

judgment before a default has taken place under installment contracts of under \$1500.⁹¹ The fact that so many states have abolished confession judgments or restricted their use in consumer transactions without causing significant increases in the cost of credit⁹² indicates that the commercial advantages of their use may be minimal. But without state or federal legislative action, attacks in the courts on existing procedures can only result in piecemeal reform. Since the *Virgin Islands* decision has potential value as precedent in litigation involving confession judgments in other federal jurisdictions, its impact may exceed the geographic limitations of the island district in which it was made. But until the Supreme Court resolves the extant procedural questions⁹³ involving the nature and form of hearings concerning waiver, judicial reform will remain the product of disparate case-by-case advances. By its reluctance in *Swarb* to address these questions, the Court has signaled its intention that the prospects for the general reevaluation of confession judgment procedures remain in the legislative province.

JEAN S. PERWIN

Copyright Law—Exclusivity of Constitutional Grant of Copyright Power to Federal Government—Supremacy Clause and Federal Preemption—Durational Limit of Copyright—*Goldstein v. California*.¹—Donald Goldstein and others, manufacturers and vendors of sound tapes and cartridges, engaged in the practice known as "tape piracy."² They made exact reproductions on master tapes of record albums purchased on the open market from retail distributors.³ Additional copies of the master tapes were made on machines known as "tape slaves." The tapes were marketed in plastic cartridges, labelled with the title of the original album, the name of the artist, the name of the original record company, and a disclaimer of any relationship with the original artist or record company.⁴

In 1970, Tape Industries Association of America and others,

⁹¹ N.Y. Pers. Prop. Law art. 9, § 302.13 (McKinney Supp. 1973); N.Y. CPLR §§ 3201, 3218 (McKinney 1963).

⁹² See Hopson, *supra* note 79, at 125.

⁹³ The opportunity for the Court to review this question will have to come in a case other than *Virgin Islands*, since there was no appeal taken, presumably because the defendant never appeared at the hearing for lack of a defense. Letter from John L. Rogers, Clerk, to Judge Warren H. Young, United States District Court for the District of the Virgin Islands, Oct. 15, 1973.

¹ 412 U.S. 546 (1973).

² *Id.* at 549.

³ The method of operation is fully explained in *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340, 342-43 (C.D. Cal. 1970).

⁴ The label read as follows:

joined by one of petitioners, brought an action in the United States District Court for the Central District of California for injunctive and declaratory relief against the District Attorney of Los Angeles County.⁵ They challenged the constitutionality of section 653h of the California Penal Code,⁶ which prohibited the duplication, with intent to sell, of any sounds recorded on records or tapes without the permission of the owner of the original master tape.⁷ The court held that the statute was a permissible state regulation directed against theft and appropriation of saleable products and was not an unconstitutional interference with federal policies enunciated in the copyright clause of the United States Constitution and in the federal copyright laws.⁸

Following this favorable decision, the District Attorney of Los Angeles County filed an information against petitioners for violating section 653h. They filed a plea of *nolo contendere* to 10 of the 140 counts charged against them and were convicted. The court denied their contention, made on motion to dismiss the complaint, that section 653h conflicted with the copyright clause of the United States Constitution and the federal statutes enacted thereunder.⁹ The Appellate Department of the Superior Court of California for the County of Los Angeles affirmed the conviction and sustained the validity of section 653h.¹⁰ Petitioners exhausted all other appellate remedies in the state.¹¹

No relationship of any kind exists between [petitioners] and the original recording company nor between this recording and the original recording artist. This tape is not produced under a license of any kind from the original company nor the recording artist(s) and neither the original recording company nor the artist(s) receives a fee or royalty of any kind from [petitioners]. Permission to produce this tape has not been sought nor obtained from any party whatsoever.

316 F. Supp. at 343.

⁵ *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340 (C.D. Cal. 1970).

⁶ Cal. Penal Code § 653h (West 1970). The text of § 653h provides in relevant part:

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

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

⁷ It was argued that the statute provided "quasi-copyright" protection unlimited in time for musical recordings which were in the public domain, 316 F. Supp. at 344, thereby conflicting with an exclusive constitutional mandate to Congress "[t]o 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." U.S. Const. art. I, § 8, cl. 8 (the copyright clause). Plaintiffs advocated the application to their case of the broad interpretation of the preemption doctrine enunciated in the United States Supreme Court decisions in *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964), and *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964), precluding states from proscribing duplications not proscribed by Congress. 316 F. Supp. at 344-45. See discussion of the preemption doctrine in text at notes 75-109 *infra*.

⁸ 316 F. Supp. at 351. See U.S. Const. art. I, § 8, cl. 8; 17 U.S.C. §§ 1 et seq. (1970).

⁹ See 412 U.S. at 548-49. The opinion of the trial court was unreported.

¹⁰ The opinion of the appellate department was unreported.

¹¹ "The appellate department certified the case for appeal but the Court of Appeals

The United States Supreme Court granted the petition for certiorari to review both the conviction under California law and the constitutionality of section 653h which had been adjudicated originally in federal district court.¹² At the outset, the Court noted¹³ that the pirated recordings were produced prior to the enactment of the amendment to the Copyright Act,¹⁴ which extended protection to sound recordings produced between February 15, 1972 and January 1, 1975.¹⁵ Applying prior law, the Court affirmed the conviction in a 5 to 4 decision¹⁶ and HELD: the outlawing of tape piracy by California statute is a valid exercise of the state's power, which it retained under the Constitution, to grant copyrights for "writings" which Congress had neither explicitly enumerated nor omitted from protection within its copyright legislation.¹⁷ In arriving at this decision, the Court reached two conclusions of major significance for the future of patent and copyright law. First, it found that the constitutional mandate to Congress to provide copyright protection was not exclusive.¹⁸ Second, it rejected a broad interpretation of the federal preemption doctrine¹⁹ enunciated in *Sears, Roebuck & Co. v. Stiffel Co.*²⁰ and *Compco Corp. v. Day-Brite Lighting, Inc.*²¹ Thus, the Court established a theoretical framework in which a state-by-state system of varying laws, rather than a uniform federal system, could control all federally unprotected classes of "writings," including developing classes which as yet seem insignificant.

Admittedly the Court's condemnation of tape piracy appears to stem from justifiable moral indignation and a sense of fair play.²² However, honest legal analysis does not necessarily lead to the Court's conclusion that state statutes prohibiting tape piracy must be upheld in the absence of an explicit federal pronouncement either for

rejected the certification. Thus, under California law, all avenues of appeal had been exhausted." Letter from Arthur Leeds, Esq., attorney for Goldstein, Nov. 5, 1973.

