does more than a member of a theater audience; he provides the equipment to convert electronic signals into audible sound and visible images. Despite these deviations from the conventional situation contemplated by the framers of the Copyright Act, broadcasters have been judicially treated as exhibitors, and viewers as members of a theater audience. Broadcasters perform. Viewers do not perform. Thus, while both broadcaster and viewer play crucial roles in the total television process, a line is drawn between them. One is treated as active performer; the other, as passive beneficiary.

When CATV is considered in this framework, we conclude that it falls on the viewer's side of the line. Essentially, a CATV system no more than enhances the viewer's capacity to receive the broadcaster's signals; it provides a well-located antenna with an efficient connection to the viewer's television set. It is true that a CATV system plays an "active" role in making reception possible in a given area, but so do ordinary television sets and antennas. CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer. If an individual erected an antenna on a hill, strung a cable to his house, and installed the necessary amplifying equipment, he would not be "performing" the programs he received on his television set. The result would be no different if several people combined to erect a cooperative antenna for the same purpose. The only difference in the case of CATV is that the antenna system is erected and owned not by its users but by an entrepreneur.

The function of CATV systems has little in common with the function of broadcasters. CATV systems do not in fact broadcast or rebroadcast. Broadcasters select the programs to be viewed; CATV systems simply carry, without editing, whatever programs they receive. Broadcasters procure programs and propagate them to the public; CATV systems receive programs that have been released to the public and carry them by private channels to additional viewers. We hold that CATV operators, like viewers and unlike broadcasters, do not perform the programs that they receive and carry.

We have been invited by the Solicitor General in an *amicus curiae* brief to render a compromise decision in this case that would, it is said, accommodate various competing considerations of copyright, communications, and antitrust policy. We decline the invitation. That job is for Congress. We take the Copyright Act of 1909 as we find it. With due regard to changing technology, we hold that the petitioner did not under that law "perform" the respondent's copyrighted works.

The judgment of the Court of Appeals is  
*Reversed.*

FORTAS, Justice (dissenting):

This case calls not for the judgment of Solomon but for the dexterity of Houdini. We are here asked to consider whether and how a technical, complex, and specific Act of Congress, the Copyright Act, which was enacted in 1909, applies to one of the recent products of scientific and promotional genius, CATV. The operations of CATV systems are based upon the use of other people's property. The issue here is whether, for this use, the owner of copyrighted material should be compensated. From a technical standpoint the question—or at least one important question—is whether the use constitutes a "performance" of the copyrighted material within the meaning of § 1 (c) of the Copyright Act. But it is an understatement to say that the Copyright Act, including the concept of a "performance," was not created with the development of CATV in mind. The novelty of the use, incident to the novelty of the new technology, results in a baffling problem. Applying the normal jurisprudential tools—the words of the Act, legislative history, and precedent—to the facts of the case is like trying to repair a television set with a mallet. And no aid may be derived from the recent attempts of Congress to formulate special copyright rules for CATV—for Congress has vacillated in its approach.

At the same time, the implications of any decision we may reach as to the copyright liability of CATV are very great. On the one hand, it is darkly predicted that the imposition of full liability upon all

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CATV operations could result in the demise of this new, important instrument of mass communications; or in its becoming a tool of the powerful networks which hold a substantial number of copyrights on materials used in the television industry. On the other hand, it is foreseen that a decision to the effect that CATV systems never infringe the copyrights of the programs they carry would permit such systems to overpower local broadcasting stations which must pay, directly or indirectly, for copyright licenses and with which CATV is in increasing competition.

The vastness of the competing considerations, the complexity of any conceivable equitable solution to the problems posed, and the obvious desirability of ultimately leaving the solution to Congress induced the Solicitor General, in a memorandum filed prior to oral argument in this case, to recommend “that the Court should stay its hand because, in our view, the matter is not susceptible of definitive resolution in judicial proceedings and plenary consideration here is likely to delay and prejudice the ultimate legislative solution.”

That is a splendid thought, but unhappily it will not do. I agree with the majority that we must pass on the instant case. An important legal issue is involved. Important economic values are at stake, and it would be hazardous to assume that Congress will act promptly, comprehensively, and retroactively. But the fact that the Copyright Act was written in a different day, for different factual situations, should lead us to tread cautiously here. Our major object, I suggest, should be to do as little damage as possible to traditional copyright principles and to business relationships, until the Congress legislates and relieves the embarrassment which we and the interested parties face.

