COPYRIGHT LAW SYMPOSIUM

Number Eight

NATHAN BURKAN
MEMORIAL COMPETITION

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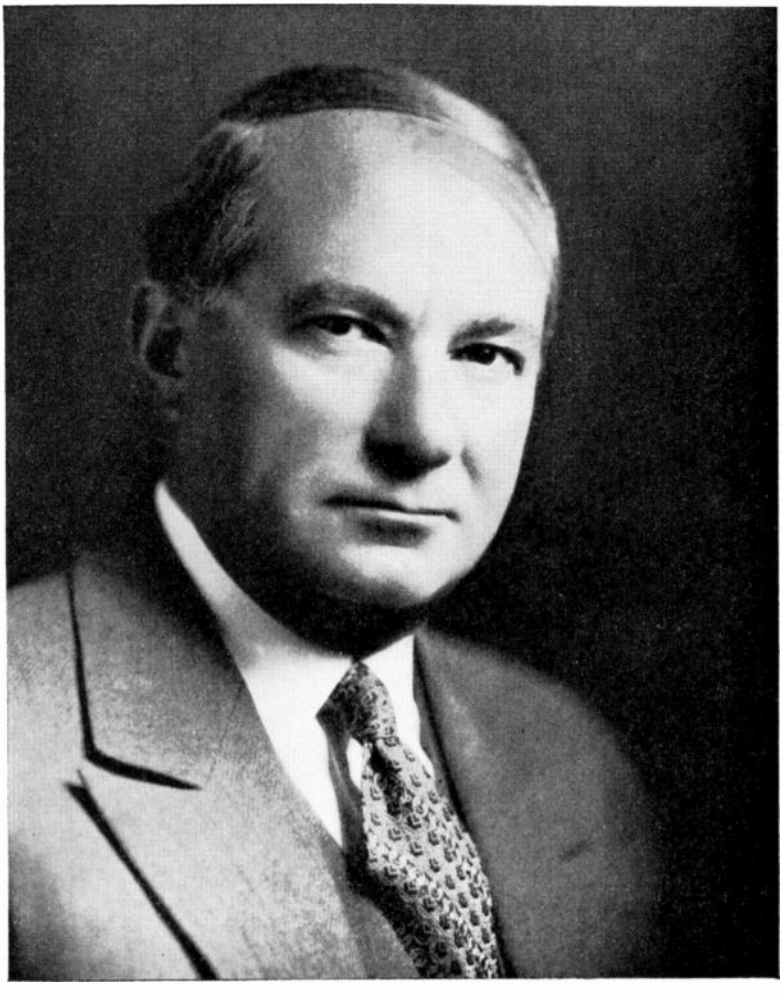

NATHAN BURKAN
1878–1936

Foreword

THE EIGHTH Annual Copyright Law Symposium, presenting the outstanding essays in the eighteenth successive year of the Nathan Burkan Memorial Competition, has brought forth two papers of rather unusual interest which the judges thought of equal worth and for each of which the sponsors are generously contributing a national prize of $500. The contrast between these excellent essays is in itself striking. The one by Maurice B. Stiefel of George Washington University on "Piracy in High Places: Governmental Publications and Copyright Law" is a unique and exhaustive original investigation of perhaps a narrow corner of the entire field; while not many in all probability will need to deal with this subject in a practical way, yet those who do should here find substantial or adequate assistance for the solution of their problems. The other, by Nathan Newbury III of Harvard University on "Protection of Comic Strips," deals with a topic more exploited in the literature and the precedents, and yet in its interesting development and completeness of analysis is definitely a contribution to the literature of the subject. Both essays are well written. They properly invite comparison with the distinguished winners of the past.

In our judgment, two other papers were worthy of particular mention and of publication in the current Symposium. Next after the national prize essays we should place the paper of William G. Wells of the University of Illinois College of Law, entitled "The Universal Copyright Convention and the United States: A Study of Conflict and Compromise." The ratification of this Convention by the United States in 1954 marked an important milestone in copyright law, signalized

by several worth-while monographs, one of which appeared in last year's Symposium. But the documented and complete exposition of this timely subject in the present essay amply justifies the recognition we are according it. The final paper by Stephen E. Strom of the University of Missouri on "Depreciation & Income Aspects of Copyright under the Internal Revenue Code of 1954" is a competent and professional analysis of some of the highly technical tax problems ever present in copyright law.

The judges have found it a pleasant task to read and reread the essays submitted to them. The field is important and vastly interesting; the subject matter, dealing with the vast multitude of products of the human mind, is ever stimulating; and there are always fascinating bypaths to lure the reader into the morass of federal jurisdiction or other kindred insolubles. The competition performs a worthy function in bringing bright law school students to consider a subject all too often bypassed in the standard law school curriculum. May it continue to do so in perhaps ever-widening circles for future generations of scholars.

CHARLES E. CLARK
CHIEF JUDGE OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

A. CECIL SNYDER
CHIEF JUSTICE OF THE SUPREME COURT OF PUERTO RICO

November, 1956

PAUL CUNNINGHAM

Preface

THE GREAT institutions of America recognize their responsibility to the youth of our nation. From primary grades to professional school, the exposure of our young people will largely determine the direction of our democracy in meeting the social, economic, and cultural challenges that lie ahead. An organization such as ASCAP, which seeks to promote the free flow of music from the composer to the public, must not lose sight of the fact that a composer's economic encouragement must come either through a system of patronage to a chosen few, or copyright laws which assure rewards to those whose works are accepted by the public. In our country we are firmly committed to the latter approach.

The Nathan Burkan Memorial Competition serves a twofold purpose. It recognizes, and pays homage to, the important part played in the Society's development by a great and unselfish lawyer; and it encourages others to follow in his footsteps by devoting time and study to the branch of the law that deals with products of the mind.

The cooperation of the deans and faculties of our leading law schools and the professional achievements, after graduation, of students who have written winning papers in this Competition, have encouraged the Society to count the annual Nathan Burkan Competition as one of its major activities.

To the Judges of our current Competition, Chief Judge Charles E. Clark of the United States Court of Appeals for the Second Circuit, and Chief Justice A. Cecil Snyder of the Supreme Court of the Commonwealth of Puerto Rico, we express our thanks and appreciation. Added to their very

busy schedules, it was a major task to review all the papers submitted and to select those worthy of publication.

Two papers, "Piracy in High Places: Governmental Publications and Copyright Law" by Maurice B. Stiefel of George Washington University Law School, and "Protection of Comic Strips" by Nathan Newbury III of Harvard Law School, were regarded as equally worthy of the first national prize of $500. Rather than divide the prize between these deserving students, the Society decided to award the full sum of $500 to each of them. To them, and to Messrs. William G. Wells and Stephen E. Strom, whose papers were selected for honorable mention, and to the other students whose papers were chosen for awards at their respective law schools, go our hearty congratulations and best wishes for success at the bar. They join an ever increasing number of distinguished lawyers and members of law faculties who first became acquainted with the legal problems of authorship as participants in this Competition. They are fitting monuments to the memory of Nathan Burkan, the distinguished first General Counsel of the American Society of Composers, Authors and Publishers.

PAUL CUNNINGHAM, PRESIDENT
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

November, 1956

Introduction

THE REACTION of bench and bar to the annual ASCAP Copyright Law Symposium has won for this publication an important place in every quarter where copyright problems arise. The Nathan Burkan Competition proves that students in American law schools are receiving sound legal training in acquiring a respect for facts, a knowledge of the rules of law established by statute or jurisprudence, an awareness of the necessity of viewing both facts and law in the light of changing economic, social, cultural and even legal concepts, and an ability to communicate to others both the conclusions about what the law is or should be in a given set of circumstances, and the method of arriving at those conclusions.

The eight volumes which have been published to date include 42 papers submitted at 31 of the nation's leading law schools.[1] The current volume adds three law schools to the list of those which have submitted papers of such outstanding merit as to justify publication in the annual symposium: George Washington University, the University of Illinois, and the University of Missouri. Harvard University appears for the fourth time. The four papers which have been published in these Symposia deal with the most vital aspects of the law of copyright. They have been cited frequently by judges and legal scholars. The authors of much of the recent periodical literature on copyright were first introduced to the subject as contestants in the Nathan Burkan Competition.

In spite of the fact that literature and music are the backbone of such billion-dollar industries as radio and television

[1] The papers appearing in the previous Copyright Law Symposia, arranged according to law schools, are listed at pages 123 to 127 of this volume.

broadcasting, motion pictures, newspaper, magazine and book publishing, phonographs used in homes or as juke boxes in public places, as well as the less commercial legitimate theater, opera, and symphony orchestra, there still is a popular feeling that authorship should not be associated with monetary considerations. This attitude is not new. Almost two centuries ago James Ralph, Esq., observed:

> Wit and money have been always at war, and always treated one another with reciprocal contempt. Perhaps for this only reason, That the man of money could acquire every thing but ideas; and the man of wit's ideas could never acquire him money. But whatever the cause may be, such is the fact: and, as if the bulk of mankind derived some kind of gratification from the quarrel, they have each in his way contributed all they could to make it perpetual.
>
> Thus a man may plead for money, prescribe or quack for money, marry for money, fight for money, do any thing within the law for money, provided the expedient answers, without any the least imputation.
>
> But if he writes like one inspired from heaven, and writes for money, the man of Touch, in the right of Midas, his great ancestor, enters his caveat against him as a man of taste; declares the two provinces to be incompatible; and he who aims at praise ought to be starved; and that there ought to be so much drawback upon character for every acquisition in coin.[2]

Bernard Shaw summed this up pithily in a dispute about the amount to be paid for adapting a Shaw work to a supposedly artistic motion picture, when he said to a movie tycoon—perhaps with tongue in cheek—"The trouble is that you think only of art while I think only of money."

The coming generation of lawyers will be called upon as advocates, judges, and legislators to mould the developing law of literary property in a world where science has opened unlimited opoprtunities for mass communication to hundreds of millions of people. Many of the messages are of a commercial nature; the enormous investment in talent and facilities demands reasonable assurance of a substantial audience.

[2] Ralph, *Case of Authors by Profession or Trade*, 5 ANN. REG. 174 (1762).

This gives greater opportunities to authors than have ever existed before. As their number increases, there will be more and more opportunities for lawyers to enter this field. If the Nathan Burkan Competition aids in developing an informed bar to advise both the creators and users of literary, artistic, and musical works, its purpose will have been fully achieved.

The writer wishes to express his personal appreciation to Chief Judge Clark and Chief Justice Snyder for their enthusiasm in judging the 31 papers submitted to them. Both have a keen interest in legal education, Chief Judge Clark having served as Dean of the Yale Law School, and Chief Justice Snyder having taught at the University of Puerto Rico School of Law. Their duties on the Bench have not lessened their desire to encourage legal research at the student level. To them and to their distinguished predecessors who have judged the papers in this Competition, goes much of the credit for its success.

HERMAN FINKELSTEIN, GENERAL ATTORNEY
AMERICAN SOCIETY OF COMPOSERS,
AUTHORS AND PUBLISHERS

New York, New York
November, 1956

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ASCAP

COPYRIGHT LAW SYMPOSIUM

Number Eight

NATIONAL AWARD ESSAY, 1955

Piracy in High Places—Government Publications and Copyright Law

By MAURICE B. STIEFEL

GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

PROBABLY THE largest publisher in the world today is the United States government.[1] Last year the total number of copies of all classes of government publications exceeded thirteen billion. Included in that figure are such diverse items as the *Congressional Record*,[2] post cards, tax forms (over 160 million of Form 1040), patents, the Code of Federal Regulations, and myriad others. In the Public Documents Division alone there were over two million orders from the public at large. Some 3,800,000 publications were mailed to libraries, and nearly 70,000,000 publications were sent to various government agencies. Another 46,000,000 were sold, so that the total number of publications distributed by the Public Documents Division was in the neighborhood of 130,000,000.

A large amount of the material published by the government has been published in copyrighted form previously. In addition, many articles are widely reprinted later in copyrighted and uncopyrighted works. Yet notwithstanding the vast number of problems arising from this mass of printed material, only one rather cryptic section of the Copyright

[1] The quoted figures in this paragraph are from a rough draft of the PRINTER'S ANNUAL REPORT for the year 1954, and were obtained from the Government Printing Office, private communication, February 3, 1955.

[2] *Id.* Forty-three thousand copies of the *Congressional Record* are printed every day Congress is in session, the number of pages ranging from sixteen to two hundred fifty-six.

Law of 1947 [3] deals directly with this problem area. It is this terse section [4] and the many unsolved and previously undiscussed problems which arise from it that will be analyzed in this article.

The pertinent language of the Copyright Law of 1947 (Section 8) is as follows:

> No copyright shall subsist in the original text of any work which is in the public domain . . . or in any publication of the United States Government, or any reprint, in whole or in part, thereof. . . . The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

Thus, it is seen that a government publication is part of the public domain, so that no such publication can be the subject of a copyright, and, further, that publication by the government of the copyrighted work of an individual will not destroy any rights which that person would otherwise have had.

While a casual reading of the section would seem to indicate that the legislative intent was spelled out with considerable clarity, a number of questions may be raised to which the answers are not obvious from the section. Precisely what is meant by a government publication? What of the government employee who prepares a writing on government time as a part of his official duties; is such work subject to copyright? [5] May a copyright be secured on a work which is merely a compilation of material from various government sources? [6] Since the government may not itself secure a copyright, how may it prevent distortion, misrepresentation, or even pirating of its own material by private individuals? Where an individual's work has been published by the government, must the individual have secured a statutory copy-

[3] 61 Stat. 652 (1947), 17 U.S.C. § 1 *et seq.* (1952). [4] *Id.*, at § 8.
[5] Sherrill v. Grieves, 57 Wash. L. Rep. 286 (1929).
[6] Hanson v. Jaccard Jewelry Co., 32 Fed. 202 (C.C.E.D. Mo. 1887).

right prior to the publication by the government, or is his common law right sufficient to assure him of the protection recited by Section 8? May the statute be construed as permitting the government to publish any copyrighted work without first securing the permission of the proprietor? [7] If the government includes a portion of a copyrighted work in its publication without notice of the copyright, has there been a dedication to the public by the proprietor of the copyright? Suppose that in the above situation the government does credit the source but omits notice of copyright. Is this sufficient to protect the original proprietor? [8] Consider the person whose copyrighted work has been infringed by the government. May he bring suit directly against the government in the Court of Claims, or must he be content with a suit against the individual infringer on the theory that the United States may not be sued without its consent? Section 8, of itself, is of little help in answering these questions.

GOVERNMENT PUBLICATION OF A COPYRIGHTED ARTICLE

Protection of the Copyright Proprietor as Against the Government.—When the government deliberately publishes a copyrighted article without obtaining the prior consent of the copyright proprietor, the general assumption would be that the holder would, as a matter of course, enjoy an action against the government for infringement. Yet no such cases have been reported. The reason appears to be that the government, relying upon its "sovereign immunity," has not yet consented to be sued for this particular type of tort. Thus, by virtue of the Tucker Act of 1887 [9] a suit for damages cannot be instituted in the Court of Claims against the government in cases "sounding in tort." Infringement of copyright is considered such a case.[10] Unlike a suit for infringement of a

[7] H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909).
[8] DEWOLF, AN OUTLINE OF COPYRIGHT LAW 81 (1st ed. 1925).
[9] Later embodied in 28 U.S.C. § 250 (1940).
[10] Lanman v. United States, 27 Ct. Cl. 260 (1892).

patent, which may now be brought in the Court of Claims, the prohibition as to such a suit for copyright infringement still stands.[11] Recently there has been some discussion as to whether the Federal Tort Claims Act as amended may not have removed this prohibition, but the general consensus, based upon a consideration of the legislative history of the act, is that the prohibition has not been affected.[12]

The above does not imply that a government official may publish copyrighted works at will, without apprehension of suit for infringement.[13] As stated by the Supreme Court in *Belknap v. Schild,*[14] a patent case:

> The exemption of the United States from judicial process does not protect their officers and agents, civil or military, in time of peace, from being personally liable to an action of tort by a private person whose rights of property have been wrongfully invaded or injured, even by authority of the United States. . . . Such officers or agents, although acting under the order of the United States, are therefore personally liable to be sued for their own infringement of a patent.

In *Towle v. Ross,*[15] where the defendants acting as employees of the government made photographic reproductions of plaintiff's copyrighted map, the court found for the plaintiff and awarded him $250 statutory damages even though defendants ceased publication and the reproductions were never used. Regarding the immunity defense, the court observed:

> The position of the defendants as employees of the United States cannot protect them from the award of damages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the Government by the employees

[11] 62 STAT. 940, 28 U.S.C. § 1491 (1952).

[12] But see Turton v. United States, 101 U.S.P.Q. 164 (6th Cir. 1954), where the court, in a case of copyright infringement, stated that the effect, if any, of Section 1346(b), Title 28, (Federal Tort Claims Act) was not to be considered.

[13] HOWELL, THE COPYRIGHT LAW 44 (3d ed. 1952). ". . . generally speaking, when the head of a department or bureau of the Government wishes to include copyright material in an official document, he should secure beforehand the consent of the copyright proprietor. . . ."

[14] 161 U.S. 10 (1896).

[15] 45 U.S.P.Q. 143 (1940).

thereof. The foundations of arbitrary power would be firmly laid if the agents could violate the rights of citizens and themselves escape unscathed.

Despite the support the *Towle* and *Belknap* holdings may offer to the copyright proprietor, there do not appear to be any reasonable grounds to justify the present dichotomy existing between the patent and copyright fields. If the government desires to utilize some invention protected by a patent, then the government is obliged to pay to obtain a license (or infringe and run the risk of a suit). The government, in view of the *Towle* and *Belknap* cases, would probably pursue a similar procedure and obtain a license in order to utilize copyrighted material. If instead it elected to infringe, the copyright proprietor would have no recourse against the government per se, but merely against the tortious government employee responsible for the act. This "double standard" in the patent and copyright fields has been the subject of considerable criticism, including proposals for remedial legislation providing for suit against the government in the Court of Claims.[16]

It is instructive to consider the existing "double standard" from a constitutional viewpoint. Historically both the patent and the copyright owe their origin to the Constitution. Article I, Section 8, expressly enumerates that:

> The Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Thus, these two rights stem from the same section and the same clause. Further, it has been suggested that the clause

[16] Private publishers complain that certain government agencies (particularly the Department of Defense) republish certain of their copyrighted works, relying on the statutory provision barring suit against the Government in actions "sounding in tort."

is, in effect, two grants of power and should be read: "Congress shall have the power to promote the progress of science . . . by securing to authors . . . the exclusive right to their writings; and shall have the power to promote the progress of useful arts . . . by securing to inventors . . . the exclusive right to their discoveries." [17] It would, therefore, seem reasonable to infer that the intent of our founding fathers was to create two coordinate rights—a patent right, and a right of copyright. Correspondingly, neither the patent holder nor the copyright proprietor should have protective rights superior to the other. Under such circumstances, one might well question whether the discriminatory Tucker Act, which still purports to prevent suit against the government in cases of copyright infringement, comports with the Constitutional intention.

A plausible argument against amending the Tucker Act contends that if the government had to be concerned about a potential law suit every time it printed a copyrighted work the restriction would tend to unduly hamper it in the dissemination of necessary material and, perhaps, restrict the interplay of ideas. Such a contingency, however, would seem to be more apparent than real, for even if the government permitted suit against itself for copyright infringement the well-settled doctrine of "fair use" would operate as a limitation on the rights of authors. One of the clearest statements as to what is meant by "fair use" is given by Judge Yankwich.

> On the whole, the law of "fair use," as evolved by the courts, is a wise synthesis of conflicting rights which, while safeguarding the author, avoids injury to the progress of ideas which would flow from

[17] 68 HARV. L. REV. 517–26 (1955); 18 GEO. WASH. L. REV. 50 (1949). See also H.R. REP. No. 1923, 82d Cong., 2d Sess. 4 (1952) and S. REP. No. 1979, 82d Cong., 2d Sess. 3 (1952), which show that the House and Senate committees agreed with the quoted interpretation when they considered codification of the patent laws in 1942. *Contra,* HOWELL, THE COPYRIGHT LAW 11 (1948 ed.).

an undue "manacling" of others in the reasonable use of copyrighted materials.[18]

Probably no more specific definition can be offered, and whether or not use of copyrighted material exceeded the bounds of "fair use" is always a question of fact dependent upon the particular circumstances. As the courts have not had too much difficulty in determining such questions in the past between individuals, there is no apparent reason why they could not continue to act with equal facility on similar questions in the future, even though the government may be one of the parties. The doctrine would seem to offer adequate assurance that the government need not fear unreasonable harassment by authors when their work has been published in the proper exercise of "fair use."

It should be noted that the problem of adequate protection for the copyright proprietor is of concern not only to authors, but also to composers, sculptors, advertisers, cartographers, compilers, cartoonists, dramatists, musical arrangers, and other creative artists. As copyright protection broadens, the problems are multiplied and become more complex. One current area receiving considerable attention is that of United States military service bands and their public performance of works by various composers. In this country such performances are generally considered to be without profit.[19] In any event, as a matter of course a license is always obtained from the owner of the public performance rights. A problem arises when the band goes overseas. In many foreign countries the playing of a composition without the consent of the composer

[18] *What is Fair Use*, 22 U. CHI. L. REV. 203, 215 (1954).

[19] Courts have, however, construed the Copyright Act of 1947 liberally with respect to the requirement that the performance must be for profit. See Herbert v. Shanley Co., 242 U.S. 591 (1917); Buck v. Crescent Gardens Operating Co., 28 F. Supp. 576 (D. Mass. 1939). The profits need not necessarily be direct. It might be argued that when a service band played for the public without any admission charge, such a performance resulted in indirect profit to the Government i.e., that the interest aroused resulted in increased enlistments.

constitutes an infringement whether or not the performance be for profit. In such a situation it is likely that liability would attach. There is no judicial authority on this question as yet. Undoubtedly, the argument of sovereign immunity might be raised as a possible defense.

Although the prospects for reform are not hopeful, plans have been launched to revise the existing copyright law.[20] Whatever modifications are enacted, provision should be made for suit against the government for infringement of a copyright belonging to an aggrieved proprietor.

Protection of the Copyright Proprietor as against Third Parties Statutory Provisions.—Once the government has published a copyrighted work, the determination of the effect of such publication upon the rights of the original copyright holder, particularly as against third parties, is of significance. The second paragraph of Section 8 of the Copyright Law of 1947, quoted previously, indicates that the rights of the copyright proprietor are not to be considered changed in any way as a result of the government's publication of the copyrighted material. The House Report [21] on this section states:

> The Government often desires to make use in its publications of copyrighted material, with the consent of the owner of the copyright, and it has been regarded heretofore as necessary to pass a special act every time this was done, providing that such use by the Government should not be taken to give to anyone the right to use the copyrighted material found in the government publication. It was thought best, instead of being obliged to resort every little while to a special act, to have some general legislation on this subject.[22]

[20] The American Bar Association at its 1954 annual meeting set up a committee to study plans for revision of the existing copyright law. Cedric Porter, a Boston attorney, heads the committee. A meeting of the American Patent Law Association was held recently (January, 1955) in which Porter discussed his plans with the Patent Law Association representatives. While plans for revision have not progressed beyond the formative stages, a number of bills have been proposed to study the existing law to recommend necessary remedial legislation. See S. 1254, 84th Cong., 1st Sess. (1955); H.R. 2677, 84th Cong., 1st Sess. (1955).

[21] H.R. Rep. No. 2222, 60th Cong., 2d Sess 10 (1909).

[22] An example of a prior instance where special legislation was enacted is given in 35 Cong. Rec. 7431 (1902), in which the Senate debated the passage

It seems fairly clear that there is no intent to permit the government to appropriate a copyrighted work without the consent of the proprietor, for the House Report gives no indication of such intent. It has been pointed out that there is nothing in this section of the act which would indicate that the government had the right to reprint copyrighted matter without the consent of the copyright proprietor.[23] There having been no opinion expressed with respect to this part of the section in subsequent committee reports, or in committee reports on later copyright acts, it seems reasonable to assume that the legislative intent is still that which was formulated by the House Committee of 1909.[24]

Publication in the Congressional Record.—A number of rather difficult questions may occur when a copyrighted article is read into the *Congressional Record.* The congressman need not worry about infringing the proprietor's copyright, for the inclusion of matter in the *Record* is considered to be privileged.[25] As a consequence, the congressman need not obtain the consent of the copyright proprietor.

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of a joint resolution providing protection for the inclusion of copyrighted material inserted in the *Woodman's Handbook*, a publication prepared by the Bureau of Forestry of the Department of Agriculture. See also 40 CONG. REC. 9386 (1906), for the Senate debate on a joint resolution to protect the copyrighted matter appearing in the *Rules and Specifications for Grading Lumber Adopted by the Various Lumber Manufacturing Associations of the United States.*

[23] WEIL, AMERICAN COPYRIGHT LAW 247 (1st ed. 1917).

[24] Further corroboration may be found in 35 CONG. REC. 7431 (1902), where in debating the *Woodman's Handbook* matter, it was stated:

"In order to give this publication its greatest value, it is necessary to embody certain copyrighted tables of log scales. Permission has been obtained from the proprietors . . . to use the data, with the provision that no copies . . . be sold by any Government Office. . . . Existing law does not permit such restrictions. Should this resolution protecting the copyright fail of passage, it would be necessary to issue the publication without these log scales."

But note the *Given* case, note 32 *infra.*

[25] For a debate in the House of Representatives as to the scope of this privilege see 23 CONG. REC. 3299–3305 (1892). One of the Representatives had read several chapters of Henry George into the record to support his position on the tariff. Brief excerpts of the ensuing debate follow:

"Mr. Burrows. 'Is it in order under the rule . . . to print remarks put into the Record, a printed volume?'

Even without such consent, members of Congress may undoubtedly quote ad libitum from copyrighted material in the course of debates on the floor, and this proviso safeguards the quoted material when it appears subsequently in the Congressional Record.[26]

The substantive question is the effect that publication of the copyrighted work in the *Congressional Record* will have upon the right of the original copyright proprietor. For example, assume that a congressman, after incorporating a copyrighted work in the *Congressional Record*, desires to send out copies of the pages of the written *Record* containing the copyrighted works to his constituents.[27] May he do so without being guilty of infringement? There has been no litigation on this question, but it would seem that such action would constitute infringement. While the inclusion of the copyrighted material in the *Record* is privileged,[28] it would appear doubtful that the courts would construe the privilege as extending to the mailing of copies of the work via the pages of the *Record* which contain it. Such a ruling would greatly weaken the protection of the copyright.

"Mr. Stone. . . . '[I] inserted it in order that it might go to the country under the frank of members of the House *in order that their constituents might be able to read this argument without having to buy it.*' (Emphasis added.)

"Mr. Doliver. . . . 'can the House see no difference between the publication of a brief extract from a public newspaper [which Doliver had read into the Record] and this concerted publication of a copyrighted volume in its Record? . . .'

"Mr. Goodnight. . . . 'all members have general leave to print. Every gentleman upon this floor . . . has the right to print as his speech whatever he pleases. . . .'

"Mr. Washington. 'The only expense to the people attending the printing of these chapters will be the cost of that much of the space of the Congressional Record. Should they all be gathered together afterwards and republished in pamphlet form, the expense will be borne entirely by those persons who may wish to distribute the book as a valuable document.'"

The net result was that the resolution to strike Henry George's work from the *Record* was tabled. There does not appear to have been any serious attempt to question the scope of the Congressional privilege since.

[26] HOWELL, THE COPYRIGHT LAW 44 (3d ed. 1952).

[27] See the idea of Representative Stone, note 25 *supra*. . .

[28] See note 25 *supra*.