¹² 412 U.S. at 548.

¹³ Id. at 552.

¹⁴ Pub. L. No. 92-140 (Oct. 15, 1971), amending 17 U.S.C. §§ 1 et seq. (1970), allowing for the first time federal copyright protection of sound recordings.

¹⁵ Pub. L. No. 92-140, § 3 (Oct. 15, 1971). It is noteworthy that, when Congress finally extended copyright protection to sound recordings, it chose only a small group to protect—those produced within the three year interval. See note 122 infra for suggested reasons for this cautious approach. Petitioners in *Goldstein* did not raise a question as to the power of the states to protect recordings produced after Feb. 15, 1972. 412 U.S. at 552 n.7.

¹⁶ The majority opinion was written by Chief Justice Burger. Justices Marshall and Douglas wrote separate dissenting opinions in which Justices Brennan and Blackmun concurred.

¹⁷ 412 U.S. at 571.

¹⁸ Id. at 556-57.

¹⁹ Id. at 569-70.

²⁰ 376 U.S. 225 (1964).

²¹ 376 U.S. 234 (1964). For a discussion of the *Sears-Compco* principle, see The Supreme Court, 1963 Term, 78 Harv. L. Rev. 143, 309 (1964); Note, 40 N.Y.U.L. Rev. 101 (1965). See also text at notes 75-109 infra.

²² See Yarnell, Recording Piracy is Everybody's Burden: An Examination of its Causes, Effects and Remedies, 20 Bull. of the Copyright Soc'y of the U.S.A. 234, 235 (1973).

or against copyright protection generally. This note will examine the validity of the Court's holding in light of the scope of prior copyright and patent law. It will be argued briefly that section 653h should have been invalidated, since a constitutional grant of exclusive copyright power to the federal government is the only route to meaningful protection for authors. Second, it will be suggested that federal law should preempt a state statute proscribing tape piracy in order to preserve a federal competitive policy which promotes free use of ideas in the public domain while offering a reward for creative endeavors. A state proscription against record duplication for unlimited times will then be criticized for conflicting with the spirit if not the letter of the constitutional mandate to Congress to extend such protection for limited times. Finally, given the need in this area for a detailed federal regulatory scheme, it will be concluded that extension of copyright protection to all tapes and records, without regard to date of production,²³ is more properly an area for congressional initiative.

EXCLUSIVITY OF CONSTITUTIONAL GRANT OF FEDERAL COPYRIGHT POWER

The *Goldstein* Court decided that the power to grant copyrights is not exclusive in the federal government.²⁴ It is submitted that the Court's conclusion is unreasonable, as demonstrated by an examination of the policies enunciated in the copyright clause.²⁵ In a system of free competition, an author may be disinclined to expend time and energy in the production of creative works for ultimate public consumption if, after disclosure, he will gain neither profit nor reputation. Therefore, as an incentive to produce and disclose new works,²⁶ Congress has awarded to an author an exclusive property right in his work,²⁷ which serves as a limited exemption from the antitrust mandate of free competition.²⁸ This benefits the general public by providing new writings and discoveries for their use, as well as a stimulant to further creativity.²⁹ The author's exclusive

²³ See notes 14-15 *supra* and accompanying text.

²⁴ 412 U.S. at 552-60.

²⁵ See note 7 *supra* for text of clause. The copyright power in the United States depends wholly on the legislation of Congress, passed pursuant to the copyright clause. *Wheaton v. Peters*, 33 U.S. 374, 420-21, 8 Pet. 591, 661-64 (1834).

²⁶ *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

²⁷ See 1 M. Nimmer, Copyright § 3.1 (1973), for the view that copyright is a property right.

²⁸ This exemption is effectively a monopoly. However, the term monopoly used herein is not necessarily the same as that used in the antitrust field. See Justice Douglas' dissent in *Goldstein* as an example of the use of the term in a copyright context. 412 U.S. at 574 (Douglas, J., dissenting). For a discussion of the differing meanings of monopoly in the context of the interaction of patent law and antitrust law, see Note, 15 B.C. Ind. & Com. L. Rev. 119, 125-26 & n.40 (1973).

²⁹ The primary purpose of the copyright clause is to maximize the availability of new

right to his work is thus at the very heart of the copyright scheme. In this economy, where the rule of free competition is commonly accepted, the copyright clause would be redundant unless it conferred the exceptional status of exclusive monopoly ownership.

In concluding that the power to grant copyrights is concurrent in the state and federal governments,³⁰ the Court in *Goldstein* apparently believed that the essential status of exclusive monopoly ownership would not be diminished by concurrent copyright authority in the federal and state governments. It is suggested that such a belief does not withstand scrutiny.

The majority in *Goldstein* conceded the advantage of a nationwide system of protection for works of national importance:

[To obtain protection in all states] a separate application is required to each state government; the right which in turn may be granted has effect only within the granting State's borders. The national system . . . eliminates the need for multiple applications and the expense and difficulty involved.³¹

Nevertheless, they found that all works were not of national importance, and that some works were purely local in nature and therefore required only local protection.³² To support this view, the Court noted that the copyright clause did not designate all works to be of national importance, or state copyright protection to be entirely impermissible.³³ The Court further asserted that the size of the United States' population and the diversity of its national origins inevitably resulted in purely local concerns requiring state protection.³⁴

On the basis of this local-national distinction, whereby the states and the federal government could have different realms of authority, the Court concluded that exercise of copyright power by the states was permissible³⁵ in that it would not be "totally contradictory and repugnant" to the federal exercise of copyright powers.³⁶ It is submitted, however, that the local-national distinction is fictitious in this day and age and is therefore an improper

works to the public. *Fox-Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932). Therefore, the copyright clause limits the author's exclusive right to that finite period of time deemed by Congress to be sufficient to promote the desired level of intellectual output. Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 Conn. L. Rev. 204, 223 (1972). For further discussion of the durational limit, see notes 110-20 *infra* and accompanying text.

³⁰ 412 U.S. at 552-60.

³¹ *Id.* at 556.

³² *Id.* at 558.

³³ *Id.* at 556-57.

³⁴ *Id.* at 557-58.

³⁵ *Id.* at 558.

