The Project Gutenberg eBook of Arguments before the Committee on Patents of the House of Representatives, conjointly with the Senate Committee on Patents, on H.R. 19853, to amend and consolidate the acts respecting copyright, by United States. Congress. House. Committee on Patents and United States. Congress. Senate. Committee on Patents

Title: Arguments before the Committee on Patents of the House of Representatives, conjointly with the Senate Committee on Patents, on H.R. 19853, to amend and consolidate the acts respecting copyright

Author: United States. Congress. House. Committee on Patents
Author: United States. Congress. Senate. Committee on Patents

Release date: August 29, 2012 [EBook #40613]

Language: English

Credits: Produced by Mark C. Orton and the Online Distributed Proofreading Team at http://www.pgdp.net (This book was produced from scanned images of public domain material from the Google Print project.)

ARGUMENTS

BEFORE THE

COMMITTEE ON PATENTS

OF THE

HOUSE OF REPRESENTATIVES,

CONJOINTLY WITH

THE SENATE COMMITTEE

ON PATENTS,

ON

H. R. 19853,

TO AMEND AND

CONSOLIDATE THE ACTS

RESPECTING COPYRIGHT.

JUNE 6, 7, 8, AND 9, 1906.

ARGUMENTS

BEFORE THE

COMMITTEE ON PATENTS

OF THE

HOUSE OF REPRESENTATIVES,

CONJOINTLY WITH THE SENATE COMMITTEE

ON PATENTS,

ON

H.R. 19853,

TO AMEND AND CONSOLIDATE THE ACTS

RESPECTING COPYRIGHT.

JUNE 6, 7, 8, AND 9, 1906.

COMMITTEE ON PATENTS, HOUSE OF REPRESENTATIVES,

FIFTY-NINTH CONGRESS.

FRANK D. CURRIER, New Hampshire, *Chairman*.

SOLOMON R. DRESSER, Pennsylvania.	CHARLES McGAVIN, Illinois.
JOSEPH M. DIXON, Montana.	WILLIAM SULZER, New York.
EDWARD H. HINSHAW, Nebraska.	GEORGE S. LEGARE, South Carolina.
ROBERT W. BONYNGE, Colorado.	EDWIN Y. WEBB, North Carolina.
WILLIAM W. CAMPBELL, Ohio.	ROBERT G. SOUTHALL, Virginia.
ANDREW J. BARCHFELD, Pennsylvania.	JOHN GILL, Jr., Maryland.
JOHN C. CHANEY, Indiana.	

Edward A. Barney, *Clerk*.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1906.

ARGUMENTS ON H.R. 19853, TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT.

Committee on Patents,
House of Representatives,
Wednesday, June 6, 1906.

The committee met at 10 o'clock a.m.; at the Senate reading room, Library of Congress, conjointly with the Senate Committee on Patents.

Present, Senators Kittredge (chairman), Clapp, Smoot, Foster, and Latimer; Representatives Currier (chairman), Bonynge, Campbell, Chaney, McGavin, Sulzer, and Webb.

The Chairman. We are met to consider Senate bill 6330, relative to the copyright law. We would like to hear first from Mr. Putnam regarding the history of the proposed legislation.

STATEMENT OF HERBERT PUTNAM, ESQ., LIBRARIAN OF CONGRESS.

Mr. Putnam. Mr. Chairman and gentlemen of the committee, the origin of this bill is indicated in the message of the President to Congress last December. The passage is brief; let me read it:

> Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the copyright office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential. Such a revision, to meet modern conditions, has been found necessary in Germany, Austria, Sweden, and other foreign countries, and bills embodying it are pending in England and the Australian colonies. It has been urged here, and proposals for a commission to undertake it have, from time to time, been pressed upon the Congress.
>
> The inconveniences of the present conditions being so great an attempt to frame appropriate legislation has been made by the Copyright Office, which has called conferences of the various interests especially and practically concerned with the operation of the copyright laws. It has secured from them suggestions as to the changes necessary; it has added from its own experience and investigation, and it has drafted a bill which embodies such of these changes and additions as, after full discussion and expert criticism, appeared to be sound and safe. In form this bill would replace the existing insufficient and inconsistent laws by one general copyright statute. It will be presented to the Congress at the coming session. It deserves prompt consideration.

So far the message. It did not contain what was the fact as to the origin of this project, that it did originate in an informal suggestion on the part of the chairman of this committee.

The conferences to which it refers were not open, public meetings; they were not conventions; they were conferences, and conferences of organizations—that is to say, associations representing a group of interests; and those organizations were specially invited, additions being made to the list later as suggestions were made of others that should be added.

The organizations selected were the most representative organizations that we could think of or that were brought to our attention as having practical concern in the amelioration of the law, but especially, of course, those concerned in an affirmative way—that is to say, in the protection of the right. They were nearly thirty in number. The list of them and their representatives is before you.

(The list referred to was, by direction of the committee, made a part of the record, and is as follows:)

List of associations invited to take part and the delegates nominated to be present at the conference on copyright, together with other participants.

AUTHORS.

American (Authors') Copyright League: Edmund Clarence Stedman[1,2], president; Richard R. Bowker, vice president; Robert Underwood Johnson[1,2], secretary; Edmund Munroe Smith, acting secretary (not present).

National Institute of Arts and Letters: Edmund Clarence Stedman[1,2], president; Brander Matthews[1,2].

DRAMATISTS AND PLAYWRIGHTS.

American Dramatists Club: Bronson Howard, president; Joseph I. C. Clarke[1], first vice president; Harry P. Mawson[1,2], chairman committee on legislation; Joseph R. Grismer[1], committee on legislation; Charles Klein[3].

Association of Theatre Managers of Greater New York: Charles Burnham[1], first vice president; Henry B. Harris[1], secretary.

ARTISTS: PAINTERS, SCULPTORS, ARCHITECTS.

American Institute of Architects: Glenn Brown, secretary.

Architectural League of America: D. Everett Waid[1,2].

National Academy of Design: Frank D. Millet.

National Sculpture Society: Daniel Chester French[3], president; Karl Bitter[2,3], vice president.

Society of American Artists: John La Farge[1], president; John W. Alexander[1,2].

COMPOSERS.

Manuscript Society: Miss Laura Sedgwick Collins[1] (charter member), F. L. Sealy[2].

PUBLISHERS.

American Publishers' Copyright League: William W. Appleton, president; George

Haven Putnam[2,3], secretary; Charles Scribner[1,2], treasurer; Stephen H. Olin[2,3], counsel.

Association of American Directory Publishers: W. H. Lee[2,3], president; W. H. Bates, secretary; Alfred Lucking[3], counsel; Everett S. Geer[3], president Hartford Printing Company; William E. Murdock[3], trustee of the Association of American Directory Publishers; Ralph L. Polk[3], trustee of the Association of American Directory Publishers; S. T. Leet[3].

PUBLISHERS OF NEWSPAPERS AND MAGAZINES.

American Newspaper Publishers' Association: Don C. Seitz[1,2], acting chairman copyright committee; John Stewart Bryan[1,2], copyright committee; Louis M. Duvall[1,2], copyright committee; Thos. J. Walsh[2], at the request of Mr. Seitz.

Periodical Publishers' Association of America: Charles Scribner[1,2].

PUBLISHERS OF ARTISTIC REPRODUCTIONS: LITHOGRAPHERS, PHOTOGRAPHERS.

National Association of Photoengravers: B. W. Wilson, jr.[2]

Photographers' Copyright League of America: B. J. Falk, president; Pirie MacDonald; A. B. Browne[3], counsel.

Print Publishers' Association of America: W. A. Livingstone, president; Benjamin Curtis[3], secretary; George L. Canfield[3], counsel.

Reproductive Arts Copyright League (Lithographers' Association—East): Robert M. Donaldson, president: Edmund B. Osborne[2], vice-president; A. Beverly Smith, secretary; Fanueil D. S. Bethune[2,3], counsel.

PUBLISHERS OF MUSIC.

Music Publishers' Association of the United States: J. F. Bowers[2,3], president; Charles B. Bayly[3], secretary; George W. Furniss, chairman copyright committee; Walter M. Bacon, of copyright committee; Nathan Burkan,[23], counsel; A. R. Serven,[3] counsel; Leo Feist[3]; Isidore Witmark[3]; R. L. Thomæ,[2,3] (Victor Talking Machine Company, of Philadelphia).

PRINTERS AND LITHOGRAPHERS.

United Typothetæ of America: Isaac H. Blanchard[1], of executive committee; Chas. W. Ames[2,3].

International Typographical Union: J. J. Sullivan, chairman I. T. U. copyright committee; P. H. McCormick, president, and George J. Jackson, organizer, of New York Typographical Union No. 6.

Central Lithographic Trades Council: W. A. Coakley[3].

EDUCATIONAL INSTITUTIONS.

National Educational Association: George S. Davis[1], associate city superintendent of schools; Claude G. Leland[2], librarian board of education of New York.

PUBLIC LIBRARIES.

American Library Association: Frank P. Hill, president; Arthur E. Bostwick.

BAR ASSOCIATIONS.

American Bar Association—Advisory committee: Arthur Steuart[1,3], chairman; Edmund Wetmore[2], Frank F. Reed (not present).

Association of the Bar of the City of New York—Advisory committee: Paul Fuller[3], chairman; William G. Choate, John E. Parsons, John L. Cadwalader, Edmund Wetmore[2], Henry Galbraith Ward, Arthur H. Masten. (Of this committee, appointed after the second conference, only Mr. Fuller was present.)

MISCELLANEOUS.

International Advertising Association: Will Phillip Hooper[1,2]; James L. Steuart[2], counsel.

The Sphinx Club: Will Phillip Hooper[1,2].

OTHERS PRESENT, BUT NOT FORMALLY PARTICIPATING.

Samuel J. Elder, of Boston; André Lesourd[3], of New York; A. Bell Malcomson[3], of New York; Ansley Wilcox[3], of Buffalo; A. W. Elson[2,3], of Boston; Gen. Eugene Griffin[3], of New York; Charles H. Sergel[3], of Chicago.

Librarian of Congress, Herbert Putnam.

Register of Copyrights, Thorvald Solberg.

Commissioner of Patents, Frederick I. Allen (was not present, but submitted written suggestions).

Department of Justice, Henry M. Hoyt[3], Solicitor-General (present, but not formally

participating); William J. Hughes[2,3], of the Solicitor-General's Office (present, but not formally participating).

Treasury Department, Charles P. Montgomery, of the Customs Division.

NOTE.—Persons marked [1], [2], or [3] were present only at the sessions thus indicated. The absence of a mark following a name indicates attendance at all three sessions.

Mr. PUTNAM. These men are the writers of books, the writers of plays, the composers of music, the architects, painters and sculptors, the photographers and photoengravers, the publishers of books, newspapers, periodicals, music, and prints, and the manufacturers, printers, typographers, and lithographers. The conference included, therefore, those interests that abroad are considered primary in such a matter—that is, the creators of the works which are to be protected and the publishers through whom the property in these becomes effective and remunerative; but it included under each of these genera several species and various subsidiary interests. It included the National Educational Association and the American Library Association as representing to some extent the consumers; and in addition to the legal counsel representing special interests it included two committees of the American Bar Association and of the New York Bar Association of experts upon copyright law, who gave gratuitous service as general advisors to the conference and in the framing of the bill.

Upon questions of importation the conference had the benefit of information and advice from a representative of the Treasury Department, expert in the practice of that Department at ports of entry. The Solicitor-General, whose name appears upon the list, was not a formal participant, but his representative was present throughout as an observer of the proceedings; and if I do not emphasize the aid which he and which the Solicitor-General himself, in later informal criticism and suggestion, rendered, it is only because the practice of his office forbids him to take part in the initiation of legislation; and his assistance in this matter must not be taken as a precedent to his inconvenience.

The conference held three meetings in June and November of last year and in March of this year, but, of course, as a conference it included various minor consultations and much correspondence. At the outset of the meeting last June each organization was invited to state the respects in which it deemed the present law defective or injurious, either to its own interest, or, in its opinion, to the general interest. The second conference had before it a memorandum prepared by the register embodying provisions deemed by the office important for consideration at that stage. The third conference, in March of this year, had before it a revision of this memorandum. The last conference, this third, resulted in the draft of a bill, which was sent to each participant for comment and suggestion, and the bill itself is before you.

We would have no misunderstanding as to what this bill is. It is a bill resulting from the conference, but it is not a conference bill; for the conference did not draw it, nor did it by explicit vote or otherwise determine its precise provisions. It is rather a copyright office bill. The office submits it as embodying what, with the best counsel available, including the conferences, it deems worthy of your consideration, in accordance with your previously expressed desire. In calling the conferences and in submitting the draft it has proceeded upon your suggestion. Apart from the chapter relating to its own administration, it has no direct interest in the bill, except its general interest to secure a general amelioration of the law. It does not offer the bill to you as the unanimous decision of a council of experts, for it contains certain provisions as to which expert opinion as well as substantial interest was divided. It does not offer to you the bill as one that has passed the test of public discussion, for it has only now come before the public. It knows already of objection to certain of its provisions—objection which will be entitled to be heard by your committee; and it is informed by one critic that his objections are sufficient to cover fully one-half of the provisions of the bill.

The bill comes before you with precisely that presumption to which its history entitles it—no less, but no more.

The conference had certain aids prepared in advance by the copyright office, which were embraced in these particular publications, setting forth the present law in this country and all previous enactments in this country—a bibliography, indeed, of all bills introduced into Congress, all amendments of the copyright laws, and the laws in foreign countries so far as they could be epitomized.

The conferences occupied eleven days in all, of twenty-two sessions—two sessions a day. Their labors are evidenced by these four volumes, which are the stenographer's record of the proceedings. The sincerity of their endeavor to secure a result that should be scientific yet conservative, is, perhaps, evidenced by the brevity of the bill. The memorandum of last November contains some 16,000 words; that of March contains some 11,000 words; the bill contains slightly over 8,000 words. I believe that the present group of statutes embodying the existing law will contain somewhat over 4,000 words; and they are alleged to be imperfect and neither systematic nor organic.

The bill attempts to be both. It is, as you see, divided into eight chapters, with some supplementary miscellaneous provisions. I say that it is divided into chapters—that is, recited in

the contents of the bill as printed officially and set forth in marginal references in the bill as printed at the Library. These chapters deal with the nature and extent of copyright, the subject-matter of copyright, who may obtain copyright, how to secure it, the duration of it, the protection and the transfer of copyright, and the copyright office.

I have furnished to your committee some analysis of it. That analysis is contained in the printed statement marked "Memorandum," of which there are additional copies here dated June 5, including those before you, containing some slight changes from those sent out to members of your committee. I would ask to have this one, dated on the outside June 5, considered the recent one.

(The memorandum above referred to was, by direction of the committee, made a part of the record, and the same is as follows:)

MEMORANDUM.

A.—*Some leading features.*

As the present law consists of but a group of statutes, and the proposed bill is systematic and organic in form, the changes which it introduces other than mere abrogations are not easily explained by mere reference to the existing statutes. Throughout attempt has been made to substitute general terms for particular specifications, to provide for a protection as broad as the Constitution contemplated, and to insure that no specification shall tend to limit unduly either subject-matter or the protection. Important respects in which the bill modifies or amplifies existing law are as follows:

Nature and extent.—Section 1, like section 9, is fundamental. The existing law (Rev. Stat., sec. 4952) specifies as the exclusive right "the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending;" of public performance or representation; and of dramatization or translation. The bill omits the specifications "printing, reprinting, publishing, completing, executing, and finishing," but attempts others intended to be fully as broad. [Please see sec. 1.] It adds the right of oral delivery in the case of lectures, and the right to make, sell, distribute, or let for hire any device, etc., especially adapted to reproduce to the ear any musical work, and to reproduce it to the ear by means of such a device; but these latter are limited to works hereafter published and copyrighted.

The copyright is to protect "all the copyrightable component parts of the work copyrighted and any and all reproductions or copies thereof in whatever form, style, or size."

Subject-matter of copyright.—A general statement that it is to include "all the works of an author," leaving the term "author" to be as broad as the Constitution intended. Certain specifications follow, but coupled with the proviso that they shall not be held to limit the subject-matter.

The specifications [sec. 5] substitute, so far as possible, general terms for particulars. They omit, for instance, the terms "engravings, cuts, lithographs, painting, chromo, statue, and statuary." They assume, however, that these will be included under the more general terms as "prints and pictorial illustrations," or "reproductions of a work of art," or "works of art," or "models or designs for works of art." The term "works of art" is deliberately intended as a broader specification than "works of the fine arts" in the present statute, with the idea that there is subject-matter (e.g., of applied design, yet not within the province of design patents) which may properly be entitled to protection under the copyright law.

Express mention is made of oral lectures, sermons, and addresses; periodicals, including newspapers; drawings and plastic works of a scientific or technical character, and new matter contained in new editions.

Labels and prints relating to articles of manufacture hereafter to be registered in the copyright office instead of in the Patent Office.

Additions, revisions, abridgments, dramatizations, translations, etc., to be regarded as new works. [Sec. 6.]

Who may obtain copyright.—As broad as heretofore. International reciprocal arrangements confirmed. The privilege extended to any foreign author who is living in the United States at the time of the making and first publication of his work, or first or contemporaneously publishes here.

How to secure copyright.—The copyright is to be "secured" by publication of the work with the notice affixed. This section, 9, with section 14, is fundamental. Sections 10, 11, and 13 prescribe subsequent procedure in the copyright office.

Registration is provided for works (e.g., works of art) of which copies are not reproduced for sale, with the requirement that the notice shall be affixed to the original "before publication thereof." [Sec. 10.]

The deposit to be not later than thirty days after publication; in the case of a periodical not later than ten days. The copies deposited to be of the "best edition," as required by the act of 1870. [Sec. 11.] In case of error or omission to make the deposit within the

thirty days, permission to make it within a year after first publication, but with the proviso that no action shall be brought for infringement until it has been made. [Sec. 15.]

In case of a printed book the copies deposited must be accompanied with the affidavit called for by House bill 13355, passed by the House April 26, 1904, that the requirements as to American typesetting, etc., have been complied with, and the affidavit is to specify the place and the establishment in which the work was done.

Extends [sec. 13] the "manufacturing clause" to include texts produced by lithographic process, and also in certain cases illustrations and separate lithographs, but abrogates it in the case of photographs.

The articles required to be deposited are to be entitled to free transmittal through the mails, as under earlier statutes (e.g., act of February 18, 1867; July 8, 1870). [Sec. 12.]

The notice of copyright simplified. Specified only for the copies "published or offered for sale in the United States." Where right of public performance is reserved on musical compositions, a notice to this effect is required. [Sec. 14.]

Ad interim term [*sec. 16*].—Extends the ad interim term of protection in the case of books first published abroad in foreign languages from one year to two years. Provides for an ad interim term in the case of books first published abroad in English, of thirty days, but with prohibition of importation during the interim.

Duration [*sec. 18*].—Instead of the present term (forty-two years), varying terms according to the subject-matter. Provides a special term of twenty-eight years (instead of forty-two years as now) for labels and prints heretofore registered in the Patent Office; increases the term of other articles, and especially derivative articles, from forty-two years to fifty years; and in the case of original works increases the term to the life of the author and fifty years. Abolishes renewals.

The bill also makes provision for the extension of subsisting copyrights to agree with the term provided in the present bill where the author is living or his widow or a child, provided the publisher or other assignee joins in the application for such extension. (See section 19 of the draft.)

The right of dramatization or translation must be exercised within ten years or it will lapse.

Protection of copyright.—The present statute (Rev. Stat., sec. 4965) attempts to define acts which shall constitute infringements. The bill, having defined the exclusive rights which the copyright has secured to the author, defines (sec. 23) infringement as "doing or causing to be done" without his consent "any act the exclusive right to do or authorize which" is "reserved" to him. It contains, however (sec. 22), the one specification that "any reproduction" without his consent "of any work or any material part of any work" in which copyright is subsisting, shall be illegal and is prohibited.

The civil remedies open to him (sec. 23) are the injunction and an action for damages and profits, or, in lieu of actual damages and profits, "such damages as to the court shall appear just, to be assessed" upon the basis of so much per copy or infringing act, but to be not less than a total minimum of $250 and maximum of $5,000. And the infringing copies are to include all copies made by the defendant, and not merely those "found in his possession" or "sold or exposed for sale." A provision for the impounding and destruction of infringing copies and means for producing them.

Protection provided for [sec. 21] against publication or reproduction of any unpublished copyrightable work.

A willful infringement for profit, now a misdemeanor in the case of such a performance or representation of dramatic or musical compositions, is made a misdemeanor in all cases, as is also the insertion of a false notice of a copyright or the removal of a true one. [Sec. 22.]

Importations [*secs. 26-29*].—Detailed provision for the treatment of copies supposed to be infringing or otherwise prohibited. Exceptions to prohibition modified as below under memorandum "B."

Suits [*secs. 32, etc.*]—Actions may be instituted "in the district of which the defendant is an inhabitant, or in a district where the violation of any provision of the act has occurred."

Limitation of actions to be three years instead of two and to apply to all actions under the act. [Sec. 34.]

Transfers [*secs. 37-45*].—Definitions of the copyright as distinct from the property in the material object and of the copyrights in derivative works as distinct among themselves.

The copyright office.—Sections 46 to 60 provide specifically for the administration of this.

Catalogue of title entries.—Detailed provision is made for the continuance of the printing of the catalogue on the allotment for printing of the Library of Congress (see secs. 55 and 56 of the draft); and the catalogue is to be made prima facie evidence of deposit and registration.

Provision is made for the reprinting of the indexes and catalogues in classes at stated

intervals, with authority to destroy the manuscript cards included in such printed volumes. The current catalogues to be distributed from the copyright office, and sold at a price fixed by the register; the subscriptions to be received by the superintendent of public documents.

Following the provisions for the indexing and cataloguing of the articles deposited, provisions are made, in sections 57, 58, and 59 of the draft for the public inspection of the copyright office record books and deposits; for the permanent use of such deposited articles; for their transfer to other Government libraries where unnecessary to the Library of Congress; and for the disposal of accumulations of useless articles.

Section 60 provides for fees. A uniform fee of $1 for registration; but this is to include the certificate which is to be furnished in all cases [a separate charge is now made for it]. And the certificate is given a new importance as prima facie evidence of the facts which it sets forth, including deposit and registration, thus exempting the complainant in an action from other affirmative proof of compliance with these formalities.

A single fee for certain registrations heretofore requiring multiple fees.

B.—*Provisions of existing law which are omitted from the bill.*

The existing law is set forth in the twenty-odd pages of "Copyright Office Bulletin No. 1." It consists of Article I, section 8, of the Constitution, sections 4948 to 4970, inclusive, of the Revised Statutes, and twelve later acts in amendment thereof. The substantial provisions of these which are intentionally abrogated are the following [references are to pages of the Bulletin, copy herewith]:

[Section 4950, page 6.—Omitted in the bill, but exists still as part of the act of February 19, 1897.]

Section 4952, page 6*A*.—Ad interim copyright. The requirement for notice (of date of publication and reservation of copyright) on the foreign edition is abolished.

Section 4952, page 7.—Labels and prints relating to articles of manufacture no longer to be registered in the Patent Office, but in the copyright office, with corresponding reduction of fee.

Section 4954, page 7.—Renewal term abolished.

Section 4956, page 8.—Requirement that the deposit of copies shall be "on or before the date of publication" is abolished, and a margin of thirty days is allowed, with provisions for making good omissions within a year.

The deposit (registration) is no longer to be the act entitling to a copyright. The copyright is to be "secured" by "the publication of the work with the notice of copyright affixed," and dates from such publication. Registration with deposit remains compulsory, and after the expiration of the thirty days no action for infringement can be brought until it has been made; but it is no longer expressed as a formality the failure to comply with which is to avoid the copyright.

Section 4956, page 8.—Preliminary deposit of title or description abolished. "Photographs" omitted from the "manufacturing clause." ["Chromos" also, in terms, but assumed to be covered by "lithographs."]

Section 4956, page 9.—Importation by individuals of the foreign edition (two copies at any one time) is abolished except with the assent of the American copyright proprietor, and the two copies at a time are throughout reduced to one. The privilege of societies and institutions (under the act of October 1, 1890) is no longer to include the importation, without such assent, of "a foreign reprint of a book by an American author copyrighted in the United States unless copies of the American edition can not be supplied by the American publisher or copyright proprietor;" and the society or institution must be incorporated, unless it be a "college, academy, school, or seminary of learning" or a "State school, college, university, or free public library."

Section 4957, page 9.—The particular language of the entry in the record books of the copyright office is no longer specified.

Section 4959, page 11.—Deposit of "subsequent editions" not required unless the "changes" which they contain are "substantial" enough to induce a new registration.

Section 4960, page 12.—Provisions of act of March 1, 1893, dropped as no longer effective.

Section 4962, page 13.—*Notice.*—The date and the word "by" no longer required in the notice. The abbreviation "Copr.," and in certain cases the letter C within a circle, permissible instead of the full word "Copyright."

Sections 4963, page 13; 4964, page 14; 4965, page 15; 4966, page 16.—Penalties imposed for acts in the nature of misdemeanors no longer to be shared by the United States with "a person" suing for them; sums recovered by way of compensation to the copyright proprietor not to be shared by him with the United States. All infringements willful and for profit made misdemeanors, and the remedies provided by sections 4965 and 4966, including the specifications of a definite sum for each infringing copy, etc., and

a minimum and maximum total are expressed definitely as compensation to the copyright proprietor rather than penalties.

Section 4964, page 14.—Witnesses not to be required for the written consent of the copyright proprietor.

Act of March 3, 1891, page 18.—Only one fee to be required in case of several volumes, or numbers or (in certain cases) parts of a series deposited at the same time with a view to a single registration.

Act of January 7, 1904, page 19.—Omitted as obsolete.

I have particularly noted in this memorandum the points in which the bill intentionally abrogates existing law and the more significant respects in which it modifies or amplifies it. The respects in which it intentionally abrogates existing law are very few, as shown in Part B of the memorandum. The phraseology of existing law is only here and there recognizable in the bill. That is because the bill attempts to be systematic and organic, and, second, because it has sought general terms, wherever descriptive, rather than particular specifications. Especially has it preferred this where the specifications might be limiting. This, as I have noted in the memorandum submitted to you, is particularly illustrated by the treatment of the "subject-matter." The bill contains only the general statement that the subject-matter is to include "all the works of an author," leaving the term "author" to be as broad as the Constitution intended; and, as you know, the courts have followed Congress in construing it to include the originator in the broadest sense, just as they have held "writings," as used in the Constitution, to include not merely literary but artistic productions.

After this general statement certain specifications follow in the bill of particular classes under which a particular application is to be made in the office, but these specifications are coupled with the proviso that they shall not be held to limit the subject-matter. The specifications so far as possible also substitute general terms for particulars. They omit, for instance, the terms "engravings, cuts, lithographs, painting, chromo, statues and statuary." They assume, however, that all of these articles will be included under the more general terms, as "prints and pictorial illustrations" or "reproductions of a work of art" or "works of art" or "models or designs for works of art." The term "works of art" is deliberately intended as a broader specification than "works of the fine arts" in the present statute with the idea that there is subject-matter (for instance, of applied design, not yet within the province of design patents), which may properly be entitled to protection under the copyright law.

The attempt to substitute general terms for particulars is evidenced also in the definition of the right, and of the acts which constitute an infringement of the right. The present statute (sec. 4952) defines the right to consist in the sole liberty to do certain things. The bill (sec. 1) defines the right to be the sole and exclusive right to do certain things, and it specifies those things; but its specifications are in terms very different from those in the present statute.

The present statute (secs. 4965 and 4966) specifies certain acts which are to be deemed an infringement. The bill, having defined the right of the copyright proprietor as the exclusive right to do certain things, defines an infringement to consist in the doing or causing to be done without his consent of any of those things, the right to do or authorize which is exclusively reserved to him. It contents itself with this, adding only the one specification that "any reproduction," without his consent, "of any work or material part of any work in which [his] copyright is subsisting," shall be an infringement.

So as to the person who may obtain copyright: The present statute mentions the "author, inventor, designer, or proprietor," and elsewhere the "originator." The bill rests with the term used in the Constitution, "author," adding only "proprietor," which is not merely in the existing statutes, but has been construed in a series of judicial decisions.

Copyright consists of the exclusive right within a defined period to do certain things with certain subject-matter and to prevent other people from doing these things. The fundamental provisions of the copyright law are therefore these four:

What is the subject-matter?

What are the acts?

How may the exclusive right to do them be secured?

And who may secure it?

Upon the third point, "How may the right be secured?" the bill modifies substantially the existing requirements of law. These make deposit and registration in the copyright office a condition precedent. They require the deposit to be at least coincident with the publication, and they stipulate that failure to comply precisely with this requirement shall avoid the copyright ab initio.

The bill, in section 9, initiates the copyright from the date of the publication of the work, with the notice of copyright affixed. So, in effect, does the present law initiate the copyright from that

date, provided the deposit and registration be effected then; but by the bill the publication with notice not merely initiates the copyright, it "secures" it. That is the expression used in the bill.

Deposit and registration in the copyright office are still requisite, but a reasonable period after publication is allowed for them. The period is thirty days, and in the case of error or omission may be even an entire year, but with the proviso that after the thirty days no action for infringement may be brought until these requirements have been complied with. The right is to be exclusive for a limited period. This period is now twenty-eight years, with a possible renewal for fourteen years—a maximum, therefore, of forty-two years. The bill abolishes renewals and provides for three terms, according to the subject-matter. The shortest is twenty-eight years for labels and prints relating to articles of manufacture heretofore registered in the Patent Office, but which the bill proposes to be taken over into the copyright office. The second term, fifty years, is substantially identical with the present possible maximum of forty-two. It applies to some original and to all derivative works. It would probably cover the majority of copyright entries during any particular period—the majority in number, I do not say in importance. The longer term—the life of the author and fifty years after his death—applies only to original works, but applies to most of those.

As to the merit of these terms, Mr. Chairman, and their necessity you will hear discussion. I merely call your attention to them with, however, these suggestions, which I feel in duty bound to communicate, because they have been so insistently urged upon us:

First, that the present term, a maximum of forty-two years (and that a conditional maximum), does not insure to the author his copyright even throughout his own life, and it makes no certain provision for his immediate family after his death. These are admittedly grave defects, and they are perhaps not met by the fact—it is a fact—that at present the privilege of renewal is taken advantage of by only a small percentage of the authors or their families.

The second is, that a term as long as life and fifty years exists in fifteen countries, including France; that England, with the minimum term of life and seven years proposes a term of life and thirty years, and that Germany, with a term of life and thirty years, is discussing—informally thus far, but is discussing a term of life and fifty years.

The third suggestion is that a common disposition to question a long term for copyright, on the ground that a short term suffices for patents, is based upon false analogy. Literary and artistic productions and useful inventions may be equally the creations of the mind, and they are coupled in the Constitution; but they are coupled, it is pointed out, only as deserving protection. Their character, and the duration of the protection required by each, may be very different. It is alleged to be very different. The monopoly is different; the returns to the creator are different, and the interests of the public are different in the two cases. The monopoly by patent in an invention is a complete monopoly of the idea. The monopoly by copyright in a literary or artistic work is a monopoly merely of the particular expression of the idea. The inventor's exclusive control of his idea, it is said, may bar innumerable other inventions, applications of his idea, of importance to the public, while the author's or artist's exclusive control of his particular expression bars no one except the mere reproducer. The returns to an inventor are apt to be quick; the returns to an author are apt to be slow, and the slower in proportion to the serious character of his book, if a book. The returns to a successful inventor are apt to be large; the returns to even a successful author or artist are not apt to be more than moderate.

Then the idea, it is said, covered by an invention or discovery, may concern the essential welfare, even the lives, of the community, and should be freely available at the earliest possible moment not unjust to the creator of it. Now, it is remarked that no particular book, at least none currently copyrighted to-day, can be said to be essential to the welfare or protection of the community. Many a man's pleasure may be enhanced by it, some men's profit; but no man's essential welfare depends upon it, and no man's life, save, perhaps, the author's own.

I communicate those suggestions as having been pressed upon us.

In no respect are the present statutes alleged to be less satisfactory than in their provisions for the protection of the right, and redress to the copyright proprietor for invasion of it. One inconvenience is that they provide a different class of remedies and recoveries for different subject-matter; another is that they seem to confuse the duty of the Government to punish a deliberate infringement as it would punish any other theft with the right of the copyright proprietor for compensation for his particular losses. The bill attempts to provide uniform remedies, and it divorces the civil action from the criminal. As the memorandum states it, "Penalties imposed for acts in the nature of misdemeanors are no longer to be shared by the United States with a person suing for them;" nor "are sums recovered by way of compensation to the copyright proprietor to be shared by him with the United States." Nor is his right to recover such sums to be imperiled by the necessity of proving that the defendant has committed an offense against the community as well as profited at his expense.

The deliberate theft of a dramatic or musical composition by the willful performance of it for profit, without the assent of the owner, author, or copyright proprietor, is now by law a misdemeanor. The conference could not see why this provision should not apply to any

infringement which is both willful and for profit, and section 25 of the bill extends it to all such.

The existing provision (sec. 4966, Rev. Stat.) which provides remedies and penalties for infringement of dramatic and musical copyrights, is of great moment to the dramatists and composers; and now that it is merged in the general provisions of this and other sections of the bill they are in great apprehension lest it may suffer accident, if accident befall these. To guard against this the general repealing clause of the bill excepts and continues in force section 4966 of the Revised Statutes, but it does so with the intention that this exception shall be dropped in case the general provisions stand.

The reason or merit of these and other provisions of the bill will at the proper time have to be made clear to you, if challenged. That is no part of my present duty, which is merely to introduce the bill to your attention, with some explanation as to how it came to be, and some note as to its leading features. But I except two matters, and I do so to avoid misapprehension; and I feel free to do so because both involve the administration of the copyright office. One is as to fees. The impression has gone out that the fee for registration is to be doubled. The fee for registration is now 50 cents, but 50 cents additional is charged for a certificate when furnished. The proposed fee is $1, but this is to include the certificate, which is to be furnished in all cases and as a matter of course. It ought to be furnished, in the opinion of the office, and no claimant of copyright ought to rest easy without it. It is the evidence of registration and deposit—indispensable formalities, even hereafter—and it is now to be prima facie evidence in a court of law of the facts which it sets forth.

If the copyright is worth the 50 cents for the registration, it seems certainly worth the additional 50 cents for the certificate. But I note here that objections are to be raised to the provision for fees, and particularly as working hardships in some cases not made exceptions, as the case of a series of studio photographs registered under one title at the same time is made an exception. You will have some suggestions as to cases in which the exaction of this fee, without some special modification in certain cases, would work an undue hardship.

On the other hand, the bill tends to reduce the aggregate fees payable by any one publisher and the aggregate receipts of the office by enabling a number of volumes of the same work, and in the case of photographs, prints, and like articles, an entire series, if registered at the same time, to be registered for a single fee.

The other matter is that of copyright deposits. The volume of these is now prodigious. During the last year alone the articles deposited exceeded 200,000 in number. A large proportion of these are of great value to the Library and are drawn up into it. The rest remain in the cellar. The accumulations in the cellar now number a million and a half items. Many of these would be useful in other Government libraries; for instance, medical books in the library of the Surgeon-General's Office. Some of them might be useful in exchange with other libraries. A few might have value in exchange with dealers. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit. They ought to be returned to the copyright proprietors if they want them, or, if not wanted, destroyed. Such dispositions are, I believe, already within the authority of law; but it is fair that they should be expressed. The bill (secs. 58 and 59) definitely expresses them. I ask your attention to them in due course. They have been accepted by the conferences, and therefore by the interests outside of the Government most nearly concerned with their operation. But they may awaken some apprehension elsewhere because of a quite common misunderstanding of the significance of the deposit and its relation to the copyright protection.

The original purpose of such deposits was the enrichment of the Library. This is clear from their history, both in this country and abroad. They were made a condition of securing copyright, but they had no continuing relation to the copyright once secured. In England, for instance, the copies required (now five) are to be for the use of the libraries—five libraries—no one of which is the office of registration for copyrights. The earliest act in this country was that of Massachusetts, in 1783, which exacted a copy as a gift to the library of the University of Cambridge, Harvard University, "for the use of said university," which was not the office of copyright. The earliest act providing for deposit in the Library of Congress, that of 1846, provided that the copyright proprietor should give one copy of the book to this Library, and at the same time it provided that he should give one copy to the library of the Smithsonian for the use of that library.

In 1867 the library of the Smithsonian became a part of the Library of Congress. The act of 1870 provided two copies, both to be addressed to the Library of Congress. But by that same act of 1870 the Library of Congress became the office of registration for copyright; and from that time, and because the failure to deposit not later than the date of publication actually voided the copyright, an impression has grown up that the articles deposited are an integral part of the record of registration, and have a peculiar sanctity as such. The fact of the deposit has been and will be an integral part of the record, and in times past this could most readily be proved by the copies themselves, the law providing neither for a certificate to the claimant admitting the receipt of the deposit nor an entry in the official record showing it. But hereafter the fact of deposit will be proved by the certificate itself.

There is an impression—a very natural one, too—that the copies deposited are necessary evidence of the thing copyrighted, and essential as such in litigation. Now, during the past thirty-six years the copyright office has record or memory of only four cases in which articles deposited have been summoned into court, and an authority on copyright litigations remarks that in three of these he is quite certain that the reason was a fanciful one, and in the fourth he did not see any necessity for it.

For the matter of that, however, there is little prospect that any article of sufficient importance to be a subject of litigation would be deliberately destroyed, or would fail to be drawn into the permanent collections of the Library—at least one copy of it.

Mr. Chairman, having indicated something of what the bill is, let me say a word as to what it is not, in intention.

First. It is not an attempt to codify the common law. The conservative bar was very fearful that it would be. Even more than the present statutes, it leaves to the courts to determine the meaning and extent of terms already construed by the courts. It does this even in cases where the temptation to define was considerable and where foreign statutes attempt a definition. For instance, Who is an author? What is publication in the case of works not reproduced in copies for sale? What is fair use? Now, many such definitions were proposed and lengthily discussed, and omitted because they did not stand the test of the best expert opinion of the most conservative advisers of the conference, particularly the committees of the bar associations.

Second. The bill does not, in intention, attempt to regulate relations between authors and publishers which are or may be matter of private contract.

Third. It is not an attempt at abstract and theoretic perfection, nor is it an attempt to transplant to this country theoretic or what might be charged to be sentimental provisions of foreign law. It tries to be a bill possible for this country at this time and under conditions local here. It contains, therefore, some provisions which are, in our judgment, neither theoretically sound nor according to modern usage abroad nor satisfactory to particular participants in the conference. These are a compromise between principle and expediency or between one interest and another at the conference, between which we could not decide for either extreme—I mean decide in the sense of bringing before you a suggestion in this particular form. We had not any decision in any other sense; we were not a commission. The bill is a compromise. I doubt if there is a single participant in the conferences whom it satisfies in every particular.

Fourth—and I feel really, Mr. Chairman, in justice to the conferences, after their year of labor, impelled to say this—the bill is not a mere congeries of provisions proposed by a selfish group, each member of which was considering solely his own particular interest. It contains, of course, some provisions which concern only particular interests—for instance, the provision as to sound records, or that as to affidavit of domestic manufacturers. But these are easily distinguishable; we suppose and we should hope that they would be distinguished, and particularly so if, as we know to be true in the case of sound records, there is to be definite objection before you against the bill as it stands; and we should hope that that objection, with the arguments of those with whom the proposal originated particularly, should be set aside for special discussion distinct from the general discussion on the bill as a whole. I say there are provisions which concern particular interests, of course, particularly; but these we should hope would be distinguished in your consideration of it.

The bill is the result of a sincere attempt, as we have seen it, to frame a reasonable general statute. I say "sincere," and I feel the right to say it because I followed the conferences closely, and had the best opportunity to judge of their temper and disposition. If some of the interests were selfish in one direction, they were met by the selfishness of others in another direction, and both were under criticism from the general advisors and under the influence of the main body. And neither such interests—and I am speaking of history now, of course—neither such interests nor any other participant in the conference initiated the conference, nor determined its composition, nor controlled its proceedings. The conference was initiated by the Copyright Office at your suggestion, Mr. Chairman. It was composed of organizations invited by the office, and it was theoretically held in the office. The Librarian presided at it, and except for the purpose of some formal resolutions it never organized or in any other way passed out of the control of the office.

If the bill reveals some selfishness, it is perhaps condonable. It is the selfishness of men trying to protect their own property; for of course, as I have emphasized, the interests that were especially invited to the conferences were those that are concerned in an affirmative way with the protection of the right. The conferences were not generally representative—completely representative—in other respects. The bill has that purpose—that is, for the protection particularly of the property. It comes before you for consideration on the ground that it goes too far. It does not create, of course, a new species of property; it merely recognizes a species of property created by the Constitution and already recognized by statute. Its purpose is simply to secure to the man who has created it a species of property which peculiarly requires the protection of law, because the very act which makes it remunerative to him lays it open to

expropriation—that is, the act of publication—and seems peculiarly entitled to the protection of the law, because it is that act, and that alone, which makes it of any use to the public; and of course it secures this protection—not permanently, but only against untimely expropriation.

It may be said that the public was not represented at the conferences. The public in this matter would, I suppose, belong to one of four classes: In the first place, the producer, the creator, with his publisher and manufacturer; or, second, one who is to enjoy the work as a consumer; or, third, one who wishes to utilize the work in some other work, or to reproduce and market it for his own benefit, when this can be done innocently; or, fourth, the student and critic of the rights and obligations of property, and of the regulation of this by law. There may be a fifth class, the mere pirate. He was not invited to the conferences, and I suppose he would not be to your hearings. But the innocent reproducer was not unrepresented at the conferences or in the discussions. In fact, most of the producers were also reproducers, and quite insistent upon their convenience as such. The original producers, publishers, and manufacturers were there as of right, and the student and critic through their interest and public spirit. As for the consumers, two considerable groups were actually represented, and more would have been if organizations could have been found to represent them. Others also there spoke for them.

But as I understand it, it is in the interest of the consumer just because it is in the interest of the producer that copyright laws were originally designed and were called for by the Constitution; and if this proposed one fails fairly to regard that interest of the consumer, its defects will surely be brought to your attention by the third great estate which is jealous of those interests—the newspaper and periodical press; for the bill is now before the public.

Finally, Mr. Chairman, notwithstanding the labor put upon it, the bill is doubtless still imperfect in expressing its intentions; and I have no doubt that while it is under consideration those especially concerned will ask leave to submit to you some amendments of phraseology. I understand that any such amendments proposed by participants in the conferences will be communicated first to the copyright office, so that they may be formulated by the register for your convenient consideration; and the office will gladly do the same for any that may reach it from any other source.

The relation of the office to this project has been peculiar, Mr. Chairman, and that alone has excused me in introducing the bill to you. But having introduced it, the office will, with your permission, relapse into its more normal position of informant to your committee on matters of fact, and an adviser when its opinion is asked. With the general structure of the bill, including its phraseology, the office will of course have especial concern. Upon the general principles involved and upon matters of practice the office will naturally have some opinions, and may not avoid ultimately expressing these, even though in doing so it incidentally supports a provision which concerns particularly a particular interest. It can not avoid this where a bill is referred to it by your committee for its opinion, and still less can it do it in the present case where it is itself in possession of the reasons which induce the various provisions and the principles supposed to underlie them. It must, as occasion requires and you think necessary, expound the bill. Mere advocacy, however, Mr. Chairman, of any particular provisions it must leave to others.

Mr. Chairman, ordinarily I assume that in such a case as this those who are in a sense proponents of the measure would be heard in the affirmative in argument in support of the measure. It is my understanding that in so far as the proponents can be said to be those who participated in the conferences, they do not care for leave to make any argument as such. Certain of them, representing typical interests, would, however, be glad to submit a word or two in behalf of those interests—a very brief word, no one of them speaking for more than five minutes. We have thus far (which I am under duty to communicate to you) notice of objections to two or three particular provisions and then to the bill substantially as a whole.

One of the particular provisions is that against reproduction of copyrighted musical compositions by means of some device or appliance for reproducing it to the ear. Another particular provision is that which, in two respects, curtails the privilege of American libraries to import foreign editions of works copyrighted here.

Mr. Currier. It does so in more than two respects, does it not?

Mr. Putnam. The present law permits two; the bill cuts the two to one.

Mr. Currier. Yes; but there are various other restrictions embodied in the bill, are there not?

Mr. Putnam. In regard to libraries?

Mr. Currier. In regard to importation for libraries.

Mr. Putnam. Yes; there may be other points. I was speaking of the two.

Mr. Currier. The individuals are cut out, are they not?

Mr. Putnam. The individuals are cut out.

Mr. Currier. That is one restriction.

Mr. PUTNAM. They are noted as cut out.

Mr. CURRIER. The number of books is reduced from two to one?

Mr. PUTNAM. In all cases; yes.

Mr. CURRIER. Then the phraseology is so changed that it must mean something. When you say, "To any book published abroad," beginning on page 16, "with the authorization of the author or copyright proprietor," what does that mean?

Mr. PUTNAM. Page 16 of the library print?

Mr. CURRIER. Yes; it is subdivision E, page 16.

Mr. PUTNAM. Section 30—"any book published abroad with the authorization of the copyright proprietor"—that is, the authorized foreign edition.

Mr. CURRIER. Well, that phraseology is new.

Mr. PUTNAM. I was not of the impression that the intent was new in that. It refers to the foreign authorized edition as distinguished from the foreign unauthorized edition, because the importation of any unauthorized edition is prohibited as a fraudulent invasion of the right. It may be, of course. If there is any diminution under that of the present privileges of libraries, there is a group of librarians who desire to be heard. I do not know that they had that so particularly in mind as the exception under subsection 3.

Mr. CURRIER. In subsection 3 there is still another new restriction, is there not?

Mr. PUTNAM. Yes.

Mr. CURRIER. As to the privilege of importation without the consent of the American copyright proprietor, etc.?

Mr. PUTNAM. Yes.

Mr. CURRIER. That is still another restriction?

Mr. PUTNAM. Yes; two copies reduced to one, this prohibition of the importation of the foreign edition of a book of an American author published here of which there is an authorized American edition——

Mr. CURRIER. And the cutting out of the right of the individual?

Mr. PUTNAM. And the cutting out of the right of the individual. I was speaking of libraries first; yes.

Mr. CURRIER. And then such restrictions as may be embodied in that phraseology?

Mr. PUTNAM. Yes; if there is any restriction there, that also.

Mr. CURRIER. I understood some two months ago that an agreement had been reached between the publishers and the librarians, satisfactory to both, which was to be embodied in the bill. Was that the proposition that is now a part of the bill?

Mr. PUTNAM. I think that can best be answered, Mr. Currier, by Mr. Bostwick, who is here, who was a participant in the conferences in behalf of the American Library Association. That is the general association of this country. Mr. Bostwick and Mr. Hill were the two delegates to the meeting; and Mr. Bostwick will say whether this provision is satisfactory to his association as an association.

Mr. CURRIER. I simply desire to say that my mail is filled with protests from librarians and from universities and colleges against this restriction.

Mr. PUTNAM. Yes; and as I was saying, Mr. Currier, we have already note of that protest. Mr. Cutter, Doctor Steiner, and perhaps others—certainly those two, however—Mr. Cutter being librarian of the Forbes Library, at Northampton, and Doctor Steiner being librarian of the Enoch Pratt Library, at Baltimore, are here in behalf of remonstrants against any diminution of the present privileges of libraries. I had understood that this provision as it stands had been accepted by the representatives of the association simply as participants in the conference. May Mr. Bostwick state as to that, Mr. Chairman? I only suggest it because you asked the question.

The CHAIRMAN. We have concluded that it is best to adopt the suggestion to hear first the proponents of the bill and then, at a later period, hear those who object to its provisions.

Mr. PUTNAM. In that case, Mr. Chairman, if you will let me suggest, the interests represented at the conference are easily classifiable. They were the creators of literary productions, the authors; they were the dramatists; they were the composers and the publishers of those productions, the manufacturers, the reproducers; they were these two associations, so far as we had them there, representing the consumers; and then there were the two committees of the American Bar

Association representing our general legal advisers.

Mr. Bowker is here representing the author class particularly.

The CHAIRMAN. We will hear from Mr. Bowker.

Mr. SULZER. Mr. Chairman, I would like to have it noted on the record that I have received a letter from former Judge A. J. Dittenhoefer, the well-known lawyer of New York City, who represents the American Dramatists' Club and the Managers' Association, of New York, and who desires to appear at some subsequent time in favor of certain provisions in this proposed law.

The CHAIRMAN. Does he desire to be heard if the committee is in favor of them?

Mr. SULZER. No; not if the committee is in favor of them. That is the point.

The CHAIRMAN. Perhaps that can be taken up, then, at a later date.

Mr. SULZER. Yes.

STATEMENT OF RICHARD ROGERS BOWKER, ESQ., VICE-PRESIDENT OF THE AMERICAN COPYRIGHT LEAGUE.

The CHAIRMAN. Will you please state your name, Mr. Bowker, your residence, and whom you represent?

Mr. BOWKER. My name is Richard Rogers Bowker. I speak as vice-president of the American Copyright League, commonly called the Authors' Copyright League.

Mr. Chairman, the American Copyright League, for which I speak as vice-president in the absence of its president, Mr. Edmund Clarence Stedman, who regrets in this letter that ill-health detains him in New York, and who desires to be recorded as well satisfied with the bill as a basis for Congressional consideration, and in the absence of our secretary, Mr. Robert Underwood Johnson, of the Century, who has been our sentinel for years in respect to all matters as to copyright legislation, the American Copyright League asks that the first half hour be devoted by your committee to the originators of copyright property.

Mr. Clemens, I understand, has reached Washington, and hopes to be present at one of these sessions as a member of the council of our league. Mr. Bronson Howard, the president of the American Dramatists' Club, and also a vice-president of this league, I hope will be present to speak for the dramatists. Mr. Sousa and Mr. Victor Herbert are here to-day representing musical composers. Mr. Frank D. Millet is here as the delegate of the National Academy of Design and of the Fine Arts Federation, and possibly Mr. Carl Bitter, president, or Mr. Daniel C. French, ex-president of the National Sculptors' Association, may also be here. We ask that a half hour be given to those gentlemen presently; and I shall occupy but five minutes or so of that time.

The conference, sir, proceeded at its first session on a memorandum which formed the basis for discussion, presented by the American Copyright League; and I mention that to say that that memorandum included two important suggestions which were not incorporated in the bill—one the suggestion that the bill should be, as it were, a group of bills, representing separately and distinctively the literary, dramatic, musical, and artistic varieties of copyrightable property. An honest endeavor was made to do that, but it proved not practicable and workable. Again, members of our council, Mr. Stedman and Mr. Clemens among them, desired very much that the authors should be safeguarded in their relations with publishers by certain insertions in the bill. It was held by the legal authorities that that was not a proper subject of introduction in a copyright code; and on those two points the American Copyright League, I think I am authorized to state, recedes from any possible dissension. And I say it, sir, because there are doubtless many points on which the several organizations would prefer to have additions or omissions.

A little girl I knew spoke of a compromise as something where everybody got what they did not want. Now, in that sense this bill is not a compromise. It represents, rather, the consensus of opinion of the originators of copyrightable property, of the reproducers, publishers and similar interests, and of representatives, as Mr. Putnam has told you, of various other interests. On behalf of the league we believe, sir, that you have before you a working basis for a just, broad, clear, workable copyright bill; and we feel confident that such a bill will emerge from your deliberations.

We ask you, sir, to keep in mind two vital points: First, that the rights of the producing classes shall be first of all thought of, but not to the detriment of the great body of reproducers and readers, on whom the author classes depend for the possibility of realizing from their productions. As has been said to you, copyright is on a different basis from patents, in that it not only does not interfere with the rights or privileges of others as succeeding inventors, but that the world is the better for any original work contributed by help of the copyright laws to the community without detriment to anyone, and therefore it should have a broader scope before you in copyright legislation than in patent legislation; and we ask that in that view, in that spirit, the

rights of the producing classes shall be kept in mind.

Secondly, sir, this is a very difficult and complicated question. Those of us who have met in conference have recognized most fully the care, fairness, and wise consideration which have been given to all interests by the copyright office and the difficulties under which a practical bill has been framed. We ask you, sir, in your considerations in the committee and in the discussions in Congress so far as they are shaped by the committee, that you will keep in mind, sir, the importance of keeping a consistent bill throughout these difficult provisions. The copyright office has been of the greatest service to all of us in that very function; and I have no doubt, sir, from our experience, that it will be of the greatest service to your committee.

The league had stood for a copyright commission instead of this conference. But when we find this bill, sir, presented as the result of only a year's work, and remember that the English copyright commission took years to produce a draft which has not yet, after nearly a generation, been enacted into law, we can not but express the greatest satisfaction with the result now before you. We do not feel, sir, that any bill can be presented to your committee which does not call for the most careful consideration, for protest from outside interests, and for discussion, not only in your committee and in the halls of Congress, but throughout the public. We do not feel that any such bill would be possible; and I wish very heartily, sir, to record the American copyright league as favoring the fullest discussion and the fullest consideration of any of what may be called the minority interests. We believe that the interests of the office are perfectly consistent with the interests of the public; and in that view, sir, we support most heartily, individually and as members of the conference, the bill which you have before you.

STATEMENT OF FRANK D. MILLET.

Mr. MILLET. I shall have very little to say, Mr. Chairman. The artists are interested in this bill because, as the committee undoubtedly understands, the copyright of a picture is often, almost always, more valuable to the artist than the original work—that is, of greater money value. We have had long experience with the law, and we have not found that we have been protected. So little protection has been afforded that it is no longer the habit for the artist to copyright his picture. We have gone out of the business of copyrighting, practically, as you will find if you will go to any exhibition, because we have not been able to get any relief in case our work had been infringed upon. We have always objected to the copyright notice which we have been obliged to put on the picture, because it is considered a disfigurement. That is another reason why we have not copyrighted. That has been a very great loss to us as a class. That has been one of the reasons why we prefer, many of us, to spend much of our time abroad.

If you will pardon me for a moment I will give a personal instance.

I have painted in England and in Europe over twenty years. I never had one bit of difficulty with my copyrights over there, and I have had considerable income from my copyrights; and I think $7 or $8 is about all the money I have ever gotten in America out of copyrights here.

Since the conferences began last winter two of my pictures have been reproduced by a journal in New York, one of them in color. They cut off my name and copyrighted the picture themselves. In the case of the other they left my copyright on and published it without my consent. I have absolutely no redress, because the law says that I can get a dollar for every copy found in their possession, and they were not fools enough to have any copies in their possession, of course. I relate this little personal tale, because that is what has been the experience of all the artists, painters, and sculptors.

We do not pretend to say that this bill, in these particular cases, or in the first case of notice, meets our highest desire, because we would like to have it exactly as it is abroad, no notice being required whatever. But we met our friends, our dearest foes, the reproducers, and made this compromise, which is satisfactory to us on the question of the notice, as to what we shall put on the picture without disfigurement, and we think that the bill is the best one that we could possibly agree to, and we are all of us fully in favor of the bill as it stands.

I thank you.

Mr. SULZER. Is the bill as it is drawn at present satisfactory to you?

Mr. MILLET. It is satisfactory to us.

Mr. SULZER. And you want it passed just as it is?

Mr. MILLET. We would like to have it passed as it is.

Mr. SULZER. That would protect the artists?

Mr. MILLET. As far as we can make out, that would protect us.

Mr. CURRIER. Is it the criminal remedy that is provided by this bill that would give the protection

you need?

Mr. MILLET. That is one of the things.

Mr. BONYNGE. What are the new remedies given to the artists by the provisions of this bill?

Mr. MILLET. At the end of the bill you will find them.

Mr. CHANEY. Just state them from memory.

Mr. MILLET. There is a misdemeanor clause that we are very keen on, the same as for the dramatists. We do not see why it should not be a misdemeanor, to apply to us as well as to the dramatists—sections 23 and 25.

STATEMENT OF JOHN PHILIP SOUSA.

Mr. SOUSA. Mr. Chairman, I would much rather have my brass band here. I think it would be more appreciated than my words will be. [Laughter.]

Mr. CHANEY. We would rather have you, just now.

Mr. SOUSA. Thank you.

Mr. Chairman, I would like to quote Fletcher, of Saltoun, who said that he cared not who made the laws of the land if he could write its songs. We composers of America take the other view. We are very anxious as to who makes the laws of this land. We are in a very bad way. I think when the old copyright law was made, the various perforated rolls and phonograph records were not known, and there was no provision made to protect us in that direction. Since then, the talking machines have come out, and the claim is made that the record of sound is not a notation.

There are three ways for the composer to make a living by his music: By sight or by sound or by touch. The notation of my compositions or the compositions of any other composer for the blind must be entirely different from the ordinary, because it must be read by the sense of touch. The notation that is made for a combination of instruments is brought out by sound. The claim that is made about these records is that they can not be read by any notation—simply that no method has been found to read them up to the present time, but there will be. Just as the man who wanted to scan the heavens discovered a telescope to do it. No doubt there will be found a way to read these records.

We are entirely in favor of this bill. The provisions satisfy us, and we want to be protected in every possible form in our property. When these perforated-roll companies and these phonograph companies take my property and put it on their records they take something that I am interested in and give me no interest in it. When they make money out of my pieces I want a share of it.

Mr. SULZER. They are protected in their inventions?

Mr. SOUSA. Yes, sir.

Mr. SULZER. And why should you not be protected in yours?

Mr. SOUSA. That is my claim. They have to buy the brass that they make their funnels out of, and they have to buy the wood that they make the box out of, and the material for the disk; and that disk as it stands, without the composition of an American composer on it, is not worth a penny. Put the composition of an American composer on it and it is worth $1.50. What makes the difference? The stuff that we write.

Mr. BONYNGE. What is the protection by the terms of this bill that is given you?

Mr. SOUSA. That in any production of our music by any of these mechanical instruments they must make a contract with us or with our publishers; that they must pay us money for the use of our compositions.

The publishers of this country make contracts with the composers, and agree to give them a sum outright or a royalty on sales for each and every copy that they publish and sell.

The companies making records for talking machines take one copy of a copyrighted piece of music and produce by their method a thousand or more disks, cylinders, or perforated rolls. If they would buy one copy from my publishers and owners of my copyright and sell that one copy, I would have no objection; but they take the copyrighted copy and make what they claim is a noncopyrighted copy, sell it, and do not give the owner of the copyright a penny of royalty for its use; and they could not do this if the composer had not written it and the publisher had not published it, and I want to be paid for the use they make of my property.

Mr. WEBB. Does this affect records already made?

Mr. CURRIER. No; it does not affect existing copyrights.

Mr. SOUSA. No. That is a sop—I am willing to let it stand for the sake of the future, but I think it is wrong. That is a sop to them, the talking-machine companies, and hereafter they will make money after this law passes on the pieces that I made before the law went into effect.

Mr. CHANEY. So that we will get "El Capitan" from the phonographs in various places?

Mr. SOUSA. Yes, sir; and I'll get nothing for it; and I am the man that made "El Capitan." [Laughter.]

I speak in the interest of the publishers and the composers, and some of them asked me to come here because I could talk from the heart, and I do. I am sure of what I say. There may be some interests opposed to the bill for selfish reasons, but these interests know the bill simply gives us rights we are entitled to.

As to the artists, Mr. Millet said that he got $8.75 for one of his pictures. You can take any catalogue of records of any talking machine company in this country and you will find from 20 to 100 of my compositions on it. I have yet to receive the first penny for the use of them.

There is another point to consider. These talking machines are going to ruin the artistic development of music in this country. When I was a boy—I was born in this town—in front of every house in the summer evenings you would find young people together singing the songs of the day or the old songs. To-day you hear these infernal machines going night and day. [Laughter.] We will not have a vocal chord left. [Laughter.] The vocal chords will be eliminated by a process of evolution, as was the tail of man when he came from the ape. The vocal chords will go because no one will have a chance to sing, the phonograph supplying a mechanical imitation of the voice, accompaniment, and effort.

On this river, when I was a young man, we went out boating and the music of young voices filled the air.

Last summer and the summer before I was in one of the biggest yacht harbors of the world, and I did not hear a voice the whole summer. Every yacht had a gramophone, a phonograph, an Æolian, or something of the kind. They were playing Sousa marches, and that was all right, as to the artistic side of it [laughter], but they were not paying for them, and, furthermore, they were not helping the technical development of music. Go to the men that manufacture the instruments that are nearest the people—the banjo, the guitar, and the mandolin—and every one of them will tell you that the sale of those instruments has fallen off greatly. You can not develop music without these instruments, the country singing school, and the country brass band. Music develops from the people, the "folk songs," and if you do not make the people executants, you make them depend on the machines.

Mr. CURRIER. Since the time you speak of, when they used to be singing in the streets——

Mr. SOUSA. Well, Mr. Currier, I am 50 years old——

Mr. CURRIER. I was just going to ask you: Since that time, the law has been passed to protect the authors of musical compositions, which would prohibit that. Is not that so?

Mr. SOUSA. No, sir; you could always do it.

Mr. CURRIER. Any public performance is prohibited, is it not, by that law?

Mr. SOUSA. You would not call that a public performance.

Mr. CURRIER. But any public performance is prohibited by the law of 1897?

Mr. SOUSA. Not that I know of at all. I have never known that it was unlawful to get together and sing.

Mr. CURRIER. It probably has not been enforced to that extent.

Mr. MCGAVIN. You think it ought to be against the law for some people to attempt to do it, do you not, Mr. Sousa? [Laughter.]

Mr. SOUSA. Yes.

Mr. CURRIER. It is possible that that has deterred the young people from singing.

Mr. SOUSA. Would you not consider it a greater crime to turn on a phonograph——

Mr. CURRIER. I do not consider singing a crime.

Mr. SOUSA. If you would make it a misdemeanor, do you not think it much worse to have a lot of these machines going than to have a lot of fresh young voices singing?

Mr. CURRIER. I think a great many people in this country get a great deal of comfort out of the phonograph.

Mr. SOUSA. But they get much more out of the human voice, and I will tell you why: The phonograph companies know that. They pay Caruso $3,000 to make a record in their machine, because they get the human voice. And they pay a cornet player $4 to blow one of his blasts into it. [Laughter.] That is the difference. The people, the homes, want the human voice. First comes the country singing school, and next comes the country brass band. Let us do something to help them. You can do it by making these people pay me for everything that I compose. [Laughter.]

STATEMENT OF VICTOR HERBERT, ESQ.

Mr. HERBERT. Mr. Chairman and gentlemen, it is hardly necessary for me to add anything, I think, to Mr. Sousa's statement. I think he has made the question very plain and clear.

I would like to say this, that both Mr. Sousa and I are not here representing ourselves as individuals and our personal interests, but we stand here for many hundreds of poor fellows who have not been able to come here—possibly because they have not got the price—brother composers whose names figure on the advertisements of these companies who make perforated rolls and talking machines, etc., and who never have received a cent, just as is the case with Mr. Sousa and myself.

I do not see how they can deny that they sell their roll or their machine, because they are reproducing a part of our brain, of our genius, or whatever it might be. They pay, as Mr. Sousa said, the singer who sings a song into their machines. They pay Mr. Caruso $3,000 for each song—for each record. He might be singing Mr. Sousa's song, or my song, and the composer would not receive a cent. I say that that can not be just. It is as plain a question, Mr. Chairman, as it could be, to my mind. Morally, there is only one side to it, and I hope you will see it and recommend the necessary law.

Mr. CURRIER. Just an incident: The talking machine company that pays a singer gets no protection on that record under the law, either, does it?

Mr. HERBERT. I think they do.

Mr. CURRIER. Could not a competing talking machine company immediately reproduce those records?

Mr. HERBERT. Well, they would go for them.

Mr. CURRIER. I have an impression that there is no law under which they could.

Mr. HERBERT. I think they would.

Mr. CURRIER. I think there is no protection at all.

Mr. HERBERT. I know that we are not protected. Since the courts have held that the perforated roll is not an imitation of the sheet music we have absolutely no ground to stand on.

STATEMENT OF MR. HORACE PETTIT.

Mr. PETTIT. I represent the Victor Talking Machine Company. While I am not here as one of the advocates or proponents of the bill, it is very fitting, I think, at this time, immediately after Mr. Sousa's and Mr. Victor Herbert's appearance, that I should state what we have to say in regard to the talking machines. It may be that Mr. Herbert and Mr. Sousa have been somewhat abused by the talking-machine companies. They, however, certainly do not show it in their appearance.

Our position is to be equitable and just in the matter. We believe that there should be protection, and we are willing that this bill, with certain amendments we have to suggest, should be passed, substantially on the lines indicated, so that the composer should have the protection against his music or his compositions being copied on a record of a talking machine; with the understanding, however, that it does not apply to subsisting copyrights. I believe that is the understanding as expressed, although there is some ambiguity in the language, and therefore I would suggest that section 3, in that regard, be modified, either by striking out the section or by adding to it. Section 3 reads (reading):

> SEC. 3. That the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting, but without extending the duration of such copyright.

I therefore would add to that, in view of that somewhat ambiguous language:

> *And provided*, That no devices, contrivances, or appliances, or dies, or matrices for making the same, made prior to the date this act shall go into effect shall be subject to

any subsisting copyright.

This, I believe, is the intention of the framers of the bill, although it is somewhat doubtfully expressed. So much in that regard.

Further, gentlemen, if the talking machine companies are to pay the author and composer, as they will under this act if passed, a royalty on the copyrighted compositions, the talking machine companies should also be protected. We might pay Mr. Herbert or Mr. Sousa or Mr. Caruso, or any of the opera singers, a thousand dollars for making a record. It is perfectly possible, within the known arts, for that record, after we have made it, to be reproduced by a mere copperplating process by somebody else and copied, so that we would pay the thousand dollars or so and have no protection against the party manufacturing a duplicate of it. Therefore, not only for that reason, but for the other reasons which I shall briefly mention, the talking machine manufacturers should be entitled to register the particular records which they prepare, and that, therefore, should be included in the act.

The bill evidently is intended to cover talking-machine records, although it is somewhat doubtfully expressed.

Section 4 is the section upon which everything more or less hangs, and that is [reading]:

> That the works for which copyright may be secured under this act shall include all the works of an author.

That is all that it says in that regard. The purport, however, is to cover substantially everything that was covered by the former copyright act. In section 18 the different things copyrighted are specified, in which section the duration of the terms are provided. Section 18 states, for instance:

> For twenty-eight years after the date of first publication in the case of any print or label relating to articles of manufacture.

Then comes a proviso, and then:

> (b) For fifty years after the date of first publication in the case of any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors; any abridgment, compilation, dramatization, or translation; any posthumous work; any arrangement or reproduction in some new form of a musical composition; any photograph; any reproduction of a work of art.

I would suggest that you include in there, on line 14 of page 14, after the word "composition," the words "any talking-machine record;" so that there would be no room for doubt but what talking-machine records are intended to be included.

For this purpose I would also amend section 5 (p. 4, lines 2 and 3) by adding between lines 2 and 3, before the word "Phonographs," the following: "(j) Talking-machine records."

I want to say one more word in that regard: The talking-machine record is a new art. At the time that the former acts were passed and the Revised Statutes it had not acquired the state of perfection in which it is to-day. The talking machine is a writing upon a record tablet—not to be read visually, but audibly to be read through the medium of a vibrating pencil engaging in the record groove. This reproduces the thing that is uttered, in the characteristic manner in which it is uttered, and therefore that particular thing ought to be the subject-matter of a property right.

For instance, we might say that a particular piece would be sung or played by some country brass band, such as Mr. Sousa alludes to. The instrumentation there of that particular piece as recorded would be as different from the instrumentation of the particular piece when played by Mr. Sousa himself, from the stage of one of the great opera houses, as could be imagined; and what should be protected there is the particular instrumentation as it is played by Mr. Sousa, as he has rendered it. The same thing applies to any orator, or any actor, or any recitationist. It is a picture of the voice, as perfectly as a photograph is the picture of a man, or of a thing; and all the personality and all the characteristics of speech of the man uttering it are there recorded.

Mr. Bonynge. Do you mean that if that lecturer delivers the lecture to one of the talking machines that you should take a copyright upon that disk, or whatever it is, that record, I suppose is what you call it, so as to prevent him from giving another reproduction of the same lecture to another talking machine?

Mr. Pettit. No, sir. That would be his right. His lecture is copyrightable. He has a perfect right to copyright that in the ordinary manner, and he has the further right, if he pleases, to have it copyrighted through the means of a talking-machine record, or, with his permission, we could do so. But wherever the thing is primarily copyrighted we could not use it in any sense without his permission.

Mr. Bonynge. Yes; but after he has copyrighted it and you have got his permission to use it in your

particular talking machine and have paid him whatever you may have agreed to pay him as compensation for the use of it, would you seek to prohibit him from giving that same lecture to another talking machine?

