
COMMENT AND CORRESPONDENCE

ENFORCING THE ANTI-DUMPING LAWS

To the Editors:

We take this opportunity to rebut the article "Enforcing the Antidumping Laws" which appeared in your Volume 6, 1979 issue.*

The seeming unending complaints generated by the leading American color television manufacturer have consistently charged Japanese television manufacturers with unfair trade practices destructive of the U.S. television industry and criticized United States Government agencies with dereliction of their duty to enforce trade laws designed to eliminate unfair import trade practices.

The consequences to American television, it is alleged, are: employment layoffs, widespread plant shutdowns, financial losses, mergers, and corporate liquidations far exceeding the severity of similar experiences recorded in any other American industry. However, this experience has not been entirely unlike the experience of the Japanese television industry which sustained a 50% casualty in membership during the past 15 years. Underlying this rapid change in the television industry is the accelerated change in both production and product technology which has displaced workers, supplanted valuable skills, eliminated components and phased out lower technology consumer products.

Without doubt, the single innovation that shook up the consumer electronic industry around the world is the transistor, an American invention developed by Bell Telephone Laboratories in 1948. The transistor "shook the \$45 billion (U.S.) electronics industry to its foundations"¹ The first victim to suffer the sweeping ripple effect of the transistor was the vacuum tube industry, "along with the electronics industry leadership and components businesses of General Electric, Westinghouse, Raytheon, Sylvania, Tung-Sol, and others."² These leaders were displaced by new electronic components manufacturers such as Texas Instruments, Motorola, Intel, Fairchild, and other companies not even in the business twenty-five years ago.

Likewise, "manufacturers of radios, calculators and watches were next to feel the transistor's impact. All three products became far more compact and reliable. In the process, GE, RCA, and Westinghouse lost their leadership positions in radio to innovative Japanese competition, while Friden, Marchant, Burroughs, Monroe, and NCR suffered a similar fate to calculators."³

Likewise, in the watchmaking business, "the same semi-conductor technology that led to transistors undermining many traditional manufacturers is even cutting into a big chunk of Switzerland's economy."⁴ In the process, Switzerland lost a substantial part of its huge watch industry to American electronics companies including Pulsar, Texas Instruments, Fairchild, Intel, National Semiconductor, Litronix as well as Japanese watch manufacturers such as Seiko.

Portable radios with transistorization provided a vast increase in portability from 6 to 8 pounds down to shirt pocket-size. Likewise, transistorization of both monochrome and color television sets substantially increased portability and reduced unit costs. In addition, transistorized smaller screen sets, because of their lower cost, created the second and third household set market with the added benefits of reductions in power consumption and maintenance costs to American consumers. Certain U.S. manufacturers, including Zenith Radio Corporation, lagged

*6 J. Legis. 24 (1979)

1. *Hearings before the subcommittee on Domestic and International Scientific Planning and Analysis of the Committee on Science and Technology U.S. House of Representatives, 94th Cong., 2nd Sess., May 5, 1976, at 700.*
2. *Ibid.* at 701.
3. *Ibid.* at 701.
4. *Ibid.* at 694.

behind in incorporating transistor circuitry which made possible the expanded use of automatic insertion machines to substantially reduce unit production costs.

Clearly, the Japanese producers not hampered by "the MBA syndrome," a super-cautious, no-risk management, less willing to gamble on anything but a sure thing,⁵ successfully ventured into the designing, production and marketing of new products by use of untested technology.

As demonstrated above, the creative benefits of technological advances are not without their short-term destructive impact creating worker trauma, discontinuities in communities, industries, and political administration. This process of technological change in the television industry has played a substantially major role in the dislocations which have occurred. Those elements within the industry which were laggard in converting quickly to solid state circuitry and automatic component insertion production experienced relatively greater dislocations - Zenith being one of them.