³⁶ *Id.* at 552-53, citing the standard enunciated in *The Federalist* No. 32, at 199-200 (J. Cooke ed. 1961) (A. Hamilton).

ground for rejecting the exclusivity of federal copyright power. Because of modern communication and transportation networks, all industries have outgrown any purely local importance they may have had when the Copyright Act was originally enacted.³⁷ Therefore, any protection of an author's reputation and profits must be national in scope if it is to be exclusive to him and sufficiently valuable to encourage him to create.

After propounding its untenable theory of the local-national distinction, the Court turned to a denial of the potential conflict existing between states exercising concurrent powers and between states and the federal government. As to the interstate conflict, the Court said that it was neither "so inevitable nor so severe as to compel the conclusion, that state power has been relinquished to the exclusive jurisdiction of the Congress."³⁸

However, Justice Douglas suggested in his dissent that uniformity was espoused in the copyright clause in order to avoid the inevitable conflicts between states' interests.³⁹ For support, Douglas relied on the dissent in *Capitol Records, Inc. v. Mercury Records Corp.*,⁴⁰ a case involving the duplication of uncopyrighted sound recordings, where Judge Learned Hand discussed the copyright clause:

If, for example in the case at bar, the defendant is forbidden to make and sell these records in New York, that will not prevent it from making and selling them in any other state which may regard the plaintiff's sales as a "publication"; and it will be practically impossible to prevent their importation into New York. That is exactly the kind of evil at which the clause is directed.⁴¹

Such inevitable conflict between the interests of two states is necessarily severe. Artists, realizing that their labors would receive only local protection while their creations were nationally accessible, would eventually stop devoting their energies for public benefit.⁴²

Turning to the potential conflict between state and federal governments, the *Goldstein* Court concluded that a concurrent exercise of copyright power would *not* necessarily lead to conflict.⁴³ Implicit in the reasoning here was the Court's underlying assumption that if Congress in the national interest expressed an intention

³⁷ 316 F. Supp. at 343-44. See Kurlantzick, *supra* note 29, at 238-39, for a negative answer to the question of whether, in light of the commerce clause, U.S. Const. art. I, § 8, cl. 3, one state may prohibit within its borders the sale of a duplicated record produced in another state.

³⁸ 412 U.S. at 558.

³⁹ *Id.* at 575 (Douglas, J., dissenting).

⁴⁰ 221 F.2d 657 (2d Cir. 1955).

⁴¹ *Id.* at 667 (Hand, J., dissenting).

⁴² For a discussion of the injuries to artists and record companies, see Yarnell, *supra* note 22, at 236.

⁴³ 412 U.S. at 559.

neither for freedom nor for protection of a work, the state was at liberty to legislate as to that work.⁴⁴ In contrast, Justice Douglas found that "free access to products on the market is the consumer interest protected by the failure of Congress to extend patents or copyrights into various areas."⁴⁵ He referred to the Court's previously expressed policy of national uniformity and found it "bolstered by Acts of Congress which vest 'exclusive jurisdiction to hear patent and copyright cases in federal courts . . . and that section of the Copyright Act which expressly saves state protection of unpublished writings but does not include published writings.'"⁴⁶ It is submitted that Justice Douglas' view is correct, given the present statutory copyright system in which only classes of writings enumerated in the law may receive federal protection.⁴⁷ Otherwise, if congressional silence meant the absence of federal interest and a free rein to the states to protect unenumerated classes of works, then Congress would have left no class of works expressly or impliedly within the public domain. Thus, congressional silence arguably implies congressional intent to leave unenumerated classes of works in free competition, and therefore state protection would interfere with congressional policy.⁴⁸

PREEMPTION OF STATE PROTECTION

Even if it were logical to reach the conclusion the Court reached—that concurrent powers are *not* totally contradictory and repugnant—state copyright statutes would fail on other grounds. They would be contrary to the supremacy clause in that they would interfere with national policies reflected in the federal Copyright Act⁴⁹ and the federal preemption doctrine enunciated in *Sears and Roebuck*.⁵⁰

Section 4 of the federal Copyright Act provides that "[t]he works for which copyright may be secured under this title shall include all the writings of an author."⁵¹ Section 5, after first enumerating categories of "writings" protected by the Act, then provides that "[t]he above specifications shall not be held to limit the subject matter of copyright as defined in section 4 of this title. . . ."⁵² A commonsensical reading of these sections could lead to a

⁴⁴ *Id.*

⁴⁵ *Id.* at 574 (Douglas, J., dissenting).

⁴⁶ *Id.* at 573 (Douglas, J., dissenting), quoting *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231 n.7 (1964). Presumably, Justice Douglas was referring to 28 U.S.C. § 1338 (1970) and 17 U.S.C. § 2 (1970).

⁴⁷ 17 U.S.C. §§ 4, 5 (1970).

⁴⁸ 412 U.S. at 574 (Douglas, J., dissenting).

⁴⁹ 17 U.S.C. §§ 1 et seq. (1970).

⁵⁰ See notes 20 and 21 *supra*.

⁵¹ 17 U.S.C. § 4 (1970).

⁵² 17 U.S.C. § 5 (1970). The term "writings" is interpreted to include any physical rendering of the fruits of creative intellectual labor. *Trade Mark Cases*, 100 U.S. 82, 94 (1879).

construction of the Act as providing all-encompassing protection for all original expressions of ideas. However, the courts have not read "writings" in section 4 to include sound recordings.⁵³ There are several reasons. First, "authors" are the people protected by this 1909 Act.⁵⁴ Where the authorship of music is concerned, section 1(e) of the Act provides specific and limited protection against unauthorized copying for composers. Thus, Congress considered the composers of music—not the performers who recorded it—to be the authors.⁵⁵ Second, courts may not have included sound recordings within the meaning of the Act on the grounds that record companies did not constitute a large enough industry to require protection in 1909, when the Act was passed.⁵⁶ In addition, courts may have reasoned that, by its terms, the Act did not apply to sound recordings,⁵⁷ since it failed to provide a suitable protective scheme for records, both as to notice and deposit requirements⁵⁸ and as to scope of protection.⁵⁹ It might be argued that, notwithstanding these minor points, courts could still have construed the Act to include sound recordings. Alternatively, the meaning of any act could arguably be expanded to cover new technologies. However, with the exception of one case decided before the effective date of the 1909 Act,⁶⁰ all of the case law supports exclusion of sound recordings from the scope of the Act.⁶¹ In light of this judicial history and in

⁵³ See Kurlantzick, *supra* note 29, at 210-11. As the *Goldstein* Court pointed out, the precursor of this problem was whether piano rolls were to be considered "writings." 412 U.S. at 565-66. The Court decided that question in the negative. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1, 18 (1908). See also *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 661 (2d Cir. 1955); 1 M. Nimmer, *supra* note 27, § 35.21. Even after a long line of cases, the legislature did not amend the Copyright Act to cover sound recordings. In fact, the Copyright Office regulations explicitly stated that the Office would not register a musical composition for copyright by deposit of a recording. 37 C.F.R. § 202.8(b) (1973).