The opinion of the majority, in my judgment, does not heed this admonition. In an attempt to foster the development of CATV, the Court today abandons the teachings of precedent, including a precedent of this Court, as to the meaning of the term “perform” in the Copyright Act. It is not our general practice to reverse ourselves, without compelling reasons to do so, on matters of statutory construction, especially on a construction of many years’ standing under which an entire industry has operated. Yet today’s decision might not be objectionable, if the majority replaced what it considers an outmoded interpretation of the term “perform” with a new, equally clear, and workable interpretation. It does not, however, do this. It removes from copyright law an interpretation which, though perhaps not altogether satisfactory as an analytical matter, has at least been settled for nearly 40 years; and it substitutes for that discarded interpretation a rule which I do not believe is an intelligible guide for the construction of the Copyright Act. Moreover, the new rule may well have disruptive consequences outside the area of CATV.

The approach manifested in the opinion of the Court is disarmingly simple. The Court merely identifies two groups in the general field of television, one of which it believes may clearly be liable, and the other clearly not liable, for copyright infringement on a “performance” theory: “Broadcasters perform. Viewers do not perform.” From this premise, the Court goes on to hold that CATV “falls on the viewer’s side of the line. Essentially, a CATV system no more than enhances the viewer’s capacity to receive the broadcaster’s signals; it provides a well-located antenna with an efficient connection to the viewer’s set. . . . CATV equipment is powerful and sophisticated, but the basic function the equipment serves is little different from that served by the equipment generally furnished by a television viewer.”

The decision in *Buck v. Jewell-LaSalle*, must, the Court says today, “be understood as limited to its own facts.” In *Buck*, the Court, speaking unanimously through Mr. Justice Brandeis, held that a hotel which received a broadcast on a master radio set and piped the broadcast to all public and private rooms of the hotel had “performed” the material that had been broadcast. As I understand the case, the holding was that the use of mechanical equipment to extend a broadcast to a significantly wider public than the broadcast would otherwise enjoy constitutes a “performance” of the material originally broadcast. I believe this decision stands squarely in the path of the route which the majority today traverses. If a CATV system performs a function “little different from that served by the equipment generally furnished by a television viewer,” and if that is to be the test, then it seems to me that a master radio set attached by wire to numerous other sets in various rooms of a hotel cannot be distinguished.

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The vague “functional” test of the meaning of the term “perform” is, moreover, unsatisfactory. Just as a CATV system performs (on the majority’s analysis) the same function as the antenna of the individual viewer, so a television camera recording a live drama performs the same function as the eye of a spectator who is present in the theater. Both the CATV and the television camera “receive programs that have been released to the public and carry them by private channels to additional viewers.” Moreover, the Court has indulged in an oversimplification of the “function” of CATV. It may be, indeed, that insofar as CATV operations are limited to the geographical area which the licensed broadcaster (whose signals the CATV has picked up and carried) has the power to cover, a CATV is little more than a “cooperative antenna” employed in order to ameliorate the image on television screens at home or to bring the image to homes which, because of obstacles other than mere distance, could not receive them. But such a description will not suffice for the case in which a CATV has picked up the signals of a licensed broadcaster and carried them beyond the area—however that area be defined—which the broadcaster normally serves. In such a case the CATV *is* performing a function different from a simple antenna for, by hypothesis, the antenna could not pick up the signals of the licensed broadcaster and enable CATV patrons to receive them in their homes.

*Buck v. Jewell-LaSalle* may not be an altogether ideal gloss on the word “perform,” but it has at least the merit of being settled law. I would not overrule that decision in order to take care of this case or the needs of CATV. This Court may be wrong. The task of caring for CATV is one for the Congress. Our ax, being a rule of law, must cut straight, sharp, and deep; and perhaps this is a situation that calls for the compromise of theory and for the architectural improvisation which only legislation can accomplish.

I see no alternative to following *Buck* and to holding that a CATV system does “perform” the material it picks up and carries. I would, accordingly, affirm the decision below.

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### Goldstein v. California, 412 U.S. 546 (1973)

BURGER, Chief Justice:

We granted certiorari to review petitioners’ conviction under a California statute making it a criminal offense to “pirate” recordings produced by others.

In 1971, an information was filed by the State of California, charging petitioners in 140 counts with violating § 653h of the California Penal Code. The information charged that, between April 1970 and March 1971, petitioners had copied several musical performances from commercially sold recordings without the permission of the owner of the master record or tape.<sup>1</sup> Petitioners moved to dismiss the complaint on the grounds that § 653h was in conflict with Art. I, § 8, cl. 8, of the Constitution, the “Copyright Clause,” and the federal statutes enacted thereunder. Upon denial of their motion, petitioners

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<sup>1</sup> In pertinent part, the California statute provides:

“(a) Every person is guilty of a misdemeanor who:

“(1) Knowingly and willfully transfers or causes to be transferred any sounds recorded on a phonograph record, . . . tape, . . . or other article on which sounds are recorded, with intent to sell or cause to be sold, . . . such article on which such sounds are so transferred, without the consent of the owner.