Mr. PETTIT. That would depend entirely on the terms of the contract; but that is not the idea at all. It is merely the means of recording a voice, the production of a particular man or band, or instrumentation, with all the characteristics of that particular voice or instrumentation, which we think should be subject to copyright.

Mr. CHANEY. Do you not think, then, if you want that sort of an amendment to section 18 that you should also amend section 4?

Mr. PETTIT. No, sir; I do not think that is necessary.

Mr. CHANEY. You think that includes it?

Mr. PETTIT. I think section 4 is broad enough to include it. You will understand that section 4 is understood to include a photograph. It is understood to include everything which is the subject-matter of copyright.

Mr. CHANEY. I was just about to ask this: Understanding that this talking machine is a new arrangement, and was invented later than the date of the original copyright law, by that very fact it might be necessary to mention it in section 4.

Mr. PETTIT. Well, I assumed that the word "author," as used by the Librarian of Congress in presenting the bill, was sufficiently broad to include anything which was originated of that character: and, as interpreted by the courts, for instance in the Sarony case (111 U. S. Repts., 59), it has been decided that the word "writing" was broad enough to include a photograph, and that therefore it would not be necessary to amend section 4, provided section 18 had specifically in it the words "talking-machine record," showing that it was meant to be included. Of course I should not object to including it. I should not object at all to having section 4 amended for that purpose, but I doubt whether it would be necessary under the circumstances.

Mr. CHANEY. You would be satisfied without its amendment?

Mr. PETTIT. I think so, provided the talking-machine record was inserted in sections 5 and 18.

There should be no question but that the particular characteristic utterances of a singer, or recitationist, or of an actor, or of an orator, or the particular instrumentation of a pianist, or leader of an orchestra, etc., independent of the composition itself, whether it is copyrighted or not, should be equally entitled to protection, as a photograph or reproduction of a work of art.

The present-day thoughts and ideas may be recorded and reproduced through this new form of writing—that is, by recording the uttered sound upon a properly prepared surface in a sound groove, by which the varied undulations of the voice are formed in the groove by corresponding undulations, lateral or vertical. Here we have a true writing of the voice, recording uttered sound, recording not only words, thoughts, and ideas, but also recording the special particular expression and characteristic method of speech employed by the person uttering the sound. In other words, we have the exact voice, with all its individuality recorded, to be reproduced through the medium of the reproducing device employing a stylus operating in the groove.

Certainly a sound record is within the contemplation of the Constitution and should be unquestionably included in this proposed new act relative to copyrights.

It matters not whether the subject-matter of the record is otherwise copyrightable or not. If the piece played is copyrighted as a musical composition it can not be reproduced on a sound record, in accordance with the bill, without the permission of the composer. A Paderewski, however, may play the copyrighted selection, and a record of his rendition of it, with all his personality and individuality thrown into the piece, should be entitled to a copyright on a sound record for reproducing purposes.

This is true, also, of the voice of a Caruso or a Melba singing either a copyrighted or uncopyrighted piece. It is true, also, as a further illustration, of the recitation by Henry Irving of "Eugene Aram's Dream." What is here copyrighted in these records is the individuality and personality of the rendition by the performer. It is the picture of the voice or of the instrumentation as, for instance, a copyrighted photograph is a picture of a person or thing.

Should another performer play the same piece played by a Paderewski the personality of Paderewski would be absolutely wanting, and the same difference between the two performances of the same composition would be in the respective sound records as would exist at the actual performance of the respective pieces. The same differences between Caruso's rendition of a selection from Rigoletto and a concert-hall singer's rendition of the same would exist in the sound record and the reproduction therefrom as would exist in the actual singing of the selection. This is true regarding the personality of every voice and instrumentation recorded.

A large portion of the selections, musical and recitational, on talking-machine records are not

copyrightable or copyrighted. These records, however, with all their originality, personality of the recitationist or singer, and peculiarity of arrangement, etc., should be copyrighted, and the private competitor prevented from purloining an artistic and characteristic production.

So-called talking-machine records in this respect differ quite materially from the mechanical organ and piano for the reason that a so-called talking-machine record is an exact record of all the modulations, and all the characteristic articulations of the voice, as well as of all the characteristics of an instrumentation. In other words, it is an exact picture of all the merits and demerits of the original, and the original is reproduced with an exactness, so that frequently, at a distance, in the present perfected state of the art, the reproduction may very well be mistaken for the original.

This record of the voice and instrumentation for sound reproducing is an art which was not commercially available or perfected when the earlier copyright laws were passed, and therefore was not included.

The following were submitted by Mr. Pettit at the meeting of June 8, 1906, embodying his proposed amendments to the bill:

JUNE 7, 1906.

To the honorable Joint Committee of the Senate and House of Representatives.

GENTLEMEN: Referring to the proposed bill, "To amend and consolidate the acts respecting copyrights," now before the committee, I would propose the following amendments:

Amend section 3 (p. 3, line 8) by adding continuously at the end of said section the following:

"*And provided*, That no devices, contrivances, or appliances, or dies, or matrices for making the same, such as referred to in clause (*g*), section 1, made prior to the date this act shall go into effect, shall be subject to any subsisting copyright."

Amend section 5 (page 4, lines 2 to 3) by adding between lines 2 and 3, before the word "Photographs," the following: "(*j*) Talking-machine records."

Amend section 18, clause (*b*), (page 14, line 14) by adding between the word "composition" and the word "any" the words "any talking-machine record."

Amend section 23 by striking out from the clause marked "First" (page 17, lines 18 to 20) the following: "or any device especially adapted to reproduce to the ear any copyrighted work."

Amend section 23 by inserting in the clause marked "Fourth" (page 18, line 4), between the words "of" and "all," the following: "any device, contrivance, or appliance mentioned in section 1, clause (*g*) and."

These amendments to section 23 are for the purpose of making the penalty relative to unlawful use of devices, etc., enumerated in section 1, Clause Z, one dollar instead of ten, which latter amount is excessive. It puts the device for reproducing sound on basis of books, etc., instead of in the class of paintings, statuary, or sculpture.

A brief memorandum of argument will be submitted later.

Senator SMOOT. I would like to ask Mr. Sousa a question. I was very much interested in your statement, Mr. Sousa, pertaining to talking machines taking the place of the human voice, and I will ask you this question: If you were protected in your productions and received a royalty from the talking machines, would that lessen the use of the talking machines any and strengthen the use of the voice and the brass band and the home choir, and so on?

Mr. SOUSA. I do not think so, but I think it will reduce two wrongs to one.

Senator SMOOT. Then, it is simply a question of your receiving the royalty that you think you are entitled to?

Mr. SOUSA. Yes, sir.

Senator SMOOT. I think there are other causes besides the general use of the talking machine that account for the fact that there is less singing than there used to be. I think we do not live quite as close to nature as we used to, and that that is what used to make us sing.

Mr. SOUSA. That is very true. But the more leeway you give the talking machine the greater encroachments they will make. If they are made to pay a royalty on all compositions that they use, perhaps they will not have so many bad ones in their records. [Laughter.]

Senator SMOOT. That is what I intended to find out, as to whether it was simply a personal affair.

Mr. CAMPBELL. Is not the real reason that if it protects you and other composers, there is an incentive to you to compose?

Mr. SOUSA. Oh, yes; I can compose better if I get a thousand dollars than I can for six hundred. [Laughter.]

Mr. CAMPBELL. That is the real reason.

STATEMENT OF PAUL FULLER, ESQ., OF NEW YORK.

Mr. FULLER. My original rôle, Mr. Chairman and gentlemen, was as one of the members of the Bar Association of New York, and as chairman of the committee to express to you gentlemen all the efforts that had been made and the most extraordinary result that has been accomplished from conflicting interests in getting up the framework of this bill, and to say on behalf of a number of the conferees, we will call them—the American Publishers' Copyright League, the America Publishers' Association, the National Academy of Design, the Fine Arts Federation, the Music Publishers' Association, the American Library Association, the Print Publishers, the Engraving Copyright League, the United Typothetæ, and the National Typographical Union—that they felt that a great achievement had been reached in getting the framework of this bill in its present condition. It is in such shape now that when anything is the matter with it we know where to apply the remedy. In the present chaotic condition of the copyright laws it would require an X ray to find where the mistake was and how to remedy it.

I did not intend to say more than a word, but the suggestions made by the last speaker, Mr. Pettit, are of so vicious a character—not intentionally so, but they show precisely how a good bill can be made bad—that I am going to extend my remarks for the five or ten minutes required to point out why they should not be regarded at all.

For instance, take section 3. Our friend wants to alter that, and it is absolutely unalterable if justice and common sense are to prevail. All that section says is that the copyright shall extend to all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting.

If there is no copyright subsisting to keep a man from singing my song through a phonograph, there is no harm done. If it is subsisting, he must pay the penalty, and the courts will ultimately determine that. The question is now before the courts. It seems to me strange that any court should hesitate to say that a man who not only copies my notation, but who actually reproduces the music, the sound, should not be required to pay me for that privilege. If a man engraves my music and sells it by the sheet, he is a counterfeiter, and I can get money from him and punish him, but if he does more than that—if he completes that counterfeit to the extent of the reproduction of the actual sound that the composer had in his brain when he put it there—they say he has not imitated. That question is before the courts. Do not touch it. Do not touch it. This new law makes it certain for the future, but do not endeavor to touch the past. Let the courts decide what the present law is.

I say that the present law will protect these gentlemen from that piracy—because it is the ultimate form of piracy. It goes further than the reproduction of the composer's music sheet. It reproduces the sound. So that they have taken everything from the music man when they reproduce it on the disk. Therefore I say leave this provision in the bill: "And all matter reproduced therein in which copyright is already subsisting." Do not touch it.

In section 18 my friend (Mr. Pettit) wants to have the disks copyrighted. Mr. Bonynge put his finger right on the point of that proposition, and perhaps it is unwise for me to say anything further. That is a patentable device, and it has been patented, and there is nothing original on that disk—nothing original to the company that makes that disk. The company has borrowed it or bought it or stolen it from somebody else, and they want to copyright that. For heaven's sake, let the copyright stop somewhere.

Mr. Bonynge said: "Would you prevent the man who sang into your phonograph, or talked into it, from singing or talking into any other?" Certainly not. It is not an original production. It is not the work of an author or composer or artist. There is nothing intellectual about it, except that it is scientific, and the scientific part of it is protected by his patent. The reason I am so emphatic about that is that when you endeavor to put in the ideas of patents and the protection of inventions into this law you dislocate it and disarrange it.

Senator LATTIMER. The musician may memorize that music, and may entertain an audience with it, but he can not sing it into a phonograph; is that it? According to your position, as I understand it, the singer may take the music of Mr. Sousa, commit it to memory, and may stand before an audience and entertain the audience with Mr. Sousa's music and reproduce it to the audience, but he can not reproduce it in a phonograph?

Mr. FULLER. If he has paid Mr. Sousa for the privilege of that public performance. But he can not, at the same time, under the payment for the privilege of a one-night stand, sing it into a phonograph and give it to a million people all over the country.

Mr. BONYNGE. And he can not give that public performance unless he has paid Mr. Sousa his royalty?

Mr. FULLER. No.

Mr. MCGAVIN. Would not the copyrighting of this phonograph record give the musician, say Mr. Sousa, double protection? He already has the protection of the copyright on his sheet music, has he not?

Mr. FULLER. Yes.

Mr. MCGAVIN. And he would have the further protection of the copyright of the music as it goes into the phonograph, would he not?

Mr. FULLER. No; it is the talking-machine people who want a copyright on that, and to hold it against the original composer.

Mr. CHANEY. I did not understand Mr. Pettit that way.

Mr. FULLER. Mr. Sousa is entitled to it, whether he prints his music on a sheet of paper or whether he prints it on a disk; but the man that prints it on the disk is not entitled to it. That is all.

Mr. BONYNGE. He has not originated anything.

Mr. FULLER. No.

Mr. BONYNGE. Except that the disk is a patentable thing, and on that he has a patent.

Mr. FULLER. Yes. The bill is a compromise, and one which every lawyer here and every lawyer who was at the conference thinks he can better; but it is the best that could be had to protect and satisfy all the interests. It has been stated that perhaps none of the interests are entirely satisfied. If that is true, it is the best kind of a bill. There are only two kinds: The bill that is perfect, the one that satisfies everybody—and there is none such; and the one that satisfies nobody, because nobody has had injustice done.

Mr. SULZER. Mr. Chairman, I move that two copies of the proceedings of these hearings be printed, one for the Senate and one for the House.

Mr. CHANEY. I second that motion.

(The motion was carried, and the committee thereupon adjourned until to-morrow, Thursday, June 7, 1906, at 10 o'clock a.m.)

COMMITTEE ON PATENTS,
HOUSE OF REPRESENTATIVES,
Thursday, June 7, 1906.

The committee met at 10 o'clock a.m., pursuant to adjournment, conjointly with the Senate Committee on Patents.

Present: Senators Kittredge (chairman), Mallory, and Latimer; Representatives Currier, Hinshaw, Bonynge, Campbell, Chaney, McGavin, Sulzer, and Webb.

Mr. PUTNAM. Mr. Chairman, Colonel Olin was next upon the list of those who were to speak for particular groups in the conference. Colonel Olin participated in the conference as counsel for the American Publishers' Copyright League, and I think that he tends in his remarks to express something of the sentiments of some others of the publishing group.

STATEMENT OF STEPHEN H. OLIN, ESQ.

Mr. OLIN. Mr. Chairman and gentlemen, a number of different bodies, mainly publishing and reproducing bodies, which participated in this conference, thought it proper, in view of the dignity of this occasion, the unprecedented meeting of the committees of the two Houses, that they should collectively say in very few words what they all thought of this bill, that so they could best serve the committee, so they could best provide that nothing should belittle the force of the language of the President or the clearness of the presentation as to the bill made by the Librarian.

These bodies who have authorized me to speak in their behalf in this matter are the Academy of Design, the Fine Arts Federation, the American Publishers' Association, the American Publishers' Copyright League, which two bodies include practically all the publishers of the United States; the United Typothetæ, which include all the great employing printers of the United States; the Music Publishers' Association, some forty-two music publishers who, by habit, not only represent themselves but those musicians who rely upon them for protection; the Photographers' League of America, the Print Publishers' Association, which two bodies represent largely the illustrating

interests of the country; the International Typographical Union, which, as the committee knows, represents the typesetters and printers; and finally the American Library Association, wish me on their behalf to say that this bill in its present form has their substantial approval. It is understood that suggestions of modifications as to detail may be made by these organizations individually through the Librarian of Congress; and I submit their signed paper to that effect to the committee.

Mr. Chairman, it seems to me that this simple statement on behalf of these bodies carries a very strong prima facie argument in favor of this bill. The greater part of the effort of the authors of this bill has been to provide in that field of copyright which Congress has already bounded and established, and which the existing law creates, a reasonable and orderly regulation; to provide against these conflicts and uncertainties and difficulties which the repeated amendment of the law has brought about.

I think everybody would, further, be glad if there could be such a bill as most men could read with some intelligence; that would not need not merely a lawyer, but a copyright lawyer, to interpret. I think most men would be glad, furthermore, in view of the importance of international copyright, if it were such a bill as an intelligent foreigner could understand and an intelligent foreign lawyer could advise about, and such a bill as that the people who are used to it here would thereby be taught something of the general copyright law and could better understand foreign rules. But at any rate, these organizations whose names I have read to you represent, with some few exceptions, roughly, the whole body of men interested in the actual working of the law. Most of them, I think, except those who are purely authors and creators, like the arts associations, have at some time or other been on each side of a copyright controversy. In their business some of them are owners of copyrights and desire to enforce their copyright as far as possible, and most of them are also desirous at times of using literary or artistic matter which is protected by copyright, and they desire that the law shall be precise, so that they can understand their rights and not unwittingly be guilty of offense.

So, for all these reasons, it seems to me that when they come to you and say, substantially, "This law is satisfactory to us," you may be sure that prima facie there is a law here that is an improvement on what at present exists, and which, on the whole, will give a reasonable and sane regulation of this most important matter. And of course if any of them come to you with special ideas as to improvement, you will hear and pass upon them for what they are worth.

I am going to leave that without any argument, because it seems to me the fact itself is persuasive and that it must impress this committee with the substantial value of this bill that has been presented.

There is one thing which the committee will naturally scrutinize with great attention, and that is every provision of this bill which in any respect seems to extend the field of copyright as Congress has previously bounded it; that is to say, which gives copyright upon some new article, or extends the term of copyright, or gives copyright to people who did not formerly possess it, or which in any degree limits the right of the public as against the copyright owner. The bill, I think, makes no very large incursion into that region, but it is that region which, I am sure, this committee will principally wish to examine. With your permission, I shall briefly speak of those things which occur to me as to such extensions.

First of all, the bill does extend the privilege of copyright to preventing the reproduction of musical sound or spoken words by machinery. That was spoken of before the committee yesterday. All that I can say about it is that this body whom I represent, although some of them have special interests in it (and they wish to be heard on it hereafter), in general look upon the matter as the circuit court of the United States in the second circuit looked upon it in their last decision on the subject, as being a matter germane to the copyright law, relating to the same kind of rights that Congress has hitherto protected, and that they see no reason why such rights should not hereafter be properly protected; and they respectfully refer the committee, so far as their suggestion goes, to the special information and advice of those on both sides of the question who have the greatest interest in it and the greatest capacity to inform the committee in regard to it.

The Chairman. Can you give the citation of the decision that you have mentioned?

Mr. Olin. I can hand it to you. A printed copy of the decision was handed to me yesterday. It has not yet been reported.

Mr. Chaney. That was the decision that was distributed yesterday?

Mr. Olin. Yes; that is the one.

The Chairman. Unless there is objection on the part of the committee, we will have this decision put in the record.

(The decision referred to is as follows:)

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

White-Smith Music Publishing Company, appellant, against Apollo Company, respondent.

Judges Lacombe, Coxe, and Townsend.

These causes come here upon appeal from a decree of the United States circuit court for the southern district of New York dismissing bill alleging infringement of copyright. The facts are stated in the opinion of the court below. (139 Fed. 427.)

Per curiam: The questions raised in these cases are of vast importance and involve far-reaching results. They have been exhaustively discussed in the clear and forcible briefs and arguments of counsel. We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant.

But in view of the fact that the law of copyright is a creature of statute and is not declaratory of the common law and that it confers distinctive and limited rights, which did not exist at the common law, we are constrained to hold that it must be strictly construed and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

We are therefore of the opinion that a perforated paper roll, such as is manufactured by defendant, is not a copy of complainant's staff notation, for the following reasons:

It is not a copy in fact; it is not designed to be read or actually used in reading music as the original staff notation is; and the claim that it may be read, which is practically disproved by the great preponderance of evidence, even if true, would establish merely a theory or possibility of use, as distinguished from an actual use. The argument that because the roll is a notation or record of the music, it is, therefore, a copy, would apply to the disk of the phonograph or the barrel of the organ, which, it must be admitted, are not copies of the sheet music. The perforation in the rolls are not a varied form of symbols substituted for the symbols used by the author. They are mere adjuncts of a valve mechanism in a machine. In fact, the machine, or musical playing device, is the thing which appropriates the author's property and publishes it by producing the musical sounds, thus conveying the author's composition to the public.

The decree is affirmed, with costs.

Mr. OLIN. The second extension or modification of the present rights of the copyright proprietor as against the public are those instances mentioned yesterday by the chairman of the House committee in regard to the exceptions to the prohibition of importation. As the law stands to-day the importation into this country of a book which is copyrighted here is prohibited, and there are certain exceptions, in the first case, of certain libraries and colleges who may import not exceeding two copies in one invoice, and individuals who may import not exceeding two copies in one invoice. This bill makes a modification of the present rule.

I would like to call the attention of the committee to the reason why the present law is as it is, and the reason why this suggestion of amendment is made. Of course, prior to 1891 there was nothing like this in the law. The law was perfectly simple, and had been perfectly simple for a hundred years. There could be no importation of the copyrighted article from abroad without the consent of the copyright proprietor. With his consent it could be freely imported. So far as I know there had never been the slightest dissatisfaction on the part of copyright proprietors or of the public with the working of that rule. As a matter of fact, it was to the interest of the copyright proprietor to bring in, I will say, the English edition of the book which he was publishing here, and to sell it—and so far as the public wanted it they always got it—at his shop or at other shops, through the regular channels of trade, so that the public and he alike were perfectly satisfied.

Mr. CURRIER. Were there any importations before 1881?

Mr. OLIN. Before 1891? I think there were.

Mr. CURRIER. With the consent of the copyright proprietor?

Mr. OLIN. I think, as a matter of fact, if you went into a bookstore you always found and could buy, at a somewhat higher price——

Mr. CURRIER. That is not the question. Were there any importations of such books?

Mr. OLIN. There were, by the copyright proprietors, who put them on sale and sold them through the trade.

Mr. CURRIER. Importations solely by the proprietor of the copyright—not by individuals?

Mr. OLIN. Yes, sir; not by individuals. Congress undertook in 1891 to do two things: First, to admit to the privileges of copyright the foreigners resident in certain countries; and, second, to require that the manufacture of copyrighted books should be by American typesetters and plate makers here in this country. And they undertook to do these things with the minimum changes in the language of the statute. They inserted a few words in one section, and then a few words in

another, and both of the desired results were brought about, just as they exist to-day. Then, in the last part of the discussion in Congress, as I remember it—and I am open to correction as to the historical account—it became apparent that the typesetter was not duly protected if only those changes were made, for the reason that the copyright proprietor, having the free right to import books from abroad, might perhaps comply with the typesetting clause colorably only, in an imperfect way, and might satisfy the public demand for his books by importation of those set up and printed abroad. Therefore, at the typesetters' request, there was imposed a prohibition of importation which affected the whole world, including the copyright proprietor. Nobody could import books.

Mr. CURRIER. That was a perfectly satisfactory provision.

Mr. OLIN. That was a perfectly satisfactory provision, both to the copyright owner and to the typesetter; but then the general public were heard, and they said "no;" an English edition may be better than an American edition, for one reason or another, and you must not deprive us of the privilege of getting the best books. Libraries were heard, and individuals were heard. And Congress then hit upon this expedient, which was very simple and on the whole has been very effectual. Congress said:

> But this prohibition shall not apply in the cases mentioned in certain specified sections referred to of the tariff act.

The sections of the tariff act referred to enumerated a certain number of classes which Congress had thought were worthy of benefit from the Government to the extent of allowing them to import books in limited numbers free from duty. So there was ready-made for the hands of Congress a certain list of people who import books who might be allowed to benefit at the expense of the copyright proprietor, just as they had been theretofore benefited at the expense of the customs. That is the law as it stands to-day.

Then Congress added this further provision, that any individual also shall be allowed to import not exceeding two copies in one invoice on payment of the duty thereon, for use, and not for sale.

Like every other provision of a law after it has been duly tested by use, it is fair to bring it before the legislature again and to call attention to its results, and that is especially true where the provision of law was necessarily adopted with haste and was obviously a mere expedient for arriving at a wished-for result. And when this conference convened the publishers said: "To some extent this section has worked badly in certain ways," which I shall now point out. The librarians in libraries and the colleges have generally availed themselves of this privilege, being coupled with the privilege to import without the payment of duty, and have imported copyrighted books in those ways in large numbers. How far individuals have availed themselves of their privilege it is impossible, or at all events would be difficult, to tell; probably not to any great extent. The number of men who care so much for an English edition of a book that they are willing to write for it to a London bookseller and import it themselves is not very large.

So far as it goes, the privilege of importation is an inroad on the rights given to the copyright proprietor. It is an inconsiderable inroad so far as most popular books—novels and the like—which have circulation are concerned. The few hundred books that come to individuals here amount to not a very substantial burden upon the proprietor of such copyrights. But there are certain classes of books, expensive to produce, and with a very limited circulation—books of a scientific character, books illustrated with plates—and they circulate among the precise classes; that is, the libraries and the colleges and these individuals who are particular about their libraries, the precise individuals who import books under these exceptions; and there were instances brought before the conference where publishers here had declined to undertake a book which would have been valuable to the public, which would have been valuable to the typesetter to set up, and the American publisher to bring out, and to the American bookseller to sell, for the reason that the very limited public which these books addressed would all, in the natural course of events, have their demands filled through these exceptions to the prohibition of importations.

That did not hurt the libraries or the individuals who habitually get English editions. It did hurt, we maintain, the American public, the reading public, and a great many individuals among the American producing classes. So that there was a modification requested of the present rules, and the modification in regard to the libraries is this: There is to be not exceeding one copy to be introduced on an invoice, the privilege is not to relate to books which have their origin here in America. With your permission, I will briefly explain those two points. In the first place, ordinarily a library or a college needs only one book at a time. If it needs another copy of the same book it is not too much to ask that it make another importation to bring it in. Under the present rule, while delicate and careful men would not take advantage of it, it is constantly a temptation to a librarian who can import free of duty and free of the copyright proprietor's claims, two copies of a book from England, to import one for the legitimate use of the library and one for some other use. The effect of that influence can not be particularly measured.

The other point is one which can be clearly understood. It is now the right of colleges and libraries, an important right, that in case of an English book they should be able to get the

English edition, which in some instances is more complete or for other reasons better than the American edition. But it can almost never be an important right to obtain the English edition of an American book since the American edition is almost always more complete, or equally complete. So that the right to import the foreign edition of an American book, a book of American origin, would ordinarily be confined to the Tauchnitz and the like editions with which the gentlemen of the committee are all familiar, where a continental publisher publishes English and American books for the benefit of travelers, and they are not allowed to be reimported into England or America. It seems to the publishers fair that the same rule which applies to every Englishman and every American as to such Tauchnitz editions should be applied to libraries; that is, that they should get the American edition, and not the other, of which the only advantage is cheapness, arising from its special purpose.

Whether or not these are reasonable changes has been very largely passed upon, it seems to me, in the controversy that has gone on with the American Library Association, which is a very powerful and very diligent and active association, and which has been very much interested in these matters; and in laying before you their approval of the bill in its present shape, it seems to me that as to this clause it must establish in the minds of the committee a clear prima facie case, at least, that this compromise that is agreed upon is a reasonable compromise. There are gentlemen here who represent certain libraries who, I understand, think that it is not a reasonable compromise.

Mr. CURRIER. That minority is a very strong one, is it not?

Mr. OLIN. I think it is a strong one; and they undoubtedly will be heard. They object that this compromise goes too far; and all that we can reasonably ask the committee at this moment is that if it occurs—if it seems to the committee that what this minority of librarians have to say overcomes the presumption of fairness that arises from a compromise satisfactory to the majority—that then the publishers may have their opportunity of showing to the committee that it is a fair compromise and a reasonable disposition of the matter.

Now, we come to the next clause of these exceptions.

Mr. CURRIER. Just an instant. Would the people you represent object seriously to an amendment to subdivision 3, on page 16, which would strike out all after the words "United States" where they occur?

Mr. OLIN. On page 16?

Mr. CURRIER. In the tenth line of subdivision 3.

Mr. OLIN. Are you reading from the printed form of the bill?

Mr. CURRIER. The library print.

Mr. CHANEY. Section 21?

Mr. CURRIER. I have not compared them. I have been using the library print all the time.

Mr. CHANEY. Just take the other bill.

Mr. PUTNAM. Section 30 of the bill.

Mr. CHANEY. Page 24 of the Senate bill.

Mr. CURRIER. Now, strike out all after the words "United States," in the twenty-fifth line, down to the fourth section.

Mr. OLIN. I am now speaking merely for the publishers, whom I do represent generally, and not for these other associations.

Mr. CURRIER. I was simply asking if the people whom you represent would make serious objection to that amendment.

Mr. OLIN. Speaking only for the publishers, I think they would. I think they would wish to be heard fully on that before any such change was made.

Mr. CURRIER. Right in that connection, let me call your attention to the first subdivision, beginning on line 13, which deals with the importation for an individual.

Mr. OLIN. On what page?

Mr. CURRIER. Page 24, line 13.

Mr. OLIN. Yes.

Mr. CURRIER. We would understand, would we not, that that was a practical prohibition of importations by individuals?

Mr. OLIN. No, sir.

Mr. CURRIER. Do you imagine that a book would ever be imported by an individual under that provision?

Mr. OLIN. I should think they would be habitually, and to a much larger extent than at present; and I will give you my reasons for it.

Mr. CURRIER. Would it not be a considerable inconvenience to secure the permission of the proprietor of the copyright?

Mr. OLIN. I should think none at all.

Mr. CURRIER. We would be glad to hear you on that, because it occurred to me that that was an absolute prohibition, in effect.

Mr. OLIN. I am glad to have my attention called to this, because this is a matter where we have not been able to make any compromise. There are no representatives of the public who could discuss such a compromise, and we come before the committee to submit it to their judgment as to its fairness in the first instance.

What I want to call the attention of the committee to is that the effect of this is simply to put the business back, as to importing one copy, to the condition that existed before 1891 as to importing all copies. We would be very glad, the copyright proprietors would be very glad, and the public would be very glad if it could altogether go back to that condition; that is, if you say books shall not be imported without the consent of the copyright proprietor. The copyright proprietor would then, as he did before, import books and put them into the trade and sell them freely.

Mr. CURRIER. Yes; the proprietor would import, but I think, in answer to an inquiry a few moments ago, you said that under the former law individuals did not import.

Mr. OLIN. No; but they did not need to.

Mr. CURRIER. Under that provision beginning on line 18, while the proprietor might import, do you think an individual would ever import—go to the trouble of getting the consent of the proprietor?

Mr. OLIN. I think the practical working of that would be just this——

Mr. CURRIER. I am only asking for information.

Mr. OLIN. The practical working would be this: Scribner & Co. would publish here a book which was also published in England. An individual would wish to get a copy of it in the English edition, and he would either go to the Scribners' store, or write to him, or he would go to his bookseller, who would send word to the Scribners, asking that a copy should be imported for that individual through Mr. Scribner, and Scribner would import it for him. That is to say, the individual would have far less difficulty, wherever he was situated throughout the country, in getting the English edition of the book than he has at present, when he himself writes to an English bookseller in London and imports it himself.

Mr. CURRIER. I am not expressing any opinion at all as to the correctness of that proposition, whether the individual should not be prohibited from importing.

Mr. OLIN. My point is that the facility with which the individual would obtain an English edition of an American copyrighted book would be greatly increased by the passage of this bill, because it would put it in the regular course of business, just as it used to be before 1891, for the owner of the American copyright to see to those importations. The law would not allow the proprietor himself to make the importations, but he would be exceedingly glad to import that book for A, B, C, D, and E, all over the country, and to make it just as easy as it was possible to do for them to get that English edition.

Mr. CURRIER. I am not at all sure that that is not so, but I think you agree with me that the individual himself, under that provision, would never directly import a book.

Mr. OLIN. I think he would not.

Mr. CURRIER. The proprietor would always do it for him.

Mr. OLIN. It would be so much easier for him to make the proprietor his agent, and the proprietor would be so glad to act as his agent, and it would be so much to the interest of both parties that that should be so that that would be naturally the course that it would take.

Mr. HINSHAW. Under existing law is the proprietor of the American copyright seriously injured by these importations?

Mr. OLIN. In ordinary cases, as I said, he is not seriously injured—that is, in the case of popular books he is not substantially injured at all. He does not know how much he is injured, because there is no means of estimating the precise amount. It is an injury, but how great he does not know.

Mr. HINSHAW. It is a sufficient injury, so that you think it ought to be restricted?

Mr. OLIN. It is a sufficient injury, especially in the cases that I have spoken of, where valuable books that cost very much to produce and that have a limited field of sale are in question, and there it does repeatedly prevent such books from being published in America.

Those are the only two limitations which affect the general public until we come to this provision of the bill which increases the term of the copyrights in different cases. As to them, of course the main argument is made by the producer, the author, or artist. He is the one who wants that addition to the term, and it is a matter of no great importance to these general organizations of reproducers whom I represent, one or two of them permanently and some only for the moment. But we may fairly make these observations: First, I repeat what was very clearly put by the Librarian yesterday, that the copyright is simply in the form of an idea, as the patent right is in the idea itself, and that consequently there is never like oppression to the public from the monopoly.

If I have a patent on a needle with the eye in the point, nobody in the country can use that until my patent is out, and that is a great oppression. If I write a book about a needle with the eye in the point, or about anything else under the sun, my idea, for what it is worth, is at everybody's disposal when my book is published. He can not copy my form, but whatever good the idea does him in his own thinking or his own work he has. That is the first consideration which has always actuated Congress and all governments, so far as I know, in making the copyright term much more extensive than that of the patent.

Then the next is a practical consideration which I think must be within the knowledge of every member of the committee, and that is that for practical purposes in most cases the public gives up nothing by extending the term, for the reason that at the end of forty-two years a very great majority of copyrights—I hesitate to say how large the majority would be—has become worthless. As a matter of fact, it is familiar to every member of the committee that people do not reproduce books that have fallen into the public domain by the expiry of the time of the copyright, except in very special cases of particularly popular works. So that in most instances the public would not be giving up anything really in adding to the end of this term a certain number of years.

Then, next, there is the consideration that in practice it is true that the public does now get the fullest opportunity to buy cheaply (which, I think, must be the only interest of the public as distinguished from the interest of the different producing classes) because books start at a certain price and at the end of a year they go down below that price. At the end of two years there are new editions at perhaps half the price, and in a very few years the publisher is making every effort to attract the public by every reduction that is possible.

There is one other consideration that I think may possibly be alluded to, and that is that since this term was fixed, partly by the improvements of science and partly by changes in legislation, the actual value of a given term of copyright has diminished. Part of the value of a term of copyright was always that at the expiration of the term the owner of the copyright had the plates and had the books and could compete to great advantage with other people. His right, his privilege in that respect, has been largely taken away by these photographic processes which have come into use. It is not necessary for the man who wishes to publish a book to go to work and have type set for it. He simply takes the existing edition and he photographs it, and he does that with great cheapness. Perhaps there would be an answer to this suggestion that the public should have the advantage that would come from all such cheapening processes; but it seems to me that it could reply that Congress has prohibited the copyright owner from taking advantage of these processes, by saying that he at first must make his book, as long as the copyright exists, in the most expensive way, from plates made by American mechanics and who receive American wages; and consequently that he is handicapped from the beginning.

I do not wish to press this argument unduly. It is something, it seems to me, that may be suggested to the committee, whether or not this committee is now to act with the same liberality which Congress showed when the existing term was fixed, if it would not necessarily in some degree extend the term by reason of the facts to which I have referred.

There is only one other, so far as I know, important extension of the right of copyright contained in this bill, and on its face it appears to be a matter of inadvertence. It is contained in section 8, where there are provisions A and B, on page 5. The present law of copyright allows a foreigner to take out a copyright if he is a resident in the United States, or if he is a citizen of one of those countries which allow similar privileges to citizens of the United States. Those are the two categories.

At first glance at A and B, in section 8, it would appear that those were intended to represent the same classes and to give precisely the same rights; but, apparently by inadvertence, in the second line of subdivision A the word which should, I think, be "and" has become "or," so that as it at present reads a foreigner, no matter where he lives, no matter whether the country of which he is a citizen gives similar rights to citizens of the United States or not, may, if he shall first or cotemporaneously publish his work within the limits of the United States, have a copyright. I am not here to say that that would not be a wise extension of the law. I am not here to say on behalf

of any of the parties whom I represent that they would or would not oppose it. I do not know anything about their views. This extension of copyright is not an extension which has been discussed in the conference. I have no right to give any approval of it, even to the limited extent that I have a right to give an approval of this bill on behalf of any of these bodies whom I represent.

Mr. BETHUNE. Would not the interest of the publishers be safeguarded if the law provided that an individual may import one copy of the foreign edition, but only after he has asked the proprietor of the American copyright to buy one for him and his request has been refused?

Mr. OLIN. If the committee chooses to put that in, I can see no harm in it at all. It seems to me that it will result in that, necessarily, if the American publisher is not actuated by his own interest, as he used to be prior to 1891, and as I think he would be again, and if he is not glad to import that copy from abroad. If he refused I think if anybody who is aggrieved should come to Congress, Congress would change the law instantly and compel the copyright proprietor to give consent; and if Congress thinks it right to put in that provision in the beginning nobody could complain. So that my answer is that I do not think anybody would object.

Mr. JOHNSON. I would like to ask if an American citizen traveling in Europe should at the time he was there purchase one of these editions, would it not be a hardship on him to compel him to forego the bringing of that copy into the United States without the consent of the American proprietor?

Mr. OLIN. Is that question addressed to me?

Mr. JOHNSON. Yes.

Mr. OLIN. If a hardship, it is inflicted by the English custom-house at present in regard to these very Tauchnitz editions. It is one of the few things they are rigorous about, and I think members of this committee may have had experience with the English customs and their rule about that. But in this bill it is provided that where there are parts of libraries or books in baggage brought back by traveling people they shall be admitted. I think it is a question of de minimis. I think in the case of a man bringing back such a book it would be no hardship worthy of the consideration of Congress.

Mr. JOHNSON. All personal baggage is included also?

Mr. OLIN. Yes.

Mr. PUTNAM. For the information of Mr. Johnson, Mr. Chairman, I think that Mr. Olin was referring, in answer to that question, substantially to subsection 4, on page 25, which was supposed to take care of the person bringing in copies in his personal baggage.

Mr. Ogilvie is here from Chicago, but before his statement is made I wish to say that, as I understood, Colonel Olin spoke in two capacities; in the first place, giving some general expression in behalf of a certain group of organizations, and their substantial acquiescence in the bill; in the second place, as counsel specially for the book publishers, with reference to certain particular provisions, particularly this importation clause.

Mr. OLIN. Yes; and, finally, I wished merely to modify the general approval of the bill which I had given on behalf of all these organizations, by expressing my understanding that they considered the bill, as I supposed was intended, with "and" instead of "or" in the second line of subdivision A, in section 8, on page 5.

Mr. PUTNAM. In that latter capacity, the provisions of the bill as to which Colonel Olin spoke were those as to importations particularly affecting the interests of the libraries; and, considering what will be most helpful to the committee, it would seem to me appropriate, and I submit it as a suggestion, that as soon as possible after the statement that you have had from Colonel Olin in explanation of those provisions you have the statement from representatives here of the group of libraries—librarians—that would dissent from the provision. Mr. Cutter is here, and, if I understand him rightly, his statement will be brief. Mr. Ogilvie, however, had been promised an opportunity to be heard early this morning. As I understood him, the oral statement that he proposes to make is an objection to certain provisions of the bill, and that he would be content with an opportunity for a ten-minute statement, to be supplemented, if he chose, in writing, to go into the record.

STATEMENT OF GEORGE W. OGILVIE, ESQ., OF CHICAGO.

Mr. OGILVIE. Mr. Chairman and gentlemen of the committee, as I understand that this bill is to take the place very largely of the copyright act of 1891, it may be proper to refer to some of the arguments that were advanced at that time as to why that particular bill should pass. In furtherance of that idea, I read from The Question of Copyright, by George Haven Putnam, on page 103, in which it is said:

> It is admitted that the proposed act or any other of a similar nature will raise the price of the very cheap reprints of English stories yet to be written a few cents apiece. A pamphlet of that sort now costing 20 cents will then cost 25 cents. Of the additional price, 2 cents will go to the author and 3 cents will go into better paper, better print, and better binding. For the 5 cents of increased cost an American story will be furnished oftener than an English story, an American author will get pay for his labor, and the reader will get a book that is 100 per cent better than the old one in paper, print, and binding.

I submit that if an additional cost of 3 cents is to go into paper, print, and binding, and will produce a book that is 100 per cent better than the 20-cent book, and 2 cents of the increased price is to go to the author, that the publisher would receive no benefit whatever; and it is well to bear in mind that the disinterested patriots who requested the passage of the international copyright law did so for the purpose of benefiting not themselves, but the author of a book 2 cents per copy, and the producer of paper, printing, and binding 3 cents per copy, out of which they got nothing. It is the same gentlemen, as I understood it, who were sponsors for that bill who are the sponsors for this. Twenty cents per copy for a book costing 3 cents to produce shows a profit somewhere of 666 per cent; and it is probable that they were satisfied with that percentage. As a basis for further remark along that line, I desire to draw your attention to section 13 on page 6 of the bill, as I have it here.

Mr. PUTNAM. That is the library copy.

Mr. OGILVIE. It is section 13 of the third paragraph [reading]:

> Any person who, for the purpose of obtaining a copyright, shall knowingly be guilty of making a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all of his rights and privileges under said copyright shall thereafter be forfeited.

The CHAIRMAN. For whom do you appear, Mr. Ogilvie?

Mr. OGILVIE. For myself as a publisher and for several other Chicago publishers, none of whom were represented at or invited to the conferences of which this hill is the result.

Mr. CHANEY. Had you no notice that there was going to be a conference?

Mr. OGILVIE. The first information that I had that there was a conference was from a gentleman representing Lyon & Healy, of Chicago, in the Manhattan Hotel in New York, last November. That was the first intimation I had that there had been a conference. I knew that there were likely to be some, but I had no notice of their dates.

Mr. CHANEY. We wanted you as well as everybody else.

Mr. OGILVIE. I knew nothing about it. I may say, also, that the first draft of this bill that I have seen was received in my office in Chicago Saturday morning last.

Again, on page 18 of the bill, section 25:

> That any person who willfully and for profit shall infringe any copyright secured by this act, or who shall knowingly or willfully aid or abet such infringement or in any wise knowingly and willfully take part in any such infringement shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year or by a fine, etc.

It seems to me a little out of order for the gentlemen who are sponsors for this bill to make it possible for them to get a copyright on a book, and if they are not caught in making a false affidavit in securing it, that a man shall go to the penitentiary for a year for pirating that particular book. It will be rather difficult for one to prove, after a number of years, that a publisher who has made an affidavit to secure a copyright to which he really was not entitled had committed perjury in connection with the securing of that copyright; but the question as to one's piracy of the book is open and "he that runs may read." It seems to me that there is a punishment there that they have applied to the wrong crime. If the man who makes a false affidavit were to go to the penitentiary for the year, I think it would protect the interests that desire protection in this country, in the form of labor, in the matter of setting up and manufacturing books wholly within the limits of the United States.

The CHAIRMAN. Do I understand you to contend that the Librarian should be charged with any special duty in that regard, for the registry of the copyright?

Mr. OGILVIE. No, sir; the Librarian can not determine whether a man is making a false or correct affidavit, but if one makes a false affidavit he is the man who should go to the penitentiary and not the individual who pirates his book.

Mr. BONYNGE. Does not section 13 provide that the man who makes the affidavit shall be guilty of

a misdemeanor?

Mr. OGILVIE. Yes; and the penalty therein provided is, "he shall be fined not exceeding one thousand dollars." That is all.

Mr. CURRIER. What is your suggestion?

Mr. OGILVIE. That you change the punishment.

Mr. CURRIER. And make it a penitentiary offense?

Mr. OGILVIE. Let them both go to the penitentiary, if either one goes.

Mr. CURRIER. In both cases?

Mr. OGILVIE. In both cases, if necessary. Do not eliminate the publisher. I am a publisher, but if I have made a false affidavit, there is no reason why the man who pirates my book should go to the penitentiary and I should only have to pay a fine, if I am caught. I see no reason why a man should go to the penitentiary in either case, really. He may unwittingly infringe the copyright of a book.

Mr. CURRIER. This says "willfully."

Mr. OGILVIE. That is subject to the construction of the courts. We all know what that means.

Mr. CURRIER. No; it puts the burden of proof on the Government to show it beyond a reasonable doubt.

Mr. OGILVIE. The proof of the perjury should also be beyond a reasonable doubt and the one guilty of it should be equally punished.

Mr. CHANEY. If he did it unwittingly it would not be willful, you know.

Mr. OGILVIE. It is impossible for a publisher to make an "unwitting" affidavit of that sort. The publisher knows where the article that he is publishing is manufactured. I have been a publisher for a great many years, and I know where the articles that I am turning out are manufactured. It is possible for him to make an affidavit that is literally and absolutely true in regard to the place of manufacture of every article that he produces.

Senator MALLORY. Where he willfully makes a false affidavit it is equivalent to perjury, and the penalty for that is generally imprisonment in the penitentiary.

Mr. OGILVIE. Then why change the penalty in this law? It certainly limits his liability under this act.

Mr. CURRIER. There is not any liability at all. No affidavit is required. There is no penalty for a false statement at all under the law now.

Mr. OGILVIE. Not as it is at present, but as this new law proposes it there is a liability.

Mr. CURRIER. This was a bill that passed the House last winter and was not reached in the Senate.

Mr. OGILVIE. Well, the facts are here.

The CHAIRMAN. It was reported favorably by the Senate committee.

Mr. CURRIER. Yes; and not reached.

Mr. OGILVIE. Section 19, the last portion of that section, reads:

> *And provided further*, That should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee or licensee shall join in the application for such renewal and extension.

Mr. PUTNAM. That provides for the extension of the existing copyright for an additional term.

Mr. CHANEY. What is your suggestion on that?

Mr. OGILVIE. That the gentlemen who framed this bill, and who wished to let themselves out of the penitentiary for committing perjury, would be likely to make a very liberal arrangement with the author, or his widow or children, if it was within his power to refuse to consent to a renewal of a copyright. He may have been paying a royalty of 20 per cent, and when the time came for securing a renewal of the copyright he would be likely to say, "I will give you 1 per cent, and if you do not agree to that I will not join the request for an extension of the copyright." I think that is wholly beyond the province of this act.

Mr. CHANEY. Whose consent should be required?

Mr. OGILVIE. Eliminate the publisher. He has no concern with it. The Constitution does not grant

him any rights under the copyright law. He is not the "inventor" or the "author." Eliminate the publisher wholly, unless you desire, in case there may be an investment there that the publisher desires to protect, to let the author take care of that by contract, so that at the expiration of the copyright the publisher may have the right to continue the publication on the payment of the same royalty.

Mr. CURRIER. Can you suggest an amendment to carry out your idea in the matter?

Mr. OGILVIE. Yes, sir.

> Unless the publisher shall agree to pay at least the same royalty for an extension of the copyright as has been paid during the previous years, the author shall have the sole right to apply for and secure an extension of copyright.

Mr. CHANEY. You are really talking against your own interests as a publisher just now?

Mr. OGILVIE. I am, absolutely, talking against my interests as a publisher.

Mr. SULZER. Do you contend that this provision would apply where the publisher had no interest in the publication beyond the ordinary time of copyright?

Mr. OGILVIE. That is all; it shall apply only to that case.

Mr. SULZER. I construe this provision in here to be just what you say.

Mr. OGILVIE. No; I read it differently from the way you do, and place a different construction upon it. We will again refer to it and see if I am wrong. If I am wrong, I shall be glad to be put right, and if you are wrong, I know that you will be glad to be put right.

Mr. SULZER. It says here unless the assignee or licensee shall join in the application. If a man is an assignee or licensee he has an interest in the copyright.

Mr. OGILVIE. He takes it for the time limit only.

Mr. SULZER. If he is not he has no interest, and would not have to join with the widow or children in this application for an extension of the copyright.

Mr. OGILVIE. But if he is the assignee or licensee then he is interested in it only during the life of the copyright.

Mr. SULZER. I do not understand it that way.

Mr. HINSHAW. How could the licensee have any interest in the copyright beyond the life of it?

Mr. SULZER. He would have an interest in it so far as it could be extended.

Mr. OGILVIE. Why should he?

Mr. BONYNGE. He has not. There is no provision now for the extension, and he would not have, except as he might get it under this bill.

Mr. CAMPBELL. He would provide for that in his contract.

Mr. OGILVIE. Yes. Leave it out of the law.

Mr. CAMPBELL. When the assignment was made, he would provide for all extensions.

Mr. OGILVIE. That is right.

Mr. HINSHAW. Are these contracts for royalty made to include a possible extension of the copyright?

Mr. OGILVIE. Not generally; because the author may be dead when the time for the renewal comes.

Mr. CURRIER. But it can be renewed then by his widow.

Mr. OGILVIE. But they do not do it generally.

Mr. CURRIER. I should suppose that in almost all cases under the existing law they would get a renewal.

Mr. OGILVIE. They do at times, but not often.

Mr. SULZER. I think I understand what you mean, and that is this: That where there is no subsisting contract, then that the publisher shall not join——

Mr. OGILVIE. The publishers shall not be required to join.

Mr. SULZER (continuing). In the application for the renewal of the copyright?

Mr. OGILVIE. Yes. As this is, it makes it impossible for the author or his widow or children to

secure the extension of the copyright without the licensee joining. Then he has it in his power to diminish the royalty paid to suit his own purpose.

Mr. CAMPBELL. If the contract for the copyright does not provide as between the author and the publisher for any renewal, what position would you be in then?

Mr. OGILVIE. According to this law it is impossible to get a renewal unless the licensee joins in the request.

Mr. CAMPBELL. The license expires——

Mr. OGILVIE. But the license does not expire until after the copyright expires.

Mr. CAMPBELL. What is the length of your contract that you usually make?

Mr. OGILVIE. This is a new provision entirely.

Mr. CAMPBELL. Under the old law, I mean?

Mr. OGILVIE. Under the old law it usually lasts as long as the copyright lasts.

Mr. CHANEY. You suggest that we leave out this last proviso absolutely?

Mr. OGILVIE. Yes, sir.

Mr. BONYNGE. Not to leave it out absolutely——

Mr. OGILVIE. I think it should be left out altogether. It is wholly unfair to an author. I can see no reason why the publisher should have any right of that kind. The Constitution grants the right to an author, and if the publisher desires to secure those rights that is a matter of contract. Let him make a contract covering that point.

Mr. HINSHAW. If the copyright had been assigned, the original proprietor would have lost all interest in the copyright; would he not?

Mr. OGILVIE. The party who now takes a copyright takes it with the understanding that it shall expire at a certain time; and then he is in no better position and no worse than any other publisher who has not had a contract with the author.

Mr. CHANEY. Suppose your contracts under this bill, should it become a law, should provide for the life of the copyright, together with any extensions thereof—then what would you say as to the proviso?

Mr. OGILVIE. Suppose the bill should provide for the life of the contract, together with any extension thereof?

Mr. CHANEY. Suppose under this bill, should it become a law, your contracts with the author should provide for the license and assignment to extend the copyright during its life and all extensions thereof?

Mr. OGILVIE. If the author wishes to make a contract of that sort, that is the author's business; but let the author thoroughly understand what he is doing. As it is here, the author may think he is entitled to the license for a renewal term, whereas he finds the publisher has it wholly within his hands. The publisher is not entitled to it; it is not his.

Mr. SULZER. After all, it resolves itself down to a mere question of contract?

Mr. OGILVIE. Yes; but this eliminates the necessity for making a contract, because this gives certain people rights.

Mr. SULZER. Only where there is a subsisting contract, however.

Mr. OGILVIE. But the contract as at present expressed is for the life of that copyright.

Mr. MCGAVIN. The life is fourteen years?

Mr. OGILVIE. Twenty-eight and fourteen. Now, then, let us assume, under this section, that a copyright expires next year. Let us assume that this bill passes, that a copyright expires next year, and that I am the author of a certain book. I go to my publisher and say: "Here under the law I am entitled to a renewal of the copyright for my book for a term of fifty years in all, or during my life, or whatever the term may be." The publisher replies: "Very well; you want me to join in the securing of that extension, do you?" "Yes." "Well, I have been paying you 20 per cent royalty; I will pay you 2 per cent hereafter, and if you do not take that I will pay you nothing." Is it impossible to suppose that some publishers would do that when they carefully provide against going to the penitentiary for committing perjury? I think not.

Another point: in section 15, in the last paragraph, this language appears:

Where the copyright proprietor has sought to comply with the requirements of this act as

> to notice, and the notice has been duly affixed to the bulk of the edition published, its omission by inadvertence from a particular copy or copies, though preventing recourse against an innocent infringer without notice, shall not invalidate the copyright.

Now, let us see where that lands us. How have the public any means of determining whether "the bulk" of the books has contained a notice of copyright? Assume that I get hold of a book that contains no notice of copyright, and as a publisher I reprint it. It may have been an expensive book to reprint. It may have cost me several thousand dollars. What provision is there in this law to reimburse me for having innocently done that which, under the law, apparently I had a perfect right to do? Not any. I think there should be some provision to reimburse a man who does a thing of that kind under an apparent right.

Mr. CHANEY. This is not a case of ignorance of the law; you think it is a case of ignorance of fact?

Mr. OGILVIE. Ignorance of fact. You are not obligated at present to go to the Copyright Office to ask any questions. The book itself is supposed to present all evidence of existing copyright.

Mr. CHANEY. Could you not obtain that information at the office of the Librarian?

Mr. OGILVIE. In regard to that as arranged at present, just to illustrate the point, I will state that I printed a book in Chicago, an English book, apparently published in England, containing no notice of American copyright. I spent several thousand dollars in getting the book out, and have spent several thousand dollars since then in lawyers' fees. The point was this: The book was published under one title in the United States and under another title in Great Britain. It contained no notice of American copyright.

In an excess of caution I communicated with the Librarian of Congress asking whether a copyright existed on that particular book, by title, in either the name of the English publisher or the name of an American publisher, whose name also happened to be on the title-page of the book; and I was informed that no copyright existed. I reproduced the book. Judge Kohlsaat, in the Federal circuit court of Chicago, decided that I was strictly within my rights. The circuit court of appeals reversed his decision and has refused a rehearing, and we must, consequently, take the matter to the Supreme Court. Now, I claim that under the law a man who does that is entitled to compensation.

Mr. PUTNAM. Excuse me just a minute, Mr. Ogilvie; will you permit, Mr. Chairman, the register to say a word?

The CHAIRMAN. Certainly.

Mr. PUTNAM. It is simply in answer to Mr. Ogilvie's intimation that he answered his inquiry, and that his inquiry was whether a copyright existed upon that book. What was the answer that he got from the office of copyright?

Mr. SOLBERG. The only purpose in making any remark on that point is that there shall not be a misunderstanding as to the nature of the replies to such inquiries. Any matter of fact on record in the copyright office is always at the disposal of any inquirer, but the copyright office is very careful not to undertake to state the termination of any copyright. It simply gives facts as to the registration of title or whether it has discovered any. In fact, it is very careful not to say even that there is no registration, but that the indices of the office and the records of the office after careful search do not disclose any.

Mr. CHANEY. Mr. Ogilvie is substantially right in his statement, then.

Mr. OGILVIE. And at this time I wish to publicly thank Mr. Solberg and Mr. Putnam for the uniform courtesy with which they reply to all inquiries that are addressed to their office. The gentleman is quite right. That was exactly the phraseology used in his reply. But that, I beg to submit, is the only source of information that publishers have; and when they get that sort of information they are justified in proceeding along lines indicated thereby.

I say that every edition of a book that is copyrighted under the United States law should contain notice of copyright, irrespective of where it may be printed, and thus give the public due notice.

Senator MALLORY. Let me ask you in regard to that instance that you speak of in your experience. That book had two different titles, you say?

Mr. OGILVIE. Yes, sir.

Senator MALLORY. That is, there was an English publication under one title and an American publication under a different title?

Mr. OGILVIE. Yes.

Senator MALLORY. Were they identically the same book?

Mr. OGILVIE. No; not identically the same book, even.

Senator MALLORY. Which title did you publish under?

Mr. OGILVIE. Under the English title.

Mr. SULZER. Was the subject-matter different?

Mr. OGILVIE. The subject-matter was different. A portion of it, consisting of some 500 pages, was alike, but a considerable portion of it was different.

Mr. HINSHAW. The English book was copyrighted in the United States?

Mr. OGILVIE. The American book was copyrighted in the United States. The English book contained no notice of copyright, and I may go further and say——

Mr. SULZER. Did you publish the English book?

Mr. OGILVIE. We published the English book. I may go further and say that the American publisher, by contract, agreed to the elimination of the American copyright mark; and he did that for this reason: The people who live in Great Britain refuse to buy, if they can avoid it, American books. I have had opportunities to sell several thousand copies of my copyright books, provided I would leave out of them the American copyright notice. I have in my office in Chicago at the present time a great number of American copyright books that have been printed in the United States and sold to publishers in Great Britain, who required the elimination of the American copyright notice; and the American publishers were foolish enough to comply with that request, thereby, in my humble judgment, vitiating their copyright. I say that in the case of an American copyright book the public are entitled to be informed, not merely by the insertion of the word "copyright," but by the insertion of the word "copyright," together with the date on which the copyright was taken out and the name of the person who took it out, exactly as the law is at present. It is not enough to simply substitute the word "copyright;" it means nothing.

Mr. CURRIER. Suppose in the case you have referred to you began to publish this book without any knowledge that it was protected by copyright? Could you not go right on and publish and sell that book?

Mr. OGILVIE. The courts have enjoined me.

Mr. CURRIER. If this law is passed, could you not do that? Let me read it. (Reading:)

"It's omission"—that is, notice of copyright—"by inadvertence from a particular copy or copies, though preventing recourse against an innocent infringer without notice."

You are an innocent infringer; you can go right along and dispose of the books. That is your case; that is your defense in any proceeding against you for selling these books.

Mr. OGILVIE. Yes.

Mr. CURRIER. But it does not invalidate the copyright as against all others, nor prevent recovery for an infringement against any person who, after actual notification of the copyright, begins an undertaking to infringe it.

Mr. OGILVIE. Well, will you tell me what this means—"shall not invalidate the copyright?"

Mr. CURRIER. Why, the copyright exists as against everybody but you in that edition of the book.

Mr. OGILVIE. Very well, if that is the case.

Mr. CURRIER. But if this bill passes, you would have a right to go on and complete the edition of the book and sell it.

Mr. OGILVIE. If that is the construction that the courts give it, very well.

Mr. CURRIER. There can not be any doubt about the construction. It is only the man who, after actual notice that the copyright exists, begins an undertaking to infringe it who is affected.

Mr. OGILVIE. I read that section very carefully, and I see the point that you raise; but I could not ——

Mr. CURRIER. I think this gives you full protection.

Mr. OGILVIE. I could not get over the statement, however, that it did not invalidate the copyright.

Mr. CURRIER. But it does not invalidate the copyright.

Mr. OGILVIE. As applied to everybody else?

Mr. CURRIER. To anybody who has notice before he begins.

Mr. OGILVIE. Very well. Now, then, with regard to the insertion of notice, to get back to the subject, I consider that the insertion of the notice is essential. If we are ashamed of the United

States, if we must cater to England, and France, and Germany, and other nations by the elimination of a notice that indicates the origin of our books, why do we desire to protect their authors?

Mr. CURRIER. Oh, this omission that is referred to is a mere inadvertence in a particular copy.

Mr. PUTNAM. I understand now, Mr. Chairman, if you will permit me, Mr. Ogilvie, it is in aid of your statement——

Mr. OGILVIE. Yes.

Mr. PUTNAM. I understand now that Mr. Ogilvie is referring to the requirement as to the notice being in terms limited to the edition sold in the United States.

Mr. OGILVIE. Yes.

Mr. PUTNAM. And it does not extend to any edition that may be produced and sold abroad?

Mr. OGILVIE. Yes.

Mr. PUTNAM. I understand that you think that it ought to be on all authorized editions of books?

Mr. OGILVIE. All authorized editions. The copyright law says that the notice shall go on the title-page or the page immediately following. You turn to any book, and what do you find on the page immediately following? Practically nothing, unless the copyright notice is there. There is plenty of room for it. If they can engrave the Lord's prayer on a three-cent silver piece, there is certainly room enough to put those half dozen words on the back of their title-page.

In regard to the publication of books under two titles, it seems to me that some provision should be made in the law to protect a man who publishes a book that is printed abroad under one title and is printed in this country under another, provided the foreign edition does not contain notice of copyright. As it is to-day, and as it will be under this law, one can import a book printed in England; it may have been written on the same subject as that which you intended to produce a book on; you have carefully warned your editors to abstain from making extracts from a book that is printed in this country or that contains a notice of copyright. You proceed. Your editor finds a book in a library that does not contain notice of United States copyright. It is published abroad by a publisher different from the one who issues it here. There is nothing to warn him. He makes copious extracts, and the owner of the copyright may be perfectly well aware of the fact that he has made those extracts. Under this law as it is proposed, he may permit that infringement to continue for three years and then claim damages, not less than one dollar a copy, although the book may have been sold for 10 cents per copy, and practically put the apparently infringing publisher, who acted in perfect good faith, out of business. It is unjust; and I submit, gentlemen, that those matters are proper subjects for consideration, and that they should not be enacted into a law in their present form.

Now, to refer to some of the remarks made by my predecessor, Mr. Olin. He said that the American Publishers' Copyright League and the American Publishers' Association represented practically all of the publishers of the United States. I differ distinctly and materially with him. They do not. They represent a few and only a few of the publishers of the United States. I doubt very much if a single publisher west of the Alleghenies (with very few exceptions) is a member of either of those associations. There may be a few exceptions—I know now that there are—but very few, and he is not qualified to speak for the others who are not members of those associations, and they do not represent a majority.

In regard to importation, he said that Scribner would be very glad to import a book if he were requested to do so. Now, I am a publisher, and if it were my book I do not think I should be very glad. I think I should tell the intending purchaser that I had a copy of the book that was at his disposal for the fixed price that I had placed upon it, and I think Scribner would do likewise.

In regard to cheap editions, which he spoke of and said that at the end of the copyright a publisher was desirous of securing as large a circulation as possible for his books—that is true within a year or two of the end of the term of copyright. But I can not recall at this moment a single book the price of which has been reduced materially until so close to the end of the term of copyright as to make it practically valueless to the original publisher unless he did reduce the price; and he does it, not for love of the public, not because he is considering the public, but simply to get ahead of his fellow-publisher. He is the man who then has a couple of years in which to exploit a cheap edition; and it seems to me that under the law as it is suggested, a term of fifty years from the date of the death of the youngest of the authors is going beyond what the framers of the Constitution decided was a limited time. Let us assume that Mark Twain, if he were 80 years of age, were to write a book. He has his daughter, who may be 20, write a few lines in that same book. Mark Twain dies in a few years; she lives to be 90. There is seventy years of copyright, and fifty years after her death, making one hundred and twenty years. I do not believe that that is a "limited time" within the meaning of the phraseology of the Constitution. [Laughter.]

Mr. CHANEY. That is the joint-author clause.

Mr. OGILVIE. There is just one point that I had overlooked. I was not at any of the conferences, but I have been informed that an attorney representing certain of the special interests at those conferences suggested that the public should be considered; and to quote literally what I was told as to what happened, "he was hooted at and laughed down." And I think that very fully expresses the sentiment contained in this proposed copyright act, so far as the public are concerned.

I thank you, gentlemen.

STATEMENT OF FRANK H. SCOTT, ESQ., PRESIDENT OF THE CENTURY COMPANY, NEW YORK, AND PRESIDENT OF THE AMERICAN PUBLISHERS' ASSOCIATION.

Mr. SCOTT. Mr. Chairman, I only wish to clear up two points that have been raised by my predecessor. I am not responsible for the exact wording of the clauses covering these two points, but I do wish to emphasize their importance.

The first is as to the question of the original publisher's rights at the termination of the present contract or the present copyright. Under the law as it now stands, at the termination of the copyright the publisher would have a set of plates and possibly a large number of books on hand. He can enter the market, no matter who comes into the field, and compete on at least equal conditions.

Under the bill as it is proposed now, if the author secures a continuation or a renewal of his copyright, and the publisher is not consulted the publisher would be left with his set of plates and his investment in the sheets and stock; and it would be absolutely impossible for him to sell them to anybody, because his contract having expired, and the author may have gone and made a new contract with a new publisher, leaving him entirely out of it. If there is no copyright whatever he can compete on equal terms.

I am only explaining why I think the publisher ought to have some consideration under those circumstances.

Mr. CURRIER. What do you say to the amendment suggested by the gentleman who last spoke?

Mr. SCOTT. Just what was that amendment?

Mr. CURRIER. That the publisher might have the right to control the extended term, provided he would pay the same royalty that he had paid.

Mr. SCOTT. I think the publisher ought to be obliged to pay the same royalty that anyone else should pay at that time. It might be a very old work. It might be that the time during which he could continue to pay that royalty had expired.

Mr. CURRIER. You could hardly set the right up at auction, could you?

Mr. SCOTT. I am sorry to say it is very often done.

Mr. CHANEY. Would you not think that would give the publisher an undue advantage over the author?

Mr. SCOTT. I think the law as it is at present framed is very broad. I only wish to say now that I think the publisher ought to be consulted. I suppose this will come up later, and I have not prepared any argument on the subject. I am only pleading that the publisher ought to have some consideration under those circumstances.

Mr. CHANEY. Can not the publisher provide against all that by the contract he makes?

Mr. SCOTT. There will be no trouble about the copyrights taken out after the passage of this bill. It is only with reference to copyrights that are now in existence.

Mr. CHANEY. Yes.

Mr. BONYNGE. You think the language of the bill as it is is too broad?

Mr. SCOTT. I think so. I think I should not have made it, myself, quite so broad.

The other point I wish to make is with reference to the publication of the American copyright notice in editions of an American copyright work which are published abroad. What the gentleman has said might be very true if the matter were always within the control of the publisher of the American edition, but, as you will readily see, it is not always within his control. These books are very often written by a foreign author. The contracts of the foreign author, for instance, in the case of English novels, are made with his own publisher in London. They have their own arrangement between themselves as to what notice shall be put in the book. The American publisher is forced to place in his own books published in this country the American

copyright notice, but he has no control as to what notice shall be placed upon books published in Germany, or in France, or in Spain, or in Russia, or in England. It is entirely beyond his control.

Mr. CHANEY. Would you think the terms of this bill, then, are right?

Mr. SCOTT. I should say the terms of this bill are right. It seems to me it is perfectly possible for anyone desiring to reprint a book in the United States to ascertain whether or not it is copyrighted. Indeed, the general facts about any book which is so important that anyone wishes to reprint it are notorious. It is known or it can be easily ascertained whether the book is published in the United States and whether it is copyrighted in the United States or not. And I do not think that anyone should be able to get hold of a single copy, whether printed abroad or printed in the United States, that does not happen to have the copyright notice, and be permitted to go ahead and reprint the book *ad libitum*. I think the rights of the owner would not be sufficiently protected if that were permitted.

Mr. MCGAVIN. What do you say about the case of the gentleman who just preceded you—the lawsuit into which he got himself?

Mr. SCOTT. That has been determined in the courts; it is not for me to say. One judge decided that he was right, and the judge to whom the case was appealed decided that he was wrong.

Mr. MCGAVIN. He seems to have made all the necessary effort to find out whether there was a copyright or not.

Mr. SCOTT. That book, as I happen to know, was an edition of one of the dictionaries, otherwise known as Webster's Dictionary. I think it was perfectly easy for him to find out whether that book was copyrighted in the United States or not. It is not for me to say whether there was any technical omission which endangered the copyright under the language of the present statute; but it does seem to me that in books generally published outside of the realm of the United States, and beyond the jurisdiction of the United States, it should not be necessary for the American publisher, who owns the copyright or who represents the owner of the copyright, to go abroad and undertake to make arrangements of this kind. It might be very difficult for him to make arrangements for the publication of the American copyright notice on foreign editions which he does not print himself and which he does not arrange to control.

Mr. CHANEY. Mr. Chairman, I want to make a suggestion about the form of expression of that clause on page 12. You will notice that in the last line of that second paragraph of section 15 the word "undertaking" is used. I do not know whether people generally understand the use of that word "undertaking" as lawyers in my part of the country do, but I would prefer the word "action" rather than "undertaking," because "undertaking" usually refers to a bond of some kind. "Action," it seems to me, is the proper word.

Mr. PUTNAM. That is page 12, line 18, is it not, Mr. Chaney?

Mr. CHANEY. Yes. The word "undertaking," you know, is used by lawyers generally in the sense of a bond or some agreement to stand good for the default of another, whereas "action" is the name of the suit.

Mr. PUTNAM. This was not intended to apply to a legal action.

Mr. CHANEY. But is it not in the same nature?

Mr. PUTNAM. No; it was simply meant to apply to the beginning of some enterprise, the beginning to prepare to manufacture. It is a business undertaking, not a legal one.

Mr. CHANEY. I misunderstood it, then.

Mr. BONYNGE. That is what I understood it to be—an enterprise.

Mr. CURRIER. You might let the two words go out, so it would read, "who, after notification of the copyright, begins to infringe it." Then it would be a question of fact.

Mr. PUTNAM. Mr. Chairman, you have asked me to announce that it will be the desire of the committee to have the names and addresses of all those present at these hearings, and the relations in which, if they desire to express it, they are here, whether in favor of or in opposition to the bill. We have provided a register at the door in which those names can be noted. I understand that it is desired that that shall extend to all those present.

The CHAIRMAN. All present, and in such form that it may be placed in the record that we are making.

Mr. CHANEY. You mean also to include, I suppose, a brief expression from these people as to their objections, and to what their objections related?

Mr. PUTNAM. Yes. The register will be supplemented by their communications, I suppose—the register itself, including their names.

Mr. Horace Pettit, Mr. Chairman, who spoke yesterday, desires to supplement his remarks with an additional suggestion or two, which he has put in writing, and asks simply to have entered in the record, with your permission.

