

# COPYRIGHT LAW SYMPOSIUM

*Number Seven*

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NATHAN BURKAN  
MEMORIAL COMPETITION

SPONSORED BY THE

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NATHAN BURKAN  
1878-1936



## *Acknowledgments*

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THE AMERICAN Society of Composers, Authors and Publishers is privileged to present the seventh volume in the Copyright Law Symposium series.

On behalf of our membership I wish to express my warm appreciation to Judge George Rossman, Hon. Loyd Wright, and Messrs. Edward A. Sargoy and Louis E. Swarts, who acted as the judges in selecting six outstanding essays from among all the essays submitted by law schools throughout the country in the Nathan Burkan Memorial Competition. The task of the judges was not an easy one; there were many lengthy, cross-country communications between them, followed by conferences at the American Bar Association meeting in Philadelphia, before the judges made their final selections.

We also wish to express our appreciation to the deans, faculty members, and staff of the law schools who, for the past seventeen years, have brought this Competition annually to the attention of their students and who have judged the winning papers at each participating law school.

The success at the bar which has been achieved by previous winners of the Nathan Burkan awards leads us to believe that the best students are attracted to this Competition, and that it, in turn, may contribute to their powers of self-expression, which are as essential to success in the legal profession as they are in literature and music.

STANLEY ADAMS

PRESIDENT

AMERICAN SOCIETY OF COMPOSERS,

AUTHORS AND PUBLISHERS

*February, 1956*

## Introduction

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THIS SYMPOSIUM presents the outstanding essays in the seventeenth successive year of the Nathan Burkan Memorial Competition which was founded by the American Society of Composers, Authors and Publishers to honor the memory of its first General Counsel. The Symposium of 1939 was the first in the series. The National Committee judging those papers was headed by Edward A. Sargoy, then Chairman of the Committee on Copyright of the American Bar Association's Section of Patent, Trademark and Copyright Law. After a lapse of sixteen years, we find Mr. Sargoy as Chairman of the Association's Copyright Subsection; and again he is a member of the Panel selecting the National Award papers in this Competition. The following papers appeared in the First Copyright Law Symposium:

*Copyright Protection for the Performing Artist in his Interpretive Rendition*, by Walter L. Pforzheimer (Yale University)

*Radio Infringement of Music Copyright*, by Paul Gitlin (Harvard University)

*State Regulation of Musical Copyright*, by Nathan Cohen (University of Oregon)

*The Law of Copyright, Especially Musical*, by E. DeMatt Henderson (University of Arkansas)

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

The following year, when I was asked to judge the papers for publication in the Second Symposium, those selected from the papers which had been awarded prizes at 76 law schools were:

*The Extent of Copyright Protection for Law Books*, by Paul P. Lipton (University of Wisconsin)

*Analysis, Criticism, Comparison and Suggested Corrections of the Copyright Law of the U.S. Relative to Mechanical Reproduction of Music*, by Charles W. Joiner (State University of Iowa)

*Some Copyright Problems of Radio Broadcasters and Receivers of Musical Compositions*, by George W. Botsford (University of Arizona)

*The Motion Picture Distributor and the Copyright Law*, by Irvin E. Bernstein (Yale University)

*Copyright Laws in Georgia History*, by W. Marion Page (University of Georgia)

All judges have different standards in selecting the best papers. My own approach was to select the best papers in different fields—protection of law books; problems of mechanical reproduction of music; radio broadcasting; motion pictures, and the law of individual states. After an interval of fifteen years those papers are still timely.

The essays published in the Third Symposium were selected by the late Dean John H. Wigmore, who was not only the leading authority on the law of evidence, but also had found time to examine the laws protecting the rights of authors<sup>1</sup> and to serve with Mr. Sargoy and others as a member of the first National Panel in the Nathan Burkan Competition. The papers selected by Dean Wigmore were:

*A Re-Examination of Literary Piracy*, by Frank R. Miller (State University of Iowa)

*Public Performance for Profit, Past and Present*, by Frank D. Emerson (Western Reserve University)

*The Law of Copyright and the Right of Mechanical Reproduction of Musical Compositions*, by Calvin Welker Evans (University of Arizona)

*American "Popular" Music and the Copyright Law*, by Irving Proper (St. Lawrence University)

*The Businessman Deals with Copyright*, by Robert W. Bergstrom (Chicago-Kent College of Law)

*Common-Law Rights Before Publication*, by Howard B. Pickard (University of Oklahoma)

<sup>1</sup> Wigmore, *Copyright Legislation in the Federal Senate*, 25 ILL. L. REV. 799 (1927); Wigmore and Ruffini, *Scientific Property*, 22 ILL. L. REV. 355 (1927).

*The Development of Motion Picture Copyright*, by Milton H. Aronson  
(Washington University)

Then came the war, and although the Nathan Burkan Competition was continued in the law schools, publication of the Annual Symposium was suspended and was not renewed until 1952 when a Panel consisting of Judge Herbert F. Goodrich of the United States Court of Appeals for the Third Circuit, Justice Roger J. Traynor of the Supreme Court of California, and Judge George T. Washington of the United States Court of Appeals for the District of Columbia selected the following papers:

*Inroads on Copyright Protection*, by Melville B. Nimmer (Harvard University)

*The Compulsory Manufacturing Provision: An Anachronism in the Copyright Act*, by Clinton R. Ashford (University of Michigan)

*The Manufacturing Clause: Copyright Protection to the Foreign Author*, by Franklin Feldman (Columbia University)

*The Doctrine of Moral Right and American Copyright Law: A Proposal*, by Arthur S. Katz (New York University)

*Copyrights and the Income Tax Problem*, by Charles O. Whitley  
(Wake Forest College)

With the publication of the Fifth Symposium, we felt that the Symposium had proved itself and that ASCAP should discontinue its previous policy of private publication. Since that time, the work has appeared as a publication of Columbia University Press, to whom we express our appreciation for their fine spirit of cooperation in this venture. It was also decided to award a national prize of \$500 to the author of the best paper submitted each year. The Panel for the Fifth Symposium consisted of Judge Stanley H. Fuld of the New York Court of Appeals and Chief Judge Leon R. Yankwich of the United States District Court for the Southern District of California. That Symposium combined the following winning papers for the years 1951 and 1952:

## NATIONAL AWARD ESSAYS

- Superman v. Captain Marvel; or, Loss of Literary Property in Comic Strips*, by Reginald Ray Reeves (University of Idaho, 1952)  
*The Doctrine of Limited Publication in the Law of Literary Property Compared with the Doctrine of Experimental Use in the Law of Patents*, by Russell H. Schlattman (St. Louis University, 1951)

## HONORABLE MENTION

- Copyright Protection in the Area of Scientific and Technical Works*, by Gilbert K. Bovard (State University of Iowa)  
*A Critical Analysis of the Infringement of Ideas*, by William T. Birmingham (University of Arizona)  
*Television—a Public Performance for Profit?* by William F. Burbank (University of Louisville)  
*Protecting Things Valuable—Ideas*, by James A. Webster, Jr. (Wake Forest College)  
*The Patentee v. the Copyrightee*, by C. Harold Herr (Temple University)  
*Plagiarism, Piracy, and the Common Law Copyright*, by Sheldon M. Young (Ohio State University)  
*Publication of Immoral and Indecent Works, with Regard to the Constitutional and Copyright Effects*, by Ted Fair (Baylor University)  
*Defenses Peculiar to Actions Based on Infringement of Musical Copyrights*, by Robert L. Wyckoff (University of Colorado)

Last year, the papers in the Sixth Symposium were selected by a Panel consisting of Chief Judge Samuel M. Driver of the United States District Court for the Eastern District of Washington and Wesley A. Sturges, then President of the American Association of Law Schools. The papers selected were:

## NATIONAL AWARD ESSAY

- Borderland—Where Copyright and Design Patent Meet*, by Richard W. Pogue (University of Michigan)

## HONORABLE MENTION

- Fair Use in the Law of Copyright*, by Saul Cohen (Stanford University)  
*UNESCO: New Hope for International Copyright?* by Richard C. Seither (Tulane University)

*Moral Right and the Common Law: A Proposal*, by Arthur L. Stevenson, Jr. (Harvard University)

*State Regulation of Musical Copyright*, by John J. DeMarines (Dickinson School of Law)

*Hurn v. Oursler After Twenty Years*, by Frank L. Bixby (University of Wisconsin)

This year, as in the first year of the Competition, we turned to the American Bar Association for selection of the Panel. It consisted of Loyd Wright, President of the Association; Judge George Rossman of the Supreme Court of Oregon, one of the editors of the American Bar Association Journal; Edward A. Sargoy, Chairman of the Copyright Subsection of the Association; and his distinguished predecessor in that post, Louis E. Swarts.

In examining each paper submitted, this Panel applied the same critical standards that Nathan Burkan would have demanded if he were still with us.

When I became associated with Nathan Burkan in 1928, his law practice in the entertainment industry had almost as many ramifications in California as in the East. Fortunately, his able associate on the West Coast was Loyd Wright, so that in heading up the Panel for this Symposium, he was called upon not only as President of the American Bar Association, but also as Burkan's friend and co-worker. In accepting his designation on the Panel, Mr. Wright said, "There is no one in my legal experience, outside of my own brother and Judge William J. Hunsacker, for whom I had a greater respect or a firmer attachment than I had for Nathan Burkan. As you know, I was his correspondent on the coast for a great many years, and it is with great pride that I accept the opportunity to judge any competition given in Nate's honor."

Mr. Wright's distinguished public service includes his recent unanimous selection as chairman of the special bipartisan commission created by Congress to inquire into the Government's loyalty-security program. The deep interest in literary property which has been manifested by him and Mr.



Louis Swarts throughout their professional careers prompted them to found the Los Angeles Copyright Society.

Judge Rossman was selected because of his great interest in legal writing, as exemplified by his work as Editor-in-Charge of the section on "What's New in the Law" which appears regularly in the *American Bar Association Journal*; his membership in *Scribes*, an organization devoted to the improvement of legal writing; his contribution to legal literature in such articles as *Appellate Practice and Advocacy*; <sup>2</sup> "Quo Vadis?" <sup>3</sup> *Coke and Bacon: Two Anniversaries*; <sup>4</sup> *No Case is Unimportant—A Message to New Lawyers*; <sup>5</sup> *Uniformity of Law: An Elusive Goal*; <sup>6</sup> and numerous book reviews. After reading all the papers certified by the participating law schools, Judge Rossman wrote:

In my opinion, all of the papers are very good. Some are brilliant. They show that a young man of intelligence secures training in the law schools of this day which enables him to write effectively upon even the specialized subjects of the curriculum. A law school can stock a student's brain with a large number of legal principles, just as a workman can fill a warehouse with merchandise, but a law school alone cannot enable a student to analyze, criticize, compare, reason and resolve. Native intelligence is required to perform well that phase of treatise writing. The papers display fine capacity on the part of each writer in analysis and reasoning.

The papers selected by the Panel are timely because of our recent adherence to the Universal Copyright Convention and the current re-examination of the copyright law under the able direction of Arthur Fisher, Register of Copyrights. The paper awarded first prize <sup>7</sup> deals with both subjects, i.e., the copyright law of another country, and the need for revision of our own law as related to the question of what constitutes

<sup>2</sup> 16 Fed. R.D. 403; 34 ORE. L. REV. 73 (1955).

<sup>3</sup> 32 ORE. L. REV. 1 (1952).

<sup>4</sup> 38 A.B.A.J. 42 (1952).

<sup>5</sup> 32 J. AM. JUD. Soc'y 101 (1948).

<sup>6</sup> 36 A.B.A.J. 175, 258 (1950).

<sup>7</sup> Dreben, *Publication and the British Copyright Law*.

“publication.” Another paper<sup>8</sup> urges that the present duration of copyright protection in the United States, 56 years in all, be extended to life plus 50 years, the term of protection granted literary works in most of the countries of the world today. Another considers “International Copyright Protection and the United States: The Impact of the Universal Copyright Convention on Existing Law.”<sup>9</sup>

A paper which should have universal appeal deals with Judge Learned Hand’s copyright opinions.<sup>10</sup> It was of especial interest to me as one of the elder “Puisne (puny) Judges,” as Learned Hand has affectionately dubbed the fortunate young men who have served as his law clerks upon graduation from law school. Here is a judge who, in leaving his imprint upon the laws which define the rights of authors, displays a mastery of law, philosophy, and literature unequaled in our time.

The remaining papers deal largely with the economics of literary property.<sup>11</sup> Although highly controversial, as the discussions by members of the Panel indicated, they are well worth reading.

Needless to say, neither the members of the Panel nor the American Society of Composers, Authors and Publishers are to be regarded as endorsing any of the views expressed in these papers. All the members of the Panel read all the papers. They were unanimous in the selection of the paper winning the National Award; they differed on the relative merits of the other papers.

The Society wishes me to express its appreciation to the members of the Panel, all of whom devoted many, many hours, in spite of their busy schedules, to the task of evaluating the essays. It is gratifying to the Society to know that the judges

<sup>8</sup> Young, *The Copyright Term*.

<sup>9</sup> Daniel Singer.

<sup>10</sup> Cracas, *Judge Learned Hand and the Law of Copyright*.

<sup>11</sup> Shull, *Collecting Collectively: ASCAP’s Perennial Dilemma*; and Laskin, *All Rights Unreserved: The Author’s Lost Property in Publishing and Entertainment*.

shared its conviction of the great importance of their judgment of these papers to the participating students, to the members of the Bar, and to others who will have occasion to read the papers here presented.

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

*New York, New York*  
*February, 1956*

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NATIONAL AWARD ESSAY, 1954

*Publication and  
the British Copyright Law*

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By RAYA S. DREBEN

HARVARD UNIVERSITY LAW SCHOOL

THERE IS MUCH dissatisfaction both in the courts and in Congress with the present law of copyright. The difficulty stems, in large part, from the emphasis in American law on the technical concept of publication which, while plaguing the American courts, is a far less frequent problem in England.

It is commonly said<sup>1</sup> that the basic difference between the American and British systems of copyright, is that while the United States has common law protection for unpublished works and statutory coverage for published works,<sup>2</sup> England since 1911 has had a complete scheme of statutory protection. Whether or not the consolidation of both areas in one statute is the essential distinction, there is no doubt that this was, in form at least, a major change from the prior English law; and, in order to understand the broad scope of the British Copyright Act of 1911,<sup>3</sup> a brief history of copyright protection prior to the statute is essential.

<sup>1</sup> HOWELL, *THE COPYRIGHT LAW* 101 (3d ed. 1952); LADAS, *INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 686 (1938).

<sup>2</sup> It is not quite accurate to say that 17 U.S.C. applies only to published works. Although sec. 2 states that nothing in the act shall limit an author's common law right "to prevent the copying, publication, or use of such unpublished work," sec. 12 provides statutory protection for a limited class of unpublished material. Although the term "unpublished" does not appear in sec. 12, which speaks of works which "are not reproduced for sale," it is judicially assumed that sec. 12 refers to unpublished works. See *Leibowitz v. Columbia Graphophone Co.*, 298 F. 342, 343 (1923); see *Patterson v. Century Productions*, 93 F.2d 489, 491 (1937).

<sup>3</sup> 1 & 2 GEO. 5, c. 46.

## THE STATUTORY SCHEME BEFORE 1911

Before 1911, the law of literary property in England was in a sorry state of confusion. In addition to common law principles, there were over twenty distinct statutes relating to copyright.<sup>4</sup> Some dated as far back as 1735.<sup>5</sup> Each act was a separate entity covering a different area, and each varied in such matters as the period of protection, the formalities required, and the consequences of registration.

With the exception of the Fine Arts Copyright Act<sup>6</sup> and the statutes relating to lectures<sup>7</sup> and performing rights,<sup>8</sup> statutory rights were not acquired until publication. Thus, an author, artist, or composer had to publish to obtain statutory copyright in engravings, prints, lithographs, works of sculpture, and books;<sup>9</sup> and the term of protection was measured from the date of publication. The period of copyright varied under the six<sup>10</sup> statutes relating to these subjects. For sculpture,<sup>11</sup> the term was fourteen years from the date of first publication, and an additional fourteen years if the artist was still living and had not assigned the copyright; for engravings, lithographs, and prints, the term was twenty-eight years from the date of publication;<sup>12</sup> for books, copyright lasted for the longer of two periods,<sup>13</sup> namely, the life of the author plus seven years, or forty-two years from date of publication.

The Fine Arts Statute was drafted on a different pattern.

<sup>4</sup> There were fourteen statutes in 1878. Report of the Royal Commissioners on Copyright, CMD. No. 2036, para. 9 (1878). In 1909 there were twenty-four. Report of the Copyright Committee, CMD. No. 4976, p. 3-7 (1909).

<sup>5</sup> 8 GEO. 2, c. 13 (1735).

<sup>6</sup> 25 & 26 VICT., c. 68 (1862).

<sup>7</sup> 5 & 6 WILL. 4, c. 65 (1835).

<sup>8</sup> 3 WILL. 4, c. 15 (1838); 5 & 6 VICT., c. 45, §§ 20, 21 (1842).

<sup>9</sup> "Books" was a generic term including written musical compositions, maps, and charts, as well as literary works. 5 & 6 VICT., c. 45, § 2 (1842).

<sup>10</sup> 8 GEO. 2, c. 13 (1735); 7 GEO. 3, c. 38 (1766); 17 GEO. 3, c. 57 (1777); 54 GEO. 3, c. 56 (1814); 5 & 6 VICT., c. 45 (1842); 15 & 16 VICT., c. 12, § 14 (1852).

<sup>11</sup> 54 GEO. 3, c. 56, §§ 2, 6 (1814).

<sup>12</sup> 7 GEO. 3, c. 38, § 6 (1766).

<sup>13</sup> 5 & 6 VICT., c. 45, § 3 (1842).

Statutory copyright did not commence on publication, but on creation; in fact, section 1 is similar to the 1911 Act. Section 1 provides that

the author, being a British subject or resident . . . of every original<sup>14</sup> painting, drawing and photograph . . . made either in the British dominions or elsewhere . . . shall have sole and exclusive right of copying . . . for the term of the natural life of such author and seven years after his death.<sup>15</sup>

Although the Act applied to unpublished as well as to published works, registration at Stationers' Hall was required.<sup>16</sup> At first, the status of the common law rights in unpublished works of art was not clear.<sup>17</sup> Later, however, it became established that the common law right existed concurrently with the statutory right.<sup>18</sup> According to Copinger, the duration of the common law right was limited to the term of the statute,<sup>19</sup> but this conclusion is not substantiated by the cases he cites, which state that the common law right is preserved until publication.<sup>20</sup> They in no way suggest the impossibility of invoking the common law rights posthumously.<sup>21</sup>

<sup>14</sup> 25 & 26 VICT., c. 68 (1862).

<sup>15</sup> The Fine Arts Act and the Sculpture Act (54 GEO. 3, c. 56 [1814]) are the only acts prior to 1911 to use the term "original."

<sup>16</sup> 25 & 26 VICT., c. 68, § 4 (1862).

<sup>17</sup> Stephen states that although the Fine Arts Act could hardly have been intended to abolish the common law principles, he is not sure it did not have this effect. CMD. NO. 2036 at appendix p. lxxv, footnote 5 (1878).

<sup>18</sup> *Mansell v. Valley Printing Co.*, 1 Ch. 567 (1908); *Bowden Brothers v. Amalgamated Pictorials*, 1 Ch. 386 (1911).

<sup>19</sup> COPINGER, *LAW OF COPYRIGHT* 19 (8th ed., Skone James, 1948).

<sup>20</sup> *Mansell v. Valley Printing Co.*, 1 Ch. 567 (1908). In *Bowden Brothers v. Amalgamated Pictorials*, 1 Ch. 386 (1911) at p. 392, the court says in reference to unpublished photographs: "the plaintiffs retain their common law rights until publication, notwithstanding that they have at the same time a statutory copyright." The words "at the same time," rather than limiting the period of common law rights, suggest merely that, in addition to the statutory right, plaintiffs *also* have common law copyright.

<sup>21</sup> In order to determine whether the common law rights extended beyond the statutory term (life and seven years), publication could not occur before the death of the author. It is interesting to note that sec. 17 of the 1911 Act, which deals with posthumous publication, is not applicable to the subjects under the prior Fine Arts Act. Macgillivray's comments on sec. 17 and sec. 31 suggest

Another difference in the Fine Arts Act not found elsewhere in the statutes was that copyright, although assignable, was in danger of falling into the public domain. A confusing proviso to section 1 required the artist, on the first sale of his work, to reserve in writing the copyright or grant it to the buyer or assignee; otherwise, copyright in the work ceased to exist. Artists, considering themselves bad businessmen, strongly advocated the repeal of this provision.<sup>22</sup>

Two other phases of domestic copyright, both having to do with oral delivery of an author's works, deserve attention. The Lectures Act<sup>23</sup> secured protection for twenty-eight years against unauthorized publication by printing,<sup>24</sup> but did not prohibit unauthorized redelivery.<sup>25</sup> Much common law learning was applicable because lectures delivered in universities and schools were not covered by the Act.<sup>26</sup> Statutes<sup>27</sup> also provided for a limited performing right, in addition to the right of printed publication, for both dramatic and musical works. But the scope of the statutory right as to dramatic works<sup>28</sup> was undefined. Much of the difficulty arose from the fact that two distinct rights were involved, the right of

that these sections depart from the prior law. MACGILLIVRAY, *THE COPYRIGHT ACT 1911*, 120-123, 159-160 (1912).

<sup>22</sup> They claim that although "purchasers would never think of asking for the copyright themselves, [they] nevertheless object to signing an agreement reserving anything to the artist; they think they are acquiring an incomplete property in what they buy." Letter by A. D. Tripp, in Appendix V of the Minutes of Evidence Taken Before the Royal Commission on Copyright, CMD. No. 2036-1 at 349 (1878). See also the rest of Appendix V p. 347-349, which contains letters from artists, and paras. 3168, 3681, 5389 of the 1878 Report.

<sup>23</sup> 5 & 6 WILL. 4, c. 65 (1835).

<sup>24</sup> *Id.*, § 4.

<sup>25</sup> CMD. No. 2036, para. 82-84 (1878).

<sup>26</sup> 5 & 6 WILL. 4, c. 65, § 5 (1845); see Art. 19, Stephen's Digest, appended to 1878 Report.

<sup>27</sup> 3 WILL. 4, c. 15 (1838); 5 & 6 VICT., c. 45, §§ 20, 21 (1842); 45 & 46 VICT., c. 40 (1882); 2 EDW. 7, c. 15 (1902); 6 EDW. 7, c. 36 (1906). The last two acts are still in force and provide for summary (criminal) proceedings.

<sup>28</sup> What constituted a dramatic work under the definition in 3 & 4 WILL. 4, c. 15 (1838), was a question frequently before the courts. Section 1 provided protection for the author of any "tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment."

printed publication and the right of public performance. These rights could be held by different persons and could expire at different times.<sup>29</sup> To make matters worse, the interaction of these copyrights was unsettled. It was questionable whether the printing of a dramatic work amounting to an abandonment of the literary copyright defeated the performing right;<sup>30</sup> a variety of opinion existed as to whether the public performance of a play effected publication so as to divest the author of his common law rights,<sup>31</sup> and it was even

<sup>29</sup> SCRUTTON, *LAW OF COPYRIGHT*, c. 4, esp. pp. 75–78 (3d ed., 1896).

<sup>30</sup> At the time of the 1878 Report, it was thought that any publication of a dramatic piece as a book, including publication not amounting to an abandonment, defeated the performing rights, para. 75 of the 1878 Report; Art. 16 of Stephen's Digest. But *Chappell v. Boosey*, 21 Ch. D. 232 (1882), held the contrary. Although in that case the issue arose in reference to a song, the court unequivocally assumed that its decision applied with equal force to any dramatic or musical composition. For a rejection of the argument that publication amounting to abandonment extinguished the representation right, see COPINGER, *LAW OF COPYRIGHT* 285 (4th ed., Easton, 1904).

<sup>31</sup> At an early date, public performance was definitely not a publication, and the author retained both the performing right and the right of printing, *Macklin v. Richardson*, *Amber* 694 (1770), nor did the first statute relating to performing rights change this result; 3 WILL. 4, c. 15 (1838), merely provided an unlimited term of protection for performing rights in unpublished (unprinted) productions, and a term of twenty-eight years in printed works. However, with the passage of the Literary Copyright Act, 5 & 6 VICT., c. 45 (1842), sec. 20 of which is a masterpiece of ambiguity, both the duration of the performing right and the effect of performance became unclear. Although sec. 20 spoke in terms of *extending* the duration of the performing right, and did lengthen the period of protection for printed plays, it did not indicate whether the unlimited term given by the prior statute to unpublished plays was now restricted. Despite sec. 21, which provided that persons shall continue to have the remedies of the 1838 Act "during the whole of his [their] interest therein," most authorities, while doubtful, thought that both categories of dramatic works were protected for the same period once public performance had occurred. Stephen's Digest, Art. 13; COPINGER, *LAW OF COPYRIGHT* 17 (8th ed.), MACGILLIVRAY, *op. cit. supra* note 21, at 51. But what caused even more trouble was another clause of sec. 20 which read "the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act to be the first publication of any book." Since the purpose of sec. 20 was to extend the duration of protection for performing rights to the period applicable to books, the clause probably intended only to set a time, namely public performance, from which the period of protection was to be measured. See *Boucicault v. Chatterton*, 5 Ch. D. 267, 278 (1876). COPINGER, *LAW OF COPYRIGHT* 27, 28 (8th ed.), takes sec. 20 to mean that, prior to the 1911 Act, public performance constituted publication,



disputed whether public performance was a necessary condition to acquire the statutory performing right.<sup>32</sup> It was accepted, however, that the dramatization of a novel did not constitute an infringement of a novelist's rights; to acquire performing rights, he had to produce the work in a dramatic form himself.<sup>33</sup>

In addition to the confusion in subject matter and duration of copyright occasioned by the numerous acts, questions of notice and registration were handled separately by each statute. As a general rule, either registration or notice was required, but not both. To effect copyright for engravings, prints, lithographs, and works of sculpture, the name of the copyright proprietor and the date of first publication had to be put on each copy;<sup>34</sup> for photographs, paintings, and drawings, registration was necessary, and no action in respect to any infringement occurring prior to registration could be sustained.<sup>35</sup> Although the statute protecting books provided for registration, once it was effected, actions for infringements occurring before registration could be maintained.<sup>36</sup> No pro-

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and he cites *Boucicault v. Chatterton*, *supra*, as authority. Copinger does not restrict his statement to mean publication only for the purposes of the performing right. It is probable that public performance extinguished the common law performing right; but see *MACGILLIVRAY*, *op. cit. supra* note 21, at 25, who points out, *Boucicault v. Chatterton*, 5 Ch. D. 267, 278 (1876), while holding that the exclusive performing rights were destroyed by a first representation abroad, can be confined to a construction of section 19 of the International Copyright Act. 7 & 8 VICT., c. 12 (1844). However, public representation probably did *not* affect the literary copyright. CMD. No. 4976 at 13 (1909). But see *SCRUTTON*, *op. cit. supra* note 29, at 87.

<sup>32</sup> *MACGILLIVRAY*, *op. cit. supra* note 21, at 25, says public performance was probably not a condition precedent to the statutory right, but *COPINGER*, *LAW OF COPYRIGHT* 281 (4th ed., 1904), states the contrary. The latter approach appears to be more consistent with the view that the statute protected the performing right for a limited period of time commencing with the date of first representation. *Macgillivray's* position assumes that the statute rather than common law protected the performing right in unprinted plays before representation, and only on performance did the limited period of the statute begin to run.

<sup>33</sup> *Reade v. Conquest*, 9 C.B.(n.s.) 755 (1861).

<sup>34</sup> 8 GEO. 2, c. 13, § 1 (1735); 54 GEO. 3, c. 56, § 1 (1814).

<sup>35</sup> 25 & 26 VICT., c. 68, § 4 (1862).      <sup>36</sup> 5 & 6 VICT., c. 45, § 24 (1842).

tection was afforded to lectures without two days' notice in writing to two justices living within five miles of the place of delivery.<sup>37</sup> Owners of performing rights did not have to comply with the registration requirement of the Literary Copyright Act,<sup>38</sup> but a separate act required notice of reservation of performing rights in musical compositions to be placed on all printed copies.<sup>39</sup>

The preceding brief summary does not include all the statutes relating to copyright; there was an act granting perpetual copyright to certain universities,<sup>40</sup> and, in addition, there were numerous statutes covering international and colonial copyright.<sup>41</sup> The following comment of the 1878 Royal Commissioners<sup>42</sup> was, if anything, an understatement.

The first observation which a study of the existing law suggests is that its form, as distinguished from its substance, seems to us bad. The law is wholly destitute of any sort of arrangement, incomplete, often obscure, and even when it is intelligible upon long study, it is in many parts so ill expressed that no one who does not give such study to it can expect to understand it.

#### COPYRIGHT AT COMMON LAW BEFORE 1911

Although throughout the eighteenth and nineteenth centuries, there was heated discussion of the nature of common law copyright and whether statutory copyright preempted the field, by 1911 it was probably accepted in England that, after publication, an author's common law rights were extinguished and his only remedy lay in the statutes.<sup>43</sup> However, since it took so long for the result to be established in England, and since even in 1911 debates in Parliament mentioned these questions,<sup>44</sup> it may be useful to explore what

<sup>37</sup> 5 & 6 WILL. 4, c. 65, § 5 (1835). <sup>38</sup> *Clark v. Bishop*, 25 L.T. 908 (1872).

<sup>39</sup> 45 & 46 VICT., c. 40, § 1 (1882). <sup>40</sup> 15 GEO. 3, c. 53 (1775).

<sup>41</sup> 7 & 8 VICT., c. 12 (1844); 10 & 11 VICT., c. 95 (1847); 15 & 16 VICT., c. 12 (1852); 38 & 39 VICT., c. 12 (1875); 49 & 50 VICT., c. 33 (1886).

<sup>42</sup> CMD. No. 2036, para. 7 (1878).

<sup>43</sup> COPINGER, *LAW OF COPYRIGHT* 4 (8th ed.); SCRUTTON, *op. cit. supra* note 29, at 3.

<sup>44</sup> See *infra* pp. 23-24.

Scrutton in 1896 called "this extinct volcano of controversy."<sup>45</sup>

The dispute really involved three interrelated questions. First, whether at common law an author retained after publication a perpetual exclusive right of printing; second, whether the statutes by granting protection for a limited period cut short this right; and finally, whether the statutory right completely replaced the common law in situations where the latter rights might be more extensive. To answer these questions, it is necessary to examine in some detail the opinions delivered in three great cases of English copyright law, *Millar v. Taylor*,<sup>46</sup> *Donaldson v. Beckett*,<sup>47</sup> and *Jeffries v. Boosey*.<sup>48</sup>

*Millar v. Taylor* was the earliest case of copyright arising in a common law court after the Statute of Anne.<sup>49</sup> The issue was whether an author retained his rights after the expiration of the statutory period of protection. The decision upheld his perpetual common law right, and the judges, 3:1, held that the statute did not curtail the period of protection. Judge Willes in delivering the most lengthy of the majority opinions traced the history of copyright both before and after the statute.<sup>50</sup>

Before 1709 there was no direct judicial decision acknowledging the existence of copyright. But, Judge Willes points out, common law, in the absence of precedent, can be found in the "principles of private justice" and in usage. The right to "copy"<sup>51</sup> was recognized and protected before the act of 1709, and the statute itself was sponsored not to create the right, but to secure procedural advantages to proprietors of

<sup>45</sup> SCRUTTON, *op. cit. supra* note 29, at 4. <sup>46</sup> 4 Burr. 2303 (1769).

<sup>47</sup> 4 Burr. 2408 (1774). <sup>48</sup> 4 H.L.C. 815 (1854).

<sup>49</sup> 8 ANN., c. 19 (1709), the first copyright statute.

<sup>50</sup> Judge Willes's opinion may be found in *Millar v. Taylor*, 4 Burr. 2303 from 2310-2335. Since this summary of his points is taken entirely from 4 Burr. to avoid a multitude of references, no further citations will be made.

<sup>51</sup> "Copy of a book" was a technical term equivalent to the modern term copyright.

literary property. Although the first ordinances regulating printing were designed to prevent the publishing of heresy and other matter directed against the statutes and laws of the realm, they had the incidental effect of protecting rights in literary property. Thus the decree of the Star Chamber in 1556 chartering the Stationers' Company resulted in a monopoly of printing by the members of the company. From the time of its organization, the group kept registers and punished piracy. Willes explains the company's refusal to grant licenses to print another man's "copy," not on the grounds of any legal prohibition, but because to have done otherwise would have been "immoral, dishonest and unjust." Through its ability to proclaim ordinances, seize prohibited books, and imprison wrongdoers, the Stationers' Company effectively protected rights in literary works. These broad powers in fact, account for the absence of piracy cases in the courts.

Other decrees of the Star Chamber are additional evidence of the existence of literary rights before 1709. Thus a decree in 1637 expressly assumes copyright to exist otherwise than through letters patent, order, or entry in the Stationers' Company register. Willes argues that the only other way copyright could exist is by common law.

Subsequent to the abolition of the Star Chamber in 1640, and after the charter powers of the Stationers' Company were deemed illegal, various ordinances were passed prohibiting printing without a license and without entry in the register of the Stationers' Company. Also prohibited was printing without an owner's consent. The use of the word "owner" in the ordinances, and later in the 1662 Licensing Act, indicates the existence and recognition of a common law property right.

However, the ability to protect this right was diminished when the Licensing Acts expired in 1694, resulting in a lapse of the summary remedies available to authors. This loss, coupled with the increasing encroachment by the Crown's

patentees upon the interests of the Stationers' Company, led to pressure for Parliamentary action. The printers did not seek the creation of a right whose existence they took for granted, but they wanted both to restrict the power of the Crown and to improve their position in the courts. A power to confiscate all counterfeit copies was urgently needed. Not only was the defendant often a pauper, but damages could only be obtained for the number of infringing copies proved. This meant that where sales were widely dispersed a plaintiff could only recover a fraction of his loss.

Willes then draws support from the jurisdiction of the courts of Chancery exercised after the passage of the Act, which indicates that the statute merely gave temporary additional security to the protection authors had before. For if a conditional right had been created by the Act, the conditions could not be dispensed with; yet, Chancery granted injunctions for printing occurring after the expiration of the statutory period. Moreover, Willes insists that Chancery would not grant such an injunction except on the basis of a clear right. He concludes his argument by citing section 9 of the Statute of Anne,<sup>52</sup> which he claims saved the common law rights. Section 9 shows that although the title of the Act had used the word "vest," the use of the term was not for the purpose of creating, but rather securing the rights. Section 9 states:

Provided, that nothing in this Act contained shall extend, or be construed to extend, either to prejudice or confirm any right that the said universities, or any of them, or any person or persons have, or claim to have, to the printing or reprinting any book or copy already printed, or hereafter to be printed.

Judge Aston, delivering a concurring opinion, added that it was inconceivable that publication destroyed the common law rights. Publication is the only means by which an author

<sup>52</sup> 8 ANN., c. 19 (1709).

can make the property useful, and the statute was not intended to curtail these rights.<sup>53</sup>

The third concurring view was that of Lord Mansfield, who repeated the arguments of the other two judges, stressing particularly the justice and moral fitness of the decision.<sup>54</sup>

The dissenting opinion of Judge Yates,<sup>55</sup> often quoted in later cases, denied that there was a perpetual common law right. Although admitting a right in unpublished manuscripts, he argued for the defendant on the ground that there can be no copyright in ideas. Property must have a corporeal substance. By publishing, an author makes a gift to the public, and the fact that usage supports these "imaginary claims" is irrelevant. The register of the Stationers' Company and its contracts could not affect the rights of the public who were not parties to such contracts. Yates claimed that section 9 gave no support to the plaintiff, because the section applied merely to universities.

Although Yates was in the minority in 1769, part of his opinion, and perhaps the whole of it, became law in 1774<sup>56</sup> when the Law Lords heard an appeal from Chancery on facts<sup>57</sup> similar to those in *Millar v. Taylor*.<sup>58</sup> In *Donaldson v. Beckett*,<sup>59</sup> eleven judges gave an opinion on the five following questions:

- 1) Whether at common law, an author of any book or literary composition had the sole right of first printing and publishing the same for sale, and might bring an action

<sup>53</sup> *Millar v. Taylor*, 4 Burr. 2303, 2335-2354 (1769).

<sup>54</sup> *Id.* at 2395-2407 (1769).

<sup>55</sup> Yates's opinion is found in 4 Burr. 2303, 2354-2395.

<sup>56</sup> *Donaldson v. Beckett*, 4 Burr. 2408 (1774), 2 Bro. P.C. 129. The report of the case in Burrows is most inadequate, for it merely lists the questions, the affirmative or negative answer of each judge, and adds "and he gave his reasons," which Burrows completely omits. Brown's account is no better. The most lengthy version is found in 17 HANSARD, PARL. HIST. ENG. 953-1003 (1774).

<sup>57</sup> Beckett had bought Millar's copyright.

<sup>58</sup> 4 Burr. 2303 (1769).

<sup>59</sup> 4 Burr. 2408 (1774).



against any person who printed, published, and sold the same without his consent?

The judges answered in the affirmative 10:1 (or possibly 9:2).<sup>60</sup>

- 2) If the author had such right originally, did the law take it away upon his printing and publishing such a book or literary composition, and might any person afterward reprint and sell, for his own benefit, such book or literary composition against the will of the author?

The judges answered in the negative 8:3.

- 3) If such action would have lain at common law, is it taken away by the Statute of the 8th Anne; and is an author, by the said statute, precluded from every remedy except on the foundation of the said statute, and on the terms and conditions prescribed therein?

The judges answered in the affirmative 6:5.

- 4) Whether the author of any literary composition and his assigns, had the sole right of printing and publishing the same in perpetuity by the common law?

The judges answered in the affirmative 7:4 or 8:3.

- 5) Whether this right is in any way impeached, restrained, or taken away by the Statute 8th Anne?

The judges answered in the affirmative 6:5.

After hearing the answers of the law judges on these five questions, Lord Camden eloquently argued against the existence of a common law perpetual right<sup>61</sup> and the Law Lords voted to reverse the decree in Chancery. *Millar v. Taylor*<sup>62</sup> was now overruled.

However, the decision in *Donaldson v. Beckett*<sup>63</sup> left room for doubt.<sup>64</sup> One of the strongest advocates for the perpetual

<sup>60</sup> The results of the voting are recorded differently for questions 1 and 4.

<sup>61</sup> 17 HANSARD, PARL. HIST. ENG. 992-1001 (1774).

<sup>62</sup> 4 Burr. 2303 (1769).

<sup>63</sup> 4 Burr. 2408 (1774).

<sup>64</sup> Confusing elements not mentioned in the main portion of this paper are present in the decision. The vote on questions one and four is summarized

common law right, Lord Mansfield, did not speak "it being very unusual (from reasons of delicacy) for a peer to support his own judgment upon an appeal to the House of Lords. . . ." <sup>65</sup> Had he voted, the answer to question three would have been 6:6, resulting perhaps, in an affirmance of the Chancery decree. Moreover, the decision itself is ambiguous. Although the law judges had ruled 7:4 that at common law an author's rights are preserved after publication, <sup>66</sup> the motion to reverse Chancery, and thus the motion on which the Law Lords voted was introduced and discussed by a peer <sup>67</sup> who claimed that the common law rights did not continue after publication. <sup>68</sup>

In England, despite *Donaldson v. Beckett*, <sup>69</sup> the question of common law rights again cropped up, not necessarily for decision but for discussion, in the third landmark of copyright law, *Jeffries v. Boosey*. <sup>70</sup> The question arose whether a foreigner residing abroad but publishing in England <sup>71</sup> was protected by the statute. <sup>72</sup> Four <sup>73</sup> of the ten common law judges discussed common law rights, because even on the assumption differently by Burrows and Hansard. Moreover, several judges seemed to have voted inconsistently with their opinions. Thus, Nares, whose vote is recorded in the affirmative to question 3, argued that the statute merely gave an additional remedy to those had at common law, 17 HANSARD, PARL. HIST. ENG. 975-976. Although Judge Ashurst voted quite differently from Nares, it is stated, he "accorded in opinion with Mr. Justice Nares." *Id.* at 976. One of the two judges, or perhaps the only judge voting against the common law rights in unpublished works, Baron Eyre, added to his affirmative answer to question three "but there may be a remedy in equity upon the foundation of the statute, independent of the terms and conditions prescribed by the statute in respect of penalties enacted thereby." *Id.* at 975.

<sup>65</sup> 4 Burr. 2417 (1774).

<sup>66</sup> Question 4.

<sup>67</sup> Lord Camden, 17 HANSARD, PARL. HIST. ENG., 992-1001 (1774).

<sup>68</sup> It is interesting to note, that the American Supreme Court in 1834, knowing of the decision of the law judges in 1774, denied the existence in the United States of common law rights after publication, *Wheaton v. Peters*, 8 Pet. Rep. 591 (1834).

<sup>69</sup> 4 Burr. 2408 (1774).

<sup>70</sup> 4 H.L.C. 815 (1854).

<sup>71</sup> The actual facts were more complicated because Bellini, the foreign author, had assigned to another foreigner, Ricordi, who in turn assigned to the plaintiff Boosey, a native born subject of England.

<sup>72</sup> Although the case arose after the passage of 5 & 6 VICT., c. 45 (1842), the facts were such that the interpretation of 8 ANN., c. 19 (1709) was involved.

<sup>73</sup> Erle, Parke, Pollock, and Jervis.

that the statute was applicable only to English subjects or residents, there was no explicit provision in the act taking away the common law rights of aliens. Justice Erle,<sup>74</sup> repeating in effect the historical reasons of Willes, and Mansfield's arguments based on justice, tried to convince the other judges and the Lords that after publication at common law, an author's rights continued. The three other judges discussing the question, denied these rights. So did Lord Brougham who stated that the opinion of the law judges in *Donaldson v. Beckett*<sup>75</sup> was inconclusive, as the House in reversing Chancery had pronounced no judgment whatsoever on this point.<sup>76</sup>

Thus by 1854 the tide had shifted. Although there was no decision on the question, it seemed as if the weight of legal opinion was against the existence of common law rights after publication. A few years later, *Reade v. Conquest*<sup>77</sup> emphasized that common law rights were extinguished after the statutory period; moreover, they were not preserved during the currency of the period. However, the absence of a decision firmly establishing that copyright in a published work exists only by statute led to the following summary by the Royal Commission.<sup>78</sup>

The common law principles which lie at the root of the law have never been settled. The well-known cases of *Millar v. Taylor*, *Donaldson v. Beckett* and *Jeffries v. Boosey*, ended in a difference of opinion amongst many of the most eminent judges who have ever sat upon the bench.<sup>79</sup>

<sup>74</sup> 4 H.L.C. 865-882.

<sup>75</sup> 4 Burr. 2408 (1774).

<sup>76</sup> 4 H.L.C. 961; Lord Chancellor Cransworth and Lord St. Leonards also believed that copyright was solely a creature of statute.

<sup>77</sup> 9 C.B.(n.s.) 755 (1861).

<sup>78</sup> At the time of the Royal Commission (1878) the law was less clear on this point than in 1911. *Cox v. Land & Water Co.*, L.R. 9 Eq. 324 (1869) had held that there was copyright in newspapers, although newspapers were not "books" and, hence, not covered by the statute 5 & 6 VICT., c. 45 (1842). This case troubled the Royal Commission. CMD. No. 2036 para. 12 (1878). For a summary of the cases effectively nullifying *Cox v. Land & Water Co.* *supra*, see SCRUTTON, *op. cit. supra* note 29, at 110.

<sup>79</sup> CMD. No. 2036, para. 8 (1878).

Faced with these conflicting common law decisions as well as with a massive array of inadequate statutes, the Royal Commissioners urged:

. . . we recommend that the law on this subject should be reduced to an intelligible and systematic form. This may be affected by codifying the law, either in the shape in which it appears in Sir James Stephen's Digest,<sup>80</sup> or in any other which may be preferred; and our first, and, we think, one of our most important, recommendations is that this should be done. Such a process, would, amongst other things, afford an opportunity for making such amendments in the substance of the law as may be required.<sup>81</sup>

This paragraph laid the foundation for the unitary scheme of the 1911 Act. The 1878 Report contained no criticism of the common law principles relating to unpublished works, and the Commissioners expressly stated in paragraph 15, "With respect to unpublished documents or works of art we do not suggest any alteration of the law." It was the attempt to set down in coherent form the entire law of literary property that led Stephen to include in his digest a summary of the law relating to unpublished works, an attempt to state the law, rather than to create new law.

Although the doctrines in this area were not criticized, it may be useful to give the general outlines of the law of unpublished works before discussing the 1911 Act. Stephen summarized it in only four articles,<sup>82</sup> and Article 4 does not deal with this subject at all but with post publication rights.

#### ARTICLE 1. COPYRIGHT IN PRIVATE DOCUMENTS

The author or owner of any literary composition or work of art has a right, so long as it remains unpublished, to prevent the publication of any copy of it by any other person.

#### ARTICLE 2. EFFECTS OF LIMITED PUBLICATION OF PRIVATE DOCUMENTS

The publication of any such thing as is mentioned in the last article for a special and limited purpose, under any contract or upon any

<sup>80</sup> Stephen's Digest was an appendix to the 1878 Report, CMD. No. 2036 (1878).

<sup>81</sup> CMD. No. 2036, para. 13 (1878).

<sup>82</sup> *Id.* at lxx-lxvi.

trust express or implied, does not authorize the person to whom such thing is published to copy or reproduce it, except to the extent, and for the purposes for which it has been lent or intrusted to him.

#### ARTICLE 3. LETTERS

A person who writes and sends a letter to another retains his copyright in such letter, except in so far as the particular circumstances of the case may give a right to publish such letter to the person addressed, or to his representatives, but the property in the material on which the letter is written passes to the person to whom it is sent, so as to entitle him to destroy or transfer it.

#### ARTICLE 4. NO OTHER COPYRIGHT EXCEPT BY STATUTE

There is (probably) no copyright after publication in any of the things mentioned in Article 1, except such copyright as is given by the express words of the statutes herein-after referred to . . .

Stephen's Digest is for the most part an accurate description of the rights in unpublished works, but his discussion needs slight amplification. At common law, an author had two distinct rights. One was a right to prevent publication based on copyright; it paralleled the statutory right and probably was no broader.<sup>83</sup> The second was a right to restrain publication or use of a work, on the grounds that to do so would be a breach of trust. Although it is often difficult to distinguish on which of these two grounds a court proceeded, the second right was probably more extensive.<sup>84</sup> Not only did it protect an unpublished work after limited publication,<sup>85</sup> but it also prevented publication of the contents of a work.<sup>86</sup> The pro-

<sup>83</sup> MACGILLIVRAY, *op. cit. supra* note 21, at 19.