Another problem with respect to the publication of a copyrighted work in the *Congressional Record* has to do with an outside reader of the *Record*. Suppose that the reader is interested in the copyrighted work and decides to publish it himself, may he do so without being sued for infringement? If notice of copyright is in the *Record*, then there is no doubt that the copyright proprietor is protected and may successfully bring suit for infringement.[29] Suppose, however, that no actual notice of copyright is given, but the congressman merely identifies the source of his quotation. The better view would seem to be that the proprietor is still protected [30] whether the subsequent publication by a reader of the *Record* be willful or innocent.[31] Thus, it would be reasoned that since the *Record* gives credit to the source, this is sufficient to put any reader on notice as to the possibility of copyright in the quoted material.[32] DeWolf goes so far as to state, "Persons using government publications . . . should be very careful to ascertain whether copyright for them was in existence be-

[29] See DEWOLF, AN OUTLINE OF COPYRIGHT LAW 81 (1st ed. 1925).

[30] *Ibid.* "It would seem that even the omission of the copyright notice in the government edition of a copyrighted work would not deprive the copyright owner of his rights."

[31] *Scienter* is not requisite for infringement. The act of copying is sufficient to sustain an action. See Toksvig v. Bruce Pub. Co., 181 F.2d 664 (7th Cir. 1950).

[32] An extremely interesting controversy is discribed in 67 PUBLISHERS' WEEKLY 900 (1905). Excerpts follow:

"A hearing of the suit of Welker Given . . . vs. Frank Palmer, government printer, is expected to begin at Washington shortly. The case is one of the most remarkable in the history of copyright law, the allegations in the suit being to the effect that the government printer annulled the law by carrying out instructions of the Senate and making copyrighted matter part of the proceedings printed in the Congressional Record. Mr. Given, a well-known Iowa newspaper man . . . in 1896 entered into a contract with the National Republican Central Committee to furnish several treatises on the tariff which should be issued in pamphlets. . . . The matter was copyrighted, and Mr. Given was to receive a royalty of so much per for each copy distributed. The articles had been printed prior to the time, and Senator Lodge incorporated them as a part of his speech on the tariff question, asking to have it reproduced in the Congressional Record, Mr. Given being given due credit. Then the National Republican Central Committee refused to pay for the articles.

fore they were issued by the Government." [33] This, it is submitted, is too broad. If a copyrighted article were to be inserted in the *Congressional Record* with neither notice of copyright nor any crediting of the source, it would seem that whatever rights the proprietor might have had would be deemed to have been yielded up to the public. Courts traditionally have been strict regarding compliance with the formalities of notice requirement.[34] In the present hypothecated situation there is no way in which the reader is given any intimation as to the existence of copyright in the work, and even if the court did not hold that the copyright was abandoned to the public it would be doubtful that the proprietor could recover in a suit against an innocent "infringer." [35]

A final question not necessarily involving the *Congressional Record* concerns statutory and common law rights. In order to be adequately protected, when one permits the government to publish a private work, must the individual have secured a statutory copyright in advance, or will his common law right [36] to his handiwork be sufficient? This question has not

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They claimed that its publication in the Congressional Record annulled the copyright and made it public property. Given did not receive a cent of the royalty promised him, and later begun [began?] the suit which will shortly come up for hearing."

Unfortunately, the question, if answered in court, was not reported, for no record of the case has been discovered. Were such a question posed today, however, one's sympathies would be for Mr. Given, and it would be expected that the court would hold accordingly. One wonders, however, why Given elected to sue the printer rather than the Republican National Committee.

[33] DeWolf, *op. cit. supra*, at 81.

[34] See Sieff v. Continental Auto Supply Co. Inc., 39 F. Supp. 683 (D. Minn. 1941).

[35] Section 21 of the Copyright Law of 1947, cited *supra*, provides protection for the copyright holder who has, by accident or mistake, omitted notice of copyright from a particular copy or copies, where a third person, having actual notice, infringes. But as against an innocent infringer who has been misled by the omission of the notice, no damages can be recovered and no permanent injunction will be issued unless reimbursement is made to the innocent infringer for any reasonable outlays made by him.

[36] See Wheaton v. Peters, 34 U.S. (8 Pet.) 591 (1834), which deals with the common law right.

been answered by the courts. That portion of Section 8 of the Copyright Law which deals with this question states:

> The publication or republication by the Government . . . of any material in which copyright is subsisting shall not be taken to cause any abridgment . . . of the copyright. . . .

While this is somewhat ambiguous, as a practical matter the individual should secure a statutory copyright before permitting the government to publish his material. "Subsist" is defined in Webster's as "to have existence; to exist or continue to exist." Congress, in framing the statute, apparently contemplated that copyright in the work would have been secured prior to publication by the government. It might be argued that the common law right of copyright also "subsisted," but this construction seems somewhat strained. It has consistently been held in the United States that the extent of the common law right is the right to the manuscript and to the first general publication, and nothing further.[37] Consequently, once the government has published, particularly where such publication gives no notice of a reserved copyright by the author, it would seem that the common law right would be extinguished, and, no statutory copyright having been obtained, the work would be deemed to have been dedicated to the public. Moreover, that portion of the title of Section 8 dealing with this area is "Publication by Government of *Copyrighted* Material" which seems to corroborate the thought that the legislators contemplated a statutory copyright.[38]

PROTECTION FOR GOVERNMENT PUBLICATIONS

Distortion or Outright Appropriation by Private Individual.—Just as the copyright proprietor may be presented with

[37] See note 36 *supra.*

[38] (Emphasis added). But see Sherrill v. Grieves, 57 WASH. L. REP. 286 (1929). The case was primarily concerned with the rights of a government employee to a copyright in a pamphlet prepared on his own time. The pamphlet was first published by the Government. It was argued that such publication was tantamount to a dedication of the pamphlet to the public and that it was

problems as to recovery or affirmative relief when the government infringes his work, the government is also confronted with certain problems as to adequate protection of its own published material. What, if any, are the possible remedies when a private party republishes a government publication but with deliberate distortions? Suppose he simply recopies the work but omits any information as to the source and sells the item at an exorbitant price? A copyright proprietor can, of course, prevent distortion or misrepresentation of his copyrighted work,[39] but since 1895 neither the government nor any individual can obtain copyright in government publications.[40] The underlying reason for this prohibition was to guarantee the free dissemination of the wealth of material published by the government. A strong democratic society being a well-informed society, it was felt that an allowance of government copyright would only restrict free dissemination of valuable government information. Yet the government sells many of its publications, and it would seem imperative that it be provided with some protection against distortion of their contents.

In cases of affirmative misrepresentation and distortion, there is no doubt that considerable protection is afforded by

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not copyrightable. The court rejected this contention, holding that Sherrill's subsequent copyrighting of the pamphlet was proper and entitled to protection from infringement. While the reasons for this decision are not too clear, it is probable that the court was influenced by (1) the fact that the initial publication by the Government was limited, the pamphlet being distributed only to students in the service school where Sherrill taught, and (2) notice of Sherrill's copyright appeared in the publication by the government.

[39] This protection of copyright holders from the distortion of satirical disparagement of their works has been recognized as the doctrine of "Moral Right." Thus, even where an individual has acquired rights in a copyrighted work, as by the doctrine of fair use for example, the copyright proprietor is protected as to distortion of his work. See Yankwich, *What is Fair Use*, 22 U. CHI. L. REV. 203 (1954); Roeder, *The Doctrine of Moral Right*, 53 HARV. L. REV. 554 (1940); Yankwich, *Thoughts on Copyright*, 28 LOS ANGELES BAR BULL. 117 (1953); Katz, *The Doctrine of Moral Right and American Copyright Law*, FOURTH COPYRIGHT LAW SYMPOSIUM 79 (1952).

[40] This is the date of the passage of the basic statute.

the Federal Trade Commission. Particularly effective has been the use of the "cease and desist" order. Thus, copartners who sold "Belt and Vitalized Soles" agreed that in composing their advertising they would cease publishing for their own commercial purposes any confidential report of government tests, and further agreed not to use such reports for sales promotion purposes.[41] An individual engaged in offering for sale a booklet entitled *Establishing and Operating a Real Estate and Insurance Brokerage Business* in interstate commerce, agreed to cease and desist from representing that substantially the same information could not be obtained for less than the two dollar price which he himself charged.[42] Similarly, two persons who published, sold, and distributed books and pamphlets including a book on *How to Win Success in the Mail-Order Business*, previously published by the United States Department of Commerce as *Establishing and Operating a Mail-Order Business*, agreed to cease and desist from representing that such a publication was a new work, or from selling such a publication without clearly disclosing the title under which it was previously sold.[43] In *F.T.C. v. Public Affairs Press*[44] the F.T.C. was upheld in requiring the Public Affairs Press to cease and desist from representing that its publication, which was merely an embellishment of certain government publications on fisheries, was a new work.

While the above instances would seem to indicate that the F.T.C. offers the government considerable protection from distortion of its works, the F.T.C. traditionally has acted only where there has been false advertising or misrepresentation. Without a showing of one of these elements there is some question as to whether or not the F.T.C. would intervene. If a private publisher merely republishes a government publica-

[41] 43 F.T.C. 756, No. 7525 (1946).
[42] 46 F.T.C. 1205, No. 7930 (1949).
[43] 47 F.T.C. 1729, No. 8114 (1951).
[44] Docket No. 5695, F.T.C. Decisions (1952).

tion without identifying it as such but without distorting it, and then sells such publication for considerably more than the government price, it might be argued that the F.T.C. lacked jurisdiction.

It is interesting to compare the jurisdictional problem represented in the domestic action with the "foreign origin" cases. All of these cases are somewhat analogous to the present problem. In each instance the defendant was attempting to market a commodity obtained in a foreign country but without disclosing the fact of foreign origin. Thus, there was no affirmative misrepresentation (misfeasance) but merely nonfeasance. The F.T.C. attempted to compel affirmative disclosure. Its jurisdiction was challenged by the defendants but was upheld by the courts. Thus, in *Segal v. F.T.C.*,[45] where Segal was marketing Japanese-made lenses without disclosing origin, the court found that such practice would positively mislead some buyers and that this plainly brought the case within the powers of the F.T.C. In similar fashion, a cease and desist order requiring the disclosure of the foreign origin of thumb tacks was affirmed in *American Tack Co. v. F.T.C.*[46] In view of this line of cases, it would appear that the F.T.C. might also have jurisdiction to compel affirmative disclosure in the present similar situation where a private party duplicates a government publication but does not credit the source and sells the issue at an exorbitant price. While this power may be inherent in the F.T.C., all indications are that it would be exercised sparingly if at all. Perhaps what is required is additional legislation more clearly implementing such power, or else there will be complaints from the credulous individuals who have paid excessively for a poor paraphrase of an inexpensive government publication.

[45] 142 F.2d 255 (2d Cir. 1944). See also Jacob Siegel Co. v. F.T.C., 150 F.2d 751, 754 (3d Cir. 1944); Muffet v. F.T.C., 194 F.2d 504, 505 (2d Cir. 1952).

[46] CCH TRADE REG. REP. ¶ 67,713, 10th ed. 1954 (2d Cir.). See also Heller v. F.T.C., 191 F.2d 954 (7th Cir. 1951), where the court held that the F.T.C. had authority to compel Heller to disclose the foreign origin of pearls which he was marketing.

Comparison with the British "Crown Copyright."—Great Britain has also been confronted with the problem of creating adequate protection for government publications. Their solution, quite different from our own, is based upon the existence of a copyright in the "Crown." As early as 1666 the king was held to have the right of copyright in the decisions of the judges.[47] Whether the king's rights as to copyright were sustained on the principle of property or prerogative did not appear from the reports of the early cases although it has been felt that a property right was the basis.[48] By 1887 the right of the Crown to secure copyright in any work created by an employee of the Crown during the course of his duty was clearly indicated.[49] It was made clear, however, that the Crown was only interested in asserting its right of copyright in certain selective areas, such as literary or quasi-literary works, charts, maps, and the like.[50] Provision for a Crown

[47] DRONE, PROPERTY IN INTELLECTUAL PRODUCTIONS 162 (1st. ed. 1879). Drone traces the early history of the Crown Copyright:

"The doctrine that the State may have an exclusive property in the decisions of its judges, although the courts appear to have lost sight of it in more recent times, was advanced in England more than two centuries ago. In 1666, the House of Lords, affirming the judgment of the Lord Chancellor who had granted an injunction against members of the Stationer's Company, held that Atkins had acquired from the king the exclusive right of printing Rolle's Abridgment (Atkins' Case, 4 Burr. 2315, reported Carter 89; Bac. Abr. Prerog. F.5). So in 1672 the same tribunal reversed the decision of the Common Pleas, that the property in the third part of Coke's Reports was in Roper, who had derived his title from the executors of the reporter, and held that 'the copy belonged to the king' by whom the defendent Streator had been licensed to print. (Roper v. Streator, 4 Burr. 2316; s.c. Skin. 234; 1 Mod. 257; Bac. Abr. Prerog. F.5.)"

[48] DRONE, cited *supra*, at 163. Drone points out that one of the grounds on which the Atkins' Case, *supra*, was argued was that the property was in the king who paid the judges. Thus, "Lord Mansfield emphatically maintained that the judgment of the Lords rested solely on this ground (i.e., property), and that it could be defended on no other."

[49] See 49 GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS, TREASURY MINUTES, August 31, 1887.

"The Law gives to the Crown . . . the same right of copyright as to a private individual. Consequently, if a servant of the Crown in the course of his duty for which he is paid, composes any document, or if a person specially employed and paid by the Crown for the purpose of composing any document, the copyright in the document belongs to the Crown as it would in the case of a private employer."

[50] *Ibid.* The Treasury minutes indicated that the majority of government pub-

Copyright was made in the Copyright Act of 1911 [51] enabling the Crown to secure copyright for a period of fifty years. That the government intended not to exercise its privilege of copyright in all publications was made quite clear in the Treasury Minutes of June 28, 1912,[52] which stated:

> The publications which fall into the first four classes [53] are issued for the use and information of the public, and it is desirable that the knowledge of their contents should be diffused as widely as possible. In the case of these publications, no steps will ordinarily be taken to enforce the rights of the Crown in respect of copyright. The rights of the Crown will not, however, lapse, and should exceptional circumstances appear to justify such a course it will be possible to assert them.

Thus, it is seen that the securing of the Crown Copyright is a matter of administrative discretion, the implication being that the privilege will be exercised sparingly.

In view of the great influence British law has had upon the development of law in the United States, it is not surprising that prior to the enactment of the Printing Act of 1895 [54] the desirability of government copyright in certain forms of pub-

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lications were published for the information and benefit of the public, and therefore that the knowledge of their contents should be diffused as widely as possible. But in certain other cases, where the government published works were of rather limited interest, but of the same general character as those published by private industry, it was felt desirable to place the Government in the same position of protection as that afforded private industry. The report then classifies the various types of government publications into seven categories: (1) reports of committees to Parliament, (2) papers required by Statute to be laid before Parliament (Rules, Orders in Council, etc.), (3) papers laid before Parliament by Command (treaties, reports from Consuls, etc.), (4) Acts of Parliament, (5) official books (the KING'S REGULATIONS FOR THE ARMY AND NAVY), (6) literary or quasi literary works (the ROLLS PUBLICATIONS, BOARD OF TRADE JOURNAL, etc.), and (7) Charts and Ordnance Maps. No restriction was desired as to the first five categories, but Crown Copyright was felt necessary as regards the last two.

[51] 1–2 GEO. V, c. 46, 18.

[52] 69 GREAT BRITAIN, HOUSE OF COMMONS, SESSIONAL PAPERS 1912–1913.

[53] See note 52 *supra.*

[54] 28 STAT. 608 (1895), 44 U.S.C. 58 (1952).

lication was strenuously urged.[55] The Printing Act of 1895, of course, put an end to the arguments, and since that time there has been no discussion of a government copyright. Nor does there seem to be any pressing need for such a measure today. While the problem of protecting the government from having its works pirated by unscrupulous private publishers still exists, the simplest solution would appear to be for the F.T.C. to take jurisdiction, using the same theory as that successfully prosecuted in the "foreign origin" cases. Only if such a method proves impracticable should the possibility of government copyright patterned after that of Great Britain be seriously considered, for the adoption of such a scheme might well create more problems than it would solve.[56]

HISTORICAL REASONS FOR THE PROHIBITION OF COPYRIGHT IN GOVERNMENT PUBLICATIONS

The Richardson Imbroglio.—As has been mentioned, Section 8 of the Copyright Law of 1947 states, "No copyright shall subsist in any publication of the United States Gov-

[55] DRONE, PROPERTY IN INTELLECTUAL PRODUCTIONS, 161–62 (1st ed. 1879), in discussing who, if anyone, had the right of copyright in judicial decisions, after dismissing both the reporter and the judge, stated:

"The copyright must be secured by the owner of the property. . . . Any person who employs another to prepare a work may, by virtue of the contract of employment, become the owner of the literary property therein. On this principle, the people who employ and pay judges are the rightful owners of the literary property in the opinions written by them. Hence, the United States Government may secure to itself the copyright in the decisions pronounced in the federal courts. . . ."

Drone admitted that frequently the Government may lose its exclusive right of property by permitting the work to be published without copyright, but reiterated, ". . . if the government chooses to retain its property, and takes the steps required in the case of every literary composition for its protection, a valid copyright may be secured."

[56] It should be noted, however, that even assuming that the F.T.C. could act in this area of nonfeasance and could compel affirmative disclosures, a hiatus still exists. For the F.T.C. has jurisdiction only (1) where the activities affect interstate commerce and (2) when the public interest is involved. See F.T.C. v. Bunte Brothers, Inc., 312 U.S. 349 (1941), F.T.C. v. Klesner, 280 U.S. 19 (1929). Were a situation to arise where one or both of the above elements was

ernment." This is merely a restatement of the prohibition which was originally announced as early as 1895, yet the reasons for it date back still further. In the Fifty-third Congress a resolution [57] was passed which provided for the printing of all presidential messages, inaugural addresses, and proclamations. The Joint Committee on Printing was instructed to assemble the papers but found that no appropriation had been made to pay for the considerable work required in assembling the material. Representative Richardson, a member of the Committee, promptly volunteered to assemble the various presidential documents, and his services were eagerly accepted. He spent a considerable amount of time at his self-appointed task.[58] Having completed his collection, but then being confronted with the job of making up indexes for his compilation by a Senate amendment to the resolution, Richardson was beginning to think about possible remuneration for his services. He had declined monetary compensation [59] and therefore sought to obtain a duplicate set of plates from the Government Printing Office. Richardson argued that since duplicates of all plates at the Government Printing Office could be sold to anyone of the public, as provided for in the Act of January 12, 1895,[60] why should he not be given a duplicate set as compensation.[61] When questioned as to

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not present, the F.T.C. would not have jurisdiction. In such instance, perhaps a government copyright might be a possible alternative.

[57] Concurrent Resolution of July 27, 1894, 26 CONG. REC. 7952 (1894).

[58] 30 CONG. REC. 1031 (1897).

[59] *Ibid.*

[60] 28 STAT. 608 (1895), 44 U.S.C. § 58 (1952).

[61] CONG. REC. 1031 (1897); "Richardson: 'If the gentleman will look at the act . . . known as the printing law, he will find . . . that all plates in the Government Printing Office may be sold; that is, duplicates, not the originals. The originals remain there, and the Government can always use them when it wishes to do so; but duplicate plates may be sold at the cost of the metal that enters into them and the composition, and 10 percent added. This is the law.'"

The debate continued:

"Mr. Brown: 'Very good. If these plates, or copies thereof, are owned by any individual member of this House . . . may he not then copyright the work as his private work?'

whether he thought he could obtain copyright in his work when published with such duplicate plates, Richardson replied that he could not, as regards the government, but that he thought he could do so with respect to private individuals.[62]

Richardson's eloquence in the House debate, however erroneous his views on copyright law, won the day, for shortly thereafter a free set of duplicate plates was presented to him.

"Mr. Richardson: 'He can not copyright the messages. I want to say to my friend if he will get Drane [Drone] on copyrights, he will find . . . that a Government publication may be copyrighted . . . where a person puts into it certain original matter of his own.'

"Mr. Brown: 'Then suppose that those plates become your private property. You can copyright the work and have all the rights under the copyright law to the exclusion of the balance of the world?'

"Mr. Richardson: 'No; not as against the Government; and I have never sought it. I might seek it as to other persons.'

"Mr. Evans: 'Now, have you cut yourself off entirely from the right to copyright any edition of this work by dedicating it to the public?'

"Mr. Richardson: 'Possibly that may be so. I do not know. . . .'

"Mr. Walker: 'Even if you put any amount of work of any kind whatever into the preparation and compilation of these messages and the public papers, and reported that work to Congress and it became a public document, of course that part of the work could not be copyrighted; but on anything that you as a private individual may put into the work after receiving these plates you may be entitled to a copyright. You may copyright the plates including new matter, but you can not copyright the work unless new matter is added in addition to what was reported in Congress. Is that a correct statement?'

"Mr. Richardson: 'I am not sure. . . .'

"Mr. Richardson: 'I do not want any copyright as against the Government. . . . The Government has a right to print this book ad libitum, and I have no desire . . . to try to prevent the Government from printing it.'

"Mr. Richardson: 'If I get these plates, I am frank to say that it is my intention to get some printing establishment to print the work and give me a royalty.—If Congress sees fit to print other editions of the work from the plates in the office any number of times, it can do so, and nobody can restrain it and nobody will attempt to restrain it.—I do not say that I should not seek a copyright as against other persons who might undertake to reproduce my work. I shall do it.'"

[62] See S. Rep. No. 1473, 56th Cong., 1st Sess. (1900). A Senate Committee had been appointed to review the Richardson affair; the Committee reported: "The . . . law June 4, 1897 carried in it a provision—"That the Public Printer be, and he is hereby authorized and directed to make and deliver to James D. Richardson . . . without cost to him duplicate electrotype plates from which the compilation of the Messages and Papers of the Presidents is published. . . ."

Richardson's purpose was, of course, to use the plates for private publication, and his own pecuniary benefit.[63] Even before he made any effort to utilize the duplicate plates, however, three editions of the *Presidential Messages* were printed by the Government Printing Office. After the printing of a few volumes of the first edition, Richardson arranged for notice of copyright to appear on all subsequent editions and proceeded to claim appropriate copyright protection in connection with the publication of the work.[64] A Senate investigating committee whose purpose was to review the Richardson affair [65] was satisfied that Richardson did not seek a copyright as against the government, and further, that he did not claim copyright in any one or more of the collected messages, but only in the form of the publication and the illustrations and original matter which he had included in the book. Nonetheless, the committee insisted that the copyright should never have issued.[66]

[63] *Ibid.* [64] *Ibid.* [65] See note 63 *supra.*

[66] *Ibid.* Quoting from the report: "The Committee on Printing will not undertake to discuss the legal question here involved further than to say that the prohibition contained in the Printing Act was intended to cover every publication authorized by Congress in all possible forms, and in view of the debate which occurred at the time, it is clear to the committee that Congress intended to prevent precisely what has happened—the copyrighting of this particular book.

"Your committee thinks that copyright should not have issued in behalf of the Messages, and that the law as it stands is sufficient to deny copyright to any and every work once issued as a Government publication. If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.

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"It must be assumed that Congress felt itself to be in Mr. Richardson's debt and undertook to discharge what it regarded as a public obligation in this way. It made a mistake. If anything more than a gracious public acknowledgment of the value of his work was due to Mr. Richardson, it should have been paid in money duly appropriated for the purpose. The Committee saw no need for new legislation to prevent such a situation occurring in the future: 'Congress has it in its own power to avoid a repetition of the false representa-

It should be noted that Richardson's use of the duplicate plates was enabling him to obtain ample compensation for his services. At the time of the Senate Report, Richardson had sold the plates to a publisher who promised a royalty of seventy-five cents for each book sold and had earned $11,320.50.[67]

While the *Senate Report* of 1900 clearly showed the impropriety in permitting an individual to obtain a copyright on a government publication, nothing was done with respect to the Richardson publications. During 1901 and 1902 many unofficial volumes of the *Presidential Messages* were distributed by private publishers, which led the public to believe that these were official publications.[68] One art company sent out certificates to various persons which purported to entitle them to an option on one copy of the volume of *Presidential Messages*.[69] Desiring to put an end to such transactions, the House of Representatives passed a resolution in 1903 to authorize a committee to investigate and report the facts to the House and to submit some plan to prevent this deception of the public.[70] Such a committee was appointed, and the result was the recommendation of passage of a bill whose purpose was to prevent the misuse of the copyright privilege.[71] It provided for a fine, imprisonment, or both, for anyone who attempted to copyright a government publication or falsely advertised a private publication as emanating from the government. Undoubtedly these punitive provisions would have been highly effective in deterring private individuals from copyrighting government publications. Unfortunately, they had been absent from the Printing Act of 1895, which

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tions of which it has been a victim by not again placing Government plates at the disposition of private persons.'"

See CONG. REC. of 1893 for interesting debate on the 1895 statute.

[67] *Ibid.*

[68] See H.R. RES. 373, 57th Cong., 2d Sess. (1903).

[69] *Ibid.*

[70] *Ibid.*

[71] See H.R. REP. No. 3892, 57th Cong., 2d Sess. (1903).

specifically prohibited copyrighting government publications without the salubrious criminal sanctions incorporated in the later act.

GOVERNMENT PUBLICATION DEFINED

While the Richardson affair was largely responsible for the provision in the Printing Act of 1895 prohibiting any copyright in a government publication, the question as to what is meant by a government publication remains unanswered to the present day.

Thus, while Section 8 of the Copyright Law of 1947 is concerned primarily with government publications, there is no definition of a government publication in the statute. To ascertain the precise scope of Section 8, the specific area covered by the term must be determined. The obvious definition, that which is published by the government, is not overly helpful when dealing with the specific and rather complex fact situations which have arisen and continue to arise.

Proposed Definitions.—Howell has indicated that while there is no case which comprehensively defines a government publication, such term would include all official documents and reports published at government expense, as well as the various registers, bulletins and information circulars issued by the various government agencies.[72] The *Checklist of United States Public Documents,* while not an official source, has given a more comprehensive definition as follows:

> Any publication printed at Government expense or published by authority of Congress or any Government Publishing Office, or of which an edition has been bought by Congress or any Government office for division among members of Congress or distribution to Government officials or the public, shall be considered a public document.[73]

[72] HOWELL, THE COPYRIGHT LAW 45 (3d ed. 1952).

[73] CHECKLIST OF UNITED STATES PUBLIC DOCUMENTS 1789–1909, *vii* (3d ed., 1911). The legislative history as to what was meant by a public document is reviewed herein.

There have been many members of Congress who felt that the definition of a government publication was of sufficient importance to be incorporated into law. Accordingly, a number of printing bills which were introduced in the House from 1913 to 1919 included a definition of the term.[74] Unfortunately, none of these proposed printing bills was ever passed. They are helpful, however, in showing the congressional intent with respect to a definition of a government publication.[75] While being printed by the Government Printing Office was a conveniently simple criterion upon which to base the definition of a government publication, it was not a satisfactory one with the advent of "processed" articles, i.e., "Publications which are reproduced by duplicating processes other than ordinary printing, such as mimeograph, multigraph, planograph, rotaprint, multilith, etc." [76] The Superintendent of Documents has indicated that such processed material, when emanating from the government, will be considered to be a government publication, just as those publications printed by the Government Printing Office.[77]

[74] See H.R. REP. No. 6539, 63d Cong., 1st Sess. § 44 (1913):

"The term 'Government publication' as used in this Act shall be held to mean and include all publications printed at Government expense or published or distributed by authority of Congress. No publication or [matter] printed at Government expense, nor any portion thereof, shall be copyrighted."