Doctor Lewandowski, present here, asks me to submit a request in writing from a firm of music publishers in New York, that he submit to you a communication in aid of the provisions for the protection of music publishers against reproduction by mechanical devices. He submits that in writing, with the request that it may be entered on the record.

(The various papers above mentioned will be found at the end of this statement of Mr. Putnam.)

Mr. PUTNAM. The copyright office, Mr. Chairman, is now in receipt, naturally, since the bill has been introduced, of some suggestions from those who have participated in the conferences, and since the bill has been introduced and is in the custody of your committee it would seem that those belong to the files of your committee. If you will permit me, I will submit these, without reading them, to be entered in the record.

The CHAIRMAN. Do you think they ought to be printed in the record of the meeting?

Mr. PUTNAM. I do, Mr. Chairman. I do not refer to mere formal communications, or those that may be disposed of absolutely by the copyright office. I do not mean all communications that come to us with reference to the bill. These are simply four communications, from four participants in the conference. One of them, Mr. A. W. Elson, makes certain definite proposals for amendments, including one to section 13 which would extend the manufacturing clause. He has sent a copy of this to you, Mr. Chairman, and I assume that it will go in the record, with the request for a hearing.

The second is from Mr. Edmund C. Stedman, who was a participant, but is in ill-health, and can not be here; but it contains an expression upon the bill that I think should go in the record.

Another is from Mr. Leo Feist, also a participant, and contains an expression about the bill that he would have made here orally if present. I think that should go in.

Another is from Mr. Ansley Wilcox, who represented certain lithographic interests very much concerned with the protection of such prints as posters, and very much concerned, therefore, in the specifications of subject-matter. He writes a communication which I think should go into the record, expressing his content with the specifications of sections 4 and 5.

The CHAIRMAN. Those will be printed in the record.

(The above-mentioned papers will also be found at the end of this statement of Mr. Putnam.)

Mr. PUTNAM. I have information, Mr. Chairman, that when the matter of the reproduction of music by mechanical devices comes up for discussion, Mr. John J. O'Connell, an attorney of New York, would like to be heard, representing ten manufacturers of automatic piano players in New York City, and desiring to be heard only in opposition to those portions of the bill respecting musical copyrights, and that in connection with the same general subject-matter Mr. Howlett Davis, an inventor of material that enters into these devices, desires an opportunity to make some opening remarks, pointing out how the proposed bill will, if enacted, act in restraint of invention, and show how it encroaches upon the existing patent laws.

If it is your pleasure, now, Mr. Chairman, I would suggest that it would be helpful to have an expression from the librarians dissenting from the assent of the American Library Association with regard to the importation clause, while Colonel Olin's remarks are fresh in mind, and if that is your pleasure, I think it is only fair that I should make clear the status of that provision.

The list of participants in the conference included two associations that might be interested or were certain to be interested in these importation provisions. One was the National Educational Association and the other the American Library Association. These importation clauses concededly contain a restriction, a limitation, a diminution of existing privileges of importations enjoyed by individuals and enjoyed by certain institutions.

The National Educational Association might well have spoken for both individuals and institutions and generally. As a matter of fact, it should be clear that the participation of the National Educational Association in the conferences was of the slightest. They were invited, we urged them to be represented, and they were present by delegate at the first and the second conferences; but their participation was of the slightest. There was no expression from them upon the diminution in the case of individuals, and they contented themselves at the outset with an expression of dissent from any provisions which tended to diminish in any way the present privileges of libraries.

The American Library Association was present by two accredited delegates, who considered, by later action of the representative board of the association, that they had authority to represent the association in assenting to final provisions. Those two delegates were the present president of the American Library Association, Mr. Frank P. Hill, of the Brooklyn Public Library, and Mr. Frank C. Bostwick, of the New York Public Library. Mr. Bostwick was here yesterday, but has had

to leave to-day. Colonel Olin's remarks included the American Library Association as one of those associations for whom he could give a general assent to the bill substantially as it stood. Coupled with that, however, should, I think, be before you this entry in the record of our conference in March last. At that conference these provisions were, I believe, substantially (as far as they regarded libraries) as they stand in the bill, except that one proviso has been added, which is rather in favor of libraries, as we understand it, than otherwise. They expressed themselves then thus:

> Mr. HILL. There is very little that I need to say. The paragraph relating to the copyright respecting the libraries has been taken up very carefully by the executive board and the council and by the delegates, and we are satisfied as an association with the draft as submitted, and, personally, I approve of the change which has been agreed to this morning between the publishers and the delegates. That related to the additional proviso that they should not be prohibited from importing foreign editions in these exceptional cases, where they could not get the American edition.
>
> I think it is only fair to state, Mr. Librarian, that while the executive board and the council of the American Library Association have both voted for the adoption of this draft there will be individual opposition. There are some librarians and some libraries that are opposed to any change in any part of the law which affects importation, and so have reserved the right to oppose that part of the bill. I think it is due to you that such statement may be made, so that you may know the individual opinion as well as the general one.

If Mr. Bostwick had been here, he would to-day have called attention to that. I do it simply because those delegates are not here to say that; and I do it in order to give Mr. Cutter's remarks a proper standing before you. Mr. Cutter, as I understand it, represents librarians and libraries who object to any diminution of the present privileges.

(The papers referred to during the foregoing statement by Mr. Putnam are as follows:)

> THE NEW WILLARD,
> *Washington, D.C., June 7, 1906.*
>
> *To the honorable Joint Committee of the Senate and House of Representatives.*
>
> GENTLEMEN: Referring to the proposed bill to amend and consolidate the acts respecting copyright, now before the committee, I would propose the following amendments:
>
> Amend section 3 (p. 3, line 8) by adding continuously at the end of said section the following:
>
> "*And provided*, That no devices, contrivances, or appliances, or dies, or matrices for making the same, such as referred to in clause (g), section 1, made prior to the date this act shall go into effect, shall be subject to any subsisting copyright."
>
> Amend section 5 (p. 4, lines 2 to 3) by adding, between lines 2 and 3, before the word "photographs," the following: "(j) talking-machine records."
>
> Amend section 18, clause (b) (p. 14, line 14), by adding, between the word "composition" and the word "any," the words "any talking-machine record;"
>
> Amend section 23 by striking out from the clause marked "First" (p. 17, lines 18 to 20) the following: "or any device especially adapted to reproduce to the ear any copyrighted work."
>
> Amend section 23 by inserting in the clause marked "Fourth" (p. 18, line 4), between the words "of" and "all," the following: "any device, contrivance, or appliance mentioned in section 1, clause (g) and".
>
> Hoping that these proposed amendments will meet with the approval of the committee, I remain,
>
> Yours, very respectfully,
>
> HORACE PETTIT,
> *For Victor Talking Machine Company.*

> JOS. W. STERN & CO., MUSIC PUBLISHERS,
> *New York, June 5, 1906.*
>
> Dr. D. P. LEWANDOWSKI,
> *Care of Raleigh Hotel, Washington, D.C.*
>
> MY DEAR DOCTOR: We herewith authorize you to represent us and speak in favor of the copyright bill at the meeting of the committee. Honorable Senator Kittredge, or any other honorable gentleman who will do anything to further the passage of this bill, will earn our everlasting gratitude and will be working for the advancement of an industry which has been sorely oppressed by piracy and injustice.

There is an excellent opportunity now to show fair play to a body of citizens who have been working at a disadvantage and fighting for years for their just rights and for proper and adequate protection from the Government.

With best wishes, we remain,

Yours, very sincerely,

JOS. W. STERN & CO.

To the Committee of the Senate on Patents, Senator Alfred B. Kittredge, of South Dakota, Chairman.

GENTLEMEN: I appear before you this morning in the name and as the representative of the firm of Jos. W. Stern & Co., music publishers, of New York, and in their behalf I wish to state that the bill on copyrights S. 6330, to amend and consolidate the acts representing copyrights, which is before you this morning, is of the highest importance, for the protection of the authors and composers and music publishers, to protect their copyrights.

The old law is very vague and unsatisfactory. The proposed new law would help music publishers and composers very much.

There has been a great deal of piracy going on and their best "hits" have been copied and pirated.

The new law makes such piracy a criminal offense, punishable by fine or a year imprisonment. If passed, as we hereby most humbly pray that it should be so, it will punish the pirates, because the fine alone can not stop their unjust deeds, and they laugh and pay their fine, but a year of imprisonment will certainly change all for the best. The said pirate would not risk a year of prison at all times.

Then again, the new law provides that no phonograph company or any makers of musical instruments, as well as makers of self-playing pianos, can deliberately use the work of the brain of the composer as well as the property of the publisher without permission to do so or paying some remuneration for the same.

Imagine the injustice of the thing. A composer writes a song or an opera. A publisher buys at great expense the rights to the same and copyrights it.

Along comes the phonographic companies and companies who cut music rolls and deliberately steal the work of the brain of the composer and publisher without any regard for the said publisher's or composer's rights.

They sell thousands and thousands of the "hits" of the publisher, which he has worked hard to make, without paying, as stated before, a cent of royalty for them.

The new law proposed remedies this, but of course the phonographic companies are fighting the new bill tooth and nail.

In this brief outline I shall include another important statement to show how much work, and anxiety of the brain a composer must use to write something in poetry or music, and what anxiety and worry he endures until the said "hit" is an accomplished fact. Sometimes his entire family depends upon the publishing of this brain work, and when it is accepted and the publisher issues the same for the public's appreciation, behold, in the next few days every sort of instrument is playing this man's composition.

I for one have suffered this injustice and piracy. Therefore I feel how dreadful it is in general to suffer and to be deprived of remuneration for the just and intelligent inventive brain work which a man produces by his genius.

This is, gentlemen, an excellent opportunity to show fair play to a body of citizens who have been working at a disadvantage and fighting for years for their just rights and for proper and adequate protection from the Government. I conclude by appealing most earnestly and respectfully to the honorable gentlemen of the committee to do their utmost to forward the passage of this bill, and I am convinced that they will earn everlasting thanks and gratitude for creating a law which will earn for them recognition and will carry their name to history for having worked for the advancement of an industry which has been sorely oppressed by piracy and injustice.

Believing that my most humble indorsement of this new law and the desire of the firm of Jos. W. Stern & Co., who have authorized me to address this body in their behalf, will soon be upon the statute books protecting copyright, I have the honor to remain,

Very respectfully, yours,

D. P. LEWANDOWSKI, M.D.

34 EAST TWENTY-FIRST STREET, *New York City*.

A. W. ELSON & CO., EDUCATIONAL ART PUBLISHERS,
Boston, June 5, 1906.

HERBERT PUTNAM, Esq.,
Librarian of Congress, Washington, D.C.

DEAR SIR: As I do not expect to be able to be present at the first hearing of the copyright bill which is now introduced in Congress, I write to ask whether the suggestions that are made on the accompanying sheet can be placed in the hands of the committee.

I should like to appear in favor of these suggestions at any subsequent hearing that may be given by the committee on the bill.

I have arranged the suggestions in the order of importance from my own particular standpoint.

As this may reach you during or after the hearing before the joint committee of the Senate and the House, I have mailed a duplicate of this to the chairman of the committee.

Very truly, yours,

A. W. ELSON.

Suggestions of additions and amendments to the copyright bill introduced before Congress May 31, 1906, entitled "A bill to amend and consolidate the acts respecting copyright."

Section 5 (subsection J).—That the words "and negatives" be added after the word "photographs," so that subsection J shall read: "Photographs and negatives."

Negatives are made the subject of copyright under the present copyright law, and there seems to be no valid reason why they should be omitted in the new copyright statute. It would very much simplify the copyrighting of all photographic reproductions if negatives were made the subject of copyright, and for the purpose of registration two prints of the negative copyrighted should be filed in the copyright office. I would therefore suggest that the following words be added to section 11, seventh line, after the word "edition," "or if the work be a negative, two prints made directly from it."

Section 13.—In this section typesetting and the lithographic process are singled out from all other processes connected with the manufacture of printed books, and given distinct protection from foreign competition over all other processes in making books that are copyrightable in the United States. Any such discrimination is unjust, and if this section is retained, the protection should be broadened to include any other processes besides lithography.

I would therefore suggest that section 13 be amended as follows: After the words "lithographic process," in the seventh line, and after the same words on page 6, first line, nineteenth line, and thirtieth line, there be inserted the words "or any other process or method," and after the words "a process," in the same line, the words "or method."

That the word "lithographs" in the second and third lines of the same page be erased, and the word "illustrations" be inserted in place of it; and on the same page, in the third line of that portion of section 13 on that page that the words "where" and "either" be erased. My preference would be to see the whole section dropped out, but failing in this no undue preference should be shown any one or two methods connected with the manufacture of books.

Section 39.—In its present form could be made clearer if it is intended to secure to an author of an original work of the fine arts any copyright which he may have obtained under the statutes on his work. On the other hand, if the section is intended to secure to an author or artist any potential copyright in a work on which he had not duly secured statutory copyright, then such provision, it would seem, would be unreasonable and unjust to the purchaser of the work; and I would therefore suggest the following wording for this section: "The author of any original work of the fine arts being the owner of such a work and having copyrighted it according to the provisions of this act or any previous United States copyright act, and who has marked upon such original work such notice of copyright as may be required by the act under which the work was copyrighted, shall not be deemed to sell or transfer said copyright upon selling or transferring the original work of art unless an agreement in writing covering the transfer of said copyright be signed by the author."

Section 37.—Is open to the same criticism as section 39. It might be corrected by the following changes, viz: That in the third and fourth lines the words "which is the subject of copyright" be struck out and the word "copyrighted" substituted for them.

Section 8.—In providing the conditions under which a foreign author or proprietor of any work may obtain copyright on such work within the United States, section 8 grants certain privileges to a foreign proprietor which are not granted to an American proprietor of a foreign work; as, for example, an American proprietor of a foreign painting who desired to copy and publish it in this country.

I would therefore suggest that section 8 after the words "provided, however" in the fifth line and through subsection (*a*) read as follows: "That copyright secured by this act shall extend to the work of an author who is a citizen or subject of a foreign state or nation only when such author or the proprietor of the work (*a*) shall be living within the United

States at the time of the making and first publication of the work or shall contemporaneously with publication in some foreign country publish the work within the limits of the United States."

A. W. Elson,
146 Oliver street, Boston.

New York, *June 4, 1906.*

Herbert Putnam, Esq.,
Librarian of Congress, Washington, D.C.

Dear Mr. Putnam: I regret to find myself, after the strain of breaking up my home, totally unable to attend the meeting of the Senate and House committees on the 6th. In fact, it is out of my power to go to Washington this week for either the formal or the informal discussions.

It seems to me that my time of active work, relative to copyright, is about ended; and possibly I ought to resign from the presidency of the American Copyright League. I am no longer the president of the National Institute of Arts and Letters, Professor Sloane having become my successor. I think the later draft of your bill is in excellent shape as a basis for consideration by the joint committee.

Respectfully, yours,

Edmund C. Stedman.

Leo Feist, Music Publisher,
New York, June 1, 1906.

Hon. Herbert Putnam,
Librarian of Congress, Washington, D.C.

Dear Sir: Very many thanks for your courteous communication of the 29th instant, and I assure you that I appreciate the compliment paid in the sending thereof.

If all is well, Mr. Witmark and myself will be at the conference.

Earnestly hoping that the bill will be passed in its present perfect form, believe me,

Very truly, yours,

Leo Feist.

Wilcox & Bull, Counselors at Law,
Buffalo, N.Y., June 5, 1906.

Hon. Herbert Putnam,
Library of Congress, Washington, D.C.

My Dear Mr. Putnam: I beg to acknowledge, with thanks, various circulars and documents relating to the new copyright bill, including the proof copy of the bill as printed May 19, and the printed copy of the bill as introduced May 31, with notices of the first hearing before the joint committees of the Senate and House, on Wednesday, June 6, at the Library building, and of the preliminary conference to be held to-day, all of which have had my careful attention.

I congratulate you that the bill has taken this definite form and is now to be given a preliminary hearing so that it will be in shape to be urged for passage next winter. The bill is a monument to the industry and broad intelligence and information of those who have been actively concerned in drafting it, and particularly of yourself and Mr. Solberg. I am proud to have had any share, however slight, in outlining it, and shall be glad to take part as actively as possible in urging it upon Congress and commending it to the people at large.

As affecting the interest of my client, the Consolidated Lithograph Company, which is a large producer of lithographic and other prints, engravings, etc., especially for use as posters, the form of the bill seems satisfactory to me and I have no doubt it will be so to my client. This refers particularly to the provisions of sections 4 and 5, defining the subject-matter of copyright and the form of applications for registration. These provisions are in the highest degree liberal and enlightened.

The Consolidated Lithograph Company has suggested that I attend the hearing in Washington to-morrow. I should like to do this, at least for the purpose of showing the interest which we feel in the measure and to assist in impressing the committees of Congress with its importance, though I know that after this hearing the bill will simply lie over for further consideration and for action at the next session. But it seems impracticable for me to be in Washington to-morrow, and I think that I can be of more service at a later time, when I hope that the company will still be disposed to send me there.

Very truly, yours,

ANSLEY WILCOX.

P.S.—Will you please send me an extra copy of the bill, or two if you have them to spare?

STATEMENT OF WILLIAM P. CUTTER, ESQ., OF THE FORBES LIBRARY, NORTHAMPTON, MASS.

Mr. CUTTER. Mr. Chairman and gentlemen, I claim to represent no association, nor to represent myself personally. I claim to represent only the public libraries of the following cities: Chicago, St. Louis, Baltimore, Louisville, Pittsburg, Newark, Minneapolis, Los Angeles, and Springfield, Mass. Also the libraries of the following universities and colleges: Yale, Cornell, Colgate, Wisconsin, Michigan, Amherst, and Brown; the New York State Library and the Connecticut State Library; the Western Massachusetts Library Club, comprising a membership of forty libraries, and the Connecticut Library Association, representing the organization of libraries in Connecticut. I wish to speak a few moments on that provision contained at the bottom of page 24 of the Senate print of the bill.

Mr. WEBB. What section?

Mr. CUTTER. Section 30; the third subsection of section 30, at the bottom of page 24, line 25, including all after the words "United States"—in other words, that portion of the bill which prohibits importation by public institutions of a certain class of books.

You are well aware of the fact that existing law allows public libraries to import two copies of any book without any restriction as to what the book shall be. There are certain points that will make the suggested legislation a great hardship to the libraries.

Mr. CURRIER. Pardon me just a minute. Can you import two copies of an unauthorized edition?

Mr. CUTTER. Yes, sir.

Mr. CURRIER. Can you do that to-day?

Mr. CUTTER. Yes, sir; we can now.

Mr. CURRIER. A fraudulent reprint, for instance?

Mr. CUTTER. Yes, sir.

Mr. CURRIER. There is absolutely no restriction, as you understand it to-day?

Mr. CUTTER. There is no restriction at all, as I understand, on library importations; but there is in this bill in regard to it.

Mr. CURRIER. I was asking about existing law.

Mr. CUTTER. Yes; I understand that libraries can import any books that they wish.

Mr. CURRIER. I had the contrary opinion, but I may be mistaken.

Mr. CHANEY. You object to that entire part of the bill, do you?

Mr. CUTTER. Yes; I object to it principally for this reason: In importations for large libraries, such as those that I represent—it does not apply to small libraries which import only a small number of books—a case of books will come in from abroad, books that are not copyrighted in this country, English books. One book in that case might, by a mistake, be one which was copyrighted here, printed in England, and containing no notice of its copyright in the United States of America. If that fact was discovered it would send all of that box of books to public store; it would place all the box of books, as I understand, in danger of being destroyed; and it would place the librarian who did the importing in danger of having to show the Secretary of the Treasury, under this law, that he was not guilty of trying to import that book illicitly.

Mr. CURRIER. Under what section of this law? Let that go in the record right here.

Mr. PUTNAM. Sections 28 and 29, I think.

Mr. CUTTER. Section 28 is in regard to the condemnation, on page 21 of the Senate print. Sections 26 to 29 include the penalties that I have referred to.

Our objection to that is the fact that libraries in these days must have at their disposal as quickly as possible the printed thought of foreign countries. If there is any delay in our obtaining the box of books (and those who have had experience, as I have, for thirteen years in importing books for libraries in this country, know that there is often six months delay in getting a box of books through the custom-house where there is the least question as to any of them) it would mean, practically, that our reason for buying the books at that time had disappeared. We want the

printed English thought as quickly as possible.

Mr. CHANEY. Do you think that is necessary to the efficiency of a public library?

Mr. CUTTER. I do.

Mr. CHANEY. That you should get those books immediately?

Mr. CUTTER. I do; yes, sir.

Now, my other reason is a commercial reason; and in order to state it I shall have to go somewhat into ancient history.

About the year 1901 certain publishers of this country formed an association called the American Publishers' Association, and, in conjunction with the American Booksellers' Association, entered into an agreement to control absolutely the selling price of books in this country. It was an agreement among the publishers that they would not furnish books to booksellers who would not agree to sell the books at a standard price—in other words, a trust proposition.

Mr. CHANEY. We have heard of trusts before. [Laughter.]

Mr. CUTTER. The libraries were granted a 10 per cent discount from the price of the class of books affected by this agreement, so-called net-price books. We discovered, however, on examination, that these new prices which were fixed were so much higher that the net result to us was an advance of 25 per cent in the price of the book, and we found that the majority of those books were not books written by American authors, but they were books written by English authors and copyrighted in this country, and that there was a difference in price amounting to the 25 per cent tariff on printed books. So that this question, gentlemen, is a question of trusts and a question of tariff.

Now, the librarians have been getting around that by importing English books, because the same book printed on the other side is sold in the case of these expensive books at a very much reduced price compared with the price on this side. If—I am going back now to my first position—if I am prevented, by the difficulties in getting through, by accident, a copyrighted book, from getting at the noncopyrighted book so long, then I will be forced to go to Mr. Scribner, who will buy the books for me abroad at his price, against my interest.

Senator MALLORY. Do I understand you to say that that book trust is still in operation?

Mr. CUTTER. Certainly.

Now, I am connected with a library that spends $12,000 a year for books in a country town. Of this sum $5,000 is spent for English books. I am a representative of a city government which taxes itself to a certain extent to educate the people in its community, and I object seriously to paying $1,000 of that $12,000 to American publishers as a tax. That is my point.

Mr. CURRIER. What changes in this bill do you suggest?

Mr. CUTTER. I should suggest the entire elimination of that provision.

Mr. CURRIER. Of the entire paragraph?

Mr. CUTTER. No; after the words "United States."

Mr. CURRIER. That was the suggestion I made some time ago—after the words "United States," in line 25.

Mr. CHANEY. Yes; precisely.

Mr. CURRIER. Would that be satisfactory to the people whom you represent?

Mr. CUTTER. That would be satisfactory. I think it would be satisfactory to all librarians.

Mr. HINSHAW. This would allow you to import, however, but one book, whereas you have had the privilege of importing two?

Mr. CUTTER. One book, but we are perfectly satisfied with that. I think any library would be. A ruling of the Treasury Department has held that a branch library is a library itself, so that in the case of a large library wanting a book for each of several branches it would be possible to import more than one.

Mr. CURRIER. With that stricken out, the people you represent would not object to sections 26, 27, 28, and 29?

Mr. CUTTER. No; it does not affect them.

The other point I wish to make is on behalf of another interest. I wish to speak a word in behalf of an interest which is not represented here at all—two interests, in fact. The first is the firms that are in the business of importing books into this country and are not represented and have not

been asked to be represented; have not been asked to come to these meetings. There are certain firms that are not in the publishing business that are in the business of importing books.

Mr. CURRIER. I think we ought to say right there, as you say they have not been asked, that the committee invites everybody.

Mr. CUTTER. Yes; I mean up to this time they have not been asked.

Mr. CURRIER. Those who were not represented at the conference, as well as those who were.

Mr. CUTTER. Whether they were asked here or not I do not know. Of course, this being a public hearing, they had a right to appear. But the point I want to make is this: That a great many of our libraries have to import books through these men, because they get a cheaper rate of importation through them than through some of the firms that are also publishers of books. This would prevent the importation of some of these books through those firms. It would practically ruin their English business, largely ruin it; and on behalf of a library that uses that method of importation largely, it seems to me that some provision might be made for other importers than those who are publishers of books.

Those are the only arguments that I wish to present.

Mr. CHANEY. To what section of this bill do you now refer?

Mr. CUTTER. I am referring to the subsection of this same section on page 24—section 30.

Mr. CHANEY. Do you mean subsection E?

Mr. CUTTER. Yes.

Mr. CURRIER. No; the subdivision called "First."

Mr. CHANEY. Oh, I see.

Mr. CUTTER. I suggest this amendment to the clause reading, "When imported, not more than one copy at one time, for use and not for sale, under permission given by the proprietor of the American copyright."

I suggest leaving out the consent of the American copyright proprietor. That changes existing law only in these particulars: It allows the importation of only one copy instead of two copies, as the existing law does; it gives the importer who has established a business here based on legislation, and who is closely in touch—the firms that I speak of serve libraries and learned men mostly with expensive books and have practically no sale to the ordinary public—it would give them an opportunity, and it would give a scholar in this country who wants a book for a particular purpose for his own use and not for sale an opportunity to import it.

Mr. CHANEY. So that if you strike out "under permission given by the proprietor of the American copyright" it satisfies them?

Mr. CUTTER. It would satisfy the request of the importers, who are not publishers.

Mr. CURRIER. Do you appear for the importers?

Mr. CUTTER. I appear for one of them only.

The CHAIRMAN. Do you feel that you are authorized to speak for the others?

Mr. CUTTER. I am authorized to speak for one firm only.

The CHAIRMAN. Do you feel that you represent the other importing firms?

Mr. CUTTER. I do not; no. I am quite convinced that I would be allowed to represent them, but I have had no communication with them.

Mr. BONYNGE. But you think you state their views on the subject?

Mr. CUTTER. I have not any doubt of it.

Mr. CHANEY. You spoke of "ancient history" back as far as 1901. Do you regard anything back behind that as ancient history?

Mr. CUTTER. No; but it is ancient history in the book business. That is when the publishers of this country discovered that the Carnegie gifts had made the library trade so large that they must do something to make some more money out of it.

Mr. PUTNAM. With your permission, Mr. Chairman, I would suggest that Mr. Bethune, representing certain of the reproducing interests particularly—I ought not to limit that by the word "reproducing," but who represented at the conference the Reproductive Arts Copyright League—should be heard.

Mr. BETHUNE. There are but two or three sections which the Reproductive Arts Copyright League wish at this time to comment upon.

Mr. Millet, on behalf of the artists, has stated that they are satisfied with the sections relating to paintings as they stand, but as I understand it the word "accessible," in section 14——

Mr. CHANEY. Whereabouts?

Mr. PUTNAM. It is the last line on page 10 of the bill.

Mr. CHANEY. I see.

Mr. PUTNAM. It is in the second paragraph in the Library print.

Mr. BETHUNE. That is such an indefinite, uncertain term that we think——

Senator LATIMER. What are you referring to; what term?

Mr. BETHUNE. The word "accessible"—"or if a work specified in subsections F to L, inclusive, of section 5 of this act, upon some accessible portion of the work itself or of the margin," etc.

Mr. CHANEY. Where would you put it?

Mr. BETHUNE. Let it be on some accessible portion, but let the bill provide that it shall be always uncovered. As it stands now, it might be on the back of the painting, and the painting might be in a box, and it would be accessible in a sense.

Mr. CHANEY. You would put in the word "uncovered?"

Mr. BETHUNE. It should be uncovered.

Mr. PUTNAM. Accessible and uncovered?

Mr. BETHUNE. Accessible and uncovered. We want to be able to ascertain at once by examining the painting in the frame, if it is in a frame, whether the picture is copyrighted or not.

Section 9 provides, about the fifth or sixth line, that "in the case of a work of art" the notice "shall be affixed to the original before publication thereof." The word "publication" is not defined, and it has been the source of considerable litigation as to what is and is not publication.

The CHAIRMAN. Has that been settled by the courts?

Mr. BETHUNE. It has not been settled by the courts. There are differing decisions now.

Mr. CURRIER. Is it not ordinarily understood to be the putting on sale of the object?

Mr. BETHUNE. No; I think not—not if it is a private sale. I think a sale should be specifically stated by the statute to be a publication, whether a private or a public sale, and the public exhibition of a painting should be a publication of it.

Mr. CURRIER. Will you suggest an amendment that will meet your idea?

Mr. BETHUNE. I am not prepared to suggest an amendment, but I shall do so in writing to this committee, if I may.

Mr. CHANEY. In a general way, what is your idea?

Mr. BETHUNE. That the statute should state that certain things shall constitute publication of a work of art, and state that publication shall include a sale, whether a public or private sale, and a public exhibition of the work of art.

I must refer again to section 14. That provides that not only in respect of paintings, but also maps and photographs, the notice can be on the back or the margin. Now, so far as a painting is concerned, that is quite satisfactory to us if the notice is to be "uncovered," but in respect of a photograph, which may be very loosely attached to a little piece of pasteboard, and the notice may be put on the pasteboard, which could be very easily removed from the photograph. The reproducer to whom the photograph is then brought, there being no evidence of its having been detached from any mount, may be easily misled, and before he discovers that he is infringing he may have invested thousands of dollars in the undertaking to reproduce it.

Mr. CURRIER. Then your suggested amendment, "uncovered," does not meet this objection, which you now state, at all?

Mr. BETHUNE. It does in respect of the painting, but I do not think that so far as the photograph is concerned the law should permit the notice of copyright to be simply on the thing to which it is attached or mounted. It should be on the photograph itself. I think that that will prevent litigation and expense to both photographers and reproducers.

Mr. PUTNAM. Mr. Chairman, may I ask Mr. Bethune to state whether, under the present law, the notice can be put on the mount of a photograph? Is that your understanding—that it can not be, and that this is an extension of the privilege?

Mr. BETHUNE. I understand that it can under the present law.

Mr. PUTNAM. That it can now; so that this simply repeats the privilege.

Mr. MCGAVIN. An objection was made here yesterday, I think, on the ground that it would deface the photograph.

Mr. BETHUNE. Yes; that objection has been made by the photographers; but I leave it to the intelligence of this committee——

The CHAIRMAN. And in case of a fine picture, for instance, the artist might object to having the words prescribed by this act appearing permanently upon the face of the picture.

Mr. BETHUNE. Yes, he might; but as a matter of fact, I am informed that there are very, very few artists who do not insist upon putting some mark, if not their name, upon the face of their painting.

The CHAIRMAN. Can you call attention to that section?

Mr. BETHUNE. There is no section in this bill providing for the placing of the notice upon the face of the painting; but, I say, there are very few artists, I am informed——

The CHAIRMAN. Where is the section that prescribes the form?

Mr. BETHUNE. Section 14.

Mr. MCGAVIN. On page 10.

Mr. BETHUNE. It may be simply a "C," with a little circle around it.

Senator MALLORY. Do you object to the word "accessible" here, on line 10?

Mr. BETHUNE. Yes; the word "accessible."

Mr. PUTNAM. Except as coupled with the word "uncovered."

Mr. BETHUNE. Yes.

Mr. MCGAVIN. If this language were made to read "accessible and uncovered," it would necessarily, then, require that it be placed upon the face of the photograph or picture, would it not?

Mr. BETHUNE. No; I think not.

Mr. MCGAVIN. You could not put it on the back, where it would be uncovered?

Mr. BETHUNE. No; I do not think that that would be covered——

Mr. CAMPBELL. How about the word "visible?"

Mr. BETHUNE. "Visible" was the word which I suggested at the conference. I do not know why it was not put in.

Mr. PUTNAM. I may say, Mr. Bethune, if you will permit me, Mr. Chairman, that this question of notice was a long-discussed question between the artist group and the committee of the reproduction group; and they started, of course, at very opposite extremes. We understood finally that they reached this point: That in the first place there should be a notice. That was a concession on the part of the artist group, who thought there ought not to be any notice except their own name. That there should be a notice—that is, something to indicate copyright, even if it should be only "C" within a circle—was insisted upon by the reproducing group. So that it was agreed that there should be something to indicate copyright. Where should it be?

Now, the present statute uses the term "visible;" but the reproducing group said (if I am wrong, Mr. Bethune will correct me): "We do not care that it shall be visible in the sense that he who runs may read it. We do not care, even, that it shall necessarily be on the front of the painting. It may be on the back of the painting. It must not be on the frame, because the frame is a detachable thing. People's tastes as to frames differ, and one collector likes one, while his successor may prefer another, and he will change the frame, and with it goes the notice. It must be on the thing itself"—that was their contention—"but it may be on the back."

Now, if it is on the back, is the word "visible" descriptive? We wanted to get some word that would indicate that it might be put in some place where it could be found by somebody looking for it, and that was the requirement of the reproducer that somebody with a sincere desire, not with a malicious intention to appropriate it, but with a sincere desire to find out whether it was copyrighted or not, might find out with a reasonable search intending to look for it. That was

satisfactory to them and that was the endeavor in using the word "accessible."

Now, it is that little doubt which Mr. Bethune has suggested to you. Would it cover the back? And would it cover and prevent a case of covering it up? The notice might be covered up. So he has suggested the addition of the words "and uncovered," but the use of the word "accessible" rather than the word "visible" was to endeavor to express what we understood to be agreed to, as the agreed intention.

Mr. BETHUNE. I think it will express it if "uncovered" is added.

Mr. PUTNAM. I should add that the reproducers definitely objected to the privilege on the part of the photographers, and so on, the print publishers, etc., of putting the notice on the mount; but of course it was understood that they had that privilege at present. They have that privilege at present, but the reproducers never thought that that was reasonable, and did not concede it to be reasonable.

Mr. BETHUNE. Now, reproducers are open to fraudulent attempts to sell to them copyrighted works by simply removing the notice of copyright, and section 25, in the draft of the bill, imposes simply a penalty of $100 as a minimum and $1,000 as a maximum fine for the removal of this notice. We think that the punishment should be imprisonment as well as fine. We want to protect ourselves from that fraud, which is very frequently encountered.

Mr. CHANEY. So that that paragraph of that section as it stands is satisfactory to you?

Mr. BETHUNE. Section 25, sir?

Mr. CHANEY. Yes.

Mr. BETHUNE. No. We want, as well as a punishment by fine of not less than $100, the words inserted "or imprisonment" or "and imprisonment," both for a specified term; it is not material how long it shall be.

Mr. WEBB. Have you suggested your amendment to this section 14 that some word instead of "accessible" should be used? Did you suggest "visible"? Was that your idea?

Mr. BETHUNE. That was the word which we did suggest, but "accessible" is satisfactory to us if "uncovered" is coupled with it.

Mr. WEBB. You want it to read "accessible and uncovered"?

Mr. BETHUNE. Yes.

Mr. WEBB. Would that apply to a magazine picture—a picture in a magazine that had the notice on the back of the original? You could look for it, and it would be uncovered.

Mr. BETHUNE. In the case of a magazine, as I understand, it would be covered by the copyright of the magazine.

Mr. WEBB. Well, that is all right; I did not understand how that would be.

Mr. BETHUNE. Those are the principal features——

Senator MALLORY. I would like to ask you with reference to that suggestion which you were referring to in regard to publication in the matter of a work of art, or a plastic work or drawing. Is there any definite suggestion that you could make, any definite change, so as to convey your idea? I think I know what you want; but it seems to me it is going to be pretty difficult to use an expression there that will convey the exact idea that you desire. Now, in the matter of a work of art, as long as it remains in the hands of the creator of it, one would think it would not be necessary, but it was suggested to me by the chairman here that even the maker of the work of art might want to copyright it, although he did not intend to sell it; he would want to prevent people from infringing on it.

Mr. BETHUNE. Precisely.

Senator MALLORY. And yet there would be no publication; he could keep it in his own library.

Mr. BETHUNE. He has the right to copyright it at any time he pleases, before publication.

Senator MALLORY. I know that; but the point is, What does the word "publication" here mean? And I would like to know, if you have given the thing any thought, if there is any suggestion you could make?

Mr. BETHUNE. Yes, sir; I think the term "publication" should be explained. I do not think we can define altogether what "publication" is; but we can state that certain things shall be included within "publication."

Senator MALLORY. What is your suggestion?

Mr. BETHUNE. I think that sale, whether a public or private sale of the painting, and the public exhibition of the painting, should be construed as a publication.

Mr. WEBB. You suggest inserting after "original" "before publication, exhibition, or offering for sale?"

Mr. BETHUNE. No, sir; I should let "publication" stand there, but I should qualify or partially define in another section what "publication" is——

The CHAIRMAN. Is there not danger in making such definition?

Mr. BETHUNE. No; I think not, if you state what it shall include, or rather what shall be included in it.

The CHAIRMAN. Suppose we define publication in the manner you suggest, would there not be difficulty in cases not covered by that definition?

Mr. BETHUNE. I think not, sir.

The CHAIRMAN. Might not the courts construe that definition as covering all classes of publications?

Mr. BETHUNE. Not if the statute specifically states that those expressions are not meant to be an exact definition of all that publication includes, and I think that can be very easily done.

The CHAIRMAN. We would be very glad to have your suggestion on that point.

Mr. BETHUNE. I should be very glad to submit it if you will be kind enough to permit me to do so.

There are some other matters which I do not care to take up your time with now, and will do so in writing.

Mr. CHANEY. Is your idea of expressing and defining "publication" for the purpose of limiting the word "publication?"

Mr. BETHUNE. Not altogether; no, sir. I think that both the reproducer and the artist should know the exact situation at the very outset. If the artist exhibits a painting in a gallery and people pay fifty cents or nothing to go in and look at the painting, although there is a restriction, perhaps, made by the artist upon copying that painting, when the painting goes to that exhibition he should know at once, and the reproducer should know, that that being a public exhibition is a publication of the painting, and if the copyright notice is not on it then the artist has lost entirely the right to copyright it entirely.

Mr. CHANEY. You are aware of the fact that if you undertake to define "publication" you do limit it to whatever you say it is?

Mr. BETHUNE. I do if I attempt to fully define it, but I should not attempt to so define it. I should attempt to say that certain things should be embraced in the term "publication."

Mr. CHANEY. Do you not thereby exclude everything else?

Mr. BETHUNE. No, sir.

Mr. PUTNAM. If Mr. Bethune will permit me, Mr. Chairman, the attention of the committee may not have been called to the fact that there is a definition of the date of publication where copies are reproduced for sale or distribution. That is in section 63. It is limited to that because, after discussion, the conference did not seem to be able, or none of our advisers seemed to be able, to suggest a definition for "publication" in the case of works of art, for instance, of which copies are not reproduced. It seemed to those who were advising us a dangerous thing to attempt.

Mr. BETHUNE. I think it would be, and I would not undertake it, but I think you will save trouble and expense to both the artists and the reproducers if you will say that the sale, whether private or public, and the public exhibition, shall be a publication of the painting.

Mr. WEBB. That is what I asked you a while ago—if you did not think, speaking of "publication" here, that it would be sufficient if you were to let it read "public exhibition or offering the same for sale," either public or private sale?

Mr. BETHUNE. To be included in the term "publication."

Mr. WEBB. But can you think of any other instance where publication would mean something else than those things?

Mr. BETHUNE. No; I can not for the moment, but I think there is danger, as the chairman has just stated—there may be many things which do not occur to me now, or would not occur to this committee, which should be contained in a definition.

Mr. WEBB. I think you would complicate it very much if you used the word "publication" generally,

and then undertook to define "publication" also, and intended that "publication" should cover more points than you specified.

Mr. BETHUNE. Why, sir, this bill starts in and says that all the works of an author may be copyrighted. It then specifies some of the things, and it then says that the things specified are not all that may be included.

Mr. WEBB. I understand that; but you, a man who is expert in these matters, can not state to us what other points would be covered than public exhibition or offering the same for sale.

Mr. BETHUNE. I am not a reproducer; I am a lawyer, and the reproducers may be able to advise me.

Mr. CHANEY. A lawyer is an originator always. [Laughter.]

The CHAIRMAN. You spoke earlier in your remarks about the decisions of courts on this subject.

Mr. BETHUNE. Yes.

The CHAIRMAN. And the lack of uniformity of the decisions relative to publication. Is not that fact due to the conditions which you now describe, and which have been suggested by different members of the committee—because what may be publication in one copyrightable article may not be publication in another?

Mr. BETHUNE. Yes, sir. For that reason——

The CHAIRMAN. Now, then, if the courts, with this attempt to define publication, have found difficulty and have differed, is it not because of the different character of the articles that have been involved in the litigation before the courts?

Mr. BETHUNE. No; it is the same article that I have in mind. There is one Massachusetts case, a Federal case, where, in the case of a public exhibition of a painting, the circuit court of appeals in the first district held that that was a publication of the painting.

Mr. CAMPBELL. Was the exhibition given for hire, for profit?

Mr. BETHUNE. Yes; my recollection is that it was a public exhibition for hire. Subsequently another case——

Senator MALLORY. It held that that constituted publication?

Mr. BETHUNE. That that constituted publication.

Senator MALLORY. It did not define what publication was any more than that?

Mr. BETHUNE. No; it simply decided that that particular public exhibition was a publication of the work.

The CHAIRMAN. In other words, it decided that in that case special acts constituted a publication?

Mr. BETHUNE. Yes, sir. Now, the Federal courts in New York State have held the contrary view in respect of a public exhibition of a painting for hire (in the Workmeister cases). Those cases will probably go up to the Supreme Court, but they may not.

The CHAIRMAN. What was the argument or the reasoning of the court in the latter decision?

Mr. BETHUNE. The Massachusetts case was distinguished, if my memory is correct, on the fine point that in one case there was a reservation—in the one case the artist made some reservation in respect of the use of the painting when he loaned it to the exhibition, and in the other case he did not; but it is just those fine points which we want to eliminate.

Senator MALLORY. From what you say, I think it would be well for us to avoid the word "publication" and state just what we want without using the word "publication" at all, if we are going to give rise to diverse decisions and litigation. I think we had better express it, perhaps, in the language which you have—"after sale or exhibition for hire" and "public exhibition."

Mr. BETHUNE. Well, there you do limit it.

Senator MALLORY. Just express it in those words.

Mr. BETHUNE. There you do limit distinctly what would be, in effect, publication, though you do not call it so, and that we do not want.

The CHAIRMAN. We would be very glad if you would submit your proposed amendment to the committee later.

Mr. PUTNAM. Mr. Chairman, I understand that Mr. W. A. Livingstone, representing certain reproducing interests, and Mr. McDonald, representing the National Photographers' Copyright League, wish to have a note recorded—not to argue a point, but simply to have a note recorded in

the minutes.

STATEMENT OF WILLIAM A. LIVINGSTONE, ESQ., OF DETROIT, MICH.

Mr. LIVINGSTONE. Mr. Chairman, I simply wish to state two things in contradiction of the last speaker. I stand here for a large reproductive interest, and consequently we are speaking also from the standpoint of the reproducer. We dissent very strongly from his opinion and we support the bill in respect to notice as it now is.

That is all we wish to say now.

Mr. WEBB. You want the word "accessible" kept in just as it is now?

Mr. LIVINGSTONE. Yes, sir.

Mr. WEBB. What do you understand that to mean?

Mr. LIVINGSTONE. I understand that to imply that that notice must be easily get-at-able in the painting or other object.

Mr. WEBB. Well, "accessible" means "get-at-able."

Mr. LIVINGSTONE. Yes, sir.

Mr. WEBB. But you have not got "easily accessible" in here. You have got "accessible," simply, whether with difficulty or whether with ease.

Mr. LIVINGSTONE. In the case of a painting or work of art it is very easy—you can hardly conceive of a case where, if the notice is accessible at all, it can not be obtained.

Mr. WEBB. Well, why should you object to the word "uncovered"—"accessible and uncovered?"

Mr. LIVINGSTONE. Because if you include the word "uncovered" you then impose some other conditions which are the result of that term, as, for example, you may compel the notice to be on the face. I will give a concrete illustration that is easily understood. Suppose you have a very small miniature which is very delicately painted. You can not put that notice across the face of the miniature, and yet you can take the miniature in your hands and turn it over and find the notice in an accessible place with ease.

Mr. WEBB. Do you think, though, that "accessible and uncovered" means putting it on the front of the painting or photograph? Could it not be on the back and be still uncovered on the back?

Mr. LIVINGSTONE. The painting may be hanging on the wall.

Mr. WEBB. It would still be uncovered.

Mr. LIVINGSTONE. Oh, not necessarily; no, sir.

Mr. WEBB. As far as the painting itself is concerned, I do not know why you all quibble between "accessible" and "uncovered," and I did not know what was the real difficulty between you on this word "accessible." The word "visible" has been suggested.

Mr. LIVINGSTONE. Another case would be this: In certain kinds of sculptures you could not possibly put that notice upon the face of the sculpture without a serious marring of it, without a serious impairment of its commercial value. The law even now takes cognizance of this, and permits you, in those cases, to put it on the bottom or on the back. It may not necessarily be uncovered, but it is accessible.

STATEMENT OF PIRIE MACDONALD, ESQ., OF THE PHOTOGRAPHERS' COPYRIGHT LEAGUE.

Mr. PIRIE MACDONALD. We wish to stand for the word "accessible" as it has been evolved by the Librarian, and we would wish that in case the word "uncovered" is used it be very strictly defined; that it be defined as to when this picture should be uncovered. If, for example—and remember, please, that I am speaking merely for photographers, and not as a reproductionist—suppose I were to make a photograph of someone, and were to properly and duly mark it with the notice as prescribed by law (for example, a photograph of yourself), and you were to decide that you objected to the notice as being a defacement, and you were to take it on yourself not to take the notice from the picture (because that would be prevented by the proposed law) but to cover it up. It is your property, unquestionably; and it gets to the hand of a reproducer and he says, "This is not uncovered." Therefore I suggest that in case by any chance the word "uncovered" is used, it be very strictly defined.

Mr. PUTNAM. Mr. Chairman, there are a great many people here who are interested in behalf of the provisions in the bill proposing protection against the mechanical devices for the reproduction of music to the ear. There are many here who are opposed to the provisions of the

bill, and those who are its proponents are in favor of them. They are, of course, very desirous to near the arguments advanced by those who are against them, and, if it be your pleasure, I would suggest that it would be only fair to hear from the opponents of those provisions as soon as possible. I have called as many as I knew of the participants in the conference who cared to say anything at this stage in favor of the bill. One additional participant to those who have spoken, representing the directory publishers—I think that association is not here—states, in a letter:

> I take this opportunity to say that our association fully indorses the bill as presented to Congress, with the single exception of the final paragraph of section 13.

That is the paragraph requiring that in the affidavit as to manufacture the place in which the work was done and the establishment shall be specified. I simply ask that that go into the record as coming from the American Directory Publishers.

The CHAIRMAN. What reason is given for that request?

Mr. PUTNAM. I understand the reason to be that it would be an undue burden upon the publishers.

The CHAIRMAN. In what respect?

Mr. PUTNAM. I think perhaps the publishers ought to answer that. It is a specification on which they alleged to the conferences might be inconvenient and difficult in some cases. In the case of directories, the directory publishers said that they were in the habit of having their work done at a great many establishments. Of our general legal advisers, as you have asked me, I feel that I ought to state this: The chairman of the advisory committee of the American Bar Association is not here to state it himself, as he stated it to us: but he was of the opinion that it was not relevant to the affidavit. But I do not see that at this point, sir, this question can be discussed, because the persons who are opposed to this provision are not fully represented here.

Of those on the list of participants that cared to be heard at this point I know of no others, except that Mr. Sullivan, who represents the International Typographical Union, not caring to make any argument or statement, but possibly caring to do so later, if he may, would like to say just a word in behalf of the general principles of the bill, or on behalf of the bill as a whole—the feeling of the Typographical Union as to the bill.

STATEMENT OF J. J. SULLIVAN, ESQ., REPRESENTING THE INTERNATIONAL TYPOGRAPHICAL UNION.

Mr. SULLIVAN. Senators and Representatives, I do not desire to take up any of your time just at this hour, as there are many gentlemen here from out of town who wish to be heard before the committee. I therefore desire to be heard at some future time, as I understand you will have a session of this committee to-morrow; and on behalf of the organization, the International Typographical Union, which I have the honor to represent, I particularly protest against any modification of section 13, known as the manufacturing clause of the copyright law.

Mr. CHANEY. Is that in this bill or the present law?

Mr. CURRIER. This bill.

Mr. SULLIVAN. I refer to section 13, known as the manufacturing clause of the old act and copied in the new one. Speaking also on behalf of my associates from New York, representing 7,500 typographers, we protest against any modification of this law.

Mr. PUTNAM. You must make it clear whether you refer to this bill or to the existing law. Are you satisfied with the bill?

Mr. SULLIVAN. I refer to the revised bill.

Mr. PUTNAM. You are satisfied with the bill as it stands?

Mr. SULLIVAN. The Senate bill.

Mr. CURRIER. You are referring simply to section 13?

Mr. SULLIVAN. Section 13; yes. That is, the old section.

The CHAIRMAN. Do you approve in all respects the bill as introduced in the Senate and House?

Mr. SULLIVAN. No, Senator; I respectfully beg to differ in this respect—that either through inadvertence or slight mistake in the draft of the bill that has been submitted to the Representatives taking part in these conferences there are six lines bracketed.

Mr. PUTNAM. They are not bracketed in the official bill. They were left out of the bill as introduced.

Mr. SULLIVAN. I respectfully request that section 13 of the bill as presented to the Representatives taking part in the conferences here be revised in the Senate bill so as to include the paragraph

that is bracketed in the draft of the bill sent out to the delegates.

Mr. PUTNAM. Well, Mr. Sullivan, I want you to be clear about this. The bill as introduced into Congress did not contain those brackets. That was a draft sent out some time ago, and the bill as introduced in Congress has not those brackets.

Mr. SULLIVAN. (after examining the official copy of the bill). That is on page 9; that is all right.

Mr. CURRIER. It is right as it is, as we understand?

Mr. SULLIVAN. It is right as it is. That is all right, then; we have no objection, Senator, to the bill as it stands. I only wish to say at this time that that bill has already passed the lower branch of Congress.

Mr. CURRIER. You refer to section 13?

Mr. SULLIVAN. Yes, sir; and Representative Currier knows it has also passed his committee. We respectfully submit the resolution to your hands, and I desire to be heard on it to-morrow.

Mr. PUTNAM. Mr. Chairman, with your permission Mr. G. Howlett Davis, of New York, desires to be heard as representing inventors who have allied themselves particularly to these devices for the reproduction of music to the ear. Mr. Davis's suggestion was that as the composers had been heard as the creators of the music in the first instance, one who is engaged as an inventor in the production of these devices should first be heard on the other side.

Mr. S. T. CAMERON. May it please the committee, Mr. Chairman, I am one of those who are representing the interests of the talking machines of the country.

The CHAIRMAN. Whom do you represent?

Mr. CAMERON. I represent the American Graphophone Company of New York.

The CHAIRMAN. Do you desire to be heard by the committee?

Mr. CAMERON. Yes, sir. I wish to say at this point, however, sir, that with all due respect to the Librarian, it would seem to me that there is no good reason existing why he should depart from the mode of procedure in connection with these talking machines that has been taken in all the rest of the bill—that is, that those who are the proponents for the changes in this bill that are of a very radical nature and very radically different from existing law should present to the committee their reasons for such changes, before hearing from the opponents of the bill.

Mr. PUTNAM. I had no intention, Mr. Chairman, of departing from that mode of procedure. I understood that two gentlemen in behalf of these provisions had been heard, Mr. Sousa and Mr. Herbert; and I had also been informed that the other interests, including those of the publishers, did not care to be heard at this point; they were content to have the provision before you as the affirmative. I desire now that the opponents of the bill should have the fullest opportunity, at the earliest possible moment, to present their views to the committee. The opponents have not advised me as to whether they had agreed upon any method of presenting their case. I simply had this suggestion from Mr. Davis which I laid before you, and the fact that Mr. O'Connell, representing ten manufacturers of automatic piano players, also wishes to be heard.

Mr. PAUL H. CROMELIN. Mr. Chairman, as the representative of the Columbia Phonograph Company, I should like to know whether it is the purpose of this committee to sit to-morrow. I had promised certain gentlemen in New York City to telephone them between half after 12 to-day and 1 o'clock, so that they can leave on the Congressional Limited and be here to-morrow, if it is your intention to-morrow to hear the opponents of this bill.

The CHAIRMAN (after consultation with other members of the committee). We will meet to-morrow morning at 10 o'clock.

Mr. CROMELIN. And may I ask also, Mr. Chairman, if it is your intention to continue these proceedings this afternoon?

The CHAIRMAN. We will continue this session until about half past 1.

Mr. CROMELIN. Thank you very much.

Mr. ALBERT H. WALKER. Mr. Chairman, I wish to inquire whether the committee is willing to sit also on Saturday to continue the hearings?

The CHAIRMAN (after further consultation). It is the purpose of the committee, if possible, to finish its hearings to-morrow.

Mr. WALKER. I wish to suggest to the committee that this bill is incomparably the most important measure that has been before any Committee on Patents of either House of the American Congress at any time since the civil war, and I think it is the most important measure that ever was before any Committee on Patents of the American Congress since the enactment of the patent law in 1836.

The CHAIRMAN. It is not the purpose of the committee to deprive anyone who desires a hearing of that privilege. On the contrary, the committee will sit so long as anyone desires to be heard, within any sort of reason.

Mr. WALKER. If the Senator will permit me one moment, I am prepared and have been preparing myself through a rather long lifetime to elucidate the subject of copyright law; and I appear before the committee in the interests of the American people and also in the interests of the authors.

The CHAIRMAN. How much time do you wish, Mr. Walker?

Mr. WALKER. I wish at least two hours, and I can take it at any time at the convenience of the committee, at any day.

The CHAIRMAN (after further consultation with the other members of the committee). We will hear you, Mr. Walker, one hour to-morrow morning, if we are unable to reach you to-day, with the privilege of submitting in writing your views if you so desire.

Mr. WALKER. If the chairman will allow me to make the suggestion, if I were to be heard to-morrow for an hour, that would probably cut off other gentlemen who would wish to speak much shorter than that, and it would be very convenient for me, if the committee is to sit at all on Saturday, to hear other gentlemen on Friday and let me speak on Saturday.

The CHAIRMAN. If we are compelled to hold a session on Saturday, we will hear you on that day; but we hope that the gentlemen who are present to present their views to the committee will finish in such time as will permit you to have your hour to-morrow morning.

Mr. WALKER. Then, is it understood that I am to speak first to-morrow morning?

The CHAIRMAN. I think not.

Mr. CURRIER. There are some other gentlemen here who will want five or ten minutes.

The CHAIRMAN. Inasmuch as you prefer to go over until Saturday, if convenient to the committee, I should think that the members from out of town and the other gentlemen here should be first to address the committee.

Mr. WALKER. That is very agreeable to me.

Mr. SOUSA. I sincerely trust, Mr. Chairman, that in Mr. Walker's discussion it will not be permitted to discuss the copyright of the past. We are not after that. We want a copyright of the future. If he will talk about things that will be for the benefit of the future, I think you should give him the time; but if he is going into a discussion of what was done a hundred or two hundred or three hundred years ago, we do not want it. [Laughter.] That is the past; we want the future.

Mr. CROMELIN. Mr. Chairman, I would like to give notice, as the representative of the Columbia Phonograph Company, representing large interests which are vitally affected by this bill; as the representative of a company which knew nothing of this proposed legislation before the publication took place on the 31st of May; as the representative of a company that was not invited to take part in the so-called conferences, notwithstanding the fact that its industry is so broad that it embraces the world, that I would like to be heard, and that it will probably take at least one hour or two hours to present this subject in all of its ramifications to your committee. It was my understanding that the committee would adjourn to-day at 12 or 1 o'clock, and in view of the fact that the opponents of this measure have had to come together quickly, and that they have had no time to organize, while on the other hand those who are proposing it have had conferences for more than one year, I propose, sir, that it would be meet and proper at this time to adjourn this conference until to-morrow morning, giving the opponents of the measure a chance to decide upon a plan of action for presenting this matter to your committee, and that we will come here to-morrow morning and present the various views of those who are interested.

I therefore suggest the advisability of a postponement until to-morrow morning or an adjournment.

The CHAIRMAN. Do I understand that all the opponents of the provisions of this law relative to talking-machine devices can be heard within one hour?

Mr. CROMELIN. No, sir. I speak on behalf of myself, for my own industry only. There are others——

The CHAIRMAN. How many desire a hearing?

Mr. CROMELIN. I believe that there are at least a half a dozen gentlemen who desire a hearing.

The CHAIRMAN. Does each want one hour?

Mr. CROMELIN. I do not know how long it will take them to present their views.

The CHAIRMAN. We established a rule at the beginning of the hearings yesterday limiting the statements to ten minutes each.

Mr. CROMELIN. I understood, Mr. Chairman, that that was in regard to the proponents of the measure. I did not understand that you intended to limit those persons whose interests are vitally affected by this measure to ten minutes to reply. I do not believe that is the intention of this committee; and I submit the question to the honorable chairman.

Mr. CHANEY. Mr. Chairman, it is entirely out of all reason to expect us to remember what these gentlemen will say. We will want a good deal of it in typewriting anyhow; and they can simply give a synopsis of an argument here as to what they want to do, and we must expect them to submit to the committee in writing for our use such matters as they seem to think important for our consideration when we are giving the bill consideration. They do not need so long a time to make a speech here. Let them prepare their matter and hand it in.

Mr. CROMELIN. Mr. Chairman, we hope to file briefs in addition to the oral statements.

Mr. CURRIER. As far as the House committee is concerned there is no expectation that there will be a report of this bill at this session of the Congress.

Mr. CROMELIN. Will the gentleman be good enough to state that positively on behalf of the committee, so that the interests that ought to be represented here to-day, and whose representatives must remain away, can be satisfied on that point?

Mr. CURRIER. I can state it most positively, as far as the House is concerned.

Mr. CROMELIN. I thank you very much.

The CHAIRMAN. And the same is true so far as the Senate is concerned.

Mr. CROMELIN. I thank you very much. We have endeavored to get that information from the Librarian, and he stated yesterday that it was highly improbable, but he could not state——

Mr. PUTNAM. Mr. Cromelin, if you will excuse me, I said that I had no right to give any such prophecy on the part of the committee; it was not within my control. You will do me the justice to say, Mr. Cromelin, that I added that when the copyright office asked for this bill to be introduced it had no expectation itself of any possibility of its being reported at this session.

Mr. CROMELIN. Thank you very much for the information I have gotten from the Librarian and from the chairmen of the respective committees. That assures us on the point, for the first time, that this bill will not be reported at this session of Congress.

(After a consultation between the members of the committees:)

The CHAIRMAN. The committee has decided that it will hear some representative of all these interests, if they shall so desire, not exceeding an hour, with the same permission to supply in writing such matter as they may desire, as was given to Mr. Walker. I might add that it seems to us that the representatives of these interests can state concisely in that time their objections to the bill as introduced in the Senate and House, leaving the details to be supplied in writing, as I have suggested. It does not seem necessary to us, unless it is desired by these representatives, to have each gentleman representing each manufactory make a speech to this committee. We think that it will be giving you all a fair opportunity to be heard to comply with the suggestion that has been made.

Mr. WEBB. The interests are about the same.

The CHAIRMAN. The interests are precisely the same, as I understand it, so that the objections must be along the same line.

Mr. CROMELIN. Mr. Chairman, may I merely state that as regards sound records as understood by a phonograph record, a graphophone record, or a telegraphonic record, the interests may not be the same. We are standing together against the whole measure; but it must be fully understood that in so far as relates to the reproduction of sounds previously produced, there may be a distinction between a sound-producing machine and a sound-reproducing machine.

The CHAIRMAN. We think that those distinctions can be very well brought out in your written communications to the committee.

Mr. JOHN J. O'CONNELL. Mr. Chairman, perhaps if the suggestion of Mr. Cromelin were complied with—that is, that a recess be taken until to-morrow morning at 10 o'clock—the various interests covering the music rolls and the phonographic records could get together and decide how to present their views to this committee, and in that way save time; and afterwards each could enlarge in his written brief on the points which he wishes to make.

Mr. CHANEY. That is so as to that particular thing, but if there is someone who wishes to be heard on some other point, why not hear him now?

The CHAIRMAN. We will postpone this question until to-morrow morning, and we will hope to finish that branch of the case, as well as the argument of Mr. Walker, to-morrow morning from 10 until 12.

Mr. O'CONNELL. As I stated to the chairman, the only thing in which my clients are interested is the music rolls, and that is the only question I personally wish to present to this committee. Perhaps the same question may be embraced in the points to be raised by the phonographic record people as well.

The CHAIRMAN. And I will say to you and the other gentlemen who are interested that you can divide that hour between yourselves as you may please, or you can select some representative to take the entire hour.

Mr. CURRIER. Mr. Remich, of New Hampshire, is here, and wishes to be heard briefly on another section of the bill.

STATEMENT OF DANIEL O. REMICH, ESQ., OF LITTLETON, N.H.

Mr. REMICH. Mr. Chairman, I appear here to-day in behalf of the stereoscopic view manufacturers of the country. There are at least twelve large manufacturers of this description of views. There may be some that are not familiar with that class of view; it is the double view that you look at through the stereoscope. The firm to which I belong is the founder of this business, D. W. Kilburn & Co., of Littleton, N.H., in the White Mountains. There are, as I say, now twelve large concerns, which are competitors. I appear here in behalf of the stereoscopic view manufacturers, who approve of this bill, except one provision, and that is the provision as to the copyright fee.

Mr. CURRIER. What section is that, Mr. Remich?

Mr. REMICH. That is section 60. You will notice that under the old law the fee for copyrighting was 50 cents. The fee is now made a dollar, which advances that expense upon our industry 100 per cent.

Inasmuch as the report of the office shows that there is a good handsome surplus of cash received, more than enough to pay for all the expense of maintaining the Copyright Office, and in addition to that some 213,000 objects, which the Librarian says are of great value to the Nation—books, paintings, etc.—and in view of the small profit in the manufacture of our goods, and the fact that in the conduct of our business we have to make long-term contracts with general agents who handle our goods, selling them over the entire world, and that our contracts have been made for a long term of years, this 100 per cent advance upon our class of goods would practically put us out of business.

Mr. CHANEY. Suppose we except those views?

Mr. REMICH. I have no objection to that. You will see that they have tried to modify this provision somewhat by a section at the bottom of the twenty-fifth page of the conference report, in which they say——

Mr. CURRIER. The thirty-eighth page of the bill, gentlemen.

Mr. REMICH. The thirty-eighth page of the bill, in which they say:

> *Provided further*, That only one registration at one fee shall be required in the case of several volumes of the same book or periodical deposited at the same time, or of a numbered series of any work specified in subsections H, J, K, and L of section 5 of this act—

Which includes our class of products—

> where such series represents the same subject with variances only in pose or composition, and the items composing it are deposited at the same time under one title with a view to a single registration.

As a lawyer, I suggest that would inject a dangerous element into our business, if we tried to copyright a series of pictures which we claimed only differed from each other in pose, and we should have more litigation on our hands in a month than you could shake a stick at. It would ruin any stereoscopic view concern in a little while.

As I suggested in our conference, that clause would apply satisfactorily to gallery work where a man, for instance, took my distinguished friend, the Representative from my district, Mr. Currier, in a gallery, and took a side view, a front view, a view standing up, a view sitting down, a view with his chin turned up, and a view with his nose turned out. In such a case there would be no change save in pose. But we send artists all over the world. We had an artist in the Japanese army during this war, and with the Russian army, and in the South African war, and in Cuba, and in the Boxer war. Our negatives are largely snapshots of moving objects and things. We may get one distinguished general in one snapshot, the next negative we make will show another distinguished general.

If we go to a great parade to make negatives, as we did at the Czar's coronation in Russia, we are

liable to get more than 500 different negatives, and they all differ in something besides pose and composition. You will see that a clause of that kind will make it absolutely impossible for us to take advantage of it, although any gallery artist could take advantage of it with success and safety.

The CHAIRMAN. Have you the form of an amendment which you propose?

Mr. REMICH. No. I have not framed any amendment. An exemption of the stereoscopic manufacturers from the $1 fee would be perfectly satisfactory to us.

Mr. CURRIER. Not the exclusion of the entire fee? You do not mean that?

Mr. REMICH. Not at all; we are perfectly willing to pay our 50-cent fee, although it amounts to a tremendous sum in our business, because we take so many negatives. To show the extent of our business, permit me to say that we have over 17,000 different subjects in stock ready for delivery. We have over 160,000 different negatives at the present time, and are importing them constantly and making them in this country.

The CHAIRMAN. The reason I asked the question was because the language here indicates that the exception you propose should be inserted with much care.

Mr. REMICH. Yes.

The CHAIRMAN. And I will be glad if you will draw your proposed amendment and insert it in the record.

Mr. REMICH. It seems to me it is going to be a difficult thing to make an exception. What is the necessity of an advance in the fee? Why is there any necessity for a change of the fee when in England, as I understand it, they charge only a shilling for doing this work, which is one-half of what we pay, and when, in point of fact, we are getting a handsome surplus—as the report of the copyright office shows, over $130,000 profit in the last six years? The office is not intended as a revenue producer. It is simply designed to protect the manufacturing interests of the country by copyright.

Of course to the man who is producing a painting or a valuable book which he may sell and obtain in royalties $50,000 on, it does not make any difference. Some men have told me they do not care; they wish the copyright fee could be $75, because larger fees for copyrighting would tend to keep out a lot of fellows. But we have a great big industry which is employing a large number of people which would be ruined by these additional charges.

The CHAIRMAN. Your suggestion, then, is to reduce the fee prescribed in section 60 from $1 to 50 cents?

Mr. REMICH. Yes; leave it exactly as it is now; yes, sir.

The CHAIRMAN. Were you present at the hearing yesterday?

Mr. REMICH. I was not present; no.

The CHAIRMAN. Mr. Putnam commented upon the situation, stating that the fee under existing law was 50 cents, and the fee for certification was 50 cents, and the only difference between the existing law and this bill upon that subject is that in all cases a certificate is to be issued, making the entire fee $1.

Mr. REMICH. You can see the effect of that. In my experience in connection with the view business, for twenty years, we have had occasion to get but five certificates. Think of that. We have paid $2.50 in the whole time, whereas under this bill we shall be compelled to take a certificate at an expense of half a dollar with every negative that we copyright, whether we want it or not.

Mr. CHANEY. How many times have you gotten certificates now?

Mr. REMICH. I say, that in all my experience with the view business—and I have been connected with it ever since I married Mr. Kilbourn's daughter and went into the firm in 1890, sixteen years ago—we have had only five certificates.

Mr. CHANEY. What is the object of your having those certificates?

Mr. REMICH. We took them simply because we had a few views pirated, and in the litigation we wanted to show the fact that they were legally copyrighted by a certificate from the office. But this law is going to compel us to take out thousands of certificates that will be of no earthly use to us. This extra expense will practically drive us out of business. This is no "pipe dream," but an absolute fact.

Senator MALLORY. You do not object to the 50 cents for the fee and 50 cents more for the certificate?

Mr. REMICH. Not at all; only we do not want to be compelled to pay half a dollar each for thousands and thousands of certificates that are of no earthly use to us.

Mr. CHANEY. I take it that the purpose of this law is to provide a notice in some form or other for everything, and this is in that nature.

Mr. CURRIER. No; this is not in the nature of a notice. This certificate gives no notice to the public.

Mr. REMICH. They would have to come here and dig out the records if they wanted to find out about that. The only argument that I have heard in favor of this suggestion is that it will diminish the amount of work that will have to be done in the copyright office. If they can make one certificate cover twenty views or twenty-five views or a hundred views, they will not have to make so many certificates. Is there any good reason why my business should be ruined to accomplish such a result when there are plenty of people that want to work in the office and when the present revenues are amply sufficient to pay for all the work done? In my town we are exempting property from taxation and offering big financial inducements to bring manufacturing interests into our town, because they are going to employ more labor. I do not suppose Washington has reached the point where it has so much population that it does not want more men and women employed in Washington, performing honest day labor and earning good money to be expended in the city.

Senator MALLORY. What is the reason assigned for uniting these two fees in one; do you know?

Mr. REMICH. I was not here, and I did not hear the reasons.

Senator MALLORY. I was not here, either, so I do not know.

Mr. PUTNAM. For the benefit of the Senator I might explain that the idea was this, Senator: That the office will hereafter furnish the certificate in all cases as a matter of course, which heretofore has been furnished only when requested; and that in furnishing it it should charge for it as heretofore, making the charge therefor $1.

Senator MALLORY. Still, the certificate is not necessary except where it is desired to prove the fact that the copyright has been secured.

Mr. PUTNAM. It was with the idea that it was a precaution that the copyright proprietor ought in reason to take.

Senator MALLORY. I have no doubt that there are many persons situated as this gentleman is who do not want any certificate except in very rare cases.

Mr. REMICH. That is right.

The CHAIRMAN. To what extent do you now issue certificates?