<sup>84</sup> COPINGER, *Law of Copyright* 38-40 (8th ed.); MACGILLIVRAY, *op. cit. supra* note 21, at 19.

<sup>85</sup> *Exchange Telegraph Co. v. Central News*, 2 Ch. 48 (1897); *Exchange Telegraph Co. v. Gregory*, 1 Q.B. 147 (1896), especially Rigby, L. J. at 157, who said, "I do not see how we can say that because this information was intended to be supplied to a large section of the public, the plaintiffs are therefore deprived of their right to protection. At any rate they were entitled to limit the supply of that information in such lawful manner as they saw fit, and it is plain that they did contract with the persons to whom they supplied it, that those persons should not either by sending telegrams or furnishing copies supply it to others."

<sup>86</sup> See *Philip v. Pennel*, 2 Ch. 577, 586-587 (1907); *Prince Albert v. Strange*, 1 MacN. & G. 25 (1849).

tection extended to ideas as well as to their form of expression.

#### PRESSURE FOR CONSOLIDATION AND THE 1909 REPORT

Despite the 1878 Report which pointed out the blatant incongruities of the English Copyright law, Parliament did nothing except add a few more statutes.<sup>87</sup> However, events in the international field began to put additional pressure on England to revise her laws.

While the 1887 Berne Convention, to which Great Britain was a party, required merely a few new orders in council relating to international copyright,<sup>88</sup> the Revised Convention of 1908 could not be ratified without changing the internal law.<sup>89</sup> Accordingly, a new committee was organized to examine the aspects of the Convention which differed from British law, "including those points . . . expressly left to the internal legislation of each country."<sup>90</sup> Although their report consisted primarily of an analysis of each article of the revised convention, the committee began by quoting the Royal Commission.<sup>91</sup> They cited the sections criticizing the maze of statutory material and the confusion arising, in the case of published works, from the interweaving of common law and statutory principles. The later report repeated verbatim the 1878 recommendation as to consolidation<sup>92</sup> and added,

<sup>87</sup> See note 4 *supra*.

<sup>88</sup> Article II, § 2, of the Berne Convention on Copyright of Sept. 9, 1886, read: "The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by the law of the country of origin of the work, and cannot exceed in the other countries the duration of the protection granted in the said country of origin."

<sup>89</sup> The revised Convention signed at Berlin on Nov. 13, 1908 stated in Art. IV that the enjoyment of rights other than in the country of origin shall not depend on the compliance with any formalities. While not requiring a change of British law, this provision was an impetus to alteration. For an analysis of the changes required by the Berlin revision see CMD. No. 4976 (1909).

<sup>90</sup> CMD. No. 4976 at 2 (1909).

<sup>91</sup> *Supra*, pp. 9, 17; the 1909 Report quoted para. 2-14 of the 1878 Report.

<sup>92</sup> *Supra*, p. 17.

it is highly desirable that the opportunity which the amendment of the law to give effect to the Convention would afford, should be taken to place the British law on an intelligible and systematic footing.<sup>93</sup>

Neither the 1909 report nor its predecessor contained any criticism of common law rights in unpublished manuscripts. The later committee, however, could not simply state, as had the Royal Commission,<sup>94</sup> that it recommended no changes in this branch of the law. The Berne and Berlin Conventions contained provisions relating to both published and unpublished material, and the committee was forced, at least for international purposes, to define publication in such areas as dramatic and artistic works. For example, to correspond with international commitments, public performance of a dramatic work, exhibition in public of an artistic object, or the erection of an architectural construction, could not effect publication.<sup>95</sup> But since these points could have been dealt with specifically by statute, the necessary changes in no way involved a statutory incorporation of the common law relating to unpublished works. Nevertheless, the more extensive examination<sup>96</sup> occasioned by international events, of the question of publication undoubtedly pushed in the direction of complete consolidation.

While the bills introduced during the three decades between copyright reports were weak-kneed efforts<sup>97</sup> to combine a few of the numerous statutes, ignoring both the problem of common law rights after publication as well as Stephen's example of including the common law prior to publication, the proposal after the second report managed to bring

<sup>93</sup> CMD. No. 4976 at 3 (1909).      <sup>94</sup> CMD. No. 2036, para. 15 (1878).

<sup>95</sup> Art. IV of the Berlin Convention (1908).

<sup>96</sup> The 1878 Report had briefly dealt with publication in respect to dramatic works. CMD. No. 2036, paras. 70-75.

<sup>97</sup> Especially Bill 265, printing ordered July 29, 1879, § 59, and second schedule listing the acts repealed, pp. 33-34; and Bill 295, printing ordered July 13, 1900, the major bill introduced prior to 1911. It is interesting to note that it repealed far fewer acts than the 1879 bill. See p. 18 of Bill 295, 1900.

the entire law of copyright under one statutory roof.<sup>98</sup> Within two years of the 1909 Report, a new act<sup>99</sup> with but thirty-seven provisions replaced the entire area covered formerly by more than twenty statutes as well as common law.

#### COMMON LAW RIGHTS AND THE 1911 ACT

A comparison of the provisions of the 1911 Act<sup>100</sup> relating to unpublished works with the clauses in Stephen's Digest,<sup>101</sup> reveals how little the passage of the Act affected the law in this area.<sup>102</sup> Since 1911 an author has the right "if the work is unpublished to publish the work or any substantial part thereof."<sup>103</sup> The duration of this right is not limited and continues until publication<sup>104</sup> except in the case of artis-

<sup>98</sup> Bill 282, printing ordered July 26, 1910.

<sup>99</sup> Copyright Act, 1911, 1 & 2 GEO. 5, c. 46.

<sup>100</sup> *Ibid.*

<sup>101</sup> See pp. 17-18, *supra*.

<sup>102</sup> a) The subject matter protected by the common law copyright in unpublished works is probably not curtailed by the statute. The rights prior to 1911 were two-fold; the proprietary right of copyright and the right to restrain publication as a breach of trust or confidence. The latter right is retained in the statute, sec. 31, and it seems that where at common law an author could assert a right in unpublished documents broader than the statutory rights, he had to invoke this second right, rather than the proprietary right. See note 84 *supra*.

b) Section 1 (1) (b) does effect a change in the law by providing that copyright is acquired if "in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions" to which the Act applies. However, Orders in Council under sec. 32 have widely extended the Act to unpublished works of foreigners. Moreover, foreigners probably have rights under sec. 31 which provides "but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence." In view of the words "or jurisdiction," it is hard to explain Macgillivray's position that the section does not apply to aliens. MACGILLIVRAY, *op. cit. supra* note 21, at 7, 8.

c) In commenting on sec. 31, Macgillivray says that the abrogation of common law rights weakens to some extent the previous protection; "the statutory remedies being substituted for the common law remedies, the right to proceed against persons in possession of or dealing with infringements is considerably restricted." *Id.* at 159. Here again, Macgillivray's conclusion is open to doubt in view of the effective remedies of the Act.

<sup>103</sup> Section 1 (2).

<sup>104</sup> Chafee says that under sec. 3, unpublished manuscripts cannot remain unpublished indefinitely. Chafee, *Reflections on Copyright Law* II, 45 COL. L. REV. 719, 727 (1945). On this point he seems clearly wrong. See note 105 *infra*.



tic works.<sup>105</sup> The author retains the same rights he had before in his letters,<sup>106</sup> nor does anything in the act abrogate his right to restrain a breach of trust or confidence.<sup>107</sup>

In view of the minor changes effected by the 1911 Act in the law of unpublished works, sec. 31 is, on its face, misleading. Worded so as to stress the difference between published and unpublished material, the clause seems primarily intended to change the law of the latter. It provides:

No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

The form of the provision as first introduced in the House of Commons is similar to Article IV of Stephen's Digest.<sup>108</sup> Viewed in the context of the historical battle of *Donaldson v. Beckett*,<sup>109</sup> and the absence of criticism of pre-publication

<sup>105</sup> Section 17 reads: "In the case of a literary dramatic or musical work, or an engraving, in which copyright subsists at the date of the death of the author . . . but which has not been published, nor, in the case of a dramatic or musical work, been performed in public, nor in the case of a lecture, been delivered in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter." Note that artistic works are not mentioned. But see, notes 19 and 21 *supra*.

<sup>106</sup> Letters come under the rubric of "original literary work" and thus are entitled to copyright. COPINGER, LAW OF COPYRIGHT 31 (8th ed.), says the law as to letters remains unchanged except that under the old law, publication was permitted, if the purpose was to vindicate the character of the receiver; and it is unlikely that this is true under the Act. However, publication may still be restrained on grounds of breach of trust.

<sup>107</sup> Section 31. See notes 85, 86, 102(a) *supra*.

Since 1911 not many cases have arisen on this theory of suit. An interesting case is *McNicol v. Sportsman's Book Stores*, MACGILLIVRAY COPYRIGHT CASES (1928-30) 116 (1930), where an injunction was not granted to restrain a newspaper from discussing a worthless system of selecting horse winners; the court saying that it was not shown that the defendant obtained her knowledge of the system through a breach of confidence.

<sup>108</sup> Quoted on p. 18 *supra*.

<sup>109</sup> 4 Burr. 2408 (1774).

rights by either the 1878 commissioners or the 1909 committee,<sup>110</sup> it becomes apparent that the original purpose of section 31 was the “abrogation of common law rights” *after* publication. The first version of the clause reads:<sup>111</sup>

No person shall be entitled to copyright or any similar rights in any literary, dramatic, musical or artistic work otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force.

The absence of the words “whether published or unpublished” indicates that the section did not originally stress the dichotomy between the two categories of works.

The statutory history of the Act in the House of Lords, subsequent to its passage by the Commons, reinforces the position that section 31 was not intended to effect a change in the law of unpublished works. When the bill was first introduced for discussion, Lord Haldane in speaking of the domestic aspects of the new bill said:<sup>112</sup>

At present the domestic law is in a great state of confusion. Ever since Lord Camden differed from Lord Mansfield in 1774 in the case of *Donaldson v. Beckett* no one has quite known what that common law was. Yet that common law of copyright is still relied on. In some cases, the common law rights subsist only till the statute law becomes operative, and in other cases the common law right co-exists with the statutory right, so that the state of confusion is difficult to describe even to a lawyer.

While Lord Haldane’s words present a valid description of the eighteenth century, but an exaggerated picture of the confusion in the twentieth,<sup>113</sup> they nevertheless indicate the concern of both the drafters and the average members of Parliament with the problems of *Donaldson v. Beckett*.<sup>114</sup>

<sup>110</sup> CMD. No. 2036, para. 15 (1878), and p. 20 *supra*.

<sup>111</sup> Bill 282, printing ordered July 26, 1910, sec. 32.

<sup>112</sup> 10 H.L. Deb. 40 (5th ser. 1911). The bill was first read in the House of Lords in August 1911; but since discussion on a bill in Parliament is postponed until the second reading, Lord Haldane spoke on Oct. 31, 1911.

<sup>113</sup> Lord Haldane was not a lawyer, but the Secretary of State for war.

<sup>114</sup> 4 Burr. 2408 (1774).

Section 31 was revised also in the House of Lords, where an addition preserving the prior law was approved without opposition.<sup>115</sup> Introduced by Lord Gorrell, the chairman of the 1909 Copyright Committee, and one of the most learned members of Parliament in the field of copyright law, the amendment to sec. 31 read:

but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.<sup>116</sup>

It becomes apparent, especially after the Lords' amendment, that sec. 31, while revolutionary on its face, is not the key difference between the law of England after the 1911 Act and the prior law. Not only did the law of unpublished works remain almost intact,<sup>117</sup> but the problems of *Donaldson v. Beckett*<sup>118</sup> at which the section was directed were probably by 1911 already resolved.<sup>119</sup>

#### THE BRITISH ACT AND AMERICAN LAW

The scope of this paper does not permit an analysis of the provisions of the 1911 Act and an evaluation of them as compared with the earlier law. As there is no doubt that a vast improvement over the former haphazard statutory treatment was achieved, only those aspects of the Act which are relevant to improving the American system of copyright law will be discussed.

In the United States copyright problems stem in large part from the doctrine of publication which is central to our law. A host of questions, the most important being the very existence of copyright, and the term of protection, depend on whether publication has been effected. The difficulty arises because the notion of publication is ill-defined and ambiguous; moreover, what may be publication for one purpose may not

<sup>115</sup> 10 H.L. Deb. 486 (5th ser. 1911).

<sup>116</sup> Bill 384, ordered printed Dec. 6, 1911.

<sup>117</sup> *Supra* p. 21.

<sup>118</sup> 4 Burr. 2408 (1774).

<sup>119</sup> *Supra* p. 16, and notes 43 and 77 *supra*.

be publication for another.<sup>120</sup> The British have to a large extent diminished the importance of these problems. Under the Copyright Act of 1911,<sup>121</sup> publication plays but a minor role. This result was not primarily accomplished by defining publication<sup>122</sup> or even by including unpublished works within the statute.<sup>123</sup> It was achieved by eliminating the requirement of registration and by tying the period of protection to an author's life and a fixed number of years thereafter.<sup>124</sup>

These two features of the British law should, without question, be incorporated into any future American act. Moreover, since there are considerable advantages, not present in England, in having statutory protection for unpublished works, a consolidation of the whole law of copyright should also be attempted.

The establishment of a unitary system of copyright would have an enormous effect in the United States. All of copyright law would be federal law thus removing the confusion arising from the interplay of federal and state decisions. In the absence of consolidation, unnecessary emphasis would still remain on the concept of publication; it would remain important even if there were no formalities required to secure statutory protection. There is considerable variation in the United States between common law and statute in such matters as remedy and procedure.<sup>125</sup> Moreover, where common law protection is broader than statutory coverage, it is common law copyright rather than the right to restrain a breach

<sup>120</sup> *Warner Bros. v. C.B.S.*, 102 F. Supp. 141 (S.D. Cal. 1951).

<sup>121</sup> 1 & 2 GEO. 5, c. 46.

<sup>122</sup> Section 1 (3) provides: "For the purposes of this Act, publication, in relation to any work, means the issue of copies of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works."

<sup>123</sup> Section 1 (1) b.

<sup>124</sup> Section 3.

<sup>125</sup> *E.g.*, 17 U.S.C. § 101 (b).

of trust that is usually more extensive. Thus the very existence of protection, to say nothing of such questions as a court's jurisdiction or the availability of statutory damages, would still depend on publication.

While unpublished works should be brought within the statutory framework, it is not clear that a provision as extensive as sec. 31<sup>126</sup> of the British Act should be adopted. The arguments both for and against such a provision stem once again from the problems raised by *Donaldson v. Beckett*.<sup>127</sup> Although the American courts at an early age rejected the claim that common law rights continue after publication,<sup>128</sup> the law on these points is much less settled than it was in England in 1911. Invariably, when broader rights based on common law are asserted, they are claimed in cases where publication has occurred, and where some components of the work in question have received statutory protection. Thus, in recent years, common law protection has been sought for news already published,<sup>129</sup> for characters in a book within statutory copyright,<sup>130</sup> for the style of performance of music already recorded and sold,<sup>131</sup> and for the form of print used in a published book.<sup>132</sup> The problems are more complex than in nineteenth-century England, because not only is common law copyright asserted in these cases, but claims are introduced and sometimes upheld on the grounds of unfair competition or some sort of quasi-property right. To be effective, a clause restricting an author to statutory copyright would have to abolish all other similar rights, and would, in effect, remove the law of unfair competition from the field of copyright.

The elimination of quasi-property rights and unfair com-

<sup>126</sup> Quoted at p. 22 *supra*.

<sup>127</sup> 4 Burr. 2408 (1774).

<sup>128</sup> *Wheaton v. Peters*, 8 Pet. Rep. 591 (1834).

<sup>129</sup> *International News Service v. Associated Press*, 248 U.S. 215 (1918).

<sup>130</sup> *Warner Bros. v. C.B.S.*, 102 F. Supp. 141 (S.D. Cal. 1951).

<sup>131</sup> *R.C.A. Mfg. Co. v. Whiteman*, 114 F.2d 86 (1940).

<sup>132</sup> *G. Ricordi & Co. v. Haendler*, 194 F.2d 914 (1952).

petition would have definite advantages. Congress, not varying notions of justice would decide what subjects are protected. Moreover, if no rights other than copyright could be asserted, the state courts would no longer entertain any actions in this field.

Although the law of literary property would become much more precise if it depended wholly on copyright, there are disadvantages of eliminating entirely the law of unfair competition from this area. The British have no law of unfair competition other than actions for passing off of title,<sup>133</sup> and, as a consequence, the copyright law covers subjects which do not properly belong within copyright. For example, record manufacturers as well as authors have copyright in their records enabling them to prevent copying<sup>134</sup> and to authorize public performance of their records.<sup>135</sup> The 1952 Committee urges that copyright be extended also to printers to protect their typographical arrangements.<sup>136</sup> They recommend that these rights be limited to twenty-five years, beginning from the date of publication; and they advise that notice of the date of publication be placed on all records and books.<sup>137</sup> The Committee thinks that television broadcasters should also be given new rights. The broadcasters should be able to authorize, for a fee, the public performance of their programs, and should have a right to prevent copying of their broadcasts.<sup>138</sup>

The inclusion of industrial products within a copyright law seems incongruous. This is especially true of technical devices such as records and television which are protected by

<sup>133</sup> For a review of the cases involving passing off, see COPINGER, *LAW OF COPYRIGHT* 80-83 (8th ed.).

<sup>134</sup> Copyright Act 1911, 1 & 2 GEO. 5, c. 46, sec. 19 (1).

<sup>135</sup> *Gramophone Co. Ltd. v. Stephenson, Carwardine & Co.*, 1 Ch. 450 (1934).

<sup>136</sup> Report of the Copyright Committee, CMD. No. 8662, para. 308 (1952).

<sup>137</sup> CMD. No. 8662, paras. 89, 90, 308 (1952).

<sup>138</sup> While the committee urges that both sound and television programs should be protected against copying, they recommend that rights to authorize public performance be given only to television broadcasters. CMD. No. 8662, paras. 186, 192 (1952).

the patent law. Moreover, the creation of additional rights increases the number of persons able to withhold a work from public dissemination. Fees for public performance can be collected by each owner of copyright; and each, despite the consent of the other owners, can prevent performance. If the suggestions of the 1952 Report are enacted, the owner of a television set could not turn it on in public without obtaining the consent of three different organizations. For example, a hotel owner operating a set in his lobby would have to pay fees to representatives of both authors and record manufacturers, as well as to the broadcasting company.<sup>139</sup>

The creation of these rights also modifies the simplicity of the British law. A right limited to twenty-five years involves problems of determining the date of publication. Since notice would be required, questions would arise as to the efficacy of various forms of notice.

A separate copyright for each technical device which improves and increases the facilities of diffusing an author's works diminishes the advantages to the public of the technical achievement. On the other hand, there are occasions when it is manifestly unjust not to give protection. For example, it may be improper for a record manufacturer to take a recording of another manufacturer's record and compete with him in the same market.<sup>140</sup> But statutory protection has the disadvantage of being applicable in all situations. Judicial discretion, at least theoretically, would be reserved for flagrant appropriation of another's work product.

Unquestionably, the retention of doctrines of unfair competition leaves the copyright law imprecise and inconsistent in areas not within the statute. However, imprecision and in-

<sup>139</sup> Performing Right Society, Phonographic Performance, Ltd., and the B.B.C. For a criticism of the methods of the collecting societies, see CMD. No. 8662, paras. 127-157, esp. para. 156. The committee also recommends the establishment of a tribunal to review collection of fees, and decisions refusing to authorize performances. *Id.*, paras. 183, 204-218.

<sup>140</sup> Metropolitan Opera Ass'n v. Wagner Nichols Recorder Corp. 199 Misc. 786, 101 N.Y.S. 2d 483 (1950), *aff'd*, 107 N.Y.S. 2d 795 (1951).

consistency may be preferable to a rigid framework which grants power to many individuals, or associations of individuals,<sup>141</sup> to prevent widespread diffusion of works—some of which are in the public domain. While fraught with many difficulties,<sup>142</sup> a possible solution may be a clause making the statutory rights exclusive, but with a proviso giving the federal courts power to entertain suits based on unfair competition in cases related to copyright.

The advantage of not requiring registration or other formalities to secure copyright does not depend on statutory coverage of unpublished works. On publication, statutory protection would automatically replace common law copyright. Since protection for most subjects would continue irrespective of publication, the significance of publication is reduced in a dual system. It merely determines the form, not the existence of copyright. However, as suggested earlier, if there are differences in remedy or procedure established by the statute, the scope of its coverage becomes important.

The elimination of registration is also desirable when consolidation is achieved. It is impracticable to require registration in an unpublished work. An author can hardly register his manuscript page by page as he creates it, or each time he revises it.<sup>143</sup> Moreover, in view of the British experience, there seems little disadvantage in abolishing such a requirement.

Many heated debates preceded the elimination of registra-

<sup>141</sup> CMD. No. 8662, paras. 127-157, esp. 156 (1952).

<sup>142</sup> The following questions, and probably many others, would immediately arise: How would one define "related to copyright"? What would happen if a claim were made on the basis of unfair competition not joined with a claim of copyright; would the state courts be completely ousted from the field of unfair competition? Would judges like L. Hand ignore this provision?

<sup>143</sup> Permissive registration has little merit. It is interesting to note that the original drafts of the British 1911 Act contained provisions for permissive registration. Bill 282, printing ordered July 26, 1910, § 17; Bill 149, printing ordered March 30, 1911, § 18.

Section 14 of Sen. Bill 3043 (Shotwell proposal, found in 86 CONG. REC. 63 [1940]) also provides for permissive registration.



tion in England. The 1878 Commission advocated a compulsory system of registration, arguing that "some visible evidence of existence" of copyright was desirable, for not only would it enable the public to know to whom certain books belonged, but would enable interested persons to ascertain whether copyright does exist.<sup>144</sup> The Commission also argued in favor of registration on the grounds of international convenience.<sup>145</sup> After 1878, events in the international field pressed in a different direction. In 1908, the Berlin Convention<sup>146</sup> expressly stated in Art. IV, "the enjoyment and exercise of these rights shall not be subject to the performance of any formality" and is "independent of the existence of protection in the country of origin of the work." As a result, the 1909 Committee was persuaded to eliminate registration.<sup>147</sup> Otherwise, if Britain became a party to the Convention, an Englishman would have protection in all countries except his own, while foreigners of all nations adherent to the convention would have protection in Britain. The committee was also impressed by the arguments against registration, especially that of M. Maillard, president of the International Literary and Artistic Association, who insisted that everyone knows when he is copying a work not his own.<sup>148</sup>

After some forty years of experience, it can be said that the British system has worked well, and no excessive hardship has resulted from doing away with registration and notice. The 1952 Report states that the "difficulties are of minor significance compared with the importance of the principle itself."<sup>149</sup>

Moreover, there are certain safeguards within the Act.<sup>150</sup> Only those works which are fixed in some permanent form are

<sup>144</sup> CMD. No. 2036, paras. 136, 138 (1878).

<sup>145</sup> *Ibid.*

<sup>146</sup> Revised Convention as signed at Berlin on Nov. 13, 1908.

<sup>147</sup> CMD. No. 4976 at 12-13 (1909).

<sup>148</sup> Minutes of Evidence taken before the Copyright Committee, CMD. No. 5051, para. 2976, pp. 125, 196 (1910).

<sup>149</sup> CMD. No. 8662, para. 2 (1952).

<sup>150</sup> Copyright Act, 1911, 1 & 2 GEO. 5, c. 46.

protected. While the Act on its face does not limit protection to non-ephemeral works, there are indications within the statute itself pointing to a requirement of permanence. Thus sec. 35, which extends copyright to areas formerly not protected, states

“Dramatic work” includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise. . . .

Certainty or permanence has also been required by the courts. They have said that a literary work must be in print or writing,<sup>151</sup> and have held that non-fixed components of a dramatic work are not the subjects of copyright.<sup>152</sup>

Although when the Act was first passed some authorities thought that it would cover some nonpermanent works,<sup>153</sup> there seems no question that this is not the law today. The 1952 Committee in rejecting a suggestion that copyright be extended to protect a performer’s particular style, said,

The essence of copyright, as we know it, is the protection against copying of a literary, dramatic, musical, or artistic work reduced to a material form. . . .<sup>154</sup>

<sup>151</sup> *University of London Press v. University Tutorial Press*, 2 Ch. 601 (1916). In this case the court did not deal with ephemeral works but with examination papers. After deciding that the introduction of the word “original” in the 1911 Act did not curtail the subjects of copyright and left unchanged the judicial interpretation of “book” of the 1842 Act, the court at 608 went on to speak of “literary work” within the 1911 Act; “copyright acts are not concerned with originality of ideas, but with the expression of thought in print or writing.” Although the statement is mere dictum and made in the context of a discussion on originality, COPINGER, *LAW OF COPYRIGHT* 33 (8th ed.), takes it to mean that there is no copyright in literary works not expressed in print or writing. He even goes so far as to contrast these with dramatic and musical works. He suggests (at 66) that only dramatic and musical compositions, and not literary works, would be protected if permanently fixed through recordings, but not fixed in graphic form. Copinger’s interpretation is quite odd because it means that recorded poetry never put in writing would give rights to the record manufacturer but not to the author.

<sup>152</sup> See *Tate v. Thomas*, 1 Ch. 503, 511 (1921), citing with approval the earlier case of *Tate v. Fullbrook*, 1 K.B. 821 (1908), which stated that to avoid injustice there must be certainty in the statutory monopoly.

<sup>153</sup> MACGILLIVRAY, *op. cit. supra* note 21, at 12.

<sup>154</sup> CMD. No. 8662, para. 170 (1952).

Other features of the 1911 Act enable smooth functioning without the necessity of registration. An assignment of copyright must be in writing.<sup>155</sup> In addition, the plaintiff may have the burden of proof. Thus, if an author is proceeding under sec. 1 of the Act, the defendant may not claim ignorance of wrongdoing; while if the plaintiff is claiming under sec. 2, he has to prove the defendant's guilty knowledge. The distinction is quite proper, for in most cases when an infringer commits acts protected by sec. 1, namely, copying, public performance, dramatization, etc., he is aware that he is treading on someone's copyright.<sup>156</sup> However, under sec. 2 a defendant infringes by selling, distributing, and importing. He may have no reason to know he is doing wrong. The 1952 Report approves of this difference,<sup>157</sup> and even proposes a modification in remedy so that it will become even more difficult to obtain relief against a secondary or section 2 infringer.<sup>158</sup>

The other major change effected by the Act of 1911 was achieved by relating the period of protection to an author's life and a fixed period thereafter.<sup>159</sup> In Britain the period is life and fifty years, but the number of years is unimportant

<sup>155</sup> Section 5 (2). The section however is confusing and the 1952 Report proposes revision. CMD. No. 8662, para. 276.

<sup>156</sup> Section 8 is of very limited effect and gives no protection to a person who was aware that the work was in copyright but erroneously thought a licence had been obtained from the true owner. *Byrne v. Statis Co.*, 1 K.B. 622 (1914).

Section 8: "Where proceedings are taken in respect of the infringement of the copyright in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy other than an injunction . . . if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work."

<sup>157</sup> CMD. No. 8662, paras. 277-279 (1952).

<sup>158</sup> Under sec. 7, all infringing copies are the property of the copyright owner; he can therefore get damages for conversion, although not for infringement, against a secondary infringer without proof of guilty knowledge. The committee recommends a proviso to sec. 7 preventing recovery of damages for conversion where the defendant proves he has no guilty knowledge. CMD. No. 8662, para. 292 (1952).

<sup>159</sup> Section 3.

to realize the advantages of sec. 3. Such a provision causes all of an author's works to fall out of copyright at once.<sup>160</sup> The tying of protection to life also reduces the significance of publication. Protection does not begin on the date of publication but is measured from the date of death which is more easily ascertainable.

Only in the cases of posthumous publication does publication determine the length of protection.<sup>161</sup> It would, moreover, be quite feasible to limit the period to life and fifty years for unpublished works. Several countries have provided that copyright in posthumous works expires at the same time as the copyright in works published during the author's lifetime.<sup>162</sup> Furthermore, the Brussels Revision of 1948<sup>163</sup> recommends such a limitation of the period of protection for unpublished works. The 1952 Committee did not approve the Brussels recommendation, as they were fearful that it would discourage the donation of embarrassing manuscripts to libraries and archives.<sup>164</sup> They were, however, in favor of a modified proposal limiting the perpetual rights in unpublished works.<sup>165</sup> The placing of a work in a library undoubtedly causes less embarrassment than publication; nevertheless, if an author's representatives are willing to put the work within the reach of students and scholars, it seems unlikely that the possibility of publication fifty years after the author's death, would substantially increase destruction of manuscripts.

A requirement that the rights in all the works of an author,

<sup>160</sup> The advantage is most apparent when successive revisions of the same work are published at different times.

<sup>161</sup> Section 17 of Copyright Act, 1911, 1 & 2 GEO. 5, c. 46. See 1952 Report, CMD. No. 8662, para. 36, recommending a needed clarification of sec. 6, which would provide that the date of publication be important for anonymous and pseudonymous works. The stress on publication in these works seems unavoidable.

<sup>162</sup> Brazil, Bulgaria, Denmark, Estonia, Finland, Haiti, Norway, Siam, Sweden, and Tunis. LADAS, *op. cit. supra* note 1, at 152.

<sup>163</sup> Berne Convention revised at Brussels, June 1948, Art. 7, subs. 5.

<sup>164</sup> CMD. No. 8662, paras. 32, 33 (1952).

<sup>165</sup> *Id.* para. 35.

whether published or unpublished, should expire at the same time would further decrease the significance of publication. Even more important, in the case of unpublished works, it would reduce the difficulty of ascertaining the owner of copyright. The longer the period of protection after death, the harder it is to find someone who can authorize publication.

The British law contains another element placing unnecessary emphasis on publication. Section 1 provides protection if:

a) in the case of a published work, the work was first published within such parts of His Majesty's dominions as aforesaid; and

b) in the case of an unpublished work, the author was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid; . . .

Although Orders in Council have considerably increased the number of works covered, an alternative and perhaps preferable solution would base protection for both categories of works on nationality or domicile.

#### CONCLUSION

In spite of these areas where publication remains determinative, the British Copyright Act of 1911 has effected a remarkable simplification of the prior law. By relieving copyright of its heavy dependence on the concept of publication, it has achieved an enormous advance over American law. A federal statute not requiring registration, and protecting all works for a period related to an author's life, would achieve a similar simplification in the United States.

# Collecting Collectively: ASCAP's Perennial Dilemma

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By J. ROGER SHULL

DUKE UNIVERSITY SCHOOL OF LAW

THE MOST VALUABLE RIGHT afforded today to the holder of a copyright of a musical composition is the exclusive right to perform the work publicly for profit.<sup>1</sup> This was not always the case. In the days before radio, television, and night clubs the composer of a popular ditty reaped huge profits from the sale of sheet music alone.<sup>2</sup> The more erudite composers of "legitimate" music, when not in the traditional garret, lived handsomely off their patrons. That the advent of radio caused an acute drop in sheet music sales is not contested.<sup>3</sup> Even before the time when predecessors of the modern disc-jockeys sent "hits" to early (and usually deserved) graves, a number of denizens of the "moon-and-June" crowd realized that certain purchasers of sheet music and stock orchestrations were getting far more for their money than a mere black-and-white

<sup>1</sup> 17 U.S.C. § 1(e): "... to perform the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit. . . ."

<sup>2</sup> Allen, *The Battle of Tin Pan Alley*, Harper's Magazine, Oct., 1940, pp. 514-523 reports: "In 1927 a hit song like 'Sonny Boy' could sell two million copies of sheet music. 'Bei Mir Bist Du Schoen,' a tremendous success of radio's heyday sold under 225,000 copies. An average pre-radio hit would sell over 1,000,000 copies; today a hit reaches 100,000." Herman Finkelstein, ASCAP's General Attorney, puts the latter figure at 50,000 and adds that "a current hit frequently yields the composer less than \$1,500 in sheet music royalties." See his article *The Composer and the Public Interest—Regulation of Performing Right Societies*. 19 LAW AND CONTEMP. PROB. 275, 278-279 (Spring, 1954).

<sup>3</sup> Allen, *supra* note 2, at 519.

copy of a rearranged harmonic scale with synchronized questionable poetry. The desire to get a portion of this extra bonus out of the tills of the dispensers and into the pockets of the producers of the raw material took physical shape in the organization known as The American Society of Composers, Authors and Publishers, hereinafter referred to as ASCAP. What originated as a mere protective and benevolent society to help abused—and sometimes indigent<sup>4</sup>—composers obtain their just (and constitutional) rewards, grew into a huge performance-right society with an income approaching the \$17 million mark,<sup>5</sup> able to dictate to customers with net worths figured in the billions.

The birth and development of the infant ASCAP was aided by the general language of the copyright law as interpreted by sympathetic courts. The number of titles in the ASCAP catalog soon reached huge proportions,<sup>6</sup> and the entertainment industry felt the pressure. ASCAP had to be big to survive. Music consumers had to be kept dependent on ASCAP in order for the latter to maintain the bargaining position so vital to its existence. This necessitated a constantly increasing portfolio—to include all songs that might possibly become hits—in order to keep pace with the capricious and easily fatigued interest of the public.

But meanwhile, another body of law, antithetical to the aims of ASCAP, was developing. The broad language of the

<sup>4</sup> Whenever ASCAP is accused of being greedy it resurrects the story of Stephen Foster who died penniless while his tunes enjoyed national popularity.

<sup>5</sup> "Unofficial word was that collections for the first eight months [of 1953] had run to the tune of \$11,400,000, roughly \$650,000 more than in the same period last year. At that rate, the year's take would be close to \$17 million. The total last year was \$16.3 million." See, *ASCAP: Collecting for the Piper's Tune*, *Business Week*, Oct. 10, 1953, pp. 136-144.

<sup>6</sup> Allen, *supra* note 1, reports that in 1940, "All told, ASCAP's catalog lists some 300,000 songs, some 2,500 of which might be said to constitute the grist of radio's mill." A more recent survey reports that of ASCAP's complete portfolio, "there are roughly 100,000 works . . . that have had some degree of public performance." *Business Week*, *supra* note 5.

antitrust laws was even more susceptible to expansion through judicial interpretation. Although the courts consistently reiterated the maxim "mere size is no offense,"<sup>7</sup> the biggest figures in the business and industrial world were whittled down to size just the same.<sup>8</sup> It was inevitable that ASCAP and the Antitrust Division of the Department of Justice should clash. The battles were many. Although ASCAP has not escaped the whittling process, its biggest club—collective enforcement of nondramatic performance rights—is still extremely heavy.

#### ORIGIN AND ACTIVITIES

ASCAP is an association formed in 1914 by Victor Herbert, the noted composer, and eight other outstanding composers and publishers, in an effort to enforce the public-performance-for-profit right granted by the Copyright Act of 1909<sup>9</sup> to composers of musical compositions.<sup>10</sup> Up until that time and for a few years thereafter, proprietors of restaurants, cabarets, and dance halls violated this right with impunity by using whatever music was at their disposal to enter-

<sup>7</sup> As stated in *United States v. United States Steel Corp.*, 251 U.S. 417, 447 (1920) and numerous cases thereafter; modified by *Cardozo in United States v. Swift & Co.*, 286 U.S. 106, 116 (1932), but not always followed.

<sup>8</sup> See, *United States v. American Tobacco Co.*, 221 U.S. 106 (1910); *United States v. Reading Co.*, 253 U.S. 26 (1919); *United States v. Union Pacific R. Co.*, 226 U.S. 470 (1912); *United States v. Paramount Pictures*, 66 F. Supp. 323 (S.D. N.Y. 1946), *modified*, 334 U.S. 131 (1947).

<sup>9</sup> *Supra* note 1.

<sup>10</sup> There are many authoritative histories of ASCAP. There is no dispute about ASCAP's origin and development. For that reason only the barest historical outline of the organization is given in this paper and the facts are not overly footnoted. I found the following references the most helpful: Cohn, *Music, Radio Broadcasters and the Sherman Act*, 29 GEO. L.J. 407 (1941); Note, 12 AIR L. REV. 172 (1941). The *Alden-Rochelle* case, cited *infra*, sums up events to 1947. White, *Musical Copyrights v. the Anti-trust Laws*, 30 NEB. L. REV. 50 (1950) contains some good comment on post-Alden-Rochelle developments including two recent consent decrees, cited *infra*; and the article in *Business Week*, cited *supra* note 5, brings the story up to date but without references to source material.



tain their customers without compensating the composer. Detection of the innumerable infringements that occurred every day was impossible for any single composer, and prosecution of the offender was often financially impractical. The need for an association to obtain for the composer his just reward was brought home to Victor Herbert when he found that he would have to pursue an infringing restaurateur to the Supreme Court in order to enforce his right to be paid for the performance of his works.<sup>11</sup>

The original function of the organization was to obtain the exclusive nondramatic performance rights to all compositions of member composers<sup>12</sup> and to license the various consumers of music in whose establishments the works were to be performed. This necessarily entailed much policing of places of entertainment, and, at first, much litigation for infringements.<sup>13</sup> As the power of ASCAP grew and its membership enlarged, users of music for profit began to fall in line. The advent of radio swelled ASCAP's coffers and finally emerged ASCAP's best, but most troublesome, customer.

The first formal test of ASCAP's power occurred when a motion picture exhibitor brought an action for an injunction to restrain defendant ASCAP from collecting license fees for the rendition of music, the performance rights to which were assigned to ASCAP by the composers. The injunction was denied. ASCAP was held not to be a monopoly and the practice of collecting for the performance of ASCAP music for profit was held to be an exercise of the legal rights of the association.<sup>14</sup> It must be remembered, however, that this action was brought in the days when ASCAP was still operating

<sup>11</sup> *Herbert v. Shanley Co.*, 242 U.S. 591 (1917).

<sup>12</sup> Originally a composer had to have five compositions published to qualify for membership. Now only one suffices.

<sup>13</sup> *Business Week*, *supra* note 5, at 143: "Time was when as many as 600 infringement suits might be pending at once. Now there may be only 20 in an entire year."

<sup>14</sup> 174th St. & St. Nicholas Ave. Amusement Co. v. Maxwell 169 N.Y. Supp. 895 (1918).

on a small scale. The monopoly question was to appear time and time again.

The growth and progress of ASCAP from 1917, the date of the victory in *Herbert v. Shanley Co.*,<sup>15</sup> is described in an article by Allen in *Harper's Magazine*:

ASCAP policed entertainment establishments, garnered evidence, and brought scores of infringement suits as it beat down concentrated opposition and established licenses for hotels, restaurants, night clubs, taverns and theaters.<sup>16</sup>

The cries of "abuse" multiplied with each trip to the courtroom by ASCAP, until in 1934, the government, through the Department of Justice, took a hand in the situation. An action was brought under the Sherman Act charging ASCAP with two specific restraints of trade:<sup>17</sup> (1) that competition between the members of ASCAP had been eliminated; and (2) "the society [has] destroyed the incentive of broadcasting stations to use the musical compositions" of nonmembers. It also complained that ASCAP had "a complete monopoly of the right to license for public performance for profit all the musical compositions of all its members" and ASCAP "has refused to agree to royalty payments based upon the actual use made of their musical compositions." After ten days of trial the government asked for an adjournment. The adjournment actually lasted six years.

The government's abandonment of the action, however, did not silence the critics of ASCAP, particularly the radio industry.<sup>18</sup> ASCAP helped the fledgling stations in the infancy of the industry by allowing performance of ASCAP music gratis or for only nominal fees, and therefore felt it fitting

<sup>15</sup> *Supra* note 11.

<sup>16</sup> Allen, *supra* note 1, at 516.

<sup>17</sup> *United States v. ASCAP*, No. E78-388 (S.D.N.Y. 1934). See *New York Times*, Aug. 31, 1934, p. 15, col. 3.

<sup>18</sup> Thanks to Cohn, *supra* note 10, at 408, for the following reference: In the Oct. 1, 1939 issue of *Broadcasting*, an editorial begins: "War is hell, whether its purpose is to preserve democracy in Europe against a madcap dictator or to preserve it in radio against an arbitrary totalitarian ASCAP."

that the association should share in the prosperity they had helped to produce.<sup>19</sup> Consequently, ASCAP license fees increased coextensively with radio's growth. Frustrated by the government's failure to prosecute ASCAP, radio carried the fight to the state legislatures. One analyst reports:

The year 1937 saw the beginning of anti-ASCAP legislation . . . Through the work of pressure groups, statutes outlawing ASCAP and similar combinations were passed in five states [Florida, Montana, Nebraska, Tennessee, and Washington]. Other states have followed this lead and with the advent of 1941, four more states and one territory [Kansas, Wisconsin, North Dakota, Vermont, and Alaska] have [similar] legislation.<sup>20</sup>

ASCAP got right to work and, with few exceptions had the statutes declared unconstitutional.<sup>21</sup> Those that have not been struck down are, with one exception, not enforced.<sup>22</sup>

The next crisis faced by ASCAP occurred in 1941 when the government reopened its antitrust action which it had abandoned in 1935. This time, the government joined as defendants BMI (Broadcast Music, Inc., a competing performance-right society that the radio networks organized as their answer to ASCAP), and two major networks, Columbia and National. The essence of the complaint filed by the Department of Justice against ASCAP on February 26, 1941, was that ASCAP was a monopoly and that its self-perpetuating board of directors had the power to and did fix prices, and that ASCAP's policy of blanket licensing was in restraint of trade.<sup>23</sup> Similar charges were preferred against BMI. (The case against the networks is not pertinent here.) BMI quickly entered into a consent decree and ASCAP followed suit.

<sup>19</sup> See Mills, *The ASCAP-NAB Controversy—The Issues: The ASCAP View*, 11 AIR L. REV. 394, 395.

<sup>20</sup> Note, 9 GEO. WASH. L. REV. 713, 715 (1941).

<sup>21</sup> See, for example, *Buck v. Swanson*, 33 F. Supp. 377 (D. Neb. 1939); *Buck v. Harton*, 33 F. Supp. 1014 (D. Tenn. 1940).

<sup>22</sup> "The State of Washington, ASCAP says, is the only one in which it still has any trouble doing business." *Business Week*, *supra* note 5, at 139.

<sup>23</sup> See Note, 12 AIR L. REV. 173, n.5, for more details.

The decree provides, *inter alia*:<sup>24</sup> Para. II, sec. 1—that ASCAP shall not acquire exclusive licenses of performance rights; Para. II, sec. 2—that ASCAP shall not discriminate in price or terms between similarly situated licensees, except that differentials may be based on “applicable business factors; Para. II, sec. 3—that ASCAP shall not require blanket licensing, but shall offer per program licenses, unless blanket licenses are requested by the broadcaster; Para. II, sec. 8—that ASCAP shall not refuse licenses of performance rights in order to exact additional consideration therefor, but it may restrict performance licenses in order to reasonably protect the value of performance rights.

Another of ASCAP's big customers, the movie industry, also felt that it was being abused. However, the movie producers followed the policy “if you can't fight 'em, join 'em.” Since they all had interests in publishing firms that distributed, among other works, the songs made popular by their screen productions, they joined ASCAP as publisher-members. In this manner, when a producer bargained for synchronization rights—the right to record music on the sound track of a film—with ASCAP and its members, no matter what price he paid, he was sure to get part of his money back in the regular distribution of funds collected by ASCAP.<sup>25</sup>

The practice that has raised the loudest cries from critics of ASCAP, as far as relations with the movie industry are concerned, is that after the initial licensing of the synchronization rights to the producer, ASCAP demanded—and for a long time received—blanket license fees from the exhibitors

<sup>24</sup> *Id.* at n.17.

<sup>25</sup> For purposes of distribution of collections, after certain deductions are allowed for expenses and payments to destitute composers, the members of ASCAP are divided into two main groups—the composers and authors (usually lyricists) on one side, and the publishers on the other. The share of each author-composer member is based on the number and popularity of his published works with a consideration for length of membership and special considerations for “prestige” music (usually, more serious works that can only be performed on the concert stage). Comparable standards are set up for the publishers.

in exchange for the right to perform the whole of ASCAP's portfolio for profit.<sup>26</sup> Dissatisfaction over the situation grew among the exhibitors during the period from 1934 to 1942. On April 9 of the latter year, 164 plaintiffs who operated 200 motion picture theaters filed suit in the Federal District Court for the Southern District of New York for treble damages under the antitrust laws (Title 15 U.S.C.A. § 15) and for injunctive relief against the practice of blanket licensing.<sup>27</sup> The suit lay dormant for four years but was resurrected in 1947 when ASCAP attempted to raise its license fees to the exhibitors, increasing them as much as 200–1500 percent. The case was decided unfavorably to ASCAP, and the organization was enjoined from certain practices hereinafter set forth.

The opinion is rather hazy as to the exact manner in which ASCAP breached the antitrust laws, but the decision was not appealed. The case was succeeded by two more consent decrees (discussed *infra*) that embodied some of the findings of the *Alden-Rochelle* case and which drastically curtailed some additional activities, vital to the existence of ASCAP. The court in the *Alden-Rochelle* case reserved jurisdiction of the matter of the injunctive relief granted. As is the case with consent decrees, the matter can be reviewed or the case reopened at the request of either party, upon a showing of changed circumstances. For these reasons and because no court has passed on the merits of the government's complaint filed in 1947,<sup>28</sup> it is necessary to study these latest clashes of the copyright and antitrust laws in more detail.

The importance of the findings in the *Alden-Rochelle* case to owners of copyrights on musical compositions cannot be

<sup>26</sup> The grant of the right to record music on a sound track of a film was not originally construed as carrying with it the right or license to perform the music publicly for profit. *Famous Music Corp. v. Melz*, 28 F. Supp. 767 (D. La. 1939); citing 31 F.2d 832, 834 (5th Cir. 1929).

<sup>27</sup> *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S.D.N.Y. 1948).

<sup>28</sup> Another reopening of the 1934 complaint.

underestimated. If all that Federal District Judge Leibell concluded is true and can be used as authority for future prosecutions of ASCAP, the entertainment industry is but a short step away from the chaotic pre-ASCAP days with 1954 overtones. Perhaps ASCAP realizes the danger and is avoiding an outright encounter with the Department of Justice's Antitrust men. The series of consent decrees is indicative of this.

#### THE ALDEN-ROCHELLE HOLDING

In the determination of this important controversy, it seems that Judge Leibell overestimated his task in awarding the plaintiffs the relief requested. He branded ASCAP again and again with the zeal of a prosecutor as a monopoly, when all that was really required of him to grant the injunctive relief prayed for was a simple finding that ASCAP had violated section 3 of the Sherman Act by restraining trade.<sup>29</sup> The language employed, at first reading, leaves one with a strong impression of the "guilt" of ASCAP, and that it escaped judicial execution only by the benevolence of an over-generous court.<sup>30</sup> But upon further consideration, several questions arise. For example, why, if on the evidence presented the Federal District Court had so little trouble finding ASCAP a monopoly, the Attorney General who had access to the same evidence in 1941 did not employ it to push the 1941 action to a successful conclusion on the merits, rather than compromise the action by use of a consent decree?