⁵⁴ 17 U.S.C. § 4 (1970). This term has been construed to mean "he to whom anything owes its origin . . ." *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

⁵⁵ 17 U.S.C. § 1(e) (1970). Section 1(e) provides a system of compulsory licensing which provides the public with access to a composition, while assuring compensation to the composer. Section 1(e) thus indicates that Congress' concern in this law was with composers, and so protection of sound recordings produced by record companies arguably falls outside the language of the Act.

⁵⁶ See Kurlantzick, *supra* note 29, at 209.

⁵⁷ *Id.* at 210.

⁵⁸ Section 19 of the Act requires notice of copyright to appear on the copyrighted item itself. Section 13 requires deposit of two copies of the item in the Copyright Office, which from the statutory language appears to be best-equipped to handle copies or descriptions thereof on paper, not on discs. 17 U.S.C. §§ 13, 19 (1970). Conceivably these details could be handled by stretching the statutory language. Kurlantzick, *supra* note 29, at 210.

⁵⁹ Zechariah Chafee, Jr. believed that the lack of remedial clauses appropriate to records in the 1909 Act was the best objection to copyrighting records under that law. He suggested that a new statute should say whether the conductor or the manufacturer was to be entitled to copyright, fix the measure of damages, and determine the scope of infringement. Chafee, *Reflections on Copyright Law*: II, 45 Colum. L. Rev. 719, 736 (1945).

⁶⁰ *Fonotipia Ltd. v. Bradley*, 171 F. 951, 963 (E.D.N.Y. 1909).

⁶¹ See 1 M. Nimmer, *supra* note 27, § 35.21. See, e.g., *Jerome v. Twentieth Century Fox-Film Corp.*, 67 F. Supp. 736, 742 (S.D.N.Y. 1946), *aff'd*, 165 F.2d 784 (2d Cir. 1948); *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 661 (2d Cir. 1955).

view of legislation to the contrary, courts would therefore be justified in continuing their past interpretation, thus leaving sound recordings as a class of "writings" not explicitly protected by the Act.

Assuming the *Goldstein* Court's position for the moment—that the Constitution leaves the exercise of copyright power concurrently in the state and federal governments—and acknowledging that the copyright protection granted by the federal Copyright Act of 1909 does not explicitly extend to sound recordings, then one logical conclusion is that protection of sound recordings must be left to the states. Using *International News Service v. Associated Press*⁶² as an analogy, the *Goldstein* Court argued in favor of such state protection.⁶³ In *International News Service (INS)*, the Associated Press (AP) sued the International News Service (INS), its competitor in gathering and distributing news, for appropriating AP news from AP-issued bulletins for the purpose of selling to INS clients before AP clients received it. The Court enjoined INS from continuing its appropriation of AP's news bulletins on the basis of common law unfair competition:

Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.⁶⁴

The Supreme Court in *INS*, noting that the misrepresentation element was absent from the charge of unfair competition, said that misappropriation took the place of misrepresentation in this case.⁶⁵ The Court further held that its decision would not create monopoly control over news events: INS would still be able to use AP news bulletins, which it had had no part in gathering, but only after the time during which AP clients had been serviced and AP had reaped its profits.⁶⁶

The connection between *INS* and *Goldstein* is apparent. In both, a "misappropriator" made his living not by misrepresentation but simply by copying the finished work of another and selling it,

⁶² 248 U.S. 215 (1918).

⁶³ 412 U.S. at 570. See also *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340, 349 (C.D. Cal. 1970).

⁶⁴ 248 U.S. at 240.

⁶⁵ *Id.* at 241-42.

⁶⁶ *Id.* at 241.

thereby reducing the other's profits. However, the *Goldstein* Court's reliance on *INS* was questionable, as suggested by Justice Brandeis' dissent in *INS*. In a famous passage, quoted in part by Chief Justice Burger in *Goldstein*⁶⁷ to support the point of view which Brandeis actually disparaged, Brandeis stated:

An essential element of individual property is the legal right to exclude others from enjoying it. . . . But the fact that a product of the mind has cost its producer money and labor, and has a value for which others are willing to pay, is not sufficient to ensure to it this legal attribute of property. The general rule of law is, that the noblest of human productions—knowledge, truths ascertained, conceptions, and ideas—become, after voluntary communication to others, free as the air to common use. Upon these incorporeal productions the attribute of property is continued after such communication only in certain classes of cases These exceptions are confined to productions which, in some degree, involve creation, invention, or discovery. . . . [A]nd these have also protection under the copyright statutes.⁶⁸

Justice Brandeis, dissenting in this case of first impression, viewed the bulletins as "publications" which were unprotected by federal copyright statutes and therefore open to anyone to copy. Brandeis argued that such copying could not be declared unauthorized, as long as it was not performed illegally, and as long as no party to a contract breached the contract in the copying process.⁶⁹ Believing that the "propriety of some remedy" was "clear," Brandeis thought that the Court was ill-equipped to prescribe detailed regulations "to redress a newly-disclosed wrong," and therefore he suggested leaving the problem to legislative resolution.⁷⁰

The same arguments can be made against the *Goldstein* decision. Since federal copyright legislation did not extend to the sound recordings in question, *Goldstein* could copy the albums, because the copying of federally unprotected sound recordings was open to all. Further, as long as *Goldstein* did the copying without violation of law or contract, he was totally within his rights; and, since the courts would be ill-equipped to prescribe detailed regulations for this "newly-disclosed wrong" of tape piracy, the problem should be left to Congress.

Moreover, even if *INS* were properly decided on its facts, the decision is not necessarily dispositive of the *Goldstein* question because the controlling policy reasons are arguably different in the two

⁶⁷ 412 U.S. at 570.

⁶⁸ 248 U.S. at 250 (Brandeis, J., dissenting).

⁶⁹ Id. at 251-53 (Brandeis, J., dissenting).