Mr. PUTNAM. Mr. Register, to what extent is that done?

Mr. SOLBERG. For last year the total of registrations numbered 116,000, and of those 28,087 were certificates.

Mr. REMICH. That is about one-fifth.

Mr. SOLBERG. It should be remembered that requests for certificates additional to the certificate paid for at the time of registration are constant, and in addition to fees submitted to secure certificates, constant inquiry is made of the Copyright Office and answered at some service cost as to what entries have been made by particular firms. They ask us "just what entries did we make in May last?"

The CHAIRMAN. What were the gross receipts of the Copyright Office for the last fiscal year?

Mr. SOLBERG. The receipts—this is for the calendar year, Senator, those being the latest figures which I have.

The CHAIRMAN. Very well.

Mr. SOLBERG. The fees for the total calendar year were $78,518, of which the certificate fees were $14,043.

The CHAIRMAN. What are the expenses of the office?

Mr. SOLBERG. The total expenses of the office can not be given. The comparison given here is between the appropriations for service only, and I could give you that for the year.

Mr. PUTNAM. That is for the fiscal year. In this case we have had to take the last fiscal year, with your permission.

The CHAIRMAN. Yes, sir.

Mr. SOLBERG. The fees for the fiscal year ending June 30, 1905, were $78,058. The appropriations for service during the same period were $74,662.46—the appropriation expended for service, but the only element covered is service cost. It does not cover printing, stationery, or any supplies,

nor the printing of the catalogue of entries, which include all registrations made at any fee, even if no certificate is paid for. That is estimated at $25,000 per year—the printer's estimate for printing. If that is included with all other expenses, the fees do not cover the total expenses of running the office.

Mr. CHANEY. By how much?

Mr. SOLBERG. I have not been able to ascertain the exact figures for printing, but I should suppose that the balance might be some thousands of dollars against the office.

The CHAIRMAN. You have some figures, Mr. Remich; you made some statement earlier in your remarks upon that subject.

Mr. REMICH. Yes, sir. I took this leaf from the report, and I will read it. This is the last year's report of the office:

> The earned fees paid into the Treasury for the year ($78,518) exceeded the amount expended for salaries, which was $74,600.37. The additional expenditures during the year for stationery and other supplies can not at this date be obtained from the chief clerk of the Library, but for the first six months of the year they amounted to but $309.63, and the year's contingent expenditures, therefore, should be under $1,000. The yearly average for the last five years has been $954.29.

Then they say:

> The appropriations for 1901, 1902, 1903, 1904, 1905, and the first half of the fiscal year 1906 include the sum of $25,740, to be used in bringing up the arrears of work prior to July 1, 1897, which amount should therefore be deducted from the total sum for appropriations for service as not properly a charge upon the current work of the office, leaving the excess of fees earned over appropriations used for service $125,675.39 for the eight and one-half years.
>
> The copyright fees are not, however, the most valuable assets of the office. During the year the articles deposited and credited numbered 213,498 articles. This large deposit of books, periodicals, maps, music, engravings, photographs, etc., includes many articles of considerable value which the Library of Congress would otherwise be required to purchase, and these articles therefore represent an annual acquisition of property to the value of many thousands of dollars.

Mr. CHANEY. But they do not produce any money.

Mr. REMICH. They do not produce any money—that is so; but they save you making an appropriation. This saves the Appropriations Committees of both House and Senate from appropriating money each year to buy these things that you would otherwise have to buy to place upon the shelves of the Library. Now, I want to do my share, and I want my business to do its share, toward supporting this Government. But I do not think, in view of this report, that there is any good reason why this great, rich Government should place this increased burden upon our industry.

Mr. CHANEY. Do you not argue unfairly when you undertake to bring in the Library as against the proposition?

Mr. REMICH. I am not trying to bring in the Library as against the proposition. Every author has to file two copies of his book, and they are placed in the Library. I say that if they did not do that, Mr. Putnam, the Librarian, would have to take money out of his appropriation and buy these books. I should suppose that that would be so. Otherwise he would not say that they were of great value. I am willing, if they want to make a certificate of every view we have and send to us, for any convenience of the office, to take them; but to force us to pay for thousands and thousands of certificates, which will make it impossible for us to make a profit in the manufacture of our goods at the close margin under which the business is conducted under our contracts, would be a hardship, and I do not believe you want to drive us out of business in that way.

Mr. CHANEY. We certainly do not want to drive you out of business.

Mr. REMICH. It seems to me that it would have that effect.

Mr. CHANEY. But I take it that the Librarian's purpose was to try to make this thing pay its way.

Mr. REMICH. I have no doubt about that. Mr. Putnam and Mr. Solberg have told me that by this consolidation of subjects many certificates could be saved. I should be glad to comply with their suggestion if our business was of such a character that we could do this series work; but you can see the difficulties.

Mr. PUTNAM. We want to be as clear as possible, and to meet this difficulty. Let me ask you this: Do you not do any series work, or is it only that you do not do work in a series under this limitation as to pose or composition?

Mr. REMICH. We do not do that class of work.

Mr. PUTNAM. If the words "only in pose or composition" were stricken out, would there be a material reduction in your fees? In the first place, it seems to me that it would be convenient for us to know—how many copyright entries do you make in the course of a year?

Mr. REMICH. I can not tell.

Mr. PUTNAM. Have you any idea?

Mr. REMICH. It varies with different years.

Mr. PUTNAM. Would it run up into thousands?

Mr. REMICH. Some years I think it does.

Mr. PUTNAM. If you were privileged to register under one fee works in a series——

Mr. REMICH. But what would be a "series?" That is the question.

Mr. CURRIER. Representing the same subject.

Mr. PUTNAM. Representing the same subject under the same title with only slight variances, but not the variances described here as "only in pose or composition." What we would like to know is, would it enable you to enter a great many of these articles under one fee that you now enter separately?

Mr. REMICH. That depends upon what you call the same subject.

Mr. CURRIER. Is seems to me that you would have to introduce the word "general;" that is, make it read "the same general subject."

Mr. REMICH. If you introduce that who will decide what is the same general subject, except the courts? It would encourage law suits.

The CHAIRMAN. It would be the Librarian, would it not?

Mr. REMICH. His decision would not be final. The law says we can go to the courts and test his construction.

The CHAIRMAN. It would be the Librarian, so far as your fees were concerned?

Mr. REMICH. Yes; but we do not want to pay a fee unless it is to be registered in such a way that the court will hold that we have a legal registration. We have an artist in San Francisco; and if we could register under one entry all the views that he will take in San Francisco while he is there, which will probably be 500 different subjects, for half a dollar, we would like to do it. But what subjects that he takes in San Francisco can we include as a series and have protected? He will take the Pacific Hotel, showing its ruin and present condition, and he may take a Chinese camp, and he may take the Flood Building, and so on. How many can we get into a series and have the court protect us when we come to try a case? That is the difficulty.

Suppose this said you shall enter under a series all churches in Paris—under one entry fee, for 50 cents—that we may enter all negatives that we take of churches there. How will you describe it in your entry upon the book? Suppose we go to Rome, where they have 365 Catholic churches; they are not grouped in any way; we can not pose them. How will you describe the 365 views? Will you describe them as 365 views of the churches of Rome, or will you specify them under one head? You can see the difficulties, gentlemen.

Mr. PUTNAM. Do you not publish those in series for selling purposes sometimes?

Mr. REMICH. No. In selling we do this: We have a pictorial illustration of the Holy Land. It includes perhaps fifty pictures, but it covers the whole of the Holy Land. One is taken in Jerusalem, one in Jaffa, and one at Damascus, for instance. We should be glad to comply with any law that will protect us and not inject doubts into our business and encourage piracy.

Mr. CURRIER. Mr. Webb desires to know if this amendment would take care of your matter: "Insert after 'seal,' in line 6, page 37, the words 'provided only 50 cents shall be charged for each stereoscopic view filed and registered.'"

Mr. REMICH. That is all right. And if we want a certificate in our business, we will come and, as the old lady said, "heave down our 50 cents and get it."

Mr. PUTNAM. "*Provided*, That in the case of stereoscopic views the certificate should not be furnished unless required, and in that case the fee shall be," etc.

Mr. CURRIER. And in such case no certificate shall be issued unless the regular fee is paid.

Mr. REMICH. That is perfectly satisfactory; but any attempt to define by series is sure to be unsatisfactory.

Mr. CURRIER. I think you may be right about this matter of series.

STATEMENT OF A. BELL MALCOMSON, ESQ.

Mr. MALCOMSON. I intend, Mr. Chairman, to be brief. The remarks that I shall make are pertinent more to correct the law so as to make it more definite than for any other purpose. I have prepared a short statement of just what the changes I propose are. The matter is one relating to lithographs. I represent Mr. McLaughlin, or McLaughlin Brothers, who are probably the largest lithographers in the country. Mr. McLaughlin has spent millions in perfecting that art in this country. He, unfortunately, is abroad at the present time, and has asked me to be here to represent him.

Lithographs have always been mentioned in the former copyright bills. A lithograph is something different from any other production of a picture or of any pictorial illustration. But in this case it has been thought by the framers of the bill that the words "print or pictorial illustration" would cover lithographs.

The CHAIRMAN. Please refer to the section of the bill that you wish to call attention to.

Mr. MALCOMSON. I am referring to page 4, line 4.

Mr. CHANEY. "Prints and pictorial illustrations?"

Mr. MALCOMSON. Yes. The word "lithograph" is not mentioned in the subjects of copyright. It has always heretofore been mentioned. The suggestion that I find in the little memorandum that was attached in relation to the bill is: "It is assumed, however, that these will be included under the more general terms as prints and pictorial illustrations;" that is, that lithographs, it is presumed by the framers of this bill, will be included under that term.

Lithographs, as I say, are something entirely different from any other production, and I do not think—and I hope the committee will agree with me—that they are entirely and specifically included. Lithographs are not included under that term.

Senator MALLORY. How about engravings?

Mr. MALCOMSON. Engravings are prints. The lithographic process is something different from the mere printing from an engraving. The lithographic process is a very peculiar and a very interesting one. It would take too long for me to go into it and describe it, but it is entirely different from printing. The use of the colors, the manner in which the ink or the color is transferred from the stone to the paper, is not the mere act of printing. The color, I will say in brief, is held there by, as it were, grease. Grease forms a material component in the practicing of the lithographic process.

The matter of lithographs has always been mentioned. The subject of lithographing has always been mentioned in previous bills, and not only that, but in this bill the lithographic process is specifically mentioned, and I shall come to that next. But the suggestion now is that there is a sufficient difference between lithographs and all other prints and pictorial illustrations to warrant the word "lithographs" being inserted there.

Mr. CURRIER. Then you would insert, after the word "prints," in line 4, on page 4, the word "lithographs?"

Mr. MALCOMSON. Yes, sir. That is my proposition. I do that because particularly in a late decision of great importance, made by the circuit court of appeals in our second circuit, they have used this language——

The CHAIRMAN. That is the decision that has already been put in the record?

Mr. MALCOMSON. I think it has. It has been handed in to the committee. A printed copy of it has been loaned to me, and I will read an extract from it to show the pertinency of my remarks about interpolating this word "lithograph:"

> But in view of the fact that the law of copyright is a creature of statute and is not declaratory of the common law, and that it confers distinctive and limited rights which did not exist at the common law, we are constrained to hold that it must be strictly construed, and that we are not at liberty to extend its provisions, either by resort to equitable considerations or to a strained interpretation of the terms of the statute.

I think that I am warranted, in view of that late decision, in asking the committee to interpolate that word "lithograph."

The CHAIRMAN. What do you say to that suggestion, Mr. Putnam and Mr. Solberg?

Mr. PUTNAM. I prefer that a suggestion as to phraseology in a section that has been so very carefully considered by our general legal advisers, these two committees of the bar association,

should be submitted to them for their opinion as to its necessity and effect; and I think it would not be helpful to the committee to have me give an offhand opinion upon it.

Mr. CHANEY. I do not think there is much doubt that that lithographic process would not be included in merely a pictorial illustration.

Mr. MALCOMSON. Or in a print.

Mr. CHANEY. Or in a print, either.

Mr. MALCOMSON. It might possibly be in a print; but a print might be construed by the courts to be something in which type and ink, or a plate and ink, is used.

The CHAIRMAN. Was this matter taken up at the conferences?

Mr. MALCOMSON. I do not know. I was not present when it was specifically discussed. I was present at one of the conferences, but not when this was specifically discussed. I have always urged upon the Copyright Office, with whom I have colabored in this matter, that it should be included. And I am now here to stand up for it. I shall ask leave to be heard again on this, in view of the fact that Mr. Putnam states that he wishes to discuss it with the parties who drew the bill. I ask to be heard again at some subsequent hearing.

I pass on now to page 8, and the next suggestion that I have to make is in line 21 on that page. We know from what I have said, or we have an idea of what a lithographic process is. In this section, which is on page 8, is the restriction in relation to the printing of books or of lithographs, which are copyrighted in this country, in a foreign country and importing them here. That applies to this case. In Germany they can do this kind of work and beat us out of our boots. We can not compete with them at all in that line of work. To such an extent is that so that to-day the pictures of our Capitol, the pictures of all prominent buildings in our cities, are printed on postcards, and you will find on these cards a little statement, if you look at it, "Made in Germany." That is so throughout our cities. They are not copyrighted, of course. If they were copyrighted they would have a protection which they do not now have; but that is the fact.

In this section 13, on page 8, to which I am referring, there is a provision that where the book is copyrighted the type shall be set up in the United States and the book shall be printed in the United States. I will read section 13, so that we can comprehend it [reading]:

> SEC. 13. That of a printed book or periodical the text of the copies deposited under section 11, above, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made from type set within the limits of the United States; or if the text be produced by lithographic process, then by a process wholly performed within the limits of the United States; which requirements shall extend also to the illustrations produced by lithographic process within a printed book consisting of text and illustrations, and also to separate lithographs ——

Now follows the matter that I am objecting to: "Except where in either case"—that is, in the case of the book being produced by lithographic process, or in the case of a separate illustration being in the book—"except where in either case the subjects represented are located in a foreign country." Now, the lithographic process is not one in which a man goes and sets himself down in front of a mountain and works his process and takes his color scheme from the mountain, or one in which he goes in front of a building in a foreign city and sets up his lithographic process and conducts it there, at all. Why that exception? What is the meaning of it? I have had no explanation of it. I can not get any. It is said, "Well, the picture may represent a building in a foreign country or foreign scenery." Not at all.

There is no necessity for that exception in those cases. If a foreign scene is to be reproduced by a lithographic process, a photograph is taken of it in the foreign country, or a sketch is taken of it in the foreign country. The color scheme is then developed by the artist, possibly there, but no part of the lithographic process is necessary to be conducted in the foreign country at all. It is brought over here, and in the factory, in the print works in Brooklyn or Detroit or some other part of the United States, the lithographic process is then practiced.

Mr. CHANEY. What effect does this section have?

Mr. MALCOMSON. It would have the effect of throwing into the hands of the German lithographer all lithographic work in relation to pictures or paintings which related to any foreign city or foreign landscape. That is what the result of that exception would be. Every foreign landscape, every foreign building that is depicted by a lithograph under that section is outside of the restrictions of this section 13. That is what that means. You can not reason it out any other way; and that is the reason we except to it. We say we are properly protected by section 13, and that that exception should come out.

Mr. CHANEY. As you explain it, I think it ought to.

Mr. CAMPBELL. Just what do you want to strike out?

Mr. MALCOMSON. I want to strike out those words that I have read. If the committee will be kind enough to mark the words, I will read them, on line 21, page 8: "Except where, in either case, the subjects represented are located in a foreign country." That ought to come out, for two reasons. It is ambiguous——

Mr. CURRIER. It would not occur to me that it is ambiguous.

Mr. MALCOMSON. Well, it is pretty straight, I think, in one way.

The CHAIRMAN. Where is your next point?

Mr. MALCOMSON. The next one, if the committee please, is on page 14, line 15. That is exactly to the same import as the one on page 4, because it inserts the word "lithograph" after the work "print," you will see.

Mr. CURRIER. You think it should be inserted there after the word "print," again?

Mr. MALCOMSON. Yes. The same argument that I made before will apply to that.

Mr. CURRIER. If it needs to be in the other place, it should be put in here, also.

Mr. MALCOMSON. That is all that I have to offer. I am exceedingly obliged to you for your attention.

Mr. CAMPBELL. Just a moment. I understood your objection on that page 4 and this last one is that the word "print" does not cover a lithograph?

Mr. MALCOMSON. My objection is that it is a question—that it would leave a question for the courts; and in so far as it is really meant to be there, and we have had a decision of one of our highest courts of appeal, unless they get a writ of error and go to the Supreme Court of the United States, using the language that I have just read to you in relation to this copyright law, that it is a statutory law, and that it must be construed strictly—with those facts before me, I urge upon the committee that we do not leave that question open.

Mr. CAMPBELL. What I wanted to inquire was just this: Do you not understand that the word "print" in its ordinary significance and meaning in the dictionary covers the lithograph?

Mr. MALCOMSON. I understand that a "lithographic print" is a proper term; but I understand that that word "print" might be construed as not broad enough to cover a lithographic print. There are prints from engravings. They are prints; and in the old law, we have the word "cut." "Cut" and "print" are substantially the same, and there is a decision, which I have not gone into, because I do not want to take up any more time than I can help——

Mr. CURRIER. I see no objection to inserting the word "lithographs," if there is any doubt about it at all.

Mr. CAMPBELL. What I want is information as to whether or not, in his experience, it is not already covered by the word "print." Under the ordinary definition in the dictionary, it seems to be perfectly covered.

Mr. CHANEY. That decision that he referred to a while ago leaves it somewhat in doubt.

Mr. MALCOMSON. I wrote a 15-page brief once on that part of the statute which related to "cuts" and "print" and discussed the subject most thoroughly; and it made me feel that we ought to have the word "lithograph" in there.

Mr. PUTNAM. Can you tell us whether in case the word "lithograph" is put in there, it might be necessary to put in the words "etching" and "engraving?"

Mr. MALCOMSON. No.

Mr. PUTNAM. You make an entire distinction, as I understand it?

Mr. MALCOMSON. Yes; an etching and an engraving would come under a pictorial illustration, without any question. An etching is a pictorial illustration of a subject, certainly, and an engraving is a pictorial illustration of a subject; but a lithograph, when the word is used subsequently in the law, it seems to me should have a place in the section which provides protection for certain subjects.

Mr. CAMPBELL. I find here that in the dictionary, under the noun "print," is this definition:

> 1. An impression with ink from type, plates, etc.; printed characters collectively; printed matter; as, small print; the print is illegible.
>
> 2. Anything printed from an engraved plate or lithographic stone——

Mr. MALCOMSON. I agree with you that the courts might hold that that was sufficient to cover it—that the word "print" would cover a lithograph, and I should contend so before the court; but it is this late decision which leads me to feel that, in so much as it is not going to do any harm, why

should we leave it out? Why should we leave it out?

The CHAIRMAN. Are there any other gentlemen to be heard now?

Mr. PUTNAM. Mr. A. Beverly Smith, speaking for the Reproductive Arts Copyright League, and particularly for certain groups of lithographers, simply desired me to say that he thinks also that the word "lithographs" should go in, but that it should go in in a separate subsection, and should be coupled with the word "posters." On the other hand, I ought, to complete the record of this day, to call your committee's attention to a communication from Mr. Ansley Wilcox, which has been presented to the committee. He was here in behalf of an establishment that gets out lithographs, and particularly posters, and he was at the conference particularly concerned about the protection of that material. He writes, and his letter has already gone down to be put in the record, or I should read it; but substantially this, that he considers the specifications of those subsections as very liberal and fully covering all that he is interested in. This is simply for your information.

Mr. A. BEVERLY SMITH. May I correct the statement of the Librarian, Mr. Chairman? I do not think it is necessary that the word "lithographs" should go in there.

Mr. PUTNAM. I beg pardon, then. I thought you did.

Mr. A. BEVERLY SMITH. I agree with the statement made to you by the Librarian regarding consultation with your legal advisers as to whether or not it should be put in. If you decide to put it in, I think it would be much wiser not to couple it with prints and pictorial illustrations at all, but to make a separate classification. And if you do decide, after consultation, to put lithographs in, I think that that will also require the word "posters" to be put in. I personally do not believe that either one is necessary to be defined separately.

(Thereupon the committee adjourned until to-morrow, Friday, June 8, 1906, at 10 o'clock, a.m.)

COMMITTEE ON PATENTS,
HOUSE OF REPRESENTATIVES,
Friday, June, 8, 1906.

The committee met at 10 o'clock a.m., conjointly with the Senate Committee on Patents.

Present: Senators Kittredge (chairman), Smoot, and Latimer; Representatives Currier, Campbell, Chaney, McGavin, Webb, and Southall.

Mr. CURRIER. Mr. Solberg, yesterday, when Mr. Cutter was testifying, I asked him this question: "Can you import two copies of an unauthorized edition?" He said, "Yes, sir." I asked, "Can you do that to-day?" He answered, "Yes, sir; we can now." I asked, then, "A fraudulent reprint, for instance?" "Yes, sir." "There is absolutely no restriction, as you understand it, to-day?" "There is no restriction at all, as I understand it, to-day."

I would like to ask you if you understand the practice to be as Mr. Cutter states?

Mr. SOLBERG. The prohibition of importation was introduced into the copyright law by the act of March 3, 1891, and it was a prohibition of importation additional or extra to that which is supposed to have existed in copyright law against any unauthorized copies. The law as it stood prior to that provided that these unauthorized copies could only be permitted importation upon the consent of the copyright proprietor. That is, the author himself or the copyright proprietor could import even a fraudulent copy.

Mr. CURRIER. That was prior to 1891?

Mr. SOLBERG. Yes. But in the act of March 3, 1891, it is stated, in connection with the typesetting clause, that copies of books not printed from type set within the limits of the United States or from plates made therefrom shall not be imported: and then certain exceptions are introduced, and one is an exception directly on behalf of the individual buyer. The other exceptions are on behalf of libraries, which consist in paragraphs of the free list of the tariff act taken over into the copyright law. It is therefore a matter of interpretation of the law what the interpolation of these exceptions means. Now, I can not authoritatively give that interpretation.

Mr. CURRIER. I would like your understanding of the practice since the law of 1891.

Mr. SOLBERG. Perhaps the best light I can throw on that is the statement that there is an opinion from the Department of Justice, the Attorney-General, that the exceptions would not bar an unauthorized copy.

Mr. CURRIER. Then you understand that Mr. Cutter is right in what he says?

Mr. SOLBERG. I would understand it so far as that decision or opinion would be supported and would be taken as final.

Mr. CURRIER. Is there any opinion in conflict with that?

Mr. SOLBERG. There are a number of opinions, none directly in conflict; none directly upsetting that.

Mr. CURRIER. Do you know what the practice of the Treasury Department is now?

Mr. SOLBERG. No; I am not competent, I think, to say; but Mr. Montgomery could answer that question if he is here, because it comes under the collector of customs.

Mr. CURRIER. If there is any gentleman present who has information on that subject and can answer that question we would be glad to hear from him.

Mr. PUTNAM. Mr. Montgomery was here yesterday; I think he will be here a little later. I think it might be helpful, if you will permit me to suggest, Mr. Chairman, as pertinent (it goes beyond your question, but is relevant in connection with it), as to whether such importation is, according to the register's information of foreign legislation, customary abroad—such privilege of importation of an unauthorized foreign edition of a book printed in the foreign country under domestic law there?

Mr. CURRIER. My purpose in seeking this information is to establish the fact, if it be a fact, where you provide that the importation must be an authorized edition, whether that is a change in law or not, a change in practice, whether it is an additional restriction. That is what I was trying to get at. I have asked a number of times whether subdivision E, at the top of page 16, "To any book published abroad with the authorization of the author or copyright proprietor," etc., changes existing law and is an additional restriction upon importation; that is all.

Mr. SOLBERG. You see, the question is difficult of answering categorically, Mr. Chairman, because it is a question of the interpretation of a complex statute.

Senator SMOOT. From the present interpretation of the law there is not any doubt in the world, then, but what this is a restriction?

Mr. SOLBERG. I should say that this act attempts to make clear that all fraudulent copies are barred.

Senator SMOOT. That is a restriction, then?

Mr. SOLBERG. As a protection of the copyright.

(The following communication from the register of copyrights is printed in connection with his above remarks by direction of the chairman:)

LIBRARY OF CONGRESS, COPYRIGHT OFFICE,
Washington, D.C., June 15, 1906.

DEAR SIR: I ask to be allowed to file for the printed report of the hearing on the copyright bill the following, in addition to my answers to the questions you asked me on Friday, June 8, in relation to the importation of copies of unauthorized editions of American books:

1. It is fundamental to the protection of copyright that all unauthorized reprints of copyrighted books shall be prohibited importation into the country of origin. It is therefore provided in all foreign copyright legislation that such unauthorized copies shall be prohibited importation. Such copies are treated as fraudulent copies, and I know of no provisions in any foreign legislation which permit importation of unauthorized copies either by individuals, educational or other institutions, or libraries.

In the copyright legislation of the United States prior to 1891, the provisions prohibiting importation dealt only with unauthorized copies and these were prohibited importation, except with the direct consent in writing of the author or copyright proprietor.

2. The act of March 3, 1891, introduced an additional prohibition of importation, namely, of copies of authorized editions of foreign copyrighted books, or of authorized foreign reprints of American copyright books, unless printed from type set within the limits of the United States or from plates made therefrom.

To this prohibition of importation certain exceptions were enacted in favor of private book buyers, educational institutions, and libraries; and some paragraphs of the free list of the act of October 1, 1890 (permitting importation without the payment of duty) were taken over into the copyright law to insure that the articles named in these paragraphs should be included in the exceptions to the prohibition of importation of copies of authorized editions of books.

It was not supposed that Congress intended that these exceptions to the prohibition of importation should apply to unauthorized editions, but upon the matter being submitted to the Department of Justice an opinion was filed by the Solicitor-General ruling that the exceptions did extend to unauthorized reproductions of American books. (See Opinion of Holmes Conrad, April 19, 1895; Synopsis of Treasury Decisions for 1895, pp. 495-498.)

3. In the provisions of the new bill dealing with importation a careful distinction has been maintained between unauthorized (fraudulent) copies and copies of authorized editions

not printed from type set within the limits of the United States.

In the case of all unauthorized reprints of books the prohibition of importation is absolute, and any such copies introduced into the United States are subject to seizure, forfeiture, and destruction. (See sections 26 to 29 of the bill.) In the case of copies of authorized editions not set in the United States, such copies if imported are seized and exported, but not destroyed. (See copyright bill, sec. 31.)

All exceptions, therefore, to the prohibition of importation of authorized editions in the bill concern only authorized copies, and there is no permission in favor of any one to import any unauthorized, pirated copies.

Very respectfully, yours,

THORVALD SOLBERG,
Register of Copyrights.

Hon. FRANK D. CURRIER,
Chairman House Committee on Patents, House of Representatives.

The CHAIRMAN. It seems that a Mr. Davis, who represents some manufacturers of musical devices, does not understand that he is to have any part of the hour assigned to the gentlemen mentioned yesterday. Is Mr. Davis here?

Mr. PUTNAM. I think Mr. Davis has not yet come in.

With your permission, Mr. Chairman, I will state as to the letter of Mr. Wilcox, to which I referred yesterday in connection with the suggestion from Mr. Malcomson as to the need of including lithographs in the specification of subject-matter, that the passage which I should have read if I had had the letter here (it was with the stenographer) was this:

> I congratulate you that the bill has taken this definite form and is now to be given a preliminary hearing, so that it will be in shape to be urged for passage next winter. The bill is a monument to the industry and broad intelligence and information of those who have been actively concerned in drafting it. * * * As affecting the interest of my client, the Consolidated Lithograph Company, which is a large producer of lithographic and other prints, engravings, etc., especially for use as posters, the form of the bill seems satisfactory to me, and I have no doubt it will be so to my client. This refers particularly to the provisions of sections 4 and 5, defining the subject-matter of copyright and the form of applications for registration. These provisions are in the highest degree liberal and enlightened.

The copyright office has received a communication from Mr. Fritz von Briesen, requesting that in section 5, after line 7, a further subdivision, "Miscellaneous," be inserted, and that the following be added:

> *And provided furthermore*, That a series of maps, drawings, photographs, prints, and pictorial illustrations, and labels and prints relating to articles of manufacture, and other subjects of copyright of an artistic nature, constituting a unit or assembled for a unitary purpose, shall be considered as the subject-matter of a single copyright registration, should the applicant so elect, whether or not they are actually joined by binding, printing on the same sheet of material, or otherwise.

I suggest this, Mr. Chairman, as appropriate to be inserted in connection with the discussion of the fees yesterday by Mr. Remicher. It bears on that point.

The CHAIRMAN. That will go in the record.

Mr. PUTNAM. I handed in, I believe, yesterday, a statement in writing from Mr. A. W. Elson, of Boston, making certain specific recommendations for changes. He telegraphs me, "Written presentation sent you fully covers my view."

That is in answer to an inquiry as to whether he wished to have a hearing before the committee.

I have received a communication from the International Brotherhood of Bookbinders, as follows:

> As president of Local No. 4, of Bookbinders' Union, of this city, and representative of the International Brotherhood of Bookbinders of the United States, I would be pleased to be heard on the Currier copyright bill to-morrow, immediately after Mr. J. J. Sullivan has spoken on bill. I will not consume more than ten minutes, and possibly less than that. I will be in attendance at the hearing.
>
> Very respectfully,
>
> J. L. FEENEY.

The office has received, since the bill was introduced, from the Music Publishers' Association, certain proposed amendments, additional provisions in connection with the protection of the

copyright on musical compositions. These, I should advise the chairman, have not been communicated to the gentlemen who are to speak in opposition to any of those provisions. They have not had them, therefore, before them in preparing their case this morning at all; and while I have manifolded copies here which are at their disposal, it is to be understood that these were not communicated to them. On the other hand, Mr. Serven, who in behalf of the music publishers handed these to me, states (if I am not correct, Mr. Serven, you will correct me) that these contain additional specifications but in the same general direction. That is all.

Mr. A. R. SERVEN. That is correct, Mr. Librarian, and simply to conform subsection G of section 1 to comply with the recent decision of the United States circuit court of appeals in the White-Smith *v.* Apollo Company case. The same idea is represented simply. The case was decided, of course, since the bill was printed.

The CHAIRMAN. Mr. Putnam, just call our attention to the proposed change.

Mr. PUTNAM. This is contained in a written communication, and it will really take less time to read it from the communication.

The CHAIRMAN. Yes.

Mr. PUTNAM. (Reading:)

> Section 1, subsection G, should be amended to read as follows:
>
> "To make, sell, distribute, or let for hire any device, contrivance, or appliance adapted in any manner whatsoever when used in connection with any mechanism to reproduce to the ear or to cause the said mechanism to reproduce to the ear the sounds forming or identifying the whole or any material part of any work copyrighted after this act shall have gone into effect, or by means of any such device, contrivance, appliance, or mechanism publicly to reproduce to the ear the whole or any material part of such work."

Omitting the explanations, the next amendment will be as follows:

> Section 3 should be amended to read as follows:
>
> "That the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting, and the devices, appliances, or contrivances mentioned in section 1, subdivision (*g*) of this act, but without extending the duration of such copyright."
>
> Section 23, subdivision (*b*)——

The CHAIRMAN. I suppose the other amendments are simply to follow if the first amendment is approved?

Mr. PUTNAM. If the first amendment is approved; that is my understanding.

Mr. SERVEN. Mr. Chairman, that is true with the exception of one amendment. The Musical Publishers' Association suggests that the same right of appeal and review in interlocutory judgments and orders should be provided for in the new bill as is provided for in the existing law. That is the only thing that is different.

Mr. HORACE PETTIT. Mr. Chairman, may I ask Mr. Serven whether he will add to his amended section 3 the clause which I suggested in my amendment to the original section 3? It would accomplish the same purpose as I had intended. My suggestion of amendment would also apply to your amended section 3, which adds:

> *And provided,* That no devices, contrivances, or appliances, or dies or matrices for making the same, made prior to the date this act shall go into effect, shall be subject to any subsisting copyright.

Mr. SERVEN, Yes, Mr. Chairman; I think that is only fair to the interests represented.

Mr. PETTIT. You accept that as an addition to your amendment?

Mr. SERVEN. We are very glad to, indeed. We think that is perfectly fair.

Mr. CURRIER. A suggestion was made here the other day, the first day of the hearings, to strike out section 3, I think.

M. PETTIT. Well, either that or that my amendment be added to it.

Mr. CURRIER. Yes. Who was the gentleman who replied to you.

Mr. PETTIT. Mr. Fuller, of New York.

Mr. CURRIER. I understood Mr. Fuller to say that the question of whether subsisting copyrights

covered these mechanical devices was now in the court, and they thought the court might hold that such devices were now covered. If such should be the decision of the court, would it not prohibit the use of graphophone cylinders and records already made and in use, if they were records of music covered by a subsisting copyright, under that section 3?

Mr. PETTIT. If the decision of the court were such as to include talking-machine records or other sound records within the subsisting law, of course it would prohibit that.

Mr. CURRIER. Does any gentleman here think we ought to legislate along that line?

Mr. PETTIT. Not that I know of. I do not understand that they think so, unless Mr. Fuller was misunderstood.

Mr. CURRIER. That would prevent any boy or girl in the country who has bought records and who is using them to-day from using them. Immediately, I suppose, a warning circular would go out that they must not use those records and cylinders that they had bought in good faith. It does not seem to me that we could pass any such legislation as that.

A GENTLEMAN. Mr. Chairman, that is exactly the position of a great many of the interests involved and exactly the position on which we wish to be heard here to-day.

Mr. CURRIER. I do not think you need spend much time in talking about subsisting copyrights.

Mr. BURKAN. The intent of this act is to make it apply to compositions copyrighted after this act goes into effect.

Mr. CURRIER. I understand that another section provides that; but it must be in conflict with this section if the courts should hold as Mr. Fuller thinks they may.

Mr. BURKAN. But the amendment to section 3 should be that the devices and contrivances mentioned in subdivision (*g*) shall apply only to compositions copyrighted after this act shall have gone into effect, and say nothing about subsisting copyright.

Mr. CHANEY. It can be readily modified to suit that. There is not any question that we do not want to make it retroactive.

The CHAIRMAN. Mr. Putnam, is Mr. Davis here now?

Mr. PUTNAM. Mr. Davis is here. Mr. Davis, it is necessary to know how the hour assigned to particular opponents of the music provision, or a group of them, is to be apportioned, and whether the statement that you are to submit is part of that or not. They understand that it is distinct from the group of statements by them, and they also state that they understood that you understood that, and that your statement would be brief, something like fifteen minutes. I ask in behalf of the Chairman as to this understanding. Whom do you represent?

Mr. DAVIS. Inventors as a class of their own, and distinct from manufacturers.

Mr. PUTNAM. No particular establishment?

Mr. DAVIS. No, sir.

Mr. PUTNAM. And no particular association?

Mr. DAVIS. No, sir.

The CHAIRMAN. How much time do you wish, Mr. Davis?

Mr. DAVIS. About 20 minutes.

The CHAIRMAN. You may proceed, Mr. Davis.

STATEMENT OF G. HOWLETT DAVIS, ESQ.

The CHAIRMAN. Will you not state your name and who you represent?

Mr. DAVIS. My name is G. Howlett Davis. I have been an inventor during all of my majority and represent inventors as a class. I hope to show how the passage of this act will, first, discourage invention; second, restrict patent grants already held by inventors; third, provide authority to confiscate an inventor's physical property; fourth, to abrogate the inventor's constitutional rights, and, fifth, to create a monopoly which would be practically controlled by a few to the detriment of inventors and the public.

Of course, there are a good many subjects to take up here in the limited time allowed me, and I am willing to take them up in any order you may designate.

The CHAIRMAN. I think it only fair that in your case as well as that of the other gentlemen the time devoted to questions should not be considered as part of your time, and taken out of your time;

but I would like to ask one or two questions before you begin. Do you understand that this bill proposes to interfere with existing patent rights?

Mr. DAVIS. Yes, sir.

The CHAIRMAN. Vested rights?

Mr. DAVIS. Yes, sir. I shall take that up first, if you please.

Senator SMOOT. You mean, then, that section 3 is the section that interferes with them?

(Mr. Davis looks for the bill.)

Senator SMOOT. If you have not it there, do not bother about looking for it now. Go right on.

Mr. DAVIS. I had a marked copy here.

Senator SMOOT. We will listen to you when you come to that section, anyhow.

The CHAIRMAN. You may proceed, Mr. Davis, and we will not interrupt you during your twenty minutes.

Mr. DAVIS. Thank you, sir.

I would like to first explain that I am here without counsel and without any previous notice from the Copyright Office, and without invitation from any source whatever. I discovered the existence of the proposed bill by mere accident on Saturday last. I was then notified that a firm which operates under my patents would have to go out of business if this law passed, and would necessarily have to cancel its licenses with me. That concern is the Perforated Music Roll Company, with offices at 25 West Twenty-third street, New York City. I have also just to-day received similar intimation from another concern manufacturing under my patents in Philadelphia, the Electrelle Company, just organized for a million dollars for the manufacture under my patents for reproducing music mechanically.

I have been inventing in numerous classes during the last twenty years, including printing presses, typesetting machines, typewriting machines, clocks, stencil duplicating apparatus, etc., but about ten years ago I took up the class of self-playing musical instruments. I recognized that there was a peculiar relation of this art to copyrighted musical compositions, and I saw that in some way whatever devices I might invent for the reproduction of music mechanically might interfere with the composer's rights, because music is a necessary component part of the class of self-playing musical instruments, and you all know that this industry has become one of the greatest of the young industries of the country. You can take up any magazine and you will see many pages filled with descriptions of self-playing musical devices, including phonographs, graphophones, apollos, angeluses, cecilians, pianophones, and a hundred other devices for reproducing music automatically. As far as I am able to ascertain none of these concerns have had notice of this bill, and the two concerns who are operating under my patents not only have had no notice, but have notified me, as before stated, that in case of the passage of the bill they will have to annul their contracts with me.

From dire necessity I was compelled to work for two years with the Æolian Company, a concern which attempted to take from me without due consideration inventions which I believe have since been recognized as superior to their instrument, the pianola. During the St. Louis exposition the Government officials sought for a self-playing device which would represent the highest advancement of the art. Among others they considered the pianola, manufactured by the Æolian Company, and they also went further and considered the inventions of poor inventors who had no backing; and finally they selected my device as the sole exhibit. It was the only self-playing musical instrument which was exhibited in the Government building during the St. Louis exposition.

After I left the Æolian Company, declining to accept the compensation which they offered me, they have persecuted me in the courts for years. Moreover, as I can prove to you if you will only give me time to produce the documents from my attorneys (I waited for them until the last minute this morning), this concern, failing to secure a monopoly or strangle my invention through the courts, and recognizing, as a result of the Government and other indorsements of it, that it would in time be universally recognized as a superior instrument, has connived with music publishers and secured from nearly every member of the Music Publishers' Association a contract which sets forth that in case the music rolls or records are decided by the courts to come within the copyright laws, they will take over from them the exclusive right of reproducing their music for a compensation. These contracts I have seen with my own eyes. I can swear that they exist, but unfortunately I can not produce them this morning. But I will agree to produce at least two of them if you will give me a week's time to do it.

Mr. CURRIER. You will have the necessary time to put anything of that kind in the record.

Mr. DAVIS. I thank you. Now, the Æolian Company, being back of the independent members of the Music Publishers' Association, have influenced in turn the music publishers as an association to

insert in this bill clauses which will cover mechanical methods of reproducing music; and in proof of this I will say that as a result of Mr. Solberg's kindness yesterday afternoon in allowing me to search the records of the star-chamber proceedings presided over by the Librarian of Congress, that the first introduction of those clauses was made by Mr. Bacon for the Music Publishers' Association in the form of an amendment which now appears in all of its substantial terms as subdivision (*g*) page 2, of the bill. Now, the independent music publishers in turn control the great majority of composers, so that there is thus formed a complete monopolistic octopus, in which the Æolian Company forms the head and brains, the Music Publishers' Association the body, the independent publishers the writhing arms, and the composers the suckers and baiters. [Applause.]

The Æolian Company is a ten-million-dollar concern whose monopolistic game has already been uncovered in several courts, as I will show by proofs, and the music publishers are here to pull its chestnuts out of the fire. [Applause.]

Now, if the inventors of this country knew what was in this bill there would be enough here to fill up every room in this great building, but they do not know it. It will strike them like a thunderbolt out of a clear sky when they learn that there are clauses in this bill which not only seem to lessen or destroy the scope and commercial value of our existing patent and confiscate our physical property, etc., but also imprison us in case we infringe the proposed copyright act.

Now I will read you from——

Mr. CHANEY. What is your first subheading there that you are going to talk from?

Mr. DAVIS. That it will discourage invention, but I would like to take up this bill first; I would like to take it a little out of set up in my preamble.

Mr. CURRIER. Subdivision (*g*) on page 2?

Mr. DAVIS. Subdivision (*b*) on page 1.

Mr. CHANEY. All right; "To sell, distribute, exhibit, or let for hire," etc.?

Mr. DAVIS. Yes, sir.

Mr. CURRIER. I do not see how that touches your industry.

Mr. DAVIS. No, sir; I had my marked copy here——

Mr. CURRIER. I should say "(*g*)" was the first one that would affect you.

Mr. DAVIS. Yes, sir "(*g*);" you are right, Mr. Currier.

Mr. CHANEY. That is, "To make, sell, distribute, or let for hire any device, contrivance," etc.?

Mr. DAVIS. "To make, sell, distribute, or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work."

Now, in this art of self-playing musical instruments alone I have been granted some twenty-seven patents by this country, and have also been granted patents all over the world. My patents read very similar to this—that I shall have the exclusive right to make, use, and sell the mechanical contrivance covered by the claims of those patents, and those claims embody, in connection with the mechanism, a perforated roll, which is a controller for the instrument, and is an essential part of it, and in the case of phonographs or graphophones they include the engraved record.

Notwithstanding that I have gone ahead in good faith under the reading of the Constitution and the laws as construed by the courts right up to date, that composers shall be limited to their "writings," intimating thereby that we inventors should have the right to any methods that we might discover for mechanically reproducing music—notwithstanding that I have expended years of effort and all my money, time, and labor to devise these machines, and have built models and exhibited them, and companies have been formed around them—and notwithstanding that my patents give me the exclusive right to make, use, and sell these machines, this proposed act comes out and says that "any device especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any published and copyrighted work after this act shall have gone into effect," etc., shall be illegal, and subjects me to all those hardships enumerated in my preamble, and transfers to the copyrighter in almost the exact words of my patent those rights given me by the Commissioner of Patents under the authority of the Constitution.

I am not a lawyer, and never made a public speech before in my life, and can only speak to you out of the fullness of my heart. I have not even been able to get my counsel here——

Mr. CHANEY. I do not think you need any. [Laughter.]

Mr. DAVIS. After destroying or limiting the patent rights already vested in me as explained, and transferring them in whole or part to the copyrighter, as contemplated in subsection (*g*), page 2, in the bill, I am, by another part of the bill, liable to imprisonment if I infringe a copyrighted composition, and this I will do of necessity if I proceed under the authority of my existing patents giving me the exclusive right to make, use, and sell my mechanical device for reproducing music, whether copyrighted or not, thus through two conflicting grants, one to the composer and the other to me, I may innocently——

Mr. CURRIER. Not if you do it innocently. If you read it carefully you will find that that is the case.

Mr. DAVIS. There is a paragraph further over, section 25, page 18, which provides that anyone who shall knowingly and willfully infringe the proposed copyright "shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding one year." Now, if I proceed "willfully" to exercise my full rights as vested in me by my existing patents in defiance of the conflicting and unconstitutional copyright grant proposed, then the copyrighter can put me in jail for a year and during my incarceration and during the entire life of my patents make, use, and sell my machines under the provisions of subsection (*g*). It is no misdemeanor for one inventor to infringe the patents of another inventor, no matter how frequent and willful such infringements may be; then why imprison an inventor for infringing a usurping copyrighter. Supposing such infringements are innocently made, then wealthy and unscrupulous corporations, such as the Æolian Company, through their unscrupulous lawyers, will succeed in jailing many poor and innocent inventors. It is hard enough now for most inventors to keep out of the poorhouse and the courts; don't add to their present hardships.

Senator SMOOT. Mr. Davis, of course you mean that that would happen if you published something after the passage of this act that was copyrighted? This act plainly says, in section G: "Any work published and copyrighted after this act shall have gone into effect." It does not affect anything at all that you have done before?

Mr. DAVIS. Yes; but it applies to machines that I have already invented and which I may use after this act, according to my patent, to mechanically reproduce any music of the past, present, or future.

Mr. WEBB. It does not apply to pieces that you play on those machines now, though, even if they are now copyrighted, does it? It only applies to pieces copyrighted after this act goes into effect.

Mr. DAVIS. My machines, those that I have been inventing and patenting for years, are specially adapted to reproduce, or may be specially adapted and arranged to reproduce any particular piece, whether copyrighted to-day or hereafter. Under the Constitution, as I understand it, I have the right to use anything that is not a writing, a readable writing; and I have gone ahead under the Constitution with the full reward therein provided as an incentive for my work. The bill covers not only pieces or controller records, but also the machines which they actuate.

Mr. WEBB. You do not understand, though, Mr. Davis, that this act will destroy any of your vested rights at present, do you?

Mr. DAVIS. I do, sir; as I have explained, though perhaps not clearly.

Mr. WEBB. When it says that it shall only apply to works published and copyrighted in the future? It only applies to works copyrighted and published after this act goes into effect, and I do not see how it can affect any vested right which you have on account of your past investments.

Mr. DAVIS. But the idea of inventions is to be able to produce a mechanism which can be specially adapted to any music, whether of to-day or to-morrow. My patent grant does not except new copyrighted pieces.

Mr. WEBB. I understand that; but there are two propositions involved here. The first is, you say it will destroy what you have already invented. The next is, you say it will destroy you because of your inability to get hold of these pieces that will be published and copyrighted in the future. Is that your point, now? Is that your argument?

Mr. DAVIS. I say that this practically depreciates or destroys the marketable value of my inventions or machines, which are capable of being used for mechanically reproducing either old or new music, as well as destroying in part or whole my existing patent rights.

Mr. WEBB. Because it will not let you reproduce works published and copyrighted in the future? Is that the reason, now, why you say it will destroy your invention?

Mr. DAVIS. Yes, sir; coupling this admission with my previous explanations.

Mr. WEBB. I wanted to get your meaning.

Senator SMOOT. Or, in other words, if Mr. Sousa should have a very popular air or piece produced in the future, you think that you ought, as you have in the past, to simply be permitted to reproduce that by your machine?

Mr. DAVIS. Yes, sir; either I or any other patentee.

Senator SMOOT. Without any consideration whatever?

Mr. DAVIS. Yes, sir, I do; because outside of a possible minor and remote ethical or equity right, he possesses not a vestige of a statutory or legal right to stop me.

Senator SMOOT. And whatever his brain, and his talent, and his gift has brought forward, you are entitled to use?

Mr. DAVIS. And I want to go ahead and explain, if you will allow me, why I say that.

Before I took up this art of self-playing musical instruments, as I said, I saw that there was a possible limitation, and that in order to make inventions commercially successful I would have to use musical compositions. If I used old music, they would be useless. I would have to use current music; and I read the Constitution, and the very first article of the Constitution that I came to, section 8, reads:

> That the Congress shall have power to promote the progress of science and useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

Mr. WEBB. Mr. Sousa insists on that, too. [Laughter.]

Senator SMOOT. Yes; I was going to say, that is just exactly what Professor Sousa insists upon.

Mr. CHANEY. That is where the other fellows claim they come in.

Mr. DAVIS. There is where Mr. Sousa and the trust, on one side, and I are going to lock horns—right here with the Constitution as our battle ground.

Mr. MCGAVIN. Would you like to amend that?

Mr. DAVIS. No, sir; I want the Constitution to stand as it is. It is not the construction Mr. Sousa puts on this word "writing" therein; it is not the construction that I put on it; but I followed this matter down, as an inventor. Every decision that has ever been made in this country and England, as I read it, has limited that word "writing" to mean some visible and readable writing; not the mere making of a wave in the air. If I invent improvements in wireless telegraphy, the Government does not grant me anything but the mechanical means of doing that, or the method. It does not give me exclusive right to use God's free air and vibrate it.

For instance, we will imagine Mr. Sousa facing an audience of ten thousand persons and behind him one hundred skilled musicians who, upon the movement of Mr. Sousa's baton perform in melodious concord upon one hundred different musical instruments. We will, for illustration, as audiences do without suggestion, forget the inventors who evolved the orchestral musical instruments and without which Sousa's band would be a nonentity, and take under consideration only one of the inventors who have formed part of the audience which has been enraptured. After the performance the thought occurs to many that it would be a blessing to mankind if such music as they had heard could be reproduced at will for their own pleasure and for that of those who are in remote sections of the world and for those who are too poor to pay for even the lowest-priced seat.

One of the inventors present determines that he can produce the great desideration to practice, and from that moment commences to evolve in his mind thousands of different apparatus which appear to him feasible for the full achievement thereof. After years of experimenting he is ready to test a machine which, in some of its structural features, resemble that of the human organism. The inventor's machine is set up within the range of the air waves, set in vibration by the instruments of Sousa's band, and which air waves are escaping into space to be lost to man forever. The ear-like diaphragm of the instrument is impinged by and set in motion, and through connecting means resembling the human oricular bones and nerves there is engraved upon a sensitive surface not far unlike the material matter of the human brain a record of every minute vibration of all the one hundred instruments.

After the performance no one in the audience, musician though he be, can simultaneously resound any two instruments, and the majority of the audience would be hissed if they attempted to resound any one of the instruments. Not so with the mechanical listener, for it is capable of resounding simultaneous and accurately all of the 100 instruments, and upon the expenditure of 50 cents for a copy of the machine-made record the poor man and his family in every part of the world can, by a slight movement of his hand, start up his $7 graphophone and thus be amused and enraptured, all owing to the inventor having caught, preserved, and provided means for mechanically reproducing the air waves which would have otherwise have escaped beyond Sousa's power to recall. Nevertheless, the bill provides that the lost chords must be all returned to Sousa by the inventor in the form of a royalty.

There is no novelty in music, nor vibrating the air as a means of transmitting musical tones, for—

Long 'ere earth was matter or had form,
Music out of wind and lightning was borne;
It was thus God solaced nature,
And her troubles were shorn.

Now, defining an ethical or equity right which the inventor might claim with equal justice against Sousa and other composers, the common people all over the world, who listen to the mechanically reproduced lost chords of Sousa's band, do frequently order and pay for the sheet music score for the piano, banjo, violin, and other instruments which the purchaser plays or thinks he can play, and upon all these orders induced by the inventor's machine he is entitled to a commission, which in actual fact and adjustment would offset the alleged right of the royalty claimed in this bill. There are many other corelated equity rights which us inventors might set up but which it would be impracticable to secure to us.

The CHAIRMAN. Mr. Davis, if I may interrupt you, do you claim that you have the right to take one of Mr. Sousa's compositions and use it in connection with your mechanical device without compensation to him?

Mr. DAVIS. Under the Constitution and all the laws of the land, I say yes, decidedly; but I want to explain my contention and the position of inventors in a little different line of argument.

The composer of music never conceives nor produces, and never did in respect of the actual composition, conceive or produce, any means for conveying to the ear the musical composition. On the contrary, all such means from the beginning to the present time are the direct result, not of authorship, not of composition, but of invention. The composer never conceives the idea of a mechanical means for playing a piece of music. That achievement is the result of the effort of the inventor. The Constitution makes no distinction in respect of right of protection as between an author and an inventor, but both are coequal under the Constitution, and the line or field within which each may be protected is clearly marked out in the Constitution, the result of authorship being distinctly distinguished from the result of invention. The author is restricted by the Constitution to protection for "writings" and the inventor to "discoveries."

The courts have determined what may properly come within the constitutional provision of discoveries, and it has been determined a number of times that under the constitutional provision a writing does not include a mechanical contrivance. If the law under discussion be enacted it will operate to take away from the inventor the rights which are vouchsafed to him by the Constitution and by the laws of Congress enacted in pursuance thereof, and deliver his rights over to the author or composer of a literary production or a musical composition. Such a procedure would clearly annihilate the inventor, offering him up as a sacrifice to the author or composer. The Constitution intended no such thing, and in matter of every right, irrespective of the limitations provided by the Constitution, Congress ought not to pass a law which turns the inventor over to the mercy of the author or composer.

It is needless to mention to this committee the unprecedented state of prosperity and material progress attained by this country as the direct result of invention. In all arts the work of the inventor will be found at the foundation of the progress and prosperity of the country. The author or composer has to do more with the pleasure or esthetics of life, the inventor with the real necessities, and in the art allied to the fine arts has had to do with placing throughout the United States in the possession of the common people everywhere the means by which the composer as composer can never give them. It is not for a moment intended to detract from the value of the work of the author or composer, for his work is valuable, but its value has certain limitations, and these limitations are defined in the Constitution and acts of Congress heretofore passed in pursuance thereof.

The farmer or the workingman in all the small towns of this country, who are possessed of an electrical piano player or an automatic piano player, or a graphophone or a phonograph, which serves to relax the tension of their daily labor and fill their souls with music, is not because of the composer, for he rarely reached them, but it is the direct result of the inventor of the mechanical contrivances with which music may be conveyed. Yet this law attempts to reach out and take away from the inventor the product of his brain and to deliver it over to the composer. So far as the mass of the people of this country is concerned, the work of the composer is infinitesimal as compared with the work of the inventor, and the inventor is willing that the composer shall have his just rights under the Constitution; that is to say, shall have full protection in his writings, but does protest that a law should not be passed which will enable the composer to overstep the field of protection to which he is entitled under the Constitution and usurp that which the Constitution has particularly provided shall be with the inventor.

Mr. CURRIER. Would you object to paying a reasonable royalty to a musical author or the proprietor of the copyright if all companies would get the right to use that piece of copyrighted music upon the same terms?

Mr. DAVIS. Most assuredly not—no, sir; I would not, provided——

Mr. CURRIER. You would not object to paying a reasonable royalty if that right was given to all upon the same terms?

Mr. DAVIS. Provisionally I would not object, but your proposition is one which mainly interests the manufacturers of my machine, whom I do not represent. As an inventor I approve of the bill as a whole and only seek to strike out therefrom those comparatively few words covering mechanical devices, the insertion of which vitally affects our present vested rights.

Mr. CURRIER. If it could be worked out along the lines suggested, you would not object to that?

Mr. DAVIS. No, sir; no, sir. But, in my opinion, you will never be able to draw a better or more workable line of demarkation between the inventor and composer than that now set up by the Constitution, particularly if you follow the lines of the present bill as regards mechanical devices, in respect to which collusive elements have been at work behind the drafting of the bill. I will give you my word of honor to produce evidence of it.

The CHAIRMAN. Of what character?

Mr. DAVIS. That Mr. Sousa, or rather the majority of composers, have been sold out by their publishers to this monopolistic octopus, the Æolian Co. and lesser satellites, and that contracts exist which anticipate and control benefits designed primarily for the composers, with whom us inventors have no direct fight.

Mr. CHANEY. The idea is now, you know, to try to protect these people who produce the music to the public, and all that. They have rights which we are bound to respect, as well as the inventor.

Mr. DAVIS. Yes, sir; and I would help you in all reasonable and lawful efforts.

Mr. CHANEY. And the idea now is to try to evolve something that will treat everybody fairly.

Mr. DAVIS. Yes, sir. But if the Constitution has led inventors on, given an incentive to them to go ahead and work and devote their funds and lives to developing these industries, which are second to none in the world as young industries, it would be wrong to come in at this stage and either curtail the incentive or subtract from rights already vested in them.

Mr. CURRIER. Yes; but that very clause gives the same incentive and protection to the musical author, does it not, as to the inventor? He is protected on his writings as you are on your discovery?

Mr. DAVIS. Yes, sir; there is a line of demarcation set up in the Constitution. I went in to try to get the line of demarcation between an inventor and a composer. I went in, as I thought, intelligently. I have studied the laws right down to the last decision of the 25th ultimo, that of the court of appeal for the second circuit, and all confirm the contention which I have made here that the only incentive held up to the composer is a specific protection for his "writings," not on machines.

The CHAIRMAN. Would you object to Mr. Sousa taking your invention and combining it with his composition and putting it upon the market?

Mr. DAVIS. If there was some fair, equitable way of doing that, no sir, I would not. But unfortunately, we inventors and composers are the ones that are generally imposed on, and naturally I am fearful that any change in the laws as they now exist will prove disadvantageous to both our interests.

Mr. MCGAVIN. If I understand your position correctly, you feel that Mr. Sousa has no more right to require any further compensation from a phonograph company, if it be a phonograph company, for the use of any particular piece of music which has been copyrighted, and of which he has received the benefit, than an inventor of a drum would have a right, after he has been protected by a patent right, to require Mr. Sousa to pay further for the use of that right. That is your position, is it not?

Mr. DAVIS. Well, you can look at that in two different lights. From the legal standpoint he has no right whatever. From an ethical standpoint there seems to be a sort of remote ethical right. I am not a lawyer, and not used to legal verbiage, and am not sure that I can clearly differentiate between legal and ethical rights.

Mr. CHANEY. Well, this is the "Constitution between friends," you know.

Mr. DAVIS. As inventors we proceeded under the laws of the land as they exist.

Mr. MCGAVIN. That is just what I say.

Mr. DAVIS. Mr. Sousa, through his publishers, has tried in the various courts to have the word "writing" broadened, but he has failed to do so, and he now comes to you to do it. In no copyright act or law has there ever been introduced before—you will not find it anywhere—one word or clause or phrase, before this one, that covers mechanical devices.

Mr. CHANEY. Under that word "writing" you want to exclude such people as Mr. Sousa entirely

from its operation in respect to self-playing musical instruments?

Mr. DAVIS. If you are going to work under the Constitution; yes.

Mr. CHANEY. Then, is it not high time that we were giving it a little wider construction than that?

Mr. DAVIS. I think it is rather late in the day, after we inventors have spent our lives at this art and created a new industry. I think you ought to have done it soon after 1789, if at all, and if the law had been passed then there is no inventor in the land that would have gone ahead developing this particular art.

Mr. CAMPBELL. Why not, Mr. Davis?

Mr. DAVIS. Because we would have been dominated by composers, as I have explained at great length.

Mr. CAMPBELL. Mr. Sousa can not use your machine nor your process.

Mr. DAVIS. But we would have gone into other fields or arts not dominated by composers. We would have left this art undeveloped. He may make use of machines if he can construct them with "writings" or musical tones and infringe only a remote correlative ethical right of the inventors.

Mr. CAMPBELL. Well, now if there is a mercantile demand, a commercial demand, for your method of reproducing music, why would you not have gone into it for exactly the same reason? If Mr. Sousa's music, played upon your machine, meets a public demand, he must use your instrument just exactly the same as you use his music.

Mr. CURRIER. But suppose there are half a dozen of these concerns and one of them, by an arrangement with the musical publishers of the country, gets control of all the copyrights?

Mr. DAVIS. That is what they have done, sir.

Mr. CURRIER. Then would the competing concerns be able to use their instruments at all?

Mr. DAVIS. They might use, but could not sell, and over their pecuniary misery would weep alone. [Applause.]

Mr. CAMPBELL. The proposition here is that this bill, as I understand it, does not affect what has already been done. It applies to the future. You all stand upon the same level, and that relates right back to the contractual rights of the parties. If Mr. Sousa desires to make a contract with some machine producing music independent from yours, why should his right to do so be restricted by us under the law? That is the question I would like to have you answer.

Mr. DAVIS. Well, sir, I am not a lawyer——

Mr. CAMPBELL. No; but that is a practical question.

Mr. DAVIS. I have been trying to get counsel here. He would probably have advised me in my opening speech for the opposition to imitate Mr. Sousa in making a bid for your sympathy and avoid a discussion of fine legal points, but I will give you my practical ideas of that. I am an inventor who has studied the law, but without being a lawyer I am ready to say that as the law now stands——

Mr. CAMPBELL. I am speaking of the future. This bill affects the future.

Mr. DAVIS. Well, "this bill affects the future," but has it the right to affect the future? Has it the right to change a situation which has existed since 1789? The bill proposes a change, not merely amend the Constitution, therefore I challenge the authority of Congress to enact it. At present the composer has no contractual right as regards a machine, and Congress can not give it to him.

Mr. CAMPBELL. That is the very proposition we are trying to get at.

The CHAIRMAN. We can not very well change the Constitution.

Mr. CHANEY. It is not a question of changing the Constitution; it is a question of giving the Constitution its fullest scope.

Mr. DAVIS. Well, a gentleman speaking here yesterday, Mr. Stephen H. Olin, counsel for the American Publishers' Copyright League, although favoring this bill as a whole, gave you a warning that if this bill attempted to broaden the word "writing" so as to include a machine, then the bill in this respect might be held by the Supreme Court to be unconstitutional, and I have already traced the introduction of the terms "machine" or "device" in the bill direct to the monopolistic octopus. Mr. Olin made that statement here yesterday voluntarily.

Mr. CHANEY. I know that.

Mr. DAVIS. Proceeding further, Mr. Olin said he was not interested in the introduction of any clause restricting the mechanical reproduction of music; that he was satisfied to leave that to the

courts, and let the courts give the construction of that word "writing" in the Constitution. They have been at work at it for many years, with the result that a machine remains a machine and not a "writing."

Mr. WEBB. Mr. Davis, your idea is that if the composer or publisher copyrights a piece of music and sells it and in the sale gets whatever price his copyright or royalty gives him, and you buy it, or anybody else buys it, that that purchaser has a right to play it or sing it in public or private, or anywhere else he pleases?

Mr. DAVIS. No, sir; I do not say that, exactly, sir——

Mr. WEBB. What is your position, then, if that is not your position?

Mr. DAVIS. Your proposition brings up the question of public performance. I say that the composer's rights are limited under existing laws to all benefits which he may receive from his visible, readable "writings" expressing his original musical conceptions, and that he can make copies of it in any manner he sees fit; but he has not the right to usurp the rights of an inventor to reproduce that music through self-acting mechanical means in public or private. The inventor has a peculiar field here. The Constitution, as I would translate it, in layman's language, says: "Now, Mr. Inventor, if you can come in and invent a machine in which the melodies that would otherwise be lost can be forever preserved and reproduced to the public for the public benefit, you shall be protected." This includes public performances. We do this in a way that does not decrease Mr. Sousa's income, but increases it, as I have explained.

Mr. WEBB. If a man goes to a store and buys a piece of copyrighted music he expects to have the right to sing it and play it anywhere he pleases; otherwise, what does he want to buy it for?

Mr. DAVIS. That is the human agency. Mr. Sousa's compensation may or may not cover all human agencies for reproducing that music, including public performances, and concerning which the inventor is not specially interested. The inventor should have the right to all mechanical agencies, where the human agency does not enter into it in any way whatever, including public performance.

Mr. WEBB. Well, they say you can use your mechanical devices wherever you please, just so you do not use their music.

Mr. DAVIS. Well, Mr. Sousa is not construing the laws. I am telling you my idea of the laws, as I understood them when I entered into this art ten years ago, and as the courts have sustained them right up to a few days ago.

Senator SMOOT. Mr. Davis, as I understand you, you would not object at all to paying a royalty for any music that you may use upon any instrument that you may have invented or produced, providing that that same royalty is paid by all other concerns or individuals, and that all other concerns and individuals may have the same right to use it as any particular one that the producer of the music may even try to designate himself?

Mr. DAVIS. Individually—and I believe I represent the class of inventors affected by the proposed act—and without retreating from the stand I have taken regarding our present rights, I would not object, because I recognize that remote ethical right which you are casting about to secure and deliver over to the composer together with the many other new gifts in the bill. If you can protect it in some such way as will meet my many objections, we inventors will be satisfied, but I am constrained to say that I think your efforts will be futile.

The CHAIRMAN. I think that is all, Mr. Davis. You can submit in writing any further statement that you desire to make.

Mr. DAVIS. Thank you; and may I submit later the evidences and proofs to which I have referred?

The CHAIRMAN. You may do that.

Mr. DAVIS. Senators and Representatives in joint committee assembled, I thank you for the close attention which you have given to my remarks and for the liberal extension of time within which to make them; and on behalf of the inventors of this country I assure you of our full confidence and belief that you will finally modify the proposed act in a way that will protect our properties and persons against the monopolistic giants who do now or may hereafter seek to destroy us.

Mr. SOUSA. Mr. Chairman, the gentleman referred to "visible music." Now, as I think you can see, that [referring to sheet music] is music, one notation. This [indicating perforated roll] is a perforated roll. That is visible; that is music in another notation. That is what they are taking [indicating perforated roll]; that [indicating sheet music] is what we are paid for.

Mr. HERBERT. Mr. Chairman, one word. Mr. Davis has made a statement which is absolutely untrue. He said, speaking about the Æolian Company and this contract which they have signed, or made the publishers sign with them, that "They control the publishers and the publishers control the composers." That is absolutely untrue in my case. Nobody controls my works, the works that I am going to write. I am going to bring out a work in September, of which I have only

written a few notes so far. I do not even know what I am going to write, and nobody has a contract with me to-day. I want to state most emphatically that I have not even been approached by any firm for the future.

Mr. CURRIER. Who is your publisher?

Mr. HERBERT. Mr. Whitmark, of New York.

Mr. CURRIER. Has anybody else published any of your music?

Mr. HERBERT. Yes; Schubert & Co., Schirmer & Co., and so on.

Mr. CURRIER. Do you mean lately?

Mr. HERBERT. That was before I went with Whitmark.

Mr. CURRIER. How long have you been with him?

Mr. HERBERT. About six or seven years.

Mr. CURRIER. And nobody else has published any of your music in six or seven years?

Mr. HERBERT. Not since then; no, sir. Naturally, I have a perfect right to go around to my friends and get the best offer I can, have I not?

Mr. CURRIER. Surely.

Mr. HERBERT. There must be competition. But I want to state most emphatically—and I know that these gentlemen are going to try to make the point that arrangements have already been made—that there have no arrangements been made in my case—absolutely none. I have not even been approached by any one of the companies—not even by the company, for instance, that is in favor of paying the royalty, the Victor Talking Machine Company. They have never spoken a word to me about the future, and I have not made a contract for my next work with Whitmark & Sons yet. I may publish it with somebody else; I do not know. So I am perfectly free to say that his statement in that respect was absolutely untrue.

Mr. SOUSA. I would like to say, Mr. Chairman, that I have never been approached by any of the mechanical instrument companies; and the house which I have a contract with, the publishing house, is not a member of the Music Publishers' Association. I have never even been approached by any of them, and I have no contract with anyone.

The CHAIRMAN. We will hear you now, Mr. O'Connell.

Mr. PUTNAM. Mr. Chairman, for the group of interests which are now to be heard I wish to make a statement that they might feel called upon or required to make, but which it is not fair should be taken out of their time. They were not participants in the conferences. How completely they were omitted is apparent only from the list. That list is before you. It will take but a moment to read the titles of these associations: American Authors' Copyright League, National Institute——

Senator SMOOT. We know them.

The CHAIRMAN. They are already in the record. They have been laid before us.

Mr. PUTNAM. They were not participants in the conferences. They were not invited to the conferences by the copyright office. There were no notices sent to them from the copyright office that the conferences were being held; that these provisions were being considered at them. The copyright office shows, so far as I am aware, no communication with them on the subject of any of these provisions. We have never, ourselves, in any way notified them that these provisions were being proposed for the bill. I say that as much because it is to their advantage that I should say it as for them to say it, and it is not fair that that statement should have to be made at the expense of their time.

STATEMENT OF JOHN J. O'CONNELL.

Mr. O'CONNELL. We intended to make that statement ourselves.

The CHAIRMAN. Whom do you represent?

Mr. O'CONNELL. I appear on behalf of ten independent manufacturers of automatic piano players in the city of New York, and the names of these concerns are as follows: Winter & Co., Ludwig & Co., Jacob Doll & Sons, Laffargue & Co., John Ludwig, the Regal Piano and Player Company, Ricca & Son, the Auto-Electric Piano Company, Newby & Evans, and the Estey Piano Company.

I also appear on behalf, by arrangement here, of independent manufacturers of music rolls. I can also say that possibly what I shall have to say to your committee will represent the ideas of the various independent manufacturers of automatic piano players in the United States and the various independent manufacturers of perforated music rolls.

To anybody reading the provisions of this bill it would appear very clearly that one of the great special interests were the manufacturers of perforated music rolls. Proceed a little further and it will be very apparent that the manufacturers of automatic piano-playing instruments, which can not be operated without music rolls, had a very special interest in this bill. It would be the easiest thing in creation to notify the manufacturers of music rolls and the manufacturers of automatic piano players of these conferences. Take up any directory of manufacturers in the United States and you would find them by the dozen.