Of greater moment is the consideration of whether the case

<sup>29</sup> The specific complaint asked for treble damages for alleged injury to property caused by defendant's violations of the anti-trust laws (see Title 15 U.S.C.A. § 15) and injunctive relief against threatened loss or damage by a violation of antitrust laws (Title 15 U.S.C.A. § 26). The claim for damages was refused because plaintiff could not prove that they ever paid more than a reasonable fee for licenses to use ASCAP music.

<sup>30</sup> Many writers agree with this conclusion. See for example, White, *supra* note 10, at 62: "There was no appeal taken from the decision and it now seems clear that the requirements of the Sherman Act, as construed by recent court decisions, need no stretching to encompass ASCAP."

actually stands for the proposition that ASCAP is a monopoly,<sup>31</sup> and, if it does, can it be used as authority for future antitrust prosecutions by the government against ASCAP? Or, can a private party depend on the holding?<sup>32</sup> Suppose, for example, an association of Full-Permittees (those restaurateurs who have full permits to sell both food and alcoholic beverages and who usually employ orchestras to attract customers) brought an action for treble damages. Could they rely on the language of the *Alden-Rochelle* case—that ASCAP is a monopoly—or would they have to produce

<sup>31</sup> Note the sweeping language of the opinion: "Almost every part of the ASCAP structure, almost all of ASCAP's activities in licensing motion picture theaters, involve a violation of the antitrust laws. . . . That ASCAP is a monopoly within the language of the antitrust laws was clearly established at the trial." Does the first part of the quotation actually mean to embrace "almost every part" of ASCAP's structure? If so, what parts are excluded? Or is the range of the quotation limited by the actual matter being litigated: "ASCAP's activities in licensing motion picture theaters?"

At least one writer thinks the holding is confined to the movie industry. Note, *Copyright Pooling and the Anti-trust Laws*, 17 U. CHI. L. REV. 183, 193 (1949): "The injunction . . . does not forbid ASCAP's functions as a central licensing organization outside the motion picture industry, nor are there any prohibitions against nation-wide policing to detect infringements."

<sup>32</sup> The crime or civil wrong contemplated under section 1 of the Sherman Act—combining or conspiring to restrain trade—is recognized as a separate and distinct crime or civil wrong from monopolizing or attempting to monopolize, as embodied in the second section of the act, though the two sections overlap in the sense that a monopoly under the second section is a species of restraint of trade under the first. (*United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 [1940], gives a good exposition of this problem.) Section 7 of the Sherman Act (15 U.S.C.A. § 15) gives a private action for treble damages to "any person who shall be injured in his business or property by . . . reason of anything forbidden or declared to be unlawful by this act." It is hard to conceive of a situation where a private party suing for treble damages would be able to recover on the single theory that defendant was a monopoly, i.e., without showing other restraints of trade. ("Before a recovery can be had by a mere private person . . . there must be at least an allegation of the manner, nature, extent, or amount of the injury sustained by such private person" *Locker v. American Tobacco Co.*, 218 Fed. 447 [2d Cir. 1914].) There is some authority for the proposition that a showing of a monopoly plus damages therefrom is enough to satisfy the statute: "All that is necessary to support the action is that the business or property of the plaintiff shall have been in some way injured by reason of the illegal scheme. . . . It has been adjudged that where, as the result of such combinations as the act makes unlawful, one is injured by being compelled to pay a higher price for any article affected thereby, he may recover. . . ." *Monarch Tobacco Works v. Amer. Tobacco Co.*, 165 Fed. 774 (C.C.W.D. Ky. 1908), citing, 203 U.S. 390 (1906), 193 U.S. 38 (1904).

their own proof of specific restraints of trade affecting their business? <sup>33</sup>

The opinion of Judge Leibell is divided into five sections. After a discussion of the "Origin and Activities of ASCAP," he deals with the general and specific violations of the anti-trust laws engaged in by ASCAP, in this order:

1. That the extension of the copyright monopoly by pooling of the nondramatic rights of the various copyright holders is unlawful.<sup>34</sup>

2. That ASCAP is a monopoly.<sup>35</sup>

3. That the transfer of nondramatic performing rights of the members to ASCAP is a restraint of trade in that competition among the members of ASCAP in marketing the performing rights of their copyrighted works is eliminated, and that this restraint is accomplished through an unlawful combination with the motion picture producers.

4. That ASCAP is analogous to a patent pool.<sup>36</sup>

5. That ASCAP has the power to fix prices and does in fact fix prices.

Next, Judge Leibell disposes of the claim for damages<sup>37</sup> and then goes on to a discussion of the injunctive relief proposed. The language used seems to refer to the second section of the opinion—"ASCAP's Violations of the Anti-Trust Laws"—but the specific references are hazy. For example, see the first paragraph under the heading "Injunctive Relief": "The conduct of ASCAP [in demanding a sharp in-

<sup>33</sup> The attendant expense of compiling evidence to successfully prosecute an action under the antitrust laws is often a great deterrent to private parties. This deterrent might be lessened or removed altogether if the *Alden-Rochelle* case is dependable as authority in future actions against ASCAP.

<sup>34</sup> "The result of such a combination is to 'add to the monopoly of the copyright in violation of the principle of the patent cases involving tying clauses,'" reads the opinion at 893. That this analogy is not strictly consistent will be discussed *infra*.

<sup>35</sup> The court arrives at this conclusion without quoting figures or percentages of the market controlled by ASCAP and without mentioning BMI and various minor competitors.

<sup>36</sup> This appears to be an extension of the first finding.

<sup>37</sup> See note 29 *supra*.



crease in license fees] is an indication of the power that ASCAP has unlawfully acquired by its own *arrangements* with its members and by their *arrangements* with the motion picture producers.” (Italics added.) This finding is used to predicate the injunctive relief that follows. The use of the word “arrangements” evidently refers to the judge’s own exposition of ASCAP’s use of the copyright pool device and the system by which movie producers stood to profit from the license fees collected from the exhibitors. The statement may be connected also to the prior finding of price-fixing, *supra*, but only inferentially. It can hardly be connected with the finding that ASCAP was a monopoly; in fact, it was not necessary to make a preliminary finding that ASCAP was a monopoly in order to find that it engaged in specific restraints of trade. Although a finding that a restraint of trade exists may be circumstantial evidence of a monopoly, restraints of trade can and do exist independent of any monopoly.

The opinion next reiterates that injunctive relief will be awarded where it is shown that there is a threat of injury for which no adequate remedy is available at law. It is then stated that the relief will be given even though ASCAP agreed to reduce its demands on the theory that “plaintiffs are entitled to have this court exercise its equitable powers to prevent a recurrence of what happened in August, 1947 [the date of the original exorbitant demands] and to have their rights adjudicated and protected by a decree of the court, because the unlawful arrangements between ASCAP and its members, and between the members and the motion picture products, is [*sic*] a continuing one and is a clear violation of the anti-trust laws.” If the subject of the verb “is” in the last quotation were present, it would still not be too clear exactly what was being enjoined.

When the terms of the injunctive decree are considered it will be seen that not only was it unnecessary to find that ASCAP was a monopoly, but that that finding is entirely un-

related to the relief granted. Only specific practices in restraint of trade are enjoined. This gives the impression that the finding that ASCAP was a monopoly was pure dictum.

The specific terms of the injunction are paraphrased as follows:

a. ASCAP and its members are enjoined from attempting directly or indirectly to enforce the motion picture performing rights of any musical compositions against anyone as long as ASCAP continues as an illegal monopoly.<sup>38</sup>

b. ASCAP is enjoined from obtaining nondramatic rights to any compositions recorded on film.

c. ASCAP's members are enjoined from refusing to grant to motion picture producers the nondramatic rights to their compositions recorded on film.

d. ASCAP's members can grant to no one except the movie producers the nondramatic rights to their compositions recorded on film.

e. ASCAP cannot require producers to require exhibitors to take out an ASCAP license.

The decree, as can be seen, is actually much milder than the damning language of the opinion would lead one to expect. The only reference to ASCAP as a monopoly is in clause "a" and there it is used merely as a measuring stick to determine the period when that particular clause will be in force.<sup>39</sup>

#### TWO MORE CONSENT DECREES

Judge Leibell, in deciding the *Alden-Rochelle* case gave as one of the reasons for amending clause "a" of the injunction

<sup>38</sup> Clause "a" was originally a command to ASCAP to divest itself of all nondramatic rights and to assign them to the owners of the copyrights. This was changed because, inter alia, the court doubted that it had the right to direct a divestiture in a private suit "even though its purpose is to break up an illegal monopoly." See the same case in 80 F. Supp. 900. This involved a petition for clarification and amendment of the original decree.

<sup>39</sup> Query, if ASCAP were prosecuted for resuming the practices restrained in clause "a," could it defend on the ground that it is not now and never was a monopoly?

that there were at that time pending two actions by the government against ASCAP, and suggested that if plaintiffs wanted further relief, they could intervene in the actions. These two actions,<sup>40</sup> also filed in the District Court for the Southern District of New York, were prosecutions by the government (1) to curtail ASCAP's activities as an international cartel, and (2) to amend the consent decree of 1941. The actions were decided by consent on March 14, 1950.

The first decree strictly regulated dealings between ASCAP and foreign performance-rights societies, and specifically ordered ASCAP to terminate contracts made with certain of the foreign societies. The most pertinent part of the decree dealing with the matter under discussion is that which restrained and enjoined ASCAP from:

Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than musical performing rights on a non-exclusive basis.

The effect of this prohibition seems to be that henceforth composer members of ASCAP can do their own bargaining whether or not ASCAP also has the power, and correspondingly, ASCAP cannot object to a "music consumer" making his own deal directly with the composer, or the owner of the copyright other than ASCAP.

The provisions of the second judgment cover the society's general operation and internal organization in the following manner:<sup>41</sup>

*General Prohibitions.*—ASCAP can deal in only nonexclusive rights to musical compositions, and cannot interfere with the right of its members to issue nonexclusive licenses to any potential licensee in the United States.

ASCAP cannot discriminate price-wise among licensees similarly situated.

ASCAP's licenses cannot exceed a period of more than five

<sup>40</sup> Reported in CCH TRADE REG. REP., ¶¶ 62,594 and 62,595.

<sup>41</sup> Thanks to White, *supra* note 10, for an excellent unraveling of the decrees.

years except for licenses granted to the movie industry. Performance rights for compositions recorded on film are to be licensed to producers only and such rights cannot be enforced against any movie exhibitor.<sup>42</sup>

*License Issuance Requirements.*—Radio shall be licensed on a unit or network basis, and no fee shall be collected from a network station when the source station of the network is licensed.

One license for a period not exceeding one year shall be granted motion picture producers covering all motion picture performance rights throughout the United States, territories and possessions, and no further license shall be required. "Per film" licenses are to be granted on request.

*License Fees for Radio.*—When figuring fees on percentage basis, programs not using ASCAP music, and income therefrom, must be excluded from the total income on which the percentage is based. Per program licenses shall be available on request and ASCAP must see to it in good faith that the prospective licensee actually has a choice. The court has power to determine what constitutes a reasonable fee.

*Internal Regulation.*—Includes provisions: providing for a more equitable method for determining shares of fees collected; changing the minimum admission requirements to one composition regularly published for composers and authors and allowing admission to any publisher whose musical publications have been used for one year on a commercial scale and who assumes the financial risk involved in normal publication; providing for access to books, accounts and records of the organization by the government.

<sup>42</sup> This appears to be an embodiment of the *Alden-Rochelle* holding. Query why the government felt it necessary to include it.

SOME IMPORTANT ASPECTS OF THE PRESENT  
LEGAL STATUS OF ASCAP IN REGARD  
TO THE ANTITRUST LAWS

MONOPOLY

That ASCAP has been found to be a monopoly under section 2 of the Sherman Act is doubtful.<sup>43</sup> As has been pointed out, the government has had access to the same evidence that caused the *Alden-Rochelle* case to be concluded against ASCAP but has not used it. It seems that ASCAP and the government are avoiding any outright clash on this issue, the government not liking the consequences to the entertainment business any more than ASCAP. So far, the government has changed just about all of ASCAP's structure and practices to its (the government's) liking. If the latest consent decrees do not work out satisfactorily there does not seem to be much else the government can do but try for a total dissolution. If the clash comes, it is hardly conceivable that ASCAP would "consent" to being broken up. If the government depends on the *Alden-Rochelle* case, it seems likely that ASCAP will have to distinguish or discredit the holding. A pertinent factor not brought out in the *Alden-Rochelle* case is that since 1940 ASCAP has had stiff competition from BMI.<sup>44</sup> ASCAP would probably carry a fight for its life to the Supreme Court.

RESTRAINTS OF TRADE

*Blanket-licensing.*—It was never denied that ASCAP uses this method to transact its business.<sup>45</sup> The authorities are agreed that this is the only feasible way to handle the prob-

<sup>43</sup> See an article by Timberg, a gentleman of the Antitrust Division of the Department of Justice who helped mold the 1950 consent decree: *The Anti-trust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 LAW AND CONTEMP. PROB. 294. The analysis of the *Alden-Rochelle* case contained herein does not mention the monopoly finding except to suggest it as a basis for the price-fixing finding.

<sup>44</sup> Business Week, *supra* note 5, at 139 reports that BMI's catalog now includes 132,000 titles.

<sup>45</sup> See 11 AIR L. REV. 394, 395.

lem. If ASCAP faithfully adheres to the terms of the consent decree, requiring only nonexclusive licensing and the granting of "per program" or "per film" licenses on request, the issue should trouble consumers of music no more.

*Copyright Pool.*—This is perhaps as adequate a term as any to describe the mass transfer of nondramatic performance rights to a central collecting agency.<sup>46</sup> The term has a bad connotation, however, when there is attempted to be drawn an analogy to a patent pool<sup>47</sup> as Judge Leibell did.<sup>48</sup> Oppenheim in his *Cases on Federal Anti Trust Laws* at 553 points out that there are many different variations of the patent pool device, but "as a practical matter it might be said that a patent pool results from any mutual exchange or acquisitions of patent rights from others." Although the term "copyright pool" is probably susceptible to as many different ramifications as is "patent pool," Oppenheim's statement of the indices of the latter is at least a starting point for sustaining or discarding the analogy. A look at ASCAP's structure will show that it does not meet the test suggested. A member of ASCAP assigns the nonexclusive rights to his compositions to the society, not in exchange for the same rights to the compositions of other members, but more or less as consideration for the assurance that the society will diligently protect that right and see to it that the assigning member will be properly compensated when that right is exploited by users

<sup>46</sup> "ASCAP, then, could be described as a giant collection agency. It operates through a system of licenses, but it's a collection agency all the same." *Business Week*, *supra* note 5, at 138. When seen through judicial eyes, however: "If ASCAP had . . . acted only as a collecting agency, there would have been no violation of the law." *Alden-Rochelle* case at 898.

<sup>47</sup> Patent pools under circumstances where trade is restrained have been condemned. See *United States v. Line Material Co.*, 333 U.S. 287 (1947) and cases cited therein. *Standard Oil v. United States*, 283 U.S. 163 (1930), which held *contra* was distinguished by the *Line Material* case. *United States v. Gen'l Instrument Corp.*, 87 F. Supp. 157, 196 (D.N.J. 1949) sums up the rule: "Once it is established that the [pooling] agreement per se is the device which has vested the combination with power to restrain trade, it is unnecessary to show that the actual restraints have been applied."

<sup>48</sup> F. Supp. 888, 894.

of music. This is illustrated by the fact that movie-producer members had to pay for synchronization rights to use compositions of other members. It is assumed that the other impresario members of the society have to take out the same licenses to perform the works of brother members as do non-member users of the society's music.

Even if ASCAP is found to be within the definition of copyright pool, it does not follow that it will automatically be condemned. Only patent pools that restrain trade or restrict competition are illegal. As a practical matter, competition between members of ASCAP is not restrained, inasmuch as a member's share in the distribution of royalties depends primarily on the number of performances his works receive.<sup>49</sup>

The copyright pooling aspect of ASCAP was not eliminated by the consent decree of 1950 although it was limited in that henceforth ASCAP can deal only in nonexclusive performing rights.<sup>50</sup> If the present restrictions placed on ASCAP do not work out to the government's satisfaction, there seems to be no recourse for the government except to take away the right in toto. ASCAP would hardly "consent" to have this right taken away. It would be like signing its own death warrant. If the right to hold and enforce non-exclusive performing rights is taken away, ASCAP's *raison d'être* is gone. Therefore, if the issue ever comes up, there is every reason to believe that there would be an all-out fight on the merits of every complaint lodged by the government against ASCAP from the 1934 complaint to the present which no judicial body short of the United States Supreme Court will resolve.

<sup>49</sup> See Finkelstein, *supra* note 2, at 284, where he points out that one of the regulations ASCAP imposes on itself is that "it must not attempt to promote the popularity of the individual works in its repertory. That is the responsibility of each of the members acting individually. The self-regulation . . . stimulates competition between the respective members. . . ." Ask any disc-jockey or band leader if there is even a "gentlemen's agreement" among song-pluggers.

<sup>50</sup> *Supra*, pp. 50-51. Also see clause "b" of the injunction in the *Alden-Rochelle* case *supra*.

Three alternatives for decision suggest themselves:

1. Condemn any form of copyright pool and leave the bargaining for performance rights once again up to the composer and the performer;<sup>51</sup>

2. Overrule in whole or in part the *Alden-Rochelle* case; or

3. Distinguish between ASCAP's copyright pool and an illegal copyright pool.<sup>52</sup>

*Price Fixing.*—ASCAP's bargaining power has been greatly decreased by both the *Alden-Rochelle* case and the 1950 Decree. Although ASCAP will henceforth have to take into consideration many more factors in scheduling rates in order to avoid cries of abuse, mechanism for arbitration in setting fees has been set up by the latest decree, which means that there is little likelihood that this charge will again be lodged against the society.

*Block-booking or Tying-clause Analogy.*—ASCAP can no longer demand that a licensee take the whole portfolio and it must license on a per piece basis whenever requested to do so. It is doubtful whether ASCAP actually ever refused to operate on this basis and the restriction should cause it no concern, since the demand for such licenses has always been negligible.

#### SUMMARY

When the original owner of a musical copyright was being oppressed and abused, the courts and the Department of Justice were inclined to give a broad definition to the rights granted by the copyright monopoly, even in the face of the antitrust laws. But when the shoe appeared on the other foot,

<sup>51</sup> One writer feels that this is the trend. 17 U. CHI. L. REV. 183, 189, n.37: "The trend of recent anti-trust decisions has been to compel copyright and patent holders to obtain their rewards without the aid of combinations with other holders or licensees."

<sup>52</sup> White, *supra* note 10, at 64, suggests an application of the "rule of reason" as an "out."



the antitrust laws were applied with more particularity to the subordination of the copyright laws. The general principle, that what a person can do individually cannot always be done collectively, which has been applied successfully to other fields of endeavor by the Department of Justice, from all indications may be applicable to the owners of copyrights on musical compositions in their relations with ASCAP. If it is applied, ASCAP's days are numbered.

The government, the courts, and writers are in almost universal agreement that the only practical method of enforcing the rights of owners of musical copyrights is collectively, and, in that sense, that ASCAP is a commercial necessity. It is inconceivable from a practical standpoint that the Department of Justice would want to bring about the destruction of ASCAP and let the individual composer once again fend for himself. However, the matter may be out of the hands of the government. Although it has been established that the remedy of divestiture and dissolution in antitrust proceedings belongs to the government alone, if the *Alden-Rochelle* holding is a sturdy-enough peg on which to hang any antitrust action against ASCAP, a private party or succession of private parties could, by a series of injunctions, so strip ASCAP of its powers that dissolution could be accomplished in all but name.

# *Judge Learned Hand and the Law of Copyright*

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By RONALD CRACAS

HARVARD UNIVERSITY LAW SCHOOL

"I am amused when I observe your own solicitude  
and ingenuity to reconcile our decisions . . ." <sup>1</sup>

JUDGE LEARNED HAND

## TECHNICAL ELEMENTS OF COPYRIGHT

### PUBLICATION

The doctrine of publication has a significant position in the law of copyright. It is a boundary beyond which you may not go and retain the common law copyright—beyond which you are required to go to obtain statutory copyright.<sup>2</sup> Precisely *when* the boundary is crossed and publication achieved can be a difficult problem. Its importance, being both an exit and an entrance, and the fortuitous fact that Judge Learned Hand's first copyright case<sup>3</sup> involved the problem of what publication is, join to make it a singularly appropriate starting place for a discussion of Learned Hand's contribution to the law of copyright.

Strictly construed, the requirement of publication could have re-created the quagmire which existed in the law of copyright prior to the Act of 1909. Judge Hand was particularly sensitive to this. He was not pleased with the possibility of having valuable rights destroyed by insignificant irregu-

<sup>1</sup> L. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law*, 24 MICH. L. REV. 466, 468 (1926).

<sup>2</sup> Except for section 12 copyright, which protects works not for reproduction.

<sup>3</sup> *Stern v. Jerome H. Remick*, 175 Fed. 282 (C.C.S.D.N.Y. 1910).

larities. In *Stern v. Jerome H. Remick*, the infringing defendant urged that the plaintiff was not entitled to statutory protection because of plaintiff's failure to publish the work after he had deposited two copies with the Librarian of Congress. Judge Hand decided that the deposit itself was publication. In his opinion, the only thing required of the copyright holder is that he relinquish his work to the public in return for the monopoly rights secured by the statute. He reasoned that this could be done by deposit alone, and that it was not necessary that the work be exploited commercially. However, he also rested his finding of publication on the alternative ground of the sale of a single copy, even though it was plain that this sale was simply an attempt to comply with the fancied requirement of the statute. He concluded that, "Certainly under this language, either the deposit or the sale of the single copy. . . . was a publication."<sup>4</sup> Thus Judge Learned Hand's excursion into the field of copyright began by piloting an author safely through the technicalities of the new copyright act.

Judge Hand subsequently questioned his conviction that deposit is publication. In *Mittenthal v. Irving Berlin* he said, "*Stern v. Remick*, *supra*, was rightly decided because there had been a sale, but I must own that what I said there of publication seems to me now open to doubt."<sup>5</sup> The plaintiff had deposited two copies with the register under section 13.<sup>6</sup> The defendant argued that the statute required deposit after publication and that deposit before publication was not compliance. Once again Judge Hand refused to destroy the substance of the act by strict construction. He ascertained that the purpose of deposit is to secure two copies of the "best edition" for the Library of Congress and he did not find that

<sup>4</sup> *Id.* at 284.

<sup>5</sup> 291 Fed. 714, 715 (S.D.N.Y. 1923).

<sup>6</sup> "After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office . . . two complete copies of the best edition thereof then published . . ." 17 U.S.C. 13 (Supp. 1952).

this purpose was affected by the fact that the register gets the copies before the author need give them up. "The purpose of the section [was] equally served in either case. . . . The purpose of the act of 1909 was to open a path for authors beside and not through the quagmire which had been created under the old act. I have no disposition to open another. Of course, the policy of the act must be enforced, but it does not lie in purposeless technicality." <sup>7</sup>

The same problem of publication was presented in a different form in *Leibowitz v. Columbia Graphophone Co.*<sup>8</sup> Plaintiff, a Rumanian subject domiciled in New York, deposited one copy of his musical composition pursuant to section 12, which provides protection for a work "of which copies are not reproduced for sale." According to section 1(e), however, no copyright for mechanical reproduction may be acquired if the author is the subject of a state which does not extend reciprocal rights.<sup>9</sup> Rumania provided for no such rights. Plaintiff sought to prevent defendant from mechanically reproducing his work by virtue of section 9(a), which provided that an alien "author" is entitled to copyright protection secured by the act if he was "domiciled within the United States at the time of first publication of his work."<sup>10</sup> Judge Hand denied copyright protection, saying that even if we assume 9(a) applied equally to 1(e) notwithstanding the reciprocal proviso clause, still it extends the right to only such aliens as are domiciled here when the work is first published. This

<sup>7</sup> *Mittenthal v. Irving Berlin*, 291 Fed. 714, 715 (S.D.N.Y. 1923).

<sup>8</sup> 298 Fed. 342 (S.D.N.Y. 1923).

<sup>9</sup> "The provisions of this title, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work . . . shall not include the works of a foreign author or composer unless the state of which [he] is a citizen or subject grants . . . to citizens of the United States similar rights." 17 U.S.C. 1(e) (Supp. 1952). See also Editor's notes p. 90.

<sup>10</sup> ". . . copyright secured by this title shall extend to the work of an author or proprietor who is a citizen of a foreign state or nation only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of first publication of his work."

17 U.S.C. 9 (Supp. 1952).

work, he concluded, has never been published. He made no reference to the possibility that the deposit under section 12 might itself be publication.

Deposit under section 12 was held to be publication in *Shilkret v. Musicraft Records, Inc.*<sup>11</sup> Plaintiff had deposited his musical composition pursuant to section 12 and brought suit to prevent mechanical reproduction of it. It was held that plaintiff's deposit was publication within the meaning of the term "published and copyrighted after July 1, 1909"<sup>12</sup> so that he was entitled to 1(e) protection. However, in the later case of *Heim v. Universal Pictures Co.*<sup>13</sup> a similar deposit was held not to be publication, and the court was able to sustain a finding that the work had been published solely in a foreign state.

Whether deposit is the equivalent of publication has been a loose stone since Judge Hand tripped over it in the *Stern* case. It has been suggested that this uncertainty has resulted from the court's manipulation of the concept in order to reach desired results depending upon its disposition toward the particular plaintiff.<sup>14</sup> However, it would seem, in fact, to be the result of the court's attempts to develop a sensible body of case law from a poorly drafted statute and to prevent ill-chosen statutory language from creating unintended gaps in the protection afforded.

#### NOTICE

Copyright notice is another of the technical aspects of the Copyright Law which is a potential pitfall for the unwary. The problem of how far notice must conform to section 19 specifications also appeared in Learned Hand's first copyright case. Plaintiff had used Roman numerals to indicate the date of his copyright and defendant urged that this was

<sup>11</sup> 131 F.2d 929 (2d Cir.) *cert. denied*, 319 U.S. 742 (1942). (L. Hand, Swan, Chase, Circuit Judges. Opinion by Swan, J., Chase, J., dissenting.)

<sup>12</sup> 17 U.S.C. 1(e) (Supp. 1952).

<sup>13</sup> 154 F.2d 480 (2d Cir. 1946). (L. Hand, Clark, and Frank, Circuit Judges. Opinion by Frank, Clark dissenting.) See also Editor's notes p. 90.

<sup>14</sup> Gorham, *Deposit as Publication Under Section 12 of the Copyright Code*, 8 N.Y.U. INTRA. L. REV. 202 (1953).

not compliance with the notice requirements. Judge Hand summarily dismissed this argument with the statement that no one can "seriously contend that the notice required by the statute could be fulfilled only by Arabic numerals."<sup>15</sup>

In *Hass v. Leo Feist*<sup>16</sup> the deviation was more significant. The copyright proprietor applied for copyright in his own name, "Deutch," but the copies of the work stated the copyright owner to be the "Haas & Cahalin Music Co." Defendant argued that this was a failure to comply with the section 19 requirement that all copies shall bear "the name of the copyright proprietor." Judge Hand allowed that the use of two names would not invalidate the copyright, provided the proprietor had the right to use either, since at common law a man could adopt any name he chose so long as he were not engaging in a fraud. He held the copyright notice was sufficient. Upon rehearing, however, he changed his decision. Under the law of plaintiff's domicile it was illegal for plaintiff to use the name "Haas & Cahalin Music Co." Judge Hand reasoned that an illegal name could not be the name of the proprietor as intended by section 19.

Whether the proper notice had been used was also an issue in *National Comics Publications v. Fawcett Publications*.<sup>17</sup> The copyright proprietor, "Detective," used the name of its subsidiary, "Superman, Inc.," in its notices. "Superman, Inc.," a dummy corporation having the same officers, directors, and shareholders as "Detective," was organized for the sole purpose of exploiting the copyright. Judge Learned Hand held that the notice was sufficient because of the relationship and identity of the two corporations. "Anyone who should act in reliance upon the proprietorship of Superman, Inc. would not find himself in any different position because it turned out that the corporation was only a dummy."<sup>18</sup>

Judge Hand exhibited in the *National Comics* case the

<sup>15</sup> *Stern v. Jerome H. Remick*, 175 Fed. 282, 283 (C.C.S.D.N.Y. 1910).

<sup>16</sup> 234 Fed. 105 (S.D.N.Y. 1916). <sup>17</sup> 191 F.2d 594 (2d Cir. 1951).

<sup>18</sup> *Id.* at 602.

same distaste for trivia causing substantial differences as he had in the cases concerned with the technical aspects of publication. Although it was not necessary for him to deliver an opinion on the point, he criticized the cases which have held that to affix the letter "C," instead of the word "Copyright," to a work not within 5(f)-(k) resulted in a forfeiture.<sup>19</sup> He made it clear that he would allow a substantial degree of latitude to the form of notice.<sup>20</sup>

Underlying Learned Hand's attitude toward the amount of conformity required is his conception of the purpose of the notice. He views it not so much as a condition precedent<sup>21</sup> to be fulfilled without variance, but more as a means of advising the public of the proprietor's claim. Hence "any notice will serve which does in fact advise that there is a proprietor who claims copyright, provided the notice does not affirmatively mislead."<sup>22</sup> Unless an infringer is misled or prejudiced by the deviation in the form of notice, there is no reason for the notice to be held insufficient, since it has served its purpose. Only by being aware of this underlying conception of the function of the notice is it possible to understand the conflicting results of cases seeming to use the same standard. The meaning of "substantial compliance with section 19 notice" will differ, depending upon whether notice is viewed primarily as a condition precedent to obtaining a valid copyright or as a warning to potential infringers.<sup>23</sup> With this in mind it is possible to extract the full import from Learned

<sup>19</sup> "It is not altogether plain to us why such a notice should not have been held sufficient. . . ." *Id.* at 602.

<sup>20</sup> He approved cases which held that "if the notice affixed carried an earlier date than the true one, the error did not forfeit the copyright, although the law required the notice to state the true year." *Id.* at 602.

<sup>21</sup> *Cf. Advertisers Exchange v. Anderson*, 144 F.2d 907 (8th Cir. 1944) (Johnson, J.).

<sup>22</sup> *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 602, 603 (2d Cir. 1951).

<sup>23</sup> Compare *Advertisers Exchange v. Anderson*, *supra* note 21, and the *National Comics* case. They reach conflicting results though both employ the term "substantial compliance."

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Hand's statement that, "surely the measure of triviality is not whether on its face the mistake seems important, but whether it is in fact."<sup>24</sup>

A recent text-writer has said that the most important aspect of the *National Comics* case is that it "reversed a long line of decisions in holding 'that any notice is sufficient which gives the substance of what is prescribed in section 19.'"<sup>25</sup> The validity of this statement may be questioned in so far as it suggests there has been a change in Learned Hand's attitude toward the notice requirement. The result of the *National Comics* case represents the logical outgrowth of his earlier decisions. The opinion is a statement, at greater length, of the attitude he exhibited in the cases dealing with the technical aspects of publication and in his earlier cases on notice. Learned Hand has never given section 19 other than a liberal construction. His decision on rehearing in *Haas v. Leo Feist* is the only holding that is inconsistent. In that case he was impressed by the fact that the alternative name was used illegally. He seems to have held the notice insufficient primarily for that reason. But the dicta of even the *Haas* case clearly indicate, however, that he favored liberal construction of section 19.

In the *National Comics* case Judge Hand also had the opportunity to outline the consequences of failure to affix sufficient notice. He drew a distinction between abandonment<sup>26</sup> and forfeiture. Abandonment presupposes an intention to surrender. The proprietor of any work may abandon his literary property, before or after copyrighting it, by manifesting an intention to surrender his rights in the work to the public. On the other hand, an author whose work is forfeited

<sup>24</sup> See note 22 *supra*.

<sup>25</sup> "Judge Hand . . . enunciated for the first time the liberal construction rule of section 19. . . . It means that the technical construction of section 19 can no longer be invoked to defeat a valid claim of copyright." WARNER, RADIO AND TELEVISION RIGHTS, Sec. 62(a), p. 193 (1953).

<sup>26</sup> Often spoken of as dedication.



does not intend to give up his rights. Loss of his copyright is the consequence of failure to comply with prescribed formalities.

A forfeiture of copyright, because of omission of notice, may sometimes be prevented by section 21 of the Copyright Law. This section provides that "Where the proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright" as against an infringer who has actual notice.<sup>27</sup> In order to qualify under section 21 the owner must have sought to comply with the notice sections. He has not sought to comply if he fails to affix any notice whatever. Even when he has sought to comply, 21 only excuses omission on "particular copy or copies." Some courts have construed this to mean very few copies. Judge Hand commented that this is "in spite of the fact that the section is remedial and should be generously construed."<sup>28</sup>

#### DEDICATION

As Learned Hand opposed the destruction of protected rights by technical pitfalls, he also opposed the enlargement of the scope of copyright protection. One such area of potential enlargement was created by persons who urged that so far as the Copyright Law did not cover "intellectual property" publication did not destroy it. It would have seemed, at least as far as Learned Hand was concerned, that this question had been resolved by the cases in which it had been said that copyrighting involved the loss of all common law rights.<sup>29</sup> Nevertheless, several attempts were made to urge this position.

<sup>27</sup> 17 U.S.C. 21 (Supp. 1952).

<sup>28</sup> *National Comics Publications v. Fawcett Publications*, 191 F.2d 594, 601 (2d Cir. 1951).

<sup>29</sup> *Photo Drama Motion Picture Co. v. Social Uplift Film Co.*, 213 Fed. 374, 376 (S.D.N.Y. 1914).

Judge Hand stood firm against such an extension. "It would certainly be a strangely perverse anomaly that turned the grant of statutory copyright into a detriment to the 'author' . . . Omission of property from the act would be a bonanza to those who possessed property of that kind."<sup>30</sup> "We see no reason why the same acts that unconditionally dedicate the common law rights in works protected by the act, should not do the same in the case of works not copyrightable."<sup>31</sup> He concluded that regardless of whether the "property" right was protected or not, publication was a surrender of all common law rights in it.

The possibility of only partial dedication by publication also arose in *G. Ricordi v. Haendler*,<sup>32</sup> where plaintiff sought redress for infringement of his common law copyright in the typography of his edition of an opera libretto. Plaintiff conceded that upon the expiration of the copyright defendant was free to copy the libretto, but urged that the typography was not dedicated when the book was copyrighted. Resting his decision on a misleading of the public, rather than on an exchange of the monopoly for dedication as he had in *RCA v. Whiteman*,<sup>33</sup> Judge Hand said that the copyright notice led the public to understand that they might reproduce the book without limitation after the copyright expired, for "[A] secret limitation upon the apparent dedication of the work, seems to us inconsistent with the exercise of the other rights of copying which by hypothesis the dedication indubitably would include."<sup>34</sup>

It was also urged by plaintiff in the *Whiteman* case that a complete dedication could be prevented by the express and specific reservation of certain rights. Judge Hand replied: "If publication were merely a question of intent this might be

<sup>30</sup> *Fashion Originators Guild v. Federal Trade Comm'n*, 114 F.2d 80, 83 (2d Cir. 1940).

<sup>31</sup> *RCA v. Whiteman*, 114 F.2d 86, 89 (2d Cir. 1940).

<sup>32</sup> 194 F.2d 914 (2d Cir. 1952).

<sup>33</sup> See note 31 *supra*.

<sup>34</sup> 194 F.2d 914, 915 (2d Cir. 1952).

possible, for the intent is obvious not to dedicate the whole right.”<sup>35</sup> But here Congress offered a monopoly in exchange for dedication, and when the monopoly expired the dedication was to be complete. In *Haendler* he left open the question whether complete dedication could be avoided by annexing to the copyright notice a reservation of the proprietor’s rights in the typography because no such specific reservation was attempted.

Some years ago I went through one of the great moving picture factories at Hollywood; I was first shown the settings and allowed to watch a scene out of a play as it was being rehearsed, over and over again. Then I was taken to the recording machines in charge of dignified, intelligent young mechanics, more properly scientists, of the lower ranks perhaps, but still deserving that high title. The contrast was, to me at any rate, so depressing that I have never forgotten it. Who could resist the inspiration of the magic by which light and sound were converted into some other essence, instantaneously transported, and made permanent upon a tiny celluloid strip? When one reflected upon the years of devotion and ingenuity, of seething imagination, and of patient verification which lay behind these results, it seemed an honor merely to be one of a species which could do such things. What a piece of work is Man!

But the other side of the shield was as dreadful as the first was inspiring; for the only uses to which this wizard seemed to know how to put his divine powers were beyond endurance tawdry, trite, dreary, and childish. Of what value was it to scale the heavens, to descend to the bowels of the earth, to practice alchemy and all the necromancer’s art, if the end were to be so pitiful as this?<sup>36</sup>

#### WHAT IS PROTECTED

Section 4 of the Copyright Law provides: “The works for which copyright may be secured under this title shall include all the writings of an author.”<sup>37</sup> Section 5, which enumerates classifications of writings for registration purposes, provides

<sup>35</sup> 114 F.2d 86, 89 (2d Cir. 1940).

<sup>36</sup> L. Hand, 38 HARV. ALUMNI BULL. 1195 (1936).

<sup>37</sup> 17 U.S.C. 4 (Supp. 1952).

that the classifications "shall not be held to limit the subject matter of copyright defined in section 4."<sup>38</sup> In Learned Hand's opinion, these two sections must be understood as intending to extend protection to all compositions which, under the Constitution, may be copyrighted at all.<sup>39</sup> What works are protected depends, therefore, upon the interpretation given to the word "Writings" in the Constitution.<sup>40</sup>

Some of the common law background, necessary for such interpretation, is supplied in his opinion in *RCA v. Whiteman*.<sup>41</sup> Judge Hand noted that an author's monopoly of the right to reproduce his composition is not limited to words but includes pictures and at times has been stated as though it extended to all productions requiring intellectual efforts. In *Reiss v. National Quotation Bureau*<sup>42</sup> he held that a code book, containing a large number of coined words having no meaning, is a writing within the meaning of the Constitution. He said that the Constitution did not embalm the habits of 1789, but is flexible enough to include whatever the ingenuity of men should devise, as long as the new subject matter has some relation to the grant. However, in *RCA* he implied that the performance of an orchestra conductor and the skill of phonograph recording were not proper subjects of copyright. Taken together, the *Reiss* and *RCA* cases present a vague outline of Judge Hand's conception of what is copyrightable. They illustrate his willingness to allow a great deal of flexibility within the traditional concepts of "Writings," i.e. words, pictures, and graphic arts, and his opposition to extension of protection to include subject matter outside the traditional scope.

Learned Hand does not find in the Copyright Law a re-

<sup>38</sup> 17 U.S.C. 5 (Supp. 1952).

<sup>39</sup> *Reiss v. National Quotation Bureau*, 276 Fed. 717 (S.D.N.Y. 1921).

<sup>40</sup> "The Congress shall have power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST., ART. I, § 8.

<sup>41</sup> 114 F.2d 86 (2d Cir. 1940).

<sup>42</sup> See note 39 *supra*.

quirement of artistic or literary merit as a condition to copyright. He has consistently taken the view that lack of merit is of no consequence. He considers it arbitrary to decide that a particular work has no element of aesthetic quality, and would not presume to make such a decision himself.<sup>43</sup> In his opinion the courts were not constituted to be censors of the arts, nor are they qualified to assume such a function. He acknowledges that popular taste frequently gives great financial value to works which may be of no artistic value. He considers it the court's function to protect this financial value, and not to set itself up as the arbiter of literary value.<sup>44</sup> The fact that a work appears to have no aesthetic value is not grounds for denying protection.

Nor does he find a requirement of novelty as a condition to copyright. In his view the patent law rule governing validity is not to be carried over into copyrights. The work must not be borrowed, since a plagiarist is not an author, but it makes no difference that the work was anticipated by prior works, which were not used. It is sufficient that the work be original: "By original [Learned Hand] means that it [is] the spontaneous, unsuggested result of the author's imagination."<sup>45</sup>

Learned Hand's early views on the subject of originality tended toward a requirement of novelty. Although he stated in *Hein v. Harris*<sup>46</sup> that lack of novelty and inventiveness was of no consequence and that an author may borrow in general from the style of his predecessor, he held that an independently created work is an infringement of a similar prior work when the similarity would lead the average person to believe that it is a copy. In *Stodart v. Mutual Film Corp.*<sup>47</sup> he assumed that an independently conceived plot which had al-

<sup>43</sup> *Jewelers Circular Publishing Co. v. Keystone Publishing Co.*, 274 Fed. 932 (S.D.N.Y. 1921).

<sup>44</sup> *Hein v. Harris*, 175 Fed. 875 (C.C.S.D.N.Y. 1910).

<sup>45</sup> *Fred Fisher v. Dillingham*, 298 Fed. 145, 149 (S.D.N.Y. 1924).

<sup>46</sup> 175 Fed. 875 (2d Cir.), *aff'd*, 183 Fed. 107 (2d Cir., 1910). See also Editor's notes, p. 90.

<sup>47</sup> 249 Fed. 507 (S.D.N.Y. 1917), *aff'd*, 249 Fed. 513 (2d Cir. 1918).

ready appeared in the public domain was not entitled to protection. The prior existence of the plot was alone sufficient to defeat copyright. Hence novelty was not required but originality alone was not enough for copyright protection if the work was too similar to a prior work.

Two cases were instrumental in the change of Learned Hand's views on originality. In *Gross v. Van Dyk Gravure Co.*<sup>48</sup> he established that each of two clearly distinguishable and independent photographs of the same subject is capable of copyright. "A painter, for example, often makes two pictures from the same model; but there may be great differences between the several positions, and sometimes even between several aspects of the same position."<sup>49</sup> He elaborated further along these lines in *Jewelers Circular Pub. Co. v. Keystone Pub. Co.*<sup>50</sup> He noted that no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike.

The plaintiff in the *Jewelers* case had compiled a directory which defendant copied. Judge Hand held that the matter compiled need not be copyrightable in order for the compilation to be protected. A person may rework the material in the public domain and is entitled to protection of his compilation. A second compiler is free to use and repeat the material in the public domain, but he cannot copy from the plaintiff's work without doing independent work of his own. He would be using the brains of the author just as much, whether his original composition is old or new.

*Fred Fisher v. Dillingham*<sup>51</sup> represents the definite turning point of his thinking on the subject of originality. He decided that it is unimportant that the same work has appeared before and is in the public domain as long as the person claiming copyright on the subsequent work created it without copying the prior work. Rejecting the underlying

<sup>48</sup> 230 Fed. 412 (S.D.N.Y. 1916).

<sup>49</sup> *Id.* at 412-413.

<sup>50</sup> 274 Fed. 932 (S.D.N.Y. 1921).

<sup>51</sup> 298 Fed. 145 (S.D.N.Y. 1924).

assumption of the *Stodart* case, he explained that the cases which seem to give rise to the notion that novelty is a requirement of copyright were merely discussing the scope of protection, how much of the substance is protected, and meant no more than that a plot is never copyrightable in its more abstract outlines. Nowhere did these cases expressly indicate that an old plot, independently conceived, might be copied with impunity. Any person is free to use all the works in the public domain, but there is no reason why he should be free to use the original composition of another.<sup>52</sup>

Judge Hand argued in *Fisher* that a different rule would be contrary to a doctrine fundamental to copyright. His first argument rested upon the words of the Copyright Law. Section 8 provides that "no copyright shall subsist in the original text of any work which is in the public domain. . . ." <sup>53</sup> This, Hand says, has no application to a work which is an independent composition because such a work is not the "original text" of any work in the public domain but a second and equally original text.

He then drew upon established instances of valid copyright, some of which he himself helped to establish, to illustrate that novelty is not a requirement. He selected cases protecting compilations, maps, and photographs; works in which the amount of novelty would be at a minimum or nonexistent and which would be almost necessarily anticipated by earlier works. He concluded: "No one doubts that two directories, independently made, are each entitled to copyright, regardless of their similarity, even though it amount to identity. Each being the result of individual work, the second will be

<sup>52</sup> But see Note, 10 SO. CALIF. L. REV. 341-342 (1937), which mentions an unreported decision, *Myers v. Mail & Express Co.*, July 23, 1919, in which "J. Learned Hand declared that a prior historian who, by extensive research had discovered all collected facts which were in the public domain, could not prevent subsequent historians from obtaining their factual material from the prior historian's work instead of themselves resorting to the public domain."

<sup>53</sup> 17 U.S.C. 8 (Supp. 1952).

protected, quite regardless of its lack of novelty. But the best instance is in the case of maps. Here, to be faithful, identity is inevitable. . . ." <sup>54</sup> In the field of photography, as in compendia, the element of novelty may be reduced to a very narrow compass. A second photographer, selecting the same subject, should have as much protection as the first.

*Hein v. Harris* was finally expressly overruled by Judge Hand in *Arnstein v. Edward B. Marks*.<sup>55</sup> In this opinion he said that the copyright gives the author sole liberty to make use of the corporeal object by means of which he has expressed himself, but it does not mean that he has the sole liberty to create any other works, even though identical. "Were it not so the man who first copyrighted a photograph . . . could prevent every one else from publishing photographs of the same object." <sup>56</sup>

The icing was added in *Sheldon v. Metro-Goldwyn Pictures Co.*<sup>57</sup> with a passage that has since been quoted to exhaustion by the many judges following the *Fisher* doctrine of originality:

. . . if by some magic a man who had never known it were to compose anew Keats's Ode on a Grecian Urn, he would be an "author" and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's.<sup>58</sup>

Learned Hand has never devoted much discussion to the question of whether there is a Constitutional requirement of novelty or merit. This is probably because it has always been clear to him that no such problem existed. A suggestion that the Constitution might not include all photographs, but only those which had some element of artistic quality, seemed

<sup>54</sup> *Fred Fisher v. Dillingham*, 298 Fed. 145, 150-51 (S.D.N.Y. 1924).

<sup>55</sup> "Our reasoning in *Hein v. Harris* . . . can be defended only in case copyrights, like patents, are monopolies of the contents of the work, as well as the right to manifold the work itself . . . that is contrary to the very foundation of the copyright law, and was plainly an inadvertence which we now take this occasion to correct." 82 F.2d 275 (2d Cir. 1936).

<sup>56</sup> *Id.* at 275.

<sup>57</sup> 81 F.2d 49 (2d Cir. 1936).