⁷⁰ Id. at 267 (Brandeis, J., dissenting).

cases. First, as the *INS* majority pointed out, no monopoly on news was created by its decision.⁷¹ In contrast, under *Goldstein*, once the record companies had published particular records, the records could never be copied in California. Second, questions of news coverage differ qualitatively from questions concerning mechanical reproductions of artistic creations. The *INS* Court imposed restrictions on *INS* which enhanced the public's First Amendment right of access to news coverage by multiple sources.⁷² The protection of this First Amendment right is of such paramount importance in a democracy that it may indeed be enough to justify a decision such as *INS*, notwithstanding Brandeis' concern with an anticompetitive effect. In contrast, while the encouragement of artistic creation is also of constitutional magnitude,⁷³ it is arguably of a different order of importance than news reporting, and may therefore be deemed insufficient justification for allowing record companies the anticompetitive privilege of exclusive and perpetual rights to reproduce their records.⁷⁴

State attempts to grant quasi-copyright protection to sound recordings bring into question the applicability of *Sears* and *Compco* as to copyright protection.⁷⁵ Prior to these decisions, state unfair competition laws had commonly been enforced to prohibit the unauthorized duplication of unpatentable articles.⁷⁶ This provided protection against competitors for the designer-retailer who had created something new and commercially valuable, but not worthy of federal patent protection.⁷⁷ In broad language, the *Sears* and *Compco* decisions invalidated the traditional state protection of articles in the

⁷¹ *Id.* at 241.

⁷² *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (stating that the First Amendment right of media viewers and listeners to access to all points of view on the media is paramount). On the other hand, *INS*'s free speech right to publish any and all news reports was diminished by the *INS* decision upholding what was effectively copyright protection. For the view that the notions of free speech and copyright are compatible, see Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A.L. Rev. 1180 (1970).

⁷³ U.S. Const. art. I, § 8, cl. 8.

⁷⁴ In addition, the applicability of *INS* to *Goldstein* is questionable because it was heard in the Supreme Court solely because of diversity of citizenship, before the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), became law. See *CBS v. DeCosta*, 377 F.2d 315, 318 (1st Cir. 1967) (stating that *INS* is no longer authoritative, on grounds of the *Erie* doctrine). Today, under the *Erie* doctrine, the same case would have to be decided on the basis of the unfair competition law controlling in the state in which the federal court was sitting. The rule of *INS*, at least vis-à-vis cases based on state laws, would seem, then, to have been divested of some of its value as precedent.

⁷⁵ See notes 20 and 21 *supra*.

⁷⁶ This was generally judge-made law. See Note, 40 N.Y.U.L. Rev. 101, 103 (1965).

⁷⁷ The federal patent law, passed pursuant to the copyright clause, provides patent protection for "[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof," and for "[w]hoever invents any new, original and ornamental design for an article of manufacture . . ." 35 U.S.C. §§ 101, 171 (1970). Many creations have not been considered novel enough for protection. See Note, 40 N.Y.U.L. Rev. 101 (1965).

public domain⁷⁸ as conflicting with the federal patent and copyright statutory scheme.

Sears concerned a claim by Stiffel of patent infringement and of unfair competition under Illinois law.⁷⁹ Sears marketed a pole lamp which was substantially identical to one patented and sold by Stiffel. The Seventh Circuit, affirming the district court, found the patents invalid for want of invention, but enjoined Sears from selling its pole lamp because the remarkable similarity to Stiffel's lamp was likely to cause confusion.⁸⁰ The Supreme Court reversed the decision.⁸¹ The Court recalled that the copyright power had been given to the federal government via the copyright clause of the Constitution.⁸² The Court then said that if state power touching on the copyright area were permitted, the federal power would be diminished.⁸³ The Court further reasoned that states could encroach on federal patent laws neither directly by state patent laws nor indirectly under another type of law, such as an unfair competition law, because such a state law would clash with objectives of the federal patent laws.⁸⁴

Compco was also an action under the Illinois unfair competition law. Compco was marketing fluorescent light components, which were substantially identical to those on which Day-Brite had a design patent.⁸⁵ The Seventh Circuit, affirming the district court, declared Day-Brite's design patent invalid, but enjoined Compco's marketing as unfair competition resulting in confusion among consumers as to the source of the components.⁸⁶ The Supreme Court reversed the decision.⁸⁷ The Court held that a state could not forbid the copying of articles unprotected by federal copyright:

To forbid copying would interfere with the federal policy,

⁷⁸ 376 U.S. at 237. Articles which the federal government has determined are not entitled to patent or copyright protection are said to be "in the public domain," and therefore legally copiable "in every detail by whoever pleases." *Id.* at 238.

⁷⁹ According to the Court of Appeals for the Seventh Circuit, only the likelihood of customer confusion as to the source of the products had to be proved in order to make a case of unfair competition under Illinois law. *Stiffel Co. v. Sears, Roebuck & Co.*, 313 F.2d 115, 118 n.7 (7th Cir. 1963). But see 376 U.S. at 227-28 n.2 for the Supreme Court's suggestion that the court of appeals, by eliminating the need to prove misrepresentation, may have extended the scope of the Illinois law of unfair competition far beyond the limits indicated by previous Illinois case law and decisions of the Seventh Circuit.

⁸⁰ 313 F.2d 115, 117-18 (7th Cir. 1963).

⁸¹ 376 U.S. at 233.

⁸² *Id.* at 228. The Court referred to 28 U.S.C. § 1338(a) (1970), giving exclusive jurisdiction to federal courts to decide copyright cases, as an indication that copyright power is lodged totally in the federal government. 376 U.S. at 231 n.7.

⁸³ 376 U.S. at 231.

⁸⁴ *Id.* In dicta, the Court noted that state laws requiring proper labelling of items as to source would be valid. *Id.* at 232.

⁸⁵ For the distinction between various patents, see note 77 *supra*.

⁸⁶ *Day-Brite Lighting, Inc. v. Compco Corp.*, 311 F.2d 26, 28-30 (7th Cir. 1963). The court of appeals held that a design for such a component was a protectable right under Illinois law. *Id.* at 29.

⁸⁷ 376 U.S. at 239.

found in Art. I, § 8, cl. 8, of the Constitution and in the implementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.⁸⁸

Although the case dealt with a patented device, the Court in express terms rejected exertion of state power in both the patent and copyright fields.⁸⁹ Significantly, the Court conceded that, if the federal government had not granted patent or copyright protection to an item, the inference to be drawn was that the item was to remain unprotected and freely accessible to all, not that the states were free to protect the item as well.⁹⁰ This doctrine has come to be known as the *Sears-Compco* principle.