For other similar bills see S. 5340, 63d Cong., 2d Sess. § 44 (1914); H.R. 15902, 63d Cong., 2d Sess. § 44 (1914); H.R. 323, 64th Cong., 1st Sess. § 44 (1915); S. 1107, 64th Cong., 1st Sess. § 82 (1915); S. 1107, 64th Cong., 1st Sess. § 82 (1915); H.R. 8664, 64th Cong., 1st Sess. § 82 (1916); S. 7795, 64th Cong., 2d Sess. § 18 (1917); H.R. 8362, 66th Cong., 1st Sess. § 31 (1919).

[75] Of interest is S. REP. No. 438, 63d Cong., 2d Sess. (1914). In reporting on S. 5340, *supra*, the committee states:

". . . the definition here used is similar to that which has been adopted by the superintendent of documents for many years in his work of classifying Government publications.—A new provision . . . requires the imprint of the Government Printing Office on every publication printed by that office. . . . The use of the Government Printing Office imprint by private printers is forbidden under penalty of $1000. The purpose . . . . is to safeguard the franking privilege by making it self-evident, through the use of the . . . . imprint, whether the publication was printed by the Government."

[76] MONTHLY CATALOGUE OF THE UNITED STATES PUBLIC DOCUMENTS, January–December 1936, 3 (1936–37).

[77] *Ibid.* There have been several decisions on the questions of printing and

It should again be emphasized, however, that all government publications are not limited to simple writings by a particular department. Consider, for example, the Federal Deposit Insurance Corporation (F.D.I.C.), the Reconstruction Finance Corporation (R.F.C.), the Commodity Credit Corporation (C.C.C.), and other government corporations.

Case Law Defining Government Publications.—Unfortunately, there have been no cases construing Section 8 of the Copyright Law as to the definition of a government publication. Indeed, there have been very few cases at all which dealt with the question, but the few that exist help shed some light on this area.

As has been stated, the basic philosophy behind the prohibition of copyright in government publication is that such publication is considered part of the public domain and for

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whether a work was a government publication only when printed at the Government Printing Office. In American Lithographic Co. v. United States, 57 Ct. Cl. 340 (1922) the government had accepted the plaintiff's bid for the production of 500,000 lithographic copies of a poster. Shortly after these posters were delivered, the government claimed that they were inaccurate and requested another 500,000 corrected. The plaintiff supplied the second 500,000 but the government refused payment, one of its defenses being that under Section 3786 of the Revised Statutes, 40 STAT. 1270 (1919), all printing and lithographing done for the government had to be done at the Government Printing Office. The court, in holding for the plaintiff, disposed of the government's contention by stating that the Liberty Loan Act, 40 STAT. 35, 37 (1917), provided for the allocation of funds from the Treasury for financing payment of such contracts, and that such financing came within a well defined exception of the Revised Statutes. The American Lithograph case was relied upon in Columbia Planograph Co., Inc. v. United States, 90 Ct. Cl. 457 (1940) where, in a similar fact situation the court held that the government's defense that a contract which it had entered into was illegal under Section 3786 of the Revised Statutes was without merit. There also have been a number of decisions of the Comptroller General construing the Printing Act of 1919. See 3 Comp. Gen. 169 (1924); 3 Comp. Gen. 491 (1924). It has been decided that reprints of published articles of the National Bureau of Standards which show the results of research work may not be classed as "press clippings" and purchased as such, but may be obtained only as printing from the Government Printing Office under the appropriation of the Department of Commerce, 3 Comp. Gen. 645 (1924); that the various processes of producing "prints or cuts" for loan to newspapers for use in illustrating articles to be published in connection with the work of a department, while

the benefit of the public.[78] However, a compilation of governmental material may be copyrighted. Thus, in *Hanson v. Jaccard Jewelry Co.*[79] the court held that such a compilation was the proper subject for copyright on the grounds that such publications require considerable labor and skill in their preparation.[80] On the other hand, a bulletin entitled *Peace Day—Suggestions and Material for its Observance in the Schools,* issued by the United States Bureau of Education, and prepared by the secretary of the American School Peace League at the request of the Bureau of Education, in which there was no reservation of copyright by the compiler, was held to be a public document.[81] The compiler's attempt to produce a "word redress of the substance" could not take it from the public under the guise of a copyright claim.[82]

The question of copyright in judicial decisions has arisen in several instances. It has been held that the opinions of both the federal and state courts cannot be copyrighted [83] although

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relating to the art of printing, do not constitute printing within the meaning of the act which requires that all printing be done at the Government Printing Office, and that such prints or cuts may be procured elsewhere by contract entered into in accordance with law, 6 Comp. Gen. 665 (1927); that the production of duplications by photolithographic or similar processes of hand drawings showing construction details of a dam with no binding, sewing or trimming operation for use in the current operations of the Corps of Engineers involves duplicating rather than printing and binding and that the copies so produced do not come within the definition of printing of the Printing Act of 1919, 19 Comp. Gen. 374 (1940); and that the revision of galley proofs incident to the printing of manuscripts is an inherent part of the process of printing and constitutes printing within contemplation of the Printing Act of 1919, so that, there being no exemption granted by the Joint Committee on Printing, funds appropriated for printing and binding may not be used for the payment of alteration charges by commercial firms in connection with the revision of galley proofs, 19 Comp. Gen. 374 (1940).

[78] BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 69 (1st ed. 1944).

[79] 32 Fed. 202 (C.C.E.D. Mo. 1887).

[80] See also DRONE, PROPERTY IN INTELLECTUAL PRODUCTIONS 152–54 (1st ed. 1879).

[81] DuPuy v. Post Telegram Co., 210 Fed. 883 (3d Cir. 1914).

[82] *Ibid.*

[83] Wheaton v. Peters, 34 U.S. (8 Pet.) 591 (1834); Banks v. Manchester, 128 U.S. 244 (1888).

the editorial work of the reporter may be the subject of copyright.[84] Similarly, statutes (either state or federal) cannot be copyrighted.[85]

Ball has emphasized the difference between a public and a private document, pointing out that General Pershing's official report to the Secretary of War giving an account of the American Army in France was held to be an official document of the United States government.[86] As such, anyone was free to print or publish it. Yet a book containing the official report and further illustrated with drawings or pictures from the public domain could be copyrighted, provided that it was a new work in the sense that the selection of pictures represented original labor sufficient to entitle the compiler to such protection.[87] Of course, any other person could do the same thing provided that his compilation contained a different set of drawings.[88] The basic criterion in this type of situation

[84] Callaghan v. Myers, 128 U.S. 617 (1888).

[85] Howell v. Miller, 91 Fed. 129 (6th Cir. 1898). See also DRONE, *op. cit. supra* at 161.

The reasons are, as set forth by Drone:

"It is obvious that the copyright in an opinion written or delivered by a judge cannot be acquired by a reporter or the first publisher on the ground of authorship, for the reason that he is not the author. It is not less clear that the judge who pronounces the decision is not entitled to the copyright therein, because he is not the owner of the property. Hence, neither the judge nor the reporter will be entitled to copyright, except by derivative title."

WEIL, AMERICAN COPYRIGHT LAW 246 (1917), in arguing that no state official may obtain copyright in a state publication (judicial decision) states:

". . . it may be questioned . . . whether any copyright may be obtained by the State, or State officer in any State . . . publication . . . since a republic can only rest upon a firm basis if its citizens are afforded as untrammelled a means as possible of knowing its affairs and doings and communicating that knowledge to others, and since works composed by public officers in their official capacity, belong to the people whom they represent and who pay them for their services in making such compositions."

[86] BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY 70 (1st ed. 1944).

[87] *Ibid.*

[88] See Eggers v. Sun Sales Corp., 263 Fed. 373 (2d Cir. 1920). Similarly, a list of names, addresses, etc., copied from applications for registration of motor vehicles, filed in the office of the state commissioner of motor vehicles, was held to be a valid subject of copyright. New Jersey Motor List Co. v. Barton Business Service, 57 F. 2d 353 (D.N.J. 1931).

is originality; while a mere copy of a work in the public domain (as a government publication) would not support a copyright, a distinguishable variation of the work might be a valid subject of copyright.[89]

A consideration of these few cases concerned with the question of determining what is a government publication shows that they are primarily concerned with the specific area of written works and are generally limited to a consideration of compilations and the like. The broader and more recent problems with respect to government corporations, band concerts, charts, and the like, raised previously have not been considered.

GOVERNMENT EMPLOYEES AND COPYRIGHT PROTECTION

Not only are there considerable difficulties in determining precisely what is meant by a publication by the government, but also problems arise in determining whether or not a person is entitled to copyright protection if he prepares a work while in the employ of the government. One of the earliest cases concerned with the rights of a government employee was that of *Heine v. Appleton.*[90] The plaintiff, an artist, was employed by the government as a master's mate and accompanied an expedition to Japan. He signed shipping articles and received pay in the capacity of master's mate, with the distinct understanding that all sketches and drawings he might make were to be the exclusive property of the government. When the plaintiff returned, such sketches and drawings as he had made were, with his consent, incorporated in a report of the expedition made to the Navy Department. Congress ordered a large number of copies of the report. Subsequently, the plaintiff tried to obtain a copyright in certain of the prints and engravings which had been incorporated in the

[89] See Gerlach-Barklow Co. v. Morris & Bendien, Inc., 23 F.2d 159 (2d Cir. 1927).

[90] 11 Fed. Cas. 1031, No. 6,324 (S.D.N.Y. 1857).

report. The court held that the plaintiff was not entitled to copyright, pointing out that the sketches were made for the government and to be at its disposal. Subsequent publication for the benefit of the public amounted to a dedication by the government to the public. In an opinion by the Attorney General [91] in a similar fact situation where an artist who was employed by the government to engrave a chart prepared by an officer of the Army attempted to obtain a copyright on the engraved plates a like result was reached.[92]

Perhaps the definitive statement characterizing the rights of the government employee was given by the Comptroller General in an opinion in 1927,[93] which held that the purchase of reprints of magazine articles prepared by government employees in their official capacity was a procurement of printing of official matter in contravention of the Printing Act of 1919. The distinction was drawn between writings that were not official: that is, were not prepared at the direction of the official superiors of the author or as part of his official duties so that the government would have no control over or proprietary interest in the matter; and writings that were official: that is, were prepared as part of the official duties of the employee. In the latter instance, the printing of such material by a private publisher did not take away its official character.[94] This opinion has been relied upon in subsequent opinions of the Comptroller General.[95]

[91] 7 Ops. Att'y Gen. 656 (1856).

[92] The Attorney General stated:

"The Government may . . . by injunction, prevent Siebert (the artist) from appropriating to himself their chart; to which he has no more rightful claim of copyright than any of his journeymen. The printer, who is hired to print any of the works of Irving, Prescott, or Bancroft, might, with as much sense and reason, claim a copyright in them against the author, as Siebert can set up such a claim here against the United States. . . . that [the chart] . . . was prepared at the public expense for the free use of the people of the United States." *Id.* at 656–57.

[93] 7 Comp. Gen. 221 (1927).

[94] In more detail, the opinion states:

"Government employees are not generally prohibited from writing and publishing articles as private individuals, and there is a recognized practice of

One of the leading cases is *Sherrill v. Grieves.*[96] In this case an army officer prepared a pamphlet on military topography at the request of the Army Service School in which he was an instructor. The pamphlet was prepared during the officer's leisure time, and was first printed at government expense by the military authorities at the school, the consent of the author having been obtained. It was argued that the publication by the government resulted in an abandonment of any right of copyright to the public. The court did not look with favor upon such a proposition, stating:

> This contention is in substance that by entering the employment of the Government a person sells all his energies physical and mental to the Government if they relate to any subject matter dealt with by him in performing his duties. If that be so, then neither the plaintiff nor the defendant Grieves had the right to copyright their books; nor had . . . any of the officers who have written on military matters such right. The fact is that officers do write such books which are copyrighted . . . with the approval of the military establishment. . . .[97]

The *Sherrill* case would appear to be a helpful guide for the Copyright Office in certain situations where the registration of a particular work for copyright might be disputed. Thus,

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Government scientists and experts writing for publication on subjects pertaining to the particular work on which they are employed. The writing may be, in form, anything from short newspaper or magazine articles to complete textbooks or works of reference, and while the writings may be given more credence by reason of the official positions of their authors they are not official publication. . . . Procuring copies of official matter is essentially a printing proposition and the purchase of reprints of such matter from a private publisher is in violation of the statute, irrespective of the fact that they may be procured at less cost due to the circumstance that such publisher has for his own purposes prepared plates from which to do the printing." *Id.* at 223–24.

[95] See, *e.g.*, 22 Comp. Gen. 715 (1943) advising that copies of a pamphlet could be procured for official use by the Administrative Office of the United States Courts and the cost charged to an appropriation available for the purchase of law books rather than a printing and binding appropriation provided the pamphlet was prepared in the private capacity of the government employee with the permission of the agency under which he was serving at the time of the publication.

[96] 57 WASH. LAW REP. 286 (1929). [97] *Id.* at 290.

when a reserve officer who is a chemist writes a training manual on chemical warfare, on his own time, at the request of the Army, and the manual is published by the Government Printing Office with notice of copyright, in light of the *Sherrill* case it would seem that such work is the proper subject for registration at the Copyright Office, despite the fact that its initial publication is by the Government Printing Office.

The most recent case concerning the rights of a government employee and copyright of a government publication appears to be that of *Sawyer v. Crowell Publishing Co.*[98] Here the court held that the mere fact that copyright and credit notices appeared on copies of maps printed by the United States Geological Survey, the printing having been done by permission of the copyright holder at the request of a commission created by Congress, did not establish the copyright holder's property rights in the maps. The court decided that whatever property rights there were belonged to the government in whose service the copyright holder was employed at the time, and based this decision on prior cases holding that when an employee creates something in connection with his duties under his employment, the product is the property of the employer.[99]

These cases are encouraging in that the criterion by which the rights of government employees shall be determined is rather clearly set forth.

CONCLUSIONS

From the preceding discussion, it seems clear that the present copyright law is in need of revision in order to cope with the many complex problem areas that exist. Perhaps the most basic need for remedial legislation is in that area dealing with the right of the copyright proprietor to sue for infringe-

[98] 46 F. Supp. 471 (S.D.N.Y. 1942).

[99] See Brown v. Mollé Co., 20 F. Supp. 135 (S.D.N.Y. 1937); United States Ozone Co. v. United States Ozone Co. of America, 62 F.2d 881, 887 (7th Cir. 1932).

ment. The archaic prohibition of suits against the government in cases of copyright infringement seems most unreasonable, particularly when patent holders are permitted to bring such a suit for patent infringement. The doctrine of sovereign immunity [100] upon which this prohibition rests has undoubtedly served a useful function in the past.[101] But the reasons for the use of the doctrine are not persuasive when viewed in the context of our present-day society. Thus, Pugh,[102] in a recent article, states:

> Today the government is nothing so much as a giant public service corporation, and there is no valid reason why citizens dealing with this colossus should do so at their peril, with no right to seek justice from their courts.
>
> . . . corrective legislation is needed—legislation which would combine and integrate our present law, and eliminate the quirks and injustices that must characterize a hodge-podge, sporadic legislative process. Pending such legislation, the courts should by interpretation give the widest possible effect to statutes waiving sovereign immunity in various fields.

[100] See Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907). Holmes enunciated the doctrine thus: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."

See also The Western Maid, 257 U.S. 419, 423 (1922). Holmes stated:

"The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so."

Holmes has been often criticized for these statements, perhaps justifiably. The internal contradiction is inherent for once the United States consents, it is no longer immune from suit. A right is created, and this right is enforceable as against the authority that creates the law on which the right depends. See Pugh, *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 492 (1953).

[101] See United States v. Shaw, 309 U.S. 495, 501 (1940). The Court, in discussing the historical background for the doctrine, stated:

"The reasons for this immunity are imbedded in our legal philosophy. They partake somewhat of dignity and decorum, somewhat of practical administration, somewhat of the political desirability of an impregnable legal citadel where government as distinct from its functionaries may operate undisturbed by the demands of litigants."

[102] *Historical Approach to the Doctrine of Sovereign Immunity*, 13 La. L. Rev. 476, 494 (1953).

Certainly the importance of correcting the abuses which may result from this inequity in the copyright and patent fields is of considerable importance. Yet other problem areas should not be overlooked. Thus, what recourse is available to the government when a government publication is pirated and sold by a private publisher? Does the F.T.C. have inherent jurisdiction to compel affirmative disclosure? Or, is a government copyright desirable? Finally, the problem of adequately defining a government publication is, unfortunately, still very much with us. The unofficial definition advanced by the Superintendent of Documents is not overly helpful when concerned with questions involving government corporations, such as the F.O.A., the F.D.I.C., and the like. Moreover, maps, sculptures, musical compositions, and so forth, are obviously not covered by such definition.

It is fortunate, indeed, that the present copyright law is under study with plans for considerable revision. It is to be hoped that the committee undertaking this study will appreciate the importance of the problems relating to government publications. Now is the time for informed action to clarify this confused area of copyright law.

NATIONAL AWARD ESSAY, 1955

Protection of Comic Strips

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THE "COMICS," whether appearing in a daily newspaper or in comic books, are widely divergent in origin. Some, such as "Li'l Abner," "Mutt and Jeff," and "Pogo," commenced as cartoons. Others, such as "Gene Autry," had their start in motion pictures; "The Lone Ranger" made his first appearance on the radio, "Raggedy Ann" apparently made hers as a doll, and "Howdy Doody" began on television. Whatever their origin, almost all of these characters have since appeared in other entertainment media and have been used to endorse various articles of merchandise.[1] When such a character achieves a degree of popularity, it may thus be of great economic value to its creator if a monopoly can be retained over it. But because this value lies in the character itself and the right to reuse it rather than in the individual comic strip or groups of strips in which the character appears, the legal theory or theories upon which protection may be based are unclear.[2]

Probably appropriation of the name of the character by another can be prevented and such protection would be of

[1] Information about the practices of the comic strip industry has been obtained through interviews and correspondence with attorneys representing the artists or syndicates through which the strips are distributed; these will hereinafter be cited as Interviews.

For a more complete description of the uses to which one character, The Lone Ranger, has been put see Lone Ranger, Inc. v. Currey, 79 F. Supp. 190, 192–93 (M.D. Pa. 1948).

[2] See generally Note, 68 HARV. L. REV. 349 (1954).

primary importance in some cases.[3] The common law doctrine of unfair competition will prevent one person from passing off his goods as those of another by using a trade name or symbol which the public identifies with the other person's goods.[4] To obtain relief the plaintiff must show that the public associates the name with his product and that the defendant's use of the name to identify his product will probably deceive the public as to the source of the defendant's goods. This common law protection has been supplemented by federal trade-mark legislation [5] which provides for the registration of identifying marks and enables the registrant to enjoin the use of his mark by another in such a way as to cause confusion of source.

Protection of the character—or product—itself is, however, a more difficult problem. Here the protection desired is not against one person passing off his goods as those of another by using the other's trade name, but protection against one person appropriating another's work and then selling it as his own. The doctrine of unfair competition has been held to provide a remedy in such a case to a limited degree,[6] but it would seem that the more appropriate remedy is the Federal Copyright Act,[7] and it is on this act that the industry places its greatest reliance.[8] However, it is not clear whether copyright will protect the character apart from the stories in which it appears; and, even if it does do so, compliance with the act's requirements, especially in the case of comic strips,

[3] A character such as Gene Autry, for example, is distinctive in little but name. The name alone, however, is of great economic value.

[4] See Chafee, *Unfair Competition*, 53 HARV. L. REV. 1289, 1291–98 (1940); *Developments in the Law—Trade-Marks and Unfair Competition*, 68 HARV. L. REV. 814, 823–24 (1955). The common law doctrine of trade names should be distinguished from common law trade-mark protection which will prevent appropriation of another person's coined or arbitrary mark although secondary meaning is lacking. See *Developments in the Law*, *supra* at 823.

[5] The Lanham Act, 60 STAT. 427 (1946), 15 U.S.C. §§ 1051–1127 (1952).

[6] The leading case is International News Service v. Associated Press, 248 U.S. 215 (1918). The doctrine of the case has been restricted, however. See p. 83 *infra*.

[7] 17 U.S.C. (1952).

[8] Interviews.

is extremely difficult. Whatever the theoretical difficulties, however, probably outright appropriation of a cartoon character would be prevented. Certainly both the industry and the public expect such a result.

The last area of difficulty is contractual. To a large extent, the creator of a comic strip character cannot exploit the character by himself. He is rarely in such a position that he can produce a movie or television program or manufacture a toy. Indeed, the distribution of comic strips to newspapers is ordinarily handled through large service agencies. Probably because the basis of protection is so unclear, what the creator retains when there is an assignment or licensing arrangement, or when someone else is permitted to take out the copyright on certain works, has been the subject of much of the litigation in the area.

PROTECTION OF THE NAME

What Is Protected.—Probably the majority of comic strip titles have been registered as trade-marks under the Lanham Act.[9] "The Lone Ranger," for example, has been registered for periodicals, cartoon strips, and a radio program.[10] In some cases the mark consists merely of the title of the strip, in others the title is used in conjunction with colors or a design.[11] Section 2 of the Lanham Act provides for registration of a mark on the Principal Register with certain exceptions as to the type of mark that can be registered.[12] A Supplemental Register is set up by Section 23 for marks not registerable on the Principal Register but which are "capable of distinguishing the applicant's goods or services . . ." and

[9] Interviews. Notice of trade-mark appears on fourteen of twenty comic strips appearing daily in the Boston *Herald* and the Boston *Globe*.

[10] See The Lone Ranger, Inc. v. M. A. Henry, 100 U.S.P.Q. 33, 33–34 (Comm'r 1953).

[11] Examples of the latter type of mark can be found in King Comics, published monthly by David McKay Co.

[12] 60 STAT. 428 (1946), 15 U.S.C. § 1052 (1952). See *Developments in the Law, supra* note 4 at 820–27.

which have been in lawful use for one year preceding application.[13] There are a number of advantages to registration on the Principal Register, the primary one being that after five years the mark can be attacked only on certain specific grounds and the registrant has the incontestable right to use the mark on the goods for which it has been registered.[14] In the case of most comic strip names the protection of the Principal Register is probably available, or at least will become available if the cartoon becomes famous. The single major problem is that often the titles involve only or primarily a proper name. Section 2(e) (3) of the act provides that a mark shall not be registerable on the Principal Register if it is "primarily merely a surname." [15] The registration of a name such as "Gene Autry" might thus be prohibited as an original matter. However, the prohibition appears to have been applied only to names of actual persons. Names with independent connotations, such as "Samson" and "Atlas," have been registered [16] as has "Red Ryder." [17] Furthermore, there seems to be no objection to registration of given names in conjunction with other words. Thus "Li'l Abner," "Mutt and Jeff," and "Little Orphan Annie" are all registered marks.[18]

In any event, if the strip becomes popular there would seem to be no question of the registerability of its name. Section 2(f) provides that "nothing in this chapter shall prevent the registration of a mark used by the applicant which has

[13] 60 STAT. 435 (1946), 15 U.S.C. § 1091 (1952).

[14] For more detailed treatment of these and other advantages of registration see *Developments in the Law, supra* note 4 at 827–31.

[15] 60 STAT. 428 (1946), 15 U.S.C. § 1052(e) (3).

[16] See Keuffel & Esser Co., 96 U.S.P.Q. 216 (Comm'r 1953). In Carafiol-Silverman Co. v. Juliette Originals, 99 U.S.P.Q. 142 (Comm'r 1953) registration was denied "Paula Dean Originals" and on this basis it would probably be denied "Gene Autry." *But cf.* Andre Dailloux, 83 U.S.P.Q. 262 (Comm'r 1949).

[17] See NEA Service, Inc., v. Anglo-American Publishing Co., 76 U.S.P.Q. 230 (Comm'r 1948) in which the Commissioner refused to register "Red Rover" because it was too similar to the previously registered mark "Red Ryder."

[18] In the case of most of these marks registration may or could be based on the fact that the mark has acquired secondary meaning. See p. 75 *infra*.

become distinctive of the applicant's goods in commerce." [19] While some classes of marks are excepted from this section,[20] surnames or marks that are descriptive of the goods sold or geographically descriptive are not. The provision thus seems to incorporate the common law doctrine of unfair competition, permitting registration and its advantages to any mark which has acquired secondary meaning and would consequently be protected as a trade name.[21] An affidavit of five years' use makes out a prima facie case that the required degree of distinctiveness has been achieved.[22] The names of at least the large majority of comic strips are well known to their reading public and would thus appear clearly to come within this provision.

Certain comic strip characters may become so famous that use of their name on a comic strip may be subject to the additional objection that it is descriptive of the content of the product to which it is affixed.[23] Thus "The Lone Ranger" would bring to mind a western story with certain specific leading characters. But, aside from the fact that such a name would probably be registered before it achieved such fame, the name became descriptive because the character and stories about him became so popular, not because the words themselves were descriptive at the start. The prohibition on registration of a descriptive mark would seem to be applicable only when the words used were originally descriptive of the product sold. Protection of a name that has become so well known that upon seeing it the contents of the product to which it is affixed are in part described to the purchaser

[19] 60 STAT. 429 (1946), 15 U.S.C. § 1052(f) (1952).

[20] Excepted are marks which are immoral or deceptive, marks which comprise the insignia of any government, and marks which comprise the name, portrait, or signature of a living person without his consent or of a deceased president without the consent of his widow. Also excepted are marks which are so similar to previously registered marks as to be likely to cause confusion of source.

[21] See *Developments in the Law, supra* note 4 at 826–27.

[22] 60 STAT. 429 (1946), 15 U.S.C. § 1052(f) (1952).

[23] Section 2(e)(1), 60 STAT. 429 (1946), 15 U.S.C. § 1052(e)(1) (1952).

is the function of trade-mark protection. It is only when the name becomes descriptive of the whole class of products involved that monopoly over its use is again prevented.[24] Indeed, no objection to registration on this ground has been raised to names which had independent connotations long before their application to the particular product involved.[25]

The protection afforded by the Lanham Act as well as the common law of trade names is quite extensive, but the function of a trade-mark is to provide identification for goods or services rather than protect the goods or services themselves from appropriation.[26] It is only a word, symbol, or device that serves such a function that is registerable.[27] Thus while the name of a particular comic strip is probably registerable as a mark identifying the comic strip, the character or characters involved in the strip are not registerable as such since they do not serve to identify the strip but are rather part of the product itself.[28] A portrayal of the character could, of course, be registered if the function served by the portrayal was identification.[29]

Infringement.—Under the Lanham Act and at common law, the test of whether a trade-mark or trade name is infringed is usually phrased in terms of confusion of source.[30]

[24] See *Developments in the Law, supra* note 4 at 832–34. See also DuPont Cellophane Co. v. Waxed Products Co., 85 F.2d 75 (2d Cir.), *cert. denied*, 299 U.S. 601 (1936), 304 U.S. 575 (1938).

[25] See Keuffel & Esser Co., 96 U.S.P.Q. 216 (Comm'r 1953); *Developments in the Law, supra* note 4 at 826.

[26] Section 45 of the act defines a trade-mark as any mark used "by a manufacturer or merchant to identify his goods. . . ." 60 STAT. 443 (1946), 15 U.S.C. § 1127 (1952). See *Developments in the Law, supra* note 4 at 822–23.

[27] See note 26 *supra*.

[28] *Ex parte* Carter Publications, Inc., 92 U.S.P.Q. 251, 93 U.S.P.Q. 105 (Comm'r 1952) (3 cases). These cases involved an attempt to register the characters appearing on the "Howdy Doody" television program. See Note, 68 HARV. L. REV. 349, 350 (1954).

[29] See Jantzen Knitting Mills v. Spokane Knitting Mills, Inc., 44 F.2d 656 (E.D. Wash. 1930) (a diving girl as a mark for bathing suits). See also the marks appearing in King Comics, published monthly by David McKay Co.

[30] See Note, 66 HARV. L. REV. 1094, 1094–98 (1953); Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 813–27 (1928).