<sup>58</sup> *Id.* at 54.



strained to him.<sup>59</sup> Some writers have suggested that novelty is a Constitutional requirement, since the creation of material already in the public domain does not "promote the Progress of Science and useful Arts."<sup>60</sup> This has never been Judge Hand's view. His opinions clearly indicate, though not explicitly, that a standard of novelty or artistic merit is not a Constitutional requirement.<sup>61</sup>

He never disguised the difficulties, as lazy judges do who win the game by sweeping all the chessmen off the table: like John Stuart Mill, he would often begin by stating the other side better than its advocate had stated it himself. At times to those of us who knew him, the anguish which had preceded decision was apparent, for again and again, like Jacob, he had to wrestle with the angel all through the night; and he wrote his opinion with his very blood. But when once his mind came to rest, he was as inflexible as he had been uncertain before. No man ever gave more copiously of himself to all aspects of his problem, but he knew that it was a judge's duty to decide, not to debate, and the loser who asked him to re-open a decision once made found a cold welcome.<sup>62</sup>

#### THE SCOPE OF PROTECTION

The most amorphous problem of the law of copyright is the extent to which a person may make use of protected literary property without infringing the copyright. Learned Hand, because of his facility with abstract concepts, quickly became the high priest of this part of the temple. He was aware that "It is . . . essential to any protection of literary property, whether at common law or under the statute, that the right cannot be limited literally to the text, else a plagiarist would escape by immaterial variations."<sup>63</sup> However, he was trou-

<sup>59</sup> *Jewelers Circular Publ. Co. v. Keystone Publ. Co.*, 274 Fed. 932, 935 (S.D.N.Y. 1921).

<sup>60</sup> Note, 10 So. CALIF. L. REV. 342 (1937).

<sup>61</sup> The Supreme Court seems to agree. *Mazer v. Stein*, 347 U.S. 201 (1954).

<sup>62</sup> L. Hand, *Mr. Justice Cardozo*, 52 HARV. L. REV. 361, 362 (1939).

<sup>63</sup> *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

bled by the fact that as soon as you protect against more than literal appropriation the matter is completely at large, and any attempt to draw a line between what is protected and what is not becomes a matter of imperceptible degrees.<sup>64</sup>

Judge Hand first came to grips with the problem in *Fitch v. Young*.<sup>65</sup> He called the protected material "expression" and the unprotected material "idea." But the terminology did not solve the problem of how far copyright extended. It merely provided labels for the two extremes, giving no assistance as to where one ended and the other began. He was forced to conclude that "it has never been very satisfactorily established, and probably never can be, at what point a plagiarism ceases to copy the expression of an author's ideas and steals only the ideas themselves."<sup>66</sup>

*Nichols v. Universal Pictures Corp.*,<sup>67</sup> a leading case in this area, represents Learned Hand's first step in developing a workable formula for a solution to the problem. He turns the question into one of substantial taking, and for purposes of this test the substance of a work is chiefly the details and incidents. The more abstract and general the material the plagiarist takes, the less substantial is the taking.<sup>68</sup> Where the boundary is, that is, how abstract or unsubstantial the material taken must be in order to be beyond the scope of protection, he does not attempt to say. He concedes that no one has been able to fix that boundary and doubts whether anyone can.<sup>69</sup> What is a "substantial taking" is left for resolution in the individual cases.<sup>70</sup>

<sup>64</sup> *Cf.* *RCA v. Whiteman*, 114 F.2d 86, 90 (2d Cir. 1940).

<sup>65</sup> 230 Fed. 743 (S.D.N.Y. 1916).

<sup>66</sup> *Id.* at 745-746.

<sup>67</sup> See note 63.

<sup>68</sup> "Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, . . . but there is a point in this series of abstractions where they are no longer protected." *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

<sup>69</sup> ". . . and while we are as aware as anyone that the line, wherever it is drawn, will seem arbitrary, that is no excuse for not drawing it." *Id.* at 122.

<sup>70</sup> Most writers have called the Learned Hand method, as expressed in *Nichols*, the "abstraction test." WARNER, *RADIO AND TELEVISION RIGHTS*, Sec. 150, n. 10,

The problem of drawing the line was not difficult in Judge Hand's next application of the "substantial taking" test in *Sheldon v. Metro-Goldwyn Pictures Corp.*<sup>71</sup> The defendant had taken so many of the details and dramatic incidents that he had no trouble in deciding that substantial parts had been lifted.

We have often decided that a play may be pirated without using dialogue . . . Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume . . . the play is the sequence of the confluence of all these means, bound together in an inseparable unity; . . . it is enough that substantial parts were lifted; . . . We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue.<sup>72</sup>

In *Shipman v. RKO Pictures, Inc.*<sup>73</sup> Judge Manton criticized Learned Hand's test. He claimed it was but a new name for comparing the "similarity of sequences of incident." Judge Hand was not sure that Manton was interpreting the *Nichols* case correctly. In a separate opinion he restated his view of the test, that there is some point where the copied

p. 525 (1953); Nimmer, *Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1130, n. 31 (1951); Note, 15 CORNELL L. Q. 633, 634 (1930). They usually contrast it with Professor Chafee's definition, as expressed by him in *Reflections on the Law of Copyright*, 45 COL. L. REV. 503, 514 (1945), which would protect the "sequence of events and the development of the interplay of characters."

A great deal of confusion has been generated in this area by the free use of nebulous language. Nimmer, *supra*, at 1131, suggested that to resolve this confusion the courts have relied heavily on the "substantial appropriation doctrine." He seems to suggest that there is some difference between the "abstractions test" and the "substantial appropriation doctrine." I submit that they are one and the same. True, Judge Hand did suggest in *Nichols* that there are two issues; 1) whether what is taken is protected, and 2) whether the taking is substantial. In practice he melted this down into the one issue of whether there has been a substantial taking. Perhaps this is "relying heavily upon the substantial appropriation doctrine," but it would be anomalous to attribute to Learned Hand a distinction he did not observe, and which probably does not exist.

<sup>71</sup> 81 F.2d 49 (2d Cir. 1936).

<sup>72</sup> *Id.* at 55-56.

<sup>73</sup> "It is naturally difficult to compare literary works by using the terminology of metaphysics." 100 F.2d 533, 537 (2d Cir. 1938).

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material is "so little concrete . . . therefore so abstract . . . no copyright can protect them."<sup>74</sup>

The more recent statements of the test appear in per curiam opinions of the second circuit. It has been essentially adopted by the other judges of the circuit, and they have frequently mentioned it with approval. One such instance is Judge Swan's opinion in *Mac Donald v. Du Maurier*,<sup>75</sup> where he found that:

[The] borrowings . . . consist in a series of concrete incidents and details, and if in fact these were borrowed from the plaintiff, we cannot properly hold that the common matter was outside the protection of the copyright law.<sup>76</sup>

The per curiam decision in *Dellar v. Samuel Goldwyn, Inc.*<sup>77</sup> summed it up well with:

We cited as authority for holding that it did not infringe the play, our decisions in *Nichols v. Universal Pictures Corporation*, . . . *Sheldon v. Metro-Goldwyn Pictures Corporation*, . . . and *Shipman v. RKO Pictures*, . . . and by doing so we meant that any similarities between the play and the film, even though the result of deliberate borrowing, would not be actionable. The principle advanced in those decisions was indeed not new, though in some of our earlier decisions it had been perhaps obscured. . . . We decided then, and we repeat now, that, before one descends far enough into the details . . . all similarity between [the play] and the [defendant's work] ends; in other words the play and the film are alike only in their broadest, most abstract, features.<sup>78</sup>

Separated from the facts of the particular cases, however, a statement of the "substantial taking" test has no real independent meaning, for it is no more than a system of analy-

<sup>74</sup> *Id.* at 538. Judge Swan, the third judge sitting, joined in this opinion, making it the majority opinion on the question of what test is used to determine the scope of protection.

<sup>75</sup> 144 F.2d 696 (2d Cir. 1944). (L. Hand, Swan, and Clark, Circuit Judges. Opinion by Swan, Clark dissenting.)

<sup>76</sup> *Id.* at 701.

<sup>77</sup> 150 F.2d 612 (2d Cir. 1945). (L. Hand, A. N. Hand, and Clark, Circuit Judges.)

<sup>78</sup> *Ibid.*

sis. Its significance, thus isolated, is that it illustrates Hand's approach to the most difficult problem in copyright and affords some indication of his attitude concerning the scope of copyright protection.

In Learned Hand's view, the scope of copyright protection is quite restricted. Historically copyright was limited to protection against literal pirating. Hand would keep protection as closely limited to its original scope as would be consonant with his desire to prevent a plagiarist from avoiding the copyright by minor variations. Hence his primary emphasis on protecting details as contrasted to abstractions. Concrete incidents are the closest things, short of paraphrasing, to the text. When a taking includes incidents and details, the plagiarist has come very close to literal appropriation of the work.

This restricted view of the scope of protection is intimately related to his conception of originality as a requirement of copyright.<sup>79</sup> Almost single-handed he established in the law of copyright the doctrine that a work need not be novel but is entitled to protection if it is original with the author. He would permit authors to draw generally from the storehouse of human achievement. With such a debt to his forebears and with a liberal requirement of originality, an author should not be entitled to protection of more than his craftsmanship. For if he may abstract freely from the motifs of writers who have preceded him, he should contribute to those who follow any novel motifs he creates, if it is possible to have novel motifs.

The craftsmanship, which is entitled to protection, he labeled "expression." His word choice was unfortunate. It created the impression of attempting to distinguish "idea" and "expression," itself often an idea. To him the term "expression" is a synonym for the more concrete parts of the

<sup>79</sup> "It appears to me very obvious that the rule as to infringement has, and indeed must have, as its correlative, the rule that originality is alone the test of validity." *Fred Fisher v. Dillingham*, 298 Fed. 145-150 (S.D.N.Y. 1924).

work; the parts closest to the text. It means the choice of words and forms, the incidents and sequences, the delineation of characters, and the treatment of facts and details.

Unfortunately the details of a work are often the financially least valuable parts of intellectual property. This is especially true for the movie industry, where an abstraction of the plot is usually all the plagiarist seeks. It is Judge Hand's view, however, that the Congress did not choose to protect this value, and it is not his function to extend it. He clearly expressed this respect for legislative jurisdiction when he said:

We are adjured that courts must adjust themselves to new conditions, and that in the case at bar justice clearly points the way to some relief. We cannot agree; no doubt we should be jealous to execute all reasonable implications of established doctrines; but we should be equally jealous not to undertake the composition of substantial conflicts of interest, between which neither the common law nor the statute has given any clue to its preference . . . and it is idle to invoke the *deus ex machina* of a "progress" which is probably spurious, and would not be for us to realize, if it were genuine.<sup>80</sup>

Judges have only limited power to amend the law. . . . We must judge upon records prepared by litigants, which do not contain all that may be relevant to the issues, for they cannot disclose the conditions of this industry, or of the others which may be involved. Congress might see its way to create some sort of temporary right, or it might not. Its decision would certainly be preceded by some examination of the result upon the other interests affected. Whether these would prove paramount we have no means of saying; it is not for us to decide. Our vision is inevitably contracted, and the whole horizon may contain much which will compose a very different picture.<sup>81</sup>

## INFRINGEMENT

### PROOF OF COPYING

Once Learned Hand abandoned his idea that independently arrived at similarity could be infringement of a prior

<sup>80</sup> *RCA v. Whiteman*, 114 F.2d 86, 90 (2d Cir. 1940).

<sup>81</sup> *Cheney Bros. v. Doris Silk Co.*, 35 F.2d 279, 281 (2d Cir. 1929).

work, it became necessary for him to find copying in order to sustain an infringement action. This could be done on the basis of actual evidence of access and copying, except that evidence of this nature is usually difficult to find.<sup>82</sup> In most cases the only way copying could be found is for the trier of fact to draw an inference of copying from the similarity of the two works and from evidence of the possibility of access to the work.<sup>83</sup> Learned Hand himself looked for similarity in the form of "parallelism of incident"<sup>84</sup> or "continuously suggestive melodic parallelism."<sup>85</sup> Therefore, it became incumbent upon plaintiffs to introduce the two works into evidence in such a way as to show the greatest amount of similarity and hence compel the drawing of an inference of copying.

In an effort to satisfy these requirements of proof, plaintiffs exhibited a great deal of ingenuity in presenting the two works so as to make the most of even coincidental similarities. In *Nichols v. Universal Film Corp.*<sup>86</sup> the plaintiff prepared an elaborate analysis of the two works, with detailed dissection of all the elements. Learned Hand was not pleased with this type of evidence. He was aware that if one wished to search carefully he could eventually find some similarities between independent works. As he said in *Arnstein v. Edward B. Marks*, "if one takes some notes of the treble in the accompaniment, moves them to the melody, raises them an octave, and cuts short the resulting melodic phrase, an identity can be made to appear."<sup>87</sup>

Judge Hand did not consider this type of evidence as the

<sup>82</sup> *Arnstein v. Porter*, 154 F.2d 464, 468 (2d Cir. 1946). (Frank, J.)

<sup>83</sup> In *Shurr v. Warner Bros. Pictures*, 144 F.2d 200 (2d Cir. 1944), Judge Hand affirmed a judgment of no infringement because the finding of no access was supported by the evidence and internal evidence of plagiarism (similarity) was wanting.

<sup>84</sup> *Sheldon v. Metro-Goldwyn Pictures*, 81 F.2d 49, 55 (2d Cir. 1936).

<sup>85</sup> "... [P]arallelism which seems to my ear to pass the bounds of mere accident." *Haas v. Leo Feist*, 234 Fed. 105, 107 (S.D.N.Y. 1916).

<sup>86</sup> *Nichols v. Universal Film Corp.*, 45 F.2d 119 (2d Cir. 1930).

<sup>87</sup> 82 F.2d 275, 277 (2d Cir. 1936).

proper solution, and to prevent such practice he adopted what has been called the "audience test." He made the question of copying depend upon the impression of the average spectator to the two works taken together, without the aid of dissection or experts. When drawing the inference himself he relied upon his own reactions and impressions.<sup>88</sup>

In addition to making the issue of copying depend upon when the average person would find copying, he also sought to limit the use of expert witnesses. His view, not only in copyright cases, is that experts tend to extend the trial and make it more expensive than necessary. Also he felt that the more the jury is led into the intricacies of dramatic craftsmanship, the more the issue and jury become confused.<sup>89</sup>

The *Arnstein v. Porter*<sup>90</sup> case may represent a change in Judge Hand's position on expert witnesses and the "audience test." Judge Frank's opinion, in which Learned Hand joined, divided the problem of infringement into two issues: (1) proof of copying, and (2) substantial appropriation. As to the former, analysis and dissection is relevant and the testimony of experts may be received. However, as to the latter issue, the outcome depends upon the response of the lay hearer, dissection or expert testimony being irrelevant. In effect, Judge Frank would limit the "audience test" to the issue of substantial appropriation.<sup>91</sup>

It is difficult to believe that Learned Hand agreed with Judge Frank on this ground. He has consistently treated the question of copying as one for the average hearer, to be decided ingenuously. Also, the question of substantial appropriation has been dealt with by him as a question of law. It has always been the other side of the coin labeled "the scope

<sup>88</sup> "... for . . . the inference I rely upon such musical sense as I have." *Haas v. Leo Feist*, 234 Fed. 105, 107 (S.D.N.Y. 1916).

<sup>89</sup> L. Hand, *Historical & Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 53 (1901).

<sup>90</sup> 154 F.2d 464 (2d Cir. 1946).

<sup>91</sup> Cf. *Nimmer, Inroads on Copyright Protection*, 64 HARV. L. REV. 1125, 1139-1140 (1951).



of protection." Finally, Learned Hand is too realistic to suppose that two such issues could be kept separate by the jury, and only one of the issues to be decided with the aid of expert testimony and dissection.<sup>92</sup>

Judge Hand joined in Judge Frank's opinion because of the procedural question. The *Arnstein* case came up on an appeal from a judgment granting defendant's motion for summary judgment. Learned Hand was becoming disturbed over the procedure, developing in the Southern District of New York, of disposing of copyright cases on motions for summary judgment. For purposes of the motion the plaintiff's allegations of copying were taken as true,<sup>93</sup> with the result that the cases were being decided solely on the question of law, that is, whether there had been substantial appropriation. He saw at least two evils in this practice. First of all, the issue of substantial appropriation is the most difficult problem in the law of copyright. Cases which might be disposed of on the issue of copying should not be resolved on the more difficult issue of substantial appropriation unless the advantages are very plain.<sup>94</sup> Second, in disposing of the suit on a motion for summary judgment, the judge unconsciously tends to forget the concession of copying and renders judgment on that issue, without admitting it to himself, when upon reading the two works it seems unlikely from their relative merits that the defendant copied.<sup>95</sup> To do this deprives the plaintiff of his right to jury trial on the issue of copying.

Learned Hand's attitude toward summary judgment in copyright cases is closer to Judge Frank's<sup>96</sup> than to Judge

<sup>92</sup> "Trial by jury is a rough scales at best; the beam ought not to tip for motes and straws." *United States v. Brown*, 79 F.2d 321, 326 (2d Cir. 1935).

<sup>93</sup> 2 MOORE, *FEDERAL PRACTICE* § 12.15 (2d ed. 1948).

<sup>94</sup> *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2d Cir. 1939).

<sup>95</sup> *Mac Donald v. Du Maurier*, 144 F.2d 696 (2d Cir. 1944).

<sup>96</sup> Judge Frank's view is that summary judgment was not intended to turn a case in which the decision depends upon the reliability of witnesses into a trial by affidavit. Summary judgment practice is to eliminate needless trials where no issue of fact is in dispute. To avoid needless trials, however, the appellate

Clark's.<sup>97</sup> Since the *Arnstein* case was decided on the summary judgment issue, the two-step procedure set forth by Judge Frank being dictum, Judge Hand's joining in the opinion does not necessarily indicate agreement with the two-step procedure. Hence the case need not be taken as indicating Learned Hand's agreement with the rejection of the "audience test" as to the copying issue and the application of it to the substantial appropriation issue.

It is possible to make an argument that Learned Hand agrees with the new two-step procedure. Since the issue of copying would have to go to the jury without dissection or expert testimony, the best way to handle the trial would be to try the issue of copying first and submit it to an unenlightened jury. If the jury found copying, then the trial would proceed into the question of substantial appropriation, at which point the previously prohibited evidence would be relevant. The two-step operation would, therefore, compel compliance with the trial procedure he recommends and would accomplish his objective of having the case disposed of, if possible, on the issue of copying.

#### UNINTENTIONAL COPYING

Before *De Acosta v. Brown*,<sup>98</sup> intent to invade the author's copyright had never been regarded by Learned Hand as an essential element of infringement. In two of his earliest cases

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court should not become a trial court. "Until the Supreme Court tells us we err, we shall therefore adhere to . . . our belief, expressed in *Dellar v. Samuel Goldwyn, Inc.*, 2 Cir., 104 F.2d 661, 662, and *Mac Donald v. Du Maurier*, 2 Cir., 144 F.2d 696, that generally there should be trials in plagiarism suits." *Arnstein v. Porter*, 154 F.2d 464, 474 (2d Cir. 1946).

<sup>97</sup> Judge Clark could not believe that a final judgment of infringement would be upheld on the facts, and so he saw no reason to have a trial, which could hardly construct a whole case without some factual basis on which to start. Under older procedure, useless trials were avoided by the demurrer and motion practices, which stressed form rather than the merits. Summary judgment, and its popular correlative, pre-trial procedure, go directly to the merits. Judgment should not be postponed where the ultimate legal result is clear. Plagiarism suits are not exceptions. *Id.* at 479-480.

<sup>98</sup> 146 F.2d 408 (2d Cir. 1944).

he decided that a willful intent to violate was not necessary<sup>99</sup> and that it was possible to be an innocent infringer.<sup>100</sup> By the time he wrote his opinion in *Haas v. Leo Feist*,<sup>101</sup> he was able to say that the right to damages, regardless of innocence, was unquestionable; and that the same rule should apply to a demand for an accounting for profits. Nor was it an excuse that the defendant's memory played a trick on him. In *Fisher v. Dillingham*,<sup>102</sup> defendant Jerome Kern could not remember whether he had ever heard or seen the plaintiff's song, but it was possible that he had and the similarity indicated copying. Learned Hand held him liable as an infringer, saying that it is seldom that a tort depends upon the purpose of the wrongdoer. It was clear from this opinion that unconscious plagiarism was actionable as much as deliberate.<sup>103</sup> In *Stodart v. Mutual Film Corp.*<sup>104</sup> he allowed damages against an infringer who thought he had bought the copyright from the agent of the owner, when in fact the agent had not been authorized.

Learned Hand felt that this rule, unintentional infringement is as actionable as deliberate, was justified because the Copyright Law provided for a form of notice. To protect his work the author must affix proper notice of copyright and thereby give a copier opportunity to advise himself of the claim of copyright. The statutory notice imposed on everyone a duty to learn the facts. Infringement was the reasonable and foreseeable consequence of the act of copying. If the work carried no notice, the copyright would be forfeited and the defendant would not be an infringer unless the copyright were saved by section 21,<sup>105</sup> in which case the statute specifically prevents the recovery of damages from an innocent infringer who has been misled by the omission of notice. Hence a per-

<sup>99</sup> *Stern v. Jerome H. Remick & Co.*, 175 Fed. 282 (C.C.S.D.N.Y. 1910).

<sup>100</sup> *Gross v. Van Dyk Gravure Co.*, 230 Fed. 412 (S.D.N.Y. 1916).

<sup>101</sup> 234 Fed. 105 (S.D.N.Y. 1916).

<sup>102</sup> 298 Fed. 145 (S.D.N.Y. 1924).

<sup>103</sup> *Cf. Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49 (2d Cir. 1936).

<sup>104</sup> 249 Fed. 507 (S.D.N.Y. 1917).

<sup>105</sup> 17 U.S.C. 21 (Supp. 1952).

son copying directly from the copyrighted work would be absolutely liable, but only if the work had proper copyright notice affixed. The absolute liability was offset by adequate warning.

This justification for absolute liability is not applicable when the defendant has copied from a copy of the plaintiff's work, which copy he supposed to be an original. This was the situation in *De Acosta v. Brown*. De Acosta had written a book on the life of Clara Barton and had added some fictitious facts of her own to make the story more palatable to the trade. Defendant Brown wrote a book on the same subject and copied from De Acosta, including the fictitious facts which De Acosta had created. Brown induced defendant Hearst to publish her book, Hearst believing that the work was entirely original with Brown. De Acosta sought damages and an accounting from each defendant.

Writing for the majority, Judge Clark held both defendants liable for damages. He interpreted prior Learned Hand decisions as indicating that good faith was not a defense to an action of infringement. He admitted that this was contrary to the general torts doctrine that liability and damages should be limited to what is foreseeable, but he noted that the analogy in copyright cases has always been to conversion of property, and while such a doctrine may apply to negligence, it does not apply to conversion.

As might have been predicted on the basis of a dictum in *Barry v. Hughes*,<sup>106</sup> Judge Hand dissented. In his view the authorities did not support absolute liability for damages in

<sup>106</sup> "It has been held that one who copies from a plagiarist is himself necessarily a plagiarist, however innocent he may be, but that would be a harsh result, and contrary to the general doctrine of torts. The wrong is copying; that is, using the author's work as a source. A copy of a copy does indeed do that, but one is ordinarily liable for only those consequences of one's acts which a reasonable person would anticipate. Laying aside a possible action for unjust enrichment, or for an injunction after discovery, we should hesitate a long while before holding that the use of material, apparently in the public demesne subjected the user to damages, unless something put him actually on notice." 103 F.2d 427 (2d Cir. 1939). (Per curiam L. Hand, Clark, and Patterson, Circuit Judges.)

this situation. All his prior cases, with one exception,<sup>107</sup> were cases of direct copying from the owner's work. The defendants in those cases had the benefit of adequate notice, which was not the situation for Hearst. It did not follow from these cases that one copying a copy, although thereby invading the monopoly, must respond in damages. As he had stated in *Haas and Fisher*, an act does not become a wrong when one must resort to consequences arising from it which reasonable persons would not anticipate. He found further support for his argument in section 20 of the statute, which prevents recovery of damages from an innocent infringer who has been misled by the omission of notice. He did not understand why the liability of a person who innocently copies from an infringer ought to be greater than that of one who uses the author's work directly.

Learned Hand's view in *De Acosta v. Brown* is supported by his prior opinions on the subject of innocent infringers. The requirement of notice is the key to his whole analysis, which is related to his views as to the function of copyright notice.<sup>108</sup> The one case that can be read as contrary to his view, *Haas v. Leo Feist*, is the one in which he most vigorously asserts that without notice it could not be a tort to copy innocently. Even if the decisions were to the contrary, however, he did not feel that they formed so impressive a body of authority that they must be followed if one thought them to be "wrong in principle and unfortunate in result."<sup>109</sup> As to profits and an injunction, however, the situation is different. It would not be fair to permit the defendant to benefit at the

<sup>107</sup> *Haas v. Leo Feist*, 234 Fed. 105 (S.D.N.Y. 1916). A writer employed by defendant copied the melody of a song from the plaintiff and defendant innocently published it. Hand held defendant liable for damages. Judge Hand distinguishes this case on the grounds of agency, asserting that the defendant, being the writer's employer, was liable for his torts. *De Acosta v. Brown*, 146 F.2d 408, 414 (2d Cir. 1944).

<sup>108</sup> See discussion of *National Comics Publications v. Fawcett Publications*, *supra* pp. 59-60.

<sup>109</sup> *De Acosta v. Brown*, 146 F.2d 408, 414 (2d Cir. 1944).

expense of the plaintiff. Judge Hand would allow these against an innocent infringer who copied indirectly.

In the course of his dissenting opinion, Learned Hand accepted the conversion of property analogy proposed by Judge Clark and attempted to make an argument that under the law of torts Hearst's actions in regard to plaintiff's property were not tortious.<sup>110</sup> It was unusual to see Learned Hand causing the consequences to flow from the label "property" instead of from the nature of the right involved.<sup>111</sup> The characterization of the right of literary property as a "property" right should not have led to the application of the doctrine of successive conversion to "property" different from that about which the rule developed.<sup>112</sup> It was unlike the Learned Hand who, in cases such as *RCA v. Whiteman*,<sup>113</sup> carefully analyzed plaintiffs' requests for protection of their property and often pointed out that calling their interest "property" did not automatically entitle it to protection.

<sup>110</sup> He cited the RESTATEMENT, TORTS sec. 222 (1934). "One who intentionally dispossesses another of a chattel without his consent or other privilege to do so is liable to the other. . . .

"d. Necessity of intent. Unless the actor intended to so deal with the chattel as to deprive the other of his possession, no action can be maintained under the rule stated in this Section although the actor may be liable under some other rule of law. . . .

"d. [sic] Character of intent necessary. The intention necessary to subject to liability one who deprives another of the possession of his chattel is merely the intention to deal with the chattel so that such dispossession results. It is not necessary that the actor intend to commit what he knows to be a trespass or a conversion. It is, however, necessary that his act be one which he knows to be destructive of any outstanding possessory right, if such there be."

It would seem that Hearst intended to deal with the "property" of the plaintiff in a way destructive of outstanding rights, if any existed.

<sup>111</sup> *Cf. Bayer Co. v. United Drug Co.*, 272 Fed. 505, 509 (S.D.N.Y. 1921). "No doubt it is convenient for many purposes to treat a trade mark as property; yet we shall never, I think, keep clear in our ideas on this subject, unless we remember that relief always depends upon the idea that no man shall be allowed to mislead people into supposing that his goods are the plaintiff's. . . ."

<sup>112</sup> Note, 58 HARV. L. REV. 615 (1945).

<sup>113</sup> 114 F.2d 86 (2d Cir. 1940).

A judge's life, like every other, has in it much of drudgery, senseless bickerings, stupid obstinacies, captious pettifogging, all disguising and obstructing the only sane purpose which can justify the whole endeavor. These take an inordinate part of his time; they harass and befog the unhappy wretch, and at times almost drive him from that bench where like any other workman he must do his work. If that were all, his life would be mere misery, and he a distracted arbiter between irreconcilable extremes. But there is something else that makes it—anyway to those curious creatures who persist in it—a delectable calling. For when the case is all in, and the turmoil stops, and after he is left alone, things begin to take form. From his pen or in his head, slowly or swiftly as his capacities admit, out of the murk the pattern emerges, his pattern, the expression of what he has seen and what he has therefor made, the impress of his self upon the not-self, upon the hitherto formless material of which he was once but a part and over which he has now become master. This is a pleasure which nobody who has felt it will be likely to under-rate.<sup>114</sup>

#### REMEDIES

##### APPORTIONMENT OF PROFITS

A finding of infringement would be of no value unless remedies were available. These are provided in section 101 of the Copyright Law.<sup>115</sup> Among other remedies, section 101 allows the copyright proprietor to recover damages and profits or, in lieu of actual damages and profits, such damages as to the court shall appear to be just.<sup>116</sup> Prior to the enactment of this section in 1909, and before Learned Hand was appointed to the bench in the Southern District of New

<sup>114</sup> L. Hand, *The Preservation of Personality*, in DILLIARD, *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 43 (1952).

<sup>115</sup> "Section 101. Infringement— If any person shall infringe . . . such person shall be liable:

"(a) Injunction. . . .

"(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just. . . ." 17 U.S.C. 101 (Supp. 1952).

<sup>116</sup> See Note, 67 HARV. L. REV. 1044 (1954).

York,<sup>117</sup> the courts had broader discretion to fashion remedies.<sup>118</sup> Several doctrines had been established in the area of copyright remedies. One of these was that an infringer who intermingled the plagiarized material with his own had the burden of disentangling the contribution of the component parts. Failure to sustain this burden resulted in allowance to the plaintiff of the full amount of the defendant's profits from the entire work.<sup>119</sup>

Learned Hand expressed some dissatisfaction with the results of this doctrine early in his judicial career.<sup>120</sup> His objection was with the unreasonable way in which the doctrine was applied. After placing the burden of apportioning the profits over the component parts upon the defendant, the courts held him to a very strict standard of proof. In an area which does not lend itself to strict rules of evidence but which calls for reasonable latitude,<sup>121</sup> this inevitably meant that the defendant could not introduce sufficient evidence to justify an apportionment and the plaintiff received all the profits.

Learned Hand displayed his attitude toward proof of copyright damages in *Gross v. Van Dyk Gravure Co.*<sup>122</sup> The plaintiff could not offer sufficient evidence of damages. Exercising his discretionary power under the "in lieu" clause, he estimated the amount of damages the plaintiff had suffered with-

<sup>117</sup> L. Hand was appointed April 26, 1909. 168 Fed. iii (1909).

<sup>118</sup> Note, 48 YALE L. J. 1279, 1280 (1939).

<sup>119</sup> *Callaghan v. Myers*, 128 U.S. 617 (1888) (Blatchford, J.); *Dam v. Kirk La Shelle Co.*, 175 Fed. 902 (2d Cir. 1910) (Noyes, J.); COPINGER, LAW OF COPYRIGHT, ch. 8 (8th ed. 1948).

<sup>120</sup> "It may perhaps be impossible for the defendant Feist under the rule of *Dam v. Kirk La Shelle* . . . to avoid a recovery of all the net profits . . . although it is perfectly apparent to unsophisticated common sense that the song's success was due to its sentiment and its appositeness to a certain strain of popular feeling at the time." *Haas v. Leo Feist*, 234 Fed. 105, 108 (S.D.N.Y. 1916).

<sup>121</sup> "Yet no one can hope to measure the degree of contribution which the plaintiff made to their production . . . and no one ought to try." *Maurel v. Smith*, 220 Fed. 195, 200 (S.D.N.Y. 1915).

<sup>122</sup> 230 Fed. 412 (S.D.N.Y. 1916).



out observing strict rules of evidence and allowing himself considerable latitude for speculation.<sup>123</sup> He did not receive an opportunity to rule upon the problem of profits directly until *Sheldon v. Metro-Goldwyn Pictures Co.*<sup>124</sup>

The *Sheldon* case first came before Learned Hand on appeal from a judgment dismissing plaintiff's infringement suit. He found that the plaintiff's play, *Dishonored Lady*, was infringed by the defendant's movie, *Letty Lynton*. He reversed the district court judgment and ordered an accounting.<sup>125</sup> The district court referred the account to a special master to determine the amount of profits and damages to which the plaintiff was entitled. The master reported the defendant's profit from the movie to be \$587,604. Interpreting prior authority as indicating that the plaintiff was entitled to the full amount of a deliberate infringer's profit, the district court felt compelled to award the whole amount to plaintiff regardless of the relative importance of the material the defendant had taken.<sup>126</sup>

The district court's unimaginative opinion was subjected to vigorous criticism in the law reviews.<sup>127</sup> Carefully tracing the origin of the doctrine of placing the burden of proof on the defendant, they discredited the cases which insisted upon an impossible standard of proof and offered several alternatives to the existing method of treating the problem.

One proposed solution was that the provision in the act

<sup>123</sup> "I think the whole course of copyright law shows a recognition of the difficulty of making legal proof of damages, and that in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof. I must assess the damages, all things considered, by the best inference I can make . . ." *Id.* at 413.

<sup>124</sup> 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940).

<sup>125</sup> 81 F.2d 49 (2d Cir. 1936).

<sup>126</sup> 26 F. Supp. 134 (S.D.N.Y. 1938) (Leibell, J.).

<sup>127</sup> Notes, 39 COL. L. REV. 869 (May 1939), 52 HARV. L. REV. 688 (Feb. 1939), 48 YALE L. J. 1279 (May 1939). There is every reason to suppose that they played an important role in Hand's subsequent decision.

"Here, as it seems to me, is where our proper duties arise, and where it becomes essential that you [the law schools] and we [the bench and bar] should work together . . . . To you I will ascribe the more excellent function of sys-

for the award of damages in lieu of actual damages and profits should be read as giving the courts discretionary power to award damages even when actual damages and profits were determinable.<sup>128</sup> This proposal was based upon the argument that section 101 was intended to replace the broad judicial discretion existing at common law and at the same time to insure reasonable recovery to copyright proprietors. However, this interpretation of the "in lieu" clause had already been rejected by a number of courts which had held that the "in lieu" provision was only applicable where plaintiff is not able to prove his own damages or show defendant's profits. Hand also rejected this solution, noting that the authorities were against this interpretation.<sup>129</sup>

The other alternative was to adopt the experience of the patent law. An analogous problem of apportioning the profits over the various elements existed in the field of patents. The courts, in attempting to arrive at some fair solution rather than denying the plaintiff any remedy or taking from the defendant all the profits, developed the "reasonable royalty" rule. Expert testimony was admitted to furnish a reasonable approximation of the amount of profits attributable to the individual elements. The use of expert testimony in this manner was later enacted into the patent law.<sup>130</sup> Some courts had applied a relative cost formula, the plaintiff taking the percentage of profits which the cost of his contribution bore to

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tematizing of rectifying and of clarifying what exists so that we shall know our possessions and be able to use our tools. To you I will ascribe the still more excellent function of contriving new methods of surveying new territory. . . . We furnish the momentum, and you the direction; but each is necessary to the other, each must understand, respect and regard the other, or both will fail." L. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law*, 24 MICH. L. REV. 466, 476, 480 (1926).

<sup>128</sup> Note, 48 YALE L. J. 1279 (1939). First appeared in the dissenting opinion in *Harold Lloyd Corp. v. Witwer*, 65 F.2d 1, 28 (9th Cir. 1933) (Mc Cormick, J.).

<sup>129</sup> "It must be owned, however, that in point of authority the plaintiffs have the advantage." *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 49 (2d Cir. 1939).

<sup>130</sup> 16 STAT. 206 (1922), 35 U.S.C. 284 (Supp. 1954).

the total cost.<sup>131</sup> Learned Hand, himself, had been one of the leaders in the development of a solution to the profits problem in the area of patents.<sup>132</sup>

Learned Hand elected to follow the solution developed in the field of patents, to relax the rules of evidence and to permit the defendant to introduce evidence which would assist the court in making some sort of a reasonable judgment. The court would allow a great deal of latitude, but would resolve doubts in favor of the plaintiff.

The defendants insist that the profits should have been apportioned and that the record contains evidence by which that can be done . . . an infringer carries the burden of disentangling the contributions of the several factors he has confused. . . . Unless however, there is an absolute bar against his success, the only question is what evidence of separation courts will accept. Strictly and literally it is true that the problem is insoluble. . . . These factors have no unit common to all . . . the difficulties of separation have generally prevented infringers from attempting any apportionment; they have contented themselves with getting down the net profits as low as possible. . . .

Essentially the same problem arises in patent accountings. . . . This plight of the infringer was considered and . . . the court plainly recognized that "by general evidence, expert testimony, or otherwise" he might relieve himself. . . . It seems to us that we ought not to disregard the progress of the law in a field so close to that before us.<sup>133</sup>

The opinion in this case is an excellent example of the working of Judge Learned Hand's judicial mind. In the field of copyright he is a skilled craftsman concerned with improving the application of the Copyright Law rather than extending its scope. He accepted the structure built by the Congress and created a system of justice from a confused statutory

<sup>131</sup> Note, 39 COL. L. REV. 869 (1939).

<sup>132</sup> *Cincinnati Car Co. v. N.Y. Rapid Transit Co.*, 66 F.2d 592 (2d Cir. 1933); "Surely it is a strange habit of mind which at once tolerates the extreme latitude allowed to juries in the assessment of damages, because their processes are not disclosed, while it insists upon an impossible nicety of calculation even at the expense of any justice whatever, when they are." *Page Machine Co. v. Dow, Jones & Co.*, 238 Fed. 369, 376 (S.D.N.Y. 1916).

<sup>133</sup> *Sheldon v. Metro-Goldwyn Pictures Corp.*, 106 F.2d 45, 48-49 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940).

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structure. His task, as he saw it, was not to give direction but to provide the momentum; not to extend but to defend what was already covered from the encroachment of senseless technicality. He impressed upon the mass of copyright law his own image in the form of fairness and justice.

### THE COPYRIGHT OPINIONS OF JUDGE LEARNED HAND

- Stern v. Jerome H. Remick & Co., 175 Fed. 282 (C.C.S.D.N.Y. 1910)  
Hein v. Harris, 175 Fed. 875 (C.C.S.D.N.Y. 1910)  
Photo Drama Motion Picture Co. v. Social Uplift Film Co., 213 Fed. 374 (S.D.N.Y. 1914)  
Maurel v. Smith, 220 Fed. 195 (S.D.N.Y. 1915)  
Herbert v. Shanley Co., 222 Fed. 344 (S.D.N.Y. 1915)  
Gross v. Van Dyk Gravure Co., 230 Fed. 412 (S.D.N.Y. 1916)  
Fitch v. Young, 230 Fed. 743 (S.D.N.Y. 1916)  
Haas v. Leo Feist, Inc., 234 Fed. 105 (S.D.N.Y. 1916)  
Klein v. Beach, 239 Fed. 108 (2d Cir. 1917)  
Stodart v. Mutual Film Corp., 249 Fed. 507 (S.D.N.Y. 1917), *aff'd*, 249 Fed. 513 (2d Cir. 1918)  
Myers v. Mail Express (July 23, 1919)  
Jewelers' Circular Publishing Co. v. Keystone Publishing Co., 274 Fed. 932 (S.D.N.Y. 1921)  
Public Ledger v. New York Times, 275 Fed. 562 (S.D.N.Y. 1921)  
Reiss v. National Quotation Bureau, Inc., 276 Fed. 717 (S.D.N.Y. 1921)  
Mittenthal v. Irving Berlin, 291 Fed. 714 (S.D.N.Y. 1923)  
Leibowitz v. Columbia Graphophone Co., 298 Fed. 342 (S.D.N.Y. 1923)  
Fred Fisher v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924)  
Cheney Bros. v. Doris Silk Co., 35 F.2d 279 (2d Cir. 1929)  
Nichols v. Universal Film Corp., 45 F.2d 119 (2d Cir. 1930)  
Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir. 1936)  
Arnstein v. Edward B. Marks, 82 F.2d 275 (2d Cir. 1936)  
Cohan v. Richmond, 86 F.2d 680 (2d Cir. 1936)  
Shipman v. R.K.O. Radio Pictures, Inc., 100 F.2d 533 (2d Cir. 1938)  
Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939) (Per curiam L. Hand, Clark and Patterson, Circuit Judges)  
Dellar v. Samuel Goldwyn, Inc., 104 F.2d 661 (2d Cir. 1939) (Per curiam L. Hand, A. N. Hand, and Patterson, Circuit Judges)  
Sheldon v. Metro-Goldwyn Pictures Corp., 106 F.2d 45 (2d Cir. 1939)

- Fashion Originators Guild v. F.T.C., 114 F.2d 80 (2d Cir. 1940)  
R.C.A. v. Whiteman, 114 F.2d 86 (2d Cir. 1940)  
Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941)  
Shilkret v. Musicraft Records, Inc., 131 F.2d 939 (2d Cir. 1942)  
Edward B. Marks Music Corp. v. Jerry Vogel, 140 F.2d 266 (2d Cir. 1944)  
Shurr v. Warner Bros. Pictures, 144 F.2d 200 (2d Cir. 1944)  
De Acosta v. Brown, 146 F.2d 408 (2d Cir. 1944) (dissenting opinion)  
Mac Donald v. Du Maurier, 144 F.2d 696 (2d Cir. 1944) (L. Hand, opinion by Swan, Clark dissenting.)  
Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946) (L. Hand, opinion by Frank, Clark dissenting.)  
Heim v. Universal Pictures Corp., 154 F.2d 480 (2d Cir. 1946) (L. Hand, opinion by Frank, Clark concurring with separate opinion)  
Edward B. Marks Music Corp. v. Foullon, 171 F.2d 905 (2d Cir. 1949)  
Pallma v. Fox, 182 F.2d 895 (2d Cir. 1950)  
National Comics v. Fawcett Publications, 191 F.2d 594 (2d Cir. 1951)  
G. Ricordi v. Haendler, 194 F.2d 914 (2d Cir. 1952)  
National Comics v. Fawcett Publications, 198 F.2d 927 (2d Cir. 1952)
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## EDITOR'S NOTES

Addendum to note 9. Section 1(e) Proclamations establishing the existence of reciprocal relations with respect to mechanical reproduction rights are no longer necessary for nationals of Universal Copyright Convention countries not domiciled in the United States. See Act of August 31, 1954, c. 1161, § 1, 68 STAT. 1030, 17 U.S.C.A. 9 (c) (Supp. 1954).

Addendum to note 13. In the *Heim* case, a contrary holding would have defeated plaintiff's claim because defendant urged that the deposit of a copy of a work of foreign origin which did not have a copyright notice constituted a publication of the work in the United States without the notice required in § 12 [now § 13] and that therefore the work becomes forfeit. Judge Frank in rejecting this contention (at 486) relied on *Osgood v. A. S. Aloe Instrument Co.*, 69 Fed. 291, 294 (C.C.E.D. Mo. 1895), and *Patterson v. Century Productions*, 93 F.2d 489, 493 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938).

Addendum to note 46. The *Heim* case was *expressly overruled* by *Arnstein v. Edward B. Marks Music Corporation*, 82 F.2d 275 (2d Cir. 1936) to the extent that the *Heim* case held that a copyright, like a patent, confers a monopoly of the contents of the work, as well as of the right to manifold the work itself. In the later case, Judge Hand held that the monopoly feature is limited to patents, and that there can be no infringement of copyright if the similarities can be accounted for by independent production rather than plagiarism.

*All Rights Unreserved:  
The Author's Lost Property in Publishing  
and Entertainment*

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By FRANKLIN T. LASKIN

YALE UNIVERSITY SCHOOL OF LAW

But I shall endeavor to show how men might come to have a property in several parts of that which God gave to mankind in common, and that without any express compact of all the commoners.

JOHN LOCKE, *An Essay Concerning Civil Government*

INTRODUCTION

IN ITS SUMMER and Fall issues of 1939 the *Partisan Review* ran a survey, "The Situation in American Writing."<sup>1</sup> Some prominent American authors were asked, "Have you found it possible to make a living by writing the sort of thing you want to, and without the aid of such crutches as teaching and editorial work? Here are excerpts of their replies:

Allen Tate, "No"; John Dos Passos, "So far . . . it's nip and tuck"; Kenneth Fearing, "I have not ever, quite, been able to live . . . by . . . creative writing"; Katherine Anne Porter, "No there has not been a living in it, so far"; James T. Farrell, "[It] is a precarious livelihood"; William Carlos Williams, "I should say not! It costs me money!"; Robert Penn Warren, "I am sure that I would not have been very successful at it"; Henry Miller, "I have to borrow and beg to keep alive . . ."; Sherwood Anderson, "It depends

<sup>1</sup> *Partisan Review*, Spring, 1939, p. 25; Fall, 1939, p. 103.

on what you mean by making a living . . ."; Robert Fitzgerald, "No"; Horace Gregory, "No."

Many, such as Don M. Mankiewicz, not queried by the *Partisan Review*, have replied elsewhere:

The inference is clearly that all writers really have more glamorous jobs, such as gandy dancer, soda jerk, or operator of a bread-wrapping machine in a bakery.<sup>2</sup>

Such author laments, appearing on dust jackets, are common enough to be a subject of parody (viz. William Saroyan's, "I used to read Tolstoi . . . I used to steal from cash registers . . ."). But they comprise an economic fact for both "quality" and commercial writers in the United States, evidenced by such recent events as: (1) a meeting of 700 fiction writers in New York last year to gain higher royalties and fairer contracts from pocket book publishers; (2) the formation of the Mystery Writers of America to increase "who-dunit" royalties, under the banner, "Crime Does Not Pay—Enough!"; (3) a 1952 strike by screen, radio, and TV authors against producers who refused to grant repeat broadcast fees; (4) a screen writers' boycott of Hollywood film packagers who would not allow "separation of rights" in scripts; (5) a revolt of 200 members in the Authors' Guild because its officers would not recognize a "leasing" program for literary rights; and (6) the defection of radio and TV writers from the Authors' League of America because of its failure to win better contract terms from broadcasters.

It is the purpose of this paper to examine this economic fact in light of the present Copyright Statute and contract practices under the Act, to determine just how the author is losing rights in his literary property. Its object is to find out how these lost rights can be restored to the author. It starts

<sup>2</sup> "I am also a part-time horse player," confesses Mankiewicz. "My house is about two miles, through the field, from Belmont Park." Dust cover of *See How They Run* (New York, 1951). In "Limousines on Grub Street," Malcolm Cowley tells how other writers earned their livings between 1940-46. *New Republic* Nov. 4, 1946, p. 588.

with Locke's premise that the creator, not someone else, is entitled to the fruits of his labor and imagination.