The CHAIRMAN. Let me interrupt you for a moment, Mr. O'Connell, to say that so far as I myself am concerned it does not seem necessary to continue longer upon that line, for the reason that the committees of the Senate and House are now giving you a hearing, and you shall have an ample opportunity to present your side of the case.

Mr. O'CONNELL. I simply wanted to make it clear to the whole committee, as I explained it to the chairman yesterday, that it was only last Saturday that we knew what the situation was and knew what the provisions of this bill were.

I might say at the outset that the companies which I represent are not members of that class which Mr. Putnam so delicately denominated as pirates. We are here to protect industries in which there are invested millions of dollars. It has also been said by some of these special interests which are appearing in favor of the bill, in elegant language, that we were "butters-in" at the eleventh hour, and that we are here for the purpose of a hold-up. If protecting our business makes us butters-in and hold-up artists, then we come under that definition.

I want to say furthermore, at the outset, that we have no particular controversy or quarrel with those very eminent gentlemen, Mr. Herbert and Mr. Sousa. It is perfectly proper for them to seek to get all they possibly can from the products of their genius, but we are all a great deal too sentimentally inclined toward them and their possessions because of the many hours of delight they have given to every one of us.

Here is our position, and I will try to outline it as briefly as I possibly can: A number of years ago in the city of New York, within the last decade, a number of gentlemen interested in a manufacturing concern, one of the pioneers in the piano-playing industry, had the foresight to realize that the industry was destined to become one in which there were millions of dollars of profit, followed the conclusion that they would like to get for themselves all of the millions in that particular industry. The question was how to achieve and attain that result. Naturally they turned to the patent laws, to get monopolies under patents covering not only the machines themselves, but also the music rolls, without which the machines could not be operated, and machinery for cutting such music rolls.

Applications were made on their behalf for hundreds of patents, both on the machine and on the music rolls, and on machines for cutting the music rolls. Before they had gone very far, however, it developed that the patent laws would not afford them a monopoly of the machines or the music rolls, because of the fact that they could not get and control a basic patent, for the reasons that in the first place the operation by means of wind instruments, vacuums, etc., of an automatic playing device was as old as pipe organs, and furthermore that the perforated music roll or perforated music sheet was also as old as the very ancient hand organ. Therefore they saw that it was utterly impossible for them to obtain the monopoly which they wanted under the patent laws, and naturally the next thing for them to consider was: Can we not attain the required result through the copyright laws?

Eminent counsel were retained, and those eminent counsel, after an examination of the existing copyright laws and decisions, made this discovery: That in what is known as the McTammany case, decided by Judge Colt in the United States circuit court for the district of Massachusetts some twenty years ago, that jurist held that the perforated music sheet used in a hand organ was not an infringement of the copyright music sheet covered by the statute. When they had reached this point it became necessary to develop a new line of action, and this was the new line of action:

Now, there existed at that time an association of music publishers, and that association included and includes practically all of the big publishing houses which turn out the classical as well as the modern and popular compositions of the day. They said to themselves: Let us make contracts with all of these houses whereby we will get from these houses the exclusive right to reproduce the compositions which they handle in music rolls and other mechanical devices. Then we will go ahead and we will institute suits and try to obtain a reversal of the decision of Judge Colt in the McTammany case, and if we fail in that, then, holding exclusive contracts as we do with the vast majority of the publishing houses, we will go before the Congress and get from it what the courts refused us.

Mr. Chairman and gentlemen, I am not speaking in the air about this. I have here with me a copy of two contracts made with one house in Chicago by this monopoly, and I now offer in evidence those two contracts.

Mr. CURRIER. What is this monopoly? You have not mentioned the name of it.

Mr. O'CONNELL. The Æolian Company, of New York, which is a Connecticut corporation.

DEFENDANT'S EXHIBIT Æolian-SUMMY CONTRACT.

Document No. 1.

Memorandum of agreement, made and entered into this 30th day of April, 1902, by and between Clayton F. Summy Company, of Chicago, in the State of Illinois, party of the first part, hereinafter called the publisher, and the Æolian Company, a corporation organized under the laws of the State of Connecticut, and having a place of business in the city of New York in the State of New York, party of the second part, hereinafter called the Æolian Company, witnesseth:

That whereas, the publisher is the proprietor of certain copyrights for musical compositions and the owner of rights in copyrights for other musical compositions; and

Whereas, the Æolian Company is engaged in the business of manufacturing and selling automatic musical instruments controlled by perforated music sheets, and in manufacturing and selling machines for playing keyboard musical instruments, which machines are controlled by perforated music sheets, and in manufacturing and selling perforated music sheets for such automatic musical instruments and machines; and

Whereas, the Æolian Company is desirous of acquiring the exclusive right for such perforated music sheets in and to all the copyrighted musical compositions of which the publisher is the proprietor, or as to which he is the owner of any rights, and of all those other musical compositions which may hereafter be protected by copyright, and the copyrights for which or rights in which may be acquired by him;

Now, therefore, the publisher, for and in consideration of the premises, and of the sum of $1, lawful money of the United States, to him paid by the Æolian Company, receipt of which is hereby acknowledged, and for and in consideration of the true and faithful performance by the Æolian Company of its covenants hereinafter made, does hereby sell, assign, transfer, and set over unto the Æolian Company, the exclusive right for all perforated music sheets of the kinds aforesaid in and to all the copyrighted musical compositions of which the publisher is the proprietor, or in the case in which he is the owner of any less rights, to the extent of said rights, and does hereby covenant and agree with the Æolian Company to give and secure to it, the exclusive right in like manner for all perforated music sheets of the kinds aforesaid in and to all those other musical compositions which may hereafter be protected by copyright, and the copyrights or rights in which may be acquired by the publisher.

And the publisher for the consideration aforesaid hereby covenants and agrees, so far as it may be reasonably in his power, to protect the Æolian Company against any claim of any third person in respect to any and all copyrighted musical compositions which may be involved in this agreement, and the copyright of which may be owned by the publisher.

And the Æolian Company for and in consideration of the premises hereby agrees that it will keep correct and true books of account in which it will set down or cause to be set down entries of all perforated music sheets made by it for playing the copyrighted musical compositions owned or controlled by the publisher; that it will on the 20th day of each and every January and July, during the continuance of the manufacture and sale by it of the perforated music sheets for playing such musical compositions, render unto the publisher a correct and true statement of the number, names, and other designations of such perforated music sheets sold by it during the six preceding calendar months, and that at the time of rendering each and every such statement it will well and truly pay unto the publisher a license fee or royalty of 10 per cent of the list prices made by the United States publishers of the printed scores or copies of such musical compositions, but never more than 50 cents for any one of such perforated music sheets.

And the parties hereto mutually covenant and agree that nothing herein contained is to obligate the Æolian Company to pay any license fee or royalty upon such perforated music sheets as shall be made by it in the United States and sold or shipped to any other country, unless it shall have been decided by a court of competent jurisdiction of such other country that the copyright laws of that country shall be applicable to perforated music sheets of the kind herein mentioned.

And the parties hereto mutually agree and covenant that the term "perforated music sheets" is not to be construed as covering the controllers of those musical instruments which are generally known as phonographs, or music boxes, or hand organs.

Anything herein to the contrary notwithstanding at the expiration of thirty-five years from the payment of the first license fee hereinbefore provided, the Æolian Company shall not be entitled to license under the copyrights thereafter acquired by the publisher, but all licenses existing under copyrights theretofore acquired by him shall remain in force until the expiration of the terms of the copyrights under the terms hereinbefore provided.

During the existence of this contract, after the payment of the license fee hereunder, the Æolian Company obligates itself to prosecute diligently, at its own expense and by its own counsel, in the name of the proprietors of the copyright, all infringers of the rights granted to it, the Æolian Company.

And the parties hereto mutually covenant and agree that all provisions of this agreement shall be binding upon and enure to the successors, executors, administrators and personal representatives of both the parties hereto.

In witness whereof the publisher has on the day and year first hereinabove written hereunto set his hand and seal and the Æolian Company has caused its name and corporate seal to be hereunto affixed by its proper officer thereunto duly authorized.

CLAYTON F. SUMMY CO. [SEAL.]
THE ÆOLIAN CO. [SEAL.]

By E. S. VOTEY,
Director.

Signature of publisher witnessed by—

J. F. BOWERS.
THEODOR WILD.

Document No. 2.

Memorandum of agreement, made and entered into this 30th day of April, 1902, by and between Clayton F. Summy Company, of Chicago, in the State of Illinois, party of the first part, hereinafter called the publisher, and the Æolian Company, a corporation organized under the laws of the State of Connecticut, and having a place of business in the city of New York, in the State of New York, party of the second part, hereinafter called the Æolian Company, witnesseth

That whereas the parties hereto have, of even date herewith, entered into an agreement whereby the Æolian Company is to have the exclusive right for all perforated music sheets intended for use in controlling-automatic musical instruments or machines for playing musical instruments, in and to the copyrighted musical compositions of which the publisher is the proprietor or as to which he is the owner of any rights, and in and to all those other musical compositions which may hereafter be protected by copyright and the copyrights or rights in which may be acquired by him; and

Whereas the parties hereto are desirous of entering into a further agreement with reference to the matters and things expressed in the above-mentioned agreement of even date herewith;

Now, therefore, the publisher, for and in consideration of the premises and the sum of $1 lawful money of the United States, to him by the Æolian Company in hand paid, receipt whereof is hereby acknowledged, does hereby covenant and agree that no charge shall be exacted from or be due from the Æolian Company for the manufacture or sale by it, or any of its customers, of any perforated music sheets of either of the kinds aforesaid, for playing any of the copyrighted musical compositions which are owned or controlled, or which shall be hereafter owned or controlled in whole or in part by the publisher, until a decision of the court of last resort in a suit which is to be instituted against some manufacturer or user, other than the Æolian Company, of such perforated music sheets, for the purpose of testing the applicability of the United States copyright laws to such perforated music sheets, and not then unless such decision shall uphold the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid.

And for and in consideration of the premises the Æolian Company hereby covenants and agrees to pay all proper expenses of conducting said suit for the purpose of testing the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid and that if the court of last resort shall in such suit decide that the United States copyright laws are applicable to such perforated music sheets, then and in such case and from that time forward the Æolian Company will keep books of account, render statements, and pay royalties as provided by the aforesaid agreement of even date herewith, but shall be free from obligation to make payments for the past.

And it is mutually understood and agreed by the parties hereto that neither party hereto is to be obligated in any way by any other provisions of this agreement, or of the aforesaid agreement of even date herewith, until the Æolian Company shall notify the publisher that a number of copyright owners satisfactory to the Æolian Company have made similar agreements with said company.

And the parties hereto mutually covenant and agree that all the provisions of this agreement shall be binding upon and enure to the successors, executors, administrators, and personal representatives of both the parties hereto.

In witness whereof the publisher has on the day and year first hereinabove written hereunto set his hand and seal, and the Æolian Company has caused its name and corporate seal to be hereunto affixed by its proper officer thereunto duly authorized.

CLAYTON F. SUMMY CO. [SEAL.]
THE ÆOLIAN CO. [SEAL.]

By E. S. VOTEY, *Director*.

Witnessed by—

J. P. Bowers.
Theodore Wild.

Both of those contracts are dated April 30, 1902. After the making of those contracts, the action known as the White-Smith suit against the Apollo Company was commenced in the circuit court of the United States for the southern district of New York. That case went to a hearing before Judge Hazel. Right at this point I may interpolate that I now ask the chairman and the members of this committee to investigate, if they feel they have the power, into those contracts, to summon witnesses, if necessary, to determine what contracts have been made, with what music-publishing houses, by this particular concern, so that the committees may be able to determine for themselves whether this concern and the publishing houses with which they are affiliated can, in the event that this bill becomes a law, have an absolute monopoly of the vast majority of the publications, in so far as they may be reproduced into perforated music rolls or other mechanical devices for reproducing the sounds.

Mr. Currier. I want to ask you the question that I asked Mr. Davis a moment ago: Would the people whom you represent object to paying a reasonable royalty to the author or proprietor of the musical composition if that right was given to all upon the same terms?

Mr. O'Connell. Primarily, I appear, sir, for the independent manufacturers of automatic piano players. Here, to-day, as I understand, I am expected to speak for the interests of the independent cutters of music rolls as well. Speaking for the clients that I originally and personally represent, I answer that provided you have the power to pass such a law we have no objection to paying a reasonable royalty to the composers, provided we are put on an equal basis with everybody else and provided our business interests are protected. That is our attitude. We do not wish to be unfair to anybody.

The Chairman. Protection in what way? How far do you wish that protection to extend?

Mr. O'Connell. In this way: It is difficult to devise a plan—in answer to the question of Mr. Currier—which will protect us, and for this reason——

Mr. Currier. I realize the difficulties.

Senator Smoot. You have no idea of being protected any more than any other concern?

Mr. O'Connell. No, sir; we want to have only the same rights as anybody else.

You must understand, Mr. Chairman, that the Æolian Company is by far the largest manufacturer of automatic piano players. If they control the output of the device, without which those players can not be operated, it is perfectly clear that it is the easiest thing on earth for them to put one after the other of the independent manufacturers down and out. I have not thought up a plan which could be devised to protect them, because that is a very difficult thing to do, and the time given for preparation has been extremely brief.

In line with what Mr. Herbert said a few moments ago, we are perfectly clear that neither Mr. Herbert nor Mr. Sousa can be controlled by this combination. They are too big. But they are the only composers in the United States to-day of whom that can be said.

Mr. Burkan. How about De Koven, and how about Julian Edwards; and how about——

Mr. O'Connell. That being so, it seems strange to me that those eminently respectable gentlemen, Mr. Herbert and Mr. Sousa, have been put forward here as advocates of this bill, when the very men who will be the greatest gainers by it have sedulously kept themselves in the background, and do not appear to be represented here, even nominally.

What will be the result if these features of the bill are put through? Mr. Herbert and Mr. Sousa will get some benefits from it. Ninety-nine per cent of the composers will get absolutely nothing from it. The Æolian Company and the concerns affiliated with it will have millions of dollars turned into their coffers. And the net result is that the public will pay and the independent manufacturers whom we represent will either go out of business, or will have to transact business in such a way that it will be without any profit to themselves, or entirely on sufferance. That is the broad, general question that is before you, gentlemen, of these committees. We only want a square deal. We want no rights that anybody else does not get.

But we do not want to have others put in a position where they can take away our right to do business on a reasonable basis. That being the broad general proposition, I shall expect during the summer vacation to supply your committees with as much information as I possibly can on these various matters, and I ask the committees to do what they can toward investigating how far I am right in this matter. I can say that those charges have been made in the White-Smith suits in the circuit court and circuit court of appeals, and they have not been answered in anyway by the representatives of the monopoly to which I refer, nor have they been denied.

On the bill itself——

Mr. CHANEY. What section?

Mr. O'CONNELL. I will take it from the beginning, if you please.

The CHAIRMAN. Before you proceed with the bill: Have the companies that you represent made any effort to secure contracts with Mr. Sousa and Mr. Herbert and the other composers that have been mentioned?

M. O'CONNELL. The companies that I represent do not make contracts with composers. The companies that I represent primarily, the 10 manufacturers, do not cut perforated music. They buy it. They buy it either from the Æolian Company, or from one of the many independent manufacturers of such rolls. So that we are not brought into direct contact with Mr. Sousa, Mr. Herbert, or any composers. We want to be in a position where the independents will not be forced out of the field, or where we can be forced to buy this perforated music at an exorbitant figure, or where they can be in the position of refusing to give it to us at any price.

The CHAIRMAN. These companies, as I understand, under existing law simply go to the store offering the music for sale, which is music, and then put it upon the rolls. Is that right?

Mr. O'CONNELL. I do not know what the particular arrangements are that the composers have with the publishers, or the publishers with the music companies.

The CHAIRMAN. Under existing law, is it necessary for the manufacturer to do more than I have stated?

Mr. O'CONNELL. Under the existing law, as it has been decided in the White-Smith suit, the cutter of music rolls can go anywhere and take a piece of music, copyrighted or uncopyrighted, and cut the roll from it. That is my understanding of it, without paying any royalty to anybody.

The CHAIRMAN. And the gentlemen and concerns you represent desire the law to remain in that condition?

Mr. O'CONNELL. I have not said that, sir. What we say is this: We want to be able to go out in the open market and buy our music rolls. We will not be in that position if this bill goes through, because with these contracts that I speak of we can not go into the open market, as there will be no open market whatever. The distribution of these music rolls will be in the hands of one house, and that house can put its own price on them, or refuse to sell them to us at all at any price. In other words, in passing this bill in its present shape, you are fostering too great a centralization of power, or putting an absolute monopoly into the hands of one group of men. That is our objection. If some means can be devised whereby we get in on the same basis, whereby we can buy our records or our perforated music sheets as Mr. Currier said, on the same terms as anybody else, we have no fault to find, then.

The CHAIRMAN. How can law prevent Mr. Sousa from making a contract with the Æolian people or any other concern that he may desire to deal with?

Mr. O'CONNELL. The law can not prevent him from making any contracts he chooses with them, provided he does not contravene the law of the land itself. He can make any contract he chooses for any price he chooses. But there is the unfortunate situation: Mr. Sousa and Mr. Herbert, and gentlemen situated as they are, naturally ought to be in a position, I suppose, where they have liberty of contract; but in passing a law the greatest good to the greatest number must always be considered. If you pass this bill you do some good to these gentlemen, you do a great deal of good to the monopoly, you do absolutely no good to the vast majority of the authors, and you do a great deal of damage to a great many millions of dollars interested and invested in manufacturing industries in this country, even if you leave the purchasing public out of consideration altogether. It is a question of which you will take, unless some means can be devised to eliminate those particular features.

Taking the bill itself, it was stated here by Mr. Putnam the other day that the object of this bill was to give a copyright on music rolls as to musical compositions composed after the passage of this act. That was my understanding of what he said.

Mr. PUTNAM. Copyrighted afterwards, I think I said.

Mr. O'CONNELL. Then I assumed, from the remarks made by some members of the committee, that they considered the act to apply only to compositions originally composed after the passage of this act, and originally copyrighted after the passage of this act. I do not believe, therefore, that the members of the committee are aware of the very many peculiar features of the bill in that regard.

Mr. CHANEY. The bill is only submitted as a tentative proposition, to get at the right thing. It is not the result of our genius at all. It belongs to some of the rest of you fellows.

Mr. O'CONNELL. It does not belong, Mr. Chaney, to me or the rest of my fellows; and we are here trying to oppose the genius of the other men, the specially interested ones who did submit it to your committee. [Laughter.]

Mr. CHANEY. Well, we fellows are not trying to shut out you fellows.

Mr. O'CONNELL. I know that you are not, and all we want is a fair, full, and complete hearing.

Taking first, Mr. Chairman and gentlemen of the committees, subdivision F of the first paragraph. There is still a subdivision B in that subdivision F:

> To make any arrangement or setting of such work, or of the melody thereof, In any system of notation.

Mr. CHANEY. On page 2?

Mr. O'CONNELL. I am reading from the House bill.

Mr. CHANEY. We have the Senate bill here. What is the section?

Mr. O'CONNELL. Section 1, subdivision F.

Senator SMOOT. It is on page 2.

Mr. O'CONNELL. It gives the right—

> to make any arrangement or setting of such work, or of the melody thereof, in any system of notation.

Then it goes on (subdivision G):

> To make, sell, distribute or let for hire any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of the work published and copyrighted after this act shall have gone into effect, or by means of any such device or appliance publicly to reproduce to the ear the whole or any material part of such work.

Mr. WEBB. Before you leave that, do you not think that section G prohibits the sale of the instrument itself, rather than the reproduction of the music or the work? You are a lawyer.

Mr. O'CONNELL. It would seem that it prohibits both, sir.

Mr. BURKAN. We will submit an amendment to cover that.

Mr. WEBB. It seems that that is a prohibition of the sale of any instrument.

Mr. CURRIER. Clearly so.

Mr. O'CONNELL. I have not seen the proposed amendment, because it was only handed in this morning after we got here.

Turning to section 6, it says—and this is very important:

> That additions to copyrighted works and alterations, revisions, abridgments, dramatizations, translations, compilations, arrangements, or other versions of works, whether copyrighted or in the public domain, shall be regarded as new works, subject to copyright under the provisions of this act.

Now, if you please, turn to section 18, subdivision B. It gives a copyright for fifty years after the first publication, and you will find at line 13 of the House bill, which I hold, that it gives a copyright for fifty years after the date of the first publication, in "any arrangement or reproduction in some new form of a musical composition." Then, you will find further down, in subsection C of that section 18, where it gives a copyright for the lifetime of the author and for fifty years afterwards in the case of an original musical composition, thus making it clear, from a reading of all those sections together, that first, where there is an original composition, say of Mr. Sousa or Mr. Herbert, which has been already copyrighted under the present act, under the provisions of this new act they have the right to prohibit the cutting of music rolls for the period of fifty years from those original compositions which they have already copyrighted; and, secondly, the most dangerous provision of the bill, that any music-cutting establishment—this monopoly, for instance—can take any old work, that has never been cut to this day into a music roll, which is in the public domain—one of Beethoven's sonatas, or the Star Spangled Banner, if that has not already been done—and they can cut a music roll and can copyright that, and they can get the exclusive right because of such cutting, notwithstanding that everybody is free to perform that particular piece in every other way. This bill gives the right to cut it into a music roll and get a copyright for fifty years after the first publication in the form of a perforated music sheet. That, I submit, Mr. Chairman and gentlemen, is a very iniquitous provision—very iniquitous.

Mr. CHANEY. That starts in on page 4 and concludes on page 14?

Mr. O'Connell. Yes.

Mr. Chaney. I think you are right about that.

Mr. O'Connell. Thank you for agreeing with me.

Then, there is another provision of section 19, which was covered yesterday by Mr. Ogilvie, in regard to book publishing, to which I have the same objection, and that is that where the author dies his family can not get the continued copyright for fifty years unless the assignee or licensee shall join in the application for such renewal and extension. Some provision ought to be made there so that in case the licensee or assignee refuses, at the instance of the widow or orphans of the author, to apply for an extension of the contract, the widow and orphans shall have the right to proceed independently of the assignee or licensee. As Mr. Ogilvie very well said, where the publisher has the right to reproduce on the payment of a royalty of 20 per cent he may very well say now, after the author dies, "I will not apply with you for this extension unless you permit me to pay you merely a royalty of 2 per cent."

I simply point that out as one of the injustices of the act, as showing that only special interests apparently seem to have been considered in the framing of the bill.

There is another question there, which will probably be covered by Mr. Walker in what he has to say to the committee afterwards, and that is as to the constitutionality of these provisions as a whole. I will merely point out what the Constitution provides in that respect.

Article 1, section 8, subdivision 8, gives the right to Congress—

> to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries.

It has been held, in the case of the Lithograph Company v. Sarony, 111 U.S., 53, at page 58, that the only thing which appears to infringe upon copyrighted matter would be—

> some visible form of writing, printing, engraving, etching, by which the ideas in the mind of the author are given visible expression.

Mr. Sousa pointed out the ordinary system of notation with the various notes, and he also held up to you a music roll with the perforations, slits, dots, and dashes, and he claimed, apparently, that those slits, dots, and dashes are visible and can be read. I doubt very much if Mr. Sousa can tell one note from another there.

Mr. Currier. I could tell the notes on that sheet just as well as I could on the other. [Laughter.]

Mr. O'Connell. All I have to say then is that apparently music is not one of your many accomplishments. [Laughter.] Some of us can not read Sanskrit, nor Hebrew, nor Greek, perhaps, but that does not mean that we can not read at all, nor that such languages can not be read. There are many of us that do understand the ordinary diatonic notation of music, and many of us that do not. The fact that the vast majority of people can not read music does not prevent it from being a writing.

The Chairman. Do you contend that it is beyond the power of Congress to make that roll copyrightable?

Mr. O'Connell. My contention is, sir, that it is absolutely beyond the power of Congress to make that roll copyrightable.

Senator Smoot. Are there people that can read that roll—that is, the same as Mr. Sousa can pick up that piece of music there [indicating] and read that music? In other words, every slit or cut or dash in that paper represents a note, does it not, just the same as the notes are differently represented upon the paper that Mr. Sousa exhibited—or a musical tone is represented?

Mr. O'Connell. It may be, but I do not think that there is a person, firm, or corporation in the United States or elsewhere to-day that can take that music roll and tell you what particular note any particular slit or dot or dash represents. If I am wrong, I want to be corrected.

Mr. Chaney. It is a notation of tone, then?

Mr. O'Connell. It is simply by relation to what is called the tracker board. This roll goes over a tracker board in which there are little holes. Each hole in the tracker board is connected with a little tube which carries the air through a bellows and to a device which strikes a hammer. As this roll goes over the tracker board of the instrument, when it strikes a hole corresponding to any particular one of those slits there is an ingress of air, because there is a vacuum underneath. That little tube is connected with a hammer which strikes the note A, B, C, and so forth, whatever it might be. They are differently arranged in different rolls. The roll that will play in one instrument will not play in another; and you can see, gentlemen, that there is a different-sized roll, different-sized slits [exhibiting sample rolls] notwithstanding that they are both the same

piece of music, composed by Mr. Sousa. [Laughter.]

Senator SMOOT. In looking at those two rolls, there is no question but what anybody can tell that they are the same piece of music.

Mr. O'CONNELL. But look at the difference across——

Senator SMOOT. That is only as to the size. You can take that same sheet of music that Mr. Sousa exhibited and have it four inches wide or you can have it eight inches wide, and it would be just the same music.

Mr. O'CONNELL. But can anybody tell me, if you please, sir, or will anybody tell us, what those notes are?

Senator SMOOT. That is the question that I asked you.

Mr. BOWKER. I can, by taking a scale corresponding to that instrument and putting it on the paper. By doing that you can tell what the note is.

Mr. WALKER. I was counsel in the Apollo case, and the question whether those rolls could be read by inspection was litigated at great expense in that case, and the circuit court of appeals for the second circuit decided, a week ago last Friday, that the overwhelming preponderance of the evidence was that they could not be read.

Mr. WEBB. And further, that that is not a copy of the music from which it is taken.

Mr. WALKER. They so decided. Judge Colt decided in 1888 that these perforated rolls are not copies of music filed in the office of the Librarian of Congress. That decision was always acquiesced in until the Æolian Company invented its ingenious scheme to monopolize the business of mechanical musical instruments; and in pursuance of that event they endeavored to secure from the circuit court of appeals in the southern district of New York a reversal of Judge Colt's decision. After years of litigation the circuit court of appeals for the second circuit affirmed Judge Colt's decision, and held that these do not infringe the copyright on the sheet music, and, as the foundation for that holding, they stated the overwhelming preponderance of evidence was that they could not be read by anybody; and they stated for that reason that they were not copies, and were not infringements.

Mr. O'CONNELL. I have been informed, while Mr. Walker was speaking, in response to what Mr. Bowker said, that in this White-Smith suit the complainants tried in every possible way to prove the truth of the assertion which Mr. Bowker has just made, and that they utterly and totally failed to sustain that assertion that those sheets could be read, even with the use of any kind of a scale. That has just been stated to me by a gentleman who is interested.

If you please, Mr. Chairman, the portion of the decision relating to that particular point has been handed to me, and here it is——

Mr. CHANEY. We have that decision.

Mr. O'CONNELL. I want to call attention briefly to just this point in it:

> It is not designed to be read or actually used in reading music as the original staff notation is; and the claim that it may be read, which is practically disproved by the great preponderance of evidence, even if it were true, would establish merely a theory of possibility of use as distinguished from an actual use.

In deciding those cases, courts and committees of Congress do not act on possibilities.

Here is another method of reproduction [exhibiting disk] of the same march of Mr. Sousa's. It is for use in a music box. I do not know what the name of the music box is. The disk was only handed to me this morning. That shows another method of reproducing, and I do not suppose that even Mr. Bowker, with the aid of a scale, can read the notes on it. [Laughter.]

Again, there is still another one here [exhibiting cylinder], which has been handed to me by Mr. Walker, a phonograph record, which he unfortunately says he broke, and which contains the same march by Mr. Sousa. And I do not believe that even Mr. Bowker, with the aid of any kind of a scale, can read that.

Mr. BOWKER. My name has been mentioned, and may I say that the character of the phonograph record which uses the very word "graph," meaning "writing," represents the earliest form of writing, that of incised character writing.

Mr. CHANEY. Of the time of Rameses.

Mr. DAVIS. May I state that it remained for the inventor to first devise that scale to which that perforated music was made, and, second, to devise a machine which would interpret that music to Mr. Currier, or all of the other members of the public, as a medium by which any music could be read. That is the only practicable way of reading it, and that was left to the inventor. A mere

reversal of that scale, to read backwards, would not be requisite.

Mr. SOUSA. I would like to ask the gentleman a question. What value would these various records have if my march was not on them—if I had never written that march?

Mr. O'CONNELL. I will say to Mr. Sousa with perfect frankness that the only object of that particular record is to produce his march. [Laughter.]

Mr. SOUSA. Without my consent.

Mr. O'CONNELL. I shall not try to hedge. I merely state facts.

Mr. CHANEY. Do you think you should do that without compensating him for the genius he displayed?

Mr. O'CONNELL. Very early in my remarks I disavowed any such intention. I did say that we were in the position—the independent manufacturers that I represent—where we could be forced to the wall because of these contracts, and that the resulting benefits to Mr. Sousa and Mr. Herbert, if Congress had power to and did pass such an act, would be vastly offset by the great detriment to our manufacturing interests and to the public.

While I am on that point I would ask leave to digress and to submit also a copy of a letter from the Æolian Company to the Chicago Music Company, dated the 5th of May, 1902, and offer it in evidence here.

(The letter referred to is as follows:)

THE ÆOLIAN COMPANY,
New York, May 5, 1902.

The CHICAGO MUSIC COMPANY,
Music Publishers, Chicago, Ill.

DEAR SIRS: Pursuant to the provision of the agreement granting us the exclusive right under your United States copyrights for all perforated music sheets intended for use in controlling automatic musical instruments and machines for playing musical instruments, we hereby notify you that a number of copyright owners satisfactory to us have made with us agreements similar to our agreement with you. From this date, therefore, our agreement goes into effect.

Looking forward to profitable and pleasant business relations, we remain,

Yours, truly,

THE ÆOLIAN COMPANY,
E. R. PERKINS, *General Manager.*

I now ask you, Mr. Chairman and gentlemen, to turn to section 15 of the bill, found at page 11 of the House bill, which would seem to me to be rather ambiguous. It provides that the owner of the copyright may commence proceedings and so forth within thirty days, but that he has a whole year within which to complete his copyright. Now, that means that he does not have to put his mark on it, I suppose, and perhaps an independent manufacturer may go ahead for a year, or, rather, for three hundred and sixty-four days, believing that he has the right to do so, and then, on the three hundred and sixty-fifth day the owner of the copyright completes his record, and he is promptly sued for all that he has done for the past year. True, the act says that in such case no action shall be brought for infringement of the copyright until the requirements have been fully complied with; but that merely says that he can not commence the action until he has complied with the act. It does not say that after he has finally complied he can not recover for the infringement during the full year within which he practically permitted his copyright to lapse.

Mr. PUTNAM. Do you understand that he is not obliged to give notice during the intervening period?

Mr. O'CONNELL. I am speaking of the one-year provision.

Mr. PUTNAM. The works that are issued carry a notice, do they not? You did not understand that it was supposed that the works issued were to be exempt from the notice upon them of copyright, did you?

Mr. O'CONNELL. I would like to know what is the reason for the provision in question, then. If there is no reason for it, it should not be there.

Mr. CHANEY. Then you would strike out all of section 15?

Mr. O'CONNELL. Why not leave the act as it is, and provide that everything must be done before publication, instead of giving them a year in which they might possibly deceive the public?

Mr. PUTNAM. Mr. O'Connell has asked what is the reason for this section. I will ask you, Mr. O'Connell, if you have observed that the section reads, this section 15, that "if, by reason of any

error or omission the requirements prescribed above in section 11 have not been complied with," etc. Now, notice that section 11 does not refer to the requirement of notice upon the published works, but of the requirement of deposit and registration in the copyright office.

Mr. O'CONNELL. In answer to that I will say that the Patent Committees of both Houses are probably aware of the fact that there have been means found and adopted for many, many years to keep applications for patents pending in the Patent Office and still not have them outlawed. It would be the easiest thing in the world for an applicant for a copyright to commit irregularities for that very purpose.

Another point: In section 18, subdivision C, there may be a copyright obtained under an assumed name. I confess that I do not see the reason for that.

Mr. CHANEY. Mark Twain, for instance, instead of Samuel L. Clemens? Is there objection to that?

Mr. O'CONNELL. I do not see the reason for it, while it might be all right in the particular instance which you suggest. Of course if it is limited to giving a copyright to a man under his pen name, that might be all right.

Mr. CHANEY. Is not that the purpose of it?

Mr. O'CONNELL. It may be the particular purpose of it, but I think the section is so broad that it might include almost anything from Genesis to Revelations.

Mr. PUTNAM. Where is that in section 18, that you may copyright under an assumed name? Will you state where you find that in that section?

Mr. O'CONNELL. On page 15:

> The copyright in a work published anonymously or under an assumed name shall subsist for the same period as if the work had been produced bearing the author's true name.

It is at the end of section 18. That would seem to me to give the right to copyright under an assumed name.

Mr. PUTNAM. Oh, yes.

Mr. O'CONNELL. As to the penalties, Mr. Chairman, I think there never has been an act passed where the penalties have been so severe. I will ask you, Mr. Chairman and gentlemen, to turn to section 23, on page 17, of the bill and I will point out as far as I may where it differs from the old act. In the first place, subdivision A gives the right to an injunction restraining such infringement. As to the damages, in addition to the injunction, it gives the copyright proprietor such damages as he may have suffered. In addition to the injunction and the damages, it gives him the right to all the profits which the infringer may have made from such infringement. And now comes the extraordinary provision. It says: "And in proving profits the plaintiff shall be required to prove sales only"—gross sales, I suppose it meant thereby—"and defendant shall be required to prove every element of cost which he claims."

That provision is revolutionary. In every case, both at law and in equity, where the plaintiff has to prove either damages or loss of profits, it is absolutely essential that he prove the actual damages or the actual profits. By that is not meant gross profits, but the net profits which the infringer has made. Under this act all that the plaintiff is required to do would be to prove that the alleged infringer sold so many goods for such and such a price, and the onus or burden of proof is entirely on the defendant to establish all the items of the expense incurred in producing the infringing article. The old act has no such provision.

Next it says that in lieu of damages and profits the court——

Mr. CHANEY. It says "actual damages."

Mr. O'CONNELL. It says that the court, instead of actual damages and profits, may award an arbitrary sum, not less than $250 nor more than $5,000, and it says that that sum shall be made up in this way: For every copy of a music roll or a phonograph record, $10. The old act provided for practically the same kind of a record, the same genesis of things, $1. Why, Mr. Chairman and gentlemen, should you impose a penalty of $10? The old act has it that paintings, statues, or sculptures should pay a penalty of $10. It also has it that prints, etc., should pay $1. Why should you put a music roll into the category of paintings, statues, or sculptures at $10, rather than into the other category?

Mr. BURKAN. We will submit an amendment making that $1. The music publishers will submit an amendment making that $1.

Mr. O'CONNELL. I thank the music publishers for considering us, even in the very slightest degree.

Five thousand dollars would seem to be the limit in any one suit, but suppose the complainant brings 20 or 50 different suits in different jurisdictions, which he would be permitted to do under

other sections of the act, which I will point out presently.

Subdivision third of that section 23, says: "In the case of a dramatic or musical composition not less than $100 for the first and not less than $50 for every subsequent infringing performance."

I submit, Mr. Chairman and gentlemen, that we are also liable to that penalty as well as the $10 a roll, because these very astute gentlemen who are back of this bill, on the very first infringement will claim that any performance on an automatic piano player whereby Mr. Sousa's march or Mr. Herbert's composition is played on a pianola or one of the independent pianos, is a musical performance, and that for the first performance, in addition to the $10 a roll, we are liable to be fined $100, and for each subsequent performance $50. I think that this section, if the other provisions of the bill are to remain in, should be amended so as to say that this shall not include a performance on a perforated music roll or on phonograph or music machine disks.

Some other extraordinary provisions of the penalties are, first, this subdivision C of the fourth paragraph of section 23 provides that the infringer is—

> to deliver up on oath to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all goods alleged to infringe a copyright.

That is an extraordinary provision. They get an injunction pendente lite, and not alone that, but we have to deliver up to them everything pendente lite. The injunction is not good enough, and we have to give the goods to them.

Next, it says (subsection D):

> To deliver up, on oath, for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies.

It may be proper, as in the old act, to direct the infringer to deliver up the copies or the plates from which they are made, but it is absolutely revolutionary to direct that the machinery be delivered up, because that machinery may be useful for perfectly legitimate purposes, and yet it must be delivered up for destruction.

It also provides that all those results can be obtained in a single action.

As to the jurisdiction of courts in suits of this kind, here is the provision of the bill:

> SEC. 32. That all actions arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.
>
> Actions arising under this act may be instituted in the district of which the defendant is an inhabitant, or in the district where the violation of any provision of this act has occurred.

Let us assume that my client, a manufacturer of an automatic piano player in the city of New York, ships one of these with a box of music rolls to Manila or some inland town in the Philippines. If it is an infringement, the infringement has occurred in the Philippines, because the music roll is not published until it is taken out of the box. According to this act they have a right to commence an action in the Philippine Islands. According to another subsection of section 32 they can send the process to the marshal in the southern district of New York, and that marshal serves the process, and thereupon the court of first instance in the Philippine Islands has jurisdiction, and the defendant has to go to the Philippine Islands to defend the case. And a still greater objection is that the complainant in such an action may commence a hundred concurrent suits and distribute them in every court in the United States, the Territories, Porto Rico, and the Philippines.

Mr. CHANEY. The idea, of course, is to put it within the reach of these people who are injured.

Mr. O'CONNELL. Does that put it within the reach of the New York corporation, or is it part of their proper proceedings to get damages or redress that they should go to the Philippine Islands to sue my clients who are domiciled in New York, where the Æolian Company is domiciled, and make us go over there to defend the suit?

Mr. CHANEY. No; but suppose the person injured lives in the Philippine Islands?

Mr. O'CONNELL. If that is the conclusion, if you simply want the plaintiff to sue in the jurisdiction where either the real plaintiff or the defendant is an inhabitant, then that raises another question.

Mr. CHANEY. Evidently that is what has been intended. There was no purpose of anybody to take all the fellows out of New York, because that is a splendid place to live, you know. [Laughter.]

Mr. O'Connell. But we have to come to the fountainhead occasionally. [Laughter.]

Mr. Webb. The act distinctly says "In the district where any violation of this act has occurred."

Mr. O'Connell. Under the old provision with regard to infringement, you could only sue a defendant where you found him, in the district where he resided. That is the provision in relation to patents, and the provision of the bill as the old act stands. Why should this new provision be inserted? Perhaps the members of this committee will be able to determine.

Mr. Chaney. I take it that that was for the purpose of making it convenient to the person injured, or the parties injured.

Mr. O'Connell. That might be all right, if the party injured was a resident of the Philippines.

Mr. Chaney. Yes.

Mr. O'Connell. Or of the Sandwich Islands, or Porto Rico?

Mr. Chaney. That is the idea.

Mr. O'Connell. I think you will find that there are none of the owners of any of these copyrights living in any of those districts; none of them. I do not suppose that Mr. Sousa intends to change his residence just at present, or Mr. Herbert either. I think they will be found doing business here right along. [Laughter.]

Section 34 provides—

> That no action shall be maintained under the provisions of this act unless the same is commenced within three years after the cause of action arose.

Why not leave that the old two-year limit? What is the necessity for three years? There is no reason for that.

Then, look at the provision in section 35.

Mr. Chaney. Is there a disadvantage in putting it three years?

Mr. O'Connell. Why should it be extended to three years?

Mr. Putnam. Is it not true that the present limitation is only for actions for penalties or forfeitures, whereas this is a general limitation on all actions, including civil actions for infringement, so that although it enlarges by one year the criminal action, it reduces the term that the complainant at present has in his civil action? This now applies to all actions. Did you notice that, Mr. O'Connell?

Mr. O'Connell. I think that the present provision relating to kindred actions of this kind is a two-year statute of limitations, and it has been found ample for a great many years, for all purposes, to protect patentees, inventors, and everybody else.

Look at section 35:

> That in all recoveries under this act full costs shall be allowed.

That is to say, where the complainant recovers he must get from the defendant, and the court must allow the complainant, full costs. Let us assume a case where the defendant gets the bill dismissed. That is not a recovery. He does not get a recovery, but there is no provision giving the defendant in that case full costs. Oh, no. They are only careful of the complainant where he recovers; but where his action fails there is no provision giving the defendant full costs.

Mr. Webb. You would strike out "recoveries" and insert "suits?"

Mr. O'Connell. If you want to do it that way. You will not be then giving one side any more than the other. But I think that provision should not be in there at all. I think the court should have full discretion in the award of costs, these actions being mostly equitable actions, and the general rule being that in a court of equity the awarding or denial of costs is in the discretion of the court.

I see no reason why the jurisdiction of the courts should be limited by a provision of this kind. I think it should be left to the courts to say in all cases whether costs should be awarded or withheld, and how much costs should be awarded; although I think there should be a provision to the effect that in the case of an action wilfully brought, and where there is no recovery—brought simply for the purpose of intimidation, where there is no reasonable ground for recovery, simply to get hold of the man's business and keep him from doing business—that there should be some provision in there giving a penalty against the complainant in such an action as that. I have only thought of that at this moment, but I think it is a good suggestion to make to the committee.

Gentlemen, I thank you for the time you have given me, and I have no more to say on the subject. I again ask, however, as I did at the outset, that on these contracts and on the question of the

monopoly in the hands of this concern and its associates, the committee should take proofs such as may be necessary to determine what the situation is. All I ask on behalf of the independent manufacturers of automatic musical instruments in the United States is that we should have a fair show, that our business should have the same protection as any other business has, and that you gentlemen may not do anything which will help this great centralization and put it in the power or a monopoly to ruin our business.

Mr. PUTNAM. I understand that Mr. H. N. LOW is by agreement to speak next.

STATEMENT OF H. N. LOW, ESQ., OF WASHINGTON, D.C.

Mr. LOW. I appear for the manufacturers of the music rolls and of instruments operated by such rolls.

Mr. CURRIER. I understood that the music-roll people had had over two hours now.

Mr. LOW. Pardon me. My remarks will be very brief.

Mr. CURRIER. The talking-machine people are to have thirty minutes, and the committee can not sit here a very great while.

Mr. LOW. My suggestions will be very brief.

The ACTING CHAIRMAN. We have to adjourn in a little while, and the gentleman who preceded you exceeded his time.

Mr. LOW. Then to merely supplement the remarks of the gentleman who has preceded me, I ask leave of the committee to submit two more contracts, similar to the ones that he has submitted, with the Æolian Company in the carrying out of the agreement that we allege. My information is that that agreement now embraces practically the whole music-publishing trade, and those outside of that agreement are very small manufacturers, and the trust or combination is just about complete and ready for this legislation. I submit that this legislation is most dangerous, and that this pretended revision of the copyright law is a cloak for something that is very wrong.

[The contracts referred to by Mr. LOW are as follows:]

> Memorandum of agreement made and entered into this 30th day of April, 1902, by and between Chicago Music Company, of Chicago, in the State of Illinois, party of the first part, hereinafter called the publisher, and the Æolian Company, a corporation organized under the laws of the State of Connecticut, and having a place of business in the city of New York, in the State of New York, party of the second part, hereinafter called the Æolian Company, witnesseth:
>
> That whereas the publisher is the proprietor of certain copyrights for musical compositions and the owner of rights in copyrights for other musical compositions; and
>
> Whereas the Æolian Company is engaged in the business of manufacturing and selling automatic musical instruments controlled by perforated music sheets, and in manufacturing and selling machines for playing keyboard musical instruments, which machines are controlled by perforated music sheets, and in manufacturing and selling perforated music sheets for such automatic musical instruments and machines; and
>
> Whereas the Æolian Company is desirous of acquiring the exclusive right for such perforated music sheets in and to all the copyrighted musical compositions of which the publisher is the proprietor, or as to which he is the owner of any rights, and of all those other musical compositions which may hereafter be protected by copyright, and the copyrights for which or rights in which may be acquired by him;
>
> Now, therefore, the publisher, for and in consideration of the premises, and of the sum of $1, lawful money of the United States, to him paid by the Æolian Company, receipt of which is hereby acknowledged, and for and in consideration of the true and faithful performance by the Æolian Company of its covenants hereinafter made, does hereby sell, assign, transfer, and set over unto the Æolian Company the exclusive right for all perforated music sheets of the kinds aforesaid in and to all the copyrighted musical compositions of which the publisher is the proprietor, or in the case in which he is the owner of any less rights, to the extent of said rights, and does hereby covenant and agree with the Æolian Company to give and secure to it the exclusive right in like manner for all perforated music sheets of the kinds aforesaid in and to all those other musical compositions which may hereafter be protected by copyright, and the copyrights or rights in which may be acquired by the publisher, except that if the Æolian Company do not accept any price offered them within three months after said offer, then the publisher may be at liberty to dispose of the same otherwise.
>
> And the publisher, for the consideration aforesaid, hereby covenants and agrees, so far as it may be reasonably in his power, to protect the Æolian Company against any claim of any third person in respect to any and all copyrighted musical compositions which may be involved in this agreement, and the copyright of which may be owned by the publisher.

And the Æolian Company, for and in consideration of the premises, hereby agrees that it will keep correct and true books of account in which it will set down or cause to be set down entries of all perforated music sheets made by it for playing the copyrighted musical compositions owned or controlled by the publisher; that it will on the 20th day of each and every January and July, during the continuance of the manufacture and sale by it of the perforated music sheets for playing such musical compositions, render unto the publisher a correct and true statement of the number, names, and other designations of such perforated music sheets sold by it during the six preceding calendar months, and that at the time of rendering each and every such statement it will well and truly pay unto the publisher a license fee or royalty of 10 per cent of the list prices made by the United States publishers of the printed scores or copies of such musical compositions, but never more than 50 cents for any one of such perforated music sheets.

And the parties hereto mutually covenant and agree that nothing herein contained is to obligate the Æolian Company to pay any license fee or royalty upon such perforated music sheets as shall be made by it in the United States and sold or shipped to any other country, unless it shall have been decided by a court of competent jurisdiction of such other country that the copyright laws of that country shall be applicable to perforated music sheets of the kinds herein mentioned.

And the parties hereto mutually agree and covenant that the term "perforated music sheets" is not to be construed as covering the controllers of those musical instruments which are generally known as phonographs, or music boxes, or hand organs.

Anything herein to the contrary notwithstanding, at the expiration of thirty-five years from the payment of the first license fee hereinbefore provided, the Æolian Company shall not be entitled to licenses under the copyrights thereafter acquired by the publisher, but all licenses existing under copyrights theretofore acquired by him shall remain in force until the expiration of the terms of the copyrights under the terms hereinbefore provided.

During the existence of this contract, after the payment of the license fee hereunder, the Æolian Company obligates itself to prosecute diligently, at its own expense and by its own counsel, in the name of the proprietors of the copyright, all infringers of the rights granted to it, the Æolian Company.

And the parties hereto mutually covenant and agree that all the provisions of this agreement shall be binding upon and inure to the successors, executors, administrators, and personal representatives of both the parties hereto.

In witness whereof the publisher has on the day and year first hereinabove written hereunto set his hand and seal, and the Æolian Company has caused its name and corporate seal to be hereunto affixed by its proper officer thereunto duly authorized.

CHICAGO MUSIC COMPANY, [SEAL.]
PLATT P. GIBBS.
THE ÆOLIAN COMPANY. [SEAL.]
By E. S. VOTEY, *Director*.

Signature of publisher witnessed by—

J. F. BOWERS,
PAULINE FLAHERTY.

Memorandum of agreement made and entered into this 30th day of April, 1902, by and between Chicago Music Company, of Chicago, in the State of Illinois, party of the first part, hereinafter called the publisher, and the Æolian Company, a corporation organized under the laws of the State of Connecticut, and having a place of business in the city of New York, in the State of New York, party of the second part, hereinafter called the Æolian Company, witnesseth:

That whereas the parties hereto have, of even date herewith, entered into an agreement whereby the Æolian Company is to have the exclusive right for all perforated music sheets intended for use in controlling automatic musical instruments or machines for playing musical instruments, in and to the copyrighted musical compositions of which the publisher is the proprietor or as to which he is the owner of any rights, and in and to all those other musical compositions which may hereafter be protected by copyright and the copyrights or rights in which may be acquired by him; and

Whereas the parties hereto are desirous of entering into a further agreement with reference to the matters and things expressed in the above-mentioned agreement of even date herewith;

Now, therefore, the publisher, for and in consideration of the premises and the sum of $1, lawful money of the United States, to him by the Æolian Company in hand paid, receipt whereof is hereby acknowledged, does hereby covenant and agree that no charge shall be exacted from or be due from the Æolian Company for the manufacture or sale by it, or any of its customers, of any perforated music sheets of either of the kinds aforesaid, for playing any of the copyrighted musical compositions which are owned or controlled, or which shall hereafter be owned or controlled in whole or in part by the publisher, until

a decision of the court of last resort in a suit which is to be instituted against some manufacturer or user, other than the Æolian Company, of such perforated music sheets for the purpose of testing the applicability of the United States copyright laws to such perforated music sheets, and not then unless such decision shall uphold the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid.

And for and in consideration of the premises the Æolian Company hereby covenants and agrees to pay all proper expenses of conducting said suit for the purpose of testing the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid, and that if the court of last resort shall in such suit decide that the United States copyright laws are applicable to such perforated music sheets, then and in such case and from that time forward the Æolian Company will keep books of account, render statements, and pay royalties, as provided by the aforesaid agreement of even date herewith, but shall be free from obligation to make payments for the past.

And it is mutually understood and agreed by the parties hereto that neither party hereto is to be obligated in any way by any of the provisions of this agreement, or of the aforesaid agreement of even date herewith, until the Æolian Company shall notify the publisher that a number of copyright owners, satisfactory to the Æolian Company, have made similar agreements with said company.

And the parties hereto mutually covenant and agree that all the provisions of this agreement shall be binding upon and inure to the successors, executors, administrators, and personal representatives of both the parties hereto.

In witness whereof the publisher has on the day and year first hereinabove written hereunto set his hand and seal, and the Æolian Company has caused its name and corporate seal to be hereunto affixed by its proper officer thereunto duly authorized.

CHICAGO MUSIC COMPANY, [SEAL.]
PLATT P. GIBBS, *President*.
THE ÆOLIAN COMPANY. [SEAL.]
By E. S. VOTEY, *Director*.

Witnessed by—

PAULINE FLAHERTY.
J. F. BOWERS.

THE ÆOLIAN COMPANY,
New York, May 5, 1902.

The CHICAGO MUSIC COMPANY,
Music Publishers, Chicago, Ill.

DEAR SIRS: Pursuant to the provision of the agreement granting us the exclusive right under your United States copyrights for all perforated music sheets intended for use in controlling automatic musical instruments and machines for playing musical instruments, we hereby notify you that a number of copyright owners satisfactory to us have made with us agreements similar to our agreement with you. From this date, therefore, our agreement goes into effect.

Looking forward to profitable and pleasant business relations, we remain,

Yours, truly,

THE ÆOLIAN COMPANY,
E. R. PERKINS,
General Manager.

Mr. CHANEY. I would like to have this gentleman who has just spoken to us (Mr. Low) submit a typewritten statement relating to the various sections in the bill to which he objects, and setting out his objections.

The ACTING CHAIRMAN. Without objection that privilege will be accorded to him.

WASHINGTON, D.C., *June, 12, 1906*.

To the Committees on Patents of the United States Senate and House of Representatives.

GENTLEMEN: I file herewith in typewriting specific suggestions for the amendment of the said bill, in pursuance of the resolution of the joint committee, passed on the 8th day of June, 1906; these remarks or this statement to follow in the record the exhibit contracts which I presented to your committees at that time.

Very respectfully,

H. N. LOW.

SUGGESTIONS AS TO THE AMENDMENT OF THE PENDING COPYRIGHT BILL.

To the Committees on Patents of United States Senate and House of Representatives.

GENTLEMEN: If the allegations which have been made before the committee, and not denied, and which can not be successfully denied, that there has been effected a combination in the nature of a trust to secure practically all of the commercial business of this country in the manufacture, sale, and use of mechanical records or controllers for the production of music, etc., by mechanical means are true, then a very serious situation confronts you.

The agencies relied upon to make said combination of publishers and manufacturers successful are—

1. The contracts which have heretofore been entered into in anticipation of this legislation, four of which contracts have been filed in connection with the remarks of Mr. O'Connell and of Mr. Low.

2. New legislation of the character proposed by this copyright bill and especially by paragraph (g) of section 1.

In one of the contracts referred to, dated April 30, 1902, between the Chicago Music Company and the Æolian Company, it is provided—

"During the existence of this contract, after the payment of the license fee thereunder, the Æolian Company obligates itself to prosecute diligently, at its own expense and by its own counsel, in the name of the proprietors of the copyright, all infringers of the rights granted to it, the Æolian Company."

In the other contract of the same date and between the same parties, a facsimile of which has been filed with your committees, it is provided—

"That no charge shall be exacted from or be due from the Æolian Company * * * until a decision of the court of last resort in a suit which is to be instituted against some manufacturer or user other than the Æolian Company of such perforated music sheets for the purpose of testing the applicability of the United States copyright laws to perforated music sheets, and not then unless such decision shall uphold the applicability of the United States copyright laws to perforated music sheets of the kinds aforesaid. And for and in consideration of the premises the Æolian Company hereby covenants and agrees to pay all proper expenses of conducting said suit," etc.

Such test suit was instituted entitled The White-Smith Music Publishing Company *v.* The Apollo Company by and at the expense of the Æolian Company, the real complainant, and decided against the Æolian Company, the holding of the court of last resort, the United States circuit court of appeals for the second circuit, being that such perforated music sheets were not infringements of the copyrights of the nominal complainant.

Although defeated so far, it is not reasonable to suppose that the combination of the Æolian Company and its "number of copyright owners satisfactory" to that company would rest without further effort to make effective for profit the agreement into which they had entered. The only remaining means was by new legislation, and I submit that the aim and end of the pending bill is to be a substitute for that favorable decision of a court of last resort which the Æolian Company failed after strenuous efforts to obtain.

Certain provisions of the bill here and there—for example, the lengthening of the copyright term—have attracted to the support of the bill various interests who are totally indifferent one way or the other to the question of perforated music sheets or phonographic records, but I submit that these other provisions are more or less unimportant, do not improve the present law, and most of them would never have been heard of except for the desire of the special interests above referred to to obtain new legislation as to the mechanical producers of sound.

In the spring of 1904 attempt was made by this same combination to obtain the legislation desired by the insertion of a specific provision in the law to substantially this effect:

"*Provided*, That in the case of a musical composition authors or their assigns shall have the exclusive right to use said copyright musical compositions in the form of perforated rolls for playing attachments, copyright on which music rolls may be obtained by said author or his assigns in the same manner as now provided by law for copyright on musical compositions."

I have not been able to discover that this proposed amendment of the law was ever introduced in the form of a bill into either House of Congress. It may have been. But I am informed that it was formulated for the purpose of introduction as a bill in Congress in the terms above set forth.

It was found impracticable to obtain the new legislation in such specific and undisguised form, and resort is now had to a pretended revision or codification of the entire copyright law, for which there is not the slightest necessity and which will inevitably give rise to a great amount of litigation before the meaning and effect of the words used in the new law can be legally understood, for the sole purpose that the Æolian Company may have with its contracting publishers and copyright owners "pleasant and profitable business relations," as expressed in the notice from the Æolian Company to the contracting

publishers, dated May 5, 1902 (a facsimile of which I have filed with your committees). This notice states "a number a copyright owners satisfactory to us have made with us agreements similar to our agreement with you."

Although the matters above referred to have been opened up before your committee in the remarks of Mr. O'Connell, I have felt it my duty to give my view of the matter in brief form, both in confirmation of what Mr. O'Connell has said, and for the purpose of indicating that the bill itself and proposed amendments thereto must be scrutinized by your committees with the greatest care before it is reported.

As to amendments of the bill, I see no alternative to the striking out of paragraph (g) of section 1. If the combine exists as is alleged it is obvious that the patents, inventions, machinery, and plants of all those manufacturers of mechanical records who are not inside of the combine, that is to say, of all the manufacturers of perforated music rolls excepting the Æolian Company, and all the manufacturers of talking machines and records excepting the two companies who are alleged to be members of another combination or trust for the exclusive manufacture of such machines, and of all without exception of the manufacturers and users and sellers of pianos and organs which are operated by perforated music sheets, will be rendered practically useless, the owners of such manufactories will be put out of business, and their workmen will have their field of labor and bread taken away.

If this will be the result of the bill, and especially of the paragraph section 1 (g), the bill is most unjust and class legislation of the worst type. And that is just what the bill is intended to be, but I am thankful that its object can not be concealed.

It is no answer to the above objection to say that the bill provides only for the future. So do the contracts between the Æolian Company and its "satisfactory number" of copyright owners. The said contracts are unlimited as to time, having been signed by the great bulk of the trade (meaning thereby almost all of the great music publishers of the country), they leave outside of the combination only small publishers, and the contracts provide as follows:

"Now, therefore, the publisher, for and in consideration of the premises, and of the sum of one dollar, lawful money of the United States, to him paid by the Æolian Company, receipt of which is hereby acknowledged, and for and in consideration of the true and faithful performance by the Æolian Company of its covenants hereinafter made, does hereby sell, assign, transfer, and set over unto the Æolian Company the exclusive right for all perforated music sheets of the kinds aforesaid in and to all the copyrighted compositions of which the publisher is the proprietor, or in the case in which he is the owner of any less rights, to the extent of said rights, and does hereby covenant and agree with the Æolian Company to give and secure to it the exclusive right in like manner for all perforated music sheets of the kinds aforesaid in and to all those other musical compositions which may hereafter be protected by copyright, and the copyrights or rights in which may be acquired by the publisher, except that if the Æolian Company do not accept any piece offered them within three months after said offer then the publisher may be at liberty to dispose of the same otherwise."

From the foregoing we arrive at this conclusion, and there is no escape from it, that there is in existence a combination whose design and effect upon very important business and laboring interests of this country will be injurious and unlawful if the bill should be passed as proposed, which combination is of unlimited duration as to time, and which combination will control, for the purpose of producing perforated music sheets, all the copyrights or rights of production hereafter for such unlimited duration of time which may be acquired by the great bulk of the trade (music publishers) of this country. Your committees will see, therefore, that the bill provides for the profitable future of the members of the combination without limit as to time.

The result of this will be threefold:

1. The Æolian Company will secure for itself practically the entire business of the United States in the manufacture of perforated music sheets, and will be in a position to dictate the prices for such sheets to the trade, including the manufacturers and sellers of pianos and organs operated by said sheets as well as the sellers of the sheets alone, and to raise the price to the public generally for such sheets.

2. The publishers who have contracted with the Æolian Company to give the latter all the rights which the publishers have or may have in copyrighted music will receive from the Æolian Company certain royalties, which royalties will either be clear profit to the publishers or will be less than any extra royalties which the publishers will pay to the composers. It is practically certain that in the long run the composers will get no more royalties than they now receive, for the composer, for his own advantage in obtaining a large sale of his works, must go to one of the large publishers of music, and will be compelled by such publisher to accept in full payment of his copyright just such a royalty as he now gets under existing law, and all the extra profits which can be mulcted from the public under section 1 (g) of the bill will be divided between the members of the combination.

3. The public will foot all the bills without any more advantage to themselves than they have under existing law.

The assertion made in support of the bill, that it relates only to the future, is completely

met with the reply that the bill does not provide for the future of anyone who is outside of the combination.

If the existing copyright law is bad or insufficient and anything like a revision of or a codification of the copyright statutes in a new law must be made in the interests of justice, let it be done. But let care be taken that you do not do injustice. If a new copyright law is to be enacted, and the pending bill is to be the foundation of such a law, the practical question is, how is it to be amended in order that it may not cause the evils above referred to.

Mr. Putnam in his introductory remarks indicated that your committees would find evidences of "selfishness" in the bill. He is undoubtedly right. It is, however, much more far reaching in this respect than Mr. Putnam had any idea of. It is extraordinary that the conference which advised Mr. Putnam adopted such radical legislation as is proposed in section 1 (g) without inviting the attendance at the conference of a single person interested adversely to this legislation. In fact it would appear that such persons were purposely kept in ignorance of what the conference was doing.

But I do not think that the selfishness of the interests which are opposed to the said new legislation, and who are now fully aware that it is proposed, extends beyond a rightful effort to prevent their own extinction.

In my opinion the manufacturers of mechanical music controllers or records are willing to pay a fair and reasonable royalty to composers of music which they use, or to other owners of copyrights for musical compositions, but this must be provided for otherwise than by an enactment which will give rise to the evils attending the said paragraph, section 1 (g) of the bill. That paragraph should be eliminated and other parts of the bill corresponding with this paragraph, and there should be substituted for it, probably at some other more appropriate part of the bill, a provision like the following:

"Any person, firm, or corporation who shall make, use, or sell, or let for hire, any device, contrivance, or appliance especially adapted in any manner whatsoever to reproduce to the ear the whole or any material part of any work published and copyrighted after this act shall have gone into effect, shall pay to the author or composer of such work a fair and reasonable royalty to be determined according to the market price for such or similar royalties.

"And the author or composer of the work so used shall have the same remedies for the recovery from such person, firm, or corporation of such royalty or royalties as is provided in this act for the recovery of damages for the infringement of copyright.

"And after the amount of such royalty or royalties shall have been ascertained and become due by express contract between the parties, or shall have been ascertained and adjudged to be due by any circuit court of the United States, and is not paid, then the author or composer shall have the same remedy by injunction against such person, firm, or corporation, as is provided in this act in cases of the infringement of a copyright."

It is believed that such an enactment would give to the composers who have appeared before your committees all the rights and remuneration which is due them, and at the same time will defeat the unlawful combination which exists and is hereinbefore referred to.

I believe that it will not be at all difficult to arrive at the just value of such royalties, and in almost every instance they would be settled by contract between the owner of the copyright and the maker of the mechanical appliance for producing the music. In the case of a composition of any value the composer will dispose of it for an agreed-upon royalty to some music publisher in the usual way. He will then dispose of his right to the composition for reproduction by mechanical means to some manufacturer of such mechanical means for a royalty agreed upon. If any other such manufacturer, not in contractual relations with the owner of the copyright thereafter makes use of the composition, the amount of the royalty for which the owner of the copyright has contracted will aid in determining what royalty is fair and reasonable and is to be paid by such other manufacturer. I suppose that in some cases litigation may be necessary to arrive at the amount of the royalty, but not more than is inevitable in human affairs. It is not to be supposed that a manufacturer will resist the payment of the royalty for a musical composition which he has utilized and pay to the complainant the cost of litigation rather than make a fair settlement upon terms which are well settled, or will soon become well settled under this act, in the trade.

A provision like that above suggested is analogous to, and appears to be quite similar in its effect to, the compulsory-license provision of some of the foreign statutes. For instance, in the law of the Dominion of Canada, lately enacted, in 1903, we have the following:

"7. (*a*) Any person, at any time while a patent continues in force, may apply to the commissioner, by petition, for a license to make, construct, use, and sell the patented invention, and the commissioner shall, subject to general rules to be made for carrying out this section, hear the person applying and the owner of the patent, and if he is satisfied that the reasonable requirements of the public in reference to the invention have not been satisfied by reason of the neglect or refusal of the patentee or his legal representatives to make, construct, use, or sell the invention, or to grant licenses to others on reasonable terms to make, construct, use, or sell the same, may make an order

under his hand and seal of the patent office requiring the owner of the patent to grant a license to the person applying therefor, in such form and upon such terms as to the duration of the license, the amount of the royalties, security for payment, and otherwise, as the commissioner, having regard to the nature of the invention and the circumstances of the case, deems just."

I instance this foreign law to show that under a system of jurisprudence exactly like our own it has been found best to limit rights heretofore granted in the most exclusive form, and provide for compelling the owners of such rights to deal reasonably and fairly with the public. This Canadian law relates to exclusive rights to inventions under letters patent, where the ascertainment of what is a just license fee or royalty is always more or less complicated and difficult. In the case of copyrights much simpler conditions prevail, the value of musical compositions are more easily measurable and there would be far less difficulty in arriving at a fair royalty by a contract between the parties or by arbitration, or, in the last resort, by the judgment of a circuit court. I have mentioned a circuit court merely for purpose of illustration. It would probably be more convenient to confer this jurisdiction on a United States district court.

It seems to me that under the conditions which confront your committees, there being on the one hand a desire to recompense musical composers, and on the other hand the necessity of defeating the unlawful combination which will have entrenched itself most securely if the bill should become a law including the objectionable paragraph which I have discussed, an amendment of the bill in some such way as above indicated is inevitable.

SPECIFIC AMENDMENT OF THE BILL.

I submit that in the interest of the public it is far better to correct any evil in the existing copyright law, which was pretty thoroughly revised not very many years ago, than to pass a revision of the law which uses so many new terms and words which have not received judicial interpretation, and which bill evidently requires itself revision and amendment in almost every section. It requires such amendment in detail in the first place to eliminate those matters which have been embodied in the bill for the purpose of most thoroughly carrying out the provisions of section 1 (g), upon which I have already commented. If it is necessary to eliminate the paragraph specified, it is also necessary to revise the bill in many other sections where corresponding matter appears.

In the second place, the bill requires amendment as to the term of copyright proposed, as to the damages for infringement, as to the effect which the certificate of the filing of the entry shall have, as to the way in which and the terms in which the notice of copyright shall be given, and as to broad and uncertain expressions which are found in many sections, which can have no good effect and which will only be productive of uncertainty, confusion, and litigation.

I am informed that a substitute bill will be submitted to your committees in the nature of specific amendments to the existing law to cure any evils which may exist therein and, among other things, to give reasonable compensation to authors or composers for the use of their works by the manufacturers of automatic mechanical reproducing devices. I believe that it will be preferable to thus amend existing law, leaving the great bulk of the law in those words and terms and provisions which there is no necessity of changing and which have become well understood by years of judicial interpretation.

I will however proceed to discuss the pending bill and point out the specific amendments which appear to be necessary in the interest of the public, both as to clearness and certainty of expression and as to the relative just claims of the author and of the public.

Section 1, paragraph (f), should be amended by striking out the words "or for purpose" and the remainder of line 10 and to the end of line 13, and by inserting the words "or to make any variation, adaptation, or arrangement thereof."

It will be seen that to retain this paragraph in the present form would be equivalent to retaining paragraph (g), because it was the intent in framing paragraph (f) to have the word "performance" cover the operation of an automatic mechanical device; and the words "arrangement or setting" were intended to include the production of a perforated music sheet.

Paragraph (g) should be eliminated for the reasons already given.

Paragraph (h) should be amended by inserting at the end thereof the words "amounting to a copy thereof."

It is obvious that this paragraph is altogether too broad and uncertain. The paragraph should only protect against infringements which are copies, and it must be left to judicial determination in the future as it has been in the past to say whether or not any particular abridgment, adaptation, or arrangement is a copy within the meaning of the law.

Section 2 appears to be substantially similar to section 36, and one of the two sections should be eliminated or they should be consolidated.

Section 3 should be amended by striking out "the copyrightable" and the rest of line 4, and to the end of line 8, and substituting "matters copyrighted after this act goes into effect."

So amended the section does not appear to be necessary in the bill, but on the other hand in its present form it will be seen at once that it is retroactive and very injurious, making in effect certain matters infringements of the copyright granted under existing law which are not infringements now and are within the public domain.

Section 4 is absurdly broad and indefinite and covers pastry or other works of a cook. It should be amended by inserting the word "literary" before the word "works," or by substituting the word "writings," which is used in the Constitution and is the preferable word to employ, or by inserting after the word "works" the words "mentioned in section 5 hereof."

In section 5 paragraph (h) should be eliminated. This paragraph was intended to cover perforated music sheets or talking-machine records which are to be otherwise provided for. As to other matters it may be said that if the reproductions referred to are copies of things already copyrighted, they are infringements; if not copies, they are works of art in themselves under paragraph (g) of section 5.

On page 4 "The above specifications shall," in line 8 and line 9 and line 10, to and including the words "nor shall," should be canceled, and in line 11, after "classification," insert the words "shall not."

It is obvious that an unlimited subject-matter of copyright is highly undesirable from the standpoint of the public.

In section 6, line 15, after "compilations," insert "or," and in the same line strike out "or other versions." These words are plainly unnecessary and are intended to have a capability of elastic interpretation unduly favorable to the author and prejudicial to the public.