Section 32 of the act prohibits the use of a registered mark by another when the use "is likely to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services. . . ." [31] At first view it would thus seem clear that if the name of a popular cartoon strip is used on another cartoon strip, its use to identify the other strip would be enjoined.[32] But it would appear questionable whether the public was deceived in any meaningful sense by such a use. In *National Comics Publications, Inc. v. Fawcett Publications, Inc.*,[33] Learned Hand reasoned that since the public was interested in such "silly" characters only for their entertainment value and did not care where they originated, there could be no meaningful claim of unfair competition. While the context of that statement was different from that involved here, the claim being that the defendant had appropriated the plaintiff's work rather than the name by which the work was identified, the argument would appear equally applicable to cases arising under the Lanham Act or at common law where appropriation of the name only is alleged. Indeed, the public is probably rarely interested in the source of any product. It is interested in the product itself. As long as the product obtained is equal in quality to that which the buyer expects to obtain, it would appear difficult to say that the buyer was deceived or at least that the deception did any harm. It is arguable that the danger the public will buy an inferior product because it bears a name or mark which has come to be associated with a superior product is such that the

[31] 60 STAT. 437 (1946), 15 U.S.C. § 1114 (1952).

[32] See, *e.g.*, Warner Bros. Pictures, Inc. v. Majestic Pictures Corp., 70 F.2d 310 (2d Cir. 1934); Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939); Hopkins Amusement Co. v. Frohman, 202 Ill. 541, 67 N.E. 391 (1903); *cf.* Crime Confessions Inc. v. Fawcett Publications, Inc., 139 F.2d 499 (C.C.P.A. 1943); NEA Service, Inc. v. Anglo-American Publishing Co., 76 U.S.P.Q. 230 (Comm'r 1948). See Oberst, *Use of the Doctrine of Unfair Competition to Supplement Copyright in the Protection of Literary and Musical Property*, 29 KY. L.J. 271, 274–78 (1941).

[33] 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952).

test of possible confusion of source will be applied without regard to the product's actual quality. Determination of the relative quality of the two products would be too time consuming and too difficult. A few comic strips are of a higher quality, and if it were permissible to produce inferior ones under the same title, their public might well be deceived and disappointed. With many comic strips the chances of this are, however, unlikely. But it would seem clear that outright appropriation and use of the name of another's comic strip to sell one's own when that name is a registered mark or has acquired great popularity would be enjoined, at least by most courts, whatever the theoretical difficulties.[34]

Under the Lanham Act the problem is not too difficult of solution. The act is phrased only in terms of possible deception. It does not require that the public be harmed by this deception before use of a name will be enjoined. If the reader of a comic strip becomes familiar with it and then reads one to which is affixed the name which he associates with the strip he usually reads, he will assume that the same person is the author of both. If the author of the second is a different person, the reader will to that extent be deceived as to the source of the comic strip, even though his enjoyment has in no way been lessened because the second strip is as good or superior to the one he has been accustomed to read. If he was entertained, he would not, to be sure, care where the strip originated, but if asked he would assume they all originated with the same person. Why he would so assume is a different question. It may be because he believes the law would prevent another from using the name or because he believes it would be wrong for another to use the name, which, it seems, brings the argument full circle.

[34] See Gruelle v. Molly-'Es Doll Outfitters, Inc., 94 F.2d 172 (3d Cir. 1937), *cert. denied,* 304 U.S. 561 (1938); Photoplay Publishing Co. v. LaVerne Publishing Co., 269 Fed. 730 (3d Cir. 1921); National Picture Theatres, Inc. v. Foundation Films Corp., 266 Fed. 208 (2d Cir. 1920) and authorities cited at note 32 *supra.*

It would appear that what is really being protected by both the common and statutory law of trade-marks and trade names is the interest of the seller of the product, not that of the public. A mark which has been in use any length of time, especially in the entertainment field, probably has acquired a considerable amount of goodwill which is a valuable asset to the owner of the mark. This is clearly true of a name that has acquired secondary meaning. In such a case, another person will not be permitted to profit from the goodwill thus created, thereby perhaps injuring the goodwill if his product is inferior, and in any case depriving the name's owner of some of the customers he has developed.[35] But under the Lanham Act a mark could conceivably be registered after only a single sale in commerce of the goods to which the mark was affixed.[36] If a similar mark is then used on the same kind of goods, there would appear to be an infringement. Yet goodwill would not seem to have been developed to any significant degree. Such a situation would appear unlikely but it may indicate that the originator of a mark is to be protected with respect to the expectancy of creating goodwill in the mark as well as in the goodwill he has created.

Another problem also arises from the confusion of source requirement of the Lanham Act and the common law of trade names. This problem is perhaps illustrated by *Atlas Manufacturing Co. v. Street & Smith.*[37] "Nick Carter" had been registered as a trade-mark under the act of 1905 [38] and used

[35] See *Developments in the Law, supra* note 4 at 843–44. When the mark is used on competing goods the injury is clear, but even when used on noncompeting goods, especially in this area, there may be confusion of sponsorship and the use may be enjoined on this basis. *Cf.* Triangle Publications, Inc. v. Rohrlich, 167 F.2d 969 (2d Cir. 1948); Hanson v. Triangle Publications, Inc., 163 F.2d 74 (8th Cir. 1947), *cert. denied*, 332 U.S. 855 (1948). See Note, 66 HARV. L. REV. 1094 (1953).

[36] See *Developments in the Law, supra* note 4 at 819; Worden v. Cannaliato, 285 Fed. 988 (D.C. Cir. 1923).

[37] 204 Fed. 398 (8th Cir.), *appeal dismissed*, 231 U.S. 348, *cert. denied*, 231 U.S. 755 (1913).

[38] 33 STAT. 724.

on a number of stories. The name was then used by the defendant in the title of a motion picture. The court refused an injunction on the ground that stories and motion pictures were not goods with "substantially the same descriptive qualities" as was required for infringement under that act,[39] and there was hence no chance that the products themselves would be confused. Probably the confusion of source test negatives this problem today.[40] Almost every character which has become famous in one entertainment medium appears in some, if not all, of the others, and most of them endorse various kinds of products. The public has probably come to expect this, but again it would not appear that use of the name would be enjoined because the public is being deceived. Indeed, even an element of harmless deception may not exist here. The public would probably know that a cowboy suit bearing the name "The Lone Ranger" was not manufactured by the author of the radio program. There might be some attenuated belief that the sponsorship was the same,[41] but again the real basis for protection, if it is afforded, would be the large amount of goodwill the name "The Lone Ranger" has developed. An inferior cowboy suit would injure that goodwill. Moreover, from the viewpoint of the creator of the character, the protec-

[39] 33 STAT. 728 (1905). See Note, 66 HARV. L. REV. 1094, 1095 (1953). The provision was usually not so strictly applied, and Patten v. Superior Talking Pictures, Inc., 8 F. Supp. 196 (S.D.N.Y. 1934) comes to the opposite result on what appears to be identical facts.

[40] See Note, 68 HARV. L. REV. 349, 351 (1954).

[41] *Cf.* The Lone Ranger, Inc. v. M. A. Henry, 100 U.S.P.Q. 33 (Comm'r 1953). The confusion of sponsorship theory may be of primary importance in this field since so much of the value of a comic strip character lies in sponsorship. Use of the character's name in branches of the entertainment field not yet entered by the creator has consequently usually been enjoined. See National Pictures Theatres v. Foundation Films Corp., 266 Fed. 208 (2d Cir. 1920); Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939); Patten v. Superior Talking Pictures, Inc., 8 F. Supp. 196 (S.D.N.Y. 1934); Paramore v. Mack Sennet, Inc., 9 F.2d 66 (S.D. Cal. 1925); *cf.* Lone Ranger, Inc. v. Cox, 124 F.2d 650 (4th Cir. 1942); Lone Ranger, Inc. v. Currey, 79 F. Supp. 190 (M.D. Pa. 1948). In Prouty v. National Broadcasting Co., *supra*, the court explicitly stated that competition was unnecessary since use of the name by defendant was a fraud on the public.

tion of the name only in the limited medium in which the character first appeared would be totally insufficient. A large part of the value of the character is in its adaptability to new fields. No one appears really to doubt that use of the name in other media would be enjoined, but the basis for the injunction is the owner's right to exclusive use and development of the name, combined with lack of sympathy for one who attempts to profit from the goodwill created by another. The basis is not fear of public deception.

The doctrine of unfair competition has aspects other than that closely related to statutory trade-mark protection. In general, equity will prevent one person from "passing off" his goods as those of another. Thus if the shape or design of a product or its container is distinctive and has acquired secondary meaning, its use by another will be enjoined if the shape or design is not functional.[42] However, if the shape or design is the reason for the purchase of the product, it is regarded as functional. Thus in *Pagliero v. Wallace China Co.*[43] the court refused to enjoin the defendant from using the plaintiff's unpatented and uncopyrighted design on his china since the design was the reason for the purchase of the plaintiff's china. Probably the same result would obtain in the case of comic strip characters, since it is their appearance and distinctive qualities that cause their sale.

Imitation of these distinctive qualities could in some cases, however, come very close to passing off. Thus, for example, if a character is represented as dressed in western clothes, riding a white horse, and with the top part of his face covered by a black mask, it would not be necessary to affix "The Lone Ranger" to identify him to the majority of people. If such a character were stamped on a cowboy suit, the case of passing off would seem to be clear. If he appears in a comic strip, it would not ordinarily be thought of as passing off but as ap-

[42] See *Developments in the Law*, *supra* note 4 at 856.
[43] 198 F.2d 339 (9th Cir. 1952).

propriation of someone else's work. The difference between the two cases is perhaps that in the first the figure is serving to identify the product, while in the second, although his appearance may in part serve the purpose of identification, the character primarily is part of the product and as such the appropriate form of protection would seem to be copyright.[44] Two cases would seem to be illustrative of this problem.[45] In both, a living person dressed and acted so as to imitate the Lone Ranger as well as using the name on his apparel and in advertising. In both not only use of the name but also the imitation of appearance was enjoined. The basis of the decisions is unclear. The complaints alleged trade-mark infringement and unfair competition, but it would seem fairly certain that imitation of appearance was enjoined on the latter ground.[46] It is certain that in at least one of the cases the impersonator was substantially injuring the goodwill built up around the character.[47] It is in this area that protection against passing off afforded by trade-mark and unfair competition verges close to the type of protection afforded by the law of copyright. All that distinguishes a character such as the Lone Ranger from other western characters, or from other cartoon characters, are certain distinctive attributes of appearance, such as the mask, white horse, and silver bullets. Use of such symbols serves as identification of the character, and hence when they are used in an impersonation, the product is in a sense being passed off as a product of the creator of the original Lone Ranger. However, such an impersonation would ordinarily be conceived as an appropriation of the

[44] See Note, 68 HARV. L. REV. 349, 355–56 (1954); Gruelle v. Molly-'Es Doll Outfitters, Inc., 94 F.2d 172 (3d Cir. 1937), *cert. denied*, 304 U.S. 561 (1938).

[45] Lone Ranger, Inc. v. Cox. 124 F.2d 650 (4th Cir. 1942); Lone Ranger, Inc. v. Currey, 79 F. Supp. 190 (M.D. Pa. 1948).

[46] See Note, 68 HARV. L. REV. 349, 351 (1954). *But see* 27 CORNELL L.Q. 144 (1941).

[47] In Lone Ranger, Inc. v. Currey, *supra* note 45, the impersonator had been seen beating his horse, which undoubtedly did not make too good an impression.

character itself, and probably the doctrine of passing off must be limited to the name by which the character or strip is ordinarily identified.[48] While the use of other identifying characteristics along with the name may be additional elements in passing off another's product as one's own, use of such characteristics in conjunction with a completely different name would not in any way cause the public to think that the impersonating character came from the same source as the original, nor would the impersonator be profiting from the goodwill created around the character he is imitating.[49]

PROTECTION OF CHARACTER

"Reverse Passing Off."—Protection of the character itself may be obtainable in three different ways—through the doctrine developed in *International News Service v. Associated Press* [50] and/or through statutory and common law copyright. In the *International News Service* case the Supreme Court enjoined on grounds of unfair competition the appropriation by the defendant of the plaintiff's news bulletins which the defendant then distributed under its own name. This doctrine might be called "reverse passing off"; it was based on the belief that one person should not be able to profit without labor or expense of his own from the work of another, thereby reducing the other person's market and potential gain. But although this idea may serve to explain much of the real present basis for the doctrine of passing off, the generalization has not been accepted for the most part,[51] the case usually being

[48] See Note, 68 HARV. L. REV. 249, 355–56: Chafee, *supra* note 4 at 1317–20. *But see* Callmann, *Copyright and Unfair Competition*, 2 LA. L. REV. 648 (1940).

[49] Thus in Gruelle v. Molly-'Es Doll Outfitters, Inc., 94 F.2d 172 (3d Cir. 1937), *cert. denied*, 304 U.S. 561 (1938) the court enjoined use of the name "Raggedy Andy" on the defendant's doll at the prayer of the owner of the doll "Raggedy Ann" but it refused to enjoin production of the doll itself stating that was a matter for copyright or patent law.

[50] 248 U.S. 215 (1918).

[51] See, *e.g.*, National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 603 (2d Cir. 1951); RCA Manufacturing Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940); Cheney Bros. v. Doris Silk Corp., 35 F.2d 279 (2d

restricted to its own strong facts.[52] There are obvious reasons for so limiting the decision. In the artistic and literary fields, protection from appropriation is provided by the Federal Copyright Act,[53] and in the fields of design and mechanical invention by the patent laws.[54] Under the Copyright Act, of major importance here, protection from appropriation is limited to fifty-six years after publication of the work,[55] and there are requirements of notice [56] and a developed body of law as to the amount of protection that will be given any specific work. These limitations and requirements probably should not be subverted by a new, judicially developed doctrine.[57] They are based on an effort to reconcile the public interest in freedom of circulation for newly created artistic work and ideas with the conflicting public interest in encouraging their creation by enabling the creator to exploit their value.[58] Thus copyright is said to protect only the "expression" of an idea, not the idea itself.[59] It protects a work only

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Cir. 1929). See Callmann, *He Who Reaps Where He Has Not Sown: Unjust Enrichment and the Law of Unfair Competition,* 55 HARV. L. REV. 595, 595–96 (1942).

[52] The defendant had directly appropriated the plaintiff's news bulletins, and, due to time differences across the country, was able to publish them before all of the newspapers associated with the plaintiff were able to publish them.

[53] 17 U.S.C. §§ 1 *et seq.* (1952). [54] 35 U.S.C. §§ 101 *et seq.* (1952).

[55] 17 U.S.C. § 24 (1952). The copyright lasts for twenty-eight years but is renewable once for a further period of twenty-eight years.

[56] With the limited exception provided in 17 U.S.C. § 21 (1952), see *infra* p. 95, notice of copyright must be affixed whenever the work is published.

[57] See National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 603 (2d Cir. 1951) and authorities cited note 48 *supra.*

[58] Lord Mansfield expressed the problem as well in 1785 as it has been expressed since when he said that "we must take care to guard against two extremes equally prejudicial; the one that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded. The act that secures copy-right to authors guards against the piracy of the words and sentiments; but it does not prohibit writing on the same subject." Sayre v. Moore, 1 East 360n, 102 Eng. Rep. 139n (K.B.).

[59] See, *e.g.,* Dellar v. Samuel Goldwyn, Inc., 150 F.2d 612 (2d Cir. 1945),

from what an ordinary observer would think was a copy of the work even if the basic idea of the second work was admittedly derived from the first.[60] Here, as in the case of notice requirements or the fifty-six year limitation on protection, there would appear to be no major objection to a common law doctrine of reverse passing off if its requirements were as, or more, restrictive than those of copyright, but then, as to works which were copyrighted, the need for such a doctrine would seem nonexistent. If a work was copyrightable but not copyrighted, the act would appear to require that it be free to appropriation. But with works that are not copyrightable—or not patentable—the problem becomes more acute. While it is difficult to meet the argument that if a work is not protected by statute it should not be protected at all, equitable considerations and the expectancy of the public or the industry involved may be so great that some method of protection will be found even if the work cannot be considered "unpublished." [61]

It would seem that the Copyright Act must preempt the field at least to some extent, but to what extent it does so has not been decided. Moreover, state law on the point is also conflicting,[62] and, because the preemption question is unset-

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cert. denied, 327 U.S. 790 (1946); Dymow v. Bolton, 11 F.2d 690 (2d Cir. 1920); Dougherty, *The Protection of Ideas in the Law of Copyright*, 18 ORE. L. REV. 207 (1938).

[60] This test may or may not be different, but courts are increasingly using the term "the ordinary observer." See Funkhouser v. Loew's, Inc., 208 F.2d 185 (8th Cir. 1953); Kustoff v. Chaplin, 120 F.2d 551 (9th Cir. 1941); Shipman v. RKO Radio Pictures, Inc., 100 F.2d 533 (2d Cir. 1938).

[61] Common law protection of a literary or artistic work ceases upon publication of the work. Wheaton v. Peters, 8 Pet. 591 (U.S. 1834); Donaldsons v. Becket, 4 Burr. 2408, 98 Eng. Rep. 257 (H.L. 1774). But in this country the Copyright Act expressly reserves to an author his common law rights in an unpublished work. 17 U.S.C. § 2 (1952). Copyright can also be obtained for unpublished works under the statute. 17 U.S.C. § 12 (1952).

[62] For example, New York appears to have accepted the International News Service doctrine to some extent. See Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133, *cert. denied*, 257 U.S. 654 (1921); Archie Comic Publications, Inc., v. American News Co., 125 N.Y.S.2d 919 (Sup. Ct. 1953). The latter case is

tled, it is not clear whether the federal courts must follow what state law there is. In the cases that have arisen, state law has been applied only when it has specifically disapproved *International News Service.*[63] Thus while a claim for unfair competition is generally joined with one for copyright infringement of a comic strip, the industry properly places no great reliance on the doctrine of reverse passing off for protection of cartoon characters.[64] The law is too confused to be depended upon, even as to its basic elements.

Copyright.—It is the law of copyright that is viewed as providing the greatest degree of protection for cartoon strips and the characters appearing in them.[65] Whatever doubts may exist as to the artistic worth of the comic strips or books, there is no question but that copyright will protect the work from appropriation by others at least to the same extent that it would protect other works.[66] Indeed, it has several times been noted that comics in this country enjoy a degree of protection

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particularly interesting in that although the claim was for unfair competition, the test applied appears to be the same as would be applied in a case of copyright infringement. Three of the five cases cited are federal copyright cases.

[63] See Addressograph-Multigraph Corp. v. American Expansion Bolt & Mfg. Co., 124 F.2d 706 (7th Cir. 1942) (Illinois law); Triangle Publications, Inc. v. New England Newspaper Pub. Co., 46 F. Supp. 198 (D. Mass. 1942) (Mass. law). *But cf.* G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952). Since the injury will usually be multi-state, a major conflicts problem will exist in any case as to what law will govern. In Purcell v. Summers, 145 F.2d 979, 989 (4th Cir. 1944), involving passing off, the court stated that if use of the name constituted unfair competition in all states but one, the use would be enjoined except within that state. But in RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940), radio broadcasting was involved and the court held that even if the defendant's actions were a tort in one state, they could not be enjoined in that state since the injunction would necessarily prohibit them in every state which the broadcast reached.

[64] Interviews.

[65] In the case of "The Lone Ranger," for example, radio scripts have been copyrighted as unpublished works; television programs (always on film) have been copyrighted as motion picture photoplays; and all publications from cartoon strips to hard-cover books have been copyrighted.

[66] See Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432 (2d Cir. 1940); Detective Comics, Inc. v. Fox Publications, Inc., 46 F. Supp. 872 (S.D.N.Y. 1942). See also the comparison made by the lower court in National

that is extraordinary.[67] Thus comic strips and books are usually individually copyrighted as they are published. However, as has been noted, it is the central character or characters that are the most important element in any cartoon strip. The story is rarely more than a stock plot with relatively few additional embellishments. In some cases each day's strip is a single incident, forming, usually, a rather old humorous situation or leading to an old joke. There are, to be sure, a few more fanciful strips, but the fantasy would seem ordinarily to be based on the particular character or perhaps the way he expresses himself. It is thus the character for which protection must be obtained, but while it is fairly certain that at least in the case of the more distinctive characters protection will be given, it is not at all clear on what theory it will be based.

It is probably necessary to distinguish between two kinds of cartoon characters, or rather two extremes. At one extreme is the ordinary western or detective hero who has no particularly distinguishing features but whose escapades provide a certain amount of excitement for his readers. Often a comic strip involving this type of character has been created only after the character has become famous in another entertainment medium.[68] At the other extreme are the characters of more distinctive delineation, usually taking the form of animals of one sort or another.[69] In between are human beings of varying degrees of peculiarity of appearance or with distinctive characteristics, costumes, or powers. If copyright pro-

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Comics Publications, Inc v. Fawcett Publications, Inc., 93 F. Supp. 349 (S.D.N.Y. 1950), *rev'd*, 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (1952).

[67] See Umbreit, *A Consideration of Copyright*, 78 U. of Pa. L. Rev. 932 (1939); Derenberg, *Copyright No-Man's Land: Fringe Rights in Literary and Artistic Property*, Copyright Problems Analyzed 215, 222 (1953).

[68] A character which achieves fame in a medium that requires him to be played by a real person obviously cannot be as distinctive as a character created on an artist's drawing board.

[69] For example, the characters created by Walt Disney.

tects these characters apart from the actual copyrighted work in which they appear, it will protect them only to the extent that they are more than mere types.[70] The originality of a western hero is not great and only appropriation of the minutiae of his physical appearance would be prohibited. The originality in Mickey Mouse or Donald Duck, on the other hand, is much greater, and while a cartoon strip involving a mouse or duck would not infringe, any very close physical resemblance—beyond the necessary resemblance of two ducks or mice—would do so. Thus, as to the first extreme, copyright will at most protect the character only to a very limited degree, while at the latter extreme protection will be much greater.

There is, however, substantial doubt whether statutory copyright does protect a character appearing in a copyrighted work. It would seem that such protection should be afforded if the character is sufficiently delineated and forms a substantial portion of the work, but the only recent direct authority on the point appears to be to the contrary. In *Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc.*[71] Warner Brothers, the Plaintiff, was granted the exclusive right to use the copyrighted work "The Maltese Falcon" in radio, motion pictures and television. Subsequently, the Columbia Broadcasting System, by arrangement with the author, produced a series of radio programs called "The Adventures of Sam Spade" which used Sam Spade and the other

[70] See Detective Comics, Inc. v. Bruns Publications, Inc., 111 F.2d 432, 434 (2d Cir. 1940) where the court stated that the plaintiff was not entitled to a monopoly over "the mere character of a 'Superman' who is a blessing to mankind." The court, however, enjoined the defendant from "printing . . . cartoons . . . portraying any of the feats of strength or powers performed by 'Superman' or closely imitating his costume or appearance in any feat whatever." From the terms of the injunction it would seem that the court believed that imitation of the central character would constitute copyright infringement.

[71] 216 F.2d 945 (1954), *cert. denied*, 23 U.S.L. WEEK 3236 (U.S. March 28, 1955). *But cf.* Detective Comics, Inc. v. Bruns Publications, Inc., *supra* note 70; see Nichols v. Universal Pictures Corp., 45 F.2d 119, 121 (2d Cir. 1930) (dictum), *cert. denied*, 282 U.S. 902 (1931); Note, 68 HARV. L. REV. 349 (1954).

leading characters from "The Maltese Falcon" but did not dramatize the story itself. The court refused to enjoin the use of the characters by the defendant. After interpreting the contract between the creator of Sam Spade and Warner Brothers as transferring nothing but the right to use the actual story itself, the court went on to say that:

> even if the Owners assigned their complete rights in the copyright to the Falcon, such assignment did not prevent the author from using the characters used therein, in other stories. The characters were vehicles for the story told, and the vehicles do not go with the sale of the story.[72]

While it is clear that the decision is based on a belief that the characters are not protected by statutory copyright, it is not clear what the consequences of the decision are. It would be almost inconceivable for the opinion to mean that the characters of a story may be freely appropriated, and indeed such a result would seem contrary to the reasoning of the opinion itself. It is stated that:

> Authors work for the love of their art no more than other professional people. . . . There is the financial motive as well. The characters of an author's imagination . . . are always limited and always fall into limited patterns. The restriction argued for is unreasonable, and would effect the very opposite of the statute's purpose, which is to encourage the production of the arts.[73]

Thus the court probably intends that the creator of a character shall have the exclusive right to its use, but the only traditional theoretical basis for that right appears to be the author's common law property right in unpublished works. Aside from the fact that a character such as Sam Spade could hardly be called "unpublished," this common law protection would seem to be perpetual, and if perpetual protection is given, the court would seem to be ignoring half of the reason for the copyright statute—to grant only a limited monopoly in the effort to balance against the interest in the promotion of the arts, the interest in free circulation of ideas. Indeed it

[72] 216 F.2d at 950.

[73] 216 F.2d at 950.

would not seem that the author's exclusive right to his characters would be held to be perpetual. It is a fundamental notion of copyright law that when the limited monopoly granted an author in a work expires, everything contained in the work is free to appropriation by the public.[74] It would appear that the only protection a work dedicated to the public should receive is that obtainable under the copyright statute.

A second line of reasoning presents the more orthodox and difficult obstacle to holding that copyright of a work, especially a literary work, protects its characters. As the opinion states, the characters may be only vehicles for telling the story. Comparison of an allegedly infringing work with an entirely different story but the same characters may not reveal any essential similarity. But it is clear that similarity of character is one of the aspects of the two works to which a court will look in determining whether there is infringement,[75] and similarity of character and name would be almost conclusive evidence that there had been copying [76] even if the copying is not such as to constitute infringement. Even the court in *Warner Brothers* admits that the character may be so much of the story that use of the character by another would infringe upon the story.

With comic strips the problem is far easier than with literary works since the problems of delineation and comparison are much decreased.[77] It is only necessary to copy a substantial portion of a copyrighted work for there to be infringement,[78] and in a cartoon strip it is clear that the central

[74] See G. Ricordi & Co. v. Haendler, 194 F.2d 914 (2d Cir. 1952); RCA Mfg. Co. v. Whiteman, 114 F.2d 86 (2d Cir. 1940).

[75] See, *e.g.*, Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936); Dam v. Kirk La Shelle Co., 175 Fed. 902 (2d Cir. 1910); McConnor v. Kaufman, 49 F. Supp. 738 (S.D.N.Y.), *aff'd per curiam*, 139 F.2d 116 (2d Cir. 1943).

[76] See Stephens v. Rowells Sales Co., 16 F.2d 805 (S.D.N.Y. 1926).

[77] See Note, 68 HARV. L. REV. 349, 359 (1954).

[78] See, *e.g.*, Universal Pictures, Inc. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947); Chappell & Co. v. Fields, 210 Fed. 864 (2d Cir. 1914); Alexander v. Theatre Guild, Inc., 26 F.2d 741 (S.D.N.Y. 1927), *aff'd per curiam*, 26 F.2d

character or characters constitute such a substantial portion. In the case of the more original characters, at least, it is a fairly simple matter to compare them and determine whether one is so similar to the other as to be a "copy." Perhaps because of the simplicity of the test and the primary importance of the originality of the character, the authority prior to *Warner Brothers* would seem to have established that the copyright of a strip is infringed by imitation of its characters. Thus, while no case has been found involving alleged infringement by a second comic strip with a different story from those which had appeared in the allegedly infringed strip, it has been held that the copyright on a cartoon strip was infringed by a doll [79] and by impersonation of the central character on the stage.[80]

Duration of Copyright.—There are substantial dfficulties in applying the Copyright Act to cartoon characters, which derive from the notice requirements and the fifty-six-year limitation on the duration of protection. Indeed these difficulties are such that if a hard case should arise, a court may either extend the doctrine of *International News Service v. Associated Press* or create a new common law property right in the character as appears to have been done in *Warner*

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742 (2d Cir. 1928); Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1127–33 (1951).