Allegations of Dumping

Emotionally charged allegations of dumping or implications of dumping have been repeated with respect to television, steel, automobiles, semiconductors, and computers from Japan. In this connection, a recent statement by Professor Warren F. Schwartz is illuminating:

What has somehow emerged is a vague and emotionally charged ideal that there is some real world phenomena called "dumping" that is inherently unfair to domestic producers. But no satisfactory explanation is given as to why the existence of different prices in the two markets (which can be explained on several grounds unrelated to the objective of securing a monopoly position) should necessarily be equated with "unfairness." I do not know the extent to which domestic interests actually believe that the practice is "unfair" and the extent to which the notion is employed cynically to secure protection from foreign competition, but there seems to be a remarkable amount of genuine conviction.⁶

Professor Schwartz concludes:

It is a pervasive theme in the thinking of people skeptical about the social value of much government intervention in economic affairs that a large portion of the harm derives not from the outcome produced by the intervention but from the sources wasted in implementing it and in trying to influence its result. It would require large social benefits to justify the expenditure (actual and contemplated, public and private) in the controversy over how antidumping duties on Japanese television sets should be determined. To me it is plain that sufficient benefits do not exist to justify those costs, or indeed any costs, because I believe that *the law serves no worthwhile ends.*⁷ (emphasis added)

In addressing the television industry specifically, Japanese manufacturers in their exports to the United States have carefully established their pricing based on rules and formulae which were designated and published by the U.S. Customs Service long ago.

It is a simple fact that the only demand the Japanese manufacturers are making is fairness in assessing customs duties and that the Customs Service remain above the controversies initiated by the self-interested parties. The Japanese ask only that Customs give careful and proper consideration to *all* of the various adjustments to which they are lawfully entitled based on data requested by Customs.

If the U.S. Government observes the international rules it has agreed to and follows the laws enacted by itself, it must give consideration to all factors which should properly be taken into account in assessing a fair and appropriate dumping duty assessment.

On the other hand, if U.S. Customs continues on its path of arbitrarily changing the rules by which it has operated over the years to apply retroactively, every nation engaged in trade

5. *Ibid.* at 694.

6. Warren F. Schwartz, "Antidumping Duties for Japanese TV's," *Regulation*, (American Enterprise Institute for Public Policy Research) May/June 1979, at 55.

7. *Ibid.* at 56.

with the United States will be alarmed at the potential danger of capricious decisions which no trading partner could reasonably tolerate.

Instead, the Japanese manufacturers urge the U.S. Customs Service and the Treasury Department to exercise the same spirit of fair play the U.S. expects for its exports by importing nations. Then there will be no intolerable and arbitrary commodity tax formula, but rather a return to the time honored practice of granting Japanese manufacturers the rights accorded to them under GATT and the 1921 Antidumping Act and fair equitable decisions on all adjustments to which they are legally entitled.

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Tokyo, August 9, 1979

THE COPYRIGHT ACT OF 1976 ITS EFFECT ON HIGHER EDUCATION'S USE OF MUSIC

To the Editors:

In order to properly understand Leslie Reicin Stein's paper, "The Copyright Act of 1976: Its Effect on Higher Education's Use of Music,"* It is important to know what that "effect" really is insofar as the individual institution is concerned. It should be clearly understood, incidentally, that the new law did not suddenly require educational institutions to begin paying fees for music used in public performances. Under the previous copyright act which had been in force for some seventy years, educational institutions were required to obtain permission – usually involving payment of a fee – for the public performance of dramatic works. Only the creators of music used in non-dramatic public performances were, for some reason, required to involuntarily donate the product of their creativity to the academic world.¹ As an example, prior to the 1976 Act, if a school wanted to produce "Death of A Salesman," it needed permission from the copyright owners of the Arthur Miller play. Under that same earlier law, however, if that same school wanted to use songs written by that same Arthur Miller – he is, incidentally, a BMI-affiliated writer – they would have needed no permission. The new law corrects this inequity. It does so, undeniably, at a cost, but, to view the "effect" in proper perspective, one must first look at that cost.

BMI's present rate to colleges and universities for the general use of music is 5 1/2 cents per year for each full-time student (or full-time equivalent).² Viewed another way, that represents an *annual* institutional expense equal to less than half the current market price for a package of chewing gum for each full-time student. For a school whose enrollment totals 5,000 full-time (or equivalent) students. BMI's annual basic fee would amount to a total of \$275. This is hardly a significant sum of money in the budget of a college of that size.

In addition to the basic rate, there are also relatively minor secondary fees for musical attractions – e.g. concerts – where payment to performers exceeds \$1,000. For each such event, the fee is roughly equal to one cent (1¢) per available seat – with a fee minimum of \$15. It is interesting to note that, in October of 1977, before the new law became effective, Arizona State University presented an evening concert to an audience of about 8,500. No payment was made to the writers and publishers of the music used that evening, but \$1,272.67 was paid by the school for "T-shirt security," \$1,042.72 was paid for campus police, \$2,558.37 was paid for union stagehands and \$1,158.78 for cleanup.³ In comparison, had payment then been required for the public performance of music, the fee to BMI would have probably been less than \$100.