The *Goldstein* Court found the *Sears-Compco* fact situations to be distinguishable.⁹¹ The unpatentable articles at issue in *Sears* and *Compco*—although not meeting the statutory criteria for patentability—were nevertheless within the broad classes of inventions afforded federal protection by the patent statutes.⁹² In contrast, the Court reasoned that the sound recordings at issue in *Goldstein* had not been brought within the more selective categories of writings receiving federal protection under the copyright statutes.⁹³ In other words, the Court implied that the *Sears-Compco* principle was inapplicable to discoveries or writings which were entirely outside the scope of federal protection. Rather, the *Sears-Compco* principle was applicable only to discoveries or writings which were within the scope of federal protection, but not sufficiently creative to warrant this protection.

It is important to note that there are two types of criteria which a discovery must meet before receiving a patent. First, it must belong to one of the broad categories of items eligible for protection. In other words, it must fall within the general scope of patent protection.⁹⁴ Then, it must be shown to be new and useful, novel,

⁸⁸ Id. at 237.

⁸⁹ Id. The Court then repeated its *Sears* dicta, to the effect that state laws as to proper labelling of sources of goods were valid. Id. at 238-39.

⁹⁰ Note, 40 N.Y.U.L. Rev. 101, 107 (1965).

⁹¹ 412 U.S. at 571. In support of its position, the Court correctly bypassed the argument that *Sears* and *Compco* were restricted by their facts to patent law. The *Compco* Court had acknowledged the applicability of the principle to both patent and copyright law. 376 U.S. at 237. In addition, patent and copyright law should be treated similarly since they arise from the same clause of the Constitution. 1 M. Nimmer, Copyright § 3 (1973). Following *Sears* and *Compco*, courts have applied the *Sears-Compco* principle as dispositive of copyright cases. See, e.g., *Cable Vision, Inc. v. KUTV Inc.*, 335 F.2d 348, 351 (9th Cir. 1964), cert. denied, 379 U.S. 989 (1965); *CBS v. DeCosta*, 377 F.2d 315, 321 (1st Cir. 1967). This would seem to be the correct approach since patent and copyright laws serve the same needs of society: they encourage creative thought by means of monopolies of limited duration in order to advance the public welfare. *Mazer v. Stein*, 347 U.S. 201, 219 (1954).

⁹² 412 U.S. at 569.

⁹³ Id. at 570 n.28.

⁹⁴ 35 U.S.C. §§ 101, 161, 171 (1970). The patent statutes explicitly cover discoveries in the following seven general categories: processes, machines, manufactures, compositions of

and non-obvious.⁹⁵ Similar criteria must be met by a writing for which a copyright is sought. First, the writing must belong to one of the categories of items eligible for copyright protection.⁹⁶ Then, the writing must be shown to be creative and original.⁹⁷ Like that of the *Goldstein* Court, the following analysis considers only the first criterion—whether the item for which protection is sought belongs to a category of items eligible for the requested protection and therefore falls under the statute in the first instance.

The Court's comparison of the reach of the patent and copyright statutes is seemingly inaccurate, because the statutes are written differently and should therefore be construed differently. The patent statutes set out only broad categories of items eligible for protection.⁹⁸ Therefore particular items within these broad categories only are eligible for patent protection. On the other hand, section 4 of the Copyright Act sets out one broad category of items eligible for protection—writings—while section 5 enumerates several subcategories within this broad category.⁹⁹

In comparing the patent and copyright statutes, the issue before the *Goldstein* Court was whether section 5 limits section 4. Two conclusions are theoretically possible if an analogy is drawn between the copyright and patent statutes. The conclusion reached by the *Goldstein* Court was that all writings which do not fit into one of the existing copyright subcategories should be treated in the same way as all discoveries which do not fit into one of the broad patent categories. As a result, in the eyes of the Court, such writings should be considered outside the scope of federal copyright protection.¹⁰⁰ In terms of the statute, the *Goldstein* Court would have concluded, then, that section 5 does limit section 4.

Justice Marshall, in his dissent, reached a different conclusion. He reasoned that the language of section 4, embodying the constitutional terms "writings" and "author," strongly suggested Congress' intent to follow its full constitutional grant.¹⁰¹ He then stated that, instead of choosing to protect all writings, section 5 exhibited a congressional intent to protect all writings within designated subcategories and to leave open to competition all writings in undesig-

matter, and useful improvements thereof (§ 101); plants (§ 161); and ornamental designs for articles of manufacture (§ 171). As an indication of how broad these categories are, notice that the term machines commonly includes everything from automobiles to electric toothbrushes. However, a writing such as a book would not be eligible for patent protection since it would not belong in any of the broad categories. Note that a statuette fitted as a lamp may be patentable and yet still copyrighted. *Mazer v. Stein*, 347 U.S. 201, 217 (1953).

⁹⁵ 35 U.S.C. §§ 101, 102, 103 (1970).

⁹⁶ The broad category is "writings." 17 U.S.C. § 4 (1970). Then several subcategories are listed, including books, periodicals, lectures, musical compositions, maps, photographs, motion pictures, etc. 17 U.S.C. § 5 (1970).

⁹⁷ *Chamberlin v. Uris Sales Corp.*, 150 F.2d 512, 513 (2d Cir. 1945).

⁹⁸ See note 94 *supra*.

⁹⁹ 17 U.S.C. §§ 4, 5 (1970). See note 96 *supra*.

¹⁰⁰ 412 U.S. at 570.

¹⁰¹ *Id.* at 577 (Marshall, J., dissenting).

nated subcategories.¹⁰² Noting that it is ordinarily difficult to infer affirmative conclusions from Congress' failure to act, Justice Marshall interpreted *Sears* and *Compco* to have concluded that, with respect to patent and copyrights, the ordinary practice was not to prevail. In other words, Justice Marshall concluded that congressional silence as to subcategories such as sound recordings was to imply a preference for free competition and therefore a negation of state authority to grant copyrights as to those subcategories.¹⁰³ Admitting that on their facts *Sears* and *Compco* applied to items in broad categories which Congress had expressly enumerated, Justice Marshall pointed to the broad language used in those cases to support his interpretation of the rule enunciated therein.¹⁰⁴ He further refuted the majority's limiting construction of sections 4 and 5 with a reference to the legislative history of the copyright statute, which suggested that, as to unlisted subcategories, Congress had decided that removal from free competition was as yet unnecessary to promote the art. Thus, as soon as copyright protection became necessary for promotion of the industry, Congress stepped in.¹⁰⁵

Accordingly, to compare unlisted subcategories within the copyright area to unlisted broad categories within the patent area in order to determine applicability of the *Sears-Compco* principle is to miss the point. Rather, the fact that sound recordings (prior to February 1972)¹⁰⁶ have been without copyright protection exhibits a congressional intent to leave them in free competition.