By 1946, "the situation in American writing" was drastic enough to call forth an "American Authors' Authority."<sup>3</sup> Known as the Cain Plan, after novelist James M. Cain, it purported to set up a central agency for the leasing of literary rights to consumers, rather than their outright sale. Authors would assign their copyrights to be held in trust by the AAA, similar to the assignment made by songwriters to ASCAP. The Authority would then bargain, on behalf of the author, with publishers and producers.<sup>4</sup> The AAA would insist that each use (i.e. license) under the copyright be separately paid for and held not longer than seven years. At the end of the seven years all property rights would revert to the Authority for relicensing to another consumer. The AAA would also lobby for tax and copyright legislation, and would aid members in infringement suits.<sup>5</sup>

Reactions to the Cain Plan, outside of Hollywood, were mostly unfavorable. The AAA was called a "Bolshevik scheme," a "writers' collective," and "an attempt by Hollywood Communists to control thought and expression in the United States."<sup>6</sup> Draftsman Cain was accused of trying to "out-Goebbels Goebbels."<sup>7</sup> The Licensing Committee of the Authors' League of America issued a report on the Plan and found objectionable such features as "compulsory membership," "relinquishment of the author's copyright," "the rigid limitation on the licensing of rights, regardless of compensation," and, generally, the AAA's "vaguely-outlined powers, control and purposes."<sup>8</sup> The Committee wrote that the answer lay not in compulsory licensing, but rather in voluntary

<sup>3</sup> Screen Writers' Guild Bulletin, August, 1950.

<sup>4</sup> See press comments collected in *Screen Writer*, March, 1947, pp. 50-54.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Atlantic Monthly*, December, 1946.

<sup>7</sup> By Dorothy Thompson, as quoted by "Peripetetic Reviewer" Edward Weeks, in the *Atlantic Monthly*, December, 1946, p. 146.

<sup>8</sup> *Publishers' Weekly*, July 19, 1947, p. 237, 238.



minimum contracts negotiated in each medium.<sup>9</sup> The issue of "Communism," however, prevented consideration of the Plan in any terms other than epithets.<sup>10</sup>

It appears that some critics of the Authority mistook its rough-hewn prospectus for legislation rather than talking-points for aggrieved authors. Others were frightened by the vigorous Cainsian argot of its provisions.<sup>11</sup> Many novelists and playwrights, successful venders of their literary rights, were unwilling to share in the lot of the less successful.<sup>12</sup> The opposition of the press, the publishers, and the entertainment corporations was that of self-interest.<sup>13</sup> The veto of the Authors' League of America, however, can be explained only in terms of the League's history and leadership.

In 1946, after long and violent agitation by its rank-and-file membership,<sup>14</sup> the Authors' League set up a committee to suggest reforms in the marketing of literary property. It was comprised of Christopher La Farge, Paul Gallico, Marc Connelly, Richard Rodgers, and Peter Lyon. All of these officers, at one time or another, had expressed opposition to the AAA. After several months this committee issued a "confidential report" on the Cain Plan, which listed "twelve questionable

<sup>9</sup> Publishers' Weekly, January 11, 1947, p. 169.

<sup>10</sup> For a history of this contumely, see New York Times, issues of Oct. 19, 20, 21, 22 and 24, 1946; Harison Smith in the Saturday Review of Literature, issues of Sept. 28, Nov. 16, 30, and Dec. 14, 1946; Harry Lorin Binsse in Commonweal, issues of Oct. 18, Nov. 1, 8, 15, and Dec. 13, 1946.

<sup>11</sup> Cain described the AAA as "a massively powerful organization . . . with a million dollar kitty and a full-time tough mugg at the head of it." For its leaders, Cain wrote, "we want a drop-kicking, forward-passing, swivel-hipping guy at Quarterback, and we want fast ends raided out of the best high schools there are."

<sup>12</sup> Louis Bromfield, *Argument Against the AAA*, Screen Writer, March, 1947, p. 8.

<sup>13</sup> "Isn't it curious that people get so excited every time some writers get together? Especially when they foregather in capitalistic enterprises clearly designed to put a bit more capital in the pockets of writers? Somehow people never get quite so excited when book publishers, radio chains, and film studios get together—I wonder why?" Letter from author Emmett Lavery appearing in Commonweal, Nov. 8, 1946, p. 93.

<sup>14</sup> New York Times, Nov. 17, 1946.

aspects" of the Plan, and went on to state that the charter of the Authors' League permitted a leasing system within its own structure without resort to "editorial control or dictatorship by individuals."<sup>15</sup> The report concluded with a promise to continue to study the "problems of licensing and the separation of rights."<sup>16</sup>

No concrete proposals ever resulted from this study. In time the Authors' League resettled on its old program of separate deals for separate media. Each guild of the League faced its market under either a collective bargaining contract (Radio, Television, Motion Pictures), or under a voluntary basic agreement (Book Publishing, The Stage). These relations continue in effect, and are re-negotiated periodically.

Today's author depends not so much on the Copyright Act to protect his literary rights as on the various authors' guilds to make contracts for him with consumers of these rights. The working out of these minimum basic and collective bargaining agreements has become a highly complex facet of copyright law. The economic fate of present-day writing might very well rest on an equitable solution to the problem of *leasing versus outright sale of literary property*.

#### MAGAZINES

##### THE BASIC PROBLEMS

The protection sought by the magazine author in his market is that which pertains to authors in all literary markets.<sup>17</sup> It depends on registration of copyright, divisibility of copyright, separation of rights in his material, and the reversion of these rights at the end of a stated period. These are four conditions precedent to an author's realizing the full profit from his creation. Such profit is often the difference between

<sup>15</sup> See *Interim Report of League*, New York Times, Dec. 25, 1946.

<sup>16</sup> *Ibid.*

<sup>17</sup> For a legal classification of the uses of literary property, see Note, *Rights in Literary Property*, 35 HARV. L. REV. 600, March, 1922; for a market application of these uses, see *Your Story Has Nine Lives*, A.L.A. Bulletin, Jan. 1946, p. 21.

livelihood and starvation. For example, Kressman Taylor's "Address Unknown," anthologized, filed, and adapted to radio, and James Thurber's "Walter Mitty," reprinted, filmed, and televised, were first short stories in periodicals.

The bargain in the magazine field is usually submission by the author followed by acceptance by the publisher. Rarely is there a preexisting contract to cover the rights of the parties. In the days before digests, radio, and motion pictures, this deal raised few problems. The magazine use was granted to the publisher along with implied serial and reprint rights. Other uses were thought to be of no commercial value. But in 1901 an author named Henry Dam sold a story to *Smart Set*, signing a receipt upon payment. The story appeared a few years later, the publisher obtaining copyright on the magazine issue under section 3 of the Statute.<sup>18</sup> Copyright on his story was later assigned to Dam. Subsequently, a play appeared which Dam claimed infringed his short story. He sued the producer on the theory that he owned all dramatic rights in his creation, and had parted with only the "magazine use." The defendant answered that *only* the magazine use was protected by copyright, and all other rights had been dedicated to the public. The court, in *Dam v. Kirk La Shelle Co.*,<sup>19</sup> agreed with defendant's theory but found for Dam, reasoning that the author's sale to *Smart Set* relinquished *all* rights in the material—magazine as well as dramatic. But since the publisher had copyrighted this "bundle of rights" and had reassigned the copyright to Dam, the plaintiff could sue for the dramatic infringement of his story.

Two principles established by the *Dam* case are still law today: (1) when an author sells his story to a publisher, absent an express reservation, all rights in the story belong to the grantee; (2) when the author *does* reserve other uses to himself, he must copyright each use independently of the magazine right, otherwise he will not be protected.

<sup>18</sup> 17 U.S.C.A., Act of March 4, 1909.

<sup>19</sup> 175 Fed. 902 (1910).

This forty-three-year-old holding is based on a misconception of the copyright law. The Judge in *Dam v. Kirk La Shelle* confused separation of rights in literary property with the idea that "copyright is indivisible." When Dam's story was registered by *Smart Set*, that copyright served to protect the story from dramatic infringement, even though Dam reserved dramatic rights.<sup>20</sup> If other uses had been reserved by Dam, they could not be registered under the Act until they assumed tangible form—as a novel or a dramatic script. Meanwhile the copyright on the story covered the basic property. The court went too far in assuming that other uses could not be separated because the basic copyright is "indivisible." This meant that if an author wanted to protect the other rights he must give them all away; but if he tried to reserve them he would not be protected. The decision was thought to be so outrageous that it led to the founding of the Authors' League of America in 1912.<sup>21</sup> [But see Editor's note.]

As other media came of age, authors found themselves losing secondary rights in their property. While the author rarely received more than one *magazine* payment, publishers would make lucrative resales of other uses, or adapt them to other forms. The courts, after *Dam v. Kirk La Shelle*, were cold to the suggestion that an author had an equitable right to the proceeds from these sales. Typical was the dictum in *Clemens v. Press Publishing Co.*:

The objections, refusals, and wishes of the plaintiff [author] after parting with the title in the property may betray the eccentricities of the author; but they have no greater weight in law than the wishes of a stranger to the transaction after it was consummated.<sup>22</sup>

<sup>20</sup> 17 U.S.C.A. 1(b).

<sup>21</sup> "The primary purpose of the Authors' League was to combat the pernicious and destructive effect of *Dam v. Kirk La Shelle*." Arthur Train, *Apologia Pro Officio Suo*, undated address on League's anniversary (pamphlet). [EDITOR'S NOTE. It is submitted that the author of this paper has misread the *Dam* case. It merely holds that although copyright is indivisible in the sense that each separate right (such as publication, performance, recording) cannot be separately copyrighted, the legal owner of the copyright may hold certain rights in trust for the respective beneficial owners.]

<sup>22</sup> 122 N.Y. Supp. 206, 207 (1910).

To protect its members, the Authors' League advised that only those rights which the magazine exploits be granted, and that the rest be reserved by contract. Alternatively, if the whole bundle is granted, then the publisher should take out copyright in the author's name. If the publisher will take out only one copyright per issue, then a "letter of trust" or a covenant to reassign copyright should be executed.<sup>23</sup>

But these measures are difficult by the nature of the magazine deal. Only the seasoned author will reserve rights under a contract—or even trouble to make a contract at all. On the other hand, it is too much to expect a publisher to copyright each entry in a thick periodical or, if done, to presume that all formalities of notice will be followed. If the letter of trust or covenant to re-assign is agreed on, the publisher might ignore his promise, or the author might forget to enforce his rights. A good faith purchaser would take clear title, and the author would have to go to law to enforce his legal or equitable claim. If the author tries to register his own entry, he finds it a costly and cumbersome process and always runs the risk of noncompliance which forfeits protection under the Act.<sup>24</sup>

The solution to the problem posed by *Dam v. Kirk La Shelle* lies in a basic reform of the present statute. Either the author should be given the sole privilege of first copyright, or free and immediate copyright should be afforded as soon as the property assumes tangible form.

Under section 9 of the present Act, the "proprietor" as well as the "author" is given the right of first registration.<sup>25</sup> This provision is a survival from the eighteenth century when booksellers and theater managers claimed the right to pub-

<sup>23</sup> *Your Story Has Nine Lives*, A.L.A. Bulletin, Jan., 1946, p. 21.

<sup>24</sup> "After publication it often happens that legal title to secondary users are (*sic*) never returned to the author." J. M. Cain, *Respectfully Submitted*, Screen Writer, March, 1947, p. 19. Section 14 of the Act prescribes monetary fines and voidance of copyright for failure to deposit a copy of the periodical in which the author claims property (17 U.S.C.A. 14).

<sup>25</sup> 17 U.S.C.A. 9, 1st sentence.

lish and produce their holdings in perpetuity.<sup>26</sup> Under the Statute of Anne enacted in 1710, booksellers and managers were allowed this monopoly.<sup>27</sup> Forerunner of our present Act, the Statute of Anne was a proprietor's law, written from the consumer's viewpoint. Its language, if not its intent, has been carried over to section 9. Under the "assignment" fiction, sale of the story itself becomes a grant of the entire copyright.<sup>28</sup> This result has been criticized as "repugnant to common sense," and as "an error in our American jurisprudence."<sup>29</sup> The proprietor, as middleman, had been deemed "not within the contemplation of the law."<sup>30</sup> *Au contra*, the copyright laws of most foreign nations provide that registration shall be only in the name of the creator of the literary property.<sup>31</sup>

Proprietor copyright, under sections 3, 9, and 26 of this Act, deprives the author of certain contract advantages. If the publisher can take the "bundle of rights" at the outset, the author is put in a negative bargaining position, attempting to retrieve what he has lost rather than licensing that which he owns. Furthermore, permitting proprietor registration defeats the leasing principle by allowing the publisher a full term of twenty-eight years under the Act. It also makes separation of uses difficult, calling forth the technical letters of trust and other covenants, which in turn give rise to litigation over licenses and equities.<sup>32</sup>

Sole author registration would protect the creator's initial rights, while not preventing a subsequent assignment of the copyright bundle. This restriction would not necessarily require the author to apply for the copyright himself. In the magazine field, for instance, the publisher would register the

<sup>26</sup> H. G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 17 (1944).

<sup>27</sup> *Ibid.* <sup>28</sup> *Atlantic Monthly v. Post Pub. Co.*, 27 F.2d 556 (1928).

<sup>29</sup> *Assignment of Copyright to the Author*, A.L.A. Bulletin, April, 1921, p. 4.

<sup>30</sup> E. C. Mills, *Variety*, Jan. 8, 1947, p. 50.

<sup>31</sup> A.L.A. Bulletin, April, 1921, pp. 5, 12.

<sup>32</sup> As in the typical case of *Eliot v. Geare Marston, Inc.*, 30 F. Supp. 301 (1939), where the author was denied standing to protect serial rights in an article which the magazine publisher had copyrighted.

entire issue, but each entry would be deemed copyrighted in its author's name. Section 3 of the Act could be amended to spell out this right in the case of composite works:

The copyright upon composite works or periodicals shall give to the proprietor thereof *and to the contributors* all the rights in respect thereto which *they* would have if each part were individually copyrighted under this title.<sup>33</sup> [Italics added.]

Case law already recognizes this result. In *Kaplan v. 20th Century Fox*<sup>34</sup> it was held that the proprietor can reassign individual copyright on each article to its author, after a composite copyright has once been registered. Under the amended section 3, a magazine author would be able to sue a dramatic infringer whether the copyright bundle was reassigned or not.

The second suggested reform is more fundamental. It would permit automatic copyright as soon as the property comes into existence, merging common law with statutory protection, rather than opposing them. This reform has long been advocated. Former Register of Copyright Solberg has written:

There are four matters in relation to any proposed revision of our copyright laws which are fundamental . . . [One of these is] the abrogation of all formalities as a *condition* for securing copyright. . . . These requirements have been insisted upon without careful consideration of the heavy cost of this burden in proportion to its usefulness.<sup>35</sup>

The requirements of registration and deposit in section 13 of the Act are further survivals from early England where, under the Licensing Acts of the Star Chamber, they were an aid to censorship.<sup>36</sup> In a congressional bill introduced by Register Solberg and the Authors' League in 1924, copyright

<sup>33</sup> 17 U.S.C.A. 3 last full sentence.

<sup>34</sup> 19 F. Supp. 780 (1937).

<sup>35</sup> 35 YALE L. J. 48, 1925.

<sup>36</sup> "The orders requiring books to be licensed and entered in the register of the Company were not intended to secure to authors any rights in the reproduction of copies. On the contrary, the purpose was to prevent the publication of heretical, libelous, seditious, or other improper political works." BALL, *op. cit. supra* note 26, at 10.

was to vest upon creation, without any conditions or formalities.<sup>37</sup> Again in 1940, in a general copyright reform bill, it was proposed that "authors shall have copyright in all their writings, whether published or unpublished, from and after creation thereof, without compliance with any conditions or formalities."<sup>38</sup> Each of these measures, regrettably, was defeated by the phonograph, radio, and motion picture lobbies.<sup>39</sup>

For the magazine author, automatic copyright or sole registration would void the ghost of *Dam v. Kirk La Shelle* and go a long way towards reaching the main goal of copyright law, which is "to secure to the author the full financial benefit of his skill, thought, and genius."<sup>40</sup>

#### BOOK PUBLISHING

##### THE LICENSE AND THE LEASING PRINCIPLE

Where the rights of the parties are governed by contract, as in book publishing, the author is concerned not with registration of copyright so much as with parceling his copyright bundle into its various commercial uses. Since the statute itself covers only the basic work and not its separable parts, the author must bargain for the terms of each use.

During the days of patronage, in the seventeenth and eighteenth centuries, an author who sold his works for gain was considered a hackney, undeserving of legal protection. These authors were at the economic mercy of booksellers who monopolized the trade. Proprietors set their own prices for manuscripts and took exclusive title to all rights.<sup>41</sup> After the Statute

<sup>37</sup> The Perkins Bill, H. R. 11, 258.

<sup>38</sup> T. Solberg, *The Copyright Act of 1940*, 15 NOTRE DAME LAW. 123 (1940).

<sup>39</sup> A.L.A. Bulletin, Dec., 1924, p. 5.

<sup>40</sup> *Bobbs Merrill v. Straus*, 210 U.S. 339 (1908).

<sup>41</sup> Some of these proprietors had acquired Milton's *Paradise Lost* for £6, Goldsmith's *The Vicar of Wakefield* for £60, and held exclusive title to the complete plays of Shakespeare. Dr. Samuel Johnson in his *The Vanity of Human Wishes* described the life of Grub Street as that of "Toil, envy, want, the patron and the jail." In his *Life of Johnson*, James Boswell quoted his mentor as stating: "Not the love or desire of fame, but the want of money . . . is the only motive to



of Anne, proprietors took the author's "right of copy" along with all rights of use. It was not until the appearance of such periodicals as *Gentlemen's Magazine* in 1731 that writing became a recognized profession.<sup>42</sup> In 1774, the English courts recognized the author's "incorporeal right of first publication for sale."<sup>43</sup> Nine years later our Colonial Congress recommended that the several states recognize copyright in an author for a "certain time not less than fourteen years from the first publication . . . such copy or exclusive right of printing, publishing, and vending. . . ." <sup>44</sup> Between the Statute of Anne and our Federal Copyright Act of 1790, the common law afforded increasing protection to an author's property.

In modern trade publishing, copyright is usually registered in the author's name, under section 9 of the Act. If the author holds the copyright title then his publisher becomes a licensee of specific rights, depending on the contract between them. A "license" under copyright law is a grant by the title holder of something less than the total statutory monopoly which is the copyright itself. This privilege at least protects the licensee from a claim of infringement by the owner; <sup>45</sup> if the license is "exclusive" it protects the licensee against the whole world.<sup>46</sup> Unlike statutory copyright itself, a license can be limited to a special purpose, locality, and use under particular conditions, and can be transferred freely without any formalities of registration.<sup>47</sup>

In the book deal the publisher tries to acquire as many rights (licenses) as possible along with his basic right of

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writing that I know of." Thomas Carlyle, in his *Reminiscences* (1881), reflected that a little food, proper warmth and a regular roof tree would have saved many a genius from becoming a hackney. BALL, *op. cit. supra* note 26, at 2, 3.

<sup>42</sup> BALL, *op. cit. supra* note 26, at 13-14.

<sup>43</sup> *Donaldson v. Beckett*, 4 Burr. 2408 (1774).

<sup>44</sup> 24 JOURNALS OF THE CONTINENTAL CONGRESS 326-27 (1774-1789).

<sup>45</sup> BALL, *op. cit. supra* note 26, at 530-31.

<sup>46</sup> *Goldsmith v. Comm'r*, 143 F.2d 466 (2d Cir. 1944).

<sup>47</sup> *Harper & Bros. v. Donohue*, 144 Fed. 491 (1905).

first English publication. In a standard trade contract,<sup>48</sup> the author gives up all or a share of the following rights: foreign and translation, book club, reprint, first serial, second serial, condensation, radio, television, motion picture, recording, and microfilms. It is stipulated that if any of these rights are in turn licensed by the publisher, the author will share in the proceeds anywhere from 10 percent to 90 percent.

Most publishers believe that the six "literary" rights—book club, reprint, serial, abridgement, foreign, and translation—come automatically with a license to publish a trade edition.<sup>49</sup> Historically, these extra uses were taken for the publisher's "protection," without additional payment to the author. In the last twenty years, however, secondary rights have become more valuable than the right of First Publication. (E.g., the estimated 1948 royalties from book clubs and pocket reprints totaled \$7,500,000.)<sup>50</sup> While an author might share 50-50 in proceeds and royalties from secondary rights, he gets no increased compensation for giving them up in the first place. Nor is it considered that he might hold them back for his own use.

Furthermore, the typical trade contract provides that all licenses run for the full statutory term of twenty-eight years, and the author promises to renew for a second term on his publisher's behalf.<sup>51</sup> The publisher takes the *sole and exclusive* privilege to dispose of secondary uses during the fifty-six years. This practice is opposed to the "leasing principle" of literary property, whereby the author gives up only

<sup>48</sup> "Trade" books are those of general reader interest, both fiction and non-fiction, as opposed to technical and professional books having a limited patronage. In the trade field the Doubleday contract is thought to be representative of the conditions which a publisher imposes.

<sup>49</sup> "Many trade publishers believe that profits in recent years have come mainly from merchandise sold outside the bookstore market, and they make and promote their lists accordingly. Though they issue proportionately less fiction now than they did before the war, more of it is selected as bait for big book-club and movie offers, and bids from reprinters, digesters, and occasionally from popular magazines." MILLER, *THE BOOK INDUSTRY*, 27 (1949).

<sup>50</sup> *Id.* at 52.

<sup>51</sup> 17 U.S.C.A. 24.

those rights which are exploited, and for only so long as they are used and paid for.<sup>52</sup>

When the author executes an exclusive license to publish his book, he is actually making an outright sale of many valuable uses for the full statutory term(s). The license, originally a means for parceling the copyright bundle, is now used to consume the whole property. For this reason the "license" and the "lease" should not be confused, although some writers on the subject have used these terms interchangeably.

A lease is a limitation on a license as to time and conditions of use. It causes the right granted to return to the licensor at the end of a stated period, or upon the happening of a certain event.<sup>53</sup> Under the Cain Plan leases of literary property would run for seven years, or as long as the right was exploited and paid for—whichever was shorter. (See *Appendix*.) Unless such a period is stipulated, there is no commercial distinction between a grant of a license and the assignment of the statutory "bundle of rights."

In spite of the legal consequences, however, commentators persist in the belief that "copyright is indivisible,"<sup>54</sup> that "there can only be one copyright . . . in any one work."<sup>55</sup> This belief is based on an historical anomaly. The concept of

<sup>52</sup> Wm. Klein II, *Protective Societies for Authors and Creators*, 1953 COPYRIGHT PROBLEMS ANALYZED 50 (1953).

<sup>53</sup> The concept of "leasing" works did not start in Hollywood. Over 100 years ago Charles Dickens arranged for the copyright on *Barnaby Rudge* to return to him six months after publication. In 1882, Maupassant agreed to lease his stories for six years only, and reserved the right to bring out special editions with other publishers at any time. During the nineteenth century, Victor Hugo limited licenses of his novels to ten years, the property afterwards reverting to the author or his heirs. SWG Mimeo, dated August, 1950; Screen Writer, Nov., 1947, p. 12; JOSEPHSON, VICTOR HUGO, A REALISTIC BIOGRAPHY OF THE GREAT ROMANTIC (1942).

<sup>54</sup> BALL, *op. cit. supra* note 26, at 46.

<sup>55</sup> This was written in 1912, in Bowker's precedential COPYRIGHT: ITS HISTORY AND ITS LAW (p. 49). But as late as 1951, copyright lawyer John Schulman commented: "Actions for infringement can be maintained only by the proprietor of the copyright himself." 7 COPYRIGHT PROBLEMS ANALYZED 28 (1952).

"indivisibility" stems from a decision involving a *patent*, not a copyright. In the ruling case of *Waterman v. Mackenzie* <sup>56</sup> the court held that the licensee of a patent had no standing to sue an infringer. This holding should never have applied to the law of copyright because the two statutory privileges are essentially different.<sup>57</sup> The Patent Statute gives the inventor an *absolute monopoly* to "make, use, and vend," <sup>58</sup> whereas the Copyright Statute gives the creator only a limited monopoly.<sup>59</sup> Logically, both classes should be protected under the provisions of the Act, but in their zeal to protect the inventor, courts have created technical hardships for the author and his grantees. In *Eliot v. Geare-Marston (supra)*, the author herself, as exclusive licensee, was denied standing under the Act to sue an infringer. In *New Fiction Publishing Co. v. Star Company*,<sup>60</sup> the court, under the "patent" analogy, held that an exclusive licensee of dramatic rights could not sue an infringer in his own name, but must join the registered owner as a party plaintiff. Seven years later it was held in *Goldwyn v. Howell et al.*<sup>61</sup> that the licensee of motion picture rights could not maintain an infringement action, relying on the "principle" that less than a grant of the entire copyright confers no remedies under the Statute.

Although the *Goldwyn* rule seems to prevail at present (the Supreme Court has not decided this specific point), a parallel body of case law has held just the opposite. As early as 1860 the court in *Roberts v. Myers* <sup>62</sup> ruled that a limited licensee of dramatic rights could start an infringement suit

<sup>56</sup> 138 U.S. 252 (1890).

<sup>57</sup> "There is such a wide difference between the rights granted to an author by copyright and those secured to an inventor under the patent laws that decisions under one class would not necessarily be controlling in the other class." BALL, *op. cit. supra* note 26, at 48. "The dissimilarities (between patent and copyright) are more pronounced than the similarities. One gives a monopoly; the other merely a prohibition against copying—a very different thing." Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932 (1939).

<sup>58</sup> *Karll v. Curtis Pub. Co.*, 39 F. Supp. 836 (1941).

<sup>59</sup> See *Bobbs Merrill v. Straus*, 210 U.S. 339 (1908). <sup>60</sup> 220 Fed. 994 (1915).

<sup>61</sup> 282 Fed. 9 (1922).

<sup>62</sup> 20 Fed. Cas. No. 11, 906 (1860).

in its own name. After the Statute of 1909, our present law, the courts reached the same result in *Photo-Drama Co. v. Social Uplift Co.*,<sup>63</sup> and *Public Leger Co. v. New York Times, Inc.*,<sup>64</sup> finding that a copyright was divisible to the extent that the Act recognized protection for separate uses comprising the basic title.

The basis for the Goldwyn line of decisions seems to be that if a copyright were held divisible, an infringer of the basic title would be subject to as many law suits as there were licensees.<sup>65</sup> But this result is avoided by Rule 19(a) of the *Federal Rules of Civil Procedure*, whereunder an exclusive licensee can sue for infringement, joining the copyright proprietor as a party plaintiff or defendant.<sup>66</sup> The effect of this Rule is to prevent multiple suits for the same cause of action, while recognizing a licensee's property rights under the statute.

Recent commentators have suggested that if an author assigns any of the rights inhering in the basic property, as enumerated in clauses (a), (b), (c), (d), and (e) of section 1 of the Act, the assignee should be entitled to all the remedies of sections 101 and 102, for infringement.<sup>67</sup> Some courts have recognized this right of licensees as a matter of contract. Before 19(a) was passed, an exclusive licensee could compel the copyright owner to protect his rights, and could sue the

<sup>63</sup> 220 Fed. 448 (1915).

<sup>64</sup> 275 Fed. 562 (1921).

<sup>65</sup> ". . . every . . . licensee of Plaintiff could severally sue the defendant and each obtain a separate judgment for one and the same violation of a copyright which no one of them owned, but in respect of which each had only certain special or limited rights." *New Fiction Co. v. Star Co.*, 220 Fed. 994, 996-7 (1915). ". . . only the owner of a copyright may sue for its infringement because otherwise a wrongdoer might be subject to more than one recovery for the redress of one wrong, since he might be subject to successive suits by different persons holding different parts of the corporate property." *Wodehouse v. Comm'r*, 166 F.2d 986 (1948).

<sup>66</sup> 28 U.S.C.A. 19, incorporating the decision of *Indiana Wireless Tel. Co. v. RCA*, 269 U.S. 459 (1926).

<sup>67</sup> *AMDUR, COPYRIGHT LAW AND PRACTICE* 924 (1936); cited in Gitlin, *Taxation of Copyright*, 27 *TAXES* 6 (1949).

owner itself in case the latter infringed.<sup>68</sup> The importance of the license in the use of copyright property was expressed by the court in *Herwig v. United States*:<sup>69</sup>

Modern business and commercial practices connected with the various rights enumerated in Section 1 [of the Act] . . . for example, the right to print, dramatize, record, etc., are inherently and essentially different. . . . Furthermore, many of the separate rights of a copyright owner may be used as the basis for securing new and separate copyrights. . . .

Shafter, in his treatise on *Musical Copyright*, has expressed the same thought:

The entire theory that copyright is indivisible and does not submit to partial assignments is fictitious, and discounts the increasing practice in literary, musical and dramatic fields. . . .<sup>70</sup>

In spite of commercial practice, however, legislative reform has not kept pace. In the 1924 Copyright Bill sponsored by Register Solberg and the Authors' League there was provision for separate assignment of separable rights in a copyrighted work, each right to carry with it the statutory protection.<sup>71</sup> Again in 1930, in a General Revision Bill to amend the Act of 1909, each subsidiary use of a property was allowed to carry its legal protection against infringers.<sup>72</sup> The Duffy Bill, introduced in Congress in 1935, provided for partial assignments of rights inhering in the basic copyright, and proposed that the Act cover uses (leases) limited by a proprietor as to time and locality.<sup>73</sup> The same Bill was proposed again in 1940. Paradoxically, consumers who would have profited from these provisions opposed the Bills because

<sup>68</sup> *Page & Co. v. Fox Film Co.*, 83 F.2d 196 (1936); *Wooster v. Crane*, 147 Fed. 515 (1906).

<sup>69</sup> 105 F. Supp. 384, 388 (1952).

<sup>70</sup> Cited in Gitlin, *supra* note 67, at 511.

<sup>71</sup> H.R. 11, 258, 68th Cong., 2d Sess. (1925).

<sup>72</sup> The Vestal Bill, H.R. 10, 434; introduced in Cong. in 1926.

<sup>73</sup> S. 2465, 74th Cong., 1st Sess. This measure also contained proposals to abolish the requirements of registration and deposit of a book after its publication as a requisite to obtaining Statutory protection.

of their treatment of a collateral matter, the "manufacturing" clause of section 16.<sup>74</sup>

Statutory recognition of the divisibility of copyright would protect the author in at least two ways: (1) by raising the legal status of inhering uses, rather than submerging them in the basic title; (2) by restoring to the author his right of action under the Statute in the event he becomes a licensee of his own creation. The first result would help to prevent a publisher from taking all *other* rights under the basic grant; the second would reduce litigation over equities, which in turn would increase commerce in literary works.

Short of legislative reform, the Authors' League sought to achieve separation of rights (which is the poor man's substitute for divisibility of copyright) under its *Basic Book Contract*, promulgated in 1947. While it presents a lucid outline of the leasing principle, the *Contract* has failed to persuade commercial publishers of its somewhat unilateral merits.<sup>75</sup>

#### THE STAGE

##### CONFLICT BETWEEN COPYRIGHT AND ANTITRUST LAW

In this area the author, under a basic monopoly (copyright) attempts to protect his rights on an industry-wide basis (my minimum basic agreement), and finds himself in violation of Federal law (the Sherman Antitrust Act). The problem of the playwright is what to do when there is a collision between two Congressional sanctions.

Until the end of the nineteenth century the playwright was no better off than the hackney journalist. In order to have his work produced he was forced to give up all rights and uses,

<sup>74</sup> Most of these bills would have abolished or modified the requirement of section 16 that English texts afforded protection under the title "shall be printed from type set within the limits of the United States. . . ." 17 U.S.C.A. 16, Rev. to Jan. 1, 1953. American publishers in concert with the International Typographers' Union have blocked every reform bill affecting this requirement. See Solberg, *The New Copyright Bill*, 15 NOTRE DAME LAW. 123 (1940), *passim*.

<sup>75</sup> Authors' Guild *Basic Book Contract*, cl. "Eighth" (c).

including the copyright.<sup>76</sup> Play production was controlled by theater managers who, after Queen Anne's reign, were allowed to register play copyrights in their own names.<sup>77</sup> The playwrights' sorry condition is described in the production history of *She Stoops to Conquer*. Oliver Goldsmith made an oral agreement with a manager to have his script performed. After many seasons of the Shubert Alley "run-around," and Goldsmith's near destruction from poverty and lost hope, the manager finally kept his word. The play was an overnight success; but when the public learned of Goldsmith's ill-treatment, it began a campaign of abuse that caused the manager to crawl to Goldsmith and beg his forgiveness.<sup>78</sup> The playwright's status as vendor was later enhanced by the acumen of such authors as Clyde Fitch, Dion Boucicault (a perennial copyright litigant), and T. A. Daly. Also, manager monopoly was broken by the appearance of outside financiers from whom the playwright could get better contract terms.

Playwrights were well represented when the Authors' League was formed in 1912. In 1920 they formed their own organization which in time became the Dramatists' Guild.<sup>79</sup> Major grievances during this period were the changing of scripts without author permission, and the taking of radio and motion-picture rights without payment. Other uses, such as stock company, foreign and touring were also usurped by the producer with the "first-class" production license. Courts usually read "implied negative covenants" into the play contract which prevented separation of secondary rights.<sup>80</sup>

The playwrights' first attempt at a collective minimum contract with producers met with failure. The producers refused to meet with authors as a group, and one went so far as to

<sup>76</sup> A.L.A. Bulletin, April, 1921, p. 4.

<sup>77</sup> *Id.* at 5.

<sup>78</sup> C. Pollock, *We Libel A Producing Manager*, A.L.A. Bulletin, April, 1923, p. 3.

<sup>79</sup> Klein, *supra* note 52, at 56.

<sup>80</sup> *Manners v. Morosco*, 252 U.S. 317 (1920); *Herne v. Liebler*, 73 N.Y. 194 (App. Div. 1902).



say that "he would rather close his theatres than sign such an agreement."<sup>81</sup> But by 1926 the Guild had enough strength to enact a minimum contract providing that members deal only with managers who had signed it, and such managers deal only with Guild playwrights. The agreement set out, *inter alia*, separation of rights and minimum royalty provisions, and generally followed the leasing principle. The Shubert Brothers, however, refused to sign. They brought suit against the Guild under New York's Donnelly Act, calling it an "illegal monopoly that employed secondary boycotts."<sup>82</sup> A settlement was effected, however, and the issue was never tried on its merits.

This first minimum basic agreement continued for five years. It was renewed for another five years in 1931, and again, with modifications, in 1936. In 1941 a new MBA was negotiated which further strengthened the playwright's bargaining position.<sup>83</sup> But in 1944 another suit was started against the Guild, this time under the Federal antitrust laws.

Carl Ring, an "angel" as well as a lawyer, was one of the backers of a musical play called *Stovepipe Hat*. When the show reached Boston for its pre-Broadway trial it looked like death. Instead of revamping the tunes or the chorus, Ring attacked the Dramatists' Guild for insisting that its MBA arbitration clause be adhered to. In his formal charge Ring claimed that the Guild was attempting to fix prices and the conditions of production in an industry having interstate branches. The Guild answered that it fell within the exemption of "labor organization" provided by the Clayton Act.<sup>84</sup> On Ring's motion for a preliminary injunction under the Sherman Act, the court found *prima facie* that the Guild's MBA

<sup>81</sup> Klein, *supra* note 52, at 55.

<sup>82</sup> *Id.* at 58.

<sup>83</sup> *Id.* at 59.

<sup>84</sup> *Ibid.* Section 6 of the Clayton Act provides that "the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor . . . organizations . . . ; or shall such organizations . . . be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws." 15 U.S.C.A. 6 (as amended).

violated the antitrust laws, and remanded the case for a trial on the issue of the extent of the Guild's acting in restraint of trade.<sup>85</sup> The jury found that the Guild was *not* a labor union, and therefore was not exempt from the Federal antitrust laws; but it also found that Ring had not been injured by the Guild's MBA because *Stovepipe Hat* had collapsed by that time.<sup>86</sup> On appeal, these findings were affirmed, but the injunction against the Guild was vacated. In this second opinion the Circuit Court neither affirmed nor denied that the Guild was a monopoly in restraint of trade, the question in the specific case having been mooted.<sup>87</sup>

Since 1944, the Guild has sought to avoid another *Ring v. Spina* suit by (a) insisting that its MBA is wholly voluntary, and (b) by changing its terms to conform with the idea that the Guild is a "labor union."<sup>88</sup>

It is the practice in the theater for a playwright to perform certain services after he has sold his play, such as choosing the cast, attending rehearsals, and making revisions in his script. The Guild believes that by spelling out these services it will be converting the agreement between playwright and manager into an employment contract.<sup>89</sup> It hopes that such a contract will qualify under the exemptions provided by Federal antitrust law. Royalties and advance payments under the MBA are referred to as "compensation for the author's services in writing the play, and the author's agreement to perform services in connection with its production."<sup>90</sup> But other provisions fail to bear out the employment nexus. For instance, in the Guild's pending MBA, the playwright is limited to total payments of \$750 a week during the pre-Broadway tryout. During the first three weeks of the New York run the playwright is limited to total payments of \$1,000 a week; then, beginning with the fourth week and "thereafter until

<sup>85</sup> *Ring v. Spina*, 148 F.2d 647 (1945).

<sup>86</sup> Decision not reported.

<sup>87</sup> 186 F.2d 637 (1950).

<sup>88</sup> Klein, *supra* note 52, at 60.

<sup>89</sup> *Id.* at 61.

<sup>90</sup> *Id.* at 60-61.

production expenses have been recouped," the author receives only \$250 a week plus 25 percent of the "weekly operating profits."<sup>91</sup> Not until production expenses have been recouped are the old royalty scales of 5, 7½, and 10 percent reinstated.<sup>92</sup>

It is submitted that the Guild's new MBA will not survive the monopoly test should another *Ring* case arise. It is a simple fact that plays are written before the "employment" contract is signed. The services which a playwright is to perform subsequent to the play's sale are for the author's own protection, as specified by the Guild's agreements of 1926, 1931, 1936, and 1941.<sup>93</sup> (A composer would not become the producer's employee merely because he scored the music or played the piano at rehearsals.) Secondly, while the terms of the agreement provide for a "salary," they also ask the playwright to bear the risks of entrepreneurship until the show realizes a net profit. Such a provision is not consistent with the idea of "employment."<sup>94</sup> Thirdly, while the Guild maintains that it is a labor union under the Clayton Act, it hedges its position by claiming that its MBA is merely voluntary, which it would not have to do if it were in fact an association of salaried workmen. For some of these reasons, at least, the courts would look through the "employment" fiction and probably find the Guild engaging in conscious parallelism—identical conduct with that once proscribed under the antitrust laws.<sup>95</sup>

The writer submits that sections 1 and 2 of the Sherman Act should never have been applied to the sale of dramatic licenses. The antitrust law of 1890 was framed nineteen years

<sup>91</sup> *Id.* at 62.

<sup>92</sup> *Ibid.*

<sup>93</sup> See A.L.A. Bulletin, Jan. 7, 1926, pp. 14-15, and Aug., 1917, p. 407.

<sup>94</sup> For example, a stagehand or a pit musician would never suffer a limitation on his wages until a show returned its invested capital, such strictures being unheard of in the bargaining agreements between management and labor. See sample minimum basic contracts collected in MATHEWS *et al.*, LABOR RELATIONS AND THE LAW 245-300 (1953).

<sup>95</sup> SPRING, RISKS AND RIGHTS 171 (1952).

before our present Copyright Statute. It is not likely that its draftsmen thought of curbing the incorporeal property right which arose under section 1(d) of the 1909 Act.<sup>96</sup> Nor is it likely that those legislators would have gone so far as the present Supreme Court in holding that "so far as the Sherman Act is concerned, a price-fixing combination is illegal *per se*,"<sup>97</sup> regardless of the nature of the commodity or the degree of restraint on commerce.

Prior to *Ring v. Spina*, the first application of the Sherman Act to vendors of copyrighted property arose in the fields of (a) book publishing, (b) motion pictures, (c) performance rights in popular music. In *Straus v. American Publishers' Ass'n*,<sup>98</sup> it was determined by the Supreme Court that the copyright owner of a book could not maintain the book's retail price level above a certain list, the monopoly of the Act not extending that far. The case is obsolete today since the passage of the Maguire Act,<sup>99</sup> and there is no relevance to the situation of the vendor of play licenses, since here the copyright owner is not trying to maintain ticket prices in Shubert Alley. The case of (b) is more complex but no more relevant to the problem of the playwright. The Government's interest in motion picture monopoly began in 1912,<sup>100</sup> and

<sup>96</sup> "Any person entitled thereto . . . shall have the exclusive right: (d) To perform or represent the copyrighted work publicly if it be a drama or, . . . to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by . . . which . . . it may in any manner . . . be exhibited, performed, represented, produced or reproduced; and to exhibit, perform, represent, produce it in any manner or by any method whatsoever;" 17 U.S.C.A. 1(d).

In 1953 a Texas Court of Civil Appeals stated flatly that "the anti-trust laws do not apply to copyrights." See *MGM Distributing Corp. v. Cocke*, 46 S.W. 2d, 489.

<sup>97</sup> *Paramount v. United States*, 334 U.S. 131, 143 (1947).

<sup>98</sup> 231 U.S. 222 (1913).

<sup>99</sup> Under this statute, modifying the Robinson-Patman Act of 1938, agreements between wholesalers and retailers for minimum price support of brand-name goods are exempt from Federal antitrust laws, if such agreements are authorized by state law. P.L. No. 542, 82d Cong., 2d Sess., § 2 (July 14, 1953).

<sup>100</sup> See Appendix "C" to Government's brief in *Paramount v. United States*, 66 F. Supp. 323 (S.D.N.Y. 1946).

after a series of abortive self-regulatory codes, antitrust suits and consent decrees, the motion picture companies were finally divested of their distribution facets in 1948.<sup>101</sup> The companies, as licensors of the copyrighted films, were accused of discriminating among exhibitors, artificially maintaining admission prices, blind selling and block selling of licenses, and other abuses. The Defendants argued that admission price-fixing was part of the monopoly allowed proprietors under section 1 of the Copyright Act. The Court answered: "The Act has never been held to sanction a conspiracy among licensors and licensees artificially to maintain prices."<sup>102</sup> Presuming this to be a rule of law, it is hard to see how it would apply to authors with scripts for sale. The playwright, unlike the film corporation, is not seeking secondary control over his copyright by admission price maintenance, discrimination among managers, or forced selling of licenses. Nor is there a conspiracy between authors and managers to restrain competition in play production. The playwright is merely trying to get the fairest price for what he has to sell. This is within the contemplation of the copyright monopoly. As Justice Roberts wrote in the *Interstate Circuit* case:

The Act attaches to the product of his brain certain attributes of property. One of these is the right . . . of exclusive enjoyment in the vendee; another is the right to license others to use the product. . . . The monopoly, so-called, amounts to no more than the attachment to the work of an author . . . the same rights as inhere in other property under the common law.<sup>103</sup> (Dissent.)

Also:

Once the property rights conferred by the Copyright Law are recognized, it must follow that the principles governing the right to use, sell, or turn to account . . . are equally applicable here. We have often held that a contract containing a covenant in restraint of trade is valid

<sup>101</sup> 334 U.S. 131 (1947).

<sup>102</sup> 66 F. Supp. 323, 340 (1946).

<sup>103</sup> *Inter-state Circuit, Inc. v. United States*, 306 U.S. 208, 236 (1939).

if the restraint is reasonably necessary for the protection of the right granted by the owner of the property.<sup>104</sup>

The antitrust precedents most analogous to authorship lie in the field of rights in popular music, and have to do with the activities of ASCAP.<sup>105</sup> Under ASCAP's charter the songwriter assigns to the Society the nondramatic performance rights in his music. ASCAP in turn licenses these rights to the commercial users, such as broadcasters, dance halls, hotels, and acts as a clearing house for royalties and the policing of infringements.<sup>106</sup> Since 1918 the consumer interests have attacked ASCAP as an unlawful monopoly in restraint of trade.<sup>107</sup> In that year the New York Supreme Court held that imposing licensing fees for the use of music was not a restraint of trade.<sup>108</sup> Four years later, in *Harms v. Cohen*,<sup>109</sup> a federal court ruled that an infringer could not set up alleged antitrust violations as a defense, and that a license to perform music, under copyright, *was no more trade or commerce than was the production of plays*. (Italics added.) Between 1937 and 1940 there was a spate of anti-ASCAP legislation by the States and Territories, which the Society fought piecemeal in the courts. In 1941 the Federal Government started antitrust proceedings against ASCAP under the Sherman Act. The suit was resolved in a consent decree which placed certain limitations on the Society's licensing powers.<sup>110</sup> This decree continued in effect until 1948 when, on the complaint of the motion picture companies, a Federal court found that ASCAP was involved in an illegal monopoly and restraint of trade in the licensing of music used on sound

<sup>104</sup> *Id.* at 239.

<sup>105</sup> See ASCAP's brief to Sup. Ct. in *Marsh v. Buck*, 313 U.S. 406 (1941).

<sup>106</sup> Finkelstein, *Public Performance Rights in Music and Performance Right Societies*, 7 COPYRIGHT PROBLEMS ANALYZED 69 (CCH, Chicago, 1952).

<sup>107</sup> Reich, *The Entertainment Industry and the Federal Anti-Trust Laws*, 20 SO. CALIF. L. REV. 1, 30 (1946).

<sup>108</sup> 174 St. & St. Nicholas Amusement Co. v. Maxwell, 169 N.Y.S. 895 (1918).

<sup>109</sup> 279 Fed. 276 (1922). <sup>110</sup> United States v. ASCAP, eq. No. 13-95.

tracks.<sup>111</sup> That same year another District Court in Minnesota found likewise that ASCAP had violated sections 1 and 2 of the Sherman Act by "monopolistic domination of music integrated in sound films."<sup>112</sup> Both of these holdings were superseded by an Amended Consent Judgment which revised the Consent Decree of 1941. This 1950 decree governs ASCAP's relations with all commercial users of music. It is significant, however, that no final determination was ever made of ASCAP's legality or illegality under the Sherman Act.<sup>113</sup>

It has been said of the songwriter that, prior to the organization of ASCAP, he had no practical means of protecting his rights under the Copyright Statute.<sup>114</sup> The same might be said of the author who licenses his dramatic rights. Both deal with large corporations which themselves have been the object of antitrust suits.<sup>115</sup> The helplessness of the individual to enforce his equities in this market has been recognized by the Supreme Court.<sup>116</sup> If, in order to realize the full benefit of his legal monopoly, a creator must join with others in vending his copyrighted work, such concert should not be illegal so long as it is regulated in the public interest.

Secondly, there is legal precedent for the argument that contracts to produce plays are not an object of interstate commerce, and therefore the Sherman Act should not apply. Prior to *Ring v. Spina*, a Federal Court found in 1926 that booking contracts for vaudeville acts moving from state to state were

<sup>111</sup> *Alden-Rochelle v. ASCAP*, 80 F. Supp. 900 (1948).