As for historic perspectives, the measure which resulted in the new law was first introduced

*6 J. Legis. 66 (1979).

1. 17 U.S.C. § 1(e) (1976).

2. Paragraph 5(a) of BMI agreement.

3. Doobie Brothers/Pablo Cruise Concert, Memorandum of Final Settlement, dated November 9, 1977.

during the Eighty-ninth Congress on February 4, 1965.⁴ It contained the present definition of public performance, eliminating the "not for profit" exemption in the following:

To perform or display a work 'publicly' means: (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered.⁵

The proposed revision had early approval from American colleges and universities as expressed by representatives of the American Council on Education (ACE), then consisting of 1,113 colleges and universities and 320 organizations in the field of higher education. Fred S. Siebert, distinguished educator and copyright consultant to ACE, testified on August 5, 1965 that he wished to "point out that the American Council on Education is not opposed to these changes in the copyright law, in fact, it is in favor of them."⁶

The House Judiciary Committee reported the following year, after months of hearings that the rights of public performance would no longer be limited by any "for profit" requirement, and that "it found persuasive the arguments that the line between commercial and 'nonprofit' organizations is increasingly difficult to draw, that many 'nonprofit' organizations are highly subsidized and capable of paying royalties, and that the widespread public exploitation of copyrighted works by educational broadcasters and other non-commercial organizations is likely to grow." In addition to these trends, the Committee reported, "it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad 'not for profit' exemption could not only hurt authors but dry up their incentive to write."⁷

Nearly a dozen years later, after all opinions had been heard and deliberated upon, the new bill finally became law. From the start, the Congress and representatives of American educational institutions, including ACE as well as copyright owners, agreed to fundamental changes in the concept of copyright and the rights of the copyright owner. One of these changes made equivalent colleges and universities with the commercial entertainment business when they publicly present copyrighted music. That was done because they are equal in a free market environment. Both pay the same fees to performers for the use of auditoriums and concert halls, the service of cleaning personnel, ushers, sound engineers, stage hands, union labor, electricity and the other ingredients that are part of the presentation. There is no educational discount of any of those parts. The new Act requires that the contribution of people who write music be equally recognized.

Early in 1977, well before the 1978 effective date of the new Act, BMI contacted interested representatives of higher education and arranged to meet them in BMI's New York offices. Further meetings followed, and as a result of them plus media publicity stemming from BMI press releases pointing out the implications of the new Act, sufficient interest within the academic community was finally aroused and a negotiating committee was formed to begin talking with BMI.

BMI, believes that it has been as scrupulously fair in dealing with higher education users of copyrighted music represented by it, as it has been with the thousands of other of its licensees. BMI has met, talked, argued, and listened, and, within the mandates of its agreements with over 55,000 writers and publishers of every type of music, finally arrived at the first mutually agreed upon contract form between it and higher education.

As pointed out in the beginning, the concept of royalties is by no means new to academia. Some time ago, in a discussion with a distinguished law professor who was vehemently opposed to the concept of public performance fees, BMI's President facetiously offered to waive its license fees to the institution involved if the professor would agree to waive his rights to the royalties that the textbooks he'd authored were then producing. His response, in full seriousness,

4. H.R. 4347, 89th Cong., 1st Sess. (1965); S. 1006, 89th Cong., 1st Sess. (1965).

5. 17 U.S.C. § 101 (1976).

6. *Hearings on H.R. 4347 Before the Subcomm. No. 3 of the House Comm. of Judiciary*, 89th Cong., 1st Sess. (1965).

7. H.R. 1476, 94th Cong., 2nd Sess. (1976).

was that he'd sooner give up his salary. And, in that same vein, it should be noted, too, that the copy of this publication in which Ms. Stein's paper appeared – and, presumably, the one in which this article is now printed – has waived none of its copyrights and expressly forbids any unauthorized reprint. Under the circumstances, it seems ironic that the creator of music, after finally gaining full and equal copyright protection, should now find that equality challenged by this same academic community that is so protective of its own rights. This irony is even further amplified when one considers how much valuable administrative time and energy is being expended by academia in order to avoid payment responsibility for the use of certain creator's properties. If a great deal of money was involved for the individual institution, it might be better understood – not excused, but understood – why so much of its administrative resource is being expended to “resist” the copyright law. It does boggle one's mind, however, when – as mentioned earlier – we consider that the *total* annual fee currently paid to BMI by an institution with a 5,000 full-time student enrollment would probably be less than any one of those students paid for books and supplies during that same year.