A proper comparison, however, may be made between lack of protection as to sound recordings as a class and lack of protection as to unpatentable items in a broad patent category, such as pole lamps. In the pole lamp situation, it may be said that, by congressional determination, inventions lacking novelty have never been removed from free competition. Similarly, it may be said that record companies have not qualified in the past for copyright protection because of a congressional determination that recordings lacked creative originality, and that companies had no need for economic incentives.¹⁰⁷ Thus, notwithstanding its authority to grant monopolies, Congress decided to refrain from doing so, thereby leaving the "writings" in the public domain free of federal or state protection.¹⁰⁸

¹⁰² Id. (Marshall, J., dissenting).

¹⁰³ Id. at 577-78 (Marshall, J., dissenting).

¹⁰⁴ Id. at 578 (Marshall, J., dissenting).

¹⁰⁵ Id. (Marshall, J., dissenting).

¹⁰⁶ See notes 14 and 15 *supra* and accompanying text.

¹⁰⁷ It is noteworthy that technology until recently may have made tape piracy impossible on a large scale, thus reducing need for copyright protection of sound recordings. 412 U.S. at 563 n.17. It is also noteworthy that Congress' unfamiliarity with recording technology may have prevented it from appreciating until recently that creativity, not mere duplication, is involved in recording. These two factors could account for the belated passage of copyright protection for sound recordings.

¹⁰⁸ The *Goldstein* Court implied other arguments against application of the *Sears-*

In sum, assuming that the *Sears-Compco* principle does apply to *Goldstein*, the *Goldstein* Court's position requires modification. Sound logic does not support the Court's simultaneous affirmance of *Sears-Compco* and validation of a California state law granting copyright protection to sound recordings. On the contrary, the Court could have coupled rejection of the federal preemption doctrine of *Sears* and *Compco* with sanctioning of the California statute. Alternatively, it could have affirmed the *Sears-Compco* principle and, applying it, found the California statute invalid under the supremacy clause¹⁰⁹ as interfering with the policies enunciated in the federal copyright law, as interpreted in *Sears* and *Compco*.

UNLIMITED DURATION OF COPYRIGHT PROTECTION

Aside from the questions of state authority, power, and jurisdiction to legislate as to copyright matters, state tape piracy statutes granting infinite protection raise a different question of constitutionality. The question is whether the Constitution and federal legislation permit the states to grant copyright protection for *unlimited* times. The Court in *Goldstein* held that infinite state grants of protection indeed meet constitutional requirements.¹¹⁰ Furthermore, reading the copyright clause literally, the Court concluded that the durational limit on copyright protection imposed by the Constitution applied only to federal power.¹¹¹ Without any basis in precedent, the Court reasoned that such a conclusion was warranted, because state copyright protection has a very narrow reach geographically. It would therefore pose a danger of no consequence, when compared with the nationwide protection granted by Congress.

Study of the policy reasons underlying copyright protection leads to the conclusion that the Court was wrong in deciding as it did on this issue. Copyrights are meant to provide a balance between the personal monopoly which works as an incentive for artistic creation and the public's interest in maximum dissemination.¹¹² The balance requires a time limit for the copyright, because an idea cannot be disseminated freely to the public if it is perpetually

Compco principle, by reference to recordings as property and not ideas. Id. at 571. The argument stated explicitly is that while *Sears* and *Compco* pose questions of copying, *Goldstein* is a question of misappropriation. 316 F. Supp. at 350. It is submitted that this argument is incorrect because *Goldstein* does in fact present a question of copying. See *International Tape Mfr. Ass'n v. Gerstein*, 174 U.S.P.Q. 198, 206-07 (S.D. Fla. 1972). Admittedly, the copying is not identical to the *Sears-Compco* copying. However, the *Goldstein* activity can hardly be characterized as misappropriation, which entails stealing; *Goldstein* stole nothing, but instead purchased the albums and with his own resources copied them. Thus, since stealing is nowhere an issue, the cases are indistinguishable on this point, and the *Sears-Compco* principle must apply to *Goldstein*.

¹⁰⁹ U.S. Const. art. VI, cl. 2.

¹¹⁰ 412 U.S. at 561.

¹¹¹ Id. at 560.

¹¹² See Kurlantzick, *The Constitutionality of State Law Protection of Sound Recordings*, 5 Conn. L. Rev. 204, 223 (1972).

monopolized by the artist. Aside from the effect on the public's interest in free access to expressions of ideas, copyright protection, while it lasts, increases the cost of goods protected. While competition would arguably drive prices down in a free and open market, this monopoly would allow its owner to charge higher prices since he is the sole provider of the desired goods.¹¹³ These two costs of copyright monopolies are tolerated in the Constitution in order to encourage a desirable level of intellectual output, which can benefit society as a whole. Excessive state protection, though admittedly affecting a smaller number of people, imposes the same kinds of costs on the people affected as does excessive federal protection, with the same detrimental effect.¹¹⁴ Excessive state protection also destroys the antimonopolistic federal copyright scheme of allowing free access to products on the market after a limited time.¹¹⁵

There are three seemingly good but finally unconvincing arguments which the *Goldstein* Court might have made, but did not, in support of its holding as to durational limits.¹¹⁶ First, the Court might have stated that, since unfettered state copyright power antedated the Constitution, it overrides constitutional policy considerations. However, contrary to this argument is the explicit assumption of *Wheaton v. Peters*¹¹⁷ that constitutional policies override previous policies, that the Constitution is not a continuation but a new beginning to copyright policy in the United States. As a second argument, the Court might have asserted that the Constitution gave Congress the power to grant to the states authority to create copyright protection of unlimited duration. However, this argument would fail as illogical. If Congress may not itself grant copyrights of unlimited duration, it may not reasonably confer that authority on another body.¹¹⁸ Third, the Court might have stated that if states can grant copyrights of unlimited duration for unpublished works,¹¹⁹ then they have the same power as to published works.

¹¹³ See Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 Harv. L. Rev. 281 (1970).

