of thinking that the system is permanent or the trends irreversible. It is a measure of the extent to which Professor Dahl has succeeded in avoiding being bemused by the precision of his own researches that he himself concludes this book by warning us of just this intellectual fallacy.

LEON BRITTAN *

AN UNHURRIED VIEW OF COPYRIGHT. By Benjamin Kaplan.[1] New York: Columbia University Press. 1967. Pp. ix, 142. $5.00.

This book is based upon the graceful and vigorous Carpentier Lectures given by Professor Kaplan at The Columbia Law School in 1966. The lectures were delivered during the accelerating momentum of the general copyright law revision, the chief subject of the third lecture. Late in 1966, after extended hearings, a final draft had been reported out of a House subcommittee. What is said to be a "substantially identical" [2] bill was promptly introduced in the new Congress, favorably reported, and sent on to Senate hearings that commenced in March, 1967. To the extent that this review comments on Professor Kaplan's analysis of the revision effort, it may be overtaken by events. Never mind; when the apocalyptic vision of a total computerized communications network is realized perhaps the dead time between composition and dissemination will be reduced to microseconds. Meanwhile, one accepts a certain stately pace for academic publications, perhaps unchanged since "Caxton founded his press in Westminster in 1476" (p. 2).

That is the author's starting point, for it is only with the spread of printing that copyright begins to be of interest, or even to exist as a legal notion. In a sparkling review of the history, which includes some new information and interpretations, along with the major events, the first lecture brings us quickly to 1909, the date of the last effective overhaul of the American statute.

Along the way in Kaplan's time machine, our guide shows us copyright "being gradually secreted in the interstices of the censorship" (p. 4). Censorship and guild control of the booksellers dwindle away at the end of the 17th century. We pause before the first copyright statute anywhere, that of 1710. We tour the echoing 18th-century corridors where lie entombed the notion that a perpetual copyright existed at common law, of such force that it could survive the limited term provided by the statute. We cross to the United States, observe a similar statute of 1790, and inspect the weighty mass of *Wheaton v. Peters*,[3] which enthroned the primacy of the statute.

What the author gives us is much more than a sightseeing tour. He is concerned to demonstrate that the early cases dealt with exact

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[1] Royall Professor of Law, Harvard Law School.

[2] H.R. REP. No. 83, 90th Cong., 1st Sess. 1 (1967). The bill, H.R. 2512, 90th Cong., 1st Sess. (1967), passed the House, as amended, Apr. 11, 1967.

[3] 33 U.S. (8 Pet.) 591 (1834).

copies, that they were still a contest of publisher against publisher, not of author against plagiarizing author. Well into the 19th century, abridgments and translations were free of control by the owner of the original work; they were thought to have a value of their own. But during the same era when Mr. Justice Story was fashioning the adaptable concept of fair use of copyrighted materials, the scope of protection began to expand, inflating the claims of authors to exclusive possession (one landmark case, *Daly v. Palmer*,[4] created property in the dramatic situation of the heroine tied to a railroad track), and enlarging the kinds of work entitled to protection (in another landmark, *Bleistein v. Donaldson Lithographing Co.*,[5] Holmes proclaimed the artistic integrity of circus posters).

All this serves as a prelude to the main theme of the second lecture. Here the fortunes of the statute of 1909 and the penetrating influence of Judge Learned Hand, who went on the bench in that same year, are entwined. The author's thesis, baldly put, is that too much material came to be protected, while too little scope was left for borrowing and imitation. After some aberrant gestures toward the standard of invention in patents, the courts settled down in easy acceptance of a very modest definition of originality as the only requirement for copyright. They required only that the work, in a literal sense, originate with the claimant. This was logically consistent with the position that plagiarism consisted only of copying — another departure from the right of a patentee, who can exclude everyone from his invention, even the independent discoverer close on his heels. Learned Hand's striking illustration of the first proposition can be extended to the second as well: "[I]f by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an 'author,' and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's."[6] By the same token, if Keats had a copyright, Hand's secluded odist would not be an infringer, since he did not copy.