<sup>112</sup> *Witmark & Sons v. Jensen*, 80 F. Supp. 843 (1948).

<sup>113</sup> See Transcript of District Court hearing of March 14, 1950 (Civ. Div. 18-6).

<sup>114</sup> Reich, *supra* note 107, at 29.

<sup>115</sup> The Shubert Brothers, for instance, are estimated to hold \$300,000,000 worth of theatrical properties, as literary proprietors as well as landlords. In 1927 the Shuberts controlled over 100 first-class houses in the United States and booked exclusively in 750 others; today they own or control 19 of New York's legitimate theatres. In 1950 the Federal Government started antitrust proceedings against the Shuberts, but the suit was later dropped. Obituary of Lee Shubert, *New York Times*, Dec. 26, 1953, pp. 1 & 13.

<sup>116</sup> *Watson v. Buck*, 313 U.S. 387 (1941).

not an object of interstate commerce so as to give a cause of action under the Sherman Act.<sup>117</sup> Under the Penal Law of New York it has been held that "owning, controlling and leasing theatres and producing plays and booking contracts for the production of plays, is not trade or commerce."<sup>118</sup> In *Hotel Edison Corp. v. Taylor*,<sup>119</sup> the New York Court of Appeals affirmed a holding that ASCAP was engaged in licensing an intangible property right created by statutory monopoly, and that such activity was not trade or commerce under the New York antitrust laws. While there have been other State and Federal decisions *contra*,<sup>120</sup> these decisions have differed only on the issue of whether the object of the restraint took place interstate, and not on the issue of whether the object of restraint was actually *trade or commerce*. Under the Sherman Act, both elements are essential to a finding of violation.<sup>121</sup> As Bernard Reich has written in his review of anti-trust and the entertainment industry:

. . . it is still open to doubt . . . that the activities of ASCAP . . . constitute trade or commerce within the meaning of the federal anti-trust laws. We have indicated the restricted meaning under Sections 1 and 2 of the Sherman Act. We have noted . . . that what is essentially personal effort does not constitute trade or commerce within the restricted meanings of those sections.<sup>122</sup>

Thirdly, there is a public policy argument against extending antitrust sanctions to the licensing of author rights. The first application of the Sherman Act to a statutory monopoly was in the area of patents.<sup>123</sup> The exclusive right to "make,

<sup>117</sup> *Hart v. Keith Vaudeville Exchange*, 12 F.2d 341 (1926).

<sup>118</sup> *People v. Klaw*, 55 Misc. 72 (1907). <sup>119</sup> 295 N.Y. 581 (1945).

<sup>120</sup> See cases collected in Reich, *supra* note 107, *passim*.

<sup>121</sup> "Section 1. Every contract, combination in the form of a trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . ." Act of July 2, 1890, as amended. (See annotations in 15 U.S.C.A. 1-7.)

<sup>122</sup> Reich, *supra* note 107, at 31-32.

<sup>123</sup> See cases and comment in OPPENHEIM, CASES OF FEDERAL ANTI-TRUST LAWS 464-515 (1948).



use and vend" conferred on inventors by Federal law has often resulted in patent pools, price-fixing, and discriminatory licensing by large industrial concerns with "hired brains."<sup>124</sup> This attempt by patent holders to control commerce by unlawfully extending a legal monopoly is plainly against the public interest.<sup>125</sup> In their zeal to prevent restraint of trade, however, the courts have applied antitrust law to copyright, using the patent analogy where no analogy really exists.<sup>126</sup> As pointed out before, the patent monopoly is total and exclusive; the author's copyright monopoly is partial and restricted. It is therefore unjust to apply the same standards of conduct to both author and inventor, where the former must have added protection to achieve his statutory rights. This confusion of standards has its result in a decision like *Ring v. Spina*, where intangible dramatic rights are treated like radio tubes, and theater productions are equated with freight cars.<sup>127</sup>

When the courts apply antitrust concepts to the author's copyright property they not only nullify the clear purpose of copyrighted legislation,<sup>128</sup> but also misconstrue the nature of the legal monopoly. The statutory protection has no meaning unless it can be carried out in terms of contract. And the mere fact that it is called a "monopoly" does not make it bad in itself, but only a counter in the balance between public interest and private reward. As a former Chief of the Antitrust Judgment Section has written, the solution to this problem

<sup>124</sup> See Symposium, *Public Interest in a Sound Patent System*, JOURNAL OF COMMERCE, March 11, 1943.

<sup>125</sup> *United States v. U.S. Gypsum Co.*, 333 U.S. 364 at 400 (1948).

<sup>126</sup> "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." U.S. CONST., art. I, § 8, cl. 8. The grouping of "authors and inventors" in this authorizing Article has caused some courts to disregard the essential differences in the Congressional franchises. For an outline of these legal differences, see Wolff, *Copyright Law and Patent Law: A Comparison*, 27 IOWA L. REV. 250 (1942).

<sup>127</sup> Reich, *supra* note 107, at 28.

<sup>128</sup> "The Copyright Law, like the patent statutes," wrote Justice Douglas in

will call for more deft anti-trust handling than a combination to fix the price of electric lamps. . . . The judicial resolution of copyright-anti-trust conflict should take the form of a complicated mosaic, consisting in large part of notions from the diverse fields of constitutional law, patents, and corporate ethics, but unified by the overriding demands of the business world and of common sense.<sup>129</sup>

## RADIO

## THE AUTHOR AS EMPLOYEE UNDER THE ACT

It was pointed out in the last section how the Dramatists' Guild sought to achieve separation of literary rights and the leasing principle by making hired hands out of free-lance playwrights. In the field of radio, where an employee-employer nexus clearly exists, it can be judged whether this is a sound way to protect the author's property.

Around 1937 the makers of Mollé shaving cream engaged an advertising agency to build a radio program around their product. The agency employed an author named Brown who composed a singing commercial.<sup>130</sup> After the program had run for several months, Brown left his job and sued the Mollé people for the use of the jingle. But a Federal District Court dismissed his bill, ruling that under Section 26<sup>131</sup> of the Copyright Act Brown had entertained his Muse as an employee of the agency, regardless of who registered the copyright. Therefore Brown's employer held legal title to the

the *Paramount* case, "makes reward to the owner [proprietor] a secondary consideration." Other courts have defined the purpose of copyright legislation in terms of reward to the author. It is to be queried whether these two purposes should be ranked above each other, as Douglas insists on doing, or whether they should be thought of as interrelated. As it stands, Douglas's dictum is meaningless: what the Court probably meant was that the Act achieves public benefit by rewarding the creator. Otherwise, why protect authors at all?

<sup>129</sup> Timberg, *The Antitrust Aspects of Merchandising Modern Music*, 19 LAW AND CONTEMP. PROB. 320, 321 (1954).

<sup>130</sup> "Mollé, Mollé,

The way to start your day,  
As your razor goes gliding along . . ." etc.  
(To be sung to the Army "Caisson Song.")

<sup>131</sup> ". . . and the word 'author' shall include an employer in the case of works made for hire." 17 U.S.C.A. 26, last sentence.

jingle in trust for Mollé—the real owners of this *meisterwerk*.<sup>132</sup> To put it more simply, Brown was only an employee of an employee of the real proprietor.

The problem facing radio authors is further complicated by the fact that broadcast material is rarely copyrighted at all, since the law holds that a radio broadcast is not a “publication” which abandons copyright.<sup>133</sup> Other complications arise from the definition of “broadcasting” which includes aural transmission (AM and FM), visual (TV), and visual and permanent (facsimile sending),<sup>134</sup> and from the source of these transmissions, network, local, and even hotels and theaters under the “multiple performance” theory.<sup>135</sup>

Before 1920 the author's radio use was not separately accounted for. If a dramatic script was sold, either all rights went with it or the author was prevented, by implied negative covenants, from selling licenses in competition with the basic grant.<sup>136</sup> It was not until 1923, when a Federal court ruled that a radio broadcast was a “public performance for profit,”<sup>137</sup> that the stations started paying authors for the use of their work. Up until 1952 it was still possible to read a poem, story, or novel over the air and evade infringement suits under the porous language of Section 1(c).<sup>138</sup> In 1937,

<sup>132</sup> *Brown v. Mollé*, 20 F. Supp. 135 (1937).

<sup>133</sup> *Uproar Co. v. NBC, Inc.*, 8 F. Supp. 358 (1934), modified, 81 F.2d 373 (1936). The same holds true, of course, of the performance of a drama before the play is published in book format (*Ferris v. Frohman*, 223 U.S. 424 [1912]), and it holds true also of the exhibition of a motion picture film, *DeMille v. Casey*, 201 N.Y. Supp. 20 (1923).

<sup>134</sup> As defined by the Federal Communications Act, 47 U.S.C. 153 (1952).

<sup>135</sup> In general, the reproduction of a broadcast performance through the use of a radio receiving set is a separate performance which, if public “and for profit” requires a separate license of the consumer. *Buck v. Jewell-La Salle Realty Co.*, 283 U.S. 191 (1931). Six years later, Judge Woolsey, in the Southern District of New York, ruled that reception by a hotel constituted a re-broadcast which required a separate license from the copyright proprietor. *SESAC v. New York Hotel Statler*, 19 F. Supp. 1 (1937).

<sup>136</sup> *Manners v. Morosco*, 252 U.S. 317 (1920).

<sup>137</sup> *Witmark v. Bamberger & Co.*, 291 Fed. 776 (1923).

<sup>138</sup> The copyright owner had the exclusive right, under the old language, “to . . . present the copyrighted work in public for profit if it be a lecture, sermon,

authors employed by broadcasters banded together to form the Radio Writers' Guild, under the charter of the Authors' League. The Guild was organized along strict trade union lines. The first staff-writers MBA went into effect in 1940; about seven years later, a free-lance agreement with the networks was signed.<sup>139</sup>

Prior to 1940 the author employed in radio was given no rights in his creation. The common law held that a commission to perform literary or artistic work was a personal service contract, carrying with it negative covenants in the absence of express reservations.<sup>140</sup> The exclusive concept of "personal" employment survives from the days of Patronage,<sup>141</sup> and was first applied in this country to commissions of works of art. In the 1900 case of *Dielman v. White*<sup>142</sup> the court held that the municipal employer, not the artist, had sole reproduction rights in a mural. After the Statute of 1909, the *Dielman* rule was applied to a songwriter who worked for a salary in the form of advance royalties,<sup>143</sup> and to an author-ess of "soap operas," in *Phillips v. WGN*.<sup>144</sup> In a decision now pending before the Ninth Circuit, the lower court held that an actor, sans reservation, had granted away TV rights in his performance because of his employee status.<sup>145</sup>

With this background in mind, the Radio Writers' Guild has sought to reserve the author's rights by spelling them out in detail. In its MBA the property is broken down into its

address or similar production, or other nondramatic literary work." Around 1934, Jimmy Durante "sang, shouted, and recited" over the air a poem by Alfred Kreymbourg but neglected to pay the author. A Federal court held that this was not an infringement (*Kreymbourg v. NBC*, and *Jimmy Durante*, 21 U.S.P.Q. 557; 22 U.S.P.Q. 248 [1934]) under the above definition. The language of 1(c) was then altered by an Act of July 17, 1952; 66 Stat. 752, which became known as the "Kreymbourg Amendment."

<sup>139</sup> Klein, *supra* note 52, at 63.

<sup>140</sup> M. E. Cohn, *Old Licenses and New Uses*, 19 LAW AND CONTEMP. PROB. 184, 197, also n. 73 (Spring, 1954).

<sup>141</sup> BALL, *op. cit. supra* note 26, at 481.

<sup>142</sup> 102 Fed. 892 (1900).

<sup>143</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697 (1941).

<sup>144</sup> 307 Ill. App. 1 (1940).

<sup>145</sup> *Peterson v. KMTR Radio Corp.*, cited in Cohn, *supra* note 140, at 190, n. 34.

various uses—book, periodical, stage, motion picture, home recording, and foreign radio right. The employer's monopoly is limited to stated periods, with reversions to the author after that time. During "exclusivity," the author and employer share 50-50 in the sale of secondary rights. The agreement is only effective if the author can qualify as an employee.<sup>146</sup>

These terms are not as liberal as they appear *prima facie*. For one thing, the employer takes not only the "exclusive radio right" but all other means of broadcast transmission along with it, without extra payment. This includes Television, the most valuable use of all. If the property should prove lucrative, it is not likely that it would ever revert to the author, since the employer has the option of exclusive renewal for many years. Nor are fees for renewal in proportion to the worth of the rights retained. Under the Staff MBA, the employer takes not only all rights for all time, but acquires also an exclusive option on the author's spare time output.<sup>147</sup> Should the author move from one status to another, he is not protected; and the broadcasters refuse to deal with the author who does not qualify under a personal service contract.<sup>148</sup>

From the author's standpoint, there are two real villains in this picture: one is the common-law interpretation of "works made for hire," under the Statute; the other is the progress of invention in the realm of broadcasting. Instead of a provision for convenience of registration, the language of section 26 has been construed as a denial of all rights to the salaried author, although this construction is at war with other sections of the Act. As the law now stands, however, the author must

<sup>146</sup> Radio Writers' Guild, Minimum Basic Agreement of 1947, *passim*.

<sup>147</sup> *Id.* cl. 22.

<sup>148</sup> "(2) Persons not covered: This agreement does not cover any person insofar as he acts in the capacity of an independent contractor. An independent contractor is distinguished from writers to be covered, in that an independent contractor is . . . (b) any individual who sells or licenses to the Company rights of use or ownership of 'material' without contracting to perform personal services with respect to revision, modification or change of such 'material.'" Radio Writers' Guild, Minimum Basic Agreement of 1947 (1) (2) (b).

form into collective employee groups to realize the protection which section 26 denies. In bargaining with employers, the author loses many valuable rights because the contract process lags far behind the new techniques of transmission,<sup>149</sup> while each contract is limited to its specific time, place, and medium. Should the author claim payment for the adoption of his work to new media, he is estopped either by the terms of the basic agreement itself, or by the courts on a theory of "non competing uses."<sup>150</sup> Should he remain outside the contract fold, the author has no way of protecting his property rights.<sup>151</sup>

Under this present state of affairs, lyricist Brown and his shaving jingle is hardly better off than he was in 1937.

#### TELEVISION

##### THE BASIC AGREEMENT BREAKS DOWN

A discussion under this heading would not be necessary if the author's MBA, as logically expected, covered all broadcast transmissions.<sup>152</sup> But the fact that it does not points up the difficulty of protecting various rights by the employment contract, especially where there are competing groups of licensors (employees), as well as licensees (consumers).

The law in this area, as regards separation of rights and

<sup>149</sup> See Kupferman, *Rights in New Media*, 19 LAW AND CONTEMP. PROB. 172 (Spring, 1954).

<sup>150</sup> Cohn, *supra* note 140, at 193; also *Wexley v. KTTV*, 108 F. Supp. 558 (1952).

<sup>151</sup> "There are many writers whose works are used in these fields, who cannot be represented by a guild, at least not by way of a standard industry contract." Klein, *supra* note 52, at 64.

<sup>152</sup> "The use of the term 'broadcasting' alone usually encompasses both radio and television. . . . Television, according to the Communications Act, is a form of radio communication." McDonald, *The Law of Broadcasting*, 7 COPYRIGHT PROBLEMS ANALYZED 53 (1952).

"And an opinion of the Attorney General of Florida requires candidates to report television expenses under a statute which refers only to 'radio' expense." Cohn, *supra* note 140, at 193.

There was a provision in the original Staff-Network MBA for it to be extended to cover the area of television; but this was precluded by a jurisdictional contest between Screen and Radio writers, and the Authors' League (see *infra*).

noncompeting uses, is still to be settled. Courts today are faced with the same problems involving motion pictures and television licenses which confronted them around 1920, in disputes over dramatic and motion picture licenses. Does the grant of the motion picture use confer a right in the licensee to show the film on television? Can the licensee of the television right enjoin the author from licensing a use to the movies? Or *vice versa*? How can non-exclusive licensees protect themselves? Where the language of the contract is not specific, should a court apply "negative covenant,"<sup>153</sup> thereby impairing the author's copyright, or should it employ the doctrine of *caveat emptor*,<sup>154</sup> thereby diminishing the licensee's property right?

In one of the first cases involving television rights, *Wexley v. KTTV*,<sup>155</sup> the District Court held that a license to make a motion picture of a play included the right to show the completed film on TV, even though the author had reserved audio television rights (whatever that was), and the right to present a live performance of his play on television after fifteen years. In construing a contract made in 1931, the court held that the author had licensed away *visual* rights in his play, regardless of whether the showing was on a TV or motion picture screen.

While the problems out-lined by the *Wexley* case are important, they are of lesser significance to today's television author who must protect his rights, not by single license contracts, but by working under an industrywide agreement.

When it was decided that TV authors should not be covered by the Radio MBA, three Authors' League factions claimed

<sup>153</sup> *Manners v. Morosco* 252 U.S. 317 (1920).

<sup>154</sup> In *Klein v. Beach*, 232 Fed. 240 (1916), the court held that a grantee of dramatic rights in 1911 must have known of the existence of motion pictures at the time of the contract. Therefore the grantee was said to have taken his license subject to the unreserved motion picture right of the author. Under this theory, amounting to "buyer beware," the plaintiff's suit to enjoin the motion picture license was dismissed.

<sup>155</sup> *Wexley v. KTTV*, *supra* note 150.

bargaining jurisdiction in the "new" medium: screen writers felt that television was akin to movie writing; Radio Writers compared it to radio; and the Dramatists Guild thought that a live TV show was like a stage performance.<sup>156</sup> In 1949 the Authors' League negotiated a contract with the Networks, but before its ratification the Radio Writers on the West Coast formed a splinter unit and won a certification election under the amended NLRA to represent employees in radio and television.<sup>157</sup> The Screen Writers, siding with the Authors' League, negotiated an MBA with TV film packagers on the West Coast. In New York, the League then signed up independent producers of "live" shows, and attempted to secure "Letters of Adherence" to its unratified agreement with the Networks.<sup>158</sup> Both the League and the recent Television Writers of America claim to represent "live" network authors.

At present there are basic agreements covering *some* authors of TV films on the West Coast, and authors who work for agencies and independent producers of "live" programs. But the majority of free-lance authors, comprising the fields of live and film network television on either Coast, are unprotected.<sup>159</sup>

The Screen Writers' contract with TV film producers applies to free-lance writers only, under the employment fiction. The basic grant to the employer is that of the TV film right, at minimum rates and schedules of compensation. The radio use is held under the employer's option. "Paid" (subscription) television and foreign theatrical uses are left to future negotiations. All other rights are reserved to the employee. The employer shares 50 percent in the outside sale of the radio and motion picture rights, but has the exclusive option of exploiting these rights within three years of de-

<sup>156</sup> Klein, *supra* note 52, at 65.

<sup>157</sup> Letter to the writer from H. Chevigny, dated Dec. 3, 1954.

<sup>158</sup> Conversation with former Guild officer Sam Moore, on Nov. 25, 1953.

<sup>159</sup> Letter to the writer from H. Chevigny, dated Dec. 7, 1953.



livery of the script. If the option is not exercised, then title reverts to the author, although the employer shares 50 percent in sales until three years after the reversion.<sup>160</sup>

The League's MBA with live TV producers is also an employment contract. The basic grant is the exclusive television use, but includes also radio and kinescope (recorded film) rights in some cases. All other rights are reserved to the employee but some (not specified), cannot be licensed during the producer's period of exclusivity. The author receives 100 percent of the sale of most subsidiary uses. The producer has a right to renew the period of exclusivity up to sixteen years. If there is no use of or payment for the material within a certain time, it reverts to the employee.<sup>161</sup>

Under the League's proposed agreement with the Networks, the basic grant includes "live" television, radio, simulcast, and kinescope. The latter rights are taken for "supplementary coverage" or to "complete the circuit." During the network's exclusivity the author promises not to license any competing broadcast, motion picture, recording or transcription. These exclusive periods range from twenty-six to one hundred and four weeks, depending on the type of program, and can be extended up to sixteen years by the company's paying small percentages of the basic compensation. The network is given the sole right to dispose of subsidiary uses in some materials. Depending on the type of program, all rights revert to the employee if there has been no use or payment from twenty-six to fifty-two weeks after delivery of the script.<sup>162</sup>

The proposed agreement of the Television Writers of America includes "demands on almost all levels considerably above what was comprised in the League's agreement."<sup>163</sup> The license is of the broadcast use with all other rights reserved to the author. Periods of exclusivity are limited to four years, and extensions are at the option of the employee. One

<sup>160</sup> Screen Writers' Guild-TV Producers Contract of 1950.

<sup>161</sup> *Ibid.*

<sup>162</sup> *Ibid.*

<sup>163</sup> Letter from H. Chevigny, dated Dec. 3, 1953.

hundred percent is demanded for every reuse of a property. Again the network's share of subsidiary rights depends on the type of program.<sup>164</sup>

Résumés of these network contracts are necessarily sketchy, since neither the Authors' League nor the TWA will release copies of their proposals.

From this brief discussion can be seen the difficulties of the author who deals in television rights. If he has already disposed of licenses in radio or motion pictures, a court might construe a television use as well in the licensee, as in the *Wexley* case, or prevent the author from vending competitive rights, under the *Morosco* rule. If he deals directly with TV producers or networks, and remains a free agent in fact, he cannot benefit from any existing MBA, and takes the chance of relinquishing all rights in his material. But even if he qualifies as an employee under one of the basic agreements, the employer (producer, agency, network) acquires exclusive secondary rights in radio and motion pictures along with the basic license of "live" television, kinescope, simulcasts, and subscription TV (coin, theater, and closed circuit transmission). All of these uses can be taken without additional payment and held for their commercially viable term so that the leasing principle never takes effect. The competition among bargaining units is such, however, that most authors in the medium are totally unprotected.

The cupidity of author groups themselves, coupled with the progress of invention in this field and the purely verbalistic thinking of the courts, has deprived the copyright franchise of almost all economic substance. Surely the problem cannot be met by thinking in terms of light waves, or sound waves, or geography, or reception techniques. As Morris E. Cohn has written on this subject:

Arguments based on superficial similarity, that is, that the audience in each case views a moving image on a screen, and arguments based on the happy choice of phraseology prior to the existence of television,

<sup>164</sup> *Ibid.*

would not solve the problem on a basis which is meaningful for the litigants. Without excluding the weight of other factors, the question . . . should, it is submitted, be considered in the light of economic issues framed and evidence received . . . and applied or rejected as justice required.<sup>165</sup>

## MOTION PICTURES

### COPYRIGHT AND COLLECTIVE BARGAINING

Presuming that all writers in the mechanical branches of authorship<sup>166</sup> could face their market as a cohesive group, would the basic protection of the copyright law be realized economically? This question can best be studied in the motion picture industry where a strong union of writers is said to exist,<sup>167</sup> and where the inter-action of "Fair Labor" and Copyright statutes takes effect.

In the "silent" days of the industry it was not thought that the author had any material to protect. It was not until 1905 that the common law recognized the "photo play" as a distinctly copyrightable property,<sup>168</sup> and not until 1912 that its protection was amended to the Statute.<sup>169</sup> Meanwhile, authorship was confined to thinking up "gags" and situations for camera sequences, and the function of scenarist often merged

<sup>165</sup> Cohn, *supra* note 140, at 202.

<sup>166</sup> So described to differentiate radio, television, and motion picture writing from the authorship of books, plays, and periodical literature. The distinction, although technical, has socio-economic as well as legal consequences: ". . . there being a long history of more or less concealed conflict between writers in the mechanical arts, and authors and dramatists," wrote a former President of the Radio Writers' Guild. "Some of this proceeds out of the inability of authors and dramatists to understand why a negotiated contract has to be an employment agreement." Letter to the writer, dated Dec. 7, 1954.

<sup>167</sup> Klein, *supra* note 52, at 52.

<sup>168</sup> *American Mutoscope & Biograph Co. v. Edison Co.*, 137 Fed. 262 (C.C.D.N.J. 1905).

<sup>169</sup> Under the Copyright Acts of 1891 and 1909, the motion picture sometimes received protection as a species of photograph. As late as 1903, however, a suit for infringement was reversed and dismissed by the Supreme Court in *Edison v. Lubin*, 195 U.S. 625 (1904). Two years later such a right was recognized in *American Mutoscope & Biograph Co. v. Edison Co.*, 137 Fed. 262 (C.C.D.N.J. 1905). In 1912, Section 5 of Title 17 was amended by the Townsend Act, adding the classifications (l) for "motion picture photoplays" and (m) for "motion pictures other than photoplays."

with that of director and actor.<sup>170</sup> Studios paid high weekly salaries, in effect buying the author himself as well as any right he might have had in the completed film.<sup>171</sup> This arrangement continued until certain abuses were noted.

A company would buy a screen play outright, make the film, and then later convert the property into a novel, a stage play, or publish it in periodical form,<sup>172</sup> without royalties to the author. Or a studio might buy a script with many sequel possibilities, such as *Topper* or *The Thin Man*, and pay the author for only one use. Or a producer might buy an original property and start a chain of re-sales, with each vendor profiting except the creator himself.<sup>173</sup> Screen material was bought on the condition that all rights vest in the company and never revert, regardless of whether they were used or not. This resulted in the practice of studios "stock-piling" scripts, so that in hard times the author would find himself in competition with his old screen plays. If an old film was released again, the author would realize nothing from the reissue; if the story was re-filmed, the author would earn nothing from the revival.<sup>174</sup> With the advent of television, producers would sell old motion pictures to the new medium, cutting down movie attendance which resulted in wide-scale author unemployment, while the screen writer earned nothing from TV showings.<sup>175</sup>

To meet some of these inequities, the Screen Writers' Guild was formed in 1920 and became affiliated with the Authors'

<sup>170</sup> ROTH, *THE FILM TILL NOW* (1949). <sup>171</sup> Klein, *supra* note 52, at 50.

<sup>172</sup> M. Field, *Twice-Sold Tales*, Screen Writer, May, 1947, p. 1.

<sup>173</sup> For example, Eric Knight's *The Flying Yorkshireman* was resold six times by different entrepreneurs. The author himself received \$3,100 on the first sale; the last person to handle the property received \$40,000. *Id.* pp. 6-8. See also MILLER, *op. cit. supra* note 49, at 7.

<sup>174</sup> In 1946 it was estimated that more than 25 percent of all films released were reissues; these reshowings were said to deprive some 200 to 300 writers of studio employment. In May of 1947, it was estimated that 50 percent of the films playing in Metropolitan New York were reissues. Field, *No Applause for These Encores*, Screen Writer, Aug., 1947, p. 24.

<sup>175</sup> Screen Writers' Guild mimeo. Bulletin, Aug., 1950, p. 3.

League. Its first industry-wide contract was framed in 1924 but ignored by the studios. There followed fourteen years of economic warfare between the film companies and the Guild.<sup>176</sup> By 1937 the Guild was strong enough to petition the NLRB for a representation election under Section 9(a) of the Wagner Act. The following year it was certified by the Board as the exclusive collective bargaining agent for employed screen writers. Under Sections 7 and 8(a)(5) of the Wagner Act, the studios could no longer refuse to bargain.<sup>177</sup>

At the negotiation table the studios presented their side of the story: a motion picture is a legal mosaic in which many rights and licenses are inextricably involved; to protect its over-all investment, these rights in music, talent, literary material, and film process must vest in the company, or one invalid license might prevent exhibition.<sup>178</sup> This must include the screen author's bundle of licenses as well. As for the author's claim to royalties, the studios said that the finished screenplay is the broth of many cooks;<sup>179</sup> that many film writers had failed to master their medium;<sup>180</sup> that authors got high salaries and shared no production risks;<sup>181</sup> that the fiscal success of a movie depends on such intangibles as "star values and showmanship," to which the writer makes no contribution;<sup>182</sup> and finally, that the writer's share could not be figured in terms of flat minimums or percentages.<sup>183</sup>

Out of this welter of arguments evolved a basic agreement

<sup>176</sup> L. Cole, *A Fundamental Right*, Screen Writer, Aug., 1947, p. 21; McCall, *A Brief History of the Guild*, Screen Writer, April, 1948, p. 29.

<sup>177</sup> Section 7 reads: "Employees shall have the right to self-organization . . . , to bargain collectively through representatives of their own choosing . . ." And Section 8 (a): "It shall be unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. 7-8, 49 STAT. 449 (1935).

<sup>178</sup> Cohn, *What Is a License of Literary Property*, Screen Writer, Sept., 1947, p. 28; Klein, *supra* note 52, at 50.

<sup>179</sup> Samuel Goldwyn, *The Writer's Share*, Symposium in Screen Writer, Sept., 1947, p. 29.

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> David O. Selznick, Symposium in Screen Writer, Sept., 1947, p. 32.

<sup>183</sup> *Id.* at 31.

that had almost nothing to do with the screen author's property rights. The Guild-Studios contract was confined almost exclusively to matters of wages, hours, working conditions, and union security. The Guild defended its position by pointing out that by the time the agreement was signed, the practice of taking all rights was too entrenched to be changed. A critic of both factions has stated that the language of the Wagner Act itself prevented any bargaining as to matters of copyright.<sup>184</sup> This contention is worth examining in some detail.

Before the amendments of 1947, the Wagner Act was vague as to the subject matter of collective bargaining. Section 1 of the Title refers to "industrial disputes arising out of differences as to wages, hours, and working conditions . . ." Section 2(9) relates "labor disputes" to "terms and conditions of employment." The *unfair labor practice* chapter refers to "discrimination . . . in regard to any term or condition of employment." Section 159(a) states that collective bargaining shall be in respect to "rates of pay, wages, hours of employment, or other conditions of employment."<sup>185</sup> The supplemental language of Taft-Hartley is similar, if not identical, under these chapters. The amended Act holds, however, that certain matters are beyond the scope of permissible bargaining: among these are the closed shop, "union security" clauses unless authorized, the check-off of dues, certain types of feather-bedding agreements, and employer contributions to union welfare funds.<sup>186</sup> The writer has failed to discover any case law which would qualify substantive copyright as a subject of collective bargaining. The issue seems never to have been raised. The furthest the NLRB and Federal Courts have gone has been to recognize such matters as pensions, group insurance, merit systems, the serving

<sup>184</sup> "The effect of the Wagner Act on the Screen Writers' Guild was to virtually paralyze any collective struggle for more favorable handling of an author's basic rights." Letter to the writer dated Nov. 4, 1953.

<sup>185</sup> 29 U.S.C. 159(a); see also 29 U.S.C. 158(d) (1952 Supp.).

<sup>186</sup> MATHEWS *et al.*, LABOR RELATIONS AND THE LAW 253 (1953).

of meals, and trust and welfare funds under the rubric of "terms and conditions of employment."<sup>187</sup> The MBA's in the radio and television industries merely qualify authors under Section 6 of the Clayton Act; there has been no test of their voluntary terms before the NLRB.

It could be inferred, then, that companies would be within their rights in refusing to bargain as to copyright matters under the amended Wagner Act, unless such matters could be tied directly to "rates of pay," or "other terms of employment." But in making this connection, the union runs the risk of losing its franchise. The author might be held to have traded his right to royalties, reversions, and other property interests in film material for minimum salaries and other workman's benefits. The amended Act does not apply to "independent contractors" or associations of entrepreneurs.<sup>188</sup> Every improvement in the author's status as *employee* would react in his diminished rights as a *proprietor*. Thus it appears that copyright and collective bargaining laws are substantively opposed. It will be seen how this theory works out in practice.

Of the 36 articles in the Guild's present agreement, only one is devoted to separation of material rights, "when a writer sells the motion picture" use and "executes an employment contract."<sup>189</sup> All secondary rights are supposedly listed and accounted for, except for television, which is left to future negotiations. Upon a flat payment these secondary rights are taken for the full copyright term(s), and there is never a reversion to the author-employee, whether they are used or not. Under this collective agreement the leasing principle is totally defeated.

Today's screen author sits on the horns of the following dilemma: if he remains a free agent (which is possible only

<sup>187</sup> *Id.* at 258-259.

<sup>188</sup> 29 U.S.C. as amended, § 2(3) and (5); Act of June 23, 1947. 29 U.S.C. 152(3) and (5) (1952 Supp.).

<sup>189</sup> Screen Writers' Guild MBA with Producers, 1951.

in theory), he has no bargaining status with the film corporation and cannot hope to reserve any material rights as a solitary vendor; but if he comes in under the Guild's contract, he is limited by its collective standards and cannot hope to get royalties, percentages of profits, or re-payments for re-uses of his property. In neither case does the existence of a copyright law have any meaning in terms of financial benefit.

It is generally recognized in the film industry that collective bargaining has failed to correct such abuses as "stockpiling," speculation in scripts, and the siphoning-off of movie rights to other media. "The general philosophy of an author's rights in his creation," wrote the head of the Authors' League in 1948, "is denied in only one field—the field of the motion picture."<sup>190</sup> In 1950, the Guild admitted that the leasing principle "is a basic principle in all media, even in radio and television—everywhere except in motion pictures."<sup>191</sup> Most conclusive of all is the fact that the screen writers, "an established force [of unionism in their] field," should decide that the Cain Plan was the only solution to the problem of *leasing v. outright sale* of literary property.<sup>192</sup>

#### CONCLUSION

It has been the purpose of this paper to point out the various ways in which the creator of literary rights is being deprived of economic benefits in his property, the different attempts to preserve and protect that property, and to sug-

<sup>190</sup> Hammerstein, *The Authors' League Today*, Screen Writer, April, 1948, p. 24.

<sup>191</sup> *Separation of Rights*, SW mimeo. Bulletin of Aug., 1950.

<sup>192</sup> Formally adopted by the Screen Writers' Guild in July of 1946 (see Appendix). More than a year after the Cain Plan was shelved by the Authors' League, an amusing parody appeared in the Guild's monthly. It portrayed two former screen writers far in the future: one was reduced to exterminating bedbugs; the other worked as a butler. Their common employer was a literary tycoon who had always insisted on the leasing principle. After watching the author negotiate a series of incredibly lucrative contracts, they are so filled with remorse that they shoot themselves. Fuller, *Write 'Em and Reap*, Screen Writer, July, 1948, p. 13.



gest an equitable solution from the standpoint of both authors and consumers.

Starting with the basic monopoly of the Statute, the author has moved from a status of no contract at all to the most comprehensive of all contracts—the collective bargaining agreement, a form of semi-public legislation.

Each legal device, premised on copyright, has proved to be insufficient in its field: the equitable agreement in magazine publishing has been construed against the author under an archaic rule of law; the publisher's contract in books takes an exclusive license, and leaves the author a copyright only in name: the playwrights' agreement with stage producers has been neutralized by a legally questionable application of the Sherman Act; the employment contract in radio has severely limited the author's benefits from other uses; the MBA in television is too restrictive in its terms and coverage, even if it did take effect; and the collective agreement in motion pictures is confined by the language of Wagner and Taft-Hartley.

The basic fault in each medium seems to be the failure of copyright legislation to keep pace with commercial practices, and the failure, in turn, of contract practices to keep up with the progress of invention. This is reflected in the old-fashioned, discrete thinking of the courts, and the belief of author guilds themselves that each medium and consumer can be bargained with as a separate entity.

Commercial usage today is breaking down the compartments set out in Section 1 of the Copyright Act. Under modern technology the use of one work becomes the use of all works. Such inventions as kinescope, magnetic tape, facsimile printing, coin television, and three-dimensional films have far outstripped the power of the law to protect single forms. Nor does the author deal any longer with individual consumers, but rather with overlapping corporations, having simultaneous interests in broadcasting, motion pictures, and book and music publishing.

To meet this changing complex, copyright reform is long overdue. The author, like the inventor, should be allowed the sole right of first registration, so as to protect his legal interest against the employer and the proprietor. The copyright on composite works should be simultaneous in both author's and publisher's names. Each possible use or adaptation of a literary work should carry its own copyright. Where works are written for hire, the creator's copyright should be preserved, subject to such equities as the parties agree to by contract.

The attitude of the courts should conform to these changes in legislation. The statutory monopoly should not be treated as a public evil, to be curbed and harassed by other Federal and State laws, but should be construed in light of its benefit to both author and consumer. Where licenses and uses are involved, under contract, the courts should rule in terms of economic justice in each case, and not rely on out-dated cases and purely verbalistic formulae. In no event should an author's copyright be diminished unless proven essential to the protection of a licensee, or grantee.

Short of copyright reform, it is up to the author himself to decide whether his interests are best served by individual, competing guilds such as exist today under the Authors' League, or by a central licensing authority which would represent all branches of authorship. In light of the League's failure at separate bargaining, and the costly factional disputes which have arisen, it is likely that authors will one day attempt to consolidate the "field" under a program such as the Cain Plan. The experience of ASCAP with nondramatic musical rights, and that of the Songwriters' Protective Association with mechanical rights in music, indicates that there might be a place in the law for a central repository of all *literary* licenses.

Registration of copyright, divisibility of copyright, separation of rights in material, and reversion of rights at the end of a use: these are still the four basic elements of author pro-

tection. They are still to be achieved. The consequences are not only economic, but also pertain to the level of writing that will be produced in America during the next generation. Publisher Ian Ballantine estimates that there are only one hundred authors in this country today who can earn a living by writing serious books.<sup>193</sup> The rest, it is to be presumed, continue to wrap their bread in bakeries, or bet on slow horses at Belmont Park.

## APPENDIX

### THE AMERICAN AUTHORS' AUTHORITY RELEVANT ARTICLES AND BY-LAWS OF THE CAIN PLAN

#### 1. PURPOSE AND POWERS

To promote and encourage commerce in interests in literary properties, and the unrestricted flow of, and commerce in, books, periodicals, pamphlets, recordings, motion picture films, printed matter, and any and all forms by which communication can be captured, held, and transmitted, whether now in existence or whether hereafter invented or developed, and any and all writings, compositions and literary creations which are or which may hereafter become subject of property or ownership.

#### 2. PROTECT WRITERS' INTERESTS

To further and to protect the proprietary interests of the creator of any and all forms of literary property, and of composite works of literature together with other creative work.

#### 3. AS TRUSTEES FOR CREATORS

To hold in trust for the creators the copyright, or subsidiary rights under the copyright, title, and all forms of interest and ownership in, literary properties of all kinds, and to assign, deal in, transfer, dispose of, license, lease, and grant interests and rights of all kinds in such properties.

#### 4. SUE AND DEFEND ON BEHALF OF WRITERS

To act as trustee, representative, or in any other capacity on behalf of creators of literary properties and owners of interests therein, including, without limiting the generality of the foregoing, to take all

<sup>193</sup> *I American Writer* 6 (Bull. of Authors' League) March, 1953, pp. 23-24.

lawful steps to preserve, enforce, and protect rights arising out of, or under, copyright, title, or other interests in literary properties, to sue, defend, arbitrate, enter into contracts, give quittances and releases.

#### 5. FORMAL POWERS

To collect, receive, and disburse monies and other assets and all forms of evidences of obligations to, and of this corporation and to, and of, its principal or beneficiary.

#### 6. RESEARCH, COMMERCIAL PRACTICES, TAXES, ETC.

To further research concerning, and to advocate and encourage, legislation, rules, regulations, practices of governmental agencies, and practices of businesses or industries dealing in or consuming interests in literary properties, for the purpose of furthering and increasing the economic benefits of the creators of literary properties, including, but not by way of limitation, the more equitable taxation without adverse discrimination of the proceeds of literary properties and including the increasing benefits from copyright and other rights and privileges of such creators.

#### 7. INTERNATIONAL PROTECTION

To promote and encourage the protection of the proprietary interests of creators, of whatever nationality, in countries and nations foreign to that of the creator or owner, and to promote international commerce in literary properties under laws, treaties, compacts, and conventions securing for the creator or owner more complete economic protection and benefit of their properties.

#### 8. MORAL RIGHTS

To establish, further, and protect moral rights of authors, composers, and creators of literary properties and of other properties of a related nature, and to promote the more thorough recognition and appreciation of creators of literary properties.

#### 9. NO DISCRIMINATION

To make available, subject to the laws of the land, the services, privileges, and benefits of the authority without discrimination by reason of the content of the property submitted, and without regard to the race, color, creed, political or organizational affiliation of the creator or owner thereof. This sub-section may not be amended, except to enlarge the right of any and all persons who enjoy the services and privileges of this corporation for any and all of their works.

## 16. EXECUTION OF INSTRUMENTS

The Executive Signatory shall execute, with appropriate seals, witnesses, and declarations, all transactions arising out of works or copyrights, accepting assignment for the Authority, and leasing, licensing, or otherwise granting limited interest in rights under a work or copyright, for the Authority as trustee for the assignor, provided:

(a) No instrument purporting to grant any rights whatever in any work or copyright assigned shall be valid unless it bears the co-signature of the owner;

(b) That no instrument shall be so executed unless it conforms with such minimum basic agreement, form of contract, or such model document as the Authority's member organization may have promulgated, and be at least as favorable to the assignor as the minimum these model documents set forth;

(c) Seven-Year Limit: That no instrument shall be so executed which sells, transfers, conveys, or grants the work or copyright to any person except the assignor, or which sells, transfers, conveys, or grants any right under the work or copyright for the life of the work or copyright, or any group of rights, or which leases, licenses or grants an interest in any right or group of rights for a period more than seven years, or which leases, licenses, or grants an interest in right or groups of rights in such fashion as to make a sale under pretense of making a lease, as by granting an option to purchase at the end of a lease period, it being the express intent of this sub-paragraph to end the dismemberment of copyright or ownership of a work, and assure to the assignor, for the whole period the Authority holds his work or copyright, the enjoyment of all rights in his work or copyright, unmutilated, undefaced, and complete as he created it. The limit of freedom granted to the Executive Signatory in respect to total conveyance is the re-assignment, on the assignor's demand, of the work or copyright back to him, which transaction must be executed within thirty days of written notice from the assignor.

## 20. DEFENSE OF AUTHORS' RIGHTS

The board through its counsel shall take appropriate legal steps against corporate interests and all other interests which trespass the rights vested in works or copyrights by law, and shall confer, plan, and cooperate with the National Director, officers, and governors with a view to the formulation of a militant, vigorous, and continuing program against such trespass.

# *The Copyright Term*

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By ROBERT E. YOUNG

COLUMBIA UNIVERSITY SCHOOL OF LAW

THE PERIOD OF copyright protection in the United States is for twenty-eight years, renewable for another twenty-eight years and commencing "from the date of first publication."<sup>1</sup> Three countries grant copyright protection in perpetuity.<sup>2</sup> All other countries in the world, excepting the Philippines,<sup>3</sup> count the period of protection from the death of the author. The majority of these countries allow a period of fifty years thereafter.<sup>4</sup>

It is the contention of this essay that the period of copyright protection in the United States is so inadequate as to work a serious injustice on American authors and hence impede "the Progress of Science and useful Arts." In place of the present copyright duration, it is herein proposed that the English or majority period lasting the life of the author plus fifty years thereafter be substituted.

## THE CONSTITUTIONAL BACKGROUND

Any discussion of copyright duration in the United States is limited from the outset by the Constitutional provision securing copyright protection to authors only "for limited Times."<sup>5</sup> However, adequate reform of the deficiencies in

<sup>1</sup> 17 U.S.C. § 24 (Supp. 1952).

<sup>2</sup> Guatemala, Nicaragua, and Portugal. 2 UNESCO COPYRIGHT BULL. (No. 2-3 1949) 70.

<sup>3</sup> *Ibid.* The Philippine system, similar to the United States, has an initial period of thirty years, renewable for thirty years, commencing upon registration.

<sup>4</sup> *Ibid.*

<sup>5</sup> "The Congress shall have power . . . to promote the Progress of Science

the present law hardly necessitates a change to copyright protection in perpetuity. The latter is neither necessarily in the public interest, for reasons to be noted,<sup>6</sup> nor is it seriously sought after today by authors themselves. As Birrell stated in 1899: <sup>7</sup> "Perpetual copyright is dead."

The immediate background to the enactment of the copyright provision in the Constitution is not well known. The Constitutional Convention had no debate concerning this provision, and the Committee had no minutes with reference to it.<sup>8</sup> On May 2, 1783, the Continental Congress, pursuant to a Committee report offered by James Madison, passed the following resolution:

*Resolved*, That it be recommended to the several States to secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators, and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication . . . such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors, or publishers, their executors, administrators, and assigns, by such laws and under such restriction as to the several States may seem proper.<sup>9</sup>

There was only one reference to this resolution in *The Federalist*. It was written by Madison and was as follows:

The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at Common Law. The right to useful invention seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have

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and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their Writings and Discoveries." U.S. CONST. Art. I, § 8.

<sup>6</sup> See pp. 46-47 *infra*.

<sup>7</sup> BIRRELL, SEVEN LECTURES ON THE LAW AND HISTORY OF COPYRIGHT IN BOOKS 206 (1899).

<sup>8</sup> Fenning, *Origin of the Patent and Copyright Clause of the Constitution*, 17 GEO. L.J. 109, 114 (1929).

<sup>9</sup> 24 J. CONT. CONG. 326-327 (1783, Library of Congress 1922).

anticipated the decision of this point by laws passed at the instance of Congress.<sup>10</sup>

Since Madison, along with Pinckney, is reputed to be one of the principal founders of the copyright clause,<sup>11</sup> his statement that "the public good fully coincides . . . with the claims of individuals" would appear to be particularly relevant to a consideration of the primary "public interest" envisaged in the Constitutional provision.

Ten of the twelve state copyright statutes passed prior to the Constitutional Convention used language justifying copyright protection as an aid to the progress of science and arts. Two mentioned only the protection to the author. Five states went beyond this and added provisions dealing with the reasonableness of the price.<sup>12</sup>

This rather sketchy history available concerning the enactment of the copyright clause in the Constitution has led inevitably towards a variety of interpretations of the boundaries of the Constitutional grant of Congressional power on the part of various writers. Some assume from the outset that "the primary purpose of copyright is, of course, to benefit the authors."<sup>13</sup> Others tend towards the view that "the test both of the scope of legislative power and its application to any particular domestic situation is clearly that of the public interest."<sup>14</sup>

Reconciliation is possible, however, when one recognizes that the *particular* public interest served by the copyright clause is specifically the "Progress of Science and useful Arts" and the *primary* method of achieving this goal by means of a copyright law is to secure adequate copyright

<sup>10</sup> THE FEDERALIST, No. 43 at 267 (Lodge ed. 1888). Fenning, *supra* note 8, at 114.

<sup>11</sup> Fenning, *supra* note 8, at 117.

<sup>12</sup> Evans, *Copyright and the Public Interest*, 2 UNESCO COPYRIGHT BULL. 4-6 (No. 1 1949).

<sup>13</sup> Chafee, *Reflections on the Law of Copyright*: I, 45 COL. L. REV. 503, 506 (1945).