[79] King Features Syndicate v. Fleischer, 299 Fed. 533 (2d Cir. 1924). In Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 75 F.2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935), a doll was held to infringe separately copyrighted drawings of a cartoon character. See also Gruelle v. Molly-'Es Doll Outfitters, Inc., 94 F.2d 172, 176 (3d Cir. 1937), *cert. denied*, 304 U.S. 561 (1938).

While dolls themselves may not have been copyrightable at one time, see Note, 66 HARV. L. REV. 877, 880–82 (1953), they clearly are so at present, after the decision in Mazer v. Stein, 347 U.S. 201 (1954). See Rushton v. Vitale, 218 F.2d 484 (2d Cir. 1955) where the court held a doll named "Zippy" was infringed without considering the question of whether the doll was copyrightable, although the question had briefly been argued. See Appellant's Reply Brief, p. 2.

[80] Hill v. Whalen & Martell, Inc., 280 Fed. 359 (S.D.N.Y. 1914); see Empire City Amusement Co. v. Wilton, 134 Fed. 132, 133 (C.C.D. Mass. 1903).

Bros., Inc. v. Columbia Broadcasting System, Inc. in order to provide the protection which copyright will not.[81]

When a character appears in a new strip for the first time, he is usually, for the present at least, fully delineated. The originality that copyright will protect exists in his appearance, not in any further development of the character internally. Copyright protection for the character would presumably start at this point.[82] In fifty-six years the limited monopoly over the particular strip ceases, but the strip may have been appearing daily throughout the period. The question is whether the character in the first strip, which has now become dedicated to the public use, may be appropriated and used in any situation which does not infringe the strips which remain copyrighted. The theory that after fifty-six years from the date of publication have elapsed everything in the copyrighted work is open to public use would seem to indicate that the character could be so appropriated and this result would appear to find support in the obvious case of a person other than the creator republishing the strips which had appeared fifty-six years and one day after their first publication. There seems little doubt that such an action would not infringe the strips which remained validly copyrighted. Probably then, in this context, copyright protection for a cartoon character will exist only so long as everything in which the character appears is copyrighted. Although more difficulty is caused by the fact that the character may change considerably over the fifty-six-year period,[83] it would seem that in

[81] It will hereafter be assumed that copyright does protect comic strip characters, the problems now being the length of time the protection will last and compliance with the statutory requirements.

[82] The point is not necessarily the first appearance of the strip. The central character may not appear for several days and subsidiary characters may become important only after they appear much later in the strip's existence.

[83] "Gasoline Alley" is an example of intentional change in character, as the characters are made to age approximately in accord with the passage of time. "Terry and the Pirates" is an example of a more rapid type of change, Terry becoming a young man upon the occurrence of World War II. Both strips appear in the Boston *Sunday Herald*.

such a case the character as he presently appears would be protected even though the character as he appeared in the past would not be, but only to the extent the present character has distinctive features apart from its predecessor.

The limited duration of copyright protection also presents a problem when the cartoon character appears in other forms or media, as, for example, when it becomes a doll. Usually this is done under a licensing arrangement and it is, of course, required that the licensee copyright the secondary work.[84] But the question is from what time the copyright on the doll runs, from the date of the first appearance of the character or from the date of the first sale of the doll. It seems that the practice is for the notice to bear the latter date, the date upon which the secondary form appears.[85] In such a situation it would seem probable that when the copyright expires on the cartoon, the character may be appropriated for use even in fields where there exist portrayals of the character on which the copyright is still valid, but again only to the extent that there are not some additional distinctive features to the validly copyrighted portrayal.[86] Again as far as the character is concerned it would seem that the fifty-six-year period runs from the date of first appearance—that that is the time when copyright protection commences—but it can be argued in almost any case in which the character is used in another medium that additional features of originality are present and hence it probably can do no harm to date the copyright notice of the second work from the time of its appearance.[87]

[84] Interviews. See Warner Bros. Pictures, Inc. v. Columbia Broadcasting System, Inc., 216 F.2d 945, 946 (9th Cir. 1954). See p. 95 *infra*.

[85] Interviews. See Brief of Appellant, pp. 2, 4, in Rushton v. Vitale, 218 F.2d 434 (2d Cir. 1955).

[86] In the case of a doll, additional distinctive elements would be likely to exist because of the fact the doll is three dimensional. Considerable work and money goes into producing such a doll even when it is copied from a live chimpanzee such as "Zippy." See Brief of Appellants, *supra* note 85 at pp. 3–4.

[87] In National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2d Cir. 1951) the court held that notice bearing a 1939 date did not invalidate the copyright on cartoon strips although they had first been copyrighted and published in 1938.

Notice.—While it may be reasonable to hold that protection of the character ceases when the copyright expires on the early cartoon strips, the analysis by which this conclusion is reached leads to a harsh result in another case. In order not to lose protection of a published work, the Copyright Act requires that notice be affixed to the work whenever it is published by authority of the copyright owner. If notice is lacking or insufficient, the work may be appropriated.[88] In *National Comics Publications, Inc. v. Fawcett Publications, Inc.*[89] it was found that notice was insufficient on some of the plaintiff's individually copyrighted strips of "Superman." As a result, the court held that these strips were dedicated to the public and remanded the case, directing that the lower court compare the allegedly infringing strips only with those on which notice of the plaintiff's copyright was valid. It was only as to these latter strips that an action for infringement could be maintained. Thus, on the analysis above, it would seem that publication of the insufficiently marked strips would allow appropriation of the character.

But as a practical matter it has proved nearly impossible for a daily comic strip to be published at all times with the required notice. Ordinarily comic strips are distributed through various syndicates. These syndicates make "mats" of the strips which are then sent to the newspapers and from which the strips are printed. The syndicates do not seem to be overly careful as to whether notice of copyright appears on the mat, and even if it does the newspaper may cut off part of the mat because it consumes too much space. The part which is cut off at times contains the notice of copyright.[90] Thus if publication of one or a few strips without notice permits appropriation of the characters involved, copyright will protect few cartoon characters.

[88] See National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (1952).

[89] *Supra* note 88.

[90] Interviews.

One possible rationalization of a contrary result is based on Section 21 of the act which provides that when notice is inadequate or lacking on "particular copies" of a work, an injunction will nevertheless issue if that work is infringed, although damages may not be recovered.[91] Without too much violence being done the statutory language, it might be argued that a full day's strip is but a "particular copy" of the strip in general and the character which appears in it.[92] While not very satisfactory, such an argument would seem preferable to an extension of unfair competition or common law copyright to afford protection in such a case, an otherwise likely result. Certainly no fundamental policy of the act would be violated.

There is, however, a simpler solution to the problem. It was stated in the *National Comics* case and has generally been accepted as the law, that if notice of copyright is required of a licensee, the failure of the licensee to affix the required notice will not forfeit the copyright.[93] The court reasoned that the copyright will be lost only if the required notice is not affixed to each copy of the work published by authority of the copyright proprietor. If the license requires as a condition that each copy of the work published by the licensee bear notice of copyright, publication without such notice is not publication by authority of the copyright proprietor. Thus if the author retains proprietorship of the copyright and requires the syndicate and newspapers to affix notice, absence of notice will not affect his copyright.[94] Ordinarily, however, the copyright is held by the syndicate rather than the artist.[95] In such a case, while the artist is free of

[91] 17 U.S.C. § 21 (1952).

[92] See Note, 68 HARV. L. REV. 349, 359–60 (1954).

[93] 191 F.2d 594, 600–1 (2d Cir. 1951).

[94] This argument is, of course, equally true where the character is licensed for use in other entertainment media or for production of a doll.

[95] Interviews. Perusal of the Boston *Herald* and the Boston *Globe* indicates that at present only Walt Kelly ("Pogo") holds the copyright to the daily strips in his own name. Al Capp formerly did so.

requirements of registration and deposit, he must depend on the syndicate to affix notice and to require the newspapers to do so.

Retention of the copyright by the artist increases the problem, which exists in any case, of depositing the requisite copies of the work with the Register of Copyrights. Section 13 of the act provides that in order to bring an action for infringement, two copies "of the best edition of the work then published" must be so deposited.[96] There would seem to be no practical way for the syndicate or the artist to comply with this provision. The artist would have to transmit, at the least, two copies of a newspaper in which his strip appears daily and pay the necessary fee.[97] The syndicate would have to transmit two copies of a large number of papers, since it will ordinarily have strips appearing in several different ones, paying a separate fee for each. A few newspapers act as their own syndicates and in such a case the whole newspaper could be copyrighted and deposited, but the answer in the usual case seems to be to ignore the problem.[98] This is probably the most economic disposition that can be made of it, but one syndicate has tried a different solution.[99] Periodically it collects the strips under its control and on which it holds the copyright, and puts them together in a book of which it presumably makes three copies. One of these copies is sold and the other two are deposited. There is some authority indicating that this system may be sustained by the courts,[100] but it would seem difficult to term the deposited

[96] 17 U.S.C. § 13 (1952).

[97] The fee is $2.00; $730 per year would be an inordinate expense to the individual artist.

[98] Interviews. Few newspapers copyright their contents in any case.

[99] King Features Syndicate. The following information may not be accurate as it is second hand.

[100] Atlantic Monthly Co. v. Post Publishing Co., 27 F.2d 557 (D. Mass. 1928). The facts of this case were very strong, however. The work involved was an article written by Al Smith on Catholicism and the Presidency, and immediate protection was essential. Three copies of the article were made as soon as they could be run off from galley. One was sold without restriction for ten cents, and the other two were deposited.

work a copy "of the best edition of the work then published."

Failure of deposit, however, is not as serious a problem as is lack of notice, since such a failure does not forfeit the copyright but is only a condition of suit on it. Apparently delay will not affect the right to bring suit, at least as long as deposit is made before the action is brought. The Supreme Court has held that a delay of fourteen months after publication and six months after infringement did not preclude maintaining a suit for infringement,[101] and although it is possible that a different result would obtain if the delay were for several years, the practicality of the situation might support upholding the suit even in that case. In view of these considerations it may therefore be better for the artist to retain the copyright with appropriate licensing arrangements. Despite the added inconvenience, the notice requirements could then be met and deposit does not seem practicable in either case.

Rights after Expiration of Copyright.—Assuming protection of character will not be afforded on the basis of the *International News Service* or *Warner Brothers* cases after the fifty-six-year limitation on copyright has expired, it is not clear whether the author will continue to have any rights in the name. Probably common law protection will cease, but two possible cases should be distinguished. It has been held, and would seem clear, that when someone other than the author appropriates a work and its title, usually for use in another medium, that person cannot maintain a suit for unfair competition against a third person who has also appropriated the work and its title.[102] This result is probably based on the strong notion that when copyright protection ends, every part of the work may be freely appropriated and used by anyone

[101] Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939). The industry consequently figures that if a case of infringement comes up, it will then be time enough to deposit copies of the strips which it is believed were infringed.

[102] Walt Disney Productions, Inc. v. Superior Selective Pictures, Inc., 98 F. Supp. 774 (S.D.N.Y.), *aff'd per curiam*, 192 F.2d 856 (2d Cir. 1951) ("Alice in Wonderland"); Glaser v. St. Elmo Co., 175 Fed. 276 (C.C.S.D.N.Y. 1909).

in any manner he pleases. Since what the title or name identifies belongs to the public, it would not seem proper to give one person a monopoly over the title or name, especially since it may be essential to exploitation of the work. This argument would seem to be equally applicable where it is the author who is attempting to enjoin use of the name by another and several cases have explicitly indicated that unfair competition will protect the name only so long as the work is protected by copyright.[103] While in some cases the chance of detrimental deception of the public through use on a product of a very strong trade name would seem so great that the use might be enjoined,[104] such a possibility would not seem to exist in the entertainment field and particularly with reference to comic strips.

Registration of the title or name under the Lanham Act presents a more difficult problem since here the monopoly in the name or title is statutorily created just as is the monopoly over the work. But a trade-mark can only be registered by its "owner," [105] and while it is not clear what law governs the definition of "ownership," [106] it appears likely that someone

[103] See Prouty v. National Broadcasting Co., 26 F. Supp. 265 (D. Mass. 1939); Patten v. Superior Talking Pictures, Inc., 8 F. Supp. 196 (S.D.N.Y. 1934); Paramore v. Mack Sennett, Inc., 9 F.2d 66 (S.D. Cal. 1925). The only distinction between Patten v. Superior Talking Pictures, Inc., *supra*, and Atlas Mfg. Co. v. Street & Smith, 204 Fed. 398 (8th Cir.), *appeal dismissed*, 231 U.S. 348, *cert. denied*, 231 U.S. 755 (1913), would seem to be that in the latter case there was no explicit finding that the work was copyrighted. See Note, 68 HARV. L. REV. 349, 353 (1954).

[104] See G. & C. Merriam Co. v. Ogilvie, 159 Fed. 638 (1st Cir.) *cert. denied*, 209 U.S. 551 (1908). The work here involved was "Webster's Dictionary," and with such a work deception of the public may be detrimental in a way that probably could not be true of another work, the value of which was in entertainment. A similar approach has apparently been used in an analogous area, where courts have indicated a design that has acquired secondary meaning may be protected if the chance of detrimental public deception is great even though the design patent has expired. See General Time Instruments Corp. v. United States Time Corp., 165 F.2d 853 (2d Cir.), *cert. denied*, 334 U.S. 846 (1948); Zangerle & Peterson Co. v. Venice Furniture Novelty Mfg. Co., 133 F.2d 266 (7th Cir. 1943).

[105] 60 STAT. 427 (1946), 15 U.S.C. § 1051 (1952). Section 1 provides: "The owner of a trade-mark used in commerce may register his trade-mark. . . ."

[106] See *Developments in the Law, supra* note 4 at 876. Once the trade-mark

other than the author could not become the owner of the name of a work upon which the copyright had expired. Where the author has registered the name while the work was still copyrighted, however, there would seem to be no answer. It has been argued that the fact that a work is copyrighted should not cause trade-mark protection, otherwise perpetual, to cease after fifty-six years.[107] But the basic assumption of this argument may be incorrect since if the work is not copyrighted, the author may not be the owner of the title within the meaning of the Lanham Act, and, in any case, the idea that when copyright expires the work may be freely appropriated might still prove to govern. While it should make no logical difference, however, the case for cessation of trade-mark protection is admittedly less strong if copyright is never obtained on a work or if it is lost through lack of notice. Theoretically the work is as much dedicated to the public in the one case as in the other, but if the comic strip and central character are of a type where the distinctive features of the character are almost nonexistent except for the name, it might be preferable to register the name only and not copyright the strip at all. But since such a procedure might allow appropriation of both the character and its name, the danger involved would seem to outweigh the possibility of perpetual protection, especially since at least in most cases it would not seem likely that protection of the strip would be desired for longer than fifty-six years.[108]

Contractual Arrangements.—The problem of character use is in large part one of contract. Licensing arrangements, as has been indicated, may be of great importance in the copyright field. They may also be important with respect to trade-mark protection. Since the Lanham Act is concerned in large

has become incontestable, however, "ownership" is no longer required. *Ibid.*

[107] See Note, 68 HARV. L. REV. 349, 351–52 (1954).

[108] These problems become almost meaningless with respect to comic strips if the *Warner Bros.* case implies that protection of character is perpetual in any event, of course, and if that implication is followed, which, as has been pointed out, seems at least unlikely.

part with protection of the public, a trade-mark may be lost if the licensor does not supervise the licensee's product to determine that the product is of a standard that is equivalent to that of the licensor's. This problem too is ignored in the comic strip industry, supervision being nonexistent or nominal,[109] but again this disposition of the problem appears to be the most economic. The public does not expect too high a standard on products sold under the name of comic strip characters and the cost of supervision would presumably be too high to warrant it.

The major question in this area is who retains the right to reuse the character in other stories or situations when the copyright of a particular work is assigned or licensed. The confusion which exists is judicially created, since courts, rather than treating the problem as one of contract interpretation alone, have also attempted to determine whether and on what basis the characters are protected. It would seem fairly clear that in assigning the copyright to a particular work, especially where it is not the work that is important but the characters appearing in it—that is, where the major economic value is in reuse of the characters in a variety of situations—the author probably does not intend to divest himself of the right to reuse the characters and indeed probably intends to retain that right exclusively in himself. On this basis, the decision in the *Warner Brothers* case seems clearly correct,[110] as does that in the "Mutt and Jeff" cases [111] where it was held that the creator of the comic strip had the

[109] See *Developments in the Law, supra* note 4 at 871–73; interviews.

[110] 216 F.2d 945 (9th Cir. 1954), *cert. denied,* 23 U.S.L. WEEK 3236 (U.S. March 28, 1955).

[111] Fisher v. Star Co., 231 N.Y. 414, 132 N.E. 133, *cert. denied,* 257 U.S. 654 (1921). In Star Co. v. Wheeler Syndicate. Inc., 160 N.Y. Supp. 689 (Sup. Ct. 1916), *aff'd mem.,* 188 App. Div. 964, 176 N.Y. Supp. 923 (1st Dep't 1919), *aff'd mem.,* 231 N.Y. 606, 132 N.E. 907, *cert. denied,* 237 U.S. 654 (1921), the court refused to enjoin use of the name "Mutt and Jeff" by the present employer of the author at the suit of the former employer. The somewhat complicated facts of the litigation are clarified in Kelley, *Rights of Authors and Artists Outside the Copyright Law,* 5 CORNELL L.Q. 48 (1919).

exclusive right to reuse the central characters in new situations as against the newspaper to which he had assigned the copyright on past strips. In the "Buster Brown" case,[112] however, the court refused to enjoin reuse of the character by the assignee, stating that the author had no common law right in it. But in this case the character had apparently been created while in the newspaper's employ instead of prior to the assignment of the copyright as in the "Mutt and Jeff" cases. It is only because the opinions talk about copyright and unfair competition that confusion exists. The first two cases, and probably the third, when viewed as a question of the intention of the parties, appear correct. Whatever rights exist under statutory copyright or at common law, if the assignment of copyright or contract of employment explicitly reserved to the author the exclusive right to reuse the characters, that reservation would presumably be enforced, and such a reservation is probably inferable whenever the copyright to a previously created work of the kind here involved is transferred.

The fact that this is primarily a problem of contract interpretation is illustrated by cases involving characters created for commercial or advertising reasons by an artist employed for that purpose. In these cases it is held that the employer has the right to reuse the characters under the contract of employment, just as the employer would own an invention created by an employee hired for that purpose.[113] Again the result seems clearly correct, but its basis is the intention of the contracting parties and should not be considered a

[112] Outcalt v. New York Herald, 146 Fed. 205 (C.C.S.D.N.Y. 1906); New York Herald Co. v. Star Co., 146 Fed. 204 (C.C.S.D.N.Y.), *aff'd*, 146 Fed. 1023 (2d Cir. 1906). In the latter case the court enjoined use of the trade-mark "Buster Brown" by the present employer of the author at suit of the former employer.

[113] Vargas v. Esquire, Inc., 164 F.2d 522 (7th Cir. 1947); Grant v. Kellogg Co., 58 F. Supp. 48 (S.D.N.Y. 1944), *aff'd*, 154 F.2d 59 (2d Cir. 1946). The latter case involved "Snap," "Crackle," and "Pop," three characters which are still used to advertise cereal for Kellogg Co.

problem of copyright law. It would seem clear from these cases that whenever an assignment is made or a license is given, the rights of the parties with respect to reuse of the characters involved should be carefully spelled out. This problem, unlike many others in the field of comic strip protection, would thus be relatively easy of solution.[114]

CONCLUSION

It would thus seem that while the theoretical problems in this field are immense, their practical impact on the industry is slight, the ordinary solution being to ignore the problem. Since the answers are far from clear, this solution appears to be as good as any other. The Copyright Act, as it presently exists, is not adequate to protect comic strip characters, especially with respect to its notice provisions, but at present it seems clear that an outright appropriation of a character which has appeared in copyrighted works will be prevented whatever the theoretical difficulties involved. But it seems that a more satisfactory means of protection would be to add to the Copyright Act a provision allowing the registration of the character itself, infringement being based on the same test with respect to two characters as it is under present law with respect to two works. If notice is felt to be necessary it could be required on every published work in which the character appears, although, especially in the case of such characters, it is difficult to see how the absence of notice would in any way prove misleading. Such a system would not seem to be too radical a departure from existing law and would clarify and delimit the protection which it appears will be given in any event on grounds that are obscure and for reasons which serve only further to confuse an already overly confused area.

[114] "The Lone Ranger," for example, requires actors, writers, licensees, and directors to sign waivers with respect to reuse of the character. Interviews. Such a procedure will undoubtedly be effective and will avoid most of the problems considered in this section.

The Universal Copyright Convention and the United States: A Study of Conflict and Compromise

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INTRODUCTION

RECENTLY AN IMPORTANT EVENT occurred in copyright law. On August 31, 1954, the United States, long considered hopelessly devoted to a policy of hypernationalism respecting foreign literary protection, broke from the precedent of the past to ratify a monumental achievement in international compromise: The Universal Copyright Convention.[1] By September 16, 1955, the requisite number of ratifications and acceptances established UCC as an actively functioning organization.[2]

In achieving this change, recognition is due the United Nations Educational, Scientific and Cultural Organization [3] in sculpturing from the labyrinth of international conflict and confusion a draft representing the combined efforts of fifty nations.[4] While time is too short to assay the eventual contribution UCC will make to international law, we in the United States must acclimate ourselves to dealing with copyright problems on a foundation of concerted action and mutual consideration. In this dawn of the atomic age, we rightfully

EDITOR'S NOTE.—This paper was written prior to the date on which UCC came into effect, and slight revisions were made subsequently.

[1] Herein referred to as UCC.

[2] Director-General's letter. 8 UNESCO COPYRIGHT BULL. 136 (No. 2, 1955).

[3] Herein referred to as UNESCO.

[4] Report of Results of Intergovernmental Copyright Conference. 5 UNESCO COPYRIGHT BULL. 188 (Nos. 3–4, 1952).

consider ourselves among the leaders in the family of nations. In copyright, however, the record is replete with primitive isolation, if not retrogression. UCC presents an excellent opportunity for asserting ourselves in a field of varied opportunities and rewards. Let us pause for some introspection as we stand poised on the threshold of this new adventure. I propose, in compiling this report, to present an analysis of our relations in international copyright [5] with emphasis directed toward appreciating and understanding the provisions of UCC. Because the future is often reflected in the past, I shall begin with the development of domestic law under the Constitution.

The genesis of the Anglo-American conception of literary protection for authors and publishers appears to be lost in oblivion. Perhaps the best explanation of its origin is that of Justice Willes in the celebrated case of *Miller v. Taylor*,[6] where he states,

> The name, "Copy of a book," which has been used for ages, as a term to signify the sole right of printing, publishing and selling, shows this species of property to have been long known, and to have existed in fact and usage as long as the name.

Justice Holmes's classic definition of this extraordinary form of property is:

> The person to whom it is given has invented some new collocation of visible or audible points—of lines, colors, sounds or words. The restraint is directed against reproducing this collocation, although but for the invention and the statute any one would be free to combine the contents of the dictionary, the elements of the spectrum, or the notes of the gamut in any way he had the wit to devise.[7]

One important condition should be added to the conception in the United States: the collocation must have been reduced

[5] Two outstanding articles in this field are Schulman, *International Copyright in the United States: A Critical Analysis*, 19 LAW & CONTEMP. PROBS. 141 (1954), and Note, 62 YALE L.J. 1065 (1953).

[6] 4 Burr 2303 (1769).

[7] White-Smith Music Pub. Co. v. Apollo Co., 209 U.S. 1, 19 (1907).

to permanent form. Article I of the Constitution states "writings," thereby excluding intangibles such as ideas and sounds.[8]

The first copyright legislation [9] in America was the Act of 1672 of the General Court for Elections of the Company of the Massachusetts Bay in New England which provided that "no printers shall print any more copies than are agreed and paid for by the owner of said copy" [10] Article I, section 8, of the Constitution attests to the awareness of copyright by the members of the Constitutional Convention.[11] It states, "The Congress shall have powers . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." The provision appears to have been the subject of little debate. To name any one person responsible we have only Madison's original record which states, "Mr. Pinkney proposed for consideration additional powers which had occurred to him." [12] Among these powers was the power "To secure to literary authors their copyrights for a limited time." The Convention's records for that day, August 18, 1787, are witness to more pressing questions re-

[8] Holmes v. Hurst, 174 U.S. 82, 86 (1899); Ferris v. Frohman, 223 U.S. 424 (1912).

[9] Social objectives of this special type of monopoly have been variously stated. Ball in his work on copyrights states them to be threefold. Foremost is the encouragement of authors in the production of works by securing to them the exclusive right to exploit the products of their endeavors. A second purpose is to appraise the public by a systematic notice and registration that an author has not abandoned his interest and is entitled to its exclusive use and benefit. Another objective is that such protection encourages literary and artistic work, thereby promoting progress and cultural advancement. BALL, LAW OF COPYRIGHTS 44 (1944)); Chaffee, *Reflections on the Law of Copyright*, 45 COL. L. REV. 503 and 719 (1945).

[10] SHURTLEFF, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND, 527 (1854).

[11] This is not difficult to understand in view of the fact that all thirteen colonies had separate copyright statutes, commencing with Connecticut in January 1, 1783.

[12] FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 321, 324, 325 (1953).

lating to the regulation of the militia, and no debate on any copyright question appears on the record.[13]

The first congressional enactment pursuant to the Constitutional grant was passed in 1790 and provided that an author or his assignee "Shall have the sole right and liberty of printing, reprinting, publishing . . . book or books, for the term of 14 years." [14] Since 1790, a general revision of the copyright law has occurred approximately every forty years.[15] The enactment of copyright legislation under the terms of the Constitution is not based upon any natural right that an author has in his writings, for since *Wheaton v. Peters*,[16] the Supreme Court has repeatedly held that such rights are purely of a statutory origin.[17] Rather, the Constitutional mandate is directed toward legislation in aid of public progress in science and the useful arts for a limited time only. Two considerations are necessary to support the constitutionality of copyright legislation. First, how much will the legislation stimulate production and distribution in aid of the public during the limited monopoly? Second, will the protection be restricted to "writings" or, as the courts have construed the term, to "tangibles" as distinguished from "intangibles?" [18]

The first comprehensive congressional legislation that followed the conglomeration of state and federal laws was demanded by President Theodore Roosevelt in his December, 1905, Message to Congress. Extensive public hearings were held jointly by the House and Senate committees working in cooperation with the Copyright Office. These efforts culminated in the Copyright Law of 1909 and laid the foundation for our present copyright statute.[19] The current law in the

[13] *Id.* at 324.

[14] Copyright Act of 1790, 1 STAT. 124 (1790).

[15] 1831, 1870, 1909 culminating in the present statute codified in 1947 and referred to as the Act of July 30, 1947.

[16] 8 Peters 591 (1834).

[17] See White-Smith Music Pub. Co. v. Apollo, 200 U.S. 1, 15 (1907).

[18] See note 8 *supra*.

[19] 61 STAT. 652 (1947), 17 U.S.C.A. (Supp. 1955).

United States is the Act of July 30, 1947, as amended, and is substantially a reenactment of the 1909 act. The most recent revision of our copyright law occurred when Public Law 743 went into effect, bringing the United States within the UCC organization.[20] This law modified the present statute in several important respects concerning international protection, consonant with the terms of the Universal Copyright Convention. Since UCC did not come into force until three months after twelve countries had deposited their ratification with UNESCO,[21] the terms of Public Law 743 were not operative until September 16, 1955. In understanding the essential elements of the new legislation, an examination of its history is essential.