This position, "modest in its pretension to monopoly" (p. 44), would be tolerable, Professor Kaplan maintains, if it had remained modest in its application. But the courts have been willing to find infringement in works that were far removed from literal copying, or that took only fragments, and those not conspicuously novel, from the plaintiff's work. Professor Kaplan, who is not overawed even by Olympian Zeus, hammers home his thesis with respectful criticism of three of Learned Hand's most magisterial and influential opinions.[7] While he is understanding of the animus which turns judges against defendants who skate too close to the line (as in the recent *Ethan*

[4] 6 Fed. Cas. 1132 (No. 3552) (C.C.S.D.N.Y. 1868).

[5] 188 U.S. 239 (1903).

[6] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

[7] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); Fred Fisher, Inc. v. Dillingham, 298 F. 145 (S.D.N.Y. 1924).

Frome case[8]) the author asserts his own willingness and preference to let those using copyrighted material take even protected details of "expression," if "they are 'improved' by changes in which the user himself displays substantial authorship" (pp. 49–50).

From his analysis of the prototypical case of the literary work — the book — the author moves on to a consideration of current standards with respect to music, designs, and "fact work" (maps, reference works, and the like). This is one stretch where the variety of problems makes the view not entirely unhurried. We catch little more than a glimpse of several features of the passing landscape. These quick exposures may be confusing to the uninitiated. But they do bring out a main point that the author wants to make. It is wrong and misleading, he contends, to think of copyright protection as all of a piece. Different media have different needs. A plastic Santa Claus figure is not the same thing as a Rembrandt etching.

There is very little here that I can find to take issue with, either in the author's reading of history, or in his appraisal of the state of the art. It does seem to me a little brutal to characterize attempts to frame an industrial design protection statute as a "curious form of supererogative folly" (p. 56). Such a statute could at least get the whole subject out of copyright, where it does not belong. I also have to register disagreement with the opinion that the decision[9] forbidding Jack Benny to parody "Gaslight" by simply hamming the exact dialogue is "wrong — and possibly unconstitutional" (p. 69). But then the Supreme Court was evenly divided, so Professor Kaplan has as many unidentified Justices on his side as I have on mine. The difference is that, on my reading of the facts, my Justices are right. The *Mad Magazine* case,[10] involving disrespectful words for old songs, is correct, and easily distinguishable. Alfred E. Neuman wrote some new words.

Since these differences are so trifling, it is doubtless time, and past time, for the reviewer to disclose — indeed, to declare — that his basic outlook is the same as the author's.[11] That is, I agree that copyright should give "necessary support and encouragement to the creation and dissemination of fresh signals or messages to stir human intelligence and sensibilities" (p. 74). But to give more than is necessary may misallocate resources, and, of much greater importance, hamper the process of continual imitation and accretion by which we learn and, we like to think, add to the store of knowledge. There are very few spontaneously inventive people. Even fewer are gloriously and effectively inventive. The rhetoric about authors and their natural rights invokes Shakespeare and Milton. The reality is likely to deal with comic books or soap dishes. For that matter, if there had been a well

[8] Davis v. E.I. duPont de Nemours & Co., 240 F. Supp. 612 (S.D.N.Y. 1965).

[9] Benny v. Loew's Inc., 239 F.2d 532 (9th Cir. 1956), *aff'd by an equally divided court, without opinion, sub nom.* Columbia Broadcasting System, Inc. v. Loew's Inc., 356 U.S. 43 (1958).

[10] Berlin v. E.C. Publications, Inc., 329 F.2d 541 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

[11] *Cf.* B. KAPLAN & R. BROWN, CASES ON COPYRIGHT, UNFAIR COMPETITION, AND OTHER TOPICS . . . . (1960).

developed copyright system in his day, we all know that Shakespeare would have been in deep trouble.

Our trouble is not that the system is fundamentally wrong but that we may have become over-refined in our search for guilty resemblances. We really do not know just what it takes to evoke the optimum output of words and music. This is something that should be capable of economic analysis. So far as I know, no such analysis has been carried through. Two young lawyer-economists were working on this, but by a tragic and staggering coincidence, both of them died.[12] Even if we had a good theoretical model, it would be hard to apply it to particular cases, as we see from Professor Baxter's admirable recent economic analysis of the patent monopoly.[13]

We are therefore obliged to make what we can of things as they are. If one has an antiprotectionist bias one is entitled, indeed obliged, to look skeptically at every proposed extension of protection. Should song writers get more from recording companies? Well, are they underpaid? That is, are enough people staying in the business to produce the quantity and variety of songs that society somehow desires? And so on, through scores of industries and markets for the products of brain and hand.