“(2) . . .

. . . .

“(b) As used in this section, ‘person’ means any individual, partnership, corporation or association; and ‘owner’ means the person who owns the master phonograph record, . . . master tape, . . . or other device used for reproducing recorded sounds on phonograph records, . . . tapes, . . . or other articles on which sound is recorded, and from which the transferred recorded sounds are directly or indirectly derived.”

Specifically, each count of the information alleged that, in regard to a particular recording, petitioners had, “at and in the City of Los Angeles, in the County of Los Angeles, State of California . . . wilfully, unlawfully and knowingly transferred and caused to be transferred sounds recorded on a tape with the intent to sell and cause to be sold, such tape on which such sounds [were] so transferred . . . .”

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entered pleas of *nolo contendere* to 10 of the 140 counts; the remaining counts were dismissed. On appeal, the Appellate Department of the California Superior Court sustained the validity of the statute. After exhausting other state appellate remedies, petitioners sought review in this Court.

### I

Petitioners were engaged in what has commonly been called “record piracy” or “tape piracy”—the unauthorized duplication of recordings of performances by major musical artists. Petitioners would purchase from a retail distributor a single tape or phonograph recording of the popular performances they wished to duplicate. The original recordings were produced and marketed by recording companies with which petitioners had no contractual relationship. At petitioners’ plant, the recording was reproduced on blank tapes, which could in turn be used to replay the music on a tape player. The tape was then wound on a cartridge. A label was attached, stating the title of the recorded performance—the same title as had appeared on the original recording, and the name of the performing artists.<sup>4</sup> After final packaging, the tapes were distributed to retail outlets for sale to the public, in competition with those petitioners had copied.

Petitioners made no payments to the artists whose performances they reproduced and sold, or to the various trust funds established for their benefit; no payments were made to the producer, technicians, or other staff personnel responsible for producing the original recording and paying the large expenses incurred in production. No payments were made for the use of the artists’ names or the album title.

The challenged California statute forbids petitioners to transfer any performance fixed on a tape or record onto other records or tapes with the intention of selling the duplicates, unless they have first received permission from those who, under state law, are the owners of the master recording. Although the protection afforded to each master recording is substantial, lasting for an unlimited time, the scope of the proscribed activities is narrow. No limitation is placed on the use of the music, lyrics, or arrangement employed in making the master recording. Petitioners are not precluded from hiring their own musicians and artists and recording an exact imitation of the performance embodied on the master recording. Petitioners are even free to hire the same artists who made the initial recording in order to duplicate the performance. In essence, the statute thus provides copyright protection solely for the specific expressions which compose the master record or tape.

Petitioners’ attack on the constitutionality of § 653h has many facets. First, they contend that the statute establishes a state copyright of unlimited duration, and thus conflicts with Art. I, § 8, cl. 8, of the Constitution. Second, petitioners claim that the state statute interferes with the implementation of federal policies inherent in the federal copyright statutes. According to petitioners, it was the intention of Congress, as interpreted by this Court in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting*, to establish a uniform law throughout the United States to protect original writings. As part of the federal scheme, it is urged that Congress intended to allow individuals to copy any work which was not protected by a federal copyright. Since § 653h effectively prohibits the copying of works which are not entitled to federal protection, petitioners contend that it conflicts directly with congressional policy and must fall under the Supremacy Clause of the Constitution. Finally, petitioners argue that 17 U.S.C. § 2, which allows States to protect unpublished writings, does not authorize the challenged state provision; since the records which petitioners copied had previously been released to the public, petitioners contend that they had, under federal law, been published.

We note at the outset that the federal copyright statutes to which petitioners refer were amended by Congress while their case was pending in the state courts. In 1971, Pub. L. 92-140 was passed to allow federal copyright protection of recordings. However, § 3 of the amendment specifically provides

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<sup>4</sup> An additional label was attached to each cartridge by petitioners, stating that no relationship existed between petitioners and the producer of the original recording or the individuals whose performances had been recorded. Consequently, no claim is made that petitioners misrepresented the source of the original recordings or the manufacturer of the tapes.