HISTORY OF UNITED STATES' PROTECTION OF FOREIGN WORKS

The Copyright Act of 1790 extended the privilege of copyright to citizens and residents of the United States only.[22] Non-resident foreign authors were not granted protection in this country until 1891, when, after considerable feeling had been aroused,[23] the Chase Act was passed.[24]

At this time foreign authors were given the privilege of copyright on the same basis [25] as United States authors, if publication was accompanied with notice of copyright, registration, deposit, and provided two other conditions were met: (1) if the foreign author's country granted reciprocal pro-

[20] Pub. L. No. 743, 83d Cong., 2d Sess. (August 31, 1954).

[21] UCC Art. IX. The twelve countries were: Andorra, Cambodia, Chile, Costa Rica, German Federal Republic, Haiti, Israel, Laos, Monaco, Pakistan, Spain and the United States of America. Subsequently the following countries ratified: France, the Holy See, Japan, Liberia, Luxembourg, Philippines and Switzerland.

[22] 1 STAT. 124 (1790).

[23] VANDYKE, THE NATIONAL SIN OF LITERARY PIRACY (1888).

[24] 26 STAT. 1106 (1891).

[25] In reality the American law does not provide for international protection at all; it only enables the citizen of a foreign country, under certain circumstances, to obtain copyright. COPINGER, COPYRIGHT 347 (1927).

tection to American authors, as determined by presidential proclamation, or if his country were a party to an international agreement providing protection to American authors, as determined by presidential proclamation; (2) unless not printed in English, two copies were required to be deposited with the Library of Congress printed from type set within the limits of the United States. This latter provision is the notorious "manufacturing clause." Originally designed as a concession to the typographical labor unions, its purpose was to discourage importations and thus to provide increased work for American labor.[26] While it is impossible to determine precisely the benefits to our domestic printing interests under the manufacturing clause, it has been measured on a basis of the increased amount of printing done in the United States. English books for the American public must come through importation or domestic printing. A memorandum compiled by an official of the Copyright Office for the five years before World War II revealed that of the 5,000 English language works registered for temporary protection under the ad interim provisions during this time, only 875 were subsequently reprinted in the United States.[27] Importations were trivial, averaging less than one half of one percent of our domestic production.[28] Obviously, the results of the manufacturing clause are of insignificant importance to the printing industry. Even assuming some gains are obtained, two serious burdens attach. First, the risk of substantial losses to the printing industry if foreign retaliation gains momentum. Contrary to conditions existing when the manufacturing clause was first adopted, this country is now the world's foremost exporter of copyrighted materials. Imagine the devastating effect on domestic industry if foreign powers should refuse to protect our motion pictures, records, and publications. This fear is not

[26] Sen. Doc. No. 99, 76th Cong., 1st Sess. 2–3 (1939).
[27] Chaffee, *op. cit. supra* note 9 at 524.
[28] Solberg, *The New Copyright Bill*, 15 Notre Dame Law. 123, 137 (1940).

idle gossip; it is recognized by responsible persons as a serious threat.[29] Second, all Americans suffer a significant intellectual loss from their lack of access to foreign English-language publications. The pecuniary advantage must be weighed against the intellectual loss measured in terms of education and cultural advancement. This disadvantage is likely to become greater now that increased attention is being given to prevailing social and economic problems.

The manufacturing clause has long been under attack by authors, publishers, foreign representatives, and legal writers as the principal obstacle to this country's participation in an international copyright treaty.[30] The retention of the manufacturing clause made reciprocity virtually impossible, since those aliens whose countries permitted substantially equal protection to our citizens were still required to print their works in the United States in order to be protected. *The Nation* [31] has compared this provision to a law requiring that foreigners landing in the United States should not be entitled to police protection until they have purchased and are wearing a suit of clothes made by an American tailor.

Some relaxation took place in the Copyright Act of 1909.[32] The requirement for manufacture in the United States was eliminated for:

1. Works in raised characters for the use of the blind. . . .
2. Books of foreign origin in a language . . . other than English.
3. Books published abroad by foreign authors seeking *ad interim* protection.

Today these three exceptions are still recognized, and with UCC in effect further exceptions have been created. Neverthe-

[29] *Testimony of Dr. Luther H. Evans, Librarian of Congress, at Hearings before the House Committee on Judiciary Subcommittee 3, on H.R. 4059*, 82d Cong., 2d Sess. 3 (1952).

[30] No other leading country except the United States effectively requires a domestic manufacture.

[31] "*An Apology for Piracy*," 38 THE NATION 4 (1905).

[32] 35 STAT. 1078 (1909).

less, books by United States' authors must comply with the manufacturing provisions to qualify for domestic protection.

In 1909, the ad interim protection requirement permitted protection for thirty days after first publication abroad, provided a copy was deposited with the Library of Congress within thirty days.[33] In 1919, this provision was broadened by permitting deposit within sixty days of first publication abroad and protection was extended to four months from day of deposit.[34] Today ad interim protection is governed by Section 22 of the Copyright Act as amended by the Act of August 31, 1954.[35] The time for deposit is six months after publication, with protection extending for five years from first publication abroad. At the expiration of this five-year period, protection will lapse unless printing is made in this country.[36] Attached to the UCC provisions was a provision extending ad interim privileges to domestic authors too. Consequently, our authors may now publish abroad and yet obtain temporary protection here.

Before UCC the result of these requirements was fatal to foreign authors' rights. When the foreign author failed to print an American edition of his work within the ad interim period, all United States copyright protection was lost. Consequently, very few foreigners[37] sought ad interim registration. The effect was that unrestricted piracy was legally permissible here. Foreign books less than "best sellers" seldom warranted the risk inherent in making a separate United States printing. Also, after expiration of the ad interim protection, no American publisher would undertake printing because he too would be unprotected from any other publica-

[33] 35 STAT. 1080 (1909).
[34] 41 STAT. 368 (1919).
[35] 68 STAT. 1030 (1954). 17 U.S.C.A. § 22 (Supp. 1955).
[36] 63 STAT. 154 (1949), 17 U.S.C.A. § 23 (Supp. 1955).
[37] The nationality of the author is the determining factor even where the interest is conveyed to a proprietor in the United States. Bong v. Campbell Art Company, 214 U.S. 236, 245 (1909).

tion or import.[38] It became increasingly apparent that, instead of gaining as they had supposed, the domestic printers and laborers actually were losing economically. Authors, likewise, suffered because no royalties would be paid to the foreign author who was denied protection. In conjunction with the changes made in 1949, further concessions were granted to permit the importation of 1,500 copies during the five-year period.[39]

The 1949 amendment to the previously stringent provisions is not to be confused with any philanthropic motives in Congress or by certain segments of the printing industry. Much agitation springs from fear of foreign retaliation. Beneficiaries of the amendments primarily appear to be authors dealing with scholarly or technical material appealing to a restricted group. Another advantage will be to permit the testing of the American market without risk of the loss normally resulting from printing a small number of copies.

Prior to UCC it was apparent that English writers were heavily discriminated against. An example of this paradox is evident when a French Canadian published his book in Canada in the French language with the copyright notice required by our law and thereby acquired copyright protection for the book in this country, including the sole right of translation into other languages. He was fully protected so long as he refrained from publishing a translation in English; otherwise he would have been required to reprint it in the United States and otherwise conform to our laws.[40]

An important hurdle is presented in the bilateral arrangements basis, whereby satutory copyright in the United States is extended only to authors who are citizens or subjects of a country which grants the benefit of copyright to American

[38] See H.R. Rep. No. 238, 81st Cong. 1st Sess. 3 (1949).
[39] 63 Stat. 154 (1949), 17 U.S.C.A. § 22 (Supp. 1954).
[40] Howell, The Copyright Law, 167 (1948).

authors.[41] The existence of this reciprocity is established by presidential proclamation and presently includes thirty-nine nations.[42] The weakness of this procedure lies in the multiplicity of laws and inadequate machinery for their enforcement. No better indictment of its utility can be found than in the fact that our publishers seek the protection accorded through the Berne Convention whenever possible, rather than taking the risk of relying on our own international agreements.[43] The dependence of protection requires familiarity with laws of thirty-nine countries, which is a precarious and monumental, if not impossible, task.[44] Notwithstanding the proclaimed countries, the United States had no reciprocal agreements with Bolivia, Bulgaria, China, Egypt, Yugoslavia, Liechtenstein, Persia, Turkey, USSR (including the former countries of Estonia, Latvia, and Lithuania), and Venezuela.[45] Authors of unproclaimed countries are not deprived of any opportunity for coming within the status of proclaimed nationals. They may obtain the privilege if domiciled in the United States at the time of first publication of the work.[46]

The requirements of proclamation, compliance with formalities and domestic manufacture, are not applied to nationals of fifteen Latin American nations which joined with the United States in the Buenos Aires Copyright Convention of 1910.[47] This treaty is similar in many respects to the Berne Union, however, it is closed to non-American countries. Pro-

[41] Stateless persons are also entitled to secure copyright on the basis of a proclaimed country. Houghton Mifflin Co. v. Stackpel Sons, 104 F.2d 206 (2d Cir. 1939), *cert. denied*, 308 U.S. 597 (1939).

[42] Argentina, Australia, Austria, Belgium, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Danzig, Denmark, Finland, France, Germany (West), Great Britain and Possessions, Greece, Hungary, India, Ireland, Israel, Italy, Japan, Luxembourg, Mexico, Monaco, Netherlands and Possessions, New Zealand, Norway, Palestine (excluding Trans-Jordan), Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Tunisia, the Union of South Africa. See 17 U.S.C.A. § 9 (Supp. 1955).

[43] Schulman, *op. cit. supra* note 5 at 144.

[44] NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE, 100, 105 (1945).

[45] 2 UNESCO COPYRIGHT BULL. 136 (No. 4, 1949).

[46] Leibowitz v. Columbia Graphophone Co., 298 Fed. 342 (2d Cir. 1923).

[47] 38 STAT. 1785 (1914), 17 U.S.C.A. § 9 (1914) (Supp. 1954). Ratifying

tection is obtained according to the copyright in the country of first publication. Upon publication, each copy of the work must contain notice that rights have been reserved.[48] All is not as cordial as might be imagined. Restrictions on imports by administrative and tariff agencies in Latin America have served the same ends as the manufacturing clause in the United States. Among members of the Buenos Aires Convention, copyright is acknowledged in member countries irrespective of the place of publication, and the rights provided are according to the copyright laws of the United States as well as those of the Buenos Aires Convention, without the necessity of complying with the United States formalities. However, there must appear on each work a statement indicating the reservation of copyright.[49] Protection cannot exceed that granted in the country where protection is sought. Thus, it has been held that the Convention does not protect the mechanical rights of authors. Article 4 states that "the rights granted to an author under this treaty are the exclusive power of disposing of his copyrighted work, of publishing, assigning, translating, or authorizing its translation and reproducing it in any form whether wholly or in part." The courts have construed this not to cover mechanical reproduction rights,[50] and protection against unauthorized recordings requires a separate presidential proclamation.[51] Duration is determined in the country of first publication, and, if published simultaneously in several countries, the country which fixes the shortest period of protection controls.[52]

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nations were Argentina, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Equador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, United States and Uruguay.

[48] Comment, 62 YALE L.J. 1065, 1071 (1953).

[49] Buenos Aires Convention of 1910, Art. 3. Set out in 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 1186 (1938).

[50] Todamerica Musica v. Radio Corporation of America, 171 F.2d 369 (2d Cir. 1948).

[51] 66 STAT. 752 (1952), 17 U.S.C.A. § 1 (e) (Supp. 1955).

[52] *Id.*, Art. 7. For brief resumé of United States law at time of the Universal Copyright Convention, see 5 UNESCO COPYRIGHT BULL. 79 (No. 1, 1952).

In 1946 an attempt was made to strengthen the Buenos Aires treaty. The United States participated, but has since failed to ratify because of the broad recognition given "moral rights." [53]

THE BERNE UNION

The nineteenth century witnessed profound changes in existing laws and conditions surrounding authors' rights. Considering the social and political unheavals prevalent during these times, it appears inevitable that literary and artistic property would cease to be a privilege of the ruling classes. Emancipated from the whim and caprice of patrons, authors were expected to support themselves by their own merits. Consequently, the demand for protection from the injustice of pirating assumed a more pressing personal interest. Due to their geographical proximity and greater emphasis on cultural arts,[54] this problem received the greatest attention among European nations. The primary center of contention was between French authors and Belgian publishers. Initially, France attempted to protect her authors by concluding separate agreements providing mutual protection for authors and publishers within the framework of bilateral treaties. As it had been impossible to conclude treaties controlling the pirating interests of Belgium and Holland, this approach met with little success. A new approach was initiated by the promulgation of the famous French Decree of 1852, whereby Louis Napoleon declared the piracy of any foreign work in France to be a crime, regardless of reciprocity. This progressive declaration rewarded French authors by enabling France to conclude over twenty treaties during the next ten years, including pacts with the traditional pirate nations, Belgium

[53] Inter-American Convention of 1946, Art. XI.

[54] Emerson, in *Apothegms*, Vol. III, 319 (1834): "We all lean on England; scarce a verse, a page, a newspaper, but is written imitation of English forms; our very manners and conversation are traditional, and sometimes the life seems dying out of all literature, and this enormous paper currency of Words is accepted instead."

and Holland. Meanwhile the first Congress of Authors and Artists met at Brussels in 1878,[55] forming L'Association Literaire et Artistique Internationale.[56] Under the leadership of Victor Hugo, increased pressure was generated for a "union of literary property" and successive annual meetings were held during the next three years. At their 1882 meeting in Rome the Association decided to convene a conference at Berne the following year for the purpose of adopting a program which would serve as a basis for an international agreement on copyright. The result was the birth of the Berne Union.[57]

The central theme of the Union is that any person publishing an original or artistic work in a member nation receives protection in other member nations against unauthorized reproduction on the same terms as are accorded nationals in the member nations.[58] Formalities were dispensed with, outside of those required by the member countries for their nationals.[59] Existing treaties, when they provided broader protection than granted by the Union, were expressly retained.[60]

The progressive attitude of the Union is attested by the subsequent revisions[61] enacted in Berlin (1908), Rome (1928), and Brussels (1948). Berlin yielded (1) expanded protection to include productions in the literary and artistic field (i.e., choreography, stage directions, geographical charts, plans, sketches, photos) and (2) complete abandonment of formalities as a condition precedent in all countries

[55] 1 LADAS, *supra* note 49 at 71.

[56] The official publication is designated *Bulletin de-l'association literaire et artistique internationale* and is published currently.

[57] The Union was initially signed by ten nations: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunis.

[58] Berne Convention of 1886, Art. II (1). For a text of the Berne Union see 2 LADAS, *supra* note 49 at 1123–34.

[59] *Id.* at 3, Art. II; Abel, *The Brussels Copyright Convention and Domestic Legislation*, 4 INT. AND COMP. L.Q. 336 (1954).

[60] Berne Convention, *supra* note 58, Art. XV.

[61] The Paris Revision of 1896 was merely a declaration of interpretation. Set out in LADAS, *supra* note 49 at 1135.

except the country of origin.[62] This latter provision extended protection to an author in all countries, except his own, notwithstanding that he made no effort to comply with any copyright formalities.

The Rome Convention of 1928 directed itself toward the expanding international problems created by radio broadcasting. Once again the definition of copyrightable works was extended to encompass lectures, addresses, sermons, and other oral literary efforts. Recognition was extended to "moral rights," [63] but legislation to determine enforceable limits was left to individual countries. The revisions in Article II recognized the exclusive right of authors to permit the communication of their works to the public by radio.

World War II interrupted the expansion and work of the Berne Union for almost twenty years. Finally, as the war clouds passed, thirty-four member countries met in Brussels on June 6, 1948. In the aftermath of a devastated Europe it seems incredible, even today, that so much was accomplished. Against this background, it is a tribute to their determination and dedication that the delegates were so deeply aware of their responsibilities to the cause of international harmony as well as their personal interests.

Before Brussels, protection depended upon the domestic laws of contracting members. For example, old Article II (3) stated, "Works of art applied to industry *are protected so far as the domestic legislations of each country allows.*" (Italics added.) Today Article II (4) reads, "Works mentioned in this article *shall enjoy protection in all countries of the Union.*" (Italics supplied.) This achievement, for the first time, provides a truly international statute as the source of protection. Uniformity exists as to works, Article II (9); per-

[62] Berlin Revision of Berne Convention Art. II (2) (1908). Set out in 2 LADAS, *supra* note 49 at 1138.

[63] Rome Revision of Berne Convention (1928). Article 6 recognizes a "right" of authors following assignment to object to any deformation, mutilation or modification prejudicial to their reputations.

sons, Article II (4); and period of protection, Article VII (1).[64] Disputes formerly dependent on domestic protection may now be brought by member states before the International Court of Justice.[65] Besides providing a ground for impartial trial, the International Court should make an immense contribution to uniformity of administration and adjudication of copyright laws among member countries. Furthermore, protection is now universally declared to exist during the life of the author plus fifty years after his death.[66] Recognition was extended to the protection of authors from radio, phonograph, and motion picture adaptions.[67] Today, the Berne Union stands like a colossus astride the field of international harmony and compromise. Uniformity in areas formerly considered irreconcilable was achieved. There can be little disagreement with Luther Evans' [68] observation:

> The very atmosphere of the Brussels Conference . . . illustrated the capacity of men of the mind and of the spirit for overcoming barriers in the realms of the intellect and arts which as yet prove less easily surmountable on economic and political fronts. . . . The foregoing was no small accomplishment nor one for which we need withhold our warmest praise.[69]

Notwithstanding that the United States provides niggardly protection to foreign authors and has remained inimical to the Union, our authors find it simple to obtain protection within the framework of the Berne countries.[70] The works en-

[64] For provisions of the Brussels Revision see 2 UNESCO COPYRIGHT BULL. 70–81 (No. 2–3, 1949). For summary of 1948 Revision see the Revisions of the Berne Convention at Brussels, 1 UNESCO COPYRIGHT BULL. 10 (No. 2, 1948).

[65] Brussels Revision of Berne Convention Article XXVII (1948).

[66] *Id.* Article VII (1) (1948).

[67] *Id.* Articles XI–XIV (1948).

[68] Chief Delegate of the United States to the Universal Copyright Convention and Librarian of Congress.

[69] Lecture delivered on the occasion of the 13th Boucher Memorial Lecture of the New York Public Library. Published 2 UNESCO COPYRIGHT BULL. 2 (No. 1, 1949).

[70] Members are Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Germany (West), Great Britain

titled to protection under the Berne pact are not only those first published in a "Berne" country, but includes those published simultaneously in other countries.[71] Publication has been liberally defined to mean merely offering copies for sale to the general public. Shrewdly taking advantage of this situation, United States authors and publishers have adopted the practice of sending copies of books or other published works to England or Canada and placing them on sale there simultaneously with their release in the United States. In this manner, a work published primarily for sale in the United States, with release of a few dozen copies simultaneously in Canada or Great Britain, provides the American author all the protection available in the Berne Union. Quite understandably, this "free ride" is a boon to American authors and publishers, who, entrenched behind the protection of the onerous manufacturing clause and the formalities obstacle, have nothing to fear from foreign interests. Naturally, Berne members resented the refusal of the United States to join Berne while wholeheartedly participating in the advantages of Berne protection. This dissatisfaction erupted into an additional protocol to the Berlin revision,[72] signed at Berne in 1914, and carried into Article 6 (2)–(4) of the Rome Revision of 1928. Under the revision, Berne members were permitted to restrict protection when a country outside the Union did not protect "in an adequate manner" the work of a Berne member. With this weapon of retaliation, it was hoped Amer-

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and Northern Ireland, Greece, Hungary, Iceland, India, Irish Free State, Israel, Italy, Japan, Lebanon, Liechtenstein, Luxembourg, Morocco, Monaco, Netherlands, New Zealand, Norway, Pakistan, Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Syria, Thailand, Tunisia, Turkey, Union of South Africa, Vatican City, and Yugoslavia. DROIT D'AUTEUR 105 (Jan. 15, 1953).

[71] Berlin Revision, Art. VI, *supra* note 62.

[72] Additional Protocol to the International Copyright Convention of Berlin Art. 1. The full text is found in LADAS, THE INTERNATIONAL PROTECTION OF ARTISTIC AND LITERARY PROPERTY, 1141 *et seq.* (1938).

ican interests could be persuaded to adopt less stringent prohibitions against foreign works,[73] but little retaliation ensued. There was, however, one exception. Following the general practice of sending a few copies to Canada for simultaneous release, American authors found Dutch courts refusing protection on the grounds that a bona fide publication had not been made under the Berne agreement. This situation was corrected in 1936, when the actual binding and distributing of several dozen copies was recognized by Dutch courts as fulfilling the Berne requirements.[74] Should retaliation succeed on any large scale, the loss to United States industry would be tremendous.

During the thirties repeated efforts were directed toward facilitating the United States' entry into the Union. President Roosevelt pledged legislation [75] and no less than seven separate bills were introduced in Congress between 1930 and 1941.[76] The opposition forces were spearheaded by the small but vocal printing interest who feared competition with the old political bugaboo: cheap foreign printing.[77] This group was aided by the radio and movie interests which were fearful that Berne's recognition of "moral rights" [78] would hamper the liberal alteration privileges that are a widespread practice in these industries. Normally friendly groups were often alienated by tacking controversial revisions of domestic law to the bills. For example, ASCAP fought the Berne proposal when that bill was joined with the repeal of Section

[73] SOLBERG, THE PRESENT INTERNATIONAL COPYRIGHT SITUATION, 10–17 (1934); COPINGER, LAW OF COPYRIGHT, 348 (Sixth ed. 1927).

[74] Discussed in *Saher, American-Netherlands Copyright Problems*, 1 WORLD TRADE L.J., 371 (1946).

[75] *Hearing before Committee on Foreign Relations on S. 1928, Pt. 2*, 73d Cong., 2d Sess. 57–8 (1934).

[76] Note, *Revision of Copyright Law*, 51 HARV. L. REV. 906 (1938) represents a contemporary picture of United States effort.

[77] *Hearings by Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 10–18, 21, 27, 89–91 (1934).

[78] See *supra*, note 63.

101(b) guaranteeing minimum damages for infringement.[79] This state of affairs prevailed on the eve of World War II. For a decade international copyright problems were to be neglected while the world turned to the affairs of war.

THE POSTWAR PROBLEM

The postwar literary world found itself pinned on the horns of a historical dilemma.[80] Dissatisfaction was widespread over the refusal of the United States and the other American nations to extend rights and privileges commensurate with those received from the Berne nations. Conversely, overseas demand was rapidly projecting the United States into the world's foremost exporter of copyrightable materials with valuable markets abroad. Neither a return to piracy or the existing laws afforded a satisfactory solution of the pressing problem. Consideration was given to attracting the Americas into Berne, but member countries refused to tolerate their own retrogression for the simple expediency of attracting the American countries. Experience rejected any theoretical solutions based on centralized authority. Uniform provisions or a superimposed international law had not been possible under the Inter-American agreements or the Berne Union until recently and the possibilities of acceptance seemed virtually non-existent. Corbett, in his informative and interesting work, "Law and Society in the Relations of States," characterizes this type of situation in the following words:

> In the absence of centralized authority, nothing approaching the regularity and predictability of national legal orders is to be expected in the international domain. Uncertainty and risk are the price that peoples pay for what still appears to them to be the advantages of 'sovereignty.' Given the conflicts of values that must be resolved before

[79] *Hearings before House Committee on Patents on Revision of Copyright Laws*, 74th Cong., 2d Sess. 39 (1936).

[80] See Chediak, *The Progressive Development of World Copyright Law*, 42 AM. J. INT. LAW 797 (1948).

a stable world society can be realized, it is not possible to dismiss all these advantages as illusory. Meanwhile such areas of social co-ordination as exist depend upon an active, but fluctuating and limited consensus.[81]

The solution, therefore, lay in evolving a constructive international union based on the administration of uniform international law, rather than basing it upon conflict of law theories. The beginning rested in determining a "common denominator" acceptable to the nations of the world.[82] Some principle of natural law, universally recognized, seemed imperative. This spark of uniformity blossomed first in Article 27 of the Universal Declaration of Human Rights approved by the United Nations General Assembly on December 10, 1948.[83] Meanwhile, the General Conference of UNESCO instructed the Director General to undertake a study of the copyright problem [84] by arranging a comparative and critical study of copyright existing in the various countries of the world. Reports and recommendations were prepared and subsequently reviewed by the Third General Assembly at Beirut in November of 1948. The following resolution was adopted: "UNESCO shall consider, as a matter of urgency, and with due regard to existing agreements, the problem of improving copyright on a world-wide basis." [85] Under the leadership of the UNESCO Committee of Experts and the affirmative approval of thirty-two nations, the possibilities of a new convention providing universal application for a maximum number of countries were explored.[86] The

[81] CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES, 86 (1950).

[82] De Sanctis, *A Universal Convention and a Minimum of Protection*, 3 UNESCO COPYRIGHT BULL. 71 (No. 1, 1950).

[83] U.N. Doc. A/811, Dec. 16, 1948. "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary, or artistic production of which he is the author." Set out in 43 AM. J. INT. L. (Supp.), 127, 132 (1949).

[84] Doc. 3C/110, 2 U.N. CONF. DOC. 29, resolution 6.7 (1948).

[85] Doc. 2C/132, 1 U.N. CONF. DOC. 17, resolution 2.4.1 (1947). Quoted in 1 UNESCO COPYRIGHT BULL. 2 (No. 1, 1948).

[86] For an illuminating examination of foreign author's problems, see Cas-

experts recommended that a "request for views" concerning the opinions of various countries be obtained. Early in 1950 this was done. Circumstances of this great task went beyond the usual conception of merely protecting the creator's possessory interests. In the words of François Hepp, Head of the Copyright Division of UNESCO, the purposes and objectives are as follows:

> Unesco has absolutely no intention of undertaking a learned, theoretical study of the problems involved, on a world-wide scale, in the legal protection of literary, artistic and scientific property. Nor does Unesco propose in any way to alter national internal laws, nor treaties in force, nor international conventions. . . . The one *aim* of Unesco is to arrange, under whatever form, a world wide modus vivendi which will assure the free flow of information, of ideas and of works. This aim we propose to accomplish in giving full consideration . . . to the legitimate interests of the public.[87]

In June of 1951 the efforts of UNESCO culminated in the "Draft of the Universal Copyright Convention." [88] The Inter-Governmental Conference for the Adoption of UCC met in Geneva from August 18 to September 6, 1952, when the provisions were discussed by fifty nations and fifteen international organizations.[89] At an appropriate ceremony forty nations expressed their approval of the Draft at the conclusion of the Conference.[90]

Obviously, instead of the traditional objectives, UNESCO justifies its work on the basis of a humanitarian public interest dedicated to the diffusion and accumulation of cultural information among all the peoples of the world. This principle represents a new approach to the problem, and embodies

tillo, *Copyright and the Use of Foreign Works*, 3 UNESCO COPYRIGHT BULL. 13 (No. 1, 1950).

[87] 2 UNESCO COPYRIGHT BULL. 4 (Nos. 2–3, 1949).

[88] Set out in 4 UNESCO COPYRIGHT BULL. 7 (No. 3, 1951).

[89] Report of Results of the Inter-Governmental Copyright Conference and text of the final Draft. 5 UNESCO COPYRIGHT BULL. 187 (Nos. 3–4, 1952).

[90] *Id.* at 188.

the genesis of a new concept of international enlightenment and co-operation. The twin objectives, universal acceptance and universal recognition of a minimum standard of protection, are still the guiding principles of the UNESCO effort. Article XVII states: "The Convention shall not abridge any legal right of protection derived from any existing multilateral or bilateral treaty." Thus, current obligations comprise no objection to UCC and in no way operate to derogate the rights of members of the Berne Union. The UNESCO survey of existing law pinpoints common ground for agreement and acceptance, with the intention of establishing accord among all nations relative to certain minimum standards of protection.[91] Upon this foundation enlargement of the scope of UCC will be developed in successive conventions.