In section 7, paragraph (b), the words "of a work" and the rest of line 6 and lines 7, 8, and 9, to and including the word "text," should be canceled. If a work has fallen into the public domain, even though subsequent to 1891, it would be retroactive to now bring it within the copyright law and deprive the public of its use.

Section 8, paragraph (a), in the interest of clearness should be amended by striking out the words "or cotemporaneously" in line 21, and by inserting after line 22 "shall publish his work within the limits of the United States cotemporaneously with its first publication elsewhere; or."

Section 9 should be amended by inserting after the word "Act," line 14, the words "and by the performance of the other conditions precedent mentioned in the act, and by entry of the title of the work as hereinafter provided." It is plain that a person does not "secure" copyright by the publication with notice, which is all that is mentioned in this section.

Section 10, line 24, the words "and such registration shall be prima facie evidence to ownership" should be struck out. There does not appear to be sufficient reason for giving a mere assertion of claim the prima facie standing of absolute ownership.

It would put upon the true author, whose production had been entered for copyright by another person, the burden of proof, and this section if not amended would be very susceptible of fraudulent use. I am inclined to think that it is advisable, certainly if the copyright entry is to be prima facie evidence of ownership, to require that the claim be verified before it is presented to the Librarian, and that false swearing to such a claim shall subject the affiant to the penalty for perjury.

Section 13, page 9, line 19, "and all his rights and privileges under said copyright shall thereafter be forfeited" should be canceled. These words might lead to the unjust forfeiture of a copyright if the false affidavit were made by the agent or printer without the knowledge of the author or owner. Also the words seem superfluous. If a condition precedent has not been performed, the right is lost by operation of law without these words. To insert them implies that the provisions of section 13 are not conditions precedent to obtaining a valid copyright.

In line 24 the word "and" should be substituted for "or;" and at the end of line 25 the words "if it has been published" should be inserted. It is very desirable that all the facts upon which the copyright depends should be clearly stated when possible.

Section 14, line 2, the words "or the," and the following matter down to, but not including the word "accompanied," in lines 5 and 6, should be canceled, and the words "with the date of entry of the copyright" should be inserted.

The notice of copyright must be clear and in such usual words, not signs which hardly anyone will understand, as are intelligible to the public. I consider it highly important that the date of copyright, including the year, month, and day, should appear in the notice, and also the name of the person by whom the original entry is made in the copyright office. The indexes will be kept by these names, and any subsequent entry or transfer should always be indexed under such original names. These remarks apply also to sections 44 and 45 hereafter considered.

In line 10, after "some," the words "uncovered and" should be inserted.

In line 13, after "name," the words "as in the original entry of copyright" should be inserted.

Line 19, the word "its" should be changed to "the," and in line 20, after "following," the words "of each separate volume" should be inserted; and in line 24, after "accessible," the word "uncovered" should be inserted.

Page 11, line 3 should be stricken out or amended to cure its indefiniteness as to the meaning of the word "composite."

In line 4, the word "musical" should be changed to "musical-dramatic."

It has never been intended by the copyright law to use the word "performance," excepting of such works as are only useful when represented or "performed" in a dramatic sense. The word "dramatic" has not always seemed sufficiently broad, and the words "musical composition" have often been added to include operas, oratorios, and musical works that are not purely dramatic, and yet are partially so. It is submitted that it has never been the intention of the law to make the mere singing of a song from copyrighted notes that have been paid for, or the playing of music, infringements of copyright, and it is believed that this section will carry out the full intent of the law if the word "dramatic" be coupled with the word "musical," as above indicated.

In view of the use of the word "performance" in other parts of this bill for the purpose of including the use of automatic mechanical devices, it should be made clear that the word "performance," in line 5, has nothing beyond its ordinary significance. I suggest that this can best be attained by striking out the word "performance," in line 5, and inserting the word "representation."

Section 15 should be amended by striking out the words "if, by reason" and the rest of line 11 and lines 12 and 13.

It is plain that these words in the bill leave an open door for free publication which brings a work within the public domain, and subsequent monopoly of the work upon a mere allegation of error. The Librarian has not the facilities or legal machinery to try such question of error, and it should be left to the courts to determine whether there has been an error or omission, and whether by reason thereof any condition precedent for a valid copyright has been left unperformed.

Page 12, line 13, the words "bulk of the" should be stricken out. These words are uncertain and would allow the proprietor to omit the notice from 49 per cent of the edition. This would clearly amount to insufficient notice to the public and could be made the instrument of fraud. Line 14 and the remainder of the section are entirely sufficient for the purpose without the words "bulk of the."

Section 17, line 22, the words "be extended to" should be canceled, and at the end of line 24 the words "such term beginning with the date of filing the request for the reservation of the copyright," should be inserted.

There appears to be no reason for granting more than the specific term, which the law will provide, in the case which section 17 is intended to cover.

Section 18 relates to the term of copyright.

The whole system provided in the Constitution is for the benefit of the public, the intent is to accumulate for the use of the public, matters of literature, art, and invention. The stimulus in the way of a reward given by the public in return for these matters is subsidiary to the main object. The reward consists in "securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." The objection to the term provided in the bill is that it is unconscionably long. It may easily amount to a hundred years or more, during which time the public will have paid tribute to the author for something which will be so old fashioned as to be useless to the public when the copyright has expired.

The word "limited" in the Constitution shows that the framers of that instrument had in mind to secure for the public certain benefits after the time had expired. To provide such a long copyright term as the authors seek to obtain in this bill would practically defeat the object of the said clause of the Constitution and the intention of its framers. I submit that it could only be considered for a moment on the ground that it is a matter of indifference to the public because the works so to be protected are entirely useless in themselves. I do not think there is any sufficient reason for lengthening the term—twenty-eight years with an extension of fourteen years—provided by existing law.

In another respect this section is bad in making the length of the term dependent upon an event which is uncertain in advance, and of which no public accessible record may be made when it occurs; that is to say, the death of the author. I see no reason why a young author should have longer protection than an old author, and the provision would leave open to publishers a door of fraud by securing copyrights for the productions of old authors in the name of some younger person.

The objection to a long term especially applies to music which depends almost entirely upon fashion and taste, and these soon change and the music becomes useless to the public. In my opinion, purely musical productions should have a relatively short term of copyright, but I have not considered the subject sufficiently to be justified in fixing any precise number of years.

But as to all copyrights it is my conviction that the interest of the public unquestionably

requires that they be granted for a definite term of years, and that, if an extension is provided, the extension should be for a fixed and definite time. It is only this which enables the public to know, upon reading a notice of the copyright, when the monopoly will terminate.

If for any reason it should seem wiser to make the term dependent in its length upon the death of an author, then the continuance of the copyright should depend upon definite evidence being filed in the copyright office showing positively the date of death.

At the end of section 18, page 15, line 8, after "name," the words "*Provided*, That in such published work the notice of copyright be given as required in this act" should be inserted.

Section 19 should, in my opinion, be canceled. It is retroactive in its character. Definite contracts have been entered into between authors and the public with respect to matters already copyrighted, and it would impair the obligations of those contracts to provide any renewal or extension of such copyrights. It has already been agreed between such authors and the public at what time their copyrighted works shall pass into the public domain.

Recurring to lines 3 and 4 of page 15, I submit that they should be canceled, so that the copyright shall extend for a definite number of years after the date of original entry. There seems to be no sound reason for giving an author a longer copyright, longer by a year, if he makes his entry on the 2d of January, than another author will have who enters his copyright on the 30th of December preceding.

Section 21 should be canceled, as it gives, in effect, copyright privileges where the conditions precedent required by this act have not been performed.

Section 22, line 14, is too broadly worded for the benefit of the authors of this bill, and the word "reproduction" should be canceled and the words "copy or representation" should be inserted.

In lines 22 and 23 the words "such fraudulent" and the rest of the section should be canceled, and the words "copies which are infringements is hereby prohibited."

Section 23, paragraph (b), should be canceled and made to read:

"(b) To pay to the copyright proprietor damages for the infringement."

As the paragraph now reads, it gives double damages. The proprietor should receive damages which will be judicially ascertained in the ordinary way, either by estimating the profits which the infringer has made, or by estimating the damages or loss which the proprietor has suffered. If there is no actual damage it should not be provided that $250 should be recovered, and if the damages are greater than $5,000 there is no sound reason for limiting them to the latter sum.

For the same reasons lines 18 to 24 on page 17, and lines 1 to 7 on page 18, should be canceled.

Paragraph (c) on page 18 should be amended by striking out the word "alleged", in line 10, and inserting "shown to the satisfaction of the court."

Section 25 should be amended by inserting at the end of line 23 "and with intent to deprive the owner of the copyright of lawful profit."

The word "willfully" does not appear to make the section sufficiently clear, and it is submitted that an infringer should not be held guilty of a misdemeanor unless he have the intent specified in the suggested amendment.

After line 6 on page 19 the following words should be inserted:

"*Provided*, That any person who performs the alleged infringing acts under a mistake of fact or law shall not be deemed to be a willful infringer."

The alleged infringer may have good reason to think that conditions precedent have not been performed and that no valid copyright exists; he may be under a mistake as to when the term expires; he may be of the opinion that what he has produced is not a copy, and he may perform his alleged infringing acts under advice of counsel. It does not seem proper under such circumstances to hold him to be a willful infringer and guilty of a misdemeanor.

In line 14 of page 19, after "knowingly," the following words should be inserted: "and with fraudulent intent."

Page 20, line 9, before "publish," the following words should be inserted: "send notice of such seizure by registered mail to the person to whom the article seized is consigned or directed, and shall."

Section 27, line 24, after "first," there should be inserted the words "mailing or".

Section 29, lines 6 and 7, the words "supposed to contain" should be canceled, and the words "which contains" should be inserted. It is unreasonable to permit a postmaster to detain a package upon a mere supposition.

In line 9, before "mail," there should be inserted the word "registered."

Page 24, lines 16 and 17, the words "not more than one copy at one time" should be canceled, and in line 17 the word "or" changed to "and."

At the end of section 32 the following should be inserted:

"*Provided*, That the owner of the right to perform any copyrighted work by means of any automatic mechanical device shall not have the remedy by injunction herein provided until the amount of fair and reasonable royalty for such use shall have been ascertained by express contract between the parties, or by judgment of a court, and shall be due and not paid."

Section 35, line 8, the word "full" should be canceled; and in line 9, after "allowed," there should be inserted "according to the practice of law and equity."

In many cases it might be inequitable to allow costs, and the court should be left free to exercise its legal discretion.

Section 36, line 11, the word "common" should be inserted before the word "law." This section should be compared with section 2, and they should be consolidated, or preferably they should both be omitted as unnecessary and as being outside of the purview of this act.

Section 38, line 23, there should be inserted after the word "musical" the word "-dramatic."

Line 25, the word "make" should be canceled and there should be inserted the words "produce by."

It is evident that the right to make belongs to the patentee of the device.

Page 30, line 1, the words "ninety days" should be changed to "three months" as more convenient and as excluding any contention whether or not Sundays and holidays are included in the ninety days. The similar provision of the patent law reads "three months."

Section 44 should be amended by inserting after "assignment", in line 12, the words: "and index the same under the name of the person by whom the original entry of copyright was made."

Section 45 should be amended so that lines 21 to 23 shall read as follows: "signee shall in all cases give in the statutory notice of copyright prescribed by this act the name of the person by whom the original entry of the copyright was made."

Without this provision the public will be put to great inconvenience in finding the original entry on which the copyright depends. The copyright notice should be of a clear and specific character so as to cause the public as little inconvenience and uncertainty as possible.

Paragraph 52 should be amended by striking out "provided" and all thereafter to the end of the paragraph in lines 2 and 3 of page 33. This provision is altogether too broad and the courts should be left free to determine what are conditions precedent to a valid copyright and whether there has been any breach of them.

Section 54 should be amended by striking out the words "the date of the" and inserting "that the affidavit states the dates of;" and in line 20 cancel the words "as stated in the said affidavit," and insert the words "which dates shall be given in the certificate."

Section 55 provides for the destruction of card catalogues. The wisdom of this provision is very doubtful. A single card catalogue for each class of copyright work would save an immense amount of time and error to the public, and to the Librarian in making searches. Instead of periodically destroying card catalogues, they should be added to and preserved. As soon as they are destroyed, instead of being able to make one examination of one part of the card catalogue, the public will be compelled to examine a great number of periodically made printed indexes. I therefore suggest that the words "and thereupon", to and including the word "intervals," lines 9 to 12 of page 34, be canceled.

As to the destruction of articles provided for in section 59, I suggest that the section be amended by inserting in line 10 of page 36, after the word "provided," the words "and with the authorization of the Committees on Patents of the Senate and of the House of Representatives."

Section 63 should be amended by striking out the words "sold or placed on" in line 7, and by inserting "made public, or sold publicly or privately, or placed on public."

As to section 64, I have to suggest that the present bill is supposed to be what may be termed a codification of the copyright law; if so, section 4966 of the Revised Statutes has no proper place outside of this bill. If there is anything desirable in the section it should be embodied in the bill at the proper place, and in doing so it should be made plain that the word "musical" where it first occurs in section 4966 means "musical-dramatic," meaning thereby a composition which is dependent upon representation or performance in the dramatic sense.

I do not believe that the people of this country are aware of what the musical composers and publishers are attempting to do in the way of securing monopolies.

> If the public were aware that these persons, after having secured copyrights giving them the exclusive right of copying and publishing music for sale, and after having sold the copies of such music are attempting to secure laws by which they may impose further taxes upon the public for the use of such music by singing or playing, and are seeking to provide fines and terms of imprisonment for those members of the public who do not pay the additional tax, there will be such a storm of protests before your committees as could not be disregarded.
>
> Section 4966 of the Revised Statutes should be repealed altogether, and so far as its provisions appear in this bill they should be limited to musical-dramatic compositions, and the provisions for damages other than actual damages and for imprisonment should be absolutely eliminated.
>
> Very respectfully,
>
> H. N. Low.

The Acting Chairman. Now we will hear the gentleman who represents the talking machines.

STATEMENT OF S. T. CAMERON, ESQ., REPRESENTING THE AMERICAN GRAPHOPHONE COMPANY, OF NEW YORK CITY.

Mr. Cameron. Gentlemen, the first objection we have to the bill is, in our mind, the most serious one, and one which has been several times touched upon heretofore, so that I shall not attempt to go into any very great detail in discussing it here, but shall simply call attention to the fact that we object to it, and point out to you why, in connection with our particular business, it is especially important.

If you will turn to section 4 you will find that it reads:

> That the works for which copyright may be secured under this act shall include all the works of an author.

Our position is that this is in direct contravention of the Constitution. If you will substitute in that clause the word used by the Constitution, and say that the works for which copyright may be secured under this act shall include all the "writings" of an author, then we do not object to that section.

Now, if you will take certain other sections of this bill, with that change made in section 4, and attempt to read them, particularly where the word "reproduce" occurs, or the word "reproductions" occurs, you will see the importance of it to us.

Take, for example, section 3, immediately above:

> That the copyright provided by this act shall extend to and protect all the copyrightable component parts of the work copyrighted, any and all reproductions or copies thereof.

If you read that word "reproductions" with the word "works" in section 4 changed to "writings," reproduction means a very different thing.

If you will turn to section 18, on page 14, subclause b, you will find this language:

> Any arrangement or reproduction in some new form of a musical composition.

Mr. Chaney. What do you understand the word "works" to mean in section 4?

Mr. Cameron. It may mean anything that is reduced to writing, or that is not reduced to writing. It may be an oral speech that is absolutely wafted upon the winds of the air and never gets into permanent form. In proof of that we go to section 5, line 20: "Oral lectures, sermons, addresses."

The talking-machine art stands in a somewhat different position from that of the perforated music roll. You take a sheet of music and you have Sousa's or any other band play that music into the horn of an instrument, a patented apparatus. That machine engraves lines corresponding to what? To the sound waves produced by the band or the voice of the performer on the wax or other tablet.

Now, if you make that word "works" read "writings," as I understand, as the Supreme Court has interpreted the word "writings," it means this, in its broadest signification: That the idea of the author has been recorded in some tangible form, in such a way that another, through the eye, may have the idea of the author impressed upon his brain. That may be a painting; it may be the work of an artist. I think the Supreme Court has included a painting under that term because of that very fact, that the idea of the artist was recorded in some tangible form and, through the eye of the beholder, the idea of the artist was conveyed to the brain of the beholder. That is what a writing is, as I understand it, within the meaning of the Constitution.

Mr. CHANEY. The effect of your argument is, then, to limit the word to something that can be read by anybody?

Mr. CAMERON. Not necessarily by anybody.

Mr. CURRIER. But by somebody?

Mr. CAMERON. Yes. I can not read Sanskrit.

Mr. CHANEY. I mean to say, that can be read by persons understanding the same language?

Mr. CAMERON. Yes; something that is capable of conveying to the reader, if you may call him such, the idea of the author.

Mr. CHANEY. And in that respect it would cut out the music-roll proposition altogether?

Mr. CAMERON. As my predecessor has told you, there is a dispute in regard to that, and I am not qualified to state. As far as I have been able to analyze the evidence, the preponderance is against the idea that the music roll can be read. But I do know this: There is a graphophone record of the disk form [exhibiting record to the committee]. There is a graphophone record of the cylinder form [exhibiting record]. I defy anyone—I defy Mr. Sousa to read that and tell whether it is one of his marches or whether it is a speech of a Member of Congress. [Laughter.]

Mr. CHANEY. They are often very much alike. [Laughter.]

Mr. CAMERON. They are both musical. [Laughter.]

Mr. MCGAVIN. They are alike in volume of sound. [Laughter.]

Mr. CAMERON. I am not making this statement theoretically nor as a lawyer. I make it as an expert in this particular art. I have spent months and months of time with the microscope myself striving to do that very thing, and I know it can not be done.

Now, let us go one step further. What is it that makes that graphophonic record valuable? I can take Mr. Sousa's score and I can select some person, some alleged musician in this audience, and I can hand him a graphophone and tell him to make that record, and it would not be worth one cent upon the market. It takes the genius of a Sousa to play into the horn. It takes the voice of the magnificent singer to sing into the horn; and it takes the skill of the mechanician who is operating the graphophone to make a fine record that has a marketable value.

You ask me if I would use Sousa's march, make that record and sell it, and not pay him any royalty. I answer, "Yes; I would;" because I have paid him royalty. Whenever Mr. Sousa publishes one of his pieces of music and puts it out upon the market and I pay the price of that music, that sheet of music passes from under the monopoly, just as when I patent a cornet and sell the cornet to Mr. Sousa, and he pays the price for it, it passes out from under the patent monopoly, and he has a right to use it. Suppose I should come here and say to you that every time one of Mr. Sousa's cornet players played the cornet that I had sold to him that he should pay me royalty for having played it! That is what he is asking of you. That is not all.

Mr. Sousa himself does not scorn, as he pretended to the other day, these "infernal talking machines." The day has been when Mr. Sousa himself came with advance scores and begged to have them put upon the machines, in order that they might popularize his own music. Nor is that all. He to-day is under contract, and he plays into these "infernal machines" with his band, and he is contributing, as he told you a few days ago, to stifle these "beautiful young voices that now have disappeared throughout our city and our land." [Laughter.] He does it for the almighty dollar. That is what he is after, and he frankly told you so.

Mr. SOUSA. I am honest, anyway. [Laughter.]

Mr. CAMERON. You are; and, as I said to you the other day, I respect you for it. All the men urging this bill are not as honest as you are, sir.

Mr. CHANEY. That is neither here nor there. We give them all credit for being honest.

Mr. CAMERON. I would not have made that remark if I had not been interrupted.

It was stated a moment ago, and it is a fact of which I wanted to speak, that the intention here is to give everyone a fair show. The gentleman here on my left (Mr. Webb) suggested that this bill would not prohibit the perforated music rolls (and the same question would apply to the graphophonic cylinder) from the reproduction of those pieces of music or other copyrightable works which had appeared and been copyrighted prior to this act. In that he is in error. Section 3 says:

> Any and all reproductions, or copies thereof, in whatever form, style, or size, and all matter reproduced therein in which copyright is already subsisting.

So that it does not go only to matter that is copyrighted subsequent to the passage of this act.

Mr. WEBB. I was speaking particularly of section g. That was the section that the gentleman was objecting to, and I referred to that particular portion.

Mr. CAMERON. The act, however, would apply by reason of section 3 to subsisting copyright.

Mr. WEBB. Yes; that may be so.

Mr. CAMERON. There is a situation in the talking-machine art that is perhaps divisible. You see two distinct forms of records. The company which I represent—the American Graphophone Company—makes both of those forms. There are a great many other companies, some of them making the machines and the records, and some of them making only the records. Some of them make the cylindrical form of record and some of them make the disk form of record; but there are two large, prominent companies, one of which makes the disk form of record and the other of which makes the cylindrical form of record. As I say, the company which I represent makes both.

Follow me now, if you please. There is also as close a musical trust, as has already been said to you by my predecessor, in this country as it is possible to form. That extends not only throughout this country, but throughout the world. There are a few musical geniuses who are able to stand above it and make them scramble for the genius. You have two of them with you to-day, Victor Herbert and John Philip Sousa. But John Philip Sousa can not speak for the struggling young composer who is not powerful enough to compel this trust to come to him instead of the young man going to the trust.

How does that effect us? Did you hear any opposition to this bill from the attorney of the Victor Talking Machine Company? No. They make the disk form of record. Have you heard any opposition from the National Phonograph Works—the Edison Company—in regard to this bill? No. They make the cylindrical form of record. Why does the Victor Talking Machine Company come here with such a virtuous show of regard for the author, and say they have no objection to this? Why is not the representative of the Edison Company—the National Phonograph Works—here opposing this bill? Because, as I charge, and I think I can substantiate it before I get through—not here, but I mean before the hearings before this committee are through—there is under way the same iniquitous proceeding that was outlined to you by my predecessor in connection with the music rolls.

Mr. PETTIT. That is absolutely untrue, as far as the Victor Talking Machine is concerned.

Mr. CAMERON. You can have a chance to reply when your time comes.

One company gets the exclusive right to make the disk form of record from copyrighted music, and the other the exclusive right to make the cylindrical form of record. Let us assume for a minute that what the gentleman says is literally true. Let us assume, I say. Is it not possible for just that combination to be made, and should the American Graphophone Company, which has millions of dollars invested in the enterprise, honestly and fairly built up under the laws of this country, money put in and money which it had an absolute right to presume the law would protect—should that company be placed in the position where it should be practically driven out of business by any such monopolistic combination? Will you gentlemen give them that opportunity?

I am not prepared to say that this music publishers' combination is the most gigantic trust on earth, but it is an absolutely close and effective trust. You may reply that we have the right to play and put upon these records all of the old noncopyrighted productions, those that are now within the public domain. To that I reply that the perforated music roll man or the talking machine man who attempts to rely solely upon old music will go out of business inside of eighteen months. He has got to meet the demand for the popular airs of the day. He has got to be able to produce Sousa's and Victor Herbert's latest productions. "I want what I want when I want it." That is where the public stands. [Laughter.] You wait three years instead of fifty, and where would we be?

Moreover, we go to Japan, we go to China, we go to the various countries of the earth, and make these records—get the original records. We do not make the original record on that disk. We do not make it upon that cylinder. We make an original record from the voice of the singer. That original record in the case of the cylinder is first very carefully covered with plumbago, to render it electrically conductive. It is then electroplated with copper; by applying cold, the original record is shrunk out, and you then have a mold, which has on its interior a perfect counterpart of the sound groove cut upon the face of the original record. We pour into that mold melted wax, or a composition that is called wax in the trade. When that is hot, it takes the impression of the mold and retains that until it sets; and as it cools it contracts, and we are then able to withdraw that from the mold, and after trimming the ends, that reproduction, that copy, is as perfect a record as the original one. If it were not so, we could not make and sell a record for fifty cents when we have to pay the singer from $500 to $1,000 or $3,000 for making the original record.

Mr. WEBB. I was going to ask, How do you get Mr. Sousa's pieces? Do you pay him for it?

Mr. CAMERON. We do not; no, sir.

Mr. WEBB. Who does?

Mr. CAMERON. The Victor Talking Machine Company has an exclusive contract with Mr. Sousa, and he gets paid for that. He did not tell you that the other day.

Mr. SOUSA. That is absolutely untrue.

Mr. CAMERON. If it is untrue I am ready to beg the gentleman's pardon. I had that information direct this morning, but I will gladly withdraw it upon Mr. Sousa's word—gladly. I do not want to make any misstatement.

Mr. SOUSA. I have never received one penny for my compositions from any kind of talking machine, nor have I ever made a contract with any of those companies.

Mr. CAMERON. I did not state that. I stated that Mr. Sousa, with his band, played into the horns of these instruments to make these records and was paid for doing it.

Mr. SOUSA. An organization known as "Sousa and his band," employed just as any other body of musicians, in which I have no part myself, plays into the instrument. That goes under arrangements made with the management of that organization to play anybody's compositions that these firms may elect; it may be a noncopyrighted piece or a copyrighted piece, or anything else.

Mr. CAMERON. I am very glad Mr. Sousa stated that. He says that he does not play his own music only, but his band stands ready to play any other man's music, copyrighted or not copyrighted, into these machines.

Mr. SOUSA. Not myself; no.

Senator LATIMER. I want to ask a question of Mr. Sousa, so as to clear the matter up a little further. The statement is that you have a band that plays into these instruments, and you, I understand, have denied that?

Mr. SOUSA. No, sir; I do not deny that "Sousa and his band," an organization known as "Sousa and his band," play for talking machines.

Senator LATIMER. Do I understand you to say that you have no connection with that band?

Mr. SOUSA. I am the director of that band, but I have no personal part in the performance of those pieces. I have never been in the gramophone company's office in my life.

Mr. MCGAVIN. Do you play for anyone else besides the Victor Talking Machine Company?

Mr. SOUSA. My manager has a contract with them for so many performances.

Senator LATIMER. You have an interest in the band and receive profit from it?

Mr. SOUSA. Yes; surely.

Mr. WEBB. You allow your name to be used all over the country?

Mr. SOUSA. In the performance of these pieces, certainly.

Mr. CAMERON. That was my charge.

Mr. HERBERT. In regard to the untruth the gentleman has stated——

The CHAIRMAN. Do you want to deny any statement that he has made?

Mr. HERBERT. Yes. In regard to this, naturally it would be inferred that it was the same case with me. In fact, he mentioned us two together. A band played into these instruments, calling itself "Victor Herbert's band," and I sued the talking machine company. That is what I got out of the company.

Mr. CAMERON. The gentleman misunderstood me. I have made no statement in regard to him, and I have no information in regard to him one way or the other.

Mr. CURRIER. He made no charge against you, Mr. Herbert.

Mr. HERBERT. Since our names have been linked all the time, I thought he intended what he said to apply to me also.

Mr. PETTIT. I would like to say to Mr. Cameron in regard to his statement about the Victor Company and Mr. Sousa, that whenever we have used Mr. Sousa's music, or rather whenever we used his band on Victor records, we always paid him for it—that is, we pay Mr. Sousa for playing.

Senator LATIMER. I want to bring out one point in connection with that. In making these records, if I understand, now, Mr. Sousa has a band that represents him, playing these pieces, and you pay for that music when you get it, or do you not?

Mr. CAMERON. Whoever employed Mr. Sousa pays for it.

Senator LATIMER. Then it is paid for when you get these records?

Mr. CAMERON. I do not wish to be misunderstood. We can take and do take one of Sousa's marches and have another band, with which Mr. Sousa is not connected, play, and we make the record; and in that case Mr. Sousa does not get any of the compensation whatever. None of that goes to him.

Mr. WEBB. But you do not advertise it as being played by Sousa's band?

Mr. CAMERON. Not at all. We advertise it as Sousa's march.

Mr. WEBB. You advertise it as a march by Sousa as a composer, but played by somebody else as the executant?

Mr. CAMERON. Yes. That is recognized as such a valuable thing to the composer, that John Philip Sousa has been to the office of the American Graphophone Company, in years gone by, with advance scores, and asked them to send them out, to advertise and help John Philip Sousa along. He will not deny it. Moreover, we are flooded to-day with artists that are struggling on the lower rounds of the ladder, that are not as high up as John Philip Sousa was a few years ago, either, begging us to do the same thing for them. I mention that to show you that even John Philip Sousa, before he got where he bestrode the musical world like a colossus, even he recognized the advertising value of the talking machine to a composer. We are not doing him such a great injury.

Mr. SOUSA. I would like to say, Mr. Chairman, that the gramophone, these talking machines, are really of very recent date. I believe the gentleman will agree with me when I say that if we go back fifteen years or sixteen years ago, we looked upon them purely as a toy. I remember the first one I saw here in this city where I was born. A gentleman had a man bark into it, and it was a remarkable thing to hear this thing bark——

The ACTING CHAIRMAN. I would suggest, Mr. Sousa, that you are taking up this gentleman's time. Unless you want to specifically deny something that he has said, or ask a question, it is hardly fair to him.

Mr. SOUSA. If I ever did allow the Gramophone Company to do it, it was because I did not think it was as important to them or to me as I do now.

Mr. CAMERON. Please do not confuse us with the Gramophone Company. It is a different thing.

Mr. CURRIER. Do you wish to deny that you are a musical colossus? [Laughter.]

Mr. SOUSA. No. I will admit that. [Laughter.]

Mr. CAMERON. One thing more in regard to the constitutional question which I mentioned. I shall submit, or the company I represent will submit, a written brief. You will be addressed on that point much more ably than I can address you by Mr. Walker, who will succeed me.

I want, in closing, however, to emphasize one fact which my predecessor, I understood, was told was unnecessary. With all deference to the chairman, who said so, I disagree with him. That is the fact that not only was the American Graphophone Company and the talking-machine interests not notified, not only were these conferences—quarterly conferences, we might call them, held in secret——

Mr. CURRIER. I think you gentlemen had better all make it clear, when you speak about these conferences, that you do not refer to committees of Congress.

Mr. CAMERON. No, sir; we do not. We refer to these star chamber proceedings, before this bill was introduced into Congress.

Mr. CURRIER. By whom? Not by anybody connected with the Congress?

Mr. CAMERON. By Herbert Putnam and the men he brought around him. That is by whom.

Mr. CURRIER. I wanted it made clear that you were not referring to any committees of Congress.

Mr. CAMERON. Every effort was made to keep us from knowing that any such bill was under way. It was not merely an act of omission, but it was an act of commission. That is not all. Not only were the American Graphophone Company not notified, but, if you will turn to the list of those present, you will find that one of those whom I have mentioned here, the representative of the Victor Talking Machine Company, at the third stage of the proceedings, was present—as what? As one of the musical publishers of the country, representing the Victor Talking Machine as one of the musical publishers of this country. See how close the association is.

The gentleman who follows me will point out that association a little closer. I think by that time the committee will realize that my suggestion of a close cooperation between the National Phonograph Works, the Victor Talking Machine Company, and the Musical Publishers' Association is well founded.

I thank you.

The CHAIRMAN. Gentlemen, we will meet to-morrow morning at 10 o'clock to hear Mr. Walker.

Mr. BURKAN. I represent the publishers and the composers. An attack has been made here, and we feel that we should get at least several minutes to answer the charges that have been made.

Mr. CURRIER. You will have some time to-morrow. We meet at 10 o'clock to hear Mr. Walker for an hour. After that you gentlemen will have an opportunity to be heard, undoubtedly.

Mr. CROMELIN. I was to appear here to-day for the manufacturers, in behalf of the talking machine interests, and was to follow Mr. Cameron. If the chairman pleases, I should be very glad to continue the first thing to-morrow morning, and let Mr. Walker follow.

The CHAIRMAN. I could not consent to that, because I understand that Mr. Walker has been notified that he will be heard the first thing to-morrow morning.

Mr. CROMELIN. I think Mr. Walker will agree to that.

Mr. WALKER. It will be quite consistent with my convenience to let this gentleman precede me for whatever time he wishes.

The CHAIRMAN. How long would you want?

Mr. CROMELIN. Probably fifteen minutes to half an hour.

The CHAIRMAN. With that understanding, Mr. Walker, he will precede you.

Mr. WALKER. Yes, sir. And I am to have an hour after that?

The CHAIRMAN. Yes.

(Thereupon the committee adjourned until to-morrow, Saturday, June 9, 1906, at 10 o'clock a.m.)

COMMITTEE ON PATENTS,
HOUSE OF REPRESENTATIVES,
Saturday, June 9, 1906.

The committee met at 10 o'clock a.m., conjointly with the Senate Committee on Patents, pursuant to adjournment.

Present: Senators Kittredge (chairman), Clapp, and Smoot; Representatives Currier, Dresser, Bonynge, Campbell, Chaney, McGavin, and Sulzer.

Mr. PUTNAM. I have one or two communications, Mr. Chairman, in effect addressed to the committee, which I offer for the record.

The CHAIRMAN. They may be inserted.

The communications referred to are as follows:

WASHINGTON, D.C., *June 8, 1906*.

The JOINT COMMITTEE ON PATENTS,
United States Senate and House of Representatives.

GENTLEMEN: On behalf of the Photographers' Copyright League of America, having participated in the conferences called by the Librarian of Congress upon the subject of a new copyright law, we beg to say that we give our hearty assent to the principles of the bill as proposed. Of course, there are minor matters which might have been otherwise drafted by us, but we as cheerfully surrender such particular items, as did many other interests represented at the conference.

Copyright legislation has for its basic principle the protection of the property of the copyright owner, and though remedies for damage are manifestly necessary, prevention of injury is the matter of highest importance to the copyright owner. Legislation which acts as a deterrent is the active principle of protection prescribed by the Constitution. For these reasons we believe the pending bill has been framed upon logical and consistent lines which, if enacted into legislation, will doubtless form precedent for other countries.

Very respectfully,

PHOTOGRAPHERS' COPYRIGHT LEAGUE OF AMERICA.
B. T. FALK, *President*.
PIRIE MACDONALD, *Delegate*.

HORACE PETTIT LAW OFFICES,
Philadelphia, June 1, 1906.

HERBERT PUTNAM, Esq.,
Librarian of Congress, Washington, D.C.

DEAR SIR: Referring to the proposed bill to amend and consolidate the act respecting copyright, a copy of which has been handed me, with your circular letter regarding suggestions, I would say that I would propose that the following clause be added continuously to the end of section 3:

"*And provided*, That nothing herein contained shall apply to sound records made or to be pressed from dies or matrices manufactured prior to the passage of this act."

That the following be added to section 18, paragraph (*b*), line 7, of said paragraph, between the word "composition" and the word "any," viz, "including any talking-machine record."

The amendment to section 3 is mainly designed to protect talking-machine manufacturers who have invested very large sums of money in records and in dies or matrices for pressing the same, many of which contain musical compositions the notation of which has been copyrighted, but which under existing laws these records do not in any manner infringe. To now take away the right to use these matrices and records, into which so much money has been put, would be very unjust and inequitable and work a great hardship upon the talking-machine manufacturers—that is, if my reading and understanding of this bill is correct. This would tie up a very large amount of capital, and place the talking-machine record manufacturers at the mercy of the owners of subsisting copyrights.

The object of the amendment to section 18, paragraph (*b*), is to relieve any doubt that records containing the characteristic articulation of the human voice, or the characteristic instrumentation by a performer, adapted for reproducing these characteristic utterances and performances to the ear are intended to be included as copyrightable matter under section 4 of this bill.

I think there will be no question but that the particular characteristic utterances of a singer, or recitationist, or of an actor, or of an orator, or the particular instrumentation of a pianist, or leader of an orchestra, etc., independent of the composition itself, whether it is copyrighted or not, should be equally entitled to protection, as a photograph or reproduction of a work of art.

It matters not whether the subject-matter of the record is otherwise copyrightable or not. If the piece played is copyrighted as a musical composition, it can not be reproduced on a sound record, in accordance with the bill, without the permission of the composer. A Paderewski, however, may play the copyrighted selection, and a record of his rendition of it, with all his personality and individuality thrown into the piece, should be entitled to a copyright on a sound record for reproducing purposes.

This is true also of the voice of a Caruso or a Melba singing either a copyrighted or uncopyrighted piece. It is true also, as a further illustration, of the recitation by Henry Irving of "Eugene Aramas' Dream." What is here copyrighted in these records is the individuality and personality of the rendition by the performer. It is the picture of the voice, or of the instrumentation, as, for instance, a copyrighted photograph is a picture of a person or thing.

Should another performer play the same piece played by a Paderewski the personality of Paderewski would be absolutely wanting, and the same difference between the two performances of the same composition would be in the respective sound records as would exist at the actual performance of the respective pieces. The same differences between Caruso's rendition of a selection from Rigoletto and a concert hall singer's rendition of the same would exist in the sound record and the reproduction therefrom as would exist in the actual singing of the selection. This is true regarding personality of every voice and instrumentation recorded.

So-called talking-machine records in this respect differ quite materially from the mechanical organ and piano, for the reason that a so-called talking-machine record is an exact record of all the modulations, and all the characteristic articulations of the voice, as well as of all the characteristics of an instrumentation. In other words, it is an exact picture of all the merits and demerits of the original, and the original is reproduced with an exactness so that frequently, at a distance, in the present perfected state of the art, the reproduction may very well be mistaken for the original.

This record of the voice and instrumentation for sound reproducing is an art which was not commercially available, or perfected, when the earlier copyright laws were passed, and therefore were not included. It is doubtless the intention of the framers of this bill to include such sound records as copyrightable matter, but in order to relieve the bill from any doubt it may properly be expressed in this section as I suggest.

Hoping that this will meet with your approval, I remain,

Yours, very truly,

HORACE PETTIT.

THE PLAYWRIGHTS LEAGUE CLUB,

New York, N.Y., June 2, 1906.

LIBRARIAN OF CONGRESS, *Washington, D.C.*

DEAR SIR: We are in receipt of your favor of the 31st ultimo, with copy of proposed copyright law. After careful consideration the provisions of this law seem admirably suited to the purposes, and its framers deserve great commendation.

As circumstances do not permit my attendance at the hearings, I would consider it a favor if you would read this letter to the committee, if not all of it, then the portions which may not be referred to at the hearing, should anything herein referred to fail to be considered. The latter paragraphs of the letter are especially brought to your attention.

In section 1, subdivision C, provision is made for the protection of an "oral delivery" which has been prepared. Would it not be well to specifically allow a speaker to announce at the conclusion of an extemporaneous address his intention of copyrighting it, not permitting this announcement, however, to interfere with the liberty of the press in reporting portions of it?

Section 9 directs that notice of copyright shall be given at each public delivery of a lecture or similar work. Does "similar work" include dramatic composition? Is the proposed notice to be given orally, or by publication on a programme, if there is a programme? It would seem that in the case of a dramatic composition theatrical managers should be compelled by law to print on each programme copyright notice of the play or plays produced, being allowed, where there is no programme, to announce it orally.

It would also seem important that in the case of a dramatic composition publicly acted in foreign countries notice of copyright in the United States, together with legal title of the work in English, be printed on the programmes, as well as on the manuscript copies of the play. This would serve as a notice against translators, who otherwise would have great difficulty in finding out whether a foreign play had been copyrighted here, since the name of the play or its English equivalent rather, would be very uncertain. Does the new law specifically require all titles to be also in English?

Does the law provide for the registration of the title in advance of the deposit of copies as at present—a valuable privilege?

Section 20 seems calculated to work an injustice to novelists. That the author's exclusive right to dramatize his copyrighted work should cease in the event of his being unable within ten years to induce managers to produce his dramatization would be unfair—would, in fact, encourage producers to wait until after ten years before producing a dramatization of a novel. Would it not be sufficient to state that the exclusive right terminates at the end of ten years provided the author does not file at least an unpublished dramatized version?

Does this section 20 mean that a foreign dramatist who deposits an unpublished and untranslated copy of a dramatic composition loses his rights if his play is not produced publicly in ten years, or does it allow him to deposit a translated unpublished copy any time within ten years, in order to protect his rights?

Section 45 might be profitably augmented by including the privilege of allowing an author who writes under a pen name to print the notice of copyright also under the same pen name. This would be a considerable privilege, since at present he must go through the complicated process of assigning his copyright to another if he does not wish his real name to appear. In his claim for copyright he could state both his real name and his pen name in which he wished the copyright to appear. This would work injustice to no one and would be a great convenience to authors whose real names are of an uninspiring nature.

This section 45 might also contain a provision allowing an author to change the title of an unpublished work without deposit for further copies, provided he paid a fee, since almost every unpublished play is renamed. The duplication of copies of the same work under different titles is of no service to the copyright office and is frequently an expense to authors. The production of a play under any other than its copyrighted title should invalidate the copyright.

The requirement of section 60, raising the copyright fee from 50 cents to $1, will work a real hardship to many writers, particularly those who write short plays for vaudeville and have a hard time to make a living, to those who write many plays without ever securing any returns, and to the writers of words of songs, whose work is apt to be stolen unless copyrighted and who receive a very small compensation in any event, as a rule. We would strongly recommend that for unpublished works and short articles in periodicals especially copyrighted and for photographs the fee be held at 50 cents, or even reduced to 25 cents.

Upon the enactment of the new law the copyright office will receive from the dramatic writers a great many more works than are at present offered, owing to the unsatisfactory condition of the existing law. The number of dramatic compositions offered will also be greatly increased by the favorable fact of the omission on the notice of copyright of the year. At present the author of an unpublished play must state the year of his copyright on his title-page, and as it is often ten years or more after a play is written before it secures a production, this telltale date proves a great drawback in submitting the play to

managers, and therefore many authors prefer to run the risk of losing their plays rather than to affix this hall-mark of antiquity. The prospect of this increased revenue should be sufficient to induce the makers of the law to reduce the copyright fee on unpublished works.

I should recommend also that a specific clause be added making it a misdemeanor to copy from an unpublished manuscript any portion without authority, or to be found in the possession of an unpublished copyrighted manuscript or parts thereof without authority. This would correct two grave abuses, one, the stealing of an author's ideas and dialogue by a manager to whom the play might be submitted, and the second, the stealing of manuscripts after a play is produced. One bureau openly advertises and continually sells for a few dollars manuscripts of produced plays, and the sale of such manuscripts enables infringers to deprive authors of great sums in royalties. The adoption of such a section as this will, of course, be sharply contested, but there is absolutely nothing inequitable in it for any person not intending fraud.

It might also be well to deny the privilege of copyright to authors who allow their plays to be publicly performed without first securing a copyright.

I trust that none of these suggestions will be taken as a criticism of the proposed law, which will confer great benefits upon and will greatly stimulate native art, but I am confident that the importance of some of the proposed additions and the convenience of others will at once be seen.

Allow me to thank you for your courtesy in sending us the copy of the proposed law, and to request the favor of any further matter which the copyright office may have to issue upon the subject.

Yours, respectfully,

THE PLAYWRIGHTS LEAGUE CLUB,
By EDWIN HOPKINS, *President*.

BRIESEN & KNAUTH, COUNSELORS AT LAW,
New York, June 8, 1906.

REGISTER OF COPYRIGHTS,
Library of Congress, Washington, D.C.

SIR: On behalf of a number of clients, who are interested in the new copyright bill, we respectfully beg to suggest that in order fully to carry out the broad purpose of the framers of the bill, the bill should be amended substantially as shown in the accompanying draft amendment.

The bill as it now stands does not provide for the registration, by means of one entry, of a great many works of literature or art which from necessity are printed on detached sheets.

Section 60 of the bill provides that several volumes of the same book or a series of photographs, drawings, etc., relating to the same subject—with variances only in pose or composition—may be registered for one fee. But a connected series of instruction carded for educational use, a series of color prints to be used on toy building blocks, sliced animals, games of authors, and other card games are protected. There is no doubt that a new game, such as pit, flinch, etc., should be copyrightable as a unit, whether with or without rules for instruction, in such a manner that all the artistic work and literary work may be fully covered by copyright, although the items of the series are not physically connected, and are not each provided with separate copyright notice.

While the experts in charge of the bill may be able to phrase this purpose in words more apt than those contained in the proposed amendment, there is no doubt that it is the intention of the framers of the bill to include the articles referred to in this letter, and also that the bill as it now stands does not cover such articles.

Respectfully,

BRIESEN & KNAUTH.

Proposed amendments to bill S. 6330.

Section 5, page 4, after line 7 insert "(m) Miscellaneous."

Line 12, change period to colon, and add:

"*And provided, furthermore*, That a series of copyrightable works, assembled for a unitary purpose, shall be considered as the subject-matter of a single copyright registration, fee and notice should the applicant elect, whether or not the items comprising said series are actually joined by binding or otherwise."

Section 60, page 38, line 15, change period to comma, and add: "or of a series considered as the subject-matter of a single copyright registration as provided for in section 5 of this act, where the items composing it are deposited at the same time under one title with a view to single registration."

Mr. Chairman, I ask leave to interpolate a word to the group of interests adverse to these "musical-device" provisions of the bill. I say it for the Government. And in order to avoid a syllable more than is necessary I have written it.

The reasons, gentlemen, why your group was not invited to the conferences were made plain in my opening statement. First, the conference was a conference of associations, and your interests are not organized into an association. But, second, the conference was to be particularly of those interests concerned "in an affirmative way"—that is, in amplifying the copyright protection; and your interests are negative. We quite anticipated the issue raised by these provisions, but it was not an issue which seemed appropriate to the conference nor for other reasons one likely to be settled by the conference.

Mr. Thomae represented that his interests might in one aspect be affirmative also and asked to hear the discussion. He was permitted to. He was not invited; he did not participate; he uttered not a word in the course of the entire proceedings. But he asked to come and listen, and he was permitted to. On the list of the few others present as observers you will find the name of Gen. Eugene Griffin. General Griffin came to us in March saying that he understood some such provisions as these were under consideration; he had some interest in a concern which would be affected; could he attend the conference and hear what was proposed? Certainly. And he did. Mr. Thomae was to us but the maker of a particular typical device. With Mr. Thomae as a competitor among you we had no concern. What device or company General Griffin was interested in we did not know and I do not know to this day. But we took care to insert the names of both gentlemen on the printed list of those present, so that you and others might be free to make such inference as you chose from the fact of their presence. And this list was furnished freely to all requesting it.

These conferences have been going on for a year past. The fact that they were being held, their purpose, and the associations participating in them was freely published. Among these associations were the composers and the music publishers. In the Apollo suit then pending they were trying to secure protection of this sort under existing law. There was every reason to suppose that they would urge it in the new statute. Did any of you ever inquire of us whether they were doing so? As long ago as last December the President announced to Congress, and in the most public way to the country, that the bill had already been prepared. Did you ask us for it? Did you even ask whether such a bill would be likely to include any such provisions? As long ago as January the music trade journals began to refer to the fact that it would do so. Did you then ask leave to come to the next conference? Did you ask even as to the character of the provisions? Did you communicate with the Copyright Office in any way in the matter? You know you did not.

The fact that you did not is not to prejudice you in any way, and the fact that you did not participate in the conferences I have myself emphasized to the committee to your advantage, pointing out that these provisions had been inserted without discussion at the conferences by any interest naturally adverse to them. The fact is to your advantage. I earnestly suggest that you avoid giving it a twist such as Mr. Cameron gave it yesterday; I mean by such expression as "star chamber proceedings." We can't let such imputations against the Government stand uncorrected. But we hate to have to divert attention from the main issue in order to correct them. The main issue is the merit of these provisions. We are as anxious as is the committee to know your substantial objections to them. And our interest is absolutely identical with that of the committee in seeing that the objections you show shall have due value and effect.

(The following letter was subsequently written by Mr. Putnam, and by direction of the chairman made part of the record:)

JUNE 16, 1906.

Messrs. CHAIRMEN: In my remarks to the representatives of the talking machine and perforated roll interests at the hearing of June 9 I stated that Mr. Thomae had not been "invited" to the conferences. Of course he was invited or he could not have attended. What I meant was that he was not among those originally invited or in our list of those naturally entitled to be present.

I had thought the distinction sufficiently clear from the context; but I find that it was not.

The chief purpose of my reference to him and to General Griffin was not, of course, to excuse or explain their presence, but to indicate how readily access to the conference could be secured by a request to the copyright office.

Very respectfully,

HERBERT PUTNAM,
Librarian of Congress.

The CHAIRMEN OF THE COMMITTEES ON
PATENTS OF THE UNITED STATES SENATE AND HOUSE OF REPRESENTATIVES.

Mr. CURRIER. I wish to say that last winter some time Mr. Griffin, who is interested in one of the perforated-roll concerns, called at the committee room and talked about this matter, and I advised him at that time to see Mr. Solberg and Mr. Putnam. The committee clerk has had some

correspondence with him since that time, and other gentlemen connected with that same business, I suppose, have been into the committee room to make inquiries regarding this matter pretty nearly every week for months.

Mr. CAMERON. I would like to say that I do not even know who Mr. Griffin is.

Mr. CURRIER. He is the vice-president of the General Electric Company. I think he lives in Brooklyn and is connected with some perforated-roll company.

Mr. CAMERON. I wish to point out that the remarks that I made were in connection with the American Graphophone Company and the automatic talking machine, and not the perforated-roll business. That is the matter that is involved in these suits, not the talking machines.

Mr. BURKAN. Mr. Griffin represents the Edison Company, and they manufacture talking machines.

Mr. DAVIS. Mr. Griffin does not represent the Edison Company, and he is a director of the Perforated Music Roll Company, who operated under my patents. General Griffin is now in Europe, and this notice which I referred to yesterday, in which I stated that notice was given me that my license would be canceled in case this bill passed, came from Mr. Henderson, the acting manager of the Perforated Music Roll Company, on behalf of General Griffin and other directors.

Mr. Henderson notified me that the passage of this act would put them out of business. He also stated to me that General Griffin had stated to him that he attended these conferences, and that he considered them logrolling proceedings, and that in time he would take action to oppose them. But at present General Griffin is in Europe. I am sure, from his remarks, that he would oppose this measure in the strongest possible way.

Mr. CURRIER. I have no doubt that he would. He gave me so to understand.

Mr. CHANEY. I think it is due to this record to say that the ultimate responsibility about this whole matter rests with Congress, and that these matters are all simply advisory, to help us to the proper conclusion and result, and that none of these gentlemen are going to be deprived of an opportunity to express themselves in whatever way they please, and to say whatever they may have to say, and that, so far as we are concerned, there is no star-chamber proceeding about it, and no logrolling business about it. We are here simply to get advice the best we can, and therefore we shall undertake to hear everybody.

The CHAIRMAN. Mr. Chaney is entirely right. The sentiments that he has expressed have been freely stated by the committee during the past three or four days that we have been in session. The committees of the Senate and the House are willing, and will be willing, to hear anyone who has objections to or who is in favor of this bill at any time within any sort of reason. It seems to me that it is to little purpose, so far as the committees are concerned, that there should be any controversy between anyone regarding the past. Who is the next witness?

Mr. CURRIER. I might say that it was for that reason that both committees decided to make no effort to report this bill at this session, but to let it go over until next winter, in order that people could have an opportunity during vacation to file briefs and such statements as they might desire to offer.

The CHAIRMAN. That is the precise purpose of the statement made by Mr. Currier in behalf of the House committee at the first session or the second, and by myself in behalf of the Senate committee.

Who is the gentleman that desires to be heard further?

Mr. PUTNAM. Mr. Cromelin.

The CHAIRMAN. You have how many minutes?

Mr. CROMELIN. I understand that I have half an hour.

The CHAIRMAN. You were limited, two days ago, to one hour for your enterprises. Mr. O'Connell had a little over an hour, and I am told that after I was compelled to leave for the Senate yesterday somebody representing these interests had fifteen minutes. We will give you fifteen minutes, with the privilege of submitting in writing any further statement that you desire to make.

Mr. CURRIER. It is necessary to do that, for the reason that two gentlemen are on the way here from Chicago who want to be heard this morning, representing the same interests that you represent.

Mr. SERVEN. I present, Mr. Chairman, a letter from the chairman of the copyright committee of the Music Publishers' Association, explaining how Mr. Thomae, who was criticised yesterday as being one of their delegates, came to have a seat with them in the conferences. It occurred to me that it would save time to have it read for the information of these gentlemen.

The CHAIRMAN. You may put it in the record.

(The letter referred to is as follows:)

The Chairman of the Joint Senate and House Committees on Patents.
Washington, D.C.

Dear Sir: I beg to make reply to an accusation against the Music Publishers' Association of the United States yesterday by the manufacturers of mechanical perforated music rolls, cylinders, and disks, in which they claimed our association had corralled into its ranks, by promise and contracts, the Victor Talking Machine Company, of Camden, N.J. They further claimed that the Librarian of Congress had made no attempt to seek them out and give them representation at the various conferences he had called for the purpose of securing suggestions from organizations of authors, composers, and others interested in receiving copyright protection for their productions.

I beg to state that the copyright department during the interim between the first and second conferences conferred with me and asked if the talking machine and music roll manufacturers had an organization. I replied that I did not know but would inquire about it. About that time I met Mr. R. L. Thomae, a representative of the Victor Talking Machine Company, who had just drafted a bill with the view of presenting it to Congress, for protection on musical compositions for which his company had secured the right, having expended about $35,000 for well-known artists who had sung in the records for them. They wanted protection from the pirates in their own business from copying such valuable subjects. As a result of our talk Mr. Thomae decided to drop the bill and secure protection in the new copyright draft which was then being formulated.

Mr. Thomae and myself made a trip to Washington, called on the copyright department, and it was agreed, in view of the fact that the talking machine people had no organization, that the delegates from the Music Publishers' Association should be increased from two to three, provided the third member was some representative of the talking-machine interests. After conferring with the president of the association it was decided to do this, and Mr. Thomae was selected as such representative. We believe that the talking machine people should have as good protection as ourselves on their original or characteristic works embodying the personalities and instrumentation of their artists, bands, orchestras, etc., employed by them.

We hereby declare that the Victor Talking Machine Company has no contracts of any kind whatsoever with any member of the Music Publishers' Association of the United States in regard to any future purchase for use of compositions belonging to us. This statement will explain in detail how the Victor Talking Machine Company came to be associated with the Music Publishers' Association in the copyright conferences held to aid in drafting the bill here under consideration. All statements to the contrary are not substantiated by the facts.

On behalf of the Music Publishers' Association of the United States, whose list of members is attached, I beg to remain,

Sincerely, yours,

George W. Furniss,
Chairman Copyright Committee.

Members Music Publishers' Association, June, 1905 to 1906.

Allbright Music Company, Chicago, Ill.
Anthony Brothers, Fall River, Mass.
Ascher, Emil, 24 East Twenty-first street, New York.
Biglow & Main Company, 135 Fifth avenue, New York.
Bloom, Sol, Forty-second street and Broadway, New York.
Boosey & Co., 9 East Seventeenth street, New York.
Bouvier, A. J., Fall River, Mass.
Chandler-Held Company, 439 Fulton street, Brooklyn, N.Y.
Ditson, Chas. H., & Co., 867 Broadway, New York.
Ditson, J. E., & Co., Philadelphia, Pa.
Ditson, Oliver, Company, Boston, Mass.
Ellis, Jno. F., & Co., Washington, D.C.
Feist, Leo, 134 West Thirty-seventh street, New York.
Fischer, Carl, 6 Fourth avenue, New York.
Fischer, J., & Bro., 7 Bible House, New York.
Frain Publishing Company, 20 West Fifteenth street, New York.
Francis, Day, & Hunter, New York.
Goggan, Thos., & Bro., Galveston, Tex.
Gordon, H. S., 1241 Broadway, New York.
Groene, J. C., & Co., Cincinnati, Ohio.
Hald, J. R., Company, 337 Wabash avenue, Chicago, III.
Harms, T. B., Company, 126 West Forty-fourth street, New York.
Harris, Chas. K., 31 West Thirty-first street, New York.
Haviland, F. B., Publishing Company, 125 West Thirty-seventh street, New York.
Jacobs, Walter, 165 Tremont street, Boston, Mass.
Lyon & Healy, 199 Wabash avenue, Chicago, Ill.
Mills, F. A., 48 West Twenty-ninth street, New York.

Molineux, Geo., 150 Fifth avenue, New York.
Novello, Ewer, & Co., 21 East Seventeenth street, New York.
Parks, J. A., Company, York, Nebr.
Paull, E. T., Music Company, 46 West Twenty-eighth street, New York.
Remick, J. H., & Co., 45 West Twenty-eighth street, New York.
Rohlfing Sons' Music Company, Milwaukee, Wis.
Schmidt, Arthur P., 146 Boylston street, Boston, Mass.
Schuberth, E., Company, 11 East Twenty-second street, New York.
Sherman, Clay, & Co., San Francisco, Cal.
Stern, J. W., & Co., 34 East Twenty-first street, New York.
Summy, Clayton F., Company, Chicago, Ill.
Swisher, M. D., 115 South Tenth street, Philadelphia, Pa.
Thiebes-Stierlin Music Company, St. Louis, Mo.
Thompson, C. W., & Co., 13 West street, Boston, Mass.
Thompson Music Company, 169 Wabash avenue, Chicago, Ill.
Vandersloot Music Company, Williamsport, Pa.
Victor-Keemer Company, Chicago, Ill.
White-Smith Music Publishing Company, Boston, Mass.
White-Smith Music Publishing Company, Chicago, Ill.
White-Smith Music Publishing Company, 13 East Seventeenth street, New York.
Whitmark, M., & Sons, 144 West Thirty-seventh street, New York.
Witzmann, E., & Co., Memphis, Tenn.
Wood Music Company, The B. F., Boston, Mass.
York Music Company (A. von Tilzer, manager), New York.

STATEMENT OF PAUL H. CROMELIN, ESQ.

Mr. CROMELIN. Before proceeding, I would like to make this point clear: That Mr. O'Connell yesterday, in appearing before your committee, was representing the perforated-roll interests. I represent the talking-machine interests, which means more in dollar capitalization than the perforated-roll interests. I trust, while I shall endeavor to finish my remarks in fifteen or twenty minutes, that if General Walker is willing, you will extend my time to half an hour.

The CHAIRMAN. We are compelled to limit you absolutely to fifteen minutes.

Mr. CROMELIN. Very well, sir.

Mr. Chairman and gentlemen of the committee, on behalf of the Columbia Phonograph Company and the Columbia Phonograph Company, General, sole sales agents for the American Graphophone Company, I protest against those portions of the proposed copyright law by which it is proposed to extend the copyright protection to reproductions to the ear, so as to include under the term "writings," as this term is used in the Constitution of the United States in the protection of authors and composers in their writings, mechanical or other reproductions to the ear; and, in particular, in so far as this bill may be construed to cover talking machine sound records in any form soever.

In view of the fact that you are going to limit me to fifteen minutes, I think it best that I should state specifically my reasons for opposing this bill, and I have put them down in writing. I have fifteen specific reasons, and I would request that during the time I am stating these reasons I shall not be interrupted. I invite the committee at the conclusion of my statement of these specific reasons to ask any questions they wish, and I request permission to appear before the committees at some future time, during the recess of Congress, to explain in detail all the statements that are made. Without attempting to elucidate, gentlemen:

First. We protest that such legislation, in so far as it relates to talking machine sound records of any kind, is unconstitutional.

Second. That such legislation is against public policy and directly contrary to the spirit and progress of the times.

Third. That the demand for such legislation does not emanate from the great mass of the musical authors (composers), nor is it demanded by them, but has been conceived by certain selfish individuals who have conspired together to form and create a giant monopoly, the like of which the world has never known.

Fourth. That such legislation, instead of being in the interest of the composers, is directly opposed to their real interest, which is to have the greatest possible distribution of such records as the best means for creating a demand for their sheet music. Abundant evidence can be furnished to sustain this fact, if desired.

Mr. CURRIER. It is desired.

Mr. CROMELIN. Fifth. That it is class legislation in the interests of the few as opposed to the enjoyment and happiness of the masses, whose rights seem regularly to have been lost sight of during its preparation, and that it is particularly vicious when the rights of the poor are

considered.

Sixth. That in so far as the question of copyright must of necessity be viewed from an international standpoint, it is inadmissible, intolerable, and distinctly un-American to grant to foreign composers the right to extract toll from every American citizen where such right is denied such foreigner at home in his own land and is denied to American composers abroad.

I hope during the recess to explain my connection with this matter. I was the representative of my company in Berlin, Germany, for four years, and had occasion to appear in this very matter; and I want to warn you gentlemen against what happened there. I trust that freedom will be given to all mechanical musical instruments and that no Æolian monopoly will be able to tack on a provision which will give them perforated-roll rights and exclusive rights. I propose to show that this monopoly is not of a national character, but the attempt to create it is an international conspiracy.

Seventh. That such legislation is directly contrary to all recent legislation in foreign countries, the most important of which is the act of the German Reichstag in 1901, by which perfect freedom is given to use copyrighted works for the purpose of mechanical reproduction; and by which, by reason of an interpretation announced by the minister of justice prior to the third reading of the bill, the right to record and reproduce any copyrighted work by means of talking machines was expressly permitted.

Eighth. That such legislation is contrary to the spirit of the Berne convention.

Ninth. That in no other country is substantially like protection afforded to composers, but that such protection has been universally denied.

Tenth. That even if such rights were granted under the laws of Great Britain, Germany, France, Belgium, and other countries, which they are not, it is beyond the power of Congress to do other than that which it is expressly permitted to do under our Constitution, and the only way by which such a law could be enacted which would stand the test of the highest court of judicial inquiry would be by an amendment to the Constitution of the United States. On behalf of my company, I protest against being plunged into such long and expensive litigation as would necessarily ensue if this bill becomes a law, unless the necessity for the same is urgent, and this I emphatically deny.

Eleventh. That such legislation is in direct contradiction to all recent judicial decisions on the subject in this country and abroad in which common law rights and statutory rights of authors and composers, their scope, extent, intent, and purpose have been discussed, the most noted of which in this country is the decision handed down by the United States circuit court of appeals, second circuit, during the last week of May, in the Æolian suit against the Apollo Company, Judges Lacombe, Townsend, and Coxe, without a dissenting voice, approving and upholding Judge Hazel's opinion rendered in the court below sustaining the contention that the perforated roll is not a violation of the copyright, and it is interesting to note that the court went out of its way to say:

> The argument that because the roll is a notation or record of the music it is, therefore, a copy would apply to the disks of the phonograph * * * which it must be admitted is not a copy of the sheet music.

In England the same position is taken by the courts, the leading and most recent case being Boosey *v.* Whight, in which it was clearly held that the perforated roll was not a violation of the copyright. In Belgium, by decree of the fourth chamber of the court of appeals in Brussels, December 29, 1905, in the case of Massenet and Puccini, composers, *v.* Ullman & Co. and Pathe Frères, manufacturers, in dismissing the suit, with costs, the court uses this language—I want to say to you, gentlemen, that this was a graphophone case:

> Considering that these apparatus can not be assimilated to the writing, or the notation by an engraving process, of the thoughts of the author; that they have nothing in common with the conventional signs permitting reading or comprehension of the work to which they are related; that isolated from the rest of the instrument they remain in the actual state of human knowledge, without any utility, that they are only one organ of an instrument of execution.

In dismissing the suit the court referred to a similar suit decided in France February 1, 1905, in which it was confirmed that—

> airs of music on disks or cylinders of graphophones and gramophones do not constitute a musical infringement.

Twelfth. That the proposed legislation in so far as relates to mechanical reproductions is in furtherance of the plans of certain powerful interests to obtain a monopoly—an international monopoly—on mechanical reproducing instruments of all kinds, and that they are attempting to use the legislative branch of the Government to secure that which has been repeatedly denied

them by the courts.

Thirteenth. That it is vicious, in that if it is permitted to be enacted into law it will deal a deathblow to great American industries which have been extended until now they embrace all countries, and in which millions of dollars have been invested in the knowledge that the right to manufacture was perfectly lawful and that the right to continue such manufacture, unhampered by such ruinous conditions as would be imposed by this bill, could never be brought into question or become the subject of serious dispute.

Fourteenth. That if this bill becomes a law it will seriously affect the rights of thousands upon thousands of American citizens who have purchased these machines and who have the right to expect to continue to use them and to obtain the supplies for them at reasonable prices instead of paying tribute to a grasping monopoly.

Fifteenth. And finally, that whatever arguments may be advanced by the association of musical publishers (and their allied interests, whose representatives framed the bill, and who, if it becomes a law, will get 99 per cent of the benefits to be derived therefrom), regarding other methods of mechanically producing sound on the theory that the same constitutes a method or system of notation and under certain conditions may be read by persons skilled in the art, under no circumstances can such arguments be truthfully advanced to cover or apply to talking machine sound records.

No man living has ever been able to take a talking-machine record and by examining it microscopically or otherwise state what said record contains. In this sense it stands preeminently in a class by itself, being unlike perforated rolls, cylinders containing pins, metal sheets, and other devices used in mechanical production of sound, and is not to be likened in any manner to the raised characters used in methods of printing for the blind, where by the sense of touch the meaning is intended to be conveyed. The sense of touch is a mere incident due to the disability of the blind, but it is perfectly feasible and easy to read the characters with the eye, and they are very properly the subject of copyright. I repeat, that to attempt to decipher a phonograph disk is in the very nature of the proceeding "reaching for the impossible." How utterly preposterous and ridiculous it would be to pass this act in its present shape, which would make a telegraphonic sound record, which is something that can not even be seen—the record itself being caused by the magnetization and demagnetization of an electric current of an ordinary piece of wire or a cylinder or disk of steel—a violation of the copyright laws.

You have seen several examples, gentlemen, of methods of reproducing sound. Mr. Cameron showed you yesterday the disk form of talking-machine record. [Exhibiting disk.] That record, if you were to examine it under a microscope, is an engraving of the sound, which is produced by a method wherein the sound waves are engraved laterally at a uniform depth.

Another form is the cylindrical record. Mark you, gentlemen, our company is the only one on earth that manufactures both forms. We are vitally interested in this legislation. In the cylindrical record the cut is of uneven depth. It is an up-and-down cut.

There are other methods, and one or the most important discoveries of the age—a discovery which was considered of so much importance that at the St. Louis Exposition of 1904 it was given great prominence in the Government exhibits—is the telegraphone.

I have here a record [exhibiting record] and I would like to ask Mr. John Philip Sousa if he can recognize "The Stars and Stripes forever" upon it. I would like Mr. Bowker, who stood up yesterday and said that he could read the music roll—which I emphatically deny—whether he recognizes an address of Mr. Victor Herbert upon this form of record [exhibiting record]?

I doubt very much whether these persons who have come down here for the purpose of putting through this legislation have ever seen this thing. They do not know what it is, even. That is the sound record. I do not know what it is. Nobody knows what it is until you put it on the machine. Yet it can be reproduced indefinitely, and it can be destroyed by that peculiar power which we know not, because no one knows at the present time what electricity is. I want to tell you what you are doing: When you pass this bill and make it a law, you make that piece of steel copyrightable [indicating]. You make this record spring copyrightable. You do not see anything on it. Look at it closely. There is nothing but a magnetic current—an electric current—by which the sound is actually recorded and can be reproduced indefinitely. I regret, gentlemen, that I am not able to show you; and I hope at the sessions of Congress, or during the recess, to personally demonstrate what I am bringing to your notice this morning.

There is one other point I would like to bring to the attention of you gentlemen, and that is this: That in the cylindrical form of talking machine it is not necessary for the manufacturer to make the roll. In every other mechanical instrument which has been referred to here the process is a factory process; but, as I am speaking, the very words that I am uttering are being taken down by Mr. Hanna, and in less time than an hour these words will be transferred to a graphophonic record; and by that means to-morrow morning you will get your printed record. For fifteen years the reports of the House of Representatives and the Senate of the United States have been prepared in this manner. And now, when you make this bill a law I can not, notwithstanding the

fact that I have purchased a piece of music of Mr. Herbert, take that which I have purchased and sing it into my machine at all. It is impossible to do so. I wish to draw this fine distinction, and show you that in the cylindrical form of talking machine it is not a mechanical operation which is done in a factory, but that it is an instantaneous form of photographing the voice. I would like to have a notation made of that.

You have limited me as to time, but before closing I want to show you what the practical operation of this bill would mean.

The CHAIRMAN. Your time has expired.

Mr. CROMELIN. May I have just one moment?

The CHAIRMAN. You may have one minute more.

Mr. CROMELIN. I would like to show you the point of the multiplicity of royalties. Under this law I go down to John F. Ellis's and buy a sheet of music composed by Mr. Victor Herbert. I pay the royalty at the time that I buy that music. I am a singer and I want to sing it. I go to a talking-machine company; but no, I do not dare. I must seek Mr. Herbert. And he says: "You are going to make a big sum on it, and you must pay me $25." I pay him $25, and I go to the talking-machine company and the company does not dare to proceed. They must first seek Mr. Herbert. Mr. Herbert says: "You are going to make a lot of money out of this; I want $100 before you can make the record." We pay that for the record.

I do not know when I get the record whether I am going to get a thing. It goes through a factory process, which costs me another hundred dollars, and then the record is made. I am about to announce the record to the people of the United States, and to give them the privilege of hearing it. What happens? No; I do not dare to do it. Every American has to pay tribute to Mr. Herbert. Before I can sell those records Mr. Herbert must get a royalty of 10 per cent on every one of them. I do not believe it is the meaning of the Constitution to do this.