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that such protection is to be available only to sound recordings “fixed, published, and copyrighted” on and after February 15, 1972, and before January 1, 1975, and that nothing in Title 17, as amended is to “be applied retroactively or [to] be construed as affecting in any way any rights with respect to sound recordings fixed before” February 15, 1972. The recordings which petitioners copied were all “fixed” prior to February 15, 1972. Since, according to the language of § 3 of the amendment, Congress did not intend to alter the legal relationships which govern these recordings, the amendments have no application in petitioners’ case.

### II

Petitioners’ first argument rests on the premise that the state statute under which they were convicted lies beyond the powers which the States reserved in our federal system. If this is correct, petitioners must prevail, since the States cannot exercise a sovereign power which, under the Constitution, they have relinquished to the Federal Government for its exclusive exercise.

### A

[ . . . ]

Article I, § 8, cl. 8, of the Constitution gives to Congress the 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 . . . .”

The clause thus describes both the objective which Congress may seek and the means to achieve it. The objective is to promote the progress of science and the arts. As employed, the terms “to promote” are synonymous with the words “to stimulate,” “to encourage,” or “to induce.” To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author who possesses an unlimited copyright may preclude others from copying his creation for commercial purposes without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the sale or commercial use of copies of their works.

The objective of the Copyright Clause was clearly to facilitate the granting of rights national in scope. While the debates on the clause at the Constitutional Convention were extremely limited, its purpose was described by James Madison in the *Federalist*:

“The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”

The difficulty noted by Madison relates to the burden placed on an author or inventor who wishes to achieve protection in all States when no federal system of protection is available. To do so, a separate application is required to each state government; the right which in turn may be granted has effect only within the granting State’s borders. The national system which Madison supported eliminates the need for multiple applications and the expense and difficulty involved. In effect, it allows Congress to provide a reward greater in scope than any particular State may grant to promote progress in those fields which Congress determines are worthy of national action.

Although the Copyright Clause thus recognizes the potential benefits of a national system, it does not indicate that all writings are of national interest or that state legislation is, in all cases, unnecessary or precluded. The patents granted by the States in the 18th century show, to the contrary, a willingness on the part of the States to promote those portions of science and the arts which were of local importance. Whatever the diversity of people’s backgrounds, origins, and interests, and whatever the variety of

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business and industry in the 13 Colonies, the range of diversity is obviously far greater today in a country of 210 million people in 50 States. In view of that enormous diversity, it is unlikely that all citizens in all parts of the country place the same importance on works relating to all subjects. Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to *exclusive* federal control.

The question to which we next turn is whether, in actual operation, the exercise of the power to grant copyrights by some States will prejudice the interests of other States. As we have noted, a copyright granted by a particular State has effect only within its boundaries. If one State grants such protection, the interests of States which do not are not prejudiced since their citizens remain free to copy within their borders those works which may be protected elsewhere. The interests of a State which grants copyright protection may, however, be adversely affected by other States that do not; individuals who wish to purchase a copy of a work protected in their own State will be able to buy unauthorized copies in other States where no protection exists. However, this conflict is neither so inevitable nor so severe as to compel the conclusion, that state power has been relinquished to the exclusive jurisdiction of the Congress. Obviously when some States do not grant copyright protection—and most do not—that circumstance reduces the economic value of a state copyright, but it will hardly render the copyright worthless. The situation is no different from that which may arise in regard to other state monopolies, such as a state lottery, or a food concession in a limited enclosure like a state park; in each case, citizens may escape the effect of one State's monopoly by making purchases in another area or another State. Similarly, in the case of state copyrights, except as to individuals willing to travel across state lines in order to purchase records or other writings protected in their own State, each State's copyrights will still serve to induce new artistic creations within that State—the very objective of the grant of protection. We do not see here the type of prejudicial conflicts which would arise, for example, if each State exercised a sovereign power to impose imposts and tariffs; nor can we discern a need for uniformity such as that which may apply to the regulation of interstate shipments.

Similarly, it is difficult to see how the concurrent exercise of the power to grant copyrights by Congress and the States will necessarily and inevitably lead to difficulty. At any time Congress determines that a particular category of “writing” is worthy of national protection and the incidental expenses of federal administration, federal copyright protection may be authorized. Where the need for free and unrestricted distribution of a writing is thought to be required by the national interest, the Copyright Clause and the Commerce Clause would allow Congress to eschew all protection. In such cases, a conflict would develop if a State attempted to protect that which Congress intended to be free from restraint or to free that which Congress had protected. However, where Congress determines that neither federal protection nor freedom from restraint is required by the national interest, it is at liberty to stay its hand entirely. Since state protection would not then conflict with federal action, total relinquishment of the States' power to grant copyright protection cannot be inferred.