It must be borne in mind that any universal agreement between the nations of the world would necessarily rest heavily on domestic legislation and encompass no revolutionary approach, but would be a rather inauspicious document in its inception. Contrary to the uniformly high standards developed by Berne, UCC rests heavily on the domestic laws of member countries. Since the international aspects of the problems raised by UCC are of pressing current interest due to its recent inception in this country, it is advisable that we scrutinize in some detail the provisions, placing emphasis on domestic considerations in the United States.

SCOPE OF UNIVERSAL COPYRIGHT CONVENTION

UCC extends to literary, artistic, and scientific works including "writings, musical, dramatic, and cinematographic works, and works of painting and sculpture." [92] The enumerated objects are not, however, limitations, but merely illus-

[91] See Schulman, *A Pattern for a Universal Copyright Convention*, 3 UNESCO COPYRIGHT BULL. 81 (No. 1, 1950).

[92] UCC, Art. I.

trations.[93] Thus the definition is left open for future expression and expansion. Among works suggested but not accepted for inclusion were oral works, works of architecture, and the "droit moral." Objection was made by the United States, as Article I of the Constitution uses "writings." [94]

Article II of UCC undertakes to extend national treatment to works originating in other nations on the same basis as protection given to a country's own nationals, subject to the exceptions of Articles III, IV, and V (formalities, duration, and translation rights). For example, UCC requires all members to protect a work published in another member country; however, nationals of *A* who publish in *B* and seek protection in *A* must still comply with *A*'s formalities.[95] Thus American authors cannot escape the manufacturing clause by publishing abroad. "Protection," as used in UCC and the United States, comprehends only the right of reproduction, translation and performance. Thus formalities relating to notice of use in licensing recordings must continue to be complied with regardless of UCC. Failure to do so constitutes a complete defense to any proceedings for infringement in this country.[96] Also recognized in some jurisdictions is the moral right or "droit moral," which is a perpetual right designed to protect the integrity of the author from any decebration of his works. A third type of right relates to the ownership in the traditional concept of corporeal ownership of a chattel. A fourth, "Droit de Suite," has no equivalent in English. It is said to permit the creator to share in the proceeds which change hands following repeated sales. For example, should an artist sell a painting for one hundred dollars and the painting were

[93] *Report of the Rapporteur-General*, 4 UNESCO COPYRIGHT BULL. 24 (No. 3, 1951).

[94] Notwithstanding the broad interpretation given "writings" under the Constitution, oral works, architectural designs, and the "droit moral" have not been recognized in this country.

[95] Art II, § 3.

[96] Mills v. Standard Music Roll Co., 223 F.849 (D.N.J. 1915) *aff'd*, 241 Fed. 360 (3d Cir. 1917). 63 STAT. 154 (1949), 17 U.S.C.A. § 1(e) (Supp. 1955).

later to be sold for one thousand dollars, the artist would be entitled to a percentage of the appreciation value received by the first purchaser. French in origin, this right is recognized in the domestic laws of Belgium, Czechoslovakia, Poland, Uruguay, and Italy. While the "monopoly of exploitation" is solely recognized in UCC, it seems probable that other protective "rights" will receive recognition soon.[97]

The foregoing exceptions created extensive debate and discussion, but as onerous as they appeared to Berne members, a universal ratification would have been impossible without them.[98] The duration problem has long been a controversial subject and UCC was no exception. The final draft is unduly complicated, but was supported as presenting a reasonable compromise agreeable to all members.[99] The rules of duration are best understood by a systematic breakdown of the propositions involved.

A. The duration shall be in accordance with the law of the state in which protection is claimed. This simply means duration shall be determined by the domestic law of the country of origin. When publication takes place in two contracting nations within thirty days it shall be treated as the first published in the state affording the shortest term.[100]

B. Notwithstanding "A," general protection under the convention shall not be less than the life of the author and twenty-five years after his death, except however, countries that compute a class of works from the basis of first publication may continue to do so if the term of protection be not less than twenty-five years from publication. Propositions "A" and "B" are not mutually exclusive, and certain classes of works may fall in either. For example, a country which measures duration by the author's life must extend protection for a minimum of twenty-five years after his

[97] See Recht, *Has the "Droit de Suite" a Place in Copyright,* 3 UNESCO COPYRIGHT BULL. 51 (No. 1, 1950).

[98] *Rapporteur, op. cit. supra* note 93 at 49–50.

[99] *Id.* at 52.

[100] UCC Article 4 (6) apparently fails to deal with the situation in a country where first publication is in a non-UCC country and second publication follows in a member country.

death, while in the United States protection cannot last beyond fifty-six years. Protection in a country for writings may be under "A" while oral works may be under "B."

C. Where a comparison of terms exists, a member state need not protect a class of work longer than the time fixed in the country of origin. Protection in member countries exists only for the term recognized in the country of origin. However, if the work is recognized as published, failure to comply with domiciliary formalities will not preclude protection in member nations for the duration of the country of origin had the requisite formalities been complied with.[101]

It must be noted that the Convention will have no retroactive effect following ratification.[102] This is due primarily to agitation by American interests, principally in the United States.[103] Consequently, radio, television and movie interests will not be required to pay royalties to foreign authors so long as the party reproducing the work acted before ratification. This represents a concession designed to make acceptance more palatable to the United States.

Compliance with formalities were held to a minimum. Adherence to domestic requirements has been retained,[104] but protection in member countries [105] is assured by compliance with a simple provision at the time of publication. In a conspicuous place affix:

1. The symbol ©,
2. Name of copyright owner,
3. Year of first publication.[106]

Publication, as defined in Article 4, is considerably more restricted than the Berne conception or the generally accepted common law definition. "Publication" as used in UCC means *the reproduction in tangible form* and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived, and has been criticized. One

[101] *Rapporteur, op. cit. supra* note 93, at 52. [102] UCC Art. VII.
[103] *Rapporteur op. cit. supra* note 93, at 55–6.
[104] UCC Art. III (2). [105] UCC Art. VI. [106] UCC Art. III (1).

authority [107] believes the words "reproduction in tangible form" to be deliberately chosen, and publication may be presumed to exist where only a few copies have been printed and placed in public libraries without actually having been exposed for sale.

Obviously, the intent of the drafters was to withdraw any considerations based on the Berne rule that audible performance constitutes a publication of the work. Primarily due to United States insistence, a phonograph performance or broadcast is not "publication" under UCC. The oral works and record exclusion indicates recognition of United States domestic law plus a realization of the practical difficulties involved in unnecessary alienating influential potential supporters in the United States.[108] The ironic result is that movie film may be protected through UCC but the sound track cannot.[109]

Unpublished works are protected by UCC without any formalities.[110] The scope of protection is determined by reference to the legal means existing for the protection of the contracting country's nationals. Thus, common law protection accorded American authors will be determined in France by reference to French law.[111] Stateless persons or political refugees may be protected if their country is a member notwithstanding residence in a non-member country. Under urging by the United States,[112] domiciles in a member country are

[107] Honig, *International Copyright Protection the Draft Universal Copyright Convention of Unesco*, 1 INT'L COMP. L.Q. 217, 221 (1952).

[108] Note, 62 YALE L.J. 1087 (1953). A broadcast or performance is not considered publication. Ferris v. Frohman, 223 U.S. 424 (1912); Uproar Co. v. National Broadcasting Co., 8 F. Supp. 358 (D. Mass. 1934), *modified* 81 F.2d 373 (1st. Cir.), *cert. denied* 298 U.S. 670 (1936). See Note, *Copyright Aspects of Sound Recordings*, 26 So. CALIF. L. REV. 139 (1953).

[109] Honig, *op. cit. supra* note 107, at 221.

[110] UCC Art. III (4). In the United States only common law protection is available. Statutory protection of unpublished works necessitates registration as in the past. 5 UNESCO COPYRIGHT BULL. 50 (No. 3, 1952).

[111] UCC Art. II (2).

[112] *Rapporteur, op. cit. supra* note 93 at 48.

treated as equivalent of nationals for the purpose of compliance with formalities.[113] A joint proposal by France, the Netherlands, Sweden, the United Kingdom, and the United States was incorporated in Protocol I annexed to UCC.[114] In substance, it requires that refugees and stateless persons be accorded identical protection with nationals of the country of their residence.

Reservations are expressly forbidden under Article XX. Some countries urged the admission of reservations, as under the Berne pact, to facilitate ratification. Conversely, an equally representative group urged that the acceptance of reservations would destroy the universal character of the convention and, therefore, should not be permitted. In view of the minimal character of the provisions and the compromise previously effected, the proposal against reservations has prevailed. Japan pointed out [115] that the reservations on translation retained by members of the Berne Union would necessarily be changed by UCC, thus making ratification by Japan impossible.[116] Extensive debate followed in an attempt to effect a solution acceptable to Japan. It was finally declared that a state [117] which was a member of the Berne Union (with reservations regarding translation rights) and of the UCC could also fulfill its obligations under UCC toward fellow members not belonging to the Berne Union if it applied to the works of such states the full translation protection under UCC Article V. With regard to the reservations permitted under Berne, Japan could continue to operate under Berne provisions with Berne members, notwithstanding the greater protection given under UCC. For example, Japan may translate works of Berne countries after ten years regardless of the translation requirements. However, with respect to

[113] UCC Art. II (3). [114] *Rapporteur, op. cit. supra* note 93 at 39.

[115] Japan reserves translation rights after ten years under Berne Convention of 1886.

[116] *Rapporteur, op. cit. supra* note 93 at 65. [117] *Ibid.*

non-Berne countries like the United States, Japan must give full credit to the UCC provisions. This quirk is exceptional in two respects. First, it is an exception to the anti-reservation Article XX, and second, it represents one of the very few cases where UCC protection exceeds that available under the Berne Union. With this construction as a precedent, it seems apparent that reservations permitted by the Berne agreement will be respected between Berne countries. Otherwise, the anti-reservation article appears controlling. Another exception to Article XX exists in Article XXII. When depositing its instrument of ratification, a state may provide that in relation to any other named state the UCC provisions shall not come into operation until that state has deposited its own instrument of ratification.

In all other respects, Berne protection appears to be more extensive and elaborate. Consequently, many delegations from leading countries of the Berne Union expressed alarm lest some Union members denounce Berne for the less stringent measures of UCC.[118] Therefore, steps were taken to insure continued operation and adherence to Berne.[119] These means consisted of embodying Article XVII proclaiming that UCC shall not in any way affect provisions of the Berne Union. An additional Declaration was annexed and incorporated by reference in Article XVII (2) and acceptance implied by ratification of UCC. In substance, the Declaration withdraws UCC protection from any country in the Berne Union should that country withdrawn from Berne subsequent to January 1, 1951. In this manner, any temptation to withdraw is lessened.

Since United States authors' rights abroad will be affected very little, opposition to the ratification of UCC could find

[118] *Rapporteur, op. cit. supra* note 93, at 62.

[119] See Resolution adopted at 45th Congress of International Literary and Artistic Association. 5 UNESCO COPYRIGHT BULL. 42 (No. 2, 1952). Also Resolution of Meeting of Copyright Experts of American Republics. 5 UNESCO COPYRIGHT BULL. 56 (No. 1, 1952).

little objection on this ground. UCC determines the protection of foreign authors using as a measure the protection given to nationals of member countries. By leaving substantive protection dependent on domestic legislation, little possibility exists for equal protection between signatories. Consequently, our authors are invariably assured of greater protection abroad than is accorded under United States domestic law. For example, contrary to policy in the United States, all Berne countries and most Latin American nations extend protection to an author's "droit moral," [120] and production and performance rights.[121] Since authors are entitled to treatment identical with that accorded nations, United States authors will receive benefits exceeding the protection granted foreign authors in this country.

The present protection achieved through simultaneous publication in a Berne country is not abridged by UCC since no changes were made in Berne protection.[122] Protection of American authors in countries outside Berne, under the Buenos Aires Convention, or under UCC, will of course be nonexistent.

Under UCC foreign authors of member states will receive protection in the United States comparable only to that accorded our nationals. As previously pointed out, foreign authors will receive less substantive protection here than they would generally be entitled to under their own laws,[123] but the procedural barriers here will be considerably weakened. No longer will the registration or deposit of copies in the Copyright Office be required. The formidable manufacturing clause will have no application with respect to foreign authors, consequently English publications printed abroad will stand on an equal plane with domestic publications. The necessity for bilateral treaties or presidential proclamations is no more. The UCC notice requirements are relatively sim-

[120] See 2 UNESCO COPYRIGHT BULL. 58–67 (Nos. 2–3, 1949).
[121] *Rapporteur, op. cit. supra* note 93 at 46–7.
[122] UCC Protocol I.
[123] *Supra* p. 5 *et seq.*

ple, and will afford no problem in compliance. In comparison with the copyright duration granted to foreign authors, the United States has the shortest fixed term: fifty-six years counting renewal.[124] Consequently, foreign authors will generally find that their copyright will expire first in this country since the shortest term between the publishing or protecting nation governs.[125]

Nationals of countries outside the framework of UCC, Buenos Aires, or presidential proclamation will continue unrecognized for copyright protection in this country. The only method by which a national of non-participating countries may become covered by United States copyright would be to reside within the boundaries of a member of UCC. In this manner the author may obtain coverage under UCC. Berne protection is much easier, requiring only publication within a Berne country regardless of the nationality of the author.

With UCC constituting the present law in the United States, several changes have become evident in the copyright statute with respect to nationals of nations belonging to UCC.[126]

1. Repeal of the manufacturing clause and its penalty provisions with respect to publications made outside the United States by non-residents of the United States.[127]
2. Repeal of the obligatory deposit requirements of the first sentence of section 13 and the penalty provisions of section 14.[128]
3. Repeal of the requirement in section 1(e) that a foreign state or nation must grant to United States citizens mechan-

[124] 61 STAT. 652 (1947), 17 U.S.C.A. §§ 24–5 (Supp. 1955). It should be noted that protection in the United States is initially granted for twenty-eight years. A renewal for twenty-eight years requires compliance with United States formalities of registration since Art. III (5) authorizes contracting states to reinstate their formalities requirements in renewal situations.

[125] UCC Art. III.

[126] 68 STAT. 1030 (1954), 17 U.S.C.A. § 9(c) (Supp. 1955).

[127] 63 STAT. 153 (1949), 17 U.S.C.A. § 16, 17, 18 (Supp. 1955).

[128] 61 STAT. 652 (1947), 17 U.S.C.A. § 13 (Supp. 1955).

ical reproduction rights and the requirement of a special presidential proclamation for protection of mechanical reproductions.[129]

4. Repeal of the formalities of registration and notice.[130]
5. Repeal of the import prohibitions of section 107, whereby importation of materials manufactured abroad in violation of the manufacturing clause is prohibited.[131]
6. Relaxation of the manufacturing clause whereby United States residents may now import 1,500 copies of English language books first published abroad and secure protection under the *ad interim* provisions.[132]

Attention is directed to the specific language in section 9(c) which states that all works first published in the United States regardless of the nationality of the author and all works of United States authors wherever published must continue to comply with domestic requirements existing prior to the UCC. Thus there is little change insofar as our resident authors are concerned.

OBJECTIONS TO UNIVERSAL COPYRIGHT CONVENTION

Traditionally, our participation in any undertaking involving recognition and cooperation with foreign powers prompts widespread criticism and disapproval. Since UCC required partial destruction of this traditionally sacred cow, the manufacturing clause, it was inevitable that modern Davids, with great hue and cry would rise to battle the Goliaths of "black-bread labor" underselling the United States worker.[133] When placed under the microscope of factual analysis, much of this argument shows itself to be fallacious. In the first place, UCC

[129] 66 STAT. 752 (1952), 17 U.S.C.A. § 1(e) (Supp. 1955).
[130] 61 STAT. 652 (1947), 17 U.S.C.A. § 10, 11, 19, 20 (Supp. 1955).
[131] 61 STAT. 652 (1947), 17 U.S.C.A. § 107 (Supp. 1955).
[132] 68 STAT. 1030 (1954), 17 U.S.C.A. § 2(c) (Supp. 1955).
[133] *Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 4059*, 82d Cong., 2d Sess., 69–82 (1952).

does not require any change in domestic law relating to nationals of any country. Section 9(c) still requires our nationals to print their works within the United States. Past experience has shown the general practice among foreign publishers to be one of making arrangements for printing in this country irrespective of the manufacturing clause. This is so for two reasons: first, European equipment is not adapted to the large scale press runs common in this country;[134] second, while the printing expense per copy declines as the number of copies increases, the expense of shipment for each copy tends to remain constant.[135] For these reasons, a large edition will invariably be run in the United States when distribution is intended here.[136] Assuming the foregoing analysis to be correct, it appears unlikely that UCC will injure United States printers.

Another major objection is based on the possibility of restriction of information[137] now available from the USSR and Soviet satellite countries.[138] Since Iron Curtain countries forbid the exportation of books, their joining UCC would prevent reprinting Soviet publications here and thus restrict distribution of information. The situation is especially dangerous where copyrighted news items are concerned, because all news is controlled by official government news agencies. Since the Soviet government controls all the sources of news, a copyrighted news story would virtually gag all subsequent releases in this country.[139] The answer to this theoretical criti-

[134] *Id.* at 159. For example, 8,000 volumes are usually needed in the United States for a profitable press run.

[135] *Id.* at 181–185.

[136] *Id.* at 177–181.

[137] Discussed in Warner, *The Unesco Copyright Convention*, 52 WIS. L. REV. 493, 500–506 (1952).

[138] Satellite countries with Berne: Bulgaria, Poland, Hungary and Czechoslovakia. DROIT D'AUTEUR 1–5 (January 15, 1953). No Iron Curtain countries have ratified the Brussels revision of 1948.

[139] Cf. International News Service v. Associated Press, 248 U.S. 215, 244 (1918). A news agency may utilize another news story only for leads. Without independent investigation and verification no legitimate use can be made of a news story.

cism rests in the realm of practicality. In previous copyright treaties and conventions Russia has conspicuously avoided any participation.[140] Furthermore, Russian domestic law renders impossible compliance with the translation provisions of UCC requiring payment of royalties. Article 107 of the Penal Code of the Russian Socialist Federal Soviet Republic states, "The purchase or resale by private persons for gain . . . of any article of mass consumption entails deprivation of liberty for a period of not less than five years and confiscation of goods in whole or in part." Chaffee [141] reports that an English writer was denied royalties on his work because "royalties to capitalists are contrary to proletarian principles." It has been taught under the Soviets that there is a basic contrast between their system and that prevailing in the Western world, that other states have been striving for the encirclement of the Soviets and consequently the Soviet economy will develop in opposition to capitalistic countries.[142]

Furthermore, the United States government would be in a position to publish anything it wishes, as Section 8 of the Copyright Statute exempts the government from copyright infringement.[143] Thus, reprints of originals or translations would be permissible. Additionally, there is little likelihood that a product of the Communist press would be restricted considering its propaganda value. On the basis of the foregoing there would seem to be little substance to the contention of Professor Warner [144] that UCC would result in cutting off the free world, in particular the United States, from vital information. On the contrary, I submit that UCC would furnish the opportunity for cultivating contacts and exchange of information with the literary and cultural elements behind

[140] 2 UNESCO COPYRIGHT BULL. 152 (No. 4, 1949).

[141] Chaffee, *op. cit. supra* note 9 at 523.

[142] Rashba, *Commercial Dealings with USSR*, 45 COL. L. REV. 530 (1945).

[143] 65 STAT. 716 (1951), 17 U.S.C.A. § 8 (Supp. 1955). Du Puy v. Post Telegram Co., 210 Fed. 883 (3d Cir. 1914).

[144] Professor of Law, Harvard Law School, 1929–45, U.S. Registrar of Copyrights, 1945–51.

the Iron Curtain . . . an opportunity that might otherwise be unavailable.

Perhaps the ultimate controversy underlying the opposition has simply been based on a policy decision respecting the desirability of international literary piracy as a worthwhile social and economic philosophy. Literary piracy is far from a dead issue. No copyright presently exists in Albania, Burma, Korea, Iraq, Nepal, and Ethiopia among others.[145] Regardless of the depressing effect piracy has upon creation, it is defended on the grounds of being the best available method of widespread dissemination of published works.[146] Philip Wylie minces no words in chastising this policy.

> Indeed, such is the unconscious hostility of the mob towards the fruits of intelligence that, not long ago, a group of representatives . . . endeavored to do away with copyright altogether on the grounds that what a man thought and wrote down, or what he felt and painted, belonged free of charge to the whole people: noneconomic, since it was art. To such men as these, only junk fabricators, gadgeteers, tram operators, pop bottlers, and the like are entitled to the best profit for their contribution to life. History will note the fact when history writes how American avarice held in open contempt all culture and all thought, decerebrated itself and so died headless.[147]

NEW DIRECTIONS

In today's world crisis, copyright plays a more decisive part than may be evident upon a cursory examination. The struggle has not been confined to military or economic objectives, but more than ever before is a crucial battle for the minds of men. "Brainwashing" and thought control have become household words. Still, behind the façades of a cold war, major engagements are being waged. Two ideologies have become locked in a conflict that may last for many years. While the guns are stilled, at least temporarily, the weapons

[145] 2 UNESCO COPYRIGHT BULL. 13 (No. 2–3, 1949).

[146] Warner, *op. cit. supra* note 137 at 508. Query: But might not publishers be loath to print works that in turn could be pirated?

[147] WYLIE, OPUS 21, 13 (1949).

of words, pictures, and sounds are being constantly utilized throughout the world. If the free world is to successfully expound its political, social, and economic doctrines an essential requirement will be maximum efficiency in stimulating the propagation and distribution of the keys to man's intellect. Copyright, in dealing and prescribing the legal relations between nations, goes beyond the rights of the parties and raises the fundamental questions of our day: monopoly, personal initiative, equality of opportunity, control, freedom of thought and speech. Obviously, copyright is in a position of great propensity for good or evil. Properly administered it becomes a formidable weapon; misunderstood it becomes an Achilles heel. To enable the United States to pursue the former course necessitates less emphasis on national interests and more on a readiness to discuss issues and principles with a view to conciliation and compromise. UCC is concerned with matters of collective rather than individual interest, and as such must require the presence and active support of all nations subscribing to and practicing the Declaration of Human Rights. By encouraging all nations in a broad intellectual exchange, copyright will create better understanding and consequently more favorable conditions for peace. To overcome the obstacles preventing free exchange of information, ideas, and knowledge is now a task of copyright. To achieve this goal, we must regulate international laws on a basis of common principles and be constantly alert to subsequent improvement. In the Jefferson Day address that Franklin D. Roosevelt prepared for delivery shortly before his death, he said that ". . . if civilization is to survive we must cultivate the science of human relationship—the ability of all peoples of all kinds to live together and work together in the same world at peace. . . ." Copyright compromise as epitomized by UCC is a vital aspect of this "science," a goal for which peoples everywhere must strive.

Depreciation and Income Aspects of Copyright Under the Internal Revenue Code of 1954

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IN ACTUALITY, only a minute portion of all taxation legislation passed in the United States has been directed solely at copyrights or at income derived from their exploitation. Yet, owners of copyrights or various rights thereunder have found themselves, and their Internal Revenue agents, in a quandary as to how the ordinary tax laws apply to such property and its income. Some problems, such as that of depreciation, have been solved simply by a careful application of the revenue law itself. Others, including chiefly the problem of categorizing the receipts derived from a copyright, have been resolved in part by corrective legislation and in part by court decisions. In addition, instances where the birth of a copyright and its income came after extended periods of gestation have often introduced inequities due to the progressive tax rates.

The Internal Revenue Code of 1954 was passed for the purpose of gathering, clarifying, and amending the vast outgrowth of taxation law conceived by Congress and the courts. In the field of copyright, as in all other areas of revenue production, the Code has in part inserted entirely novel provisions, altered many sections, and substantially reenacted still others. The purpose of this article is to cull from the revenue law those provisions applicable to copyright and to air them in their present-day light.

DEPRECIATION

Section 167(a) of the 1954 act provides, "There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear (including a reasonable allowance for obsolescence) (1) of property used in the trade or business, or (2) of property held for the production of income."

There seems to be no question that a copyright, falling generally within the definition of an "intangible," is subject to the depreciation allowance of the above section. An Income Tax Unit Ruling as early as 1922 stated that the deduction could be taken under the revenue acts of 1918 and 1921.[1] The 1954 regulations provide, at Section 167(a)–3.:

> If an intangible asset is known from experience or other factors to be of use in the business or in the production of income for only a limited period, the length of which can be estimated with reasonable accuracy, such an intangible asset may be the subject of a depreciation allowance. Examples are . . . copyrights. An intangible asset, the useful life of which is not limited, is not subject to the allowance for depreciation. No allowance will be permitted merely because, in the unsupported opinion of the taxpayer, the intangible asset has a limited useful life. . . .

The expense of publishing a copyrighted text in book form, where the author pays all the publication costs and sells the books himself, is not subject to a depreciation deduction. Such capital is a part of the cost of certain books, which are for sale in the ordinary course of business and therefore should be returned when those books are sold. A part of the expense incurred should be apportioned to each book in the edition, and the price received from the sale of each book, less the expense so apportioned to it, should be returned by the author as profit.[2]

As indicated by the regulation, the taxpayer must be in

[1] I.T. 1287, I-1 Cum. Bull. 28 (1922). [2] I.T. 1287, I-1 Cum. Bull. 28 (1922).

a position to show that the copyright is "property" to which the allowance can apply. In *Taylor v. Commissioner*,[3] the taxpayer attempted to take the deduction for depreciation on his copyrighted plan to increase classified advertising for newspapers. The taxpayer refused to divulge the details of the plan, as apparently the only value therein was in its remaining secret. The deduction was denied.

The Code allows the use of several methods of calculating the depreciation deduction, including the straight line, declining balance, and sum of the years-digits systems, as well as "any other consistent method" subject to certain limitations.[4] However, none but the straight line system may be used in depreciating copyrights, as Section 167(c) states the others mentioned ". . . shall apply only in the case of property (other than intangible property) described in subsection (a). . . ." Under the straight line method, the cost or other basis of the property, less its estimated salvage value (there would be no salvage value in a copyright after its expiration), is deducted in equal annual amounts over the period of the estimated useful life of the property. For example, a $55,000 asset, with a five-year useful life and a salvage value of $5000, would be depreciated at the rate of $10,000 per year.

The period over which the deduction may be taken causes no appreciable problem. If the useful life of property can be determined, that period must be used. If such is impossible to calculate, as it might well be in the case of a copyright, its useful life still may "be estimated with reasonable accuracy" as required in the regulation. Since the life of a copyright in the United States is twenty-eight years from the date of first publication,[5] this period would appear to be proper to use. Copyrights, however, may be renewed for a further period of twenty-eight years,[6] and apparently the principles applica-

[3] 51 F.2d 915 (3d Cir. 1932).
[4] Section 167(b).
[5] 61 STAT. 652. 17 U.S.C.A. § 24 (1947).
[6] *Ibid.*

ble to leases with an option to renew apply. Treasury Decision 4957 [7] states in this connection:

> . . . the matter of spreading such depreciation . . . over the term of the original lease, together with the renewal period or periods, depends upon the facts in the particular case. As a general rule, unless the lease has been renewed or the facts show with reasonable certainty that the lease will be renewed, the cost or other basis of the lease . . . shall be spread only over the number of years the lease has to run, without taking into account any right of renewal.

Section 1.167(a)–6 of the regulations provides, "If a . . . copyright becomes valueless in any year before its expiration the unrecovered cost or other basis may be deducted in that year."