Let us go one step further. At a recent banquet in Portland, Oreg., of the "Ad. Men's Association," by arrangement with the telephone company, over the seat of every person who participated in that banquet there was a little horn attached to the telephone, and there was a Columbia graphophone at the central office. But if this bill becomes a law the telephone company would not dare do that. They would not dare give the people in the country the privilege of an evening's entertainment, where they can not get to the big cities, without first arranging with Mr. Herbert. Mr. Herbert would say: "No; you can not do this. I want a hundred dollars' profit before you do that." After you have done it, everybody who pays a toll of 5 cents for an evening's entertainment to the telephone company pays its tribute to Mr. Herbert. I do not believe that that is the intention of you gentlemen.

I regret that I am so much limited as to time, and I hope to appear before you during the summer session, as I believe that I can throw some new light on the situation.

Mr. CURRIER. You gentlemen speak of the committee holding sessions during the summer season. The House has no such authority. The members of the House are likely to have a very busy season, and it will be impossible to get the House committee here during the summer. But the House committee will be here on the first Monday in December, ready to hear you gentlemen.

Mr. CROMELIN. I thank you very much for your attention.

Mr. CHANEY. In the statement that you submit I would like to have you make it specific as to which sections you object to, and make your argument apply to those sections.

Mr. CROMELIN. I shall be glad to do that.

Senator SMOOT. And let it follow your remarks in the record?

Mr. CROMELIN. Yes, sir.

STATEMENT OF ALBERT H. WALKER, ESQ., OF NEW YORK.

Mr. WALKER. Gentlemen of the committee, I sincerely thank you for the compliment implied in giving me an hour in which to express my views upon this bill. The allowance is liberal, and it will not be extended except at the request of the committee. My hour will be an hour of sixty minutes, and my remarks will end at twenty minutes before 12, if they end in the middle of a sentence.

I do not appear in behalf of any particular interest, although I have one client which is interested in one section of the bill. I do not propose, however, to address myself particularly to the interests of that client. I do propose to address myself to the bill as a whole.

I think that the gentlemen who prepared this bill are to be thanked by the committee, and by the people of the United States, and by everybody else, for the large amount of labor which they have devoted to the preparation of that proposition for legislation. I particularly desire to express my

personal appreciation of the labors of Mr. Putnam—his entirely disinterested and very skillful labors in the preparation of the bill.

We have had copyright laws in this country now for exactly one hundred and sixteen years, and none of them have been scientific; none of them have been systematic; none of them have been well developed. It is high time that the whole system of legislation upon the subject should be put upon a scientific basis and should be developed in a scientific form. This bill is a sincere attempt to accomplish that result. It contains a number of provisions which I heartily approve. It contains much that I think ought to be amended. I trust that out of this bill, and before the end of the present Congress, a bill will be evolved which will be enacted into law, and which will be just as to all parties and of very much benefit to the American people, and of benefit to the composers and the authors, who are the particular subjects of the bill. I believe, however, that before that result is accomplished extensive amendments must be made in this bill.

I am going to devote the first ten minutes of my time to stating the principles upon which I think those amendments ought to be framed, and after that I am going to apply those principles to portions of the bill, to show what changes would result from the application of those principles to the bill. In order to say what I intend to say on the subject of principles, it will be necessary for me to indulge in a few moments of historical statement.

When the scholar looks over the civilizations of history, he finds only one principle that pervades them all, and that principle is the principle and idea of the continuity of private property. China, Greece, Rome, Babylon, Nineveh, Judea, Egypt, England, Germany, Russia, the United States are all pervaded, as Japan is, by the notion of the continuity of private property. And when I speak of the continuity of private property I mean its continuous continuity, its hereditable character, its passing down from father to son, from age to age, and from generation to generation.

My good friends Victor Herbert and John Philip Sousa, men whom I respect personally as well as professionally, are basing their desire for the passage of this bill upon the notion which they have that that idea of the continuity of private property inheres in their intellectual productions; and there is exactly where my brothers are mistaken.

I am myself an author. I am an author of books and writings. A hundred of them probably have been published. I am the author of a very large number of addresses, which have been delivered without writing, on religious, historical, economic, legal, scientific, and miscellaneous subjects; but I know, as well as I know any proposition in history or in law, that I have not any element of private property in any of those intellectual productions, in the sense in which I am defining private property, namely, with the idea of continuity.

Why is that so? It is so because from the foundation of the world until now there never was a nation and there never was a day when the idea of the continuity of private property was connected in the minds of men with intellectual productions. England has developed the idea of private property more fully than has any other nation; and England never ascribed the idea of the continuity of private property to any intellectual production, either for an invention or for a writing. To this day no man has a right in England to a patent on an invention, and never has had. The granting of any patent on an invention in England is dependent entirely upon the pleasure of Edward the Seventh; and the patents themselves, when granted, each one of them sets forth that fact, and states that Edward the Seventh thinks on the whole that it will benefit the realm to grant this patent, and proceeds to grant it. But if Edward the Seventh and those who represent him choose to decline to issue a patent in pursuance of any particular application they can do so in entire conformity with the laws of England.

In respect to the protection of private property relevant to intellectual productions in the domain of books or musical compositions, this is the history in England: Prior to the time of Milton nobody had a right to publish anything in England without the permission of the Crown, and that permission was granted or refused, not with reference to the deserts or the merits of the author or the composer, but with reference to the opinion of the Crown as to whether or not the published thing would be beneficial or not beneficial to the public interests. And the Crown usually identified the public interests with the interests of the Crown, so that it suppressed what it desired to suppress and permitted to fly what it desired to be published.

At the time of the Commonwealth publication became free and was free, but there was still no notion of any exclusive right to publish a particular literary or musical composition inhering in the author of that composition; and that right never did begin and never was heard of in England until the reign of Anne, when Parliament passed a statute establishing such a right for a limited time.

In 1769 a copyright which had been issued under the statute of Anne had expired, and the owner of that copyright determined to test the question in the English courts as to whether or not there was a perpetual right of copyright under the common law of England, regardless of the statute of Anne, and the owners of that copyright brought suit for its infringement after the term established by the statute of Anne had expired; and the question whether such a common-law right existed or not came before the court of king's bench when Lord Mansfield was chief justice of that court. The court of king's bench decided, as an academic proposition, that there had been

anciently an exclusive right to an intellectual production under the laws of England. That was, however, a purely speculative statement. They could not point to the time when anybody asserted any such right or to an instance when anybody had acquiesced in it. They simply took the ground, as an academic proposition, that anciently there had been such a right. They also decided, however, that whether that right existed or not, it had been ended by the statute of Anne, and that the statute of Anne circumscribed the right to the limited time provided for by that statute.

From that decision or the court of king's bench the plaintiff appealed to the House of Lords, sitting in its judicial capacity. We sometimes have the notion that when the House of Lords sits in its judicial capacity all the peers of the Realm—500 in number—assemble together and hear the arguments and render a final decision, but it is not so. Only the law lords participate; and if an ordinary nobleman should venture to sit when the House of Lords was sitting in its judicial capacity he would be hooted out of the room, and his presence would be made to appear to him to be extremely unwelcome. The number of law lords that sat at the time of the hearing of that argument was 11, and 6 of them rendered the opinion that the statute of Anne was the only foundation known to the law of England for exclusive right to an intellectual production, and that therefore the plaintiff was not entitled to recover.

That was the situation of the laws of England at the time of the foundation of our Union, at the time of the Declaration of Independence, and at the time of the framing of our Constitution. In 1787 our Constitution was framed, and the fathers inserted in that Constitution this provision:

> The Congress shall have power to promote the progress of science and the useful arts by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.

That is the only foundation that exists for the patent laws of the United States, and it is the only foundation that exists for the copyright laws of the United States. It is true that a copyright when it is issued in accordance with the statute made in pursuance of that Constitution is property, but it is not property in the historic sense of property. It entirely lacks the notion of continuity. It entirely lacks the notion of permanency. It is a species of property created, and not arising out of the circumstances of civilization and human life, as property in general has always done, long preceding governments. It is a species of property created by the law-making power, and a species of property created by the law-making power in a matter not inherently subject to property right.

In creating that particular property the constitutional convention was influenced by this consideration: We will not grant a permanent property right in any intellectual production, because in our judgment that would be inconsistent with the progress of civilization as a whole, but we can consistently, with the progress of civilization as a whole, grant a limited property right in an intellectual production. Therefore they did provide in the Constitution that though Congress might give to authors an exclusive right, the right must be limited in point of duration, and therefore Congress has not the slightest power to grant a permanent right in any intellectual production.

Victor Herbert may hereafter, as I hope he may, rival some of the great composers of the past and produce music far better than the splendid music that he has thus far produced, but if he does it will be impossible for Congress to reward him and his heirs with a permanent absolute property right in any such intellectual production. The best we can do, Mr. Herbert, is to give you a limited right to your intellectual production. That limited right is limited not only in respect of duration, but it is limited in respect of quality, in respect of formal expression, and it is limited thus: There shall be, according to the constitutional provision, an exclusive right for a limited time and for a limited form of expression, and that limited form of expression is defined by the word "writings."

Mr. Chairman and gentlemen of the committee, I have spent my laborious life as a lawyer, a scholar, an inventor, an author, and a lecturer. I have delivered hundreds of addresses that never were reduced to writing. I have delivered but few that were. In so far as I delivered those lectures that were never reduced to writing, I am not entitled, either by law or by ethical principles, to any exclusive right. I am entitled to an exclusive right to my intellectual productions only when I reduce them to writing and file them in the office of the Librarian of Congress, where they will remain a permanent monument, and can be handed down to future times and can be read and availed of by my contemporaries.

The Constitutional Convention wisely provided that if the American people are to grant a monopoly in an intellectual production the man who makes that intellectual production shall give it to the American people; and he gives it to the American people by first furnishing them the fullest information of its character, in the case of a patent, or in the case of a copyright he gives it to the American people by consenting to the terms upon which it was issued, namely, that it shall be free after the expiration of the limited time for which it was granted. Further than that, in taking out a copyright, or in taking out a patent, the man consents that the copyright shall be confined to his writing, and shall not extend to any other form of expression of his intellectual idea.

I am not alone in this. The Supreme Court of the United States is with me.

Mr. CHANEY. Just a moment: It has not occurred to me that this is not either a question of continuity of property or a question of the quality of the property. It is simply a question of just to what extent people are to be given the control of their own writings, and as to just through what different forms they will be able to trace their property.

Mr. WALKER. That is the question, and that is the exact question which I am going to address myself to now.

Mr. CHANEY. Very well.

Mr. WALKER. The case of the "Trade-Mark Cases" was decided by the Supreme Court of the United States in 1880, and it is reported in 100 United States Reports, at page 94. In that case the owners of certain collocations of words which they were using as trade-marks sought to sustain the validity of their trade-mark under the copyright law, holding that those words constituted writings which were copyrightable and which had been copyrighted.

The Supreme Court unanimously decided that the statute which they invoked, which statute was abundantly broad enough to cover that provision, was unconstitutional, because although these collocations of words were writings in the literal sense they were not writings within the sense of the Constitution. In so deciding, the Supreme Court narrowed down the meaning of the word "writings" instead of extending it, by holding that the Constitution gives a monopoly not to writings in general but only to such writings as have some literary character and permanent value in themselves. This is the language of Justice Miller:

> And while the word writings may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original and are founded in the creative powers of the mind. The writings which are to be protected are the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like.

The case which the Supreme Court had before it on this subject next is the Sarony case, decided in 1883, and reported in 111 U.S., page 58.

Mr. CHANEY. We had that yesterday.

Mr. WALKER. In that case Mr. Sarony sought to sustain the validity of a copyright upon a photograph of that then very ornamental gentleman, Oscar Wilde. It turned out that in this picture which Mr. Sarony personally took of Oscar Wilde, in his esthetic costume at the time he captured the hearts of the American women by his highly ornamental appearance [laughter], Mr. Sarony had personally posed Oscar Wilde, so as to give him a peculiar beauty, which might not have been developed by the ordinary photographer; and the Supreme Court of the United States sustained the validity of that particular copyright upon the particular ground that Mr. Sarony put particular skill in the posing of the man so as to produce a particularly artistic effect.

But if I should go into a photograph gallery and have somebody pose me who did not have that skill—and also because the subject would not admit of it, and would not produce any particularly attractive effect—and the attempt should be made to copyright that photograph, he would go right up against the decision of the Supreme Court in the Sarony case, and he would be told that the copyright was invalid, because it did not involve any intellectual effort in its production.

Mr. CHANEY. I think your picture would influence the committee quite as much as Oscar Wilde's. [Laughter.]

Mr. WALKER. Well, Oscar Wilde is dead, and not here to speak for himself; and I am living still.

Mr. CHANEY. I hope you will live long, sir.

Mr. WALKER. Thank you.

The next case, and the last case in which these matters have been before the Supreme Court, is the case of Higgins *v.* Keuffel, decided by that tribunal in the October term of 1890, and reported in 140 U.S.

In that case a copyright had been issued, in strict conformity with the copyright law of 1874, upon a label used for manufacturing purposes, as a label on a bottle or a package. There was no doubt whatever but what the copyright was in strict conformity with the statute, but the Supreme Court held that the statute was unconstitutional, because although the label was a writing, it was not a writing in the sense that the Supreme Court had defined that word in the Trade-Mark cases. Here Justice Field delivered the opinion of the court, and he said:

> The clause of the Constitution under which Congress is authorized to legislate for the protection of authors and inventors is contained in the eighth section of Article 1, which declares that "the Congress shall have power to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to

their respective writings and discoveries."

> This provision evidently has reference only to such writings and discoveries as are the result of intellectual labor. It was so held in the Trade-Mark cases, where the court said that "while the word 'writing' may be liberally construed, as it has been, to include original designs for engravings, prints, etc., it is only such as are original and are founded in the creative powers of the mind."

In the year 1888, a suit was brought in the United States circuit court for the eastern district of Massachusetts for the purpose of subjecting a perforated roll like one of these [exhibiting] to the domain of a copyright upon a sheet of music which had been lawfully and regularly copyrighted. That case was elaborately litigated, and was the subject of argument on both sides before his honor, Judge Colt, then the circuit judge and now the chief judge of the circuit court of appeals for the first judicial circuit.

Judge Colt in that case, commonly called the McTamanny case, gave an elaborate and learned decision to the effect that this perforated paper roll, or any sheet of perforated paper like it, intended for the mechanical reproduction of a tune, did not infringe a copyright upon the tune thus reproduced.

That was in 1888, and that decision was universally acquiesced in by all the judges and all the people of the United States for thirteen years. During that thirteen years a number of gentlemen devoted themselves to making the machines, pianolas, or whatnot, that are capable of being used with these perforated sheets; and among those gentlemen is the modest and excellent inventor, Mr. Davis, who appeared before the committee yesterday. Those men proceeded in full reliance upon the decision of Judge Colt, acquiesced in by everybody that they had a perfect right to perforate those sheets of music and use them in mechanical playing instruments; and great amounts of ingenuity have been devoted to the development of that particular art, and large amounts of capital have been devoted to it, in full reliance upon the decision of Judge Colt, in which everybody acquiesced. But the Æolian Company, of Meriden, Conn.—and in the statement that I am about to make I am going to state what is true; I can not prove the statements here to-day, but I could prove them if the committee should sit and take testimony and send for persons and papers——

Senator SMOOT. You can file the proof, can you not, Mr. Walker?

Mr. WALKER. It would be like a big litigation to do so, and it would be putting a very heavy expense upon me that I would hardly be called upon to bear. But I can tell you how I know.

Mr. CURRIER. If the statements that you are to make now are not true, gentlemen can controvert them.

Mr. WALKER. Certainly. They have had chances to controvert them heretofore. This is not the first time that I am making these statements in public. I have made them in court over and over again, and they have passed entirely unchallenged, because they are perfectly true.

The Æolian Company made certain contracts with a large number of members, and I think with every one of the members of the Musical Publishers' Association——

Mr. BURKAN. I beg to deny that——

Mr. CURRIER. Later on you can be heard, if you wish.

Mr. WALKER. A gentleman showed me one of the contracts to-day, and I have it in my pocket.

Mr. BURKAN. It was the one offered in evidence.

Mr. WALKER. I can not be interrupted. I am telling what I know to be true.

The CHAIRMAN. You shall not be interrupted, Mr. Walker.

Mr. WALKER. Thank you. The Æolian Company made contracts with nearly all or all of the members of the Musical Publishers' Association. Each of those contracts provided as follows: That the particular member of the Music Publishers' Association granted to the Æolian Company the exclusive right to make perforated sheets of paper to play the tunes represented by all of the music published by that particular publisher; and that contract also provided that the Æolian Company should never pay any money for that exclusive right until the Æolian Company succeeded in getting some court to decide that the copyright laws covered the perforated paper roll. That contract also provided that the Æolian Company should pay all the expenses of some test suit made for the purpose of testing that question.

In pursuance of that contract, the Æolian Company caused the White-Smith Music Publishing Company to bring a suit against the Apollo Company, in the southern district of New York, upon a couple of little negro melodies, one of which was entitled "Little Cotton Dolly" and the other of which was entitled "The Kentucky Babe Schottische." I fancy that the copyright on both those negro melodies was not worth as much as a dollar and a half, and that certainly $3 would cover

the value of both of them; but they answered the purpose of a test case.

The Æolian Company poured out money like water in that litigation, and endeavored to secure from the United States courts a reversal of the decision of Judge Colt, which had been made many years before. In the course of that litigation I was retained by the Automusic Perforating Company, which was not a party to this litigation, but which had an interest a hundred times greater than that of the nominal defendant. In pursuance of that retainer I presented a petition to Judge Hazel, before whom the case was heard, and in that petition I asked that my client be made a defendant. And I set forth in that petition the whole Æolian scheme in full, with all the clearness of statement of which I was capable, and it was sworn to by my client.

When that statement was filed before the judge, a printed copy was served upon the attorney for the Æolian Company, Mr. Charles E. Hughes, one of the ablest men in the United States, who has distinguished himself in the recent insurance investigation in New York. Anything that he does not think of is not likely to be worth thinking of, and when he put in, as he did, an elaborate brief in reply to my petition, he did not controvert one solitary word of the statement of evidence set forth in the petition about the inherent character of the Æolian scheme, which he would have done if he could have done so.

The CHAIRMAN. What was his reply—raising questions of law?

Mr. WALKER. I do not think his reply amounted to a row of pins.

The CHAIRMAN. Is that a matter of printed record?

Mr. WALKER. His reply? I have a copy of his brief in my office in New York.

The CHAIRMAN. Will you send that to the committee?

Mr. WALKER. I will; yes.

Senator CLAPP. And your petition?

Mr. WALKER. Yes.

Mr. SULZER. He raised the question of jurisdiction in his reply, did he not?

Mr. WALKER. No; not at all.

Mr. SULZER. What was his reply, if you remember?

Mr. WALKER. I would rather not tell, because I do not think it is particularly creditable to Mr. Hughes.

Mr. SULZER. You just complimented him very highly.

Mr. WALKER. And I do not desire to deduct anything from that compliment.

Mr. BONYNGE. You are going to file a copy of it, are you not?

Mr. WALKER. Yes; but my time is limited, and if I gave the honorable gentleman from New York an account of that it would take me ten minutes to do so.

The CHAIRMAN. You will have an opportunity to inspect his reply and that petition when we have the records here.

Mr. WALKER. Now, let me tell you the rest of the story. His reply did not contain a word controverting my statements of fact in the petition. He did not take any issue with the statements of fact in the petition at all—not the slightest. But so far as his reply contained any matter at all, it was first of all an attempt to show that my client was not entitled to be admitted as a defendant anyway, and that, if I was entitled to be heard, he took the ground that my argument was not very conclusive. He did not reflect upon the petition at all; his reply applied entirely to my argument.

Judge Hazel afterwards overruled the petition, and the same day that he overruled the petition he decided the case in favor of the defendant, and followed my brief in his decision. So that the intellectual origin of Judge Hazel's decision can be traced back to the brief that I filed in pursuance of the petition which he overruled.

Very well. The Æolian people then caused that case to be appealed to the circuit court of appeals. When the case came up there I filed a petition in that court to be permitted to argue the case on behalf of the defendant, and also file a brief, both of which petitions were granted. In that petition I repeated the whole Æolian story over again, and I served a copy of that petition on Mr. Hughes a week before the argument came up, and he had abundant opportunity to reply to it. I also called him up and asked him if he was going to reply to it, and he said "No." And when he came to the argument he was as silent as the grave; though he had nearly two hours for his speech, he was as silent as was the grave in respect to all the allegations I had made about the inherent character of the Æolian scheme, and confined himself entirely to attempting to persuade

the court that a perforated paper roll was an infringement of sheet music, and that however unconscientious the Æolian scheme might be as the representative of the Æolian company it was entitled to the pound of flesh.

And that was the way he met the second presentation of the Æolian scheme. Afterwards, two weeks ago yesterday, the circuit court of appeals for the second circuit decided against him again.

Mr. BONYNGE. How long ago?

Mr. WALKER. Two weeks ago yesterday.

Mr. CURRIER. The decision is in the record already.

Mr. WALKER. Certainly.

Now, I wish to say this to the committee, that that Æolian scheme is the most ingenious scheme that I ever knew to be invented by anybody in this country for the purpose of acquiring wealth by means of a patent or a copyright monopoly. And, further than that, I wish to say that the Æolian scheme is so ingenious that it does not violate any law whatever except one, and that is the golden rule. You can not square the Æolian scheme with the Sermon on the Mount, but you can square it with the Sherman antitrust act, and you can square it with every statute on the statute books. They have dodged a violation of every statute in inventing their scheme. And now they lack nothing at all to consummate their scheme except for Congress to pass this bill in the form in which it is drawn. That will place the capstone upon the monument, and will give to the Æolian Company a million of dollars a year out of the pockets of the people of the United States. And of that million of dollars they will keep at least $900,000, and about $90,000 of the rest will go to the music publishers, and not one cent over $10,000 of the whole million will go into the pockets of any music composers during their natural lives.

In the nature of the case it must be so. My statements are not based alone upon any special contracts or facts; but as long as human nature remains as it is, as long as the business problem involved in mechanical playing instruments remains as it is, it must be true that a proposition, if enacted and enforced, to subject perforated music rolls to copyright protection will enormously burden the American people for the benefit of corporations and middlemen, and only very slightly for the benefit of musical composers.

These distinguished gentlemen—Mr. Herbert and Mr. Sousa—are so distinguished that they can make their own terms, and this bill would enrich them. I do not see that they need to be enriched. I believe that these gentlemen, for amusing the American people, are each one of them receiving more money than Theodore Roosevelt is receiving for regulating the affairs of mankind. [Laughter.] And I myself have contributed many a dollar to their coffers, and I have always obtained full value therefor. I have had the pleasure of listening to two of their operas lately, and if any of you gentlemen get a chance to hear one of them I hope you will not miss it, because it is worth the price.

But this business problem that I am expounding is one of great complexity, and while the result of many years of experience with this general topic and the result of many months of special investigation of this subject convinces me that all my statements as to how the thing must work are correct, I can not, in any brief period of time, prove these statements to be true by depositions or testimony of witnesses.

Mr. CHANEY. Can you give us an illustration of the respect in which the mere copyrighting of the music roll will do all that?

Mr. WALKER. Yes; I can. I think I can do it in three or four minutes.

The music that the American people want to play now is made up of two kinds—classic music, uncopyrighted music, and the current music that comes out. Now, if this scheme were carried out the Æolian people would have the exclusive right to perforate paper rolls in accordance with all the current music covered by their contracts with the music publishers; and those contracts cover at least nine-tenths of all the music being produced month by month and year by year.

Now, inasmuch as the Æolian Company would have the exclusive right to perforate sheets for half the music that the people want, nobody could sell a music-playing instrument unless it was manufactured by the Æolian Company, because the Æolian Company as a part of their policy would refuse to sell their perforated sheets except for use in connection with their own instruments; and this would be the situation: You want to buy a pianola. You go to New York and call on the Æolian people. They say: "We will sell you a pianola, and if you buy it from us you can use it to play any tune known to man, classical or modern. Go over to our neighbor across the street, and he will sell you a pianola, too, but he can only sell you music rolls to represent classic music and uncopyrighted music. If you are contented with Beethoven and Mozart and the masters, and do not care for Sousa and Victor Herbert and their contemporaries, go across the street and buy your pianola. But if you want a pianola that will enable you to play any copyrighted music at all, you must buy it from us; for there is not another party in the United

States that can sell you one of those machines."

So that the passage and enforcement of this bill would practically give the Æolian Company, of Meriden, Conn., a permanent patent on an old machine, namely, the automatically played piano, and all other musical instruments played by perforated paper roll.

I assure you, gentlemen, that this bill must in the nature of the case have that operation. So that the moment that the Congress passes that bill, if it were to be enforced by the courts afterwards, Congress would be giving to the Æolian Company, of Meriden, Conn., a permanent patent on that great industry, without those people ever having invented a solitary part of the origin of the business, and without ever having composed a single piece of music played in their machines.

The CHAIRMAN. Mr. Walker, had you intended to speak specifically about the provisions of this bill?

Mr. WALKER. I had, but I have been interrupted so much that I have not been able to do so up to this point. Now I am going to devote myself entirely to that.

The CHAIRMAN. You have only twenty-five minutes.

Mr. WALKER. I realize that.

Mr. CHANEY. You were going to speak of the constitutionality of the bill, also.

Mr. WALKER. That is what I am going to take up now.

The Constitution provides that copyrights may be granted on writings. This bill provides that copyrights may be granted on works. The fourth section of this bill reads as follows:

> That the works for which copyright may be secured under this act shall include all the works of an author.

Although this bill purports to be founded on the Constitution, and although the Constitution is confined to the word "writings," that word "writings" does not appear among the 8,000 words of that bill. It is not there once. This bill is based upon the theory that Congress has power to grant an exclusive right to works, and the word "works" is used more than 30 times where the word "writings" ought to have been used, and the word "writings" is not printed in that bill from its beginning to its end.

I am not reflecting upon any gentleman who drafted the bill in that way, because the bill was drawn upon the theory that the Constitution justifies copyright upon an author's works. Now, the word "works" includes "writings" and is far more comprehensive than "writings." Take the case of Theodore Roosevelt. He has published and printed 15 volumes of original works, and he has delivered without writing more than 1,500 speeches. Now, those books that he has printed and those speeches that he has delivered are equally his works, but they are not equally his writings, because he never has reduced those speeches to writing. So that there is a plain distinction between works and writings, and that distinction is recognized in this bill, as follows. (Now I will devote myself for the rest of the time to strict analysis.)

> SEC. 4. That the works for which copyright may be secured under this act shall include all the works of an author.

Then twelve classes of works are enumerated. The third of those classes of works is said to be "oral lectures, sermons, and addresses." Now, those productions come under the head of works, and do not come under the head of writings, confessedly.

Mr. BONYNGE. But they could not be copyrighted until they were reduced to writing, could they?

Mr. WALKER. Yes; they could, under this bill.

Mr. BONYNGE. How?

Mr. CURRIER. What would you file in the copyright office?

Mr. WALKER. You do not have to file anything for a year.

Mr. CURRIER. I know that; but you have got to file something then.

Mr. WALKER. But you get a year's copyright without ever doing that, and this bill would give a man a monopoly of a whole year on a speech never reduced to writing, and that is a "limited time." And if he chooses ever to reduce it to writing, then all he has got to do is to file one copy in the office of the Library of Congress and not publish it at all.

Mr. CHANEY. Well, you must remember that we must confine this to copyrighted matter.

Mr. WALKER. You must confine it quite narrowly, I think; but please let me develop my particular thought.

It is perfectly plain that under this bill a man may have a copyright on an oral sermon, lecture, or address and maintain that copyright for a whole year without that discourse ever being even put into typewriting during that period. That is a perfectly plain case, therefore, of copyrighting a work that is not a writing.

Now, come down to subsection G, "works of art." There is another item. Now, that word is much broader than "writings." I have made a good many works of art myself. Everybody that invents a complicated machine produces a work of art and a work of high art. There are a great many works of art here in this room which could not by any possible strain of language be denominated "writings." There is a perfectly plain case of attempting to copyright, under this statute, a work which is not also a writing.

Mr. CURRIER. What change would you suggest in subsection G?

Mr. WALKER. I have formulated such a change as that, but it would take a little time to explain it.

Mr. CURRIER. Very well. Take your own course.

Mr. WALKER. I am very glad to be at the disposal of the committee, but it would take me five minutes to explain. It is a very important point.

Subsection H covers "Reproductions of a work of art." There is a perfectly flagrant case of attempting to copyright not only a thing that is not necessarily a writing, but also a thing that is not even original; whereas the Supreme Court has told us over and over again that nothing can be copyrighted that is not original.

Now, go over to the next page, page 4, Class L:

> Labels and prints relating to articles of manufacture, as heretofore registered in the Patent Office under the act of June 18, 1874.

That was the very act that the Supreme Court held fifteen years ago was unconstitutional as not authorizing copyright on things which are not writings. So that there is a recommendation to this committee to reenact a law that the Supreme Court has expressly held to be unconstitutional.

Now, come, if you please, to the second page of this bill. The first section of this bill enumerates exclusive rights to be covered by copyright. Subsection C is:

> To deliver, or authorize the delivery of, in public for profit, any copyrighted lecture, sermon, address, or similar production prepared for oral delivery.

Mr. CAMPBELL. What page is that?

Mr. WALKER. The top of page 2.

Senator SMOOT. Subdivision C.

Mr. WALKER. (Reading):

> To deliver, or authorize the delivery of, in public for profit, any copyrighted lecture, sermon, address, or similar production prepared for oral delivery.

A lecture could be copyrighted under this statute without any copy ever being put even into typewriting, as I stated a little while ago, and that copyright could be maintained for a year, when the discourse has no existence whatever except in the mind of the man who delivers it, and in the ears of those who heard it, and in the air that transmitted it from the vocal organs of the lecturer.

> D—To publicly perform or represent a copyrighted dramatic work.

Section 4966 of the Revised Statutes covers that ground already, and provides that copyright may cover the performance of dramatic work. But I hold, and I hold without the slightest hesitation, that that whole section 4966 is unconstitutional. No court has ever held it to be constitutional, and any attempt on the part of Congress to grant a copyright to enable a man to monopolize the rendering of a play on the stage is preposterous. The fathers who went to Philadelphia in 1787 had more weighty business on hand than to give to playwrights an added grip on the monopoly of their productions in addition to the common-law grip that they already had. At that time and now the author of a play is abundantly protected under the common law, but Congress in 1870 provided an additional grip for the playwright under the copyright statute, in face and eyes of the fact that the Constitution under which they were acting was confined to writings. But if I do not remember wrongly (and I think the gentleman from North Carolina will agree with my recollection) about 1870 Congress did several things that could not be fully vindicated under the Constitution.

Mr. WEBB. Yes.

The CHAIRMAN. Mr. Walker, have you in mind the exact language of the Constitution?

Mr. WALKER. Certainly.

The CHAIRMAN. Will you not put it on the record at this point?

Mr. WALKER. "Congress shall have power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

> "F. To publicly perform a copyrighted musical work, or any part thereof."

Now, is Mr. Sousa present? If not, I see Mr. Victor Herbert here, and I would like to ask Mr. Victor Herbert whether, during the last few years, he has with his orchestra performed copyrighted music of other composers, of which copyrighted music he purchased and had the sheets there for the performance?

Mr. HERBERT. With their permission.

Mr. WALKER. Did you get any other permission than the purchase of the sheets?

Mr. HERBERT. That is included.

Mr. WALKER. Did you get any special permission to perform?

Mr. HERBERT. The permission is written on the sheet.

Mr. WALKER. What is written on the sheet?

Mr. HERBERT. Permission for performance.

Mr. WALKER. It is on the sheet, is it?

Mr. HERBERT. Yes.

Mr. WALKER. In all cases?

Mr. HERBERT. That is, on the corner of the sheets—"permission to perform."

Mr. WALKER. Very well, if in his case it is there. But this is the situation of the law at the present time: If one of you gentlemen goes to church and joins in the singing of a hymn that is the subject of a copyright, you are liable to a penalty of $100 for the first time you join in that singing, and a penalty of $50 for every subsequent time, unless you yourself bought that particular hymn book at first hand from the publisher. That is the law now.

Mr. SULZER. Suppose the church bought it?

Mr. WALKER. Then you are liable for the penalty.

Now, that section 4966 has been violated more than a million times since Congress enacted it in 1897, and Congress does not notice the difference; and I take it that it has taken no steps to vindicate its dignity.

Mr. BONYNGE. There is a bill pending before our committee on that proposition.

Mr. WALKER. Yes; I understand about that pending bill, but I am speaking of the law as it now exists. So that, gentlemen, I take the ground that any legislation that gives to the composer of any music the exclusive right to publicly perform that music is outside of the Constitution, because a copyright on a writing can be infringed only by writing; and when some gentleman or some lady stands up in a church and sings a song out of his or her mind he or she is not doing anything about any writing.

Clause G is one to which I direct attention. That clause G is the one that is directed against all music-playing instruments. The gentleman who preceded me did not make entirely clear the nature of this beautiful instrument that he showed the committee, which he stated was capable of rendering music. What he showed to the committee was a perfectly plain steel cylinder. When you look at it you can see no——

Mr. CURRIER. Most members of both committees are perfectly familiar with that instrument.

Mr. WALKER. Very well; I am very glad to hear that. There are a very great many persons who are not.

Mr. CURRIER. That instrument was exhibited before the House committees in the Fifty-seventh Congress.

Mr. WALKER. Oh, yes—then you know all about it. There are a great many gentlemen who have not been informed about it, and I thought I would mention it.

Aside from the matters of constitutional consideration—I have twelve minutes left, and during those twelve minutes I wish to devote myself to some criticisms of this bill which have nothing to do with the constitutional questions that I have been discussing. Those criticisms are equally applicable whether the bill is to be framed and enacted on the basis of "works," or whether it is to be framed and enacted on the basis of "writings." And in any view that anybody may take about the scope of the copyright, the criticisms to which I am now calling attention deserve consideration.

The first one is in section 13, which is one of those sections that is intended to give the American manufacturer the monopoly of manufacturing copyrighted books.

That purpose is a good one, but that section is not well drawn to effect that purpose, because the gentlemen who drew the section were not thoroughly acquainted with the art of printing in its modern development; and the suggestions I have to make to the committee are with a view to strengthening that section so as to close up some loopholes that the authors of the section left wide open.

The language is:

> That of a printed book or periodical the text of the copies deposited under section 11 above shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made from type set within the limits of the United States, or if the text be produced by lithographic process, then by a process wholly performed within the limits of the United States.

The trouble there is that the author of that section supposed that the lithographic process was the only other process of producing a book besides printing it from type or a streotyped plate. Now, the lithographic process is not the only process. There are modern processes of photomechanical printing that have nothing at all to do with lithography, that are much cheaper than lithography, and that do all that lithography does. As an illustration, those beautiful illustrated supplements that come out every week with the New York Tribune on Sunday are supposed by some gentlemen to be lithographs. They are not. They are printed on aluminum cylinders at great speed and with great cheapness, and they are very much cheaper and very much better than can be done by the old art of lithography.

Mr. CURRIER. Could not that be said to be a plate within the meaning of this act?

Mr. WALKER. No; because a stereotype plate is meant. But that is very easily corrected. I would suggest that for the words "by lithographic process" be substituted "any other process." Then that covers lithography and every other possible process. Then, on the 21st line of that page, I would suggest the substitution of "illustrations" for "lithographs," because illustrations may be made otherwise than by lithography.

The gentleman who delivered himself upon that particular subject upon behalf of the American mechanic was uninformed about the matter, and complained that a large number of printed illustrations were being imported into this country that would be kept out under the lithographic clause if you put the lithographic clause in strong enough. Now, he is entirely mistaken about that, because the very things that are being imported and that he complains of are not made by lithography at all, but by another process.

Section 15 contains a provision as to what shall happen if the copyrighter does not deposit his copies in the office of the Librarian of Congress on time; and there is a proviso in lines 19, 20, and 21 which reads:

> That in such case no action shall be brought for infringement of the copyright until such requirements have been fully complied with.

That ought to be amended by adding the words "or be based on any infringement begun before the time of that compliance," because otherwise the public would have no protection at all. A man could go on and innocently infringe during that year, and the only protection this section gives him is that he would not be sued until after the end of the year, but when sued the action would be retroactive; and that amendment ought to go in to perfect the section.

Section 18 relates to the duration of copyright. Gentlemen, that is a topic to which I have given great consideration, and I can do no more than state my opinion. I should like to elaborate it, but what I would recommend the committee to adopt on that subject is this very short provision: That the copyrights secured by this act shall endure for a hundred years in the case of an original book or dramatic or musical composition (one hundred years, Mr. Herbert, I liberally advocate in your behalf) and for fifty years in every other case.

I am totally opposed to any law providing for the extension of any copyright or any patent. The public ought to know, when the copyright comes out and when the patent comes out, exactly when it is going to expire; and it ought not to be made contingent upon anything so uncertain as human life. On the other hand, there is every reason in favor of giving the copyrighter a very long

period of monopoly. Seventeen years is long enough for the patentee. I am a patentee myself. I would be very glad indeed to have Congress extend some of my patents, but I have not the effrontery to ask Congress to do it, because I do not deserve it.

Mr. CURRIER. Do you think a hundred years is a limited time within the meaning of the Constitution?

Mr. WALKER. Oh, yes; certainly. A thousand would be. [Laughter.] And I wish to make this suggestion: It was suggested to me that the word "limited" meant definitely limited, and that therefore Congress would not be conforming to the Constitution if it made the period dependent upon any uncertain contingency. Now there is some force in that.

Mr. SULZER. I agree with you, Mr. Walker, upon making the number of years definite; whether you make the years few or many, make them definite. Now, right there, without any intention to be facetious, do you not think that fifty years is sufficient?

Mr. WALKER. No; and I will tell you why. Harriet Beecher Stowe wrote "Uncle Tom's Cabin" in 1853. She got a copyright on it for twenty-eight years, then an extension of fourteen years, and at the end of that time, in 1895, the copyright expired. Harriet Beecher Stowe then was dead—died in 1896—but she left two maiden daughters; and it would be a comfort to me, and it would be a comfort to all those who honor the memory of Harriet Beecher Stowe, if those two ladies could now be in the receipt of some royalty from "Uncle Tom's Cabin," which they can not be.

Mr. SULZER. Is there any government that grants a patent or copyright for more than fifty years that you know of?

Mr. WALKER. Not that I know of. Fifty years would be altogether excessive for any patent. The longest period that could possibly be vindicated by argument for a patent would be twenty years.

Mr. BONYNGE. How about copyright?

Mr. WALKER. I wish I could argue the matter; but I hold that all original works ought to be copyrighted for a hundred years, and all derivative works, such as dictionaries and encyclopedias, for fifty.

Mr. BONYNGE. What is the longest period granted by any government, that you recall, for a copyright?

Mr. WALKER. I can not speak as to that with certainty.

Mr. SULZER. Fifty years?

Mr. WALKER. The nations are numerous.

Now, I must come to another point, section 23, in respect of the damages that may be recovered. Section 23 begins as follows:

> That if any person shall infringe the copyright in any work protected under the copyright laws of the United States by doing or causing to be done, without the consent of the copyright proprietor first obtained in writing, any act the exclusive right to do or authorize which is by such laws reserved to such proprietor, etc.

The trouble with that is that it makes the man who does the thing an absolute infringer unless he can show a consent in writing; and that repels the whole doctrine of implied licenses and equitable estoppel, which two doctrines are found to be absolutely indispensable to the administration of justice in patent cases, and heretofore in copyright cases. The idea that there can be no answer to an infringement suit for a copyright except a written license is new in this statute. It has never been in any copyright law before, and it would work havoc with justice, because it would enable the wilfully malicious copyrighters to mislead men into unwitting infringement, and then pounce on them with an infringement suit, and then, when they set up equitable estoppel or an implied license, say, "Equitable estoppel and implied license do not go in this statute. You must show a written license." Words can not express how badly that would work.

Again, in subdivision B, this man is—

> to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer may have made from such infringement.

That is wrong, because it gives him two recoveries; and in patent cases the courts have established for more than a quarter of a century that the patentee is entitled to a recovery of profits or damages, whichever he prefers, but is not entitled to recover both. No proposition has ever been made, in any statute, to give anybody a double recovery until it is made here; and here he is told that he shall have both. And what is worse, down at the bottom there of the subsection, if it turns out that there were no damages inflicted and no profits made, then the provision is that

the judge shall fix the damages at such a sum as he finds to be just; and then, after the judge is told to exercise his discretion to fix a just sum, he is told that that sum must not be less than $250.

On page 18, among the evils and misfortunes that are to be inflicted upon the unwitting infringer as well as the willful infringer, is the following. He must—

> deliver up on oath, to be impounded during the pendency of action, upon such terms and conditions as the court may prescribe, all goods alleged to infringe a copyright.

So that if anybody wants to drive his competitor out of business, all he has to do is to file a bill alleging that the competing goods infringe, and he does not even have to swear to that; and then, in pursuance of that bill, all the property of that alleged infringer is impounded during the course of the litigation. And it would be a very dull complainant that could not keep the litigation going at least five years, and to that extent eliminate competition.

The next one is wickeder still. The infringer must—

> deliver up on oath for destruction all the infringing copies or devices, etc.

Here is a case of an unwitting infringer. He is found to infringe. He thought he did not infringe. Good lawyers told him he did not. The court finally found that he did, and there, among the penalties, all his goods must be delivered up for destruction. Now, that is entirely wrong. The courts have decided in patent cases that under precisely those circumstances the defendant has a right to export his goods and sell them in foreign countries; and there is no ethical and no legal reason why an unwitting infringer of a copyright, after having been found to infringe in this country, should not export his goods and sell them elsewhere. And the circuit court of appeals for the second circuit has unanimously decided, in patent cases, that that is perfectly right.

Mr. WEBB. Not only the copyrighted goods, but the machines themselves.

Mr. WALKER. I will come to the other point—certainly; and he must not only have those destroyed, but the "plates, molds, matrices, or other means of making such infringing copies."

My client, the Automusic Perforating Company, has a plant that cost $50,000. That mechanism is adapted to perforating rolls, and if they should use that mechanism in perforating 500 rolls with perfect right, and then inadvertently use that mechanism in perforating one roll that was held to infringe, under this bill their whole plant would be cleared out of their place and would be destroyed.

Gentlemen, that is so surprising a proposition that I presume it may be of interest to know the origin of it. The patent laws of England provide that, at the discretion of the court, infringing material may be destroyed. That is because the Parliament of England is not subject to any constitutional limitations, and can pass any kind of a law that it pleases. Mr. Justice Gray knew more about the laws of England than he did about the laws of America; and at one time, one of the two times when he was deciding a patent case while he was on the bench, he ran across an English decision in which it was held that the infringing goods might be destroyed. And then, by way of obiter dictum, without having the slightest occasion to do so, he wrote into the decision an obiter dictum to the effect that that was the law of this country. But the judges of the circuit courts know better, and never have enforced that obiter dictum. And if they were to enforce it they would violate two or three provisions of the Constitution, among others that no person shall be deprived of property without due process of law.

But the authors of this provision, taking the hint from that obiter dictum of Justice Gray, have not only applied it to the same matter that Judge Gray applied it to, namely, the infringing thing itself, but to the entire plant of the infringer.

(At this point it was announced that Mr. Walker's time was up.)

Mr. WALKER. I promised to stop at the end of an hour, and I will do so.

The CHAIRMAN. Can you finish what you desire to say regarding the provisions of this bill in five minutes additional?

Mr. WALKER. Well, I can talk five minutes; I ought to have ten. [Laughter.]

The CHAIRMAN. We will give you five minutes more because of the interruptions.

Mr. WALKER. Yes.

Section 30, in respect to this matter of importations—I am now speaking on behalf of the gentlemen, no one of whom I know, namely, those who desire to be protected in this country against the competition of the labor of Europe in getting up copyrighted books. Section 30 reads:

> That during the existence of the American copyright in any book the importation into the

> United States of any foreign edition or editions thereof (although authorized by the author or proprietor) not printed from type set within the limits of the United States or from plates made therefrom, or any plates of the same not made from type set within the limits of the United States, or any editions thereof produced by lithographic process not performed within the limits of the United States, in accordance with the requirements of section 13 of this act, shall be, and is hereby, prohibited.

Now, gentlemen of the committee, that prohibition does not amount to a row of pins. It is as void as is the atmosphere around the North Pole at Christmas time of all human interest, because, although one would suppose by a superficial reading that it put a fence up around all parts of the lot, it leaves at least half the sides of the lot entirely uninclosed. Thus, it prohibits nothing except the importation of an entire edition. Now, somebody may say: "No; it is not an entire edition it is aimed at, but only one specimen of the edition."

But I say in response to that, that that language "Edition or editions" is taken out of the present statute, and in the present statute the words "edition or editions" are confined in their meaning to entire editions by the circumstance that the present statute prohibits also the importation of individual copies. So that if Congress were to enact that section, and it should come before a court, the lawyer for the defendant would say: "It is perfectly plain that Congress intended to change the law. Formerly, in its wisdom, it prohibited the importation of an edition or editions, and also the importation of individual copies. Now it has expressly left out prohibition of the importation of individual copies and prohibited only the importation of an entire edition," and there would not be any answer whatever to that argument.

Mr. SULZER. Then, in the interest of the working people of the United States, you would prefer to have the law left just as it is now?

Mr. WALKER. That would be much better than this; but I would strengthen that law. I know how to strengthen it, and I——

Mr. SULZER. Will you tell us, briefly, how you would strengthen the present law?

Mr. WALKER. Yes; I would do it by amending this section in three places, very simply, if the stenographer will take this down.

Mr. SULZER. He takes everything down.

Mr. WALKER. Very well. I propose that section 30 be amended in the interest of American mechanics by substituting the word "copy" for the words "edition or editions" in line 5 of page 23. Then in line 9 of that section——

Mr. SULZER. "Or any part thereof?"

Mr. WALKER. Wait a moment—and by substituting the word "copy" for the word "editions" in line 9 of page 23; and by substituting the words "any other" for the word "lithographic" in line 10 of page 23. Now, with those amendments, every door would be closed, and the American mechanic would be protected at every point.

Mr. SULZER. Would that preclude any part of that edition being imported?

Mr. WALKER. It would, because that language, "or any part thereof," is contained elsewhere.

Section 32: There is a statement that—

> all actions arising under the copyright laws of the United States shall be originally cognizable by the circuit courts of the United States, the district court of any Territory, the supreme court of the District of Columbia, the district courts of Alaska, Hawaii, and Porto Rico, and the courts of first instance of the Philippine Islands.

Gentlemen, one of the competitors of the gentlemen before me wrote an opera, and that was George Ade, and in this opera he inserted this witticism:

> The Constitution may follow the flag, but the cocktail is sure to.

We are told by the Supreme Court that the Constitution does not follow the flag necessarily; it follows it if Congress sends it there. Now, if in the wisdom of Congress the copyright law should be extended to Hawaii, Porto Rico, and the Philippine Islands, that can be accomplished only by a statute expressing that intention. And the statement that the courts in those outlying regions shall have jurisdiction of copyright cases amounts to nothing unless you extend the copyright laws to those portions of the earth's surface. I am not in favor of doing it; but if you want to make copyrights effective in those outlying regions you must do so by express enactment.

Here is a more important matter:

> Actions arising under this act may be instituted in the district of which the defendant is an inhabitant, or in the district where the violation of any provision of this act has

occurred.

That ought to be amended by substituting the word "his" for the word "the," because as it reads now you can sue a man for somebody else's infringement.

Mr. CHANEY. So that it would read "his violation?"

Mr. WALKER. Yes; substitute "his" for "the." Then there should be added to that section this language: "And wherein the defendant has a regular and established place of business."

The public policy involved in that point has been threshed out for many years in patent cases; and in patent cases it has been found to be unjust to compel anybody to submit to an action for infringement of a patent in any district unless it be in the district of which he is an inhabitant, or a district where he has a regular and established place of business. You can not sue somebody for infringing a patent merely by proving that he did formerly infringe that patent in a particular district away from home, or by finding him in that particular place. You can not go to Chicago and sue a New York man for infringing a patent on the allegation that a year or so ago he did infringe that patent in the northern district of Illinois, unless you prove also that he has a regular and established place of business in Chicago. No man ought to be sued for infringing a copyright except in the district where he resides; or, lacking that, in the district where he is engaged in business.

Mr. CHANEY. Then you would favor the defendant rather than the complainant in such a case?

Mr. WALKER. No; I would be just to both; and my proposition is deduced from the present patent statute, and that patent statute is deduced from considerations of justice as they have worked out during fifty years of patent litigation as on the whole being most equitable.

Section 35 provides that "In all recoveries under this act full costs shall be allowed."

That ought to be amended by substituting the word "actions" for the word "recoveries," so as to permit recovery in behalf of a successful defendant as well as in behalf of a successful complainant; and the word "full" ought to be erased, and these words ought to be added "in accordance with law," so that the section would read:

That in all actions under this act, costs shall be allowed in accordance with law;

and the law that would be put into operation by that amendment would be those general statutes of the United States which relate to the taxation of costs in all litigations in the United States courts.

Here is a bad section, 43—

That in place of the original instrument of assignment there may be sent for record a true copy of the same, duly certified as such by any official authorized to take an acknowledgment to a deed.

That opens the door wide to fraud, because hardly anything is easier than to get a notary public to certify that one document is a copy of another, particularly where he is acting in a capacity outside of his office, and therefore would not be liable for any inconvenience or penalty if the certificate should turn out to be false. So here is a proposition to make the ownership of a copyright depend upon the record in the copyright office of an alleged copy of an assignment, which alleged copy may be fraudulent, and if fraudulent then resulting in no punishment to the wrongdoer.

Mr. CHANEY. You would confine that to some other official, then; would you?

Mr. WALKER. No; I would take it out altogether, and leave it as in patent cases—that only originals are entitled to be recorded. Such a thing as allowing a copy of an assignment of a patent or a copyright to be recorded in the place of the original is entirely unknown, and it would open the door widely to fraud.

The CHAIRMAN. Your time has expired, Mr. Walker.

Mr. WALKER. Yes. I wish to express my thanks to the committee for hearing me so long and so patiently, and to express my best wishes for the future of the bill, and my own entire willingness to contribute, if I am found to be competent to contribute, to the perfection of the bill hereafter.

Senator SMOOT. Mr. Walker, I have been wondering, for the hour that you have been delivering your intelligent speech here, on what basis your congratulations were extended to Mr. Putnam and other persons who took part in the preparation of this bill. [Laughter.]

Mr. WALKER. Why, I am surprised that you did not see that.

Mr. PUTNAM. I can say, Senator, It is because they have had the benefit of such lucid criticism at such an early stage. I can say that it was not expected by us that anyone would take up this bill

with such a penetrating intelligence as Mr. Walker has shown, within a week after its introduction into Congress.

Mr. WALKER. And I wish to say to the Senator from Utah, if I may be permitted, that while I have criticized this bill in plain terms, the framework of the bill as a whole is very scientific, and in one day or two days I could so amend the bill as to entirely remove all my objections and still preserve the substance of the scheme which Mr. Putnam has put upon paper.

Senator SMOOT. I have been very much interested, Mr. Walker, in your statement.

Mr. SULZER. Mr. Chairman, I agree with the Senator from Utah; I have been very much interested in what Mr. Walker has said, and I was going to make this suggestion: That he be allowed to file a brief with the committee, which will be printed in the record as a part of the record.

The CHAIRMAN. That was understood the other day.

Mr. WALKER. Thank you very much.

Mr. SULZER. Mr. Chairman, I would be glad to have the committee hear now Mr. Nathan Burkan, who represents the publishers and composers of music.

Mr. CURRIER. Mr. Sulzer, two gentlemen who are now present have come all the way from Chicago to address the committee and have just this moment gotten here.

The CHAIRMAN. We will hear Mr. Burkan after them.

Mr. CURRIER. We will hear him later.

Mr. PUTNAM. Mr. Chairman, you have requested me to remind the gentlemen present that it is the desire of the committee to have a register of the names of all who have attended these hearings, and the capacity (if they desire to indicate it) in which they have been here. Some of you who were not here before will find opportunity to register at the door, and I would suggest that as the register was not opened until Thursday, any of you who know of any persons present on Wednesday who had left by Thursday, and whose names therefore did not appear upon the register, will please pass a memorandum of their names in to us.

Mr. Chairman, I have a memorandum handed in which I offer to the committee on behalf of Mr. Charles W. Ames, calling attention to a misunderstanding, as he has believed, of two sections, section 3 and section 19, and another communication simply filing objections to certain sections, 13, 18, 32, 33, and 34, and desiring an opportunity later to be heard.

The CHAIRMAN. They will go in the record.

(The papers above referred to, together with a letter from Mr. Leo Feist, were directed to be made part of the record, and are as follows:)

WASHINGTON, *D.C., June 9, 1906*.

Mr. HERBERT PUTNAM, *Librarian of Congress*.

DEAR SIR: I wish to file with the committee at this time objections to sections 13, 18, 32, 33, and 34 of the copyright bill. I will indicate briefly the grounds of my objection and will make further argument on them at some future time if the committee should desire.

Yours, respectfully,

CHARLES W. AMES.

Section 13, page 9.—I have always objected to the proposed affidavits of domestic manufacture. I believe there is no real need for it and that it imposes an unnecessary burden on the copyright proprietor and the copyright office. It has been demanded only by the Typographical Union, which claims to have private reasons for believing that the requirement of domestic manufacture is being frequently violated by publishers. The records of the copyright office do not show such violations, nor have I ever heard of any being shown in the courts. The publishers generally throughout the country regard this requirement as an imposition and an outrage—that on the suspicion of the Typographical Union they should be required to swear that they were not violating the law whenever they take out copyright. The publishers would have questioned the propriety of this measure when it was pending before the last Congress if opportunity had been offered, and strenuous opposition would have been made to the passage of the bill.

At the first conference last year, the representatives of the Association of Publishers, in a spirit of conciliation, agreed with the representatives of the Typographical Union that they would not oppose the requirement of an affidavit. As a member of that Association of Publishers. I shall not now oppose the affidavit section as a whole, which requires me to swear five hundred times a year that I have done something, failure to do which would have invalidated many thousands of dollars' worth of copyright property.

But I do object earnestly and emphatically to the final paragraph of section 13 (lines 21-

25, p. 9), requiring the statement in the affidavit of the particular establishment in which the work has been done. This fact is wholly irrelevant to the purpose of the affidavit and has no bearing on the requirements of the copyright law. It is purely a private business matter. In case the affidavit is challenged (as it would be in only an infinitesimal proportion of registrations) and proof of domestic manufacture is required in any action, of course the establishment would be readily shown. Copyright proprietors should not be required to disclose it otherwise, satisfying the curiosity of business rivals and others.

It seems also an unnecessary insult to the publishers to provide special penalties for false affidavits. Will not the ordinary penalties for the crime of perjury be sufficient to cover all cases where publishers, in addition to jeopardizing their property rights by violating the provision for domestic manufacture, swear falsely in the premises?

I believe that Mr. Sullivan, in behalf of the Typographical Union, stated at the last conference that the union was not disposed to insist on the specification of the establishment in the affidavit if it should appear that this fact was unnecessary and irrelevant to the purpose of the affidavit. I hope that the union will make no opposition to the elimination of this provision, which is obnoxious to the publishers. By so doing they will at least minimize the opposition of the publishers to the affidavit provision as a whole. There are very many publishers throughout the country who are not members of the association referred to, and will not be governed by the agreement made at the conference.

The date of publication, if given in the affidavit, might serve for convenience as furnishing an essential fact to be a part of the record covered by the Librarian's certificate.

Section 18, page 14.—This section relates to the term of copyright. In fixing the term I think due consideration has never been given to the fact that a vast majority of copyrights become commercially worthless after a very few years. Thus the records of the copyright office show that last year but 2.7 per cent of the copyrights completing their original term of twenty-eight years were thought by the authors of sufficient value to renew them for the additional fourteen years under the comparatively simple provisions of the present law.

It is safe to say that not more than 5 per cent of all the copyrights have any commercial value after twenty-eight years. It would seem feasible to provide for the extension of the property rights in these valuable literary or artistic properties without conferring undeserved or undesired extensions of term in hundreds of thousands of copyrights of no pecuniary value to the owners. On the other hand, there is some intrinsic value to the public in a portion of the copyrighted material after it has lost all pecuniary value to the author or his assignee.

I believe that the great majority of copyrights should fall into the public domain at a definite and easily ascertainable time. I hold, therefore, that the ordinary copyright term should be no longer than the twenty-eight years as fixed at present. But the few valuable copyrights could be secured for a much longer term by a simple and easy arrangement for renewal, as by requiring merely the filing of a notice of the desire to extend and allowing the author or his heirs to file such notice; or, in case there has been an outright assignment, permitting the author and assignee or licensee under royalty to join as provided in section 32 of the present draft.

Some provision should also be made for the renewal of valuable proprietary copyrights of the sort enumerated in subsection *(b)* of section 18.

Sections 32-33, pages 26-27.—My most serious and strenuous objections are to this section 32, regarding actions arising under the copyright law, and especially the second paragraph, providing that actions may be brought and jurisdiction secured in any district of the United States where violation of any provision of this act has occurred. This means that any copyright proprietor or any publisher may be brought into any district in the United States or every district simultaneously in the case of many articles sold generally throughout the country. And it therefore concerns very nearly every person interested in the copyright law.

Every copyright proprietor may be defendant in a suit as well as complainant. Suits may be brought in good faith or for malicious reasons; for the real protection of property or for harassing business rivals. They may be well founded or groundless, honest or frivolous. Now, speaking as the proprietor of a large number of copyrights and a great deal of valuable copyright property which I am anxious to protect against infringement, I would much prefer to forego the advantages offered to complainants under this section rather than run the risk of the infinite vexation which might be caused my company as defendant in malicious and frivolous suits brought in foreign jurisdictions chiefly for purposes of blackmail.

I see no good reason why copyright proprietors should have facilities for the use of the Federal courts not accorded to any other class of suitors. It is true that certain classes of copyright property may require special provisions for their protection, but it should be noted that section 966 of the Revised Statutes is by this bill retained (see sec. 64), and would therefore still protect dramatists and musical people in the peculiar rights which they now have under the present law.

The penal provisions of this bill are severe and even harsh, including misdemeanor

clauses with fines and forfeitures and even imprisonment. On the other hand, the law is full of novel provisions. It will be, at best, years before these can be judicially construed so that they may be generally understood. Meanwhile, everyone concerned will find many doubtful points and open questions on which legal advice will vary, and can in no case be conclusive. To subject authors and publishers to the danger of being peremptorily summoned to defend an action in a distant district for some supposed violation of some provision, "any provision of this act," however insignificant, with the issuance of ex parte injunctions operative throughout the whole country, with possible "impounding" of important and valuable publications for an indefinite period of time (during the pendency of the suit, see sec. 23, p. 18), a publisher in New York might sue his neighbor across the street in any distant district, possibly Alaska or the Philippine Islands; a rich and powerful house might crush a feeble competitor by forcing him to defend suits brought simultaneously in a hundred jurisdictions. These possibilities may well terrorize all persons interested in copyrightable property of any description.

Finally, I say from long experience that it is a mistaken kindness to make copyright litigation easy. The protection of the copyright law is chiefly moral. Remedies for actual wrongs committed are in most cases illusory. A copyright suit should never be brought except for the most serious reasons and to protect large business interests.

I believe, therefore, that section 32 should be eliminated altogether from this bill, unless it is thought necessary to retain the first paragraph; and I suppose section 33 would go with it. If this were done, perhaps section 4966 of the Revised Statutes should be incorporated in the new law at this point and reenacted for the sake of completeness, if the committee thinks that it should be retained.

Section 34, page 28.—The limitation of actions in the present law applies only to actions for penalties and forfeitures. I do not think it should be applied, as in this section 34, to all actions; if it should be so applied the term should be at least six years (which is the rule with patents, I understand). The statutes should show clearly that the time runs from the date of the discovery of infringement by the complainant. In these days of an ever-increasing multitude of publications, the copyright proprietor should not be required to examine everything which is issued to see whether his works have possibly been pirated; nor should he be debarred from seeking a remedy if knowledge of piracy should come to him long after the offense has been committed. Unfairness is not always shown on the face of an infringing work, and direct evidence is often required to prove this even to the injured proprietor.

[Memorandum by Charles W. Ames.]

JUNE 9, 1906.

As a constant attendant at the last two conferences, I venture to offer a few words in explanation of two sections of this bill, which, I think, have been misunderstood by some of the gentlemen who have appeared before the committee.

Section 3 has been supposed to have some particular reference to and bearing on now existing copyrights taken under the present law. On the contrary, I understand this section to be general and permanent in its character, the purpose of the last three lines being to specifically protect all copyrighted matter for its proper term and no longer, when reproduced in whole or in part, under license or otherwise, in connection with a later copyrighted work. This section is very important as definitely clearing up for the future a question which has been frequently raised in connection with the present law.

Section 19, on the other hand, relates merely to now existing copyrights. It has the laudable purpose of extending the benefits of the new law to authors of valuable literary and artistic works copyrighted under the present law. The provisions at the end of the section are designed to secure such new privileges to the authors without interfering with the vested rights and investments of their publishers. After such authors have enjoyed the full forty-two years of monopoly granted them under existing law, they may secure such additional term as is to be accorded to authors under the new law; but if under the contracts which they have already made they have conferred rights upon their publishers as assignees or licensees, then they must have the publishers join with them in their request for the extension.

It is questionable whether, in the absence of such provision, the new privileges could be lawfully conferred upon authors who have assigned their rights without impairment of existing contracts. For example, when an author has sold his copyright altogether, the publisher has combined with the literary property investment in plates, stock, and good will, which should not be taken from him at the expiration of the copyright term. In such cases, he could, under the provisions of the present section, secure an extension of exclusive rights only with the help of the author with proper compensation, and the author could secure extension only by fair consideration of the publisher's rights. If they fail to agree, they are left just where they expected to be when they made their contract under the terms of the present law.

As to the licensee for publication under royalty, I see no objection to the addition of such a provision as was proposed by Mr. Ogilvie, to protect the author against unfair treatment in respect to future royalties.

WASHINGTON, D.C., *June 8, 1906*.

The CHAIRMAN OF THE JOINT COMMITTEE ON PATENTS OF THE SENATE AND HOUSE OF REPRESENTATIVES.

SIR: At the meeting of the Joint committee held to-day, counsel representing one of the talking machine companies made a statement to the effect that Hon. Herbert Putnam, Librarian of Congress, in the preparation of the copyright bill had called into conference only such interests as he wanted, and with whom he was in league, and intimated that the Librarian has acted in an unfair manner.

When recess was taken and the gentleman was leaving the building, I called him aside and emphatically took exception to the remarks referred to. As one attending but not participating in the last two conferences held, I think it no more than fair and just and my duty to express to the joint committee the fact that Mr. Putnam's course throughout the conferences was fair, just, and equitable to all interests represented, and that every interest concerned was invited to present its views.

The interests were varied and frequently antagonistic, and Mr. Putnam was decided in his expressions that every representative should be heard to the fullest and freest extent, and that after the wishes of those interested was ascertained he was confident an equitable bill would be the outcome; that while it might not be satisfactory in every respect to each, yet he felt positive that with the assistance of the Department of Justice, the Treasury Department, and the cooperation and counsel of the American Bar Association, and the Bar Association of the City of New York, no interest or line of industry, whether represented or not, would be unjustly or unfairly treated. His attitude in all of the conferences was in the highest degree dignified and impartial.

To my positive knowledge the trade journals, as well as the newspapers, contained full information concerning the copyright conferences and the proposed copyright bill as long ago as February, 1906; yet the gentleman referred to claims that the conferences were star chamber proceedings for the benefit of selected private interests. No interested concern could have failed to become acquainted with the fact that the conferences were being held, and no one seeking admission was denied opportunity to present his views.

This statement is made solely for the reason that the unjust, unfair, and undeserved criticism of Mr. Putnam, known to me to be absolutely true, has stirred my deepest indignation, and I present this protest to the committee and ask that the reflections upon Mr. Putnam be stricken from the record.

Sincerely, yours,

LEO FEIST.

STATEMENT OF FREDERICK W. HEDGELAND, ESQ.

The CHAIRMAN. Whom do you represent?

Mr. HEDGELAND. I represent the Kimball Company.

I wish to state, gentlemen, that three or four days ago I first learned of the introduction of this measure. I have heard what the advocates of this bill have said with reference to there being one side to this question. There are really four sides to this question—the public, the composer, the manufacturers of the automatic musical instruments, and the inventors that have made that industry possible.

The bill as drawn practically gives the monopoly of all this capital that has been invested, the genius that has been displayed and made this field possible to the composer, to the publisher and composer, in its entirety. Now, the brains and effort that have made this market open to the publisher should be recognized in this bill. The bill should not be a retroactive one, to punish the inventor and the capitalist for what they have done in the past to provide a field for the composer.

Mr. CURRIER. It will not be retroactive.

Mr. HEDGELAND. It must be equitable; and as to any rights that are conveyed in that bill to the publisher or the composer, it must put these industries on an equal footing. Otherwise it is creating one of the worst features of trusts that one can conceive of.

In a recent suit it has been claimed that these instruments discourage education in music. Such is not the case. In a recent test case it was proven and never contradicted that learning, both vocal and instrumental, has increased year after year, and that the sale of these staff notation copies has been increased rather than diminished by the automatic musical instruments. Now, those things all being taken into consideration, I think this industry deserves very careful equitable consideration on your part.

I have had no time to prepare the different phases of this matter, and would like, if the committee will give me permission, to file a short brief from the manufacturers' and inventors' standpoint.

The CHAIRMAN. You may have that privilege.

Mr. HEDGELAND. With that, gentlemen, I will not take any more of your time.

To the joint committee of the Senate and House:

In obedience to the privilege extended me on my short address June 9 by your honorable committee I now file the following brief:

There are, without question, four vital interests involved in the copyright legislation now before your committee, as applying to mechanical reproductions of musical compositions, as set forth specifically in section 1, paragraph (g), and section 38; this bill, H.R. 19853, also bristles in many sections with conditions that might easily be construed as applying to mechanical industry, and calls for careful analytical legal investigation.

The interests of equity involved are: The inventor; the composer; the manufacturer of automatic instruments and their controllers; the public. I shall take up the equities in the order named.

The inventor.—Being an inventor, and the majority of my inventions being on automatic musical instruments and devices for making the controllers (which patents largely outnumber any contributed by any other individual to this art), I am well fitted to state the part these devices have taken in the advancement of music. Automatic musical instruments date back six decades or over. The barrel organ, with its cylinder and pins, was used to accompany divine worship in English churches before pianos adorned the homes of the congregation, and they have been constantly manufactured up to the present time, and are known now as orchestrions. Twenty-three years ago, at the inventions exhibition held in London, England, automatic reed organs (Æolians) were exhibited by the Mechanical Organette Company, of New York, and, mechanically, I had charge of the instruments on exhibition. There were also exhibited piano players of French and German manufacture and the Miranda pianista, an English pneumatic player. Both Æolians and piano players have constantly been manufactured up to the present time, inventive genius constantly laboring for perfection in operation, ease of operation, and reduction of cost to place them in reach of the masses. It is a fact beyond dispute that barrel organs are as old as or older than pianos or reed organs.

I have labored twenty-three years in this industry and contributed between thirty and forty patents to the automatic-instrument industry, and have invented and patented machines that would record on controllers for automatic musical instruments the conceptions of pianists and authors, when played on an instrument by them, and I have yet to acquire a competency for my labors. The inventor's labors are always discounted by the following conditions:

First. Capital and machinery to market and manufacture the invention.

Second. State of the prior art as brought out in the Patent Office search.

Third. The liability of infringement and the slow and tedious and expensive process of stopping it, taking testimony from Maine to California, etc. I have a case of flagrant infringement which was prosecuted four years ago and has not yet been adjudged by the circuit court—as is usual in such cases, temporary injunction being denied, which the composer or author could and does readily obtain.

The composer.—The composer or author of musical compositions rarely, if ever, follows composing or copyrighting alone as the means of making a livelihood. In all my experience I can not recall a single instance where this has been the case. With practically no exceptions, the composers of musical compositions are engaged in various other walks of life, and this line of work is more or less incidental to the occupations they follow. As an illustration I will name a few of them: Band masters, professional pianists, organists, choir leaders, teachers of music, piano salesmen, music salesmen, and many other callings. The amount of time or application spent in framing musical compositions is oftentimes but a few hours and in the majority of cases in otherwise idle hours. For instance, the testimony of George Schleiffarth, given under oath, which appears later in this brief. He states: "I have composed 1,500 pieces in thirty-seven years and have netted only $5,000 for these thirty-odd years." This is an average earning of $3.33 for each piece he copyrighted, or a yearly income during these thirty-seven years of $135 per year from his copyrights. It is patent to anyone that he did not procure his livelihood by this means. This is not an exceptional case, but rather a fair average of them.