As we have seen, the language of the Constitution neither explicitly precludes the States from granting copyrights nor grants such authority exclusively to the Federal Government. The subject matter to which the Copyright Clause is addressed may at times be of purely local concern. No conflict will necessarily arise from a lack of uniform state regulation, nor will the interest of one State be significantly prejudiced by the actions of another. No reason exists why Congress must take affirmative action either to authorize protection of all categories of writings or to free them from all restraint. We therefore conclude that, under the Constitution, the States have not relinquished all power to grant to authors “the exclusive Right to their respective Writings.” [ . . . ]

### III

Our conclusion that California did not surrender its power to issue copyrights does not end the inquiry. We must proceed to determine whether the challenged state statute is void under the Supremacy

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Clause. No simple formula can capture the complexities of this determination; the conflicts which may develop between state and federal action are as varied as the fields to which congressional action may apply. “Our primary function is to determine whether, under the circumstances of this particular case, [the state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” We turn, then, to federal copyright law to determine what objectives Congress intended to fulfill.

By Art. I, § 8, cl. 8, of the Constitution, the States granted to Congress the power to protect the “Writings” of “Authors.” These terms have not been construed in their narrow literal sense but, rather, with the reach necessary to reflect the broad scope of constitutional principles. While an “author” may be viewed as an individual who writes an original composition, the term, in its constitutional sense, has been construed to mean an “originator,” “he to whom anything owes its origin.” Similarly, although the word “writings” might be limited to script or printed material, it may be interpreted to include any physical rendering of the fruits of creative intellectual or aesthetic labor. Thus, recordings of artistic performances may be within the reach of Clause 8.

While the area in which Congress *may* act is broad, the enabling provision of Clause 8 does not require that Congress act in regard to all categories of materials which meet the constitutional definitions. Rather, whether any specific category of “Writings” is to be brought within the purview of the federal statutory scheme is left to the discretion of the Congress. The history of federal copyright statutes indicates that the congressional determination to consider specific classes of writings is dependent, not only on the character of the writing, but also on the commercial importance of the product to the national economy. As our technology has expanded the means available for creative activity and has provided economical means for reproducing manifestations of such activity, new areas of federal protection have been initiated.<sup>17</sup>

In 1909, Congress agreed to a major consolidation and amendment of all federal copyright statutes. A list of 11 categories of protected works was provided. The relevant sections of the Act are discussed in the text of our opinion. The House Report on the proposed bill specifically noted that amendment was required because “the reproduction of various things which are the subject of copyright has enormously increased,” and that the President has specifically recommended revision, among other reasons, because the prior laws “omit[ted] provision for many articles which, under modern reproductive processes, are entitled to protection.”

Since 1909, two additional amendments have been added. In 1912, the list of categories in § 5 was expanded specifically to include motion pictures. The House Report on the amendment noted:

“The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give to them distinct and definite recognition and protection.”

Finally, in 1971, § 5 was amended to include “sound recordings.” Congress was spurred to action by the growth of record piracy, which was, in turn, due partly to technological advances. It must be remembered that the “record piracy” charged against petitioners related to recordings fixed by the original producer prior to Feb. 15, 1972, the effective date of the 1971 Act.

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<sup>17</sup> The first congressional copyright statute, passed in 1790, governed only maps, charts, and books. In 1802, the Act was amended in order to grant protection to any person “who shall invent and design, engrave, etch or work . . . any historical or other print or prints . . .” Protection was extended to musical compositions when the copyright laws were revised in 1831. In 1865, at the time when Mathew Brady’s pictures of the Civil War were attaining fame, photographs and photographic negatives were expressly added to the list of protected works. Again in 1870, the list was augmented to cover paintings, drawings, chromos, statuettes, statuary, and models or designs of fine art.

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Petitioners contend that the actions taken by Congress in establishing federal copyright protection preclude the States from granting similar protection to recordings of musical performances. According to petitioners, Congress addressed the question of whether recordings of performances should be granted protection in 1909; Congress determined that any individual who was entitled to a copyright on an original musical composition should have the right to control to a limited extent the use of that composition on recordings, but that the record itself, and the performance which it was capable of reproducing were not worthy of such protection. In support of their claim, petitioners cite the House Report on the 1909 Act, which states:

“It is not the intention of the committee to extend the right of copyright to the mechanical reproductions themselves, but only to give the composer or copyright proprietor the control, in accordance with the provisions of the bill, of the manufacture and use of such devices.”