¹¹⁴ Kurlantzick, *supra* note 112, at 223. It is apparent from recent landmark cases in the antitrust area, rejecting mergers of companies comprising only a small percentage of a market, that the trend is to avoid even small departures from anti-monopolistic principles. In *United States v. Pabst Brewing Co.*, 384 U.S. 546, 550-53 (1966), the Court struck down a merger which involved only 4.5% of a national market, because the merger substantially lessened competition in Wisconsin, where Pabst by merger owned 24% of the beer market, and in the Wisconsin-Illinois-Michigan region, where Pabst owned 11% of the market. Similarly, in *United States v. Von's Grocery Co.*, 384 U.S. 270, 272, 278 (1966), the Court outlawed a merger involving only 7.5% of the grocery sales in metropolitan Los Angeles, simply to preserve competition by arresting the trend toward concentration in its incipency.

¹¹⁵ 412 U.S. at 574 (Douglas, J., dissenting).

¹¹⁶ Kurlantzick makes these three arguments and rejects them as explained in text at notes 117-20 *infra*. See Kurlantzick, *supra* note 112, at 224-27.

¹¹⁷ 33 U.S. 374, 420-21, 8 Pet. 591, 661 (1834).

¹¹⁸ Kurlantzick, *supra* note 112, at 225.

¹¹⁹ The traditional state common law authority to regulate unpublished works is given explicit statutory legitimacy in 17 U.S.C. § 2 (1970).

However, this argument fails as well because the state power vis-à-vis durational limit as to unpublished works has never been tested. Moreover, if it were tested, the resolution would arguably be in favor of durational limits, since a creator's interest in his own work dies when he dies, and family interests in maintaining exclusive rights to unpublished works diminish as time progresses.¹²⁰ In sum, a strong argument may be made as to the unconstitutionality of tape piracy statutes without durational limits.

CONCLUSION

In conclusion, it is submitted that the *Goldstein* Court should have decided that the California tape piracy statute was unconstitutional in at least one of three ways. First, the Court could have read the copyright clause of the Constitution as a grant of exclusive copyright power to the federal government, as the only meaningful method of balancing the interests of the author against those of the public. Second, the Court could have found the statute violative of the supremacy clause of the Constitution by application of the *Sears-Compco* principle of federal preemption, by which the absence of federal copyright protection is to imply conscious inaction by Congress, leaving unprotected items purposefully within the public domain in free competition. Finally, the Court might reasonably have invalidated the statute (of unlimited duration) on the grounds that durational limit is required by the Constitution and policies enunciated in federal law.

Admittedly, such a decision would have left the record companies and millions of fair-minded Americans with an uneasy result: tape pirates would have been completely free to pirate records in California. But, the *Goldstein* decision produces an uneasy result as well: the Court has improperly entered a frontier area of the copyright law in which it is ill-equipped to resolve conflicts affecting such diverse interests and controlling such large amounts of money.¹²¹ In the most recent copyright legislation Congress did prescribe copyright protection for recordings "fixed" between February 1972 and January 1975.¹²² But, this leaves a majority of

¹²⁰ Kurlantzick, *supra* note 112, at 225-26.

¹²¹ See Brandeis' dissent in *INS*, 248 U.S. at 267. Some of the people affected by copyright protection for sound recordings include record companies, artists, arrangers, technicians, performers, music publishers, and advertisers. Yarnell, *Recording Piracy is Everybody's Burden: An Examination of its Causes, Effects and Remedies*, 20 Bull. of the Copyright Soc'y of the U.S.A. 234, 235 (1973). In 1970, there were at least 900 commercial record companies in operation nationwide. In 1968 the gross sales of disc phonograph records, based on list price, amounted to \$860 million. The gross sales of authorized tapes totaled at least \$250 million. 316 F. Supp. at 343-44.

¹²² Pub. L. No. 92-140 (Oct. 15, 1971). "A sound recording is 'fixed' when the complete series of sounds constituting the work is first produced on a final master recording that is later reproduced in published copies." 37 C.F.R. § 202.15a(b) (1973). The amendment's limitation to three years was arguably caused by an immediate need for interim legislation to meet international as well as national demands, coupled with a congressional desire to leave the

recordings unprotected by uniform federal law. Unfortunately, in attempting to undermine the distasteful business of tape piracy, the Court set aside sound legal reasoning for a cause that, to be handled properly, required legislative attention and revision of the federal Copyright Act to include sound recordings explicitly within its scope. Effective relief will come only when Congress decides to assert its full power in the copyright field, by enacting a permanent version of its tape piracy statute. At that time, the *Goldstein* decision will admittedly be rendered moot with respect to tape and sound recordings. However, it will remain a misguided precedent for future cases regarding state protection of federally unprotected classes of writings.

SUSAN KAGAN LANGE

Labor Law—Civil Rights Act of 1964—Burdens of Proof in Employment Discrimination Cases—*McDonnell Douglas Corp. v. Green*.¹—Percy H. Green, a black mechanic, was hired by the McDonnell Douglas Corporation in 1956. In 1963, Green requested and was granted a transfer to a position as a laboratory technician—a position with no union security—in the aircraft manufacturing plant in St. Louis. In 1964, Green was laid off along with a number of other workers from his department as a result of a decrease in work load.

Green had been active in the civil rights movement during his tenure with McDonnell Douglas. He protested his discharge as being racially motivated to the President's Commission on Civil Rights; the United States Departments of Justice, the Navy, and Defense; and the Missouri Commission on Human Rights. During late 1964 and 1965, Green protested McDonnell Douglas' allegedly racially discriminatory hiring practices as a member of CORE and ACTION, two civil rights groups. The protests included picketing the home of James F. McDonnell, chairman of the board of McDonnell Douglas; a "stall-in" which blocked the main highway access, route to the McDonnell Douglas plant by means of parking rows of cars in the road; and a "lock-in" during which certain McDonnell Douglas employees were locked into a downtown St. Louis office building

field open in view of contemplated major reforms of the Copyright Act in the near future. Yarnell, *supra* note 121, at 242. However, Justice Douglas concluded that, notwithstanding the strong drive for federal protection of sound recordings, Congress was reluctant to enact this amendment for more than a limited trial period in which this new monopoly approach could be considered. 412 U.S. at 574 (dissenting opinion).

¹ 411 U.S. 792 (1973). The statement of facts presented in this note is digested from the Supreme Court opinion, *id.* at 794-98; the circuit court opinion, 463 F.2d 337, 338-40 (8th Cir. 1972); and the district court opinion, 318 F. Supp. 846, 847-50 (E.D. Mo. 1970).