<sup>14</sup> Evans, *supra* note 12, at 6.



protection to authors. Although there has been no case in which copyright duration has been attacked on Constitutional grounds, it would appear to be a safe assumption that any Congressional enactment that served to secure adequate copyright protection for an author would be sustained as constitutional if there was any *reasonable* basis for believing it would tend "to promote the Progress of Science and the useful Arts," as well as the more general purpose: "to establish Justice [and] promote the general Welfare." The normal presumption of constitutionality would tend to insure this result. Such a limited extension as that proposed is surely well within the Congressional power.

Indeed, Congress has never been inclined to view its copyright power in a narrow fashion. The Act of February 3, 1831,<sup>15</sup> enlarged the original term from fourteen to twenty-eight years and granted a number of other benefits to the author and his descendants. The Committee on the Judiciary of the House of Representatives stated quite frankly in their report that the change was "chiefly to enlarge the period for the enjoyment of copyright, and thereby to place authors in this country more nearly upon an equality with authors in other countries."<sup>16</sup>

In the Copyright Act of March 4, 1909,<sup>17</sup> which is essentially the statute in effect at the present time, the copyright renewal period was extended to twenty-eight years. However, serious consideration was given to a bill which sought to change the copyright duration to the English period,<sup>18</sup> which already consisted of life plus a term of fifty years, and the latter was only rejected after Congress decided (erroneously, as it turned out) that it was to the author's best interests to retain the prior system. Thus, the House report stated:

It was urged before the committee that it would be better to have a single term without any right of renewal, and a term of life and 50

<sup>15</sup> 4 STAT. 436.

<sup>16</sup> 7 CONG. DEB., cxix (1830).

<sup>17</sup> 35 STAT. 1075.

<sup>18</sup> H.R. 19853 and S. 6330, 59th Cong., 1st Sess. (1906).

years was suggested. Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period.<sup>19</sup>

It should be noted that the 1909 amendment was passed after the great New England literary renaissance, when both the quality and quantity of this country's literary output was at an all time high. Some of America's greatest writers, Melville, Hawthorne, Emerson, Whittier, Holmes, to name just a few, had created their best work under the old copyright statute. If Congress had felt itself constitutionally bound merely to provide sufficient copyright protection to "stimulate creation" in the narrowest sense, it could have found ample justification for refusing to amend the copyright law at all. Fortunately, Congress did not believe that a proper interpretation of the Constitution required so niggardly a treatment of America's authors.

#### A RATIONALE OF COPYRIGHT DURATION

Since there is undoubtedly no constitutional obstacle to the proposed term, the issue narrows down to the legislative question of whether the "Progress of Science and useful Arts" will best be served by the present term or the proposed one. In order to intelligently answer this question, it first becomes necessary to analyze the fundamental arguments for a longer or shorter copyright duration.

#### THE PUBLIC INTEREST IN EXTENDING STATUTORY PROTECTION OF AN AUTHOR'S WORK

It should be recognized from the outset that in the United States (and England) an author's right to legal protection in his publication is a purely statutory right. In the words of the Supreme Court:

<sup>19</sup> H.R. REP. 2222. 60th Cong., 2d Sess. 14 (1909). The Senate committee adopted the report of the House committee, see SEN. REP. 1108, 60th Cong., 2d Sess. (1909).

The House report "clearly expresses a Congressional purpose to give the author every conceivable assistance in obtaining the greatest return from the product of his intellectual labors." Kupferman, Note, 44 COL. L. REV. 712, 723 (1944).

. . . it seems now to be considered the settled law of this country and England that the right of an author to a monopoly of his publication is measured and determined by the copyright act—in other words, that while a right did exist by common law, it has been superseded by statute.<sup>20</sup>

However, even if the right of an author in his creation must initially be conceded to be purely one of statutory allowance, it does not thereby follow that considerations of justice and equity must be ignored in a legislative determination of the proper duration of the statutory protection. On the contrary, these considerations must inevitably play a role in any determination of the effect of the copyright statute on progress in the arts and sciences.

Primarily, of course, copyright protection aids artistic and scientific progress by providing adequate legal protection for the author's publication and thus insuring a certain quantum of economic incentive and security for authors. This economic motivation is in no sense to be minimized. It is the fundamental assumption of our economic system, and although an extension of our present copyright duration would admittedly not increase the concomitant economic motivation by leaps and bounds, it is hypocritical to deny to the author the economic motive which we willingly grant in the case of the businessman.<sup>21</sup>

Nevertheless, Shakespeare lived and wrote before the Stat-

<sup>20</sup> *Holmes v. Hurst*, 174 U.S. 82, 85 (1899). See also *Wheaton v. Peters*, 8 Pet. 591 (1834); *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 250 (1st. Cir. 1911).

<sup>21</sup> For this reason, the following type of argument is inherently inequitable and invalid, *when applied solely to justify economic restrictions on authors alone*: "We all know how faintly we are affected by the prospect of very distant advantages, even when they are advantages which we may reasonably hope that we shall ourselves enjoy. But an advantage that is to be enjoyed more than half a century after we are dead, by somebody, we know not by whom, perhaps by somebody unborn, by somebody utterly unconnected with us, is really no motive at all to action. . . . Now, this is the sort of boon which my honorable and learned friend holds out to authors. Considered as a boon to them, it is a mere nullity; . . ." 8 MACAULAY, WORKS 200 (Trevelyan ed. 1875).

ute of Anne and Melville before the revised Copyright Act of 1909. Economic motivation is seldom the sole motivating force behind human creation. Some of the other causes are undoubtedly derived from innate factors in the personality of the author, but certainly one of the strongest forces affecting progress in the arts and sciences is the cultural attitude toward the artist, the respect or lack of it which a country exhibits toward its artistic and creative population and which is directly manifested by the protection accorded them in its copyright law. If the United States retains a system of copyright law which grants inadequate protection to authors and their families, it genuinely hurts the progress of the arts and sciences by publicly reflecting the low concern of the nation for the welfare of its authors.<sup>22</sup>

It should also be kept in mind that an inadequate copyright law manifests a basic cultural lack and immaturity to other countries, and thus tends to diminish the prestige which the United States now more than ever needs to maintain in the world.

For these reasons, the extent to which the copyright law reflects the following sentiments is directly proportionate to the extent to which the copyright law serves the public interest:

When we come to weigh the rights of the several sorts of property which can be held by men and in this judgment take into consideration only the absolute question of justice, leaving out the limitations of

<sup>22</sup> For an author's point of view: ". . . such is the unconscious hostility of the mob toward 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. . . .

"In all America are only five thousand of us who make our whole livelihood by writing, anyway. To Congress—a scattered, inconsequential number—vote-voiceless and therefore impotent. It is a figure—five thousand in one hundred and fifty millions—which the aspiring writer should bear in mind." WYLIE, *OPUS* 21, 13, 15 (1949).

expediency and of prejudice, it will be clearly seen that intellectual property is after all the only absolute possession in the world. . . . The man who brings out of nothingness some child of his thought has rights therein which cannot belong to any other sort of property . . . the inventor of a book or other contrivance of thought holds his property, as a God holds it, by right of creation.

So the restrictions which we may cast around the property of intellect must be made with the confession of the rightfulness of that property. They must be made with the acceptance of the proposition that it has the same sanctions as other human interests, and that society is as much interested in maintaining its bounds as it is in protecting ancestral acres, or the other well accepted forms of property.

Intellectual property has been slowly growing into recognition in our laws for some centuries past, and this development of legal protection has been followed by an enormous increase in the proportion of human endeavors that has been given to the work of improving the physical and mental condition of man . . . Whatever tends to lower the protection given to intellectual property is so much taken from the forces which have been active in securing the advances of society during the last centuries.<sup>23</sup>

#### THE PUBLIC INTEREST IN LIMITING STATUTORY PROTECTION OF AN AUTHOR'S WORK

The essential point to be kept in mind in any discussion of this topic is that any valid argument for shortening copyright duration must address itself specifically to the reasons for restricting property subject to copyright, as opposed to property interests in general. Arguments against the latter may or may not be valid, but it is patently unfair to use them solely against the copyright owner. The advocate of a limited copyright duration must answer from the start Mark Twain's assertion that it is no more fair for a country to limit the copyright term than it would be for a country to say to a citizen who had discovered gravel and sand pits on his property:

You may go ahead and work your gravel and sand pits and get out of them all the money possible for a period of 28 years; but after

<sup>23</sup> SCHALER, *LITERARY PROPERTY* (1878), quoted in Solberg, *Copyright Reform*, 14 NOTRE DAME LAW. 343, 358-359 (1939).

that the profits from your gravel and sand pits must go to your Government and the world at large; it matters not in the least whether you are left without an estate to entail, whether your children and your grandchildren live and die in poverty.<sup>24</sup>

*The Impediment of Progress.*—It is frequently said that a copyright is a monopoly and therefore is contrary to the public interest in that it grants a single owner control over what is necessary for the well being of the public at large. Often the argument takes the form of an assertion that, so far as the public welfare is concerned, there is no essential difference between patents and copyrights.

The fallacy in this argument lies in the fact that the copyright statute grants no such absolute monopoly to the copyright owner as the patent statute grants to the patentor.<sup>25</sup> If a machine is patented, no one else may secure a patent for the same idea, or even innocently reproduce it. However, if an author produces a novel by completely independent thought, in good faith, he is entitled to an independent copyright, even though prior copyright may exist on the same work.<sup>26</sup>

Furthermore, patented works are primarily intended to be used for a commercial or industrial purpose. An absolute monopoly over such objects for a long period could seriously retard technological development. Copyrighted works, however, are intended primarily to be used for enjoyment and instruction. The limited monopoly of the copyright owner could not retard the economic progress of a country; and, since ideas themselves are not copyrightable, but merely the pattern by

<sup>24</sup> Quoted in testimony of Mary Greer Conklin, *Hearings before House Committee on Patents on Revision of Copyright Laws*, 74th Cong., 2d Sess. (1936).

<sup>25</sup> "Copyright law is usually treated as an offshoot of patent law. . . . The dissimilarities are more pronounced than the similarities. One gives a monopoly; the other merely a prohibition against copying—a very different thing." Umbreit, *A Consideration of Copyright*, 87 U. PA. L. REV. 932 (1939). Cf. Karll v. Curtis Publishing Company, 39 F. Supp. 836 (D. Wis. 1941).

<sup>26</sup> *Arnstein v. Marks Music Corporation*, 82 F.2d 275 (2d Cir. 1936); *Fisher v. Dillingham*, 298 F. 145 (S.D.N.Y., 1924); WEIL, *AMERICAN COPYRIGHT LAW* 998 (1912); *DRONE, PROPERTY IN INTELLECTUAL PRODUCTION IN GREAT BRITAIN AND THE UNITED STATES* 205 (1879).

which the idea is presented to the public,<sup>27</sup> it could not retard intellectual progress.

The only possible detrimental effect on "cultural" progress that prolonged copyright ownership might conceivably bring about would be the pricing of books beyond the economic capacity of the average reader,<sup>28</sup> and the prolongation of the power of a descendant or assignee of the author to withhold the work from circulation entirely. The discussion following in the next two topics will show that there is or need be no valid reason for concern over either of these possibilities.

*The Economic Disadvantages.*—From the conclusion that copyright is a form of monopoly (although an admittedly limited one), it is often asserted (or implied) that copyright inevitably places serious economic burdens on the public by substantially raising the cost of publications. This is probably the oldest and most persistent reason advanced for limiting the copyright duration. Even Professor Zechariah Chafee, Jr., in an otherwise excellent discussion of the topic, writes of "the plain disadvantage" of the copyright monopoly<sup>29</sup> and approvingly quotes Lord Macaulay's famous passage: "The principle of copyright is this. It is a tax on readers for the purpose of giving a bounty to writers."<sup>30</sup>

Now, whatever may have been the case in Lord Macaulay's time, this argument has little validity at the present day. It is even doubtful whether it had much validity in the past.<sup>31</sup> It

<sup>27</sup> *Nutt v. National Institute Incorporated for the Improvement of Memory*, 31 F.2d 236 (2d Cir. 1929).

<sup>28</sup> Even the seriousness of such a situation would be diminished by the availability of a free public library.

<sup>29</sup> Chafee, *Reflections on the Law of Copyrights*: I, 45 COL. L. REV. 503, 507 (1945). ". . . the very effect of protecting them is to make the enjoyment of their creations more costly and hence to limit the possibility of that enjoyment especially by persons of slender purses." *Ibid.*

<sup>30</sup> MACAULAY, *op. cit. supra* note 21, at 201.

<sup>31</sup> In his "tax on readers" speech, Lord Macaulay was arguing against a bill proposing a term of life plus 60 years. In 1911, the present English law was enacted which contains a term substantially similar to the proposed one (see p. 139 *supra*) and which has apparently worked no harm on the public. Yet read Lord Macaulay's forecast of the dire events that would ensue upon enactment

is a hardy truth of the publishing business that "the selling price of a book depends not on the copyright but on the extent of the market that can be assured for it."<sup>32</sup>

Alexander MacMillan, the noted publisher, protested against this "tax on readers" notion in a letter to Lord Coleridge in 1873:

I think you gentlemen who make the laws of the land and maintain them ought to put property in books at least on the same basis as property in land or in the funds. You don't benefit the public: that is demonstrable. All you do is to let anyone send out so-called cheap, often imperfect editions of our great writers. That anyone may do what he likes in reprinting a great author's work prevents and does not further the production at a cheap price of really good editions. . . . The public might with reasonable management have better and as cheap editions as they now have.<sup>33</sup>

Of the numerous expenses that go into a publication or a stage production, the author's fractional share (usually 10 percent) of the gross profits under a royalty contract is seldom a controlling influence in terms of the price the public pays; and this is even more so in the case of an outright sale. Shakespeare is never produced today merely because he is in

of such a copyright duration: "I will only say this, that if the measure before us should pass, and should produce one tenth part of the evil which it is calculate to produce, and which I fully expect it to produce, there will soon be a remedy, though of a very objectionable kind. Just as the absurd acts which prohibited the sale of game were virtually repealed by the poacher, . . . so will this law be virtually repealed by piratical booksellers. . . . Men very different from the present race of piratical booksellers will soon infringe this intolerable monopoly. Great masses of capital will be constantly employed in the violation of the law. Every art will be employed to evade legal pursuit; and the whole nation will be in the plot. On which side indeed should the public sympathy be when the question is whether some book as popular as *Robinson Crusoe*, or the *Pilgrim's Progress*, shall be in every cottage, or whether it shall be confined to the libraries of the rich for the advantage of the great-grandson of a bookseller who, a hundred years before, drove a hard bargain for the copyright with the author when in great distress? Remember too that, when once it ceases to be considered as wrong and discreditable to invade literary property, no person can say where the invasion will stop. . . ." *Id.* at 207-208.

<sup>32</sup> PUTNAM, THE QUESTION OF COPYRIGHT 446 (1896). See also COPINGER, LAW OF COPYRIGHT 84 (8th ed. 1948).

<sup>33</sup> MORGAN, THE HOUSE OF MACMILLAN 175-176 (1944).



the public domain; whether he is presented at all is a result of a determination of the relative demand of the market and the cost of production.<sup>34</sup> And when he is produced, the public generally pays the same price for his plays as those of copyrighted authors. In short, it is certainly the case that there are many factors more responsible for the prices of our publications and productions than the stipend paid to the copyright owner.

However, the "tax on readers" theory has surely been given its deathblow by the phenomenal success in the past decade or so of the paper-cover book industry. Although paper covers have been published in the United States since 1825, it was not until 1939 that the firm of Pocket Books entered the field and began the "bold distribution scheme"<sup>35</sup> that gave them only twelve years later a combined sales total greater than all best sellers since 1880.<sup>36</sup>

Pocket Books "learned to keep close check of the way sales of particular titles were moving in various localities so as to know what and how to promote, what titles sell best, and so know what to produce."<sup>37</sup> They were not particularly concerned with whether the work was in the public domain or not.

Lest it be felt that the paper-cover development is a minor and passing phase of publishing, it is important to note a few of the relevant statistics. There are over two dozen large reprint houses now.<sup>38</sup> In a recent year, the public spent \$63 million on over 230 million volumes, and the sales total is still rising.<sup>39</sup> This is over one-quarter of the total hard book

<sup>34</sup> "Shakespeare has been affected by the high cost of living. Every type of expense has gone up so greatly . . . that Shakespeare is really banished from our stage. So Lawrence Langner, founder and co-administrator of the Theater Guild and founder of the American Shakespeare Festival Theatre and Academy . . . said. . . ." *Variety*, March 31, 1954, p. 64, col. 1.

<sup>35</sup> Lasser, *Publisher's Corner; Lessons from the Paper Covers, Part I*, *Saturday Review of Literature*, Oct. 21, 1950, p. 46.

<sup>36</sup> White, *Look*, March 11, 1952, p. 92.

<sup>38</sup> White, *supra* note 36.

<sup>37</sup> Lasser, *supra* note 35.

<sup>39</sup> *Id.* at 91.

sales for the same period.<sup>40</sup> Other book sales have risen "far, far less."<sup>41</sup> Sales to reprint houses are now an important function of hard-cover publishing.<sup>42</sup> Some reprint houses even advance money to an original publisher or guarantee his risk in return for the early submission of books for 25-cent contract.<sup>43</sup>

That the future may bring even greater reliance on these inexpensive and popular paper covers by publishers is seen in the statement by William H. White that

publishers may, in not too many years, bring all their books out first in paper covers; then, if a book sells well, they would publish a hard back edition for people who want a longer-lived copy for their libraries. Already, a few novels from Gold Medal, and nonfiction from other paper cover publishers, have been picked up by the hard cover industry and printed in lasting, more expensive editions.<sup>44</sup>

What is of most significance for copyright reform in this important publishing development is not only that books of every conceivable variety, including the most recent best sellers, are now available to the public in the cheapest of editions, but that the author's royalty on each copy is only about a fraction of a cent.<sup>45</sup> Surely, no one can complain of copyright being a burdensome "tax on readers" in light of the present day publishing scene.

The intense competition between publisher of soft- and hard-cover books is also a factor that keeps prices of books down, copyrighted or not. The works of Hemingway compete with those of Faulkner, not even as steel, say, competes with aluminum, but as one vintage of wine competes with another.

<sup>40</sup> Lasser, *supra* note 35.

<sup>41</sup> Lasser, *Publisher's Corner; Lessons from the Paper Covers, Part III*, Saturday Review of Literature, Dec. 23, 1950, p. 36.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Ibid.* See also *International Expansion Caps Ten Years of Pocket Books*, Publishers' Weekly, Feb. 11, 1950, pp. 896-98.

<sup>44</sup> White, *supra* note 36, at 94.

<sup>45</sup> Lasser, *Publisher's Corner; Lessons from the Paper Covers, Part II*, Saturday Review of Literature, Nov. 18, 1950, p. 26.

Furthermore, the very presence of the copyright itself is a factor helping to keep costs down for the public in that it eliminates the expense of duplicate typesetting and allows the economies of mass-production techniques.

What Mark Twain said as to this alleged economic burden on the public seems more valid than ever today:

The excuse for a limited copyright in the United States is that an author who has produced a book and has the benefit of it for that time has had the profit long enough, and therefore, the Government takes the property which does not belong to it and generously gives it to the 88 millions. That is the idea. If it did that, that would be one thing; but it doesn't do anything of the kind. It merely takes the author's property, merely takes from his children the bread and profit of that book, but gives the publisher double profit. . . .<sup>46</sup>

Finally, there is the strong probability that, aside from a few well-established classics, no publisher would risk publishing a work which did not have clear copyright ownership; the situation is analogous to that of the nonmarketability of real estate which has clouded title. A number of more important motion picture producers are hesitant about using any material for which at least colorable title cannot be purchased.<sup>47</sup> Certainly more authoritative and accurate editions of a work are published when proprietary ownership is present.

That this is a real problem can be seen by a consideration of the publishing history of the novelist, Tolstoy.

. . . Tolstoy renounced copyright in his lifetime, thinking that he was thus unselfishly giving his work to mankind. His generosity had the opposite effect. It at once became perilous for any publisher to undertake the risk of translation in the face of so many potential rivals, and those who did risk a volume now and then were free to put on the market a version as accurate or inaccurate, as faithful or as debased as they pleased. In consequence, for many years the publication of Tolstoy, unless it was endowed, was a hasty gamble and not what

<sup>46</sup> See note 24 *supra*.

<sup>47</sup> Evans, *supra* note 12, at 20.

copyright would have made it—a steady, long-term and consistent enterprise.<sup>48</sup>

*The Veto Power.*—Although it is generally admitted that the author should have the right to grant or refuse permission to publish his work during his lifetime, many commentators believe that this “veto power” should be denied to the descendants or assignees of the author. Examples of cases, hypothetical and actual, where descendants have or might have refused permission to publish a dead author’s work because of the descendant’s prudish or illiberal bias have often been cited as reasons for refusing extension of the copyright duration.<sup>49</sup>

Against this viewpoint it might be maintained that these situations are the very rare exception and that in the vast majority of cases the normal desire of the descendant to receive the income from the sale of the work would be sufficient incentive to overcome any personal idiosyncrasies. Furthermore, situations can be envisaged in which the desire of the descendant to withhold the work from publication may be based on reasonably valid grounds, e.g., to prevent the dead author from being held up to ridicule or defamation.

However, to avoid the possibility of a valuable work being withheld by a descendant on arbitrary grounds, it would appear desirable to incorporate into the American law the British provision giving anybody the right to republish the work on paying a 10 percent royalty to the copyright owner after the author has been dead twenty-five years. It would probably be wise also to incorporate into American law the additional British provision allowing a compulsory license to be

<sup>48</sup> MORGAN, *op. cit. supra* note 33, at 176. See also MAUDE, *LIFE OF TOLSTOY* 468 (1930); Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 719, 732 (1945).

<sup>49</sup> See MACAULAY, *op. cit. supra* note 21, at 204–206; BOSWELL, *LIFE OF JOHNSON* sub May 8, 1773. This is a problem under the present act as well, since it in no way restricts the descendant’s veto power.

ordered during the first twenty-five years on terms fixed by a judicial body if the copyright owner allows a work to go out of print or refuses to allow a play to be publicly performed.<sup>50</sup> Although the British experience indicates that little use probably would be made of the compulsory license provisions,<sup>51</sup> their presence in the law might have a healthy deterrent effect.

*Dedication to the Public.*—The argument has been made that since publication is in a sense a dedication to the public, “it is unreasonable to give to the remote successors of the author, long after his death, a monopoly in what has in fact been made public.”<sup>52</sup>

This viewpoint was adequately answered by Bowker:

The theory that by permitting copies to be made, an author dedicates his writing to the public, as an owner of land dedicates a road to the public by permitting public use of it for twenty-one years, overlooks the fact that in so doing the author only conveys to each holder of his book the right to individual use, and not the right to multiply copies, as though the landowner should not give but sell permission to individuals to pass over his road, without any permission to them to sell tickets for the same privilege to other people. The owner of a right does not forfeit a right by selling a privilege.<sup>53</sup>

*Locating the Owner.*—All the prior traditional arguments for limiting the copyright duration are seen to be either inherently fallacious or directed against evils which can easily be remedied by appropriate changes in the existing law. This is, unfortunately, not the case with regard to the problem of tracing title to a kind of property of which no physical pos-

<sup>50</sup> Copyright Act, 1911, 1 & 2 GEO. 5, c. 46, §§ 3, 4. See Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 725-728 (1945). Professor Chafee's fear that the British term might be invalid under the Berlin Convention, Article 7, is no longer very relevant, since the Universal Copyright Convention is the best hope for American participation in an international copyright convention now, and U.C.C., Art. IV, § 2 merely prescribes a minimum term of twenty-five years from the date of publication or death of the author. See pp. 162-68 *infra*.

<sup>51</sup> I LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY § 146 (1938); COPINGER, *op. cit. supra* note 32, at 86-87.

<sup>52</sup> COPINGER, *op. cit. supra* note 32, at 84.

<sup>53</sup> BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 4 (1912).

session is possible. The ordinary registration statute remedy would help locate assignees, or at least protect subsequent purchasers for value and the like.<sup>54</sup> However, Professor Chafee states the real difficulty:

Unless an author has made recorded transfers of his rights, ownership remains in him or in his surviving family. With a long copyright duration, many significant events affecting this ownership may occur without appearing on the records of the Copyright Office. This causes uncertainties such as: Is the author alive? When did he die? Did he leave a will? Was he lawfully married to the woman claiming to be his widow? How many children did he have? Were they legitimate? Where are they now? Under our present renewal system many of these questions are pressing, and they will remain so under either a fifty-six-year term or a life plus term. . . .<sup>55</sup>

The possibility of these troublesome complications occurring would, of course, increase as the copyright duration is extended.

Conceivably, a system of registration could be worked out which would eliminate this problem. One such might be a system in which anyone wishing to claim ownership in a copyright after a certain period (e.g., fifty years) beyond the author's death would have to affirmatively re-register his claim every tenth year or so, or else be forever barred from asserting it. This would place most of the burden of location on the copyright owners themselves, and since the later should be of a relatively small number because of the necessarily limited number of copyrights that would remain valuable for so long a period, the scheme might be practicable. Another alternative might be Professor Chafee's idea of an "Official Receiver" who would be empowered fully to represent unknown copyright owners after a judicial determination that they could not be ascertained. Those wishing to purchase the copyrighted material then need only pay royalties to the

<sup>54</sup> 17 U.S.C. §§ 28-32 (Supp. 1952) are the present assignment recordation provisions.

<sup>55</sup> Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 503, 732 (1945).

Official Receiver to gain a clear right to publication or production. The latter would retain the money for a period in the event the copyright owner ultimately appears.<sup>56</sup>

Both these schemes, of course, might be impractical because of factors of convenience, or cost. But without some such system, it is clearly necessary to limit the copyright duration to a period which would not extend much beyond, say, two life spans—in order to avoid a situation in which valuable copyrighted material could not be used because of the difficulty of locating the rightful owners.

*A Method of "Taxing" the Author's Descendants.*—This is an argument for shortening copyright ownership which is seldom heard, although it is often implied in the question: "Why should the works of Shakespeare still be the property of Shakespeare's heirs?" There is some evidence that it was used as a justification for a shortened copyright in the past.<sup>57</sup>

Unfortunately, at the present time, the value of the copyrighted work is included in the decedent's gross estate for purposes of the estate tax, both in this country<sup>58</sup> and in England.<sup>59</sup> Although there are very few authoritative rulings on the point,<sup>60</sup> the value of the copyright in the United States

<sup>56</sup> *Id.* at 733.

<sup>57</sup> See the following from the Report of the House Committee on Patents, June 10, 1890: "In all forms of society, all kinds of property are held under such conditions and limitations as society deems reasonable.

" . . . In not to exceed a term of one hundred years the entire value of almost every specific piece of property is taken from the owner by the public in the form of taxes, in return for the protection and security which society gives.

"It is entirely reasonable that the law should bring a copyright to an end at the expiration of a term of years—this, especially, in view of the fact that it is not usual to tax copyrights from year to year. . . ." Quoted in PUTNAM, *THE QUESTION OF COPYRIGHT* 91-92 (1896).

<sup>58</sup> The value of the gross estate is defined in § 2031 of the Internal Revenue Code, 1954, as including "the value at the time of . . . death of all property, real or personal, tangible or intangible, wherever situated. . . ."

<sup>59</sup> See DYMOND, *THE DEATH DUTIES* 252 (10th ed., 1946). The convention against double duties on estate taxes between the United States and England mentions copyrights in Art. III(i).

<sup>60</sup> In spite of diligent research, only one case was discovered in which the value of a copyright for estate tax purposes was in issue, and that was a B.T.A.

is undoubtedly determined by its "fair market value."<sup>61</sup> It is submitted that the peculiar nature of the property is such that for the vast majority of copyrights it is exceedingly difficult to estimate the "fair market value." Their value is dependent on the rapidly fluctuating tastes of the public; the possibility that producers in the future may wish to adapt the works for movie or theater or radio; the chance that an author may be "rediscovered" by some future critic, and so on. It is true that there are other items of property in the gross estate that are also difficult to evaluate, but it is doubtful whether their valuation depends so greatly on such various and intangible factors. Furthermore, the owner of these properties do not lose all rights to their property after a comparatively short period—their property rights could exist in perpetuity. The fact that there are so few cases contesting the valuation would appear to indicate that a copyright is seldom evaluated at anything near what the property may ultimately bring in.

For these reasons, a wiser method of taxing the copyright estate might be to recognize the limited term of a copyright as analogous to a form of taxation and let it go at that. If the idea of creating a specific exemption in the estate tax law for copyrights seems startling now, one suspects that the continual historical process of amending the copyright laws to extend their duration will some day only be halted, if at all, on this basis, especially if a genuinely adequate system of registration is developed.

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memo concerning a contract for the use of a "copyrighted trade name" for a cigar: *Est. of P. P. Martinez*, 1939 P-H B.T.A. Memorandum Decisions 385.

<sup>61</sup> "The value of every item of property includible in the gross estate is the fair market value thereof at the time of the decedent's death; . . ." U.S. TREAS. REC. 105, § 81.10 (1954).



THE INADEQUACY OF THE COPYRIGHT DURATION IN  
THE UNITED STATES AND THE SUPERIORITY  
OF THE ENGLISH TERM

THE HISTORICAL BACKGROUND

The need for copyright legislation only arose after the invention of printing and the evolution of the publisher. Prior to that time, authors were supported by the state or individual patrons; thereafter, they were compensated by the payments of individual readers in the society.<sup>62</sup> Printers were the first to receive grants of exclusive rights—seldom for the purpose of learning, but generally as a means of regulating printing. With the expiration of the Licensing Act of Charles II in 1679, the statutory grants to printers died out in Great Britain.<sup>63</sup>

In 1709 the first genuine Anglo-Saxon copyright law was passed: the Statute of Anne.<sup>64</sup> Sixty-five years later, this “unfortunately conceived and unhappily expressed statute,” as Birrell called it,<sup>65</sup> was interpreted by the House of Lords in the famous case of *Donaldson v. Beckett*<sup>66</sup> as having supplanted the common law rights of the author, which were declared in dictum to have been in perpetuity. Henceforth, all rights of the author to sue for infringement of his copyright after publication had to be based on the statute.<sup>67</sup>

The crucial vote on the question of whether the statute took away the author’s common law rights was 6–5, Lord Mansfield abstaining, according to the Reporter, because it was “very unusual (from reasons of delicacy) for a peer to sup-

<sup>62</sup> PUTNAM, *AUTHORS AND THEIR PUBLIC IN ANCIENT TIMES* 3 (1894).

<sup>63</sup> BIRRELL, *op. cit. supra* note 7, at 41–68. <sup>64</sup> 8 ANNE, c. 19 (1709).

<sup>65</sup> BIRRELL, *op. cit. supra* note 7, at 68.

<sup>66</sup> 4 BURR. 2408, 98 Eng. Rep. 257 (H.L. 1774), *overruling*, *Millar v. Taylor*, 4 BURR. 2303, 98 Eng. Rep. 201 (K.B. 1769). See MACGILLIVRAY, *THE LAW OF COPYRIGHT* 7 (1902) for a detailed analysis of the case.

<sup>67</sup> The same result was reached by the Supreme Court of the United States with reference to this country’s copyright statute in *Wheaton v. Peters*, 8 PET. 591, 657 (1834).

port his judgment upon an appeal to the House of Lords.”<sup>68</sup> Lord Mansfield had voted against the proposition that the Statute of Anne took away the author’s common law rights in *Millar v. Taylor*<sup>69</sup> and since “it was notorious that Lord Mansfield adhered to his opinion,”<sup>70</sup> this would not have been the law if he had not abstained from voting in the House of Lords.

The Statute of Anne gave the author and his assigns the exclusive copyright for fourteen years from publication, and after the expiration of this term, if the author was still living, the copyright could be renewed. The statute was amended in 1814 by extending the original term to twenty-eight years, “and also, if the author shall be living at the end of that period, for the residue of his natural life.”<sup>71</sup> In 1842 the original term was extended to forty-two years or the life of the author and seven years, whichever should prove longer.<sup>72</sup> The present English term, as noted, is, with minor exceptions, for the life of the author plus fifty years.<sup>73</sup>

The first United States copyright statute was the act of May 31, 1790.<sup>74</sup> It was patterned after the English act, granting the author the exclusive copyright for fourteen years and a right to a renewal term of fourteen years, if the author was still living. In 1831, the original term was extended to twenty-eight years.<sup>75</sup> In 1909, Congress rejected bills providing for the English term of life plus fifty years<sup>76</sup> and substituted instead the present duration of twenty-eight years plus a right to renewal for twenty-eight years. The Congressional purpose in retaining the older system was ostensibly to allow the author the advantage of retaining the renewal term for a future sale, but, either because of the Congressional com-

<sup>68</sup> *Donaldson v. Beckett*, 4 Burr. 2408, 2417, 98 Eng. Rep. 257, 262 (H.L. 1774).

<sup>69</sup> See note 66 *supra*.

<sup>70</sup> See note 68 *supra*.

<sup>71</sup> 54 GEO. 3, ch. 56.

<sup>72</sup> 5 & 6 VICT., ch. 45.

<sup>73</sup> Copyright Act of 1911, 1 & 2 GEO. 5, ch. 46.

<sup>74</sup> 1 STAT. 124.

<sup>75</sup> 4 STAT. 436.

<sup>76</sup> H.R. 19853 and S. 6330, 59th Cong., 1st Sess. (1906).

mittee's inadequate understanding of the existing law or just poor draftsmanship,<sup>77</sup> the amended statute was worded in such a fashion that a majority of the Supreme Court, in *Fred Fischer Music Company v. Witmark*,<sup>78</sup> felt compelled to hold that the renewal term could be alienated in advance. With this definitive ruling, the so-called "advantage" of the author in his renewal period vanished (if it ever existed), for all practical purposes.<sup>79</sup> Birrell's comment on the detriment to authors wreaked by the draftsman of the Statute of Anne would appear to be doubly applicable to the plight of American authors:

. . . how annoying, how distressing, to have evolution artificially arrested . . . by an ignorant Legislature, set in motion not by an irate populace clamouring for cheap books (as a generation later they were to clamour for cheap gin), but by the authors and their proprietors, the booksellers.<sup>80</sup>

As Birrell assumed, it would appear that the Statute of Anne was not originally intended as a measure to take away

<sup>77</sup> The House report stated: "Your committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of 28 years, your committee felt that it should be the exclusive right of the author to take the renewal term, and the law should be framed as is the existing law so that he could not be deprived of that right." H.R. REP. 2222, *supra* note 19. In the *Witmark* case, the renewal right was assigned in advance by a power of attorney. That this was not envisaged by Congress is apparent from the statement in the House report that since contributors to cyclopedic works might live all over the world and the proprietor would thus have difficulty in obtaining their consent to a renewal application, it would be best to give the renewal rights to the proprietor of these works. H.R. REP. 2222, *supra* at 15. See Kupferman, *supra* note 19, at 730, n. 103. Also see the strong dissent of Frank, J., in the Circuit Court opinion in the *Witmark* case *infra*. Mr. Justice Frankfurter, for the majority of the Supreme Court in the *Witmark* case *infra*, based his opinion on the absence of language in the Copyright Act of 1909 manifesting a legislative purpose to nullify agreements by authors to assign their renewal rights plus the statement in the House report quoted *supra* that "the law should be framed as is the existing law (italics added). . . ." The existing law had no such provision.

<sup>78</sup> 318 U.S. 643 (1943) (3 Justices dissenting), *aff'g*, 125 F.2d 949 (2d Cir. 1942) (with dissent by Frank, J.), *aff'g*, 38 F. Supp. 72 (S.D.N.Y. 1941).

<sup>79</sup> See pp. 162-168 *infra*. <sup>80</sup> BIRRELL, *op. cit. supra* note 7, at 22.

the common law rights of authors in view of the fact that it was supposedly enacted for their benefit; most probably, if it were not for the poor drafting job done by the authors' friends (or Lord Mansfield's notions of "delicacy"), the statute might never have been so interpreted. However, *Donaldson v. Beckett* did so interpret the statute, and, as a result, the history of Anglo-Saxon copyright legislation has been one of a slowly evolving series of amendments extending the copyright duration beyond the clearly inadequate term of the Statute of Anne in order to reapproach the original goal of securing adequate legal protection to the works of authors. However, only forty years after *Donaldson v. Beckett* was handed down, the English law insured that no copyright would be taken from an author during his own lifetime—a principle, one would assume, of elementary justice. The protection granted authors under the American law, however, has generally shown a tendency to lag behind that granted under the English,<sup>81</sup> and that supposedly basic principle is still only roughly approximated in the present United States copyright law.

This historical perspective, however, is not only useful in showing the slow evolution in Anglo-Saxon law of longer periods of copyright protection since the ill-fated Statute of Anne (an evolution which the author believes has still not ended in the United States), but is also effective in demolishing the notion that the present American law is peculiarly a part of our tradition and should be changed with only the greatest reluctance. The history of Anglo-Saxon copyright legislation shows clearly that the present American copyright term is directly patterned on the old English system, a system one might note, which the English themselves had the good sense to abandon a number of years ago. Surely our national heritage does not require us to retain at all costs a legislative fabric inherited directly from the English which the English

<sup>81</sup> See note 16 *supra*.

themselves, with all their great love of tradition, saw fit to discard.

One final historical fact should be noted: the period of fourteen years that served as the foundation of the Statute of Anne and the original American copyright term as well as the multiplying factor in all subsequent American copyright legislation was based on the time it took to train two apprentices.<sup>82</sup> This ancient formula obviously has little meaning today and the particular number of years constituting the present American copyright terms must be justified, if at all, on other grounds.

#### THE COPYRIGHT TERM—PRESENT AND PROPOSED

The agitation leading to the 1909 amendment in the American copyright term was a direct result of the numerous injustices to authors caused by the limited duration of the copyright protection afforded by the 1831 act: a period, including the renewal term, of forty-two years.<sup>83</sup> Emerson, Longfellow, Lowell, Whittier, Holmes, and other leading American authors outlived their earlier copyrights.<sup>84</sup> Listen to Brander Matthews's contemporary account of the plight of some of America's most outstanding authors at the time:

There is no need to dwell on the disadvantages of the existing American law, and on the injustice which it works. It may take from an author the control of his book at the very moment when he is at the height of his fame and when the infirmities of age make the revenue from his copyrights most necessary. An example or two from contemporary American literature will serve to show the demerits of the existing law. The first part of Bancroft's *History of the United States*, the history of the colonization, was published in three successive volumes in 1834, 1837, and 1840; and although the author, before his death, revised and amended this part of his work, it has been lawful, since 1882, for any man to take the unrevised and incorrect first edition and to reprint it, despite the protests of the author, and in compe-

<sup>82</sup> 3 Co. Inst. c. 85; Hamilton, *Patents and Free Enterprise* (TNEC Monograph No. 31, 1941) 22.

<sup>83</sup> See note 75 *supra*.

<sup>84</sup> BOWKER, *op. cit. supra* note 53, at 118.

tition with the improved version which contains the results of the author's increased knowledge and keener taste.

At this time of writing (1890) all books published in the United States prior to 1848 are open to any reprinter; and the reprinter has not been slow to avail himself of this permission. The children of Fenimore Cooper are alive, and so are the nieces of Washington Irving; but they derive no income from the rival reprints of the *Leatherstocking Tales* or of the *Sketch Book*, reproduced from the earliest editions without any of the author's later emendations. . . . Half a dozen volumes were published by Mr. Whittier and by Dr. Holmes before 1848, and these early, immature, uncorrected verses are now reprinted and offered to the public as "*Whittier's Poems*" and "*Holmes's Poems*." Sometimes the tree of poesy flowers early and bears fruit late. So it is with Lowell, whose *Heartsease and Rue* we received with delight only a year or two ago, but whose *Legend of Brittany*, *Vision of Sir Launfal*, *Fable for Critics* and first series of *Biglow Papers* were all published forty-two years ago or more, and are therefore no longer the property of their author, but have passed from his control absolutely and forever.<sup>85</sup>

Lest the above appear to be a digression into ancient history, a few pertinent facts should be noted. Contrary to popular opinion, and aside from a few famous exceptions, creative people as a whole have a life expectancy equal to that of the noncreative population.<sup>86</sup> Since the 1909 amendment to the copyright law, which extended the renewal term by fourteen years,<sup>87</sup> the average life expectancy in the United States has increased from 49.32 to 68.4 years.<sup>88</sup> With regard to the statistics relevant to the longevity of the young author, one finds that the average life expectancy of the twenty-year-old

<sup>85</sup> Reprinted from the *Political Science Quarterly* in PUTNAM, *op. cit. supra* note 32, at 340-341.

<sup>86</sup> A recent study showed, for example, that the average life expectancy of mathematicians was identical to the average of musicians, painters, and British authors and poets. *The Longevity of the Eminent*, Science, Sept. 24, 1943. See also DUBLIN, LOTKA, AND SPIEGELMAN, LENGTH OF LIFE 5-6 (1949).

<sup>87</sup> See note 17 *supra*. The extension, of course, was based on the traditional Statute of Anne term, with no apparent inquiry being made into its original *raison d'être*.

<sup>88</sup> 30 STATISTICAL BULLETIN 10 (Met. Life Insurance Co. 1949) 2; 34 STATISTICAL BULLETIN 7 (Met. Life Insurance Co. 1953) 2; 37 VITAL STATISTICS—SPECIAL REPORTS 12 (National Office of Vital Statistics 1953) 343.

has increased from 42.71 years in 1909 (a period almost identical to the then existing copyright term), to 51.5 in 1950, the latest year for which published figures are presently available.<sup>89</sup> Moreover, the life expectancy in 1950 for one large group of the population, white females, was already 54.9 years.<sup>90</sup> When one takes into account the fact that the median length of life is longer than the average life expectancy figures;<sup>91</sup> that the statistics themselves are based on present conditions of mortality and do not take into account the possibilities of improved mortality shown by all recent experience;<sup>92</sup> and the fact that the life expectancy curve itself is still showing a steady rise;<sup>93</sup> it becomes quite apparent that the youthful author of today, as his counterpart in 1831, has little better than an even chance of not outliving his earlier copyrights. In short, the hard reality of the matter is that the plight of the American author today, in so far as the length of the copyright term is concerned, is essentially what it was 125 years ago.

America's major cultural renaissance in this century, it is generally admitted, took place in the period between the two World Wars. Most of the leading lights of this period are either in their middle years now,<sup>94</sup> or have met untimely deaths because of the turbulence of the period. But the time

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

<sup>91</sup> The average life expectancy is the average number of years lived by the members of the life table cohort. The median length of life is the age at which half of the original members of the cohort have died. See 37 VITAL STATISTICS—SPECIAL REPORTS, at 333.

<sup>92</sup> For this reason, most forecasts of mortality have been on the conservative side. DUBLIN, *op. cit. supra* note 86, at 175, 182.

<sup>93</sup> See note 86 *supra*.

<sup>94</sup> Most of the leading authors, including novelists, of the past generation have written some of their most impressive work in their early years, e.g., Hemingway, Wolfe, Farrell, to name just a few. This fact would tend to discount one of the traditional arguments for a term of years rather than a life plus term, namely, that based on Macaulay's contention that "no work of the imagination of the very highest class . . . was ever, in any age or country, produced by a man under thirty-five . . . [and] of the good books now extant in the world more than nineteen-twentieths were published after the writers had attained the age of forty." MACAULAY, *op. cit. supra* note 20, at 214-215.

is fast approaching when a new series of injustices is bound to occur to the leading creative minds of the United States (not to mention the lesser authors), as happened to the luminaries of the last American renaissance—unless the present copyright duration is extended. The damage should be prevented before it occurs.<sup>95</sup>

A term based on the life of the author obviously would prevent these injustices. In England, since 1842 it has insured that no author outlived his own copyrights and guaranteed that the statutory protection would not decrease in value with the rising life expectancy of the author. This elementary consideration for the creative population should be etched into the American law as well.

Moreover, there are many other advantages to a period based on the life of the author rather than a term of years. For one thing, it allows all the works of an author to fall into the public domain at once, rather than piece by piece.<sup>96</sup> The date of death is generally easier to determine than the date of "*publication*," which is actually a highly technical concept that must often be subjected to interpretation by the courts.<sup>97</sup> Furthermore, a period of life plus fifty years is more apt to provide adequate protection for the author and his family than a term of years, since the former is based upon biological rather than arbitrary numerical factors. The author's life is a "natural measure."<sup>98</sup>

Finally, a term of life plus fifty years would place the American author on a par with all of his English-speaking

<sup>95</sup> If George Bernard Shaw had been an American author, the world would have witnessed the sorry spectacle of one of America's greatest authors being stripped in his lifetime of all remuneration for every work he composed before the age of thirty-eight.

<sup>96</sup> "In no possible event should copyright be made to depend on the date of first publication, since to do so is to make an author's intellectual output become common property in dribblets, and to throw open to the printers the early and uncorrected editions at a time when the later and corrected ones are still protected." BIRRELL, *op. cit. supra* note 7, at 146.

<sup>97</sup> See WINCOR, *HOW TO SECURE COPYRIGHT* 41-45 (1950) for a discussion of the meanings of "*publication*."

<sup>98</sup> Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 503, 731 (1945).



counterparts as well as those of most of the other major countries in the world in so far as the period of copyright protection is concerned.<sup>99</sup> This would not only rectify an injustice to the American author, but would enhance the international prestige of the United States by eliminating this country's unseemly distinction in maintaining one of the world's shortest copyright terms.

Prospects for ratification of the Berne Convention appear to be nil at the present time. Even if the American copyright term were extended to a period of life plus fifty years, a present requirement of the Convention for most works,<sup>100</sup> there is apparently not much chance now of the United States copyright law being amended to comply with two other requirements of the Convention, namely, the automatic recognition of copyright without any formalities,<sup>101</sup> and the protection of the "moral rights" of authors.<sup>102</sup>

Prospects for ratification of the Universal Copyright Convention, however, are more promising.<sup>103</sup> The only necessary

<sup>99</sup> See note 4 *supra*.

<sup>100</sup> Initially, the Berne Convention recommended this term but only required that the duration in most works equal either the domestic law of the publishing country or the protecting country, whichever was shorter. See Berne Convention of 1886, Art. II, § 2; Berlin Revision of 1908, Art. 7; Rome Revision of 1928, Art. 7. The 1948 Brussels Revision, however, made the term compulsory. See Brussels Revision of 1948, Art. 7(1).

<sup>101</sup> Compare Art. (4) 2 of Berne Convention as revised at Berlin in 1908 with 17 U.S.C. §§ 10-16, 19-23 (Supp. 1952). See Evans, *supra* note 12, at 28.

<sup>102</sup> Art. 6 *bis* of Berne Convention as revised at Rome in 1928.