Calculating the basis upon which a copyright is to receive a depreciation deduction involves no special law, but merely an application of the Code as directed to other forms of assets. Section 167(f) of the Code states that the basis is that provided in Section 1011 for the purpose of determining gain on sale or other disposition of property. The latter provision requires the basis to be figured according to Section 1012, which states that such basis shall be the cost of the property, unless otherwise provided, adjusted under Section 1016. Regulation Section 1.167(a)–6 announces, "The cost or other basis of a . . . copyright shall be depreciated over its remaining useful life."

". . . [The copyright's] cost . . . includes the various Government fees, . . . attorneys' fees, and similar expenditures," states Section 1.167(a)–6 of the regulations. The cost of a copyright to the author consists of his actual capital outlay in securing it, including the cost of producing the work covered by the copyright, but it does not include any amount representing the value of the author's time and labor.[8] The cost of producing and copyrighting the text of a book is the cost of a capital asset or property, and because of the mo-

[7] 1939–2 CUM. BULL. 87.

[8] O.D. 996, CUM. BULL. 155 (Dec. 1921).

nopoly secured under the copyright, the owner has an increased value for any edition of his book published during the copyright period. The cost of this capital asset may be returned to the owner through his depreciation allowance.[9]

Regulation 118, § 39.23(1)–7, under the 1939 Code, added to the cost factors stated above "development or experimental expenses, etc., actually paid." However, the section of the new regulations just mentioned provides that these expenses are presently to be omitted in determining one's basis for depreciation and treated as a separate deduction under Sections 174 and 106 relating to research and experimental expenditures. Under these sections, a deduction is allowed for research or experimental expenditures paid or incurred in connection with one's trade or business if not charged to capital account.[10] If the allowance is not taken in this manner, and if the expenses are chargeable to capital account (except if an allowance is available under the regular depreciation or depletion deduction provisions), the expenditures can be treated as deferred expenses and allowed as a deduction ratably over a period of not less than 60 months as selected by the taxpayer.[11] However, under the latter alternative, an adjustment to basis must be made to the extent of a deduction so taken, under certain circumstances.[12] Prior to the enactment of Section 174, the Commissioner's policy was to allow deduction of research and development expenditures where the practice of the taxpayer under his established method of accounting was to charge such items to expense.[13]

As to an estate, trust, or legatee holding a copyright previously owned by a decedent, the value of the property is determined as of the date of decedent's death.[14] The basis for

[9] I.T. 1287, I-1 CUM. BULL. 28 (1922).
[10] Section 174(a)(1).
[11] Section 174(b)(1).
[12] Section 1016(a)(14).
[13] 2 P-H 1954 FED. TAX SERV. § 11,095.
[14] Section 1014(a): ". . . the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the

determining gain on a sale of property in such a case is stated in Section 1014, and, as Section 167(f) provides, this basis is to be used in calculating the depreciation deduction. Such a provision allows a deduction for depreciation even though the property cost the taxpayer nothing.

Section 1053 provides:

> In the case of property acquired before March 1, 1913, if the basis otherwise determined under this part, adjusted (for the period before March 1, 1913) as provided in section 1016, is less than the fair market value of the property as of March 1, 1913, then the basis for determining gain shall be such fair market value.

This provision may well apply today in the case of a copyright which has been renewed, as the second twenty-eight-year period, in reference to the above section, could last until 1969. The allowance will often result in a saving to the taxpayer due to an increased depreciation deduction.

CAPITAL EXPENDITURES

The 1954 Code provides [15] that certain deductions are not to be allowed, including those stated in Section 263: "(a) No deduction shall be allowed for—(1) Any amount paid out for . . . permanent improvements or betterments made to increase the value of any property. . . ."

The section holds that expenditures which increase the value of property are not permitted to be claimed as expense deductions. These capital items are treated as permanent investments to be added to the cost basis of the property and charged off by the depreciation or obsolescence deductions.

The 1939 regulations applicable to the comparable section in the old Code stated, "Amounts expended for securing a copyright and plates, which remain the property of the person

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decedent's death by such person, be the fair market value of the property at the date of the decedent's death. . . ." See also Section 2032.

[15] Section 261.

making the payments, are investments of capital." [16] Apparently no new pronouncements on this topic have been made.

Therefore, the cost of obtaining a copyright can be returned only through the depreciation deduction and not as a business expense.

INCOME AND CAPITAL GAINS TAXES

Royalties received under a copyright are taxable by the ordinary income provisions of the Internal Revenue Code. Section 61(a)(6) expressly so provides.

A great deal of litigation has arisen over the problem of whether certain payments received by the holder of a copyright can be classified as a capital gain and therefore be subject to reduced taxation. As will be discussed later, the mass of conflict evolving from such claims has been conclusively settled by the addition of Section 1221(3) into the 1954 Code. However, as the problem may still arise in certain connections, also to be analyzed later, a summary of the law on the subject remains relevant.[17]

The cases involved have arisen chiefly in two connections; the ordinary application of the capital gains tax to the particular income, and whether the income was a capital gain so as to exempt it in certain cases from taxation to a non-resident alien author not doing business in the United States.[18]

In *Goldsmith v. Commissioner*,[19] the court held that a perpetual assignment of the exclusive world-wide motion picture rights in a copyrighted play was not a sale of the copyright

[16] Internal Revenue Reg. 118, § 39.24 (a)-2.

[17] Gitlin, *Taxation of Copyright*, 27 TAXES 503 (1949); Swartz, *Authors and the Federal Income Tax*, 26 TAXES 51 (1948); Casey, *Sale of Patents, Copyrights and Royalty Interests*, 7 INST. ON FED. TAX. 383 (1949); Fincke, *An Analysis of the Income Aspects of Patents, Copyrights, and Their Analogues*, 5 TAX L. REV. 361 (1950); Whitley, *Copyrights and the Income Tax Problem*, FOURTH COPYRIGHT LAW SYMPOSIUM 159 (1952).

[18] Section 861(a)(4) [1939 Code § 119(a)(4)]; Section 871(a)(1) [1939 Code § 211(a)(1)(A)]; Section 1441(c) [1939 Code § 143(b)].

[19] 143 F.2d 466 (2d Cir. 1944).

such as to make the income therefrom taxable as a capital gain. The court held the income was subject to the ordinary income rates. The cases involving the non-resident alien aspect of the problem have been more numerous. In *Sabatini v. Commissioner*,[20] the taxpayer had granted exclusive world right to produce motion pictures for a limited time based upon certain of his works and had received a lump-sum payment. The court held no sale was made, but merely a limited license. The receipts were determined to be a royalty paid in advance, the lump-sum payment rather than the more common royalty arrangement not affecting the substance of the transaction. Other cases have followed this decision.[21] In *Rohmer v. Commissioner*,[22] non-resident aliens sold an American company the exclusive and perpetual American and Canadian serial rights in their manuscript for a lump-sum payment. In following the earlier cases mentioned, the court held that since the rights given were only in a limited territory, the transfer was of less than the whole and, therefore, a license. The lump-sum payment did not change the nature of the dealing. The court distinguished several cases in which virtually all of the rights in patents were transferred so as to make their transfer a sale.[23] Finally, in *Commissioner v. Wodehouse*,[24] the Supreme Court held taxable the receipts from an arrangement whereby the purchaser bought several stories from a non-resident alien and agreed to copyright them. After publication, all rights, except American serial rights, were to be reassigned to the author. The court found, notwithstanding the ruling by the circuit court that business practice gave effect to transfers of separate rights as sales, that legis-

[20] 98 F.2d 753 (2d Cir. 1938).

[21] Estate of Marton, 47 B.T.A. 184 (1942); Ehrlich v. Higgins, 52 F. Supp. 805 (S.D.N.Y. 1943).

[22] 153 F.2d 61 (2d Cir. 1946).

[23] General Aniline and Film Corp. v. Commissioner, 139 F.2d 759 (2d Cir. 1944); Commissioner v. Celanese Corp. of America, 140 F.2d 339 (App. D.C. 1944).

[24] 337 U.S. 369 (1949).

lative history and past decisions disclosed a policy to make the receipt of copyright rentals and royalties subject to taxation. Again, lump-sum payments were not regarded as capable of altering the grant of a license to a sale.

The result of these cases seems to be that the transfer of a particular or limited right in copyrighted material, rather than the entire "bundle of rights," is not a sale, but only a license, with the receipts thereunder being taxable as ordinary income, regardless of whether the payments are made in installments or in a lump sum.[25]

However, in 1952, the rule of "one bundle" in the copyright field took a healthy side step when the case of *Herwig v. United States*[26] came before the U.S. Court of Claims. The controversy involved a claim by Kathleen Winsor for a partial refund of taxes arising out of a transaction regarding her famous novel, *Forever Amber*. The author had sold the exclusive motion picture rights in the book to a film company, whereupon the purchase price of $165,000 was taxed as royalties for the grant of a license, following previous decisions. The judges considered the statements of the circuit court in the *Wodehouse* case to the effect that the business practice was to buy and sell the various rights under a copyright as separate and distinct "goods," as well as Judge Learned Hand's repudiation of the "one package rule" in his dissent to the ruling of the *Goldsmith* case, and similar problems in the field of patent and tradmark law. Their decision was, "We believe that it is not only logical but also practical and just to consider the exclusive and perpetual grant of any one of the 'bundle of rights' which go to make up a copyright as a 'sale' of personal property rather than a mere 'license'." The court went on to find that Miss Winsor had not made the sale in the ordinary course of business, gave her the benefits

[25] The distinction has recently been reaffirmed in a late case, applying to a transaction occurring in 1942. Cory and Cory v. Commissioner, 23 T.C. 775 *aff'd*, 230 F.2d 941 (2d Cir. 1956).

[26] 105 F. Supp. 384 (U.S. Ct. of Claims 1952).

of the capital gains tax, and granted a $26,000 tax refund. No mention was made of a reversal of prior cases.

In view of the *Herwig* case, the government has isued Revenue Ruling 54-409 [27] modifying a prior release [28] which had followed the earlier decisions. The ruling holds, ". . . (A) copyright proprietor's grant of the exclusive right to exploit a copyrighted work in a particular medium effects a transfer of property, and . . . a grant of less confers only a license on the grantee."

From the ruling and the *Herwig* case, it seems that a sale of anything less than the exclusive right to exploit a work in a particular medium still invokes the old "bundle" rules. The government has not given in completely, however. The ruling further states:

> That a copyright proprietor's grant effects a transfer of property does not necessarily mean that the consideration received from the grant is in the nature of proceeds from a sale. . . . Therefore, it is held that, when the proprietor of a copyright grants the exclusive right to exploit the copyrighted work throughout the life of the copyright in a medium of publication or expression for a consideration which is not measured by a percentage of receipts from the sale, or publication of the copyrighted work, is not measured by the number of copies sold, performances given or exhibitions made of the copyrighted work, and it not payable periodically over a period generally coterminous with the grantee's use of the copyrighted work, the consideration is to be treated as the proceeds of a sale of property and not as rentals or royalties.
>
> Whether a copyright is a capital asset within the meaning of section 117 of the Internal Revenue Code of 1939 and when the provisions of section 107(b) of the Code with respect to copyrights would apply are separate and distinct questions.

The result of these comparatively recent developments seems to be that the old concept of the indivisibility of a copyright has vanished in part, to allow a "sale" of the exclusive rights in particular mediums, provided the consideration for

[27] INT. REV. BULL. 1954-39, 10.
[28] I.T. 2735, XII-2 CUM. BULL. 131 (1933).

the purchase is not paid as royalties or the like, so as to give the transaction the appearance of a license grant.

The question which presents itself at the present date is whether or not income received from a transfer of a copyright, even in a manner approved by the courts in the above cited cases, may be taxed as a capital gain to professional authors.

Section 1201 of the 1954 Code sets out the alternative tax on a capital gain. The tax is determined with reference to short and long term capital gains for losses as defined in Section 1222. That section in turn requires a reference to Section 1221 to ascertain what is to be included in a "capital asset," the genesis of the entire capital gains scheme.

Section 1221 provides:

> For purposes of this subtitle, the term "capital asset" means property held by the taxpayer (whether or not connected with his trade or business), but does not include— . . .
>
> (3) a copyright, a literary, musical or artistic composition, or similar property held by—
>
> (A) a taxpayer whose personal efforts created such property, or
>
> (B) a taxpayer in whose hands the basis of such property is determined, for the purpose of determining gain from a sale or exchange, in whole or in part by reference to the basis of such property in the hands of the person whose personal efforts created such property.

The section makes it perfectly clear that a taxpayer-author, regardless of whether he transfers his copyright in a manner to be interpreted by the courts to be a "sale," cannot receive the benefits of the capital gains tax. This exclusion was added in 1950 to prevent amateurs from obtaining an unintended tax benefit. Professional writers were never able to treat the proceeds from the sales of their works as capital gain, since the transfers were made to customers in the regular course of business much like a merchant in across-the-counter sales, and such gains were not within the definition of "capital assets," per Section 1221(1) and (2) and its predecessors.

However, the amateur was making only a casual sale of his wares and could not be deemed to be transferring in the "regular course of business." [29] The situation was brought to the forefront in 1948, when President Eisenhower, then in the public eye only as a military leader, obtained a purported $500,000 tax saving by selling his *Crusade in Europe* to the publishers for a lump-sum payment, including all his rights in the work. The Bureau of Internal Revenue ruled the transaction was the sale of a capital asset and taxable according to capital gains rates.[30]

The author himself clearly is excluded from the capital gains benefits under Section 1221(3)(A). Other persons also omitted are those named in subsection (3)(B). The reference in the latter apparently is to Section 1015, which says the basis of property acquired by gift or by a transfer in trust ". . . shall be the same as it would be in the hands of the donor. . . ." or ". . . the grantor. . . ." A question might well be raised as to why the framers of the Code did not refer specifically to the section. Other sections in the revenue act referring to the methods for calculating the basis of property set out systems for such determination which would reach a result contrary to that mentioned in the subsection above. Apparently, therefore, a taxpayer is prevented from having his copyright income taxed as a capital gain only when he himself created the copyrighted property, or where he received the copyright as a gift or as a beneficiary under a trust. A purchaser, devisee, heir, etc., appears to retain the advantage of the lower tax rates, provided still, of course, he meets the requirements of the *Sabatini*, *Wodehouse*, *Herwig*, etc., cases, and the government rulings in relation thereto, and makes the transfer a sale rather than a license. The 1939 regulations on the previous section give no aid in resolving the question.[31]

[29] I.T. 2169, IV-1 CUM. BULL. 13 (1925).

[30] See also Paul Reece Rider, 16 T.C. 1456, *affirmed* 200 F.2d 524 (8th Cir. 1952); Richard W. TeLinde, 18 T.C. 91 (1952).

[31] Internal Revenue Reg. 118, § 39.117(a)-1(c).

Section 1231 of the new Code, refering to special rules for determining capital gains in respect to property used in the trade or business of the taxpayer, makes the same exclusions as Section 1221(3). Presumably, however, a purchaser, devisee, or heir would still be able to claim the reduced rates.

Of course, if trafficking in copyrights is the business of the taxpayer, he would be unable to claim the benefits of the regular Section 1201 capital gains tax, as Section 1221(1) and (2) expressly excludes a copyright or any other property so used from the definition of a "capital asset."

LONG-TERM INCOME

A taxpayer receiving income under a copyright was, at one time, subject to an inequity with regard to his income tax, due to the fact that although the compensation he received was often attributable in whole or in part to work done over a period of years, the income was taxed wholly in the year received, making the taxpayer taxable in higher brackets than would have been so had he been assessed during each year in which he did his work. However, this inequity has been eliminated by Section 1302 of the 1954 Code and its predecessors. The section, as applicable to copyrights, is cited in the footnotes below.[32]

[32] Section 1302: "(a) Limitation on Tax.—If

(1) an individual includes in gross income amounts in respect of a particular . . . artistic work created by the individual; and

(2) the work on the . . . artistic work covered a period of 24 months or more (from the beginning to the completion thereof); and

(3) the amounts in respect of the . . . artistic work includible in gross income for the taxable year are not less than 80 percent of the gross income in respect of such . . . artistic work in the taxable year plus the gross income therefrom in previous taxable years and the 12 months immediately succeeding the close of the taxable year, then the tax attributable to the part of such gross income of the taxable year which is not taxable as a gain from the sale or exchange of a capital asset held for more than 6 months shall not be greater than the aggregate of the taxes attributable to such part had it been received ratably over . . . in the case of an artistic work, that part of the period preceding the close of the taxable year but not more than 36 months.

(b) Definitions. For the purposes of this section . . .

The 1954 provisions were taken from Section 107(b) of the 1939 Code. The former section granted long-term benefits to compensation for services rendered over an extended period but originally this section applied only to "personal services" so rendered, and authors were unable to qualify. This led to the inclusion of Section 107(b) by an amendment in 1942.

Long-term benefits are available only to a taxpayer who receives compensation in the tax year from an artistic work created by the taxpayer himself, the labor on such work having covered a period of twenty-four months or more. The compensation so received in the tax year must, however, be at least 80 percent of the total amounts received for the artistic work in the tax year itself and in all previous years, plus sums which are expected to be received in the twelve months following the end of the tax year.

If the income meets all the requirements stated above, one proceeds as follows: (1) The tax attributable to the artistic work income in the present tax year is calculated by determining the difference between the tax where the particular receipts are added to the taxpayer's gross income and where those amounts are excluded. (2) The artistic work income is then spread ratably over a period not exceeding the thirty-six months prior to the close of the tax year, and the amount of tax attributable to such income for each of the tax years represented by the thirty-six-month period is calculated (again, by subtracting the difference between the tax with and without the ratable portion of the artistic income attributed to such year). (3) The tax arrived at under step (2) for each of the years represented by the thirty-six-month period is totaled. If the amount of tax arrived at under step (1) is greater than that calculated under step (3), the tax in the present year will be reduced to the extent of such excess. Should the step (1) total be less than that in step (3), which

(2) Artistic Work.—The term "artistic work" means a literary or artistic composition or copyright covering a literary, musical, or artistic composition."

would be an unusual case, the lesser sum will be assessed.

This section is a limitation on the tax for the year in which the type of income is received, however. Income and taxes for prior years are not readjusted (except as stated in the following paragraph), although revisions are made for the purpose of calculating the present year's tax.

It is important to note that in determining whether the 80 percent rule is met, one must also include the artistic work income which is received in the twelve-month period following the end of the present tax year. This, of course, necessitates an estimation. In the event receipts from the artistic work in the following twelve months actually reach an amount large enough to make such income received in the tax year less than 80 percent of the total received, the taxpayer would be required to file an amended return and pay tax without the benefit of the long-term income section.

Several cases arose under the old Code with regard to what should be included in calculating income under the 80 percent provision. In one decision,[33] it was held that even though the author's contract provides for royalties to be given in advance, or the publisher voluntarily gives the author the same, the amounts are still considered in meeting the percentage test, as all amounts actually received are to be so included. The fact that the advances were to be charged against later royalties was immaterial. But even though the taxpayer may have been entitled to advances or was offered them, if such actually were not taken, they may not be included to enable the author to fall within the section. In another case,[34] the court held that where the payment to the taxpayer was dated December 30, 1943, the author had constructively received payment in 1943, even though the payment actually was deposited in 1944, so as to permit him to take advantage of the benefits by complying with the 80 percent provisions.

The section expressly excludes capital gains income from

[33] J. G. Cozzens, 19 T.C. 663 (1953).

[34] McEuen v. Commissioner, 196 F.2d 127 (5th Cir. 1952).

its terms. This merely conforms with Section 1221, which denies capital gains benefits to the taxpayer-author who receives income under a copyright.

The period over which the artistic work must extend has caused some difficulty. The new Code states the labor must cover at least twenty-four months, shortening the period from thirty-six months as previously provided. Although the duration of the work was more than the thirty-six-month period over which the receipts therefrom are to be extended, the income can be spread only to the extent of thirty-six months.[35]

The fact that all the work was done prior to the year in which the compensation is received does not affect the applicability of the section. Such was the holding in *Robertson v. United States*,[36] where the work was completed eight years before payment was made. A prior case holding *contra* was overruled.[37]

Problems have arisen as to when an author begins work upon his composition, so as to ascertain whether the twenty-four-month test has been met. In *E. H. Blum*,[38] the tax court held the work period under the 1939 Code began with the written notation of an idea by the author, where followed by persistent, although not systematic, research. The period started before the final idea was decided upon and the actual work was commenced. In *I. D. Richardson*,[39] the period commenced when the author began field notes for a war memo book, even though the notes were later lost and the work done all over again.

SOURCE OF INCOME

In several connections, under the Revenue Code, it becomes important to determine whether income has been derived from

[35] The 1939 Code and Internal Revenue Reg. 118, § 39.107-2, Example 1, thereto followed.

[36] 343 U.S. 711 (1952).

[37] Williams v. United States, 84 F. Supp. 362 (U.S. Ct. of Claims 1949).

[38] 11 T.C.M. 612, Decision 19.042 (1942).

[39] 14 T.C. 547 (1950).

sources within or without the United States. This is true in the case of nonresident aliens,[40] foreign corporations,[41] and U.S. citizens or domestic corporations receiving income from U.S. possessions in certain situations.[42]

Section 861 and 862 define respectively what is to be treated as income from within and without the United States. Among the former are:

(a) . . . (4) Rentals or Royalties.—Rentals or royalties from property located in the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using in the United States . . . copyrights. . . .

The latter section provides, logically enough, that income from without the U.S. includes:

(4) rentals or royalties from property located without the United States or from any interest in such property, including rentals or royalties for the use of or for the privilege of using without the United States . . . copyrights. . . .

Although the 1954 regulations on this subject have not as yet been issued, those involving the 1939 Code added nothing to the interpretation.[43]

A few cases have arisen involving the interpretation of these sections as applicable to copyrights. Payments received by a nonresident alien author for the publication rights of his works in the U.S. were held to be "payments for the use or privilege of using property in the U.S.," although the contract was executed abroad.[44] Also, income has been held to have been derived from sources within the country although the receipts were derived from the assignment to a U.S. corporation of the world-wide motion picture rights in the works.[45]

[40] Section 871. [41] Section 881. [42] Section 931.
[43] Internal Revenue Reg. 118, § 39.119(a)-4 and (c)-1(d).
[44] Sabatini v. Commissioner, 98 F.2d 753 (2nd Cir. 1938).
[45] Molnar v. Commissioner, 156 F.2d 924 (2nd Cir. 1946).

Rules Governing the Competition

1. All accredited law schools are invited to participate in the Nathan Burkan Memorial Competition.
2. The Competition is open, under such local rules as shall be specified by the dean of each law school, to all third-year students. In the discretion of the dean, second-year students may also be eligible.
3. The subject of the Competition shall be any phase of *Copyright Law*. The prizes will be awarded to the students who shall, in the sole judgment of the dean of the law school—or such other person or committee as he may delegate for the purpose—prepare the two best papers on this subject. The dean may in his discretion withhold the awards entirely, if in his opinion no worthy paper is submitted, or may award only the first or second prize if only one worthy paper is submitted.
4. The awards in the Competition will be a first prize of $150 and a second prize of $50, to be paid the winning students, through the dean, upon the latter's written certification to the Society.
5. To insure uniformity and convenience to the examining committees, local and national, please conform to the following rules:
   (a) Manuscript should be typewritten (double-space) on $8\frac{1}{2} \times 11''$ paper, $1''$ margin all around, with all quotations exceeding four lines in length single-spaced and indented.
   (b) Manuscript, including quotations, should not exceed fifty pages in length.
   (c) Citations should be in approved law review form.
   (d) Please bind the manuscript in any standard, letterhead-size manila or cardboard cover.
   (e) Be sure to hand in *two* copies of your manuscript as thus prepared, and it will be helpful if you will plainly label the outside front cover with the title of the paper, your name, and your permanent *home address.*
   (f) In fairness to all contestants, as papers are presumed to represent individual study, collaboration with others in their preparation is not permitted.

6. The winning papers only (two copies), as determined under the foregoing rules, will be forwarded by the dean to the Society, which shall be privileged to authorize their publication.

7. Papers may appear as Law Review contributions, provided their entry in the Nathan Burkan Competition is duly noted.

8. Closing date for submission of papers is August 15—or such earlier date as the dean may specify. Winning papers must be certified to the Society not later than August 31.

9. After the close of the Competition in each participating law school, the best paper will be selected for a National Award of $500, and those which are adjudged to be the five best papers (or such other number as the judges of the National Competition may determine) will be printed in the form of a "Copyright Law Symposium."

   Questions concerning the Competition may be addressed to the Society's General Attorney, Herman Finkelstein, 575 Madison Avenue, New York 22, N.Y.

Law Schools Contributing Papers to Previous Copyright Law Symposia

UNIVERSITY OF ARIZONA COLLEGE OF LAW

George W. Botsford, *Some Copyright Problems of Radio Broadcasters and Receivers of Musical Compositions,* SECOND SYMPOSIUM 71 (1940).

Calvin Welker Evans, *The Law of Copyright and the Right of Mechanical Reproduction of Musical Compositions,* THIRD SYMPOSIUM 112 (1940).

William T. Birmingham, *A Critical Analysis of the Infringement of Ideas,* FIFTH SYMPOSIUM 107 (1954).

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E. DeMatt Henderson, *The Law of Copyright, Especially Musical,* FIRST SYMPOSIUM 125 (1939).

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Ted Fair, *Publication of Immoral and Indecent Works, with Regard to the Constitutional and Copyright Effects,* FIFTH SYMPOSIUM 230 (1954).

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Irving Propper, *American "Popular" Music and the Copyright Law,* THIRD SYMPOSIUM 164 (1940).

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Robert W. Bergstrom, *The Businessman Deals with Copyright,* THIRD SYMPOSIUM 248 (1940).

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Robert L. Wyckoff, *Defenses Peculiar to Actions Based on Infringement of Musical Copyrights,* FIFTH SYMPOSIUM 256 (1954).

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Franklin Feldman, *The Manufacturing Clause: Copyright Protection to the Foreign Author*, FOURTH SYMPOSIUM 76 (1952).
Robert E. Young, *The Copyright Term*, SEVENTH SYMPOSIUM 139 (1956).

DICKINSON SCHOOL OF LAW

John J. DeMarines, *State Regulation of Musical Copyright*, SIXTH SYMPOSIUM 118 (1955).

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J. Roger Shull, *Collecting Collectively: ASCAP'S Perennial Dilemma*, SEVENTH SYMPOSIUM 35 (1956).

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Charles W. Joiner, *Analysis, Criticism, Comparison and Suggested Corrections of the Copyright Law of the U.S. Relative to Mechanical Reproduction of Music*, SECOND SYMPOSIUM 43 (1940).

Frank R. Miller, *A Re-Examination of Literary Piracy*, THIRD SYMPOSIUM 2 (1940).

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William F. Burbank, *Television—a Public Performance for Profit?* FIFTH SYMPOSIUM 133 (1954).

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Clinton R. Ashford, *The Compulsory Manufacturing Provision: An Anachronism in the Copyright Act*, FOURTH SYMPOSIUM 48 (1952).

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Howard B. Pickard, *Common-Law Rights Before Publication*, THIRD SYMPOSIUM 298 (1940).

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Nathan Cohen, *State Regulation of Musical Copyright*, FIRST SYMPOSIUM 91 (1939).

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Russell H. Schlattman, *The Doctrine of Limited Publication in the Literary Property Compared with the Doctrine of Experimental Use in the Law of Patents*, FIFTH SYMPOSIUM 37 (1954).

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Saul Cohen, *Fair Use in the Law of Copyright*, SIXTH SYMPOSIUM 43 (1955).

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C. Harold Herr, *The Patentee v. the Copyrightee*, FIFTH SYMPOSIUM 185 (1954).

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Thomas O. Shelton, *The Protection of the Interpretative Rights of a Musical Artist Afforded by the Law of Literary Property, or the Doctrine of Unfair Competition*, FIRST SYMPOSIUM 173 (1939).

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Richard C. Seither, *UNESCO: New Hope for International Copyright?* SIXTH SYMPOSIUM 74 (1955).

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