To interpret accurately Congress’ intended purpose in passing the 1909 Act and the meaning of the House Report petitioners cite, we must remember that our modern technology differs greatly from that which existed in 1909. The Act and the report should not be read as if they were written today, for to do so would inevitably distort their intended meaning; rather, we must read them against the background of 1909, in which they were written. [ . . . ] After pointedly waiting for the Court’s decision in *White-Smith Music Publishing Co.*, Congress determined that the copyright statutes should be amended to insure that *composers of original musical works* received adequate protection to encourage further artistic and creative effort. Henceforth, under § 1 (e), records and piano rolls were to be considered as “copies” of the original composition they were capable of reproducing, and could not be manufactured unless payment was made to the *proprietor of the composition copyright*. The section of the House Report cited by petitioners was intended only to establish the limits of *the composer’s* right; composers were to have no control over the recordings themselves. Nowhere does the report indicate that Congress considered records as anything but a component part of a machine, capable of reproducing an original composition or that Congress intended records, as *renderings of original artistic performance*, to be free from state control.

Assuming, *arguendo*, that petitioners’ use of the composition they duplicated constitutes a “similar use,” the challenged state statute might be claimed to diminish the return which is due the composer by lessening the number of copies produced, and thus to conflict with § 1 (e). However, as we have noted above, the means presently available for reproducing recordings were not in existence in 1909 when 17 U.S.C. § 1 (e) was passed. We see no indication that the challenged state statute detracts from royalties which Congress intended the composer to receive. Furthermore, many state statutes may diminish the number of copies produced. Taxing statutes, for example, may raise the cost of producing or selling records and thereby lessen the number of records which may be sold or inhibit new companies from entering this field of commerce. We do not see in these statutes the direct conflict necessary to render a state statute invalid.

Petitioners’ argument does not rest entirely on the belief that Congress intended specifically to exempt recordings of performances from state control. Assuming that no such intention may be found, they argue that Congress so occupied the field of copyright protection as to pre-empt all comparable state action. This assertion is based on the language of 17 U.S.C. §§ 4 and 5, and on this Court’s opinions in *Sears, Roebuck & Co. v. Stiffel Co.* and *Compco Corp. v. Day-Brite Lighting*.

Section 4 of the federal copyright laws provides:

“The works for which copyright may be secured under this title shall include all the writings of an author.”

Section 5, which lists specific categories of protected works, adds:

“The above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title . . . .”

Since § 4 employs the constitutional term “writings,” it may be argued that Congress intended to exercise its authority over all works to which the constitutional provision might apply. However, in the



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more than 60 years which have elapsed since enactment of this provision, neither the Copyright Office, the courts, nor the Congress has so interpreted it. The Register of Copyrights, who is charged with administration of the statute, has consistently ruled that “claims to exclusive rights in mechanical recordings . . . or in the performances they reproduce” are not entitled to protection under § 4. With one early exception, American courts have agreed with this interpretation; and in 1971, prior to passage of the statute which extended federal protection to recordings fixed on or after February 15, 1972, Congress acknowledged the validity of that interpretation. Both the House and Senate Reports on the proposed legislation recognized that recordings qualified as “writings” within the meaning of the Constitution, but had not previously been protected under the federal copyright statute. In light of this consistent interpretation by the courts, the agency empowered to administer the copyright statutes, and Congress itself, we cannot agree that §§ 4 and 5 have the broad scope petitioners claim.

*Sears and Compco*, on which petitioners rely, do not support their position. In those cases, the question was whether a State could, under principles of a state unfair competition law, preclude the copying of mechanical configurations which did not possess the qualities required for the granting of a federal design or mechanical patent. The Court stated:

“The patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.”

In regard to mechanical configurations, Congress had balanced the need to encourage innovation and originality of invention against the need to insure competition in the sale of identical or substantially identical products. The standards established for granting federal patent protection to machines thus indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free. The application of state law in these cases to prevent the copying of articles which did not meet the requirements for federal protection disturbed the careful balance which Congress had drawn and thereby necessarily gave way under the Supremacy Clause of the Constitution. No comparable conflict between state law and federal law arises in the case of recordings of musical performances. In regard to this category of “Writings,” Congress has drawn no balance; rather, it has left the area unattended, and no reason exists why the State should not be free to act.

## IV

More than 50 years ago, Mr. Justice Brandeis observed in dissent in *International News Service v. Associated Press*:

“The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use.”

But there is no fixed, immutable line to tell us which “human productions” are private property and which are so general as to become “free as the air.” In earlier times, a performing artist’s work was largely restricted to the stage; once performed, it remained “recorded” only in the memory of those who had seen or heard it. Today, we can record that performance in precise detail and reproduce it again and again with utmost fidelity. The California statutory scheme evidences a legislative policy to prohibit “tape piracy” and “record piracy,” conduct that may adversely affect the continued production of new recordings, a large industry in California. Accordingly, the State has, by statute, given to recordings the attributes of property. No restraint has been placed on the use of an idea or concept; rather, petitioners

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and other individuals remain free to record the same compositions in precisely the same manner and with the same personnel as appeared on the original recording.