These considerations bring us to the economics, law, and politics of statutory revision, to which most of the third lecture is devoted — with politics taken to mean the clash of interest groups before the Congress.

The new bill has been in gestation for a decade. It is a thoroughly professional piece of work, reflecting great credit on the Copyright Office draftsmen. It is not a simple statute; but the issues involved are not simple either; they are intricate and delicate. It lights up many dark corners of the 1909 Act with the help, for example, of a new first section with thirty-two paragraphs of definitions.[14] It deals sensibly with the formalities of notice and registration, easing the harsh forfeitures for technical defects, against which even judges had begun to rebel. It flattens the great divide between unpublished and published works, bulldozing into the federal system all works "fixed in any tangible medium of expression."[15] This ends (almost) the anomaly created by the proposition that performance is not publication, which made it possible for music and drama to be performed (and broadcast) forever without having to come within the limited duration of statutory copyright.

The trouble with the new bill, as Professor Kaplan points out, is that its thrust is generally toward a greater scope of protection.[16] The

[12] Hurt & Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. (No. 2, 1965 Papers and Proceedings) 421 (1966), was a provocative beginning. See, for a full consideration of a field adjoining copyright, W. BAUMOL & W. BOWEN, PERFORMING ARTS — THE ECONOMIC DILEMMA (1966). F. MACHLUP, THE PRODUCTION AND DISTRIBUTION OF KNOWLEDGE IN THE UNITED STATES (1962) provides a comprehensive framework for analysis.

[13] Baxter, *Legal Restrictions on Exploitation of the Patent Monopoly: An Economic Analysis*, 76 YALE L.J. 267 (1966).

[14] H.R. 2512, 90th Cong., 1st Sess. § 101 (1967).

[15] *Id.* § 102.

[16] *See* H.R. REP. No. 83, 90th Cong., 1st Sess. 3 (1967): "Despite the complexity and particularization of some of its provisions, however, the basic aim

most visible evidence of this is the extension of duration of copyright, from the present scheme of 28 years plus a second 28-year term if the person entitled wants to claim it, to a term measured by the life of the author plus 50 years, or, for a "corporate" author, a term of 75 years. How long a copyright should last is one of those questions that is hard to answer objectively, even with the assistance of refined analysis (which, as I have already remarked, we do not have). I have yet to hear a self-sustaining argument for the 50-year period after the life of the author, beyond the fact that it is found in many other countries. Conformity on our part is doubtless an aid to international harmonization, in itself a good and indeed necessary thing in an age of global communication. But, whatever the merits, a longer term obviously gives something to everybody on the producing side of the communications and entertainment industries, and may have eased the occasional concessions that were elsewhere exacted from one group or another.

The organized interests that make their views emphatically and untiringly known do not represent sharp conflicts between producers and users of copyrightable material. We are hearing from industries in which the firms are often quite conglomerate in structure. In copyright, they are now producers, now users. Thus, motion pictures are an important protected industry, as well as being enormous consumers of copyrighted stories and music. The broadcasters are even more prodigious consumers, and, in one guise or another, are producers of programs for which they want protection. It is consequently possible to perceive in the bill, without any sinister implications whatever, an elaborate sequence of tradeoffs. For example, the 1909 Act has a royalty ceiling of two cents a song for compulsory licenses of recording rights. It has survived since 1909, "to the consternation of economists," as Professor Kaplan remarks (p. 108). The song writers propose to do away with the compulsory license. The recording industry resists, successfully. As haggling continues about an increase in the royalty ceiling, the recording industry should not be unmindful that the bill creates a new right, protecting sound recordings (performances, apart from the compositions performed) against "piracy" by exact copying.

So, all along the way, the trend is to tighten old exemptions, to create new ones sparingly, to create some new rights, and to define old ones expansively.