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New York, January 28, 1980

COMMENTS ON OIL POLLUTION LEGISLATION

To the Editors:

Gulf Oil Corporation would like to comment on a recent note in the *Journal of Legislation* entitled “Oil Pollution: The Need for Uniformity” written by James P. Kilcoyne.* The general theme of Mr. Kilcoyne's note was directed towards the need for federal preemption in the area of oil pollution legislation.

Federal Statutory Framework

Presently, the major federal oil spill legislation is found in §311 of the Clean Water Act. Section 311 provides that dischargers of oil are liable for clean up costs as well as a civil penalty. There is no provision in the Act which allows riparian property owners to recover from parties responsible for oil spills. Such owners must pursue normal tort remedies to recover damages resulting from oil spills. Existing federal legislation under the Clean Water Act does not provide for preemption.

Additional proposed legislation has recently been introduced in Congress which would expand existing federal water pollution laws.² This proposed legislation is commonly referred to as “Superfund.” The Superfund legislation would create a fund to reimburse victims of hazardous substances. The fund would also be used to provide the financial resources of cleaning up existing hazardous waste disposal sites. Initial drafts of Superfund legislation do not provide for preemption.

Merits of Preemption

Gulf Oil Corporation believes that federal preemption in the area of oil pollution legislation is highly desirable. In addition to the desirability of preemption in the oil spill area, Gulf Oil Corporation also believes that the benefits of federal preemption are equally applicable to legislation on spills and disposal site clean up of hazardous substances. In the absence of such

*6 J. Legis. 126 (1979).

1. 33 U.S.C. § 1321 (1976).

2. S. 1341, H.R. 4566, H.R. 4571, 96th Cong., 2d Sess. (1979).

a preemption, many states have elected to enact statutes that needlessly duplicate federal legislation. There are four principal problems associated with duplicative state and federal legislation in this area:

1. *Expense to the Taxpayer.* There is a significant expense associated with the enactment of state statutes, the regulatory development of such statutes, the administration of the statutes and regulations, and the enforcement of such laws. When state statutes merely duplicate existing federal laws, this expense is incurred with no articulable benefits. In the absence of preemption, this unnecessary expense is compounded by the ability of fifty different states to enact duplicative oil pollution legislation.
2. *Compliance.* As a matter of compliance, it is difficult for the oil industry to deal with multiple state and federal acts that impose varying obligations upon dischargers. While the basic objectives of federal and state oil pollution legislation are usually redundant, the details of the obligations placed upon dischargers are rarely the same from one statute to the next. A principal purpose of any legislation should be simplicity, allowing the regulated party to understand fully the nature of its obligations. It is difficult to insure full compliance with pollution legislation when the oil industry must deal with fifty-one different acts as opposed to a single law.
3. *State Expertise.* Many states do not have legislatures with expertise in the area of oil pollution. States without the expertise in the oil pollution area have enacted legislation that is sometimes poorly drafted and does not properly address the problems associated with oil spills. When the Congress has adequately addressed the problems associated with oil pollution, there are advantages to remove the risk that states with insufficient legislative technical staffing will improperly attempt to reproduce federal efforts.
4. *Implementation.* It is difficult to implement redundant state and federal oil spill statutes. Federal and state agencies often disagree with the manner in which laws should be interpreted and enforced. Situations occur where state and federal authorities assume opposite positions on oil pollution issues. Dischargers can be confronted with conflicting requirements. Preemption in the area of oil pollution would remove unnecessary involvement by state agencies.

While preemption in the area of oil pollution legislation is desirable, its inclusion in the legislation is by no means assured. The enactment of pollution legislation has become politically popular. Proponents of state oil spill legislation often support such bills for reasons that are politically expedient, rather than because the legislation is needed, desirable, or is the most effective route available. Federal preemption provisions in regard to oil spills can be expected to draw some criticism from state officials. Nevertheless, this route is the most practical one available.

In conclusion, Gulf Oil Corporation supports federal preemption of state oil pollution legislation. However, the political pressures exerted by the states represent a formidable obstacle to including preemption in future federal oil spill legislation.

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Houston, Texas, February 18, 1980