In sum, we have shown that § 653h does not conflict with the federal copyright statute enacted by Congress in 1909. Similarly, no conflict exists between the federal copyright statute passed in 1971 and the present application of § 653h, since California charged petitioners only with copying recordings fixed prior to February 15, 1972. Finally, we have concluded that our decisions in *Sears* and *Compro*, which we reaffirm today, have no application in the present case, since Congress has indicated neither that it wishes to protect, nor to free from protection, recordings of musical performances fixed prior to February 15, 1972.

We conclude that the State of California has exercised a power which it retained under the Constitution, and that the challenged statute, as applied in this case, does not intrude into an area which Congress has, up to now, pre-empted. Until and unless Congress takes further action with respect to recordings fixed prior to February 15, 1972, the California statute may be enforced against acts of piracy such as those which occurred in the present case.

*Affirmed.*

DOUGLAS, Justice (dissenting):

Article I, § 8, cl. 8, of the Constitution provides:

“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.”

Madison made a brief comment on this provision governing both patents and copyrights:

“The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point, by laws passed at the instance of Congress.”

We have been faithful to that admonition. In *Sears Roebuck & Co. v. Stiffel Co.*, we said:

“Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a State could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a State cannot encroach upon the federal patent laws directly, it cannot, under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.”

An unpatentable article is “in the public domain and may be made and sold by whoever chooses to do so.” In that case we did not allow a State to use its unfair competition law to prevent copying of an article which lacked such novelty that it could not be patented. In a companion case, *Compro Corp. v. Day-Brite Lighting*, where an unfair competition charge was made under state law, we made the same ruling, stating:

“Today we have held in *Sears, Roebuck & Co. v. Stiffel Co.* that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.”

Prior to February 25, 1972, copyright protection was not extended to sound recordings. *Sears* and *Compro* make clear that the federal policy expressed in Art. I, § 8, cl. 8, is to have “national uniformity in patent and copyright laws,” a policy bolstered by Acts of Congress which vest “exclusive jurisdiction to

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hear patent and copyright cases in federal courts . . . and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings.”

Prior to February 15, 1972, sound recordings had no copyright protection. And even under that Act the copyright would be effective “only to sound recordings fixed, published, and copyrighted on and after the effective date of this Act [Feb. 15, 1972] and before January 1, 1975.”

California’s law promotes monopoly; the federal policy promotes monopoly only when a copyright is issued, and it fosters competition in all other instances. Moreover, federal law limits its monopoly to 28 years plus a like renewal period, while California extends her monopoly into perpetuity.

Cases like *Sears* were surcharged with “unfair competition” and the present one with “pirated recordings.” But free access to products on the market is the consumer interest protected by the failure of Congress to extend patents or copyrights into various areas. The drive for monopoly protection is strong as is evident from a reading of the committee reports on the 1971 Act. Yet, Congress took but a short step, setting up a trial period to consider the new monopoly approach. It was told that state laws, such as we have in this case, were being challenged on the ground that the Federal Constitution had pre-empted the field, even in absence of a provision for making it possible to obtain a copyright for sound recordings. But the House Committee made only the following comment:

“While the committee expresses no opinion concerning this legal question, it is clear that the extension of copyright protection to sound recordings would resolve many of the problems which have arisen in connection with the efforts to combat piracy in State courts.”

The Department of Justice in commenting on the proposals that resulted in the 1971 Act told the House:

“We believe that extending copyright to reproduction of sound recordings is the soundest, and in our interpretation of *Sears* and *Compro*, the only way in which sound recordings should be protected. Copyright protection is narrowly defined and limited in duration, whereas state remedies, whose validity is still in doubt, frequently create broad and unwarranted perpetual monopolies. Moreover, there is an immediate and urgent need for this protection.”

The need for uniformity was stated by Judge Learned Hand in a dissent in *Capitol Records, Inc. v. Mercury Records Corp.* That case involved the duplication of uncopyrighted sound recordings, the court holding that state law prevailed where there was no federal copyright provision. Judge Hand emphasized in his dissent that “uniformity” was one of the principal purposes of the Patent and Copyright Clause and that uniformity could be obtained only by pre-emption. He said:

“If, for example in the case at bar, the defendant is forbidden to make and sell these records in New York, that will not prevent it from making and selling them in any other state which may regard the plaintiff’s sales as a ‘publication’; and it will be practically impossible to prevent their importation into New York. That is exactly the kind of evil at which the clause is directed.”