Only late in the contest did a new force, of predominantly users' interests, appear on the field. This was the "Ad Hoc Committee on Copyright Law Revision," loosely organized under the aegis of the National Education Association. Its chief impetus came from those who saw in the new bill a mortal threat to the new ease of access to classroom material made possible by the photocopying explosion. The Ad Hoc Committee, taking under its wing the educational broadcasters who also thought they were being short-changed, sounded strident alarms that photocopying would become as illicit as counterfeiting

of the bill is very simple: to insure that authors receive the encouragement they need to create and the remuneration they fairly deserve for their creations."

(no more true under the new law than the present one). Even if the interests for which the Ad Hoc Committee spoke did not establish an educational exemption, they won some concessions, notably in the form of a new statutory definition of "fair use," a definition given generous scope by interpretations in the report of the House Committee.

A more diffuse user interest — perhaps inadequately represented because of its diffusion — is concerned with the fantastic potential of information storage and retrieval through computers. The draft bill, even while the draftsmen were admitting that the question was a close one, appeared to make the ingestion of copyrighted material by a computer an infringement. Absent an exemption, there would be little question that a computer printout of a protected work would infringe. But it is highly questionable whether input alone should be controllable. The issue goes far beyond conceptualization — whether the work has been "copied" or "fixed" inside the computer. This is another instance where Professor Kaplan, while warning against the premature solution of the revision draft, emphasizes that we ought to "proceed not by deduction from a monistic premise but upon a series of judgments about ends served and disserved by particular measures" (p. 124).

Once rights or exemptions are riveted into a statute, vested interests rapidly encyst them; their removal requires painful surgery. The seemingly casual jukebox exemption of 1909 is the classic example. Media of greater social significance are today in such a state of flux that it seems quite undesirable to attempt a statutory resolution that may not be alterable for a generation or two. It is hard to guess which may turn out worse, the offhand disposition of computer problems, or the elaborate compromise that has been proposed with respect to CATV.

These and other uncertainties lead Professor Kaplan "with regret and some misgiving" (p. 111) to propose the creation of a regulatory commission. One shares his sentiments. For middle-aged New Dealers, a proposal for an administrative commission to deal with a set of problems beyond the detailed grasp of the legislature conveys a sense of *déjà vu*. For other reasons, including the predictable opposition of everyone who is getting something out of the new bill, such a proposal is not now ripe for detailed examination. But the conditions that elicit it will not disappear. It is altogether certain that, in whatever form the bill passes, it will contain clumsy compromises, and failures of prevision. It ought to be put under intense scrutiny, say for five years, and then formally reviewed. The congressional committees and their staffs are not going to provide such scrutiny; they must turn to other pressing matters. The Copyright Office has considerable capabilities, and also deficiencies, for this task. Once its leadership has recovered from the revision effort, it will be plunged into administration of the new provisions.

A modest suggestion is that there should be created, either as part of the statute or by separate joint resolution, a Copyright Review Council.[17] Its mission should be simply to study the operation of the

[17] The nomenclature and the proposal are in part suggested by a recommen-

statute. It should have substantial public representation, both from government and from the public at large. Since the Copyright Office is a part of the Library of Congress, the whole operation can dwell on Capitol Hill, not at the executive end of Pennsylvania Avenue.

There are so many segments of public policy, and so much specialization built up around them, that it is hard to enlist sustained attention on behalf of the general public interest in any one. The chief criticism I would direct against my review proposal is that it might be taken over by interested parties even sooner than a regulatory commission might be. Still, the activities that are touched by copyright are, I think, of growing interest, as our leisure-directed society consumes ever increasing amounts of culture and entertainment.

Professor Kaplan aimed to "introduce the intelligent general lawyer to the law and mystique of copyright" (p. 1). As an academic quasi-specialist I cannot tell whether he has hit his target. The manner is delightful — who would expect that a work on copyright could make one reader laugh? But Professor Kaplan is not a simple man when it comes to matter. As many readers of this *Review* will know, one needs to pay close attention when he speaks. To anyone who has been at all exposed to the subject, I need only say that Benjamin Kaplan's *Unhurried View* in all respects equals, and in many surpasses, Zechariah Chafee's *Reflections on the Law of Copyright*.[18]

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dation of the President's Commission on the Patent System. REPORT: "To PROMOTE THE PROGRESS OF . . . USEFUL ARTS" 43 (1966).

[18] Chafee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 503, 719 (1945).

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