I do not believe a single case can be produced where a musical composer has earned a livelihood by his compositions alone. This is a very different case with the author of a book with whom the composer shares like privileges under the copyright act. In the majority of cases the author follows writing as his only means of livelihood. This class of work occupies a great deal of time, expense, travel, and study of the subjects forming the foundation of his work. The composers rarely treat their compositions as a serious business proposition, but rather as a side issue of net gain on what they realize from them. The publishers of the country are banded and organized together for mutual protection and enrichment to profit by this condition at the expense of the composer, the policy to fight royalties in favor of outright purchases for nominal amounts being general.

The manufacturer of automatic musical instruments and their controllers.—The equitable interest of the automatic instrument manufacturer consists really of two classes, namely,

their rights as legitimate manufacturers to a self-made industry; and the part they have taken in the musical education of mankind, and the right they have to continue uninterrupted in an industry and art in which they have been so potent a factor, without molestation.

First. All manufacturers of automatic musical instruments or their controllers have vast interests involved. Capital and time have been heavily spent in creating an honest, legitimate and, beyond question, legal business. They have acquired patent rights, built at large expense special machinery to make a more perfect and less costly product. In short, have exercised and exhibited the same ambition and enterprise that is put into any business where price and merit is the determining factor of success.

Second. The manufacturer of self-playing instruments has done much to extend and create cultivated musical taste in the community.

This has at no time been at the expense of the composer, but, to the contrary, has increased not only the sale of sheet music but has not diminished the study of music, as the following witnesses testified under oath in the recent copyright case: White Smith Music Publishing Company *v.* Apollo Company, which testimony was never rebutted or disputed as to fact.

Mr. George Schleiffarth, witness called on behalf of defendant, being duly sworn, testified as follows:

"I have been writing music for thirty-seven years. I have written about fifteen hundred copyrighted compositions, several comic operas, and innumerable musical sketches of all sorts. I have also published some music personally and have now compositions with nearly all the leading publishers in the United States. My best-known compositions are 'Doris,' 'Ambolena Snow,' 'Douglas Club Two-step,' 'Who Will Buy My Roses Red?' and the comic opera 'Rosita,' which has been playing for about twelve years, * * * and as the composer is anxious to be known, I have often asked my publishers to allow the reproduction of my compositions on graphophones and self-playing devices.

"Q. 5. Is it your actual observation that the demand for the sheet music is created and stimulated so that the sale thereof is increased by having the musical compositions played by the piano players and other self-playing instruments, and that the cutting of the perforated rolls for a given musical composition and the selling of such rolls with and for the piano players does increase the demand for the sheet music?—A. As I am not in the sheet business on such a scale that I could judge to what extent it has increased, I still claim, from knowing the amount of music sold in the United States to-day, especially in the popular composition line, it is stimulated by all self-playing devices. For example, I would sit at a piano player and play a catchy melody; six or eight people standing around me will immediately ask—or some of them will—'What is this tune you are playing?' and I know from personal knowledge that many copies, especially of my own compositions, which are cut for self-players, have been bought in sheet-music form on account of my playing them on the machine.

"Redirect:

"Q. 22. I inferred from your statements in that regard that you received usually what you regard as very small compensation or price for a great many of your compositions thus sold. Will you give some instances of this sort, illustrating the disparity between the price you received and the popularity, in sales, of the pieces respectively?—A. My first great success, 'Careless Elegance," which I published on royalty twenty-eight years ago, and which is still selling to-day, netted me $11. My great song, 'Who Will Buy My Roses Red?' which sold 100,000 copies, netted me $83. My great composition, 'The World's Exposition March,' $5. 'The Cadet Two-step' (50,000 copies sold), $4. And so I may go on ad infinitum. Out of 1,500 compositions I have probably earned $5,000."

"Peter C. Lutkin, witness called on behalf of the defendant, being duly sworn, testified as follows:

"Q. 4. Have you in mind the rate of growth in respect to pupils in attendance in the school of music for which you are dean, for five or six years back; and if so, will you kindly give us the facts in general?—A. I have the statistics for the past five years. The attendance in the school of music for the year 1898-99 was 248; for the next year, 297; the next, 348; for the next, 366; for the present year, 460. The figures for the present year are an underestimate rather than an overestimate, as the year is not yet closed; actual number is 453 to date, but will probably run to 475.

"No cross examination."

"Julius W. Peters, a witness called on behalf of the defendant company, being sworn, deposes and testifies as follows:

"Direct examination by Mr. Burton:

"Q. 1. Please state your name, age, residence, and occupation.—A. Julius W. Peters; age, 45; residence, 4465 Oakenwald avenue, Chicago, Ill.; bookkeeper for Chicago Musical College.

"Q. 2. In your capacity of such bookkeeper, have you been intrusted with the keeping of the attendance of that institution?—A. I have.

"Q. 3. Will you please state what those records show as to the rate of growth of the attendance of pupils at that institution during recent years, giving, if you can do so, the rate from year to year, down to the current year?—A. I have taken this report from the year 1896-97, and our years run from September to September, The increase from 1896-97 to 1897-98 over the preceding year was 9.6 per cent, in the following year 10 per cent, in the next year 10 per cent, in the next 23¾ per cent, and in the next year 12.9 per cent.

"Q. 4. Can you give, from the indications so far in this year, the approximate rate of increase?—A. I should say it would be at least as much as last year, which was approximately 13 per cent.

"Q. 5. What is the total increase in attendance from the first year of which you have stated the figures, to the present time?—A. 75.3 per cent; that is, up to September, 1902.

"No cross-examination."

"Mr. WILLIAM MCKINLEY, a witness called on behalf of defendant, being duly sworn, deposes and testifies as follows:

"Direct examination by Mr. BURTON:

"Q. 1. Please state your name, age, residence, and occupation.—A. William McKinley; 41; 3306 Indiana avenue, Chicago, Ill.; music publisher.

"Q. 6. During the period, say, for the past three years, during which the manufacture and sale of these automatic players has been most rapidly increasing, what has been the fact with regard to the sales of sheet music, as to growth or diminution?—A. My business has greatly increased.

"Q. 7. If you have made any examination with regard to the compositions which have been cut in perforated rolls and used in automatic players by the different companies making such players, as to the sales which have been made of these pieces in sheet-music form during the period, say of the last three or four years, or since the time when they were cut in perforated rolls, will you state how the sales of such pieces have run? Have they increased or decreased during those years?—A. My business has very greatly increased in certain pieces that I know are issued in the form of a perforated roll.

"Q. 8. Have you in mind—if so, you may state as near as you recall—the rate of increase of any number of those which you have looked up and remember, giving their titles, if you recall them; and, if not, in general?—A. The sales of some of the pieces have doubled within the last two years—double what they were for the four years previous. I have traced up about 20 pieces of that sort to get these figures from which I stated the comparison above. I know when I desire to get new music for my family I call on the operator or performer of some of the stores that handle the music rolls. They often give me a list of the pieces. I usually purchase that. I have a list in my pocket of perhaps at least 20 pieces that I have been recommended to purchase. They have been recommended to me by one of the young men who has charge of that department—music rolls—in one of the stores; pieces I had never heard before.

"Q. 9. I understand you mean by your last statement that the pieces that you are recommended to purchase are so recommended by persons who have opportunity to hear them played by means of the perforated rolls?—A. Yes, sir.

"No cross-examination."

"WALTER LUTZ, witness, called on behalf of defendant, being duly sworn, deposes and testifies as follows:

"Direct examination by Mr. BURTON:

"Q. 1. Please state your name, age, residence, and occupation.—A. Walter Lutz; 29 years; 902 North Halstead street, Chicago, Ill.; salesman with H. B. McCoy in the music business, Chicago.

"Q. 2. How long have you been employed as music salesman?—A. Sixteen years.

"Q. 3. From your experience as a salesman of sheet music, have you had any opportunity or occasion to judge what effect, if any, the introduction and increasing use of the piano players and other automatic instruments of this class has upon the demand for and sale of the sheet music of the same compositions?—A. Yes; I have had people come in the store and ask for music which they had heard from the various players.

"No cross-examination."

I wish to call the committee's attention to the fact that the above testimony was taken to prove the opinions expressed by two witnesses for the plaintiffs were in error when they stated as their opinion that the mechanical player was detrimental to the sale of sheet music. Note the lawyers for the White Smith Music Publishing Company did not dispute

the facts by not cross-examining these witnesses. The plaintiff is a big music publishing house and influential members of the Music Publishers' Association, with all the evidence and aid their association could lend, could not and did not attack these undisputable facts. It is a coincident worthy of your close attention that W. M. Bacon, a partner in the plaintiff's firm in this case and also of the copyright committee of the Music Publishers' Association, who was leader of the prosecuting forces and signally failed to prove that this industry did other than to improve the sale of music, now comes to your committee with a copyright measure framed by his associate on the copyright committee of his association.

Mr. G. W. Furniss, who is chairman, presented it and had it drafted in at the first conference, at which they both were present, and they were at every other conference to guard their conspiracy; conspiracy I say, because Mr. Bacon's firm has a contract (and his lawyers had to so stipulate), identical to the contract filed with your committee, between a publisher and the Æolian Company. Read the contract; they have conspired against the composer and against the public for an undue personal gain, grafted what they wanted in their copyright measure, and now come to you gentlemen with it under the guise that the composer is being robbed of his dues by automatic devices. I submit it is a prima facie case of the principals to this contract not only planning to sweat the composer, but to hold up the public. It is a conspiracy in which the copyright office has aided them, possibly innocently, and they have asked your assistance, the public funds paying the expenses, the same public they want to get under their grasp. I can prove every word of this at any time. Is it not time Uncle Sam should arouse?

The public.—The public side of this question is an important one. They have purchased in good faith instruments and self-playing devices and invested their money on the reasonable assurance of being able to continue undisturbed in these rights, and, by their patronage, have helped develop one of the foremost industries of this country and must be permitted to continue to buy controllers from the different manufacturers of their instruments. The public's spending power in this industry, being the foundation of this great and prosperous industry and the foundation on which compensation is now sought by copyright legislation for the composer, it is obvious that it must not be impaired at this late date by any measure calculated to give either the composer or his publishers legislation that will place either of them in a position to dominate this extensive industry and interests, and the public.

PERTINENT POINTS OF FACT.

This bill, H.R. 19853, as presented, is an iniquitous measure, framed not by the "poor composer" nor by the public interested, but by banded, bonded interests, which have conspired together for special privileges and greed and have had the audacity to submit it to Congress for its seal of approval. There is no secret now about this. The Librarian's records show, as also his admissions, that the interests I have enumerated in this brief were never notified of intended proceedings and never invited, although these uninvited interests are the very ones bartered in in the bill. The conferees at the conference consisted of the Book Publishers' Association, the Music Publishers' Association, etc. The two mentioned could hardly represent the authors and composers. Have they any credentials to this effect? The facts are, they represent copyrights they own and for which they seek further favorable concessions, out of which the exploited beneficiaries, the composers, would get nothing.

It had been maintained that mechanical players tend to discourage learning and reduce the sale of copyright music, but all the evidence taken on this subject proves the contrary is the case, and it was never questioned, even by counsel representing the publishers, who now seek special privileges. The publishers can not prove that they have paid an average of 1 per cent on copyright music they have published, nor the composers that they have earned an average of 1 per cent on their copyrights, in an industrial field of their own, yet they ask legislation giving them a dominating interest in an industry that other brains and money have created. Any amendment to this measure placing all interests on an equitable footing will be fought by its advocates, showing their corrupt intentions. This industry has been hampered for past years by threats of the mentioned combinations, and Congress in any new bill should clearly define whether this mechanical matter is or is not included in the amendment. To end this matter once and for all, I am in favor of giving the composers (not the proprietor or owner of a copyright) the specific right to copyright his composition as applied to mechanical reproductions, and to collect reasonable royalties from manufacturers who may wish to use it, leaving it to a court of equity to determine what a reasonable equity would be, if such a measure is considered advisable. I should urge that, as this provision will apply solely to mechanical reproductions and receive its benefits therefrom, the term of this copyright should, in all equity, take the life of a patent with which it associates.

The following parallel ethical equities with the case of the composer might well be considered by the committee:

The architect, the man of brains, who conceives a wonderful conception of a piece of architecture or arrangement of a building, how can he prevent anyone else from duplicating this result or building it, which is the creation of his conception and work? A man discovers a treatment for some disease; others use it and apply it. A surgeon discovers a new form of operation; the others use it. A business man, by dint of his brain,

figures out a great system for running his business, which makes it immensely profitable; his fellow-beings adopt it and don't pay him a cent. There are hundreds of parallel cases. Gentlemen, if it had not been for this gigantic conspiracy you would not have heard of the composer's woes.

This amendment has been fathered throughout by publishers, associations, and rings. They have exploited the composers' interests when they do not represent them, but, instead, their own selfish interests, which have been safeguarded in advance by contract.

Any legislation in favor of the oppressed composer should be so worded and framed as to not place him any further under the power of these combinations.

I shall be pleased, at any time, to prove to your honorable committee any statements made in this brief.

F. W. HEDGELAND,
Representing Inventors, Manufacturers, Composers, and the Public, 1535 West Monroe street, Chicago, Ill.

STATEMENT OF CHARLES S. BURTON, ESQ., OF CHICAGO, ILL.

The CHAIRMAN. Whom do you represent?

Mr. BURTON. I speak for the manufacturers of the perforated rolls and automatic instruments.

The CHAIRMAN. How much time do you wish?

Mr. BURTON. I do not know how much time the committee has at its disposal nor what has transpired. It may appear that some of the points on which I wish to speak have already been handled, and if I am informed of that as I touch them I will not take up further time with them. As I say, I speak for the manufacturers of perforated rolls and automatic instruments.

The CHAIRMAN. We have had several speakers on that subject.

Mr. BURTON. I understand that some points have been presented.

The CHAIRMAN. Perhaps it would answer your purpose to be permitted to see what they have said and supply in writing any additions you may desire to make.

Mr. BURTON. I should be very glad to do so. I have been obliged to come here on the shortest possible notice. I left my desk with my mail half opened and jumped for a train upon a telegraphic request to be here, and have only had that much time to determine just the form in which I would like to present what I have to say. But I could give you in ten minutes, probably, the results which, it seems to me, the bill should accomplish, and if I touch on points that have already been discussed it will not be necessary to speak further on them.

The CHAIRMAN. You may have ten minutes.

Mr. BURTON. But I would like to take advantage of the permission to file a full brief, giving my suggestions in detail as to the changes which, it seems to me, ought to be made in the bill.

Mr. CHANEY. Of course we want that, Mr. Burton. We think that will be more valuable to the committee than a speech.

Mr. BURTON. That is what I wanted to present, and if I had had time I should have been glad to have brought it in that form here.

I want to say first that it seems to me that while the bill follows the previous statutes in general in respect to copyrights, in the point I am going to speak of it ought to be amended. The practice in respect of patents is that the inventor shall verify his inventorship; he shall make oath that he believes himself to be the inventor, and any rights that pass to an assignee of the inventor must pass by an instrument which can be placed of record, signed by the inventor. But on the contrary, in the case of copyrights, in order to obtain a copyright the person claiming as the proprietor has merely to come in and make the claim as proprietor. He does not even have to verify that; and thereupon this bill expressly provides that he has a prima facie title to the copyright thus obtained.

It seems to me that that opens the door, as it always has—there is nothing new in this bill in that respect—to a large amount of fraud upon the author or whoever is the one in whom the right originates. I think, therefore, that when the bill is made up it should require the author to verify his authorship. The bill should provide that the application for registration should be accompanied by an affidavit of authorship, and if application is made on behalf of an assignee as proprietor there should be an instrument conveying the right from the person who originates it, namely, the author, accompanying the petition. It seems to me that no hardship can arise from requiring this of an author and the assignee of an author, as it is required of an inventor and the assignee of an inventor.

The bill provides that there shall be a very careful prima facie case made by affidavit as to the printing and preparation of the mechanical material for publication in order to come within the statute. All that must be verified, but the fundamental authorship requisite goes upon a mere assertion, without even the verification of an oath of the party claiming. A change should be made in that respect.

Then, furthermore, with regard to the right respecting perforated rolls, in respect of which I am speaking particularly, I think the right should be entirely distinct and separate from the fundamental copyright, the copyright of the "work," using the term that has been used; that the right to the perforated roll or whatever other form of mechanical reproduction is claimed should be based upon the filing of a copy of that perforated roll; that the filing of the copy of the original work should carry the copyright in the common sense of the word, but if the author desires to claim copyright in a perforated roll on his work, for that purpose, if you please to put it so, he should take it for that purpose, and make his claim of copyright upon that roll. If he wishes it in any other form of reproduction, such as the disk of the talking machine, he should file that; and I think that right should be entirely separate from the right which might pass by an assignment of the copyright. The publisher who may acquire the copyright on the work from the author should not, without express conveyance (although the same person might acquire both) acquire the right to control the perforated roll or the phonograph record or the talking-machine disk; they should be entirely separate.

The bill does provide that these shall be regarded as separate estates; but in view of the decisions in which a similar phrase is used, it is clear to me that that means that when the copyright has been obtained by the one proceeding provided for here, all these elements of it are separate estates which might be passed by separate assignments, but they would all be contained in the one copyright. I think that is wrong. I think that the right for the perforated roll should be acquired by filing a copy of that roll, in order that the public may know just exactly what is claimed, and whether it is claimed or not, and whether it is to be utilized.

Furthermore, I think that is a right that is naturally distinct from the other. It is a right that goes into manufacture instead of into publication. It is not to be done by the same people, naturally. The manufacturer, having a factory, makes the perforated roll. The publisher makes the books in an entirely different way. The two things are like different lines of trade. They are not naturally blended, either in use or sale. And therefore the composer or author, whichever it be, a work of words or of music, should be entitled to handle it entirely himself, apart from any right that he may have passed to the publisher by the transfer of his copyright.

I think I overheard as I came in a remark indicating that the next point I desire to press has already been suggested. In section 3 of the bill as I read it, as it stands now, there is a provision which would make it possible (and the committee will interrupt me if it has already been discussed, for in that event I should not wish to spend any time upon it) for the owners of copyrights of existing music to simply refile that music for copyright under this statute, and publish it with the mark that is required by this bill, and thereupon all that was contained in the previous copyright that is contained in that refiled and recopyrighted matter would come under this act, with all the privileges that this act gives over former copyright acts.

For example, this very matter of the right to mechanically reproduce would attach to a piece of music which had been previously copyrighted and of which a copy is now filed under this statute, and all the privileges of the bill except the longer term would attach to old copyrighted music which is simply refiled. So it would be possible to make the provisions of this act retroactive, so that the publishers, upon taking this proceeding, for 50 cents, with all their copyrighted music, would immediately cause the loss of the millions of dollars that have been invested in those rolls.

Mr. CURRIER. That has been discussed by several gentlemen, and objection taken to it—the same objection you are discussing now.

Mr. BURTON. Very well; I will not talk of that.

Mr. CHANEY. His point is that he would let the copyright go to each one of these interests, as I understand it.

Mr. CURRIER. That is on another point, however. He is speaking about section 3 now, in reference to subsisting copyrights.

Mr. BURTON. In section 3 there is a provision which ought to be changed to prevent the subsisting copyright from carrying over these provisions into the new——

Mr. CURRIER. That has been discussed by several gentlemen.

Mr. BURTON. Then if you are not going to make it retroactive—I judge the committee is clear upon that point—so as to bring under a copyright and make infringements all these outstanding millions of rolls, the question next should be, Should it be possible for the composer, by copyrighting now his perforated roll or taking any steps under this statute, to have the right from this time on to control the cutting of music which has heretofore been cut?

That strikes one at once with a little semblance of justice; but the injustice of that proposition consists in this: That for every piece of music which has been cut by a manufacturer, that has been lawfully cut under the present decisions, where he has a perfect right to do it, he has been obliged to expend from $10 to $25. He has that much investment lying under this music that is out in the market. Now, if it is not reasonable that all this outstanding music, lawfully made and lawfully sold, should become outlawed by a new act, is it reasonable that all this provision for making that investment, which amounts to millions of dollars, in the preparation for cutting this music, should become outlawed immediately, so that no more compensation can come to this manufacturer who has this $25 or this $10 invested in each piece, and say to him: "You can not use that music; you can not cut any more of that music?" Is it reasonable that that investment should be killed—that that investment, lawfully made, in a lawful product, should become immediately unlawful and waste paper?

Mr. WEBB. What section has that effect?

Mr. BURTON. I do not say the bill would certainly have that effect. It is entirely uncertain, but it seems to me the bill would have the effect, as I read it, of permitting the composer to claim the rights except as to outstanding music—that is, the right from this time on to cut it. The bill should be clear. I have had only a very short time to examine it, and a provision may possibly lurk somewhere under which the continued production of perforated rolls now being produced would be permitted, but I think not. I think it is possible, or might be held possible, under the bill for the composer to claim the rights from this time on to cut the music.

Mr. CURRIER. Oh, very clearly so; he can sell that right.

Mr. BURTON. If that is the case, it seems to me unjust.

Mr. CAMPBELL. Where the copyright has run out?

Mr. CURRIER. No; for copyrights taken out after the passage of this bill.

Mr. BURTON. I am talking about the music that is now on the market, not the rolls, but the means of cutting them—whether the composer can, under this bill, acquire the right to stop the cutting from now on of that music.

Mr. CURRIER. I do not think you need to take any time with that proposition.

Mr. BURTON. If that is clear, I will pass it. It seems to me the bill gives it; but if you make it entirely clear that it does not——

Mr. CURRIER. It is not the purpose of the committee, I judge, to allow that. Your time has expired.

Mr. BURTON. Then I will ask leave to file a complete brief suggesting changes.

Mr. CURRIER. And I might say to you what has been said to others here—that neither the Senate nor the House committee will take any action on this bill at this session. It will go over until next winter, and at any time before action is taken you can file any further brief or any further suggestions with the committee.

Mr. BURTON. I thank the committee on behalf of the interests I represent.

> *To the Senate and House Committees on Patents*:
>
> Pursuant to the permission granted me at the conclusion of the few minutes' oral hearing with which I was favored before the joint meeting of your committees, I beg to submit herewith a brief and suggestions with respect to the amendments to Senate bill 6330 and House bill 19853, deemed proper and necessary in order to make the act contained in said bills properly protective of the rights and conservative of the interests arising out of and connected with the industries of automatic musical instruments and controlling devices—perforated rolls, talking-machine disks, and phonograph cylinders—for the same.
>
> All of which is respectfully submitted.
>
> The following facts should be taken into consideration in making any amendment to the copyright law affecting automatic reproducing devices as well as perforated rolls for reproducing music, talking-machine disks, and phonograph cylinders for their respective purposes.
>
> 1. To the modern arts relating to automatic music-playing devices and automatic means for reproducing sound, such as talking machines and graphophones, authors and music composers have contributed not a single iota.
>
> These arts have been the result of the combined efforts of thousands of scientific, industrious, and artistic inventors. These inventors and the manufacturers cooperating with them by their capital and business skill and enterprise have created these entire arts and to them is due the entire benefit which the public has derived and is deriving from these arts.

2. Musical composers and song writers, notwithstanding their entire lack of participation in the creation and development of these arts, have derived already and are still deriving large pecuniary benefit from them.

This is most clearly provable in respect to musical compositions. For any musical composition which has been largely reproduced by automatic players employing perforated roll controllers a largely increased demand immediately arises. The sale of the ordinary staff notation of any such composition experiences a notable stimulus immediately upon the production and sale of the perforated rolls for producing the composition automatically upon musical instruments.

This fact is conclusively established by the record in the suit of Apollo *v.* White-Smith Music Publishing Company, lately determined in the United States circuit court of appeals in the eastern division of the southern district of New York. We are filing herewith a copy of the printed record of the defendant in that suit, having marked the pages[1] containing the testimony upon this point, and also a copy of the brief on behalf of the defendant citing[2] the facts as established by the record upon both sides to the effect that in the face of the testimony by wholesale and retail dealers in sheet music, that the sale of perforated rolls for such music largely and promptly increased the demand for the sheet music, there was offered not one word of testimony to the contrary, although in the control of the complainants and available as witnesses in their behalf—practically as cocomplainants or cobeneficiaries with them in the suit—were included nearly all the large publishers of and dealers in sheet music, whose records of sales would have established the facts one way or the other overwhelmingly, so that the absence of testimony from these sources must be taken as an admission of the fact as testified to by the few publishers who were accessible to the defendants.

[1] Schleiffarth, pp. 48-51; McKinley, pp. 97-100; Lutz, pp. 100-101; Jansen, pp. 131-133.

[2] Pp. 29-34.

We assert, and challenge contradiction, that the experience and observation of the music trade during the past ten years, during which this art has grown from infancy to its present proportions, establishes the proposition, viz, that the sale of perforated rolls and other means for automatically reproducing musical compositions to the ear tends largely to increase the demand for the ordinary staff notation or other published form of the particular compositions which are thus reproduced.

3. The making of a perforated roll or equivalent device or appliance for reproducing to the ear a musical composition is not a mere mechanical process nor one involving mere mechanical skill. It is, on the contrary, an artistic process requiring musical taste and ability and affording opportunity for the exercise of the very highest musical taste and ability, conjoined with the most exact and delicate understanding of the mechanical principles and features of the mechanism with which the controller device—perforated roll or the like—is designed to cooperate for reproducing the music to the ear. The art of the "arranger," as he is termed, of a perforated roll brings into exercise an artistic sense and skill of as high a rank as that of the musical composer and requires, in addition thereto, an ability to understand accurately and minutely the intricate mechanism to which the device produced must correspond and with which it must cooperate.

In the case of the talking-machine disk and phonograph cylinder, the contribution of the singer and player is even more obvious, as the essential and controlling element in the value of the devices which result and which are the distinct product of the art of the singer and player is a thing apart from the art of the composer.

The producer of a perforated roll or of a talking machine disk or phonograph cylinder, therefore, is as much entitled to be considered an "author" in virtue of the production of such roll, disk, or cylinder, entirely apart from and subsequent to the composition of the music as is the painter by virtue of his sensitive appreciation of beauties of form and color in nature and his skill in reproducing them upon the canvas. The landscape painter does not create the nature scene, but he is not the less an artist because he depicts it only, instead of creating it from his imagination. Nor is he less entitled to a copyright upon his painting, because it is a more or less perfect reproduction to the eye of that which existed for the eye before he reproduced it, than if he had evolved the scene from his imagination and then depicted it to the eye by the same skill.

The photographer who merely posed his subject is entitled to a copyright upon his photograph. He did not cast the features, nor shape the form, nor arrange the hair, nor devise the costume. He merely posed them all, and chose the position with respect to light and shadow, and adjusted the contrivances for affecting both. This was his art, and the photograph is the result; and it is his photograph for purposes of copyright.

The "arranger" of the perforated roll is an artist of as high merit as the photographer, and in some respects of as high merit as the landscape painter.

If there is to be secured or conferred upon anyone an exclusive right to the perforated roll, or to the talking-machine disk, or to the phonograph cylinder, for producing to the ear a particular composition, that right, in virtue of authorship, belongs to the arranger of the perforated roll and to the singer or player who produces the talking-machine disk or the phonograph cylinder.

That copyright may reasonably be granted to the producers of these devices for the devices themselves seems too obvious for argument, and that it should not be in the power of any composer whose composition is published and on the market to discriminate between different arrangers of perforated rolls or different singers or players, in respect to the right of making such records, respectively, and of selling or renting the same, seems also obvious justice.

It would be no injustice, in view of the observed facts above stated—that the composer derives benefit only and never injury from the sale of these automatic devices—that he should have no rights in respect to them, except to be credited with the compositions by having them marked with the title which he has given them for market and with his name as composer. But in view of the possibility that there may be reciprocal advantage—that the name and repute of the music and of its author may contribute to the sale of the reproducing devices—a royalty for the use of the title and name may reasonably be allowed to the composer.

But the composer should not be recognized as having any right entitling him to prohibit anyone who desires to do so from making such automatic reproducing devices by employing either the art of the arranger of the perforated roll, or the voice of the singer, or the skill of the player on musical instruments.

And the royalty should be uniform for all makers of each sort of device; that is, all makers of perforated rolls for a given composition should pay the same royalty to the composer for the use of his name and the title of his music, and all makers of vocalizing disks or cylinders should likewise pay the same royalty for a given composition.

This right to royalty should be allowed, not in virtue of any domination or supposed domination of the original copyright over the act of reproduction, but solely in virtue of the natural right of the composer to have his name and the title which he has given to his music associated therewith, howsoever it is produced, and of the fact that presumably a commercial value attaches to such name and title, which will benefit the seller of the automatic reproducing device.

This right of royalty should therefore not run to the proprietor of the original copyright as such, but to the composer as such. If the composer has sold his copyright the purchaser should not, by virtue of that purchase, acquire any interest in the royalty of the composer for the use of his name and the title of his music. Of course the composer could sell this royalty right, and if he chose to sell it with the copyright and to the same person he could do so, but it should not pass without express mention. It should not pass as incident or appertaining to the copyright.

Such a provision would be precisely like the provision in the present statute with respect to translations. In the statute it is now provided, not that the copyright includes the right of translation, but that the author whose work has been copyrighted has the exclusive right of translation. He may sell his copyright, but such sale does not divest him of the monopoly of the translation nor vest such monopoly of translation in the assignee of his copyright.

NOTE.—This point is somewhat fully developed in brief of the defendants in White-Smith Music Publishing Company *v.* Apollo, copy of which brief is herewith furnished. (See p. 46 to 50, inclusive.) The position above stated and presented in brief, as above noted, was not controverted and was apparently fully conceded as a legal proposition, by counsel for the complainants in that suit. The ultimate propositions supported by the above contention in that suit were contested upon other grounds. Copy of complainants' brief upon this point will be furnished the committee later, with citation to the particular paragraphs sustaining the above statement.

Outside of and as an exception to the general class of musical compositions to which the foregoing considerations are pertinent, there is a class more closely related to automatic reproducing devices and in respect to which the composer has a more vital interest, viz:

Musical compositions not reproducible to the ear by a single human performer upon any instrument, but which can be produced by means of perforated rolls on an automatic instrument.

The staff notations of such compositions have practically no market value, except in case they are arranged in the forms of orchestral scores, so as to be produced by a plurality of instruments simultaneously played by different performers. The number of copies of such orchestral scores which will be required is necessarily very limited, and the sale of such staff notations offers a very limited field from which the composer may derive a just compensation for his work. The only source of revenue to the composer of such works is in the sale of the only means of playing these, viz, the perforated rolls.

It may be deemed proper and it will not be denied that it would be just that a composer of a musical composition of this class who causes it to be embodied in the form of perforated roll, and who can derive a revenue from it practically only in this form, should be considered in the light of both composer and arranger, and as entitled to obtain original and independent copyright of the perforated roll, so as to control the composition absolutely in this form.

It is believed that it will not be difficult to frame a provision of the statute to do justice to this class of composition, and which shall not trench upon the natural equity of the

perforated roll arranger for other musical compositions, or upon the natural right of the public to derive the use of the automatic reproducing devices upon ordinary musical compositions, without requiring the consent of or paying tribute to the composer.

4. As to duration of copyright.—The bill before your committees proposes a remarkable extension of the period of copyright beyond anything heretofore granted. This is believed to be contrary to sound public policy and of doubtful constitutionality.

The Constitution expressly limits the power of Congress in respect to their copyright protection to granting such protection "for limited periods." The term "limited" can have only a relative meaning, and the obvious meaning is limited with respect to or in comparison with the period during which the public will have desire or use for the copyrighted work. It is contemplated, evidently, that in compensation for the protection which the statute gives the composer for a limited period the public shall derive the unqualified use and benefit of the work for a remaining period. If there is no remaining period, the consideration for the protection has failed.

It needs no statistics to establish to the common knowledge of the committee that not one book in ten thousand has any commercial value fifty years after its publication. It will probably be safer to say that not one published work in a hundred thousand has any life after fifty years. If, therefore, the author is given the monopoly for fifty years, the public has nothing left to compensate it for that monopoly and protection.

Not one work in a million endures so as to have any value after one hundred years.

But the bill proposes, as to the great bulk of copyrightable matter, that the period of copyright shall be substantially one hundred years—fifty years after the death of the author.

It is respectfully submitted that this transcends the intention of the constitutional limitation, and that the public would, by such an enactment, be deprived of substantially all the compensation which the Constitution intended should be reserved to it in return for the copyright protection granted the author.

Whether the constitutional limitation should or should not be so strictly applied, it seems beyond doubt that sound public policy forbids thus bartering away all the public benefit arising from the free right of publication after the expiration of copyright.

There is a second objection to the particular form in which the bill gives this extended copyright term. There does not appear to be any logical relation between the copyright protection and the duration of the life of the author. The privilege or protection granted is in no respect personal, except as to the revenue which may be derived.

There does not appear any reason why the work of a mature writer of 60, presumably capable of giving to the public compositions of peculiar value, especially if they relate to scientific or philosophical subjects, should receive less protection from his copyright than would be granted to a youth of 20, whose immature productions would obtain the protection of a presumably long life before him (during which he would often regret his immature publication).

Furthermore, the particular form or provision of the bill with respect to joint authors (line 24, p. 14; line 26, p. 15), when corrected to cure the obvious error in the phraseology and express the doubtless intended meaning, opens the way most obviously for practical fraud upon the public. An aged author, by associating with himself in a nominal yet unimpeachably colorable way a youthful assistant, and obtaining copyright in their names as joint authors, will secure protection for his work concurrent with the life of the junior and fifty years thereafter, instead of concurrently with his own nearly ended life and subsequent fifty years.

It is obvious that joint authorship will become exceedingly popular if this paragraph of the bill is retained; and by the expedient of triple or quadruple authorship the chances of a long period will be greatly increased.

NOTE.—The very obvious error above indicated—line 24, page 14, line 2, page 15—has probably received the attention of the committee. The sentence supplying the connection from the commencement of section 18 now reads: "That the copyright secured by this act shall endure * * * in the case of joint authors, during their joint lives and for fifty years after the death of the last survivor of them." The gap which is left between the dates of death of the first and last dying of the joint authors is uncovered by the copyright under this form of statement. That is, the copyright would lapse upon the death of the first dying—the end of their joint lives—and revive at the death of the last survivor. The correction is obvious. Make the sentence read: "In the case of joint authors, until the death of the last survivor of them and for fifty years thereafter."

It is believed that the present term of copyright should not be disturbed unless to shorten it. Twenty-eight years, with a possible extension of fourteen, exceeds the actual life of a great majority of copyrighted publications and leaves the public nothing for its concession of temporary monopoly to the inventor; but it is, perhaps, a fair average, and at least it has caused no serious complaint upon either hand.

An exception should, however, be made in respect to any protection which may be given to anyone, whether composer or arranger, with respect to the automatic reproducing devices—such as perforated rolls—associated so closely, as these devices necessarily are,

with manufacture as distinguished from publications and with inventions as distinguished from literary or artistic works. The duration of the patents, whose owners must pay tribute to the holders of any form of copyright upon the perforated rolls, are granted only seventeen years' monopoly in which to derive all compensation for their inventions.

The copyright protection, if any, granted in any form upon perforated rolls should not exceed the term of patents—seventeen years.

5. Verification of authorship and ownership should be required.—All our copyright laws hitherto have been unaccountably lax in respect to the requirements for making prima facie title to copyright by virtue of authorship or proprietorship. It has only been necessary, and the present bill only makes it necessary, that the applicant for registration under the copyright statute should state, without verification of any sort, that he claims as the author or proprietor, as the case may be. So singularly loose is the requirement that the applicant is not even required to declare that he is the author or proprietor, but only to state that he claims as author.

How easily a fraudulently disposed claimant will satisfy his conscience in stating that he claims as the author, when he might hesitate to declare that he is, in fact, the author; and how much more easily one who conceives that he has a shadow of right to ownership will make the like statement that he claims as the proprietor when he would hesitate to declare that in fact he is the proprietor, is obvious without comment.

But it is certainly obvious that so vast and important a right as that conferred by the copyright statute should not be vested and given prima facie validity in anyone who has merely the effrontery to declare even that he is the owner or that he is the proprietor.

Why should less be required of the claimant to copyright than is required of the claimant to patent right?

The applicant for patent must make oath that he believes himself to be the first and original inventor, and his oath must also declare affirmatively the existence of all of the other conditions precedent to his right to obtain a patent. Why should not the author claiming copyright be subject to a similar requirement?

The assignee of an inventor desiring a patent to issue to himself must file in the Patent Office an instrument in writing, signed by the inventor, conveying to the assignee the whole or such portion of the interest as it is desired to have appear in the name of the assignee upon the issue of the patent, and must in addition expressly request that the patent so issue to the assignee. Why should less proof be required of one claiming copyright as proprietor?

It seems that no argument is necessary to enforce these suggestions. Under the present law and under the proposed bill any publisher obtaining possession of an author's manuscript under any color of right not involving him in larceny by reason of the possession may proceed to put the work in print and make application for copyright, not even averring that he is the proprietor, but stating that he claims as proprietor. The copyright certificate will issue, and his title to the copyright will be prima facie established by the proceedings which he takes pursuant to the statute and the action of the copyright office therein; and the author, who may be ignorant of the proceedings, who may have only entered upon negotiations with the publisher without any intention of accepting the offers which may have been made, finds himself in the position of being obliged to contest a prima facie right on the part of the publisher to the copyright in his work, with the alternative that if the publisher's title is not conceded to be good the author's right is lost by publication.

How many authors have succumbed to the embarrassment of just this situation, deliberately created by greedy publishers, will never be known, but it is time that the statute which offers such inducement to greedy human nature to perpetrate frauds of this character should be remedied, and that the prima facie right acquired under copyright statutes should have behind it at least the support of the oath as to authorship and of an instrument of assignment by the author to the party claiming as proprietor.

6. Penal provisions.—It is respectfully submitted that the penal provisions of this statute are grossly disproportionate to the offenses or injuries to which they are directed, and obviously provocative of blackmail and coercion, and in some instances clearly unconstitutional and unenforceable. No attempt will be made here to discuss all of these provisions, but attention will be directed only to those which bear upon the particular matter on behalf of which this presentation is made, namely, automatic reproducing devices; and without discussion it is suggested as too obvious for argument that a penalty of $10 for each and every infringing copy of a perforated roll found in the possession of the alleged infringer, his agents or employees, is grossly excessive, in view of the selling price of such rolls, which seldom exceeds $3, and probably averages not far from $1.

Severe penalties are only proper where the offense complained of can not be committed by accident or inadvertence, and where there can be no possible mistake as to a given act constituting the offense. In any case in which there might be room for difference of opinion, or where the offense might be committed unwittingly, such penalties are grossly improper.

But when the situation is such that the party entitled to complain or who might allege injury by reason of the alleged offense is to be the beneficiary of the penalty, and

especially, as in the present bill, is to absorb the entire penalty, it is obviously contrary to reason and good morals to make the penalty materially exceed the damage, because there is thereby created a motive on the part of the person alleging injury to promote and encourage surreptitiously the alleged offense until it has grown to large proportions, so that he may thereby reap a greater benefit from the trespass than he could possibly have reaped otherwise from the property trespassed upon.

In the case of the perforated rolls, all these objections to severe penalties are found concurrent, for—

(*a*) There will easily arise wide and honest difference of opinion as to whether two given perforated rolls are infringements, one of the other, and even whether a given perforated roll is an infringement of a particular musical composition (if the bill should be retained in such form as to make the original copyright apply to perforated rolls). It is well known that controversies are constantly arising upon the question of infringement as between two staff notations, the second author often claiming and frequently establishing, contrary to the belief of the first, that his composition was an independent one, both having derived their theme from sources in the public domain.

A perforated roll presenting a composition only so similar to a public and copyrighted composition as to raise a question of infringement if it were a staff notation, instead of a perforated roll, will raise the same question as a perforated roll. The copyright owner will reap an advantage, it may be, of 10 per cent, upon the selling price of the sheet music, let us say 15 to 25 cents for every copy sold. He will reap a profit of $10 as a minimum upon every copy which he can find in the possession of the alleged infringer, his agents, or employees. Is there any doubt which remedy he will elect? Is there any doubt that he will await his opportunity for finding a large stock in the hands of the alleged infringer? Is there any doubt that a statute so framed would offer almost irresistible inducement to blackmail, which might be perpetrated under such circumstances?

The extravagant injustice of the provisions for impounding the "goods alleged to infringe" upon the commencement of a suit and for delivering up for destruction all copies, as well as all plates, molds, matrices, and other means for making infringing copies, have been well discussed by Mr. Walker. It is not deemed conceivable that your committee will seriously entertain such obviously oppressive legislation. On what possible pretense of equity or justice may a complainant, who thinks that his copyright has been infringed, upon that mere allegation lock up his competitor's stock of goods, while he on his part monopolizes the market during the pendency of a long litigation to determine the justice of that which may have been only a colorable charge at the start?

One's sense of justice is startled into horror at the suggestion of subsection d, on page 18 of the bill, that "all plates, molds, matrices, and other means for making infringing copies shall be delivered up for destruction," even if it is understood that this is to be done only at the conclusion of a suit. Whoever drafted this provision was either malicious or ignorant. (This statement is made with careful deliberation and we wish to repeat it: He was either malicious or ignorant.) Mr. Walker's presentation must make this clear. I make the same for my own client, which has an equipment involving an investment of many thousand dollars for producing perforated rolls, every element of which would enter into the production of each single roll, and all of which would be subject to destruction under the language quoted. Under this provision of the bill a single accidental, inadvertent infringement will subject that entire plant to destruction, though the copyright owner may not be damaged 50 cents.

Could anything be easier than for a malicious manufacturer to ruin his competitor by entrapping him into the manufacture of a single infringing roll and then bringing suit under this section and destroying his establishment?

Your committee will not doubt that the writer of this section was ignorant of this possibility, if it acquits him of being malicious in the drafting of this provision.

7. Section 4966—Public performance.—Your committees have not failed to notice the single provision of section 64 of the bill which, "providing that all acts and parts of acts inconsistent with are hereby repealed," makes exception of section 4966, and in respect to that section provides that its provisions "are hereby confirmed and continued in force, anything contrary in this act notwithstanding."

The framers of this bill were more anxious than for anything else that the monopoly of public performance given by section 4966 should in no respect be weakened, and although they have embodied in this bill provisions in terms more stringent than those of that section, fearing that these more stringent provisions might not be constitutional, or that by some slip they might be found to leave a loophole, they reversed the ordinary procedure, and, instead of making the bill as a new act, repealing all inconsistent acts, they make the section of the former act nullify the bill as to all inconsistent features.

It will occur to the committee that this is an unscientific mode of proceeding, and that the bill, when enacted into law, should be clear and consistent within itself, and not subject to nullification by its own terms in any respect.

But it is believed that section 4966 of the present statute has been tacitly treated as meaning something which the legislature in enacting it never intended, and that the provisions in the present bill, developing into express terms that which has been tacitly treated as involved in the terms of said section of the present law, crystalizes into

dangerous permanency a defect which would have been eliminated from the present statute whenever the United States courts had occasion to review it.

Protection for public performance is justifiable only in respect to compositions which by their nature yield no considerable revenue to the author by the sale of copies or otherwise than by public performance. Dramatic compositions clearly fall within this class. A dramatic composition is written primarily to be performed and only incidentally to be read. Some dramatic compositions may have such literary character that they would be bought to be read and so little dramatic quality that they will not be largely performed; but the dramatic composition whose value is in performance and not in reading gets little protection from the copyright statute without special provision giving monopoly of public performance. A hundred copies will supply all the actors who need it; no one else wants it; but a million people will be glad to see it performed and will pay high prices for their seats. The dramatic writer must get his revenue from the million—not from the hundred—or he will fail of adequate compensation.

Recognizing this situation, Congress, in 1870, enacted the following provision:

"SEC. 4966. Any person publicly performing or representing any dramatic composition for which copyright has been obtained, without the consent of the proprietor or his heirs or assigns, shall be liable," etc.

In 1897 the section was amended by inserting the provisions now contained in section 4966, making it include musical compositions, the words "or musical" being inserted after the word "dramatic" in the second line of above.

There can be no reasonable doubt that the intention of the amendment of this section, by making it refer also to musical compositions, was to include musical-dramatic with other simple dramatic compositions; that is, to make the scope of the protection take in all compositions whose value rested in dramatic performance as distinguished from mere vocalization.

The word "perform" in the section clearly points to this significance and intention.

It is not believable that Congress intended to provide by this amendment that every member of a religious congregation joining publicly in the singing of a copyrighted tune should be liable to the penalties prescribed by this section; nor even that every member of a church choir, having purchased the copies of the copyrighted anthem, sold only for such purpose and useful only for such use, should be subject to these penalties, if the publisher omitted to grant expressly the permission to sing with the sale of a printed copy.

But no other interpretation can possibly be derived from the present section unless the word "perform" is taken as applying to dramatic performance and as not including mere vocalization in public.

The present bill is intended to leave no doubt upon this point, and in that respect it is contrary to public policy, sound sense, and every consideration of justice.

The holder of a musical copyright should not be vested, by virtue of that copyright, with the right to sell his music, which is made to be sung, and prohibit its singing; to sell his music, which is made to be played, and prohibit its playing. Still more obnoxious to justice is it that one who has been openly sold a copy of a piece of music, and who has done with it that which constitutes the only motive for buying it, namely, has sung it, or played it, or procured some one else to sing it for his entertainment, should, if he chances to do that in public, be penalized and put in the position of one who has committed a misdemeanor or transgressed another's rights. Reason and sense revolt at such a statute or such an interpretation of a statute; and musical composers demanding such rights place themselves in contempt of civilized society.

Section 4966 should be amended by making clear that it relates only to dramatic performance, while it includes such performance of compositions which are musical as well as dramatic. And all provisions of the present bill exceeding such protection should be limited.

8. As to right of translation.—The present bill makes a radical departure from the present statute in respect to the right of translation of a copyrighted work into other languages. Under the present statute, as above noted and presented in the brief cited, the right of translation inheres in the author as author, conditioned only upon copyright having been obtained of his original work, but not conditioned upon that copyright remaining in him. His assignment of the original copyright does not carry to the purchaser, or divest from the author, the right of translation. The translation, when made by the author, is his own product. He may copyright it or not as he pleases; but the owner of the original copyright has no right in the translation unless expressly conveyed to him (which may be done, of course, by express mention in the conveyance of the original copyright, or by the transference of the manuscript of the original work before copyright, putting the purchaser in the position fully of the author as to all the rights arising out of authorship).

The present bill, however, makes the right of translation not merely one which is conditioned upon the existence of copyright of the original work, but an essential and integral part of that copyright, so that it will pass with the assignment of the copyright without special mention, and the proprietor of the copyright, and not the author, would thereafter have the right of translation. The author could not translate his own work

without infringing the copyright which he had sold to the proprietor. Any translation, however maladroit or misleading, which the copyright owner—publisher—might approve would pass under the author's name as his work into the foreign language, and he would have no voice to protest against the libel, no power to remedy the injury by putting out a correct translation.

It can not be doubted that such considerations as these governed in the enactment of the present statute in such form that the right of translation inheres in the author and does not pass without his express act, though the original copyright may have been assigned. It is obvious that the author ought to have a right in respect to translation which will not require express reservation in order to remain his own when he sells his copyright. It will be apparent that negotiations between an author and publisher for the sale of his copyright will commonly proceed in general terms, referring to the copyright by that term, and that the author will commonly be considering only what may be termed the original copyright in such negotiations, and that he will in some instances convey the copyright with no thought of the appurtenant rights involved in it, and will wake up only too late to find that he has no control over translation, if the term "copyright" carries the whole right, including that of translation, as the present bill provides.

The statute is right as it stands and the bill should be amended to conform to the present statute in this respect.

I have drafted amendments to the various sections and paragraphs of the bill such as are necessary, in my judgment, to make it conform with the requirements of equity to the different interests affected, and with sound public policy, in the various respects above pointed out and discussed, and would submit them herewith, but find that they are so numerous and require insertions and emendations at so many points in the bill that I believe the purposes of the committee will be much better served by the submission a little later of a full draft of a bill embodying the various changes which I would suggest, so that the matter may be considered in a form consistent throughout instead of in the piecemeal form which would result from the many amendments which would be required to put the present bill in desirable form.

Such completely framed bill I promise to submit to the committee at an early day and in ample time for full consideration upon the reassembling of the committee in the fall.

Thanking the committee for the opportunity which has been afforded me for presenting my views in the interest of my client, I am,

Respectfully,

CHAS. S. BURTON,
Representing Melville Clark Piano Company.

STATEMENT OF NATHAN BURKAN, ESQ., OF NEW YORK CITY.

Mr. BURKAN. Gentlemen, there has been a great deal said here about this "monopoly," this great "music trust," that intends to——

Mr. CHANEY. You are a publisher, are you?

Mr. BURKAN. I represent the Music Publishers' Association. This combination between the Music Publishers' Association and the Æolian Company, the purpose of which is to destroy the independent manufacturers of perforated rolls, cylinders, and disks adapted to reproduce musical sounds.

I think we should at this time refer to the history of this alleged contract between Æolian Company and some of the publishers. A number of years ago an action was brought in the circuit court of Massachusetts to restrain the manufacture and sale of perforated rolls on the ground that such perforated rolls infringed the complainant's copyright on his musical composition. The case was argued before Judge Colt, and he decided that a perforated roll was not a copy of a sheet of music, and therefore not an infringement of the copyright. (Kennedy *v.* McTammany, 33 Fed. Rep., 584.) A number of years thereafter another action was begun in the District of Columbia, the case of Stern *v.* Rosey, to restrain the manufacture of cylinders and disks adapted to reproduce musical sounds—applying particularly to talking machines. That court decided against the publisher. Thereafter these companies grew up, one after another, and manufactured rolls, disks, and cylinders, and appropriated for use upon these devices the property of the composer, for which he did not receive a dollar.

The Æolian Company, the pioneer in this line of industry, became a very large concern, investing millions of dollars in the establishment of a plant and in the manufacture of these rolls. They knew, or were advised by counsel, that this question, whether a perforated roll adapted to reproduce a copyrighted musical composition was not a "copy" of the composition within the meaning of the copyright law, was uncertain; it had never been decided by any appellate court. And it was very essential for the welfare of the company, and for the protection of its interests, to ascertain whether in fact it was infringing upon a copyright every time it made or sold a roll.

The ACTING CHAIRMAN. Do you represent the Æolian Company?

Mr. BURKAN. No, sir; I do not. I have no interest in the Æolian Company. I never appeared in any action for it, am not appearing for it now, and do not expect and will not receive or accept any compensation for my services here. I represent the music publishers, and I am a friend of Mr. Victor Herbert.

I desire to reiterate that the Æolian Company was advised by able counsel that there was some doubt about this proposition. The Æolian Company, to protect its property, and in order to settle this question once for all, sent its agents to several publishers who stated to them: "Gentlemen, we have sought legal counsel—the ablest that we could find in the city of New York—who advise us that there is grave doubt as to whether the manufacture by us of these perforated sheets do not infringe your copyrights, and that question ought to be determined by the highest court or the land."

No single publisher, gentlemen, had sufficient funds to carry on such an expensive litigation, because these music publishers are not the millionaires that our friends on the other side have attempted to point out and show. Most of them are poor men. No single composer would be able to supply the funds to carry on such a litigation. There was a great deal involved; and when this company came and said: "Gentlemen, we will take up this litigation; we will try to establish your rights; but for our trouble, if we do establish your rights, if we can get the highest court in the land to decide that the present copyright laws are applicable to these perforated sheets, then we want the exclusive rights to manufacture perforated rolls adapted to reproduce your music upon specified royalties for a number of years."

Was there anything inherently wrong in that? A number of publishers naturally jumped at that offer. It would mean to a large publisher thousands of dollars if the courts decided in his favor. At the time when this offer was made, the perforated roll companies were appropriating his copyrighted music for which he received not a single penny. And the contract that was entered into between the Æolian Company and some of the publishers, a copy of which was offered in evidence here, provides that the consideration for this agreement was this litigation. Nothing was concealed; everything in connection with this contract was done in the open, and the consideration for the contract is expressed in the contract as follows:

> And for and in consideration of the premises the Æolian Company hereby covenants and agrees to pay all proper expenses of conducting such suit for the purpose of testing the applicability of the United States copyright laws to perforated music sheets of kinds aforesaid, and that if the court of last resort shall in such suit decide that the United States copyright laws are applicable to such perforated music sheets, then and in such, case and from that time forward the Æolian Company will keep the books of account and pay the royalties.

These gentlemen, the publishers who made this contract, did not have in mind the creation of a monopoly. Each publisher, naturally, as any other business man, wanted to get something for his property, and it was very advantageous to the publisher to get the highest court to decide in his favor, without paying the enormous expense of such a litigation. Mr. Davis, the inventor of these perforated rolls, properly said—he said it truthfully and honestly—"My invention depends upon Mr. Sousa and Mr. Herbert and their compositions." The music of these gentlemen is a component part of my invention.

The ACTING CHAIRMAN. The Æolian Company, as the law stood, did not have to pay to musical publishers a cent?

Mr. BURKAN. Not a cent.

The ACTING CHAIRMAN. What was their object in getting a decision of the court which would force them to pay large sums to the musical publishers?

Mr. BURKAN. They are the largest manufacturers of these rolls in the world. They have manufactured thousands and thousands of these rolls representing the best copyrighted compositions. Suppose a large number of publishers or a number of public-spirited men had gotten together a fund, and suppose a case to test the applicability of the present copyright laws to perforated rolls had been carried to the highest court and won—then the Æolian Company would have been obliged to account for all its profits on these perforated rolls to the publisher, and would have been obliged to pay Mr. Herbert, Mr. Sousa, Mr. Chadwick, Mr. Damrosch, and other composers thousands of dollars in back royalties; whereas under this agreement the Æolian Company protected itself, because the publisher who signed it consented to the use of his composition for the perforated rolls, and he would have been estopped under such agreement from suing for an accounting of profits.

The ACTING CHAIRMAN. Yes; but the Æolian Company originated this litigation.

Mr. BURKAN. Yes—very true, sir; very true. The Æolian Company (and I do not appear in this matter as its champion at all) had spent thousands of dollars to improve and protect its patents to

these perforated rolls. It employs the most skillful and talented arrangers to arrange and edit these compositions embodied in the roll, so that when you purchase an Æolian record or roll and pay your $2.50, or whatever the price may be, you get a roll when used in connection with the playing instrument which gives an exact reproduction of the music as written by the composer, say, by Mr. Nevins, Mr. Chadwick, or Mr. Foote. There were a small number of companies that also sold perforated rolls, but instead of the rolls producing exact reproductions of the music they gave distorted and feeble imitations or versions of that music. They did not give to the public what the public was bargaining for, and instead of creating a taste and demand for this form of reproduction of music, the tendency was to destroy the taste and lessen the demand; and the result was not only to destroy this great industry, of which the Æolian Company was the pioneer and in which it was vitally interested, but also to injure the composer whose work was thus reproduced.

There is an artistic side to this question, sir. If you made a speech in Congress, Mr. Chairman, and I should get someone else to repeat your speech into a machine, and your speech lasted fifteen minutes, but in order to crowd it into a cylinder that is adapted to reproduce a speech of two minutes' duration, I should cut, distort, and disfigure it, and then it was reproduced to the public all over the land and sold as Mr. Currier's speech, you naturally would be offended. That is the artistic side of this case.

Mr. WEBB. You would have no right to represent it as his voice, his work.

Mr. BURKAN. That is what they are doing—representing it as his, the composer's work, and Mr. Herbert's work is judged by the reproduction of it by these mechanical devices. The public says, "That is Victor Herbert's composition," or "That is Mr. Chadwick's composition." And I want to say to the gentlemen here that this proposed law does not only cover music, but it covers poems, speeches, and stories.

Now, then, some of these men made this contract. This contract is solely dependent upon the decision of the Supreme Court. It is not dependent upon any legislation at all, and the Æolian Company took absolutely no part in this legislation. The Music Publishers' Association received an invitation from Mr. Putnam to appear at the conferences, and we appeared, and we naturally were interested in getting this legislation. But I say this——

Mr. CROMELIN. Mr. Chairman, may I interrupt one moment?

Mr. CROMELIN. May I deny that?

The ACTING CHAIRMAN. You will suspend.

Mr. BURKAN. The Æolian Company took absolutely no part, had nothing whatever to do with this legislation at all. And I say to you, sir, that if the purpose of these contracts is to stifle competition and to control the industry of making perforated rolls and talking-machine cylinders, then the Sherman Act covers contracts of this kind. I say to you that the Donnelly Act or antitrust law in our State (New York) is very stringent; if it should appear to Mr. Jerome or to the attorney-general of New York, in which State the Æolian Company has its principal place of business, that these contracts tend to stifle trade, or were entered into to destroy competition, each one of these conspirators could be sent to jail, and could be restrained by injunction from enforcing the contracts. We have antitrust laws, sir; and under those laws each of these men could be restrained by injunction from enforcing the contract and criminally punished for entering into it.

The ACTING CHAIRMAN. Your time has expired. Mr. Cromelin, you may have one minute to contradict any statement he has made.

Mr. CROMELIN. Mr. Chairman, just one minute. Just before leaving New York Saturday I spoke with the manager of the Æolian Company, and I wish this to go on record—that he told me that they did not want to oppose this legislation; that they had contracts; and when people have contracts of this kind they do not go to the house tops and proclaim the fact. The only reason you know of this contract, sir, is because it is a matter of record in the case of the Apollo Company in the second circuit of New York.

Mr. CHANEY. Do you mean to say that this contract is an improper one to make?

Mr. CROMELIN. Not at all; I did not say that, sir.

Mr. CHANEY. Then what concern is it to us, who are engaged in framing this bill, about that contract?

Mr. CROMELIN. The chairman asked the gentleman whether the Æolian Company was interested in this——

Mr. BURKAN. Absolutely not.

Mr. CROMELIN. And the manager of the company told me that they were.

The ACTING CHAIRMAN. It might occur to some members of this committee that if one concern was

to get an absolute monopoly of making perforated rolls or musical disks, it did concern this committee.

Mr. BURKAN. Can I say a word, sir, on that point? There are hundreds of publishers, sir—hundreds of publishers who are under no contract with the Æolian Company; there are hundreds of composers who are under no contract with this company. You are legislating for the future, and it seems unfair that hundreds of publishers and composers, not parties to this agreement, should be punished because a number of publishers, 10 or 20, have made an unlawful agreement. That is the question that you must consider in connection with this "monopoly" charge.

Mr. WEBB. Now, you are a lawyer?

Mr. BURKAN. Yes, sir.

Mr. WEBB. May I ask you your opinion as to whether or not the word "writings," referred to in article 8 of the Constitution covers these rolls?

Mr. BURKAN. Yes, sir; yes, sir. If you will just allow me three minutes——

The ACTING CHAIRMAN. No; answer the question. I can not allow you three minutes, because we shall have to go over to the House. The hearings will be closed right here, as soon as you answer that question.

Mr. BURKAN. In the circuit court of appeals, White-Smith Company *v.* Apollo Company case, the court said in a decision involving the question as to whether a perforated roll is an infringement of the copyrighted work which it is adapted to reproduce, and it is important in connection with the claim that Congress has no power to enact this legislation——

The questions raised in these cases are of vast importance and involve far-reaching results. They have been exhaustively discussed in the clear and forcible briefs and arguments of counsel. We are of the opinion that the rights sought to be protected by these suits belong to the same class as those covered by the specific provisions of the copyright statutes, and that the reasons which led to the passage of said statutes apply with great force to the protection of rights of copyright against such an appropriation of the fruits of an author's conception as results from the acts of defendant.

This language of the court is in itself, without further argument on the definition of the word "writings," sufficient warrant and authority for the Congress to enact this legislation.

(The hearings were thereupon announced closed.)

1.E.6. You may convert to and distribute this work in any binary, compressed, marked up, nonproprietary or proprietary form, including any word processing or hypertext form. However, if you provide access to or distribute copies of a Project Gutenberg™ work in a format other than “Plain Vanilla ASCII” or other format used in the official version posted on the official Project Gutenberg™ website (www.gutenberg.org), you must, at no additional cost, fee or expense to the user, provide a copy, a means of exporting a copy, or a means of obtaining a copy upon request, of the work in its original “Plain Vanilla ASCII” or other form. Any alternate format must include the full Project Gutenberg™ License as specified in paragraph 1.E.1.

1.E.7. Do not charge a fee for access to, viewing, displaying, performing, copying or distributing any Project Gutenberg™ works unless you comply with paragraph 1.E.8 or 1.E.9.

1.E.8. You may charge a reasonable fee for copies of or providing access to or distributing Project Gutenberg™ electronic works provided that:

- You pay a royalty fee of 20% of the gross profits you derive from the use of Project Gutenberg™ works calculated using the method you already use to calculate your applicable taxes. The fee is owed to the owner of the Project Gutenberg™ trademark, but he has agreed to donate royalties under this paragraph to the Project Gutenberg Literary Archive Foundation. Royalty payments must be paid within 60 days following each date on which you prepare (or are legally required to prepare) your periodic tax returns. Royalty payments should be clearly marked as such and sent to the Project Gutenberg Literary Archive Foundation at the address specified in Section 4, “Information about donations to the Project Gutenberg Literary Archive Foundation.”

- You provide a full refund of any money paid by a user who notifies you in writing (or by e-mail) within 30 days of receipt that s/he does not agree to the terms of the full Project Gutenberg™ License. You must require such a user to return or destroy all copies of the works possessed in a physical medium and discontinue all use of and all access to other copies of Project Gutenberg™ works.

- You provide, in accordance with paragraph 1.F.3, a full refund of any money paid for a work or a replacement copy, if a defect in the electronic work is discovered and reported to you within 90 days of receipt of the work.

- You comply with all other terms of this agreement for free distribution of Project Gutenberg™ works.

1.E.9. If you wish to charge a fee or distribute a Project Gutenberg™ electronic work or group of works on different terms than are set forth in this agreement, you must obtain permission in writing from the Project Gutenberg Literary Archive Foundation, the manager of the Project Gutenberg™ trademark. Contact the Foundation as set forth in Section 3 below.

1.F.

1.F.1. Project Gutenberg volunteers and employees expend considerable effort to identify, do copyright research on, transcribe and proofread works not protected by U.S. copyright law in creating the Project Gutenberg™ collection. Despite these efforts, Project Gutenberg™ electronic works, and the medium on which they may be stored, may contain “Defects,” such as, but not limited to, incomplete, inaccurate or corrupt data, transcription errors, a copyright or other intellectual property infringement, a defective or damaged disk or other medium, a computer virus, or computer codes that damage or cannot be read by your equipment.

1.F.2. LIMITED WARRANTY, DISCLAIMER OF DAMAGES - Except for the “Right of Replacement or Refund” described in paragraph 1.F.3, the Project Gutenberg Literary Archive Foundation, the owner of the Project Gutenberg™ trademark, and any other party distributing a Project Gutenberg™ electronic work under this agreement, disclaim all liability to you for damages, costs and expenses, including legal fees. YOU AGREE THAT YOU HAVE NO REMEDIES FOR NEGLIGENCE, STRICT LIABILITY, BREACH OF WARRANTY OR BREACH OF CONTRACT EXCEPT THOSE PROVIDED IN PARAGRAPH 1.F.3. YOU AGREE THAT THE FOUNDATION, THE TRADEMARK OWNER, AND ANY DISTRIBUTOR UNDER THIS AGREEMENT WILL NOT BE LIABLE TO YOU FOR ACTUAL, DIRECT, INDIRECT, CONSEQUENTIAL, PUNITIVE OR INCIDENTAL DAMAGES EVEN IF YOU GIVE NOTICE OF THE POSSIBILITY OF SUCH DAMAGE.

1.F.3. LIMITED RIGHT OF REPLACEMENT OR REFUND - If you discover a defect in this electronic work within 90 days of receiving it, you can receive a refund of the money (if any) you paid for it by sending a written explanation to the person you received the work from. If you received the work on a physical medium, you must return the medium with your written explanation. The person or entity that provided you with the defective work may elect to provide a replacement copy in lieu of a refund. If you received the work electronically, the person or entity providing it to you may choose to give you a second opportunity to receive the work electronically in lieu of a refund. If the second copy is also defective, you may

demand a refund in writing without further opportunities to fix the problem.

1.F.4. Except for the limited right of replacement or refund set forth in paragraph 1.F.3, this work is provided to you 'AS-IS', WITH NO OTHER WARRANTIES OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO WARRANTIES OF MERCHANTABILITY OR FITNESS FOR ANY PURPOSE.

1.F.5. Some states do not allow disclaimers of certain implied warranties or the exclusion or limitation of certain types of damages. If any disclaimer or limitation set forth in this agreement violates the law of the state applicable to this agreement, the agreement shall be interpreted to make the maximum disclaimer or limitation permitted by the applicable state law. The invalidity or unenforceability of any provision of this agreement shall not void the remaining provisions.

1.F.6. INDEMNITY - You agree to indemnify and hold the Foundation, the trademark owner, any agent or employee of the Foundation, anyone providing copies of Project Gutenberg™ electronic works in accordance with this agreement, and any volunteers associated with the production, promotion and distribution of Project Gutenberg™ electronic works, harmless from all liability, costs and expenses, including legal fees, that arise directly or indirectly from any of the following which you do or cause to occur: (a) distribution of this or any Project Gutenberg™ work, (b) alteration, modification, or additions or deletions to any Project Gutenberg™ work, and (c) any Defect you cause.

Section 2. Information about the Mission of Project Gutenberg™

Project Gutenberg™ is synonymous with the free distribution of electronic works in formats readable by the widest variety of computers including obsolete, old, middle-aged and new computers. It exists because of the efforts of hundreds of volunteers and donations from people in all walks of life.

Volunteers and financial support to provide volunteers with the assistance they need are critical to reaching Project Gutenberg™'s goals and ensuring that the Project Gutenberg™ collection will remain freely available for generations to come. In 2001, the Project Gutenberg Literary Archive Foundation was created to provide a secure and permanent future for Project Gutenberg™ and future generations. To learn more about the Project Gutenberg Literary Archive Foundation and how your efforts and donations can help, see Sections 3 and 4 and the Foundation information page at www.gutenberg.org.

Section 3. Information about the Project Gutenberg Literary Archive Foundation

The Project Gutenberg Literary Archive Foundation is a non-profit 501(c)(3) educational corporation organized under the laws of the state of Mississippi and granted tax exempt status by the Internal Revenue Service. The Foundation's EIN or federal tax identification number is 64-6221541. Contributions to the Project Gutenberg Literary Archive Foundation are tax deductible to the full extent permitted by U.S. federal laws and your state's laws.

The Foundation's business office is located at 809 North 1500 West, Salt Lake City, UT 84116, (801) 596-1887. Email contact links and up to date contact information can be found at the Foundation's website and official page at www.gutenberg.org/contact

Section 4. Information about Donations to the Project Gutenberg Literary Archive Foundation

Project Gutenberg™ depends upon and cannot survive without widespread public support and donations to carry out its mission of increasing the number of public domain and licensed works that can be freely distributed in machine-readable form accessible by the widest array of equipment including outdated equipment. Many small donations ($1 to $5,000) are particularly important to maintaining tax exempt status with the IRS.

The Foundation is committed to complying with the laws regulating charities and charitable donations in all 50 states of the United States. Compliance requirements are not uniform and it takes a considerable effort, much paperwork and many fees to meet and keep up with these requirements. We do not solicit donations in locations where we have not received written confirmation of compliance. To SEND DONATIONS or determine the status of compliance for any particular state visit www.gutenberg.org/donate.

While we cannot and do not solicit contributions from states where we have not met the solicitation requirements, we know of no prohibition against accepting unsolicited donations from donors in such states who approach us with offers to donate.

International donations are gratefully accepted, but we cannot make any statements concerning tax treatment of donations received from outside the United States. U.S. laws alone swamp our small staff.

Please check the Project Gutenberg web pages for current donation methods and addresses.

Donations are accepted in a number of other ways including checks, online payments and credit card donations. To donate, please visit: www.gutenberg.org/donate

Section 5. General Information About Project Gutenberg™ electronic works

Professor Michael S. Hart was the originator of the Project Gutenberg™ concept of a library of electronic works that could be freely shared with anyone. For forty years, he produced and distributed Project Gutenberg™ eBooks with only a loose network of volunteer support.

Project Gutenberg™ eBooks are often created from several printed editions, all of which are confirmed as not protected by copyright in the U.S. unless a copyright notice is included. Thus, we do not necessarily keep eBooks in compliance with any particular paper edition.

Most people start at our website which has the main PG search facility: www.gutenberg.org.

This website includes information about Project Gutenberg™, including how to make donations to the Project Gutenberg Literary Archive Foundation, how to help produce our new eBooks, and how to subscribe to our email newsletter to hear about new eBooks.