I would reverse the judgment below.

MARSHALL, Justice (dissenting):

The argument of the Court, as I understand it, is this: Art. I, § 8, cl. 8, of the Constitution gives Congress the 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.” The Framers recognized that individual States might have peculiarly local interests that Congress might not consider worthy of attention. Thus, the constitutional provision does not, of its own force, bar States from promoting those local interests. However, as the Court noted in *Sears, Roebuck & Co. v. Stiffel Co.*, with respect to every particular item within general classes enumerated in the relevant statutes, Congress had balanced the need to promote invention against the desire to preserve free competition, and had concluded that it was in the national interest to preserve competition as to every item that could not be patented.

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That is, the fact that some item could not be patented demonstrated that, in the judgment of Congress, it was best to let competition in the production of that item go unrestricted. The situation with regard to copyrights is said to be similar. There Congress enumerated certain classes of works for which a copyright may be secured. Its silence as to other classes does not reflect a considered judgment about the relative importance of competition and promotion of “Science and useful Arts.” Thus, the Court says, the States remain free to protect as they will “writings” not in the enumerated classes, until Congress acts. Since sound recordings fixed prior to February 15, 1972, were not enumerated by Congress as subject to copyrighting, the States may protect such recordings.

With respect, I cannot accept the final step of this argument. In my view, Congress has demonstrated its desire to exercise the full grant of constitutional power. Title 17 U.S.C. § 4, states: “The works for which copyright may be secured under this title shall include *all the writings of an author*” (emphasis added). The use of the constitutional terms “writings” and “author” rather strongly suggests that Congress intended to follow the constitutional grant. It could exercise the power given it by the Constitution in two ways: either by protecting all writings, or by protecting all writings within designated classes and leaving open to competition all writings in other classes. Section 5 shows that the latter course was chosen, for it enumerates various classes of works that may be registered. Ordinarily, the failure to enumerate “sound recordings” in § 5 would not be taken as an expression of Congress’ desire to let free competition reign in the reproduction of such recordings, for, because of the realities of the legislative process, it is generally difficult to infer from a failure to act any affirmative conclusions. But in *Sears* and its companion case, *Compco Corp. v. Day-Brite Lighting*, the Court determined that with respect to patents and copyrights, the ordinary practice was not to prevail. In view of the importance of not imposing unnecessary restraints on competition, the Court adopted in those cases a rule of construction that, unless the failure to provide patent or copyright protection for some class of works could clearly be shown to reflect a judgment that state regulation was permitted, the silence of Congress would be taken to reflect a judgment that free competition should prevail. I do not find in *Sears* and *Compco* a limitation on that rule of construction to general classes that Congress has enumerated although, of course, on the facts of those cases only items in such classes were involved; rather, the broadest language was used in those cases. Nor can I find in the course of legislation sufficient evidence to convince me that Congress determined to permit state regulation of the reproduction of sound recordings. For, whenever technological advances made extension of copyright protection seem wise, Congress has acted promptly.<sup>4</sup> This seems to me to reflect the same judgment that the Court found in *Sears* and *Compco*: Congress has decided that free competition should be the general rule, until it is convinced that the failure to provide copyright or patent protection is hindering “the Progress of Science and useful Arts.”

The business of record piracy is not an attractive one; persons in the business capitalize on the talents of others without needing to assess independently the prospect of public acceptance of a performance. But the same might be said of persons who copy “mechanical configurations.” Such people do provide low-cost reproductions that may well benefit the public. In light of the presumption of *Sears* and *Compco* that congressional silence betokens a determination that the benefits of competition outweigh the impediments placed on creativity by the lack of copyright protection, and in the absence of a congressional determination that the opposite is true, we should not let our distaste for “pirates” interfere with our interpretation of the copyright laws. I would therefore hold that, as to sound recordings fixed before February 15, 1972, the States may not enforce laws limiting reproduction.

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<sup>4</sup> Between 1909 and 1951, Congress’ attention was repeatedly drawn to problems of copyrighting sound recordings. Many bills to provide copyright protection for such recordings were introduced, but none were enacted. Respondent argues that Congress failed to enact these bills primarily out of uncertainty about the relationship between federal law and international copyright conventions, and was comforted in the knowledge that protection was available under state law. However, it is enough that Congress was aware of the problem, and could have acted, as it did when other technological innovations presented new problems, rather expeditiously. The problems that Congress confronted in 1971 did not spring up in 1970, but had existed, and Congress had not acted, for many years before.

**17 U.S.C. § 1101(a) (2004)**

Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance, or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.