<sup>103</sup> The Universal Copyright Convention, as of this writing, has been signed by 40 countries—36 (including the United States) at Geneva on September 6, 1952, and four more since. It does not take effect until after ratification by 12 countries, at least four of which do not belong to the Berne Convention. President Eisenhower submitted it to the Senate for ratification, as Executive "M," on June 10, 1953. Bills to accomplish the necessary implementing legislation were introduced in the Senate on August 1, 1953, by Senator Langer (S. 2559) and in the House of Representatives on July 29 and 30, 1953, by Representatives Reed (H.R. 6670) and Crumpacker (H.R. 6616). As of this writing, no hearings have been held upon these bills or the treaty itself. For an analysis of the background and content of the Universal Copyright Convention, see Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 198 (1953) and Note, *International Copyright Protection and the United States*, 62 YALE L.J. 1065 (1953).

[EDITOR'S NOTE. The Universal Copyright Convention became effective on September 16, 1955, three months after the twelfth country, Monaco, deposited

implementing legislation for adherence to the Convention is repeal of the manufacturing clause<sup>104</sup> (also a requirement under the Berne Convention<sup>105</sup>) and repeal of present formalities of registration and notice without, however, substituting a system of automatic copyright recognition.<sup>106</sup> The only minimum term of protection required is one for twenty-five years from either the date of first publication or the death of the author, depending on the particular method of computation used by the member state.<sup>107</sup>

Nevertheless, ratification of the Universal Copyright Convention would increase the necessity for amending the American copyright term to the duration of the present English term. Under the terms of the Convention,<sup>108</sup> a state need not accord a greater term of protection than is accorded in the country of origin. In the past, foreign countries adhering to the Berne Convention have granted American works the protection for life plus fifty years required by the terms of the Convention.<sup>109</sup> This meant that American authors at least received the advantage of the English term for their works

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its instruments of ratification. Prior to that time the Convention had been ratified by Andorra, Cambodia, Chile, Costa Rica, the Federal Republic of Germany, Haiti, Israel, Laos, Pakistan, Spain, and the United States (December 6, 1954). Since Monaco's adherence, the Holy See, Luxembourg, and the Philippines have ratified. For current adherence information, write The Public Information Officer, UNESCO, New York City. For the most recent modification of the United States Copyright Law to meet the requirements of the Universal Copyright Convention, see P.L. 743, 83d Cong., 2d Sess. (August 1954).]

<sup>104</sup> U.C.C., Art. X.

<sup>105</sup> Berne Convention Art. (4) 2 as revised at Berlin in 1908.

<sup>106</sup> See note 104 *supra*.

<sup>107</sup> U.C.C., Art. IV, § 2. Photographic works and works of art, however, need not be protected for more than a ten-year period.

<sup>108</sup> U.C.C., Art. IV, § 4.

<sup>109</sup> American works have heretofore been protected in Berne Convention countries by simultaneous publication in the United States and a Berne member nation, generally Canada or England. Finkelstein, *supra* note 103, at 200. This is done, however, by sufferance and not compulsion on the part of the Berne Convention member. If the United States were to refuse to ratify the Universal Copyright Convention, there is a grave possibility that American works would no longer be allowed international protection by this circumventious method. *Id.* at 203,

copyrighted abroad. Under the Universal Copyright Convention, however, there is no such guarantee. The only way to eliminate the possibility of American authors now losing the superior period of copyright protection abroad as well as at home is by incorporating the Berne term directly into the American law.<sup>110</sup>

#### THE RENEWAL TERM

Conceivably, one advantage of the renewal term is that it is a partial solution to the problem of locating the copyright owner by compelling the latter to obtain a new registration after twenty-eight years. This, however, is obviously a backdoor approach to the problem. If a solution is genuinely desired, a thorough system of registration is the answer—not one providing for a single period after a twenty-eight-year lapse.<sup>111</sup>

In fact, the only real advantage of a renewal period is that envisaged by the Congressional committee which drafted the present renewal provision; namely, if an author's work proves to be an enduring success, he would not be able to share in the future profits if it has been sold outright unless he is given the exclusive right to renew the last half of the copyright.<sup>112</sup> Unfortunately, the Supreme Court in *Fred Fischer Music Company v. Witmark*<sup>113</sup> held that under the present statute the author can assign both terms by the simple expedient of giving a power of attorney to renew in his name. The bargaining power of publishers is normally greater than that of authors (especially if they are unknown), and, consequently, most outright sale contracts in the publishing field are apt to include such a power of attorney. Under these cir-

<sup>110</sup> It is interesting to note that American representatives at the Universal Copyright Convention implicitly recognized the advantage of the Berne term over the American by trying, albeit unsuccessfully, to have the term of the protecting country rather than the publishing country apply. Note, 62 YALE L.J. *supra* note 103, at 1089.

<sup>111</sup> See Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 503, 722 (1945).

<sup>112</sup> See note 77 *supra*.

<sup>113</sup> See note 78 *supra*.

cumstances, the renewal term is an empty gift to authors, especially since even under a single term an author can assign only half of the copyright term (or any fraction for that matter) if he so desires and the publisher agrees.

However, the apparent solution of making the second term nonassignable would not be desirable either in all situations.

A restriction on alienation would be an anachronism in this day and age, as well as a burden on the amusement business. If an organization in the moving picture industry desires to purchase a story copyrighted 24 years ago in order to make a modern screen version and can secure no more than an exclusive interest in a copyright which has but four years remaining of its original term, the plan may have to be shelved.<sup>114</sup> Protection for a longer period is needed and the risk involved in leaving the author free, for a short time to deal with his renewal as he wishes is too great in view of the tremendous investment required. As a consequence, the author may lose the relatively high remuneration involved. While this is a valid argument today, it would not be true of the period during which the 1909 statute was enacted,<sup>115</sup> when the fields of intellectual endeavor were more limited and there was no motion picture classification in the act.<sup>116</sup>

Furthermore, a publisher often invests heavily in plates and advertising and should be able to obtain rights to the entire copyright term in order to protect this investment.<sup>117</sup>

In addition, there are definite disadvantages to the entire concept of a renewal period. A publisher should be able to make agreements for the full duration of the copyright without being at the mercy of the contingencies involved in purchasing a renewal term. Professor Chafee states the problem:

The publisher can never be sure of getting the renewal term despite his purchase of the author's rights in it. Everything depends on whether the author lives through the first term. . . . No matter what the author signs, he cannot cut off his widow's right to renew. Furthermore,

<sup>114</sup> See Motion Picture Daily, April 6, 1943, p. 1, col. 3.

<sup>115</sup> Section 5 amended in 1912 to include them. 37 STAT. 488 (1912), 17 U.S.C. § 5 (1940).

<sup>116</sup> Kupferman, *supra* note 19, at 724, 725.

<sup>117</sup> BOWKER, *op. cit. supra* note 53, at 117; Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 503, 723 (1945).

the publisher cannot be sure of protecting himself by getting a second power of attorney from the author's wife, because there is no guarantee that *this* wife will be his widow. She may die or be divorced and he may marry again; nobody can tell when the song is published who the second wife will be. If the children share in the renewal power, matters become infinitely worse. Minors cannot validly assign. Even if all the existing children are adults, an assignment from them would not make the publisher secure; other children might be born. And who is the executor of a live author? <sup>118</sup>

The renewal term is also a source of dissatisfaction to the author, not only because of the limitation it imposes on his bargaining position if it is the sole method of contracting allowed, but also because of the danger involved in his having to be careful to properly reregister every copyright still believed valuable in the twenty-eighth year after its "publication" or else forever lose all profits from the work. <sup>119</sup>

There is no valid reason for restraining the power to contract if adequate compensation is made for the author's disadvantage in bargaining power. This could best be done *in the case of an outright sale* by granting the author a non-assignable right in a renewal term. Such a provision is particularly necessary if the copyright term is extended—in order to insure that what was intended to be a benefit for authors does not become instead merely a boon to publishers; and it would be best to put such protection in the copyright law itself rather than rely on the present uncertain bargaining power of authors' societies. However, if an author signs a royalty contract rather than one providing for an outright sale, he is fully able to share in all future sales and there is no need for a renewal term with all its disadvantages to both the publisher and the author. <sup>120</sup>

<sup>118</sup> Chafee, *supra* note 117.

<sup>119</sup> "Notwithstanding that a whole year is given for filing the application, it is surprising how frequently applicants defer mailing it until the eleventh hour, thereby running the risk of losing the renewal term altogether if for any reason the application fails to reach its destination in time." HOWELL, *THE COPYRIGHT LAW* 111 (3d ed. 1952).

<sup>120</sup> A minimum royalty provision (e.g., 10 percent) should be added for this situation.

All these considerations were neatly balanced in the excellent scheme of the now defunct Shotwell Bill.<sup>121</sup> It limited outright sales to a twenty-five-year period but allowed a royalty agreement to last the full term of life plus fifty years so long as copies were made available for sale by the publisher.<sup>122</sup> This would provide adequate protection for the author while allowing the necessary flexibility of choice on the part of both author and publisher.

#### FORMALITIES

Under the present copyright law,<sup>123</sup> various formalities such as publication with notice,<sup>124</sup> registration,<sup>125</sup> deposit of copies after publication,<sup>126</sup> and affidavit of manufacture in the United States<sup>127</sup> must be complied with or else the owner may not be able to sue for infringement of the copyright<sup>128</sup> or might have his rights under the copyright forfeited.<sup>129</sup> Various writers in the past have criticized these provisions of the law as placing irrelevant and arbitrary conditions upon the author's right to copyright protection.<sup>130</sup> The Berne Con-

<sup>121</sup> "The so-called 'Shotwell Bill' for amending the copyright law was introduced in the Senate as S. 3043 on January 8, 1940 [76th Cong., 3d Sess.]. The bill was not reported from the committee nor were any hearings held on it. It consequently died." Letter to the writer from Richard S. MacCarteney, Chief, Reference Division, Copyright Office, The Library of Congress.

This is not meant to be an endorsement of the entire Shotwell Bill. The bill contained various retrogressive features as well, such as an extension of the ill-famed manufacturing clause. It also provided for optional registration and unlimited common law rights, which are specifically disapproved *infra*. See Solberg, *The New Copyright Bill*, 15 NOTRE DAME LAW. 23 (1940); Note, 12 AIR. L. REV. 49 (1941).

<sup>122</sup> Section 13 (4).

<sup>123</sup> See note 1 *supra*.

<sup>124</sup> § 10.

<sup>125</sup> § 11.

<sup>126</sup> § 13.

<sup>127</sup> § 17.

<sup>128</sup> § 13.

<sup>129</sup> § 18.

<sup>130</sup> Thus a former United States Register of Copyrights stated: "Only the United States is so far behind the rest of the world that an author's literary property and its protection is not only made to depend on compliance with requirements that have nothing to do with the principle of copyright (for example obligatory American manufacture) or with formalities that in some cases are difficult and sometimes next to impossible of compliance and what is worse, may finally impair or actually destroy the author's literary property." Solberg, *Copyright Reform: Legislation and International Copyright*, 14 NOTRE DAME LAW. 343, 350 (1939). See also Solberg, *The New Copyright Bill*, 15 NOTRE DAME LAW. 123 (1940); Elder, *Our Archaic Copyright Laws*, 37 AM. L. REV. 206 (1903).

vention, in accord with this line of thought, requires the elimination of all formalities that serve as a condition to the granting of copyright protection.<sup>131</sup>

In so far as the formality of notice was supposed to give evidence of the beginning of the copyright term, it would obviously be of little value under a system based on the life of the author plus a term of years.<sup>132</sup> However, there are other functions served by some of these formalities that are valuable even under the proposed term. For one thing, it is probably wise to have a system of registration in the copyright law and any genuine system of registration necessarily depends on some type of statutory requirement. The provision as to deposits has not only been of assistance in securing a comprehensive collection of national works for the Library of Congress,<sup>133</sup> but, along with the registration requirement, has proved of great value to writers themselves as evidence of ownership in litigation.<sup>134</sup> Even the date of publication under a term commencing with the death of the author would apparently be of some value in facilitating searches in the registration office.<sup>135</sup>

The primary significance of the notice requirement is the policy it embodies of forcing the author to assert affirmatively his claim to copyright. Experience has shown that authors do not concern themselves with seeking copyright protection for a respectable percentage of their work, particularly for those works of a "purely informational and scientific" nature.<sup>136</sup> One method of dealing with this situation might be to require only those publishing works of the latter type to assert their

<sup>131</sup> See note 101 *supra*.

<sup>132</sup> However, even under the present system the notice date serves generally as no better than a rough guide in this regard in view of the complicating factor of the optional nature of the renewal term. Primary reliance must necessarily be placed on correspondence with the Copyright Office.

<sup>133</sup> See Evans, *supra* note 12, at 20, 22.

<sup>134</sup> "[The certificate of registration] shall be admitted in any court as prima facie evidence of the facts stated therein." 17 U.S.C. § 209 (Supp. 1952). See Note, 12 *AIR. L. REV.* *supra* note 121, at 52.

<sup>135</sup> Evans, *supra* note 12, at 14.

<sup>136</sup> *Id.* at 18.



claim to copyright while granting automatic protection to books and work of a non-informational character. This might be more trouble than it is worth, however, and some simplified system of notice such as that required by the Universal Copyright Convention<sup>137</sup> is probably the best solution.

In short, even under the proposed term, registration, notice, and deposit requirements would still probably serve a useful function and should be retained. However, they should be made as simple as fulfillment of their proper functions would require. The provision of the act making a copyright void if copies are not deposited three months after a demand by the Register of Copyrights<sup>138</sup> is far too harsh a penalty on the author for what is normally the responsibility of the publisher. A fine of the latter is sufficient.<sup>139</sup> Implementing legislation for ratification of the Universal Copyright Convention would not only provide a simplified and hence better system of notice, but would get rid of the requirement for an affidavit of domestic manufacture which is probably the most bothersome existing formality.<sup>140</sup>

#### COMMON LAW RIGHTS

A peculiar anomaly of the American copyright law is that although it contains one of the shortest periods of copyright protection in the world *after* "publication" (as has been noted), it provides one of the longest periods *before* "publication."<sup>141</sup> The copyright duration of works that have not been published is, in fact, in perpetuity.<sup>142</sup> Certain unpub-

<sup>137</sup> See note 106 *supra*.

<sup>138</sup> 17 U.S.C. § 14 (Supp. 1952). Six months for any outlying territorial possession of the United States or any foreign country. See Solberg, *supra* note 130, at 129.

<sup>139</sup> This was the plan of the Shotwell Bill, § 14. See note 121 *supra*.

<sup>140</sup> See Ashford, *The Compulsory Manufacturing Provision*, FOURTH COPYRIGHT LAW SYMPOSIUM 49 (1952); Feldman, *The Manufacturing Clause*, 50 COL. L. REV. 686 (1950).

<sup>141</sup> The British Act abrogates all common law rights of the author in his work. Copyright Act, 1911, 1 & 2 GEO. 5, c. 46 § 31.

<sup>142</sup> 17 U.S.C. § 2 (Supp. 1952); *Moore v. Ford Motor Co.*, 28 F.2d 529 (S.D.N.Y. 1928), *aff'd*, 43 F.2d 685 (2d Cir. 1930); *DRONE, op. cit. supra* note



lished works such as lectures, or dramatic or musical compositions, may by compliance with the proper formalities be registered under the copyright statute,<sup>143</sup> and thus lose their common law status.<sup>144</sup> There is no *requirement* that unpublished manuscripts be registered, however, and, as a result, such unpublished material may be withheld from the public view in perpetuity by the author or his descendants<sup>145</sup> no matter how great the public interest in the manuscript.

The best justification for the perpetual rights given unpublished works, other than historical, would appear to be that there is no longer much of a problem in locating the owner of a work that has not been published. It is reasonable to assume that normally, if one can once lay one's hands on the physical copy of an unpublished work, one presumably will be able to determine the whereabouts of the owner without much difficulty, as in the case of realty or other physical property. Since there is thus supposedly no exceptional public detriment in granting the right, all the traditional arguments for private property rights arise.

A further reason, and undoubtedly the primary explanation for the beneficence of the American law towards unpublished works, is that if the copyright statute uses a term of years as the measuring rod of copyright duration, there is no point at which such a term could commence for unpublished, nonregistered works. This would not, of course, be the case if the duration was measured initially by the life of the author and *then* by a term of years.

There are, however, significant reasons why it might be wiser to cut off the common law copyright at the same time

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26, at 100; WINCOR, *op. cit. supra* note 97, at 40-41; AMDUR, COPYRIGHT LAW AND PRACTICE 31 (1936).

<sup>143</sup> 17 U.S.C. § 12 (Supp. 1952).

<sup>144</sup> Marx v. United States, 96 F.2d 204 (9th Cir. 1938).

<sup>145</sup> McCarthy and Fischer, Inc. v. White, 259 Fed. 364 (S.D.N.Y. 1919); Frohman v. Ferris, 238 Ill. R. 430 (1909), *aff'd*, Ferris v. Frohman, 223 U.S. 424, 435 (1912); see AMDUR, *op. cit. supra* note 142, at 356. For a complete discussion of common law rights see Pickard, *Common Law Rights Before Publication*, THIRD COPYRIGHT LAW SYMPOSIUM 299 (1940).

as the expiration date of the proposed term.<sup>146</sup> The public interest in the unpublished manuscripts of the nation's leading authors and composers is obvious, especially if they remained unpublished during the author's lifetime because of lack of recognition rather than the author's poor opinion of their worth. The free access of scholars to manuscripts of literary, social, or historical importance is also in the public interest. Furthermore, they should not have to use this material after the author's death "at peril of settlement with unknown and unascertainable claimants of remote consanguinity or tenuous proprietorship."<sup>147</sup>

The physical property, of course, belongs to the owner.<sup>148</sup> But the copyright (i.e. the right to copy) should go into the public domain at the same time as the "published" works to prevent an arbitrary withholding of the manuscripts from the public by the descendants.<sup>149</sup> Possibly a device analogous to the *subpoena duces tecum* should be provided for particularly recalcitrant descendants when the public interest would appear to warrant it. Where scholars are unable to ascertain the legal owner of unpublished manuscripts of public importance after the death of the author, a judicial declaration that the manuscripts are in the public domain should be possible after evidence is presented that a reasonably thorough search has been made. Finally, the ameliorative remedies proposed above<sup>150</sup> to avoid the public injury that could result from the arbitrary use of the veto power by the descendants during the copyright period should apply also to unpublished works.

<sup>146</sup> Even if the present law be maintained, one would assume that a system which cuts off the author's exclusive copyright in fifty-six years if a work be published but grants it for perpetuity if it remains unpublished would be to that extent contrary to the avowed purpose of the copyright law: to stimulate publication. But see Evans, *supra* note 12, at 8.

<sup>147</sup> *Ibid.* See also Chafee, *Reflections on Copyright Law*: II, 45 COL. L. REV. 503, 726, n. 15 (1945).

<sup>148</sup> See, to this extent; *Baker v. Libbie*, 210 Mass. 599, 97 N.E. 109 (1912).

<sup>149</sup> It might be advisable to provide a short period of copyright protection in this situation as incentive to publication by the publisher.

<sup>150</sup> See pp. 153-54 *supra*.

# *International Copyright Protection and the United States: The Impact of the Universal Copyright Convention on Existing Law*

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By DANIEL M. SINGER

YALE UNIVERSITY SCHOOL OF LAW

THROUGH ITS COPYRIGHT laws, nearly every nation<sup>1</sup> gives to its own nationals who create literary or artistic works the power to prevent commercial use of their creations without their consent. Within his own nation the artist, or his transferee,<sup>2</sup> can determine on what terms his work—such as books, music, plays, paintings, and motion pictures—shall be produced and who shall produce it.<sup>3</sup> Although this may tend to

<sup>1</sup> Afghanistan, Ethiopia, Iraq, Mongolia, Nepal, Saudi Arabia, and Yemen provide no copyright protection at all. 4 UNESCO COPYRIGHT BULL. 63-102 (No. 3 1951). For a list of nations granting copyright to their own nations, see 2 *id.* at 12-16 (No. 2-3 1949). For a comprehensive survey of the domestic and international copyright laws of the various nations, see 4 *id.* at 104-260 (No. 1-2 1951) (Europe); 4 *id.* at 63-102 (No. 3 1951) (Africa; Asia); 4 *id.* at 13-95 (No. 4 1951) (South America; Mexico); 5 *id.* 78-113 (No. 1 1952) (United States; Central America).

<sup>2</sup> All nations, in substance, allow transfer of copyright. See 2 *id.* at 104-11 (No. 2-3 1949). But some nations give the author a *non-transferable* right to object to mutilation of his work which reflects adversely on his reputation. See pp. 190-91 *infra*.

<sup>3</sup> Procuring the author's consent to reproduction usually involves remunerating him, and this "right" to be paid is the author's bread and butter. A complete tabulation of the rights granted to an author by the various nations, describing the types of works protected and the author's power over various uses, with citations to relevant statutory provisions, may be found in 2 UNESCO COPYRIGHT BULL. 18-143 (No. 2-3 1949); 2 *id.* at 30-155 (No. 4 1949). For United States provisions, see 17 U.S.C. § 1 (Supp. 1952); HOWELL, THE COPYRIGHT LAW 11-26, 120-53 (3d ed. 1952).

restrict dissemination of authors' works, most countries feel that copyright protection encourages literary and artistic production to an extent which justifies its existence.<sup>4</sup>

A different situation arises, however, when an author in country *A* (the country of first publication or origin) seeks the power to control reproduction or translation of his work in country *B* (the protecting country). For several reasons country *B* may not protect foreign authors.<sup>5</sup> Country *B* may freely enjoy a wealth of art created in other countries while contributing little copyrightable material to the world.<sup>6</sup> Or its printers, in order to maintain a monopoly over the printing of matter distributed domestically, may try to prevent protection of material printed abroad.<sup>7</sup> Such attitudes, in turn, can prejudice the rights of country *B*'s nationals in country *A*; *A* may be reluctant to give copyright protection

<sup>4</sup> PUTNAM, *THE QUESTION OF COPYRIGHT* 1-7, 35-95, 364-68 (1891); Chafee, *Reflections on Copyright Law*, 45 COL. L. REV. 503, 506-15 (1945); Evans, *Copyright and the Public Interest*, 2 UNESCO COPYRIGHT BULL. 2 (No. 1 1949). See also Pforzheimer, *Copyright Reform and the Duffy Bill*, 47 YALE L. J. 433 (1938); Warner, *U.S. Copyright Act: Anti-Monopoly Provisions Need Some Revision*, 34 A.B.A.J. 459, 461-63 (1948); H.R. REP. No. 2222, 60th Cong., 2d Sess. 4 (1909). For an excellent critical and philosophical treatment of copyright, see Chafee *supra*, at 503, 719.

<sup>5</sup> In addition to the nations listed in note 1 *supra*, Albania, Bhutan, Burma, Hashemite Jordan, Indonesia, Korea, Kuwait, Oman, San Marino, and USSR seem to grant no protection to foreign works. See chart, 2 UNESCO COPYRIGHT BULL. 32 (No. 4 1949). For a wry comment on protection of foreign works in the Soviet Union, see Chafee *supra* note 4, at 523.

<sup>6</sup> China typifies this position: her literary production is probably negligible; at least statistics on her literary production are not available. UNESCO, *STATISTICAL REPORT ON BOOK PRODUCTION 1937-1950* (1952). And China pirates foreign works. *Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 4059*, 82d Cong., 2d Sess. 209 (1952). Her international copyright obligations are confined to an article of a 1903 Supplementary Treaty of Commerce with Japan, the present applicability of which appears doubtful, 2 UNESCO COPYRIGHT BULL. 52 (No. 4 1949), and Article IX of the 1946 Treaty of Friendship, Commerce and Navigation with the United States, U.S. TREATY SER., No. 1871 (Dep't State 1946), 63 STAT. 1300, 1308-9 (1949). The latter agreement merely allows nationals of either country to comply with the copyright law of the others. *Ibid.* For the extent and nature of protection in China, see 4 UNESCO COPYRIGHT BULL. 70-72 (No. 3 1951).

<sup>7</sup> The United States printing trades have taken this position. See pp. 181-183 *infra*.

to authors from nations which make it difficult for *A*'s nationals to procure protection abroad.<sup>8</sup>

To curtail mutual piracy of foreign literary works, most nations early attempted to achieve international control through bilateral treaties.<sup>9</sup> These treaties, many of which are still in force,<sup>10</sup> obligate country *B* to honor copyrights from country *A*. But the bilateral approach from the start spurned uniformity and engendered confusion.<sup>11</sup> Hence, nations sought instead to assure copyright protection by multi-lateral agreement. During the last quarter of the nineteenth century, European nations and a few others organized the International Copyright Union, generally known as the "Berne Union."<sup>12</sup> Acceptance of Berne, however, has been confined largely to Europe. The United States<sup>13</sup> and others in the Western Hemisphere<sup>14</sup> have remained aloof.

<sup>8</sup> For an example of this kind of retaliation, see pp. 194-96 *infra*.

<sup>9</sup> 1 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 44-67 (1938). But see Finkelstein, Book Review, 48 YALE L.J. 712 (1939); Chafee, Book Review, 52 HARV. L. REV. 1378 (1939), both criticizing Ladas's treatment of copyright theory.

<sup>10</sup> See, e.g., the present bilateral relations of France, 2 UNESCO COPYRIGHT BULL. 64-72 (No. 4 1949). For a general treatment of modern bilateral arrangements, see 2 *id.* at 30-155; 1 LADAS, *op. cit. supra* note 9, at 150-79.

<sup>11</sup> 1 LADAS, *op. cit. supra* note 9, at 50-67. Also see list of United States copyright relations following 17 U.S.C.A. § 9 (Supp. 1952).

<sup>12</sup> The official name is: L'Union internationale pour la protection des oeuvres littéraires et artistiques. A history of the numerous preparatory meetings and of the final conference called in 1886 for the signing of the treaty, plus a list of the countries participating, may be found in 1 LADAS, *op. cit. supra* note 9, at 71-83. For a general discussion of the International Copyright Union see DeWolf, *International Copyright Union*, 18 J. PAT. OFF. SOC'Y 33 (1936); Solberg, *The International Copyright Union*, 36 YALE L.J. 68 (1926); Solberg, *Copyright Law Reform*, 35 YALE L.J. 48, 66-68 (1925). See also, COPINGER AND SKONE JAMES, *LAW OF COPYRIGHT* 268-87 (8th ed. 1948); UNWIN, *THE TRUTH ABOUT PUBLISHING* 264-66 (4th ed. 1946); KILROE, *INTERNATIONAL COPYRIGHT* 1-36 (1944); BOWKER, *COPYRIGHT: ITS HISTORY AND ITS LAW* 311-40 (1912); LANCEFIELD, *NOTES ON COPYRIGHT* ¶¶ 153-206 (1896).

<sup>13</sup> See Brown, *The Role of the United States in Relation to the International Copyright Union in Recent Years*, 34 J. PAT. OFF. SOC'Y 141, 200 (1952).

<sup>14</sup> Of the Western Hemisphere nations only Brazil (1922), Canada (1887), and Haiti (1887) joined the Berne Union, 1 LADAS, *op. cit. supra* note 9, at 121, and Haiti renounced the treaty in 1943, 2 UNESCO COPYRIGHT BULL. 84 (No. 4 1949). Dates in parentheses are those of ratification. For discussion of copyright protection among American states, see Pan American Union, Copyright

## International Copyright and United States 179

In the hope of instituting a system of international copyright control which would be acceptable to Berne members, to the United States, and to Latin America, the United Nations Educational, Scientific and Cultural Organization (UNESCO) began in 1947 to draft a universal copyright convention.<sup>15</sup> Recent submission of the final draft of this document<sup>16</sup> poses anew the general problem of effective international protection, and in particular the question of United States participation.<sup>17</sup>

Protection in the Americas, Pts IV and V (Law and Treaty Ser. No. 33, 2d ed. 1950); (hereinafter cited as Protection in the Americas) Note, *Inter-American Copyright Convention*, 60 HARV. L. REV. 1329 (1947); *House of Delegates: Proceedings*, 33 A.B.A.J. 390, 399-400 (1947).

<sup>15</sup> Resolution 2.4.1 of the General Conference of UNESCO at Mexico City in 1947 stated: "Unesco shall, with all possible speed and with due regard to existing agreements, consider the problem of improving Copyright on a world-wide basis." Quoted in 1 UNESCO COPYRIGHT BULL. 2 (No. 1 1948). See Kuhn, *The Work of Unesco on Copyright*, 43 AM. J. INT'L L. 343 (1949). A comparative study of copyright laws was carried on in 1948, followed by meetings of committees of experts. The Third Committee of Experts, meeting in Washington, D.C., in 1950, debated extensively the substantive provisions which a new convention should contain. For a summary record of this meeting see 3 UNESCO COPYRIGHT BULL. 3-99 (No. 3-4 1950). A final draft was completed in Paris in 1951. 4 *id.* at 3-30 (No. 3 1951) (volumes 1-4 of the UNESCO COPYRIGHT BULLETIN are devoted to presenting in detail the information collected by the Copyright Division of UNESCO). See also U.N. UNIVERSAL DECLARATION OF HUMAN RIGHTS, Art. 27, Para. 2: "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."

<sup>16</sup> Thirty-six nations, including the United States, signed the UNESCO Universal Copyright Convention at an Intergovernmental Copyright Conference in Geneva, Switzerland, in September, 1952. 5 UNESCO COPYRIGHT BULL. 27-29 (No. 3-4 1952). Four countries—Belgium, Israel, Japan, and Peru—signed after the Conference had ended. For a complete list, see authorities cited in note 161 *infra*. But the Convention will not go into effect until ratified. UNIVERSAL COPYRIGHT CONVENTION, Art. IX (hereinafter cited as UCC).

[EDITOR'S NOTE. The UCC became effective Sept. 16, 1955, three months after Monaco, the twelfth country, deposited its instruments of ratification (UCC, Art. IX). Prior to this Andorra, Cambodia, Chile, Costa Rica, the Federal Republic of Germany, Haiti, Israel, Laos, Pakistan, Spain, and the United States (December 6, 1954) had deposited ratifications. Since Monaco's adherence, France, the Holy See, Luxembourg, and the Philippines have ratified. For current adherence, consult The Public Information Office, UNESCO, New York City.]

<sup>17</sup> See pp. 199 *et seq. infra*. The Universal Copyright Convention, Executive M., 83d Cong., 1st Sess. (1953), was transmitted to the Senate on June 19, 1953, and was referred to the Committee on Foreign Relations. 99 CONG. REC. 6554 (1953). Enabling legislation has been presented to Congress. See note 264 *infra*.

## UNITED STATES PROTECTION OF FOREIGN WORKS

The United States currently grants protection to only a limited number of foreign works. This country has never joined the Berne Union.<sup>18</sup> America was originally content to pirate literary works of other nations, especially England's.<sup>19</sup> Under the federal copyright statute of 1790,<sup>20</sup> a nonresident alien could not procure copyright here.<sup>21</sup> An 1891 amendment, however, forsook the policy of piracy and permitted foreigners to get American copyright.<sup>22</sup> The substance of that legislation persists to the present.<sup>23</sup>

## REQUIREMENTS FOR ACQUIRING AMERICAN COPYRIGHT

Foreigners can currently obtain copyright in the United States only if certain conditions are met. First, the President must proclaim that the foreign author's country grants American authors the same protection it gives its own nationals.<sup>24</sup>

<sup>18</sup> See text at note 13 *supra*.

<sup>19</sup> In general, see BOWKER, *op. cit. supra* note 12, at 341-72; COPINGER, *op. cit. supra* note 12, at 291; *Report of the British Commission of 1878*, in *THE QUESTION OF COPYRIGHT* 267-71 (Putnam ed. 1891); MATTHEWS, *CHEAP BOOKS AND GOOD BOOKS* (1888); PUTNAM, *INTERNATIONAL COPYRIGHT* (1879); WHITE, *THE AMERICAN VIEW OF THE COPYRIGHT QUESTION* (1880). For a British view of American piracy see BOHN, *THE QUESTION OF UNRECIPROCATED FOREIGN COPYRIGHT* (1851). For an early publisher's defense of international copyright anarchy, see CAREY, *THE INTERNATIONAL COPYRIGHT QUESTION CONSIDERED* (1872); CAREY, *LETTERS ON INTERNATIONAL COPYRIGHT* (1853). And see MORGAN, *ANGLO-AMERICAN INTERNATIONAL COPYRIGHT* (1879).

<sup>20</sup> Copyright Act of 1790, 1 STAT. 124 (1790).

<sup>21</sup> "... nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States." Copyright Act of 1790, § 5, 1 STAT. 125 (1790).

<sup>22</sup> 26 STAT. 1106-7 (1891); see H.R. REP. No. 2401, 51st Cong., 1st Sess. (1890).

<sup>23</sup> See 17 U.S.C. § 9 (Supp. 1952).

<sup>24</sup> *Ibid.* A citizen of an unproclaimed country cannot, by assigning his reproduction rights to a national of a proclaimed country, acquire protection in the United States. *Bong v. Alfred S. Campbell Art Co.*, 155 Fed. 116 (2d Cir. 1907), *aff'd*, 214 U.S. 236 (1909). But the Second Circuit has held that the American assignee of Adolf Hitler, who had no citizenship, had acquired a valid United States copyright in *Mein Kampf*. *Houghton Mifflin Co. v. Stackpole Sons*, 104 F.2d 306 (2d Cir.), *cert. denied*, 308 U.S. 597 (1939). For discussion of the *Houghton Mifflin* case see Breathitt, *Copyright Protec-*



## International Copyright and United States 181

Such proclamations have issued to thirty-seven nations.<sup>25</sup> Secondly, a foreign author must comply with the formalities imposed on Americans.<sup>26</sup> Any publication of the work must bear notice of copyright, its date, and the name of its proprietor.<sup>27</sup> The author must, on demand of the Register of Copyrights, deposit two copies of the work—or one copy and four dollars,<sup>28</sup> and he must register his claim to protection.<sup>29</sup> An author can copyright a work not reproduced for sale, such as a motion picture, simply by filing with the Copyright Office a registration containing a description of the work.<sup>30</sup>

*The Manufacturing Clause.*—The most serious obstacle confronting foreign authors who seek American copyright is the statutory requirement that, in order to be protected in the United States, all books or periodicals in the English language “shall be printed from type set within the limits of the United States.”<sup>31</sup> Enacted in 1891,<sup>32</sup> when the printing

*tion of Aliens and Stateless Persons*, 41 KY. L.J. 302 (1953); Dawson, *Hitler and the Copyrights of Stateless Persons*, 21 PA. B.A.Q. 26 (1949); Smith, *The Kampf about “Mein Kampf”*, 19 B.U.L. REV. 633 (1939); Note, 49 YALE L.J. 132 (1939); Note, 13 So. CALIF. L. REV. 356 (1940).

<sup>25</sup> Argentina, Australia, Austria, Belgium, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Danzig, Denmark, Finland, France, Germany, Great Britain and possessions, Greece, Hungary, Ireland, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands and possessions, New Zealand, Norway, Palestine (excluding Trans-Jordan), Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Tunisia, and Union of South Africa. 17 U.S.C.A. § 9 (Supp. 1953). The most recent proclaimed nation is Japan. See 1 U.S. CODE CONC. & ADMIN. NEWS, 83d Cong., 1st Sess. 962 (1953). By proclamation, bilateral treaty, or multilateral convention, the United States has copyright relations with a total of fifty-four nations. *Ibid.*

<sup>26</sup> 17 U.S.C. § 9 (Supp. 1952).

<sup>27</sup> 17 U.S.C. §§ 10, 19 (Supp. 1952). But see Katz, *Is Notice of Copyright Necessary in Works Published Abroad?—A Query and a Quandary*, [1953] WASH. U.L.Q. 55; Note, 22 N.Y.U.L.Q. REV. 105 (1947).

<sup>28</sup> 17 U.S.C. §§ 13, 14, 215 (Supp. 1952).

<sup>29</sup> 17 U.S.C. § 13 (Supp. 1952). 37 CODE FED. RECS. § 202.1(b) (1949). Also see HOWELL, *op. cit. supra* note 3, at 85–86.

<sup>30</sup> 17 U.S.C. § 12 (Supp. 1952).

<sup>31</sup> 17 U.S.C. § 16 (Supp. 1952). For discussion of the statute, see Breathitt, *Copyright Protection of Aliens and Stateless Persons*, 41 KY. L.J. 302 (1953); SHRIVER, *Notes on the Law of Copyright and Importation of Books*, 31 LAW LIB. J. 127 (1938); Solberg, *The New Copyright Bill*, 15 NOTRE DAME LAW. 123, 130–40 (1940); Note, *Relaxation of the Manufacturing Requirement for Foreign Works*, 35 CORN. L.Q. 452 (1950).

<sup>32</sup> 26 STAT. 1107 (1891).



trades may have needed shelter from foreign competition at the expense of English authors,<sup>33</sup> the manufacturing clause has served to deny American copyright to all but the best-known foreign authors writing in English.

The manufacturing clause presents no problem to an English author, such as Sir Winston Churchill, who writes a "sure" best seller.<sup>34</sup> Regardless of the statutory requirement, he or his publisher will make arrangements with an American publisher to have his book printed here, thus reaping the advantages of an American distribution network and large scale press runs to which European equipment is not adapted.<sup>35</sup> Publishers commonly adopt this practice.<sup>36</sup>

The one who suffers most from the manufacturing requirement is the English-writing alien who cannot predict his American market. Since American publishers are loath to print an edition of less than 8,000 copies,<sup>37</sup> an Englishman cannot use a small American printing to test the market here by taking advantage of the American distributing network. Under an amendment to the manufacturing clause,<sup>38</sup> however, a foreign author has six months after a publication abroad in which to acquire a temporary American copyright on the material printed there. Known as *ad interim* copyright, this protection lasts for five years. During that time the author may import 1,500 protected copies of the work into the United States.<sup>39</sup> But, if at the end of five years he wants to

<sup>33</sup> See H.R. REP. NO. 2401, 51st Cong., 1st Sess. 1-2 (1890); Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 104 (1926); Ashford, *The Compulsory Manufacturing Provisions in ASCAP*, FOURTH COPYRIGHT LAW SYMPOSIUM 52-57 (1952). American publishers very shortly abandoned their earlier support of the manufacturing clause. See statement of George H. Putnam quoted in Ashford, *supra*, at 54-55.

<sup>34</sup> The manufacturing clause also applies to works translated into English and printed abroad. See 17 U.S.C. § 16 (Supp. 1952).

<sup>35</sup> See *Hearings*, *supra* note 6, at 27; Chafee, *supra* note 4, at 523-26.

<sup>36</sup> *Hearings*, *supra* note 6, at 27.

<sup>37</sup> *Id.*, at 159.

<sup>38</sup> 35 STAT. 1080 (1909), as amended, 17 U.S.C. § 22 (Supp. 1952).

<sup>39</sup> *Ibid.* For a discussion of the most recent changes in *ad interim* protection, raising the import limit from 500 to 1500 copies and increasing the period for

retain American copyright, he must have an edition printed in this country.<sup>40</sup>

*Ad interim* protection is not all that a foreign author might desire. If his work meets with little initial success, the foreign author may not find it feasible to engineer an American printing during the *ad interim* period. Should he later write a best seller, the demand for his earlier book might skyrocket. But since the author could no longer copyright the earlier work in the United States,<sup>41</sup> American publishers could reproduce it without paying royalties. The problem is aggravated by the fact that denying copyright in a book also precludes the foreign author from deriving any benefit from motion picture, radio, or dramatic adaptation of his work in the United States. Thus, without an American edition, the English-writing author risks piracy which may cost him the lion's share of his potential reward.

#### EQUALITY OF SUBSTANTIVE PROTECTION

Once a foreign author obtains United States copyright, however, his substantive protection is the same as that of Americans. He acquires the exclusive right to vend, copy, or translate his work, or to perform it publicly for profit if a musical work.<sup>42</sup> In addition, a copyright proprietor can enjoin unauthorized use of his work and recover minimum statutory damages therefore.<sup>43</sup> This protection lasts twenty-eight years, renewable for an identical term.<sup>44</sup>

#### INTER-AMERICAN AGREEMENTS

The requirements of proclamation, compliance with formalities, and domestic manufacture do not apply to nationals

registration from 60 days to six months, see *Hearings before Committee on the Judiciary on H.R. 2285*, 81st Cong., 1st Sess. (1949).

<sup>40</sup> 17 U.S.C. § 23 (Supp. 1952).

<sup>41</sup> 17 U.S.C. § 22 (Supp. 1952).

<sup>42</sup> This list of rights is not exhaustive. For a complete list see 17 U.S.C. § 1 (Supp. 1952). For a short summary of authors' rights, see Schulman, *Authors' Rights* in FEDERAL BAR ASS'N, 7 COPYRIGHT PROBLEMS ANALYZED 19-30 (1952).

<sup>43</sup> 17 U.S.C. § 101 (Supp. 1952).

<sup>44</sup> 17 U.S.C. § 24 (Supp. 1952). See Kupferman, *Renewal of Copyright*, 44 COL. L. REV. 712 (1944).

of fourteen Latin American nations who joined with the United States in the Buenos Aires Copyright Convention of 1910.<sup>45</sup> This treaty,<sup>46</sup> closed to non-American countries,<sup>47</sup> specifies that an author must obtain copyright in the country of first publication before other nations are obligated to grant protection.<sup>48</sup> Each copy of the work must contain notice that rights have been reserved.<sup>49</sup>

The treaty, however, does not assure United States creators of complete protection south of the border, nor does it confer upon their Latin-American brethren absolute control over works circulated in the United States. Administrative and tariff restrictions in Latin America,<sup>50</sup> combined with narrow judicial interpretation in the United States,<sup>51</sup> may have under-

<sup>45</sup> 17 U.S.C. § 9(b) (Supp. 1952).

<sup>46</sup> U.S. TREATY SER., No. 593 (Dep't State 1910), 38 STAT. 1785 (1914). The following nations have ratified the treaty: Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, United States, and Uruguay. 2 UNESCO COPYRIGHT BULL. 144 (No. 4 1949). Mexico has recently ratified the Convention, but has not yet notified the Pan-American Union officially. Communication to the *Yale Law Journal* from Manuel Canyes, Chief, Division of Law and Treaties, Organization of American States, dated March 30, 1953, in Yale Law Library. A communication from Dr. Canyes, dated June 4, 1954, does not list Mexico as a member nation. See also, Ladas, *Inter-American Copyright*, 7 U. PITT. L. REV. 283 (1941); Sanders, *The Protection of Intellectual Property of American Citizens in Latin America*, 139 Publishers' Weekly 2456 (1941); Protection in the Americas *op. cit. supra* note 14, at 11-22.

<sup>47</sup> Buenos Aires Convention of 1910, Preamble. The full text of this Convention is found in Protection in the Americas 199 *et seq.*

<sup>48</sup> Buenos Aires Convention of 1910, Art. 3. 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." *Id.*, Art. 4.

<sup>49</sup> *Id.*, Art. 3.

<sup>50</sup> For a summary of these restrictions, see *Hearings, supra* note 6, at 38, 150, 213; Warner, *The Unesco Universal Copyright Convention*, [1952] Wis. L. REV. 493, 498; Sanders, *supra* note 46; Protection in the Americas 107-110, 174-75.

<sup>51</sup> Since courts have construed Article 4, note 48 *supra*, as not covering mechanical reproduction rights, nationals of Buenos Aires treaty nations cannot get royalties from the use of their copyrighted music on phonograph records. *Todamerica Musica v. Radio Corporation of America*, 171 F.2d 369 (2d Cir. 1948); *Portuondo v. Columbia Phonograph Co.*, 81 F. Supp. 355 (S.D.N.Y. 1937). And see 29 OPS. ATT'Y GEN. 64 (1911) for the origin of this

mined protection in Latin America.<sup>52</sup> These restrictions curtail imports of American books and periodicals printed in the national language—material which would compete with the domestic publishing industry. And despite the provisions of the treaty,<sup>53</sup> some countries impose deposit and filing fees on foreign authors.<sup>54</sup> Conversely, United States protection against unauthorized American recordings of foreign music requires a Presidential proclamation finding that the composer's nation grants mechanical reproduction rights to Americans.<sup>55</sup> The treaty does not supersede this special requirement.<sup>56</sup> And such proclamations have issued only to Argentina,<sup>57</sup> Cuba,<sup>58</sup> and Chile<sup>59</sup> among the Latin-American nations, even though the recording right is one of the most valuable the Latin-American can have today.<sup>60</sup>

The Inter-American Convention of 1946<sup>61</sup> attempted to strengthen the Buenos Aires treaty. Twelve nations, including limiting interpretation of the Copyright Act of 1909, 35 STAT. 1075 (1909), 17 U.S.C. § 1(e) (Supp. 1952).

<sup>52</sup> See *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress, 77th Cong., 1st Sess. 38-40, 65, 78-79, 87-89 (1941)*; Statement of Edwin P. Kilroe, *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress, 75th Cong., 1st Sess. 2-3 (1937)*.

<sup>53</sup> Buenos Aires Convention of 1910, Art. 3: "The acknowledgement of a copyright obtained in one state in conformity with its laws shall produce its effects of full right in all other states, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right."

<sup>54</sup> 4 UNESCO COPYRIGHT BULL. 12-52 (No. 4 1951); Sanders, *supra* note 46.

<sup>55</sup> 17 U.S.C. § 1(e) (Supp. 1952). And see note 51 *supra*.

<sup>56</sup> See note 51 *supra*. <sup>57</sup> 49 STAT. 3413 (1913), 17 U.S.C.A. § 9 (1952).

<sup>58</sup> 37 STAT. 1721 (1911), 17 U.S.C.A. § 9 (1952).

<sup>59</sup> 44 STAT. 2590 (1925), 17 U.S.C.A. § 9 (1952).

<sup>60</sup> Communication to the *Yale Law Journal* from Herman Finkelstein, General Attorney, ASCAP, dated March 31, 1953, in Yale Law Library.

<sup>61</sup> For the text of this Convention see 1 UNESCO COPYRIGHT BULL. 94 (No. 2 1948). And see Pan-American Union, Handbook for Delegates to Inter-American Conference of Experts on Copyright (1946); Pan-American Union, Proceedings of the Inter-American Conference of Experts on Copyright (1946); Report of United States Delegate to Inter-American Conference of Experts on Copyright, U.S. CONF. SER. No. 99 (Dep't State 1947). Also see Rea, *Some Legal Aspects of the Pan-American Copyright Convention of 1946*, 4 WASH. & LEE L. REV. 10 (1946); Comment, *The Inter-American Copyright Convention: Its Place in United States Copyright Law*, 60 HARV. L. REV. 1329 (1947).

Argentina, Brazil, and Mexico, have adopted the revision.<sup>62</sup> But the United States has taken no action toward ratification,<sup>63</sup> presumably because she objects to the broad protection given to an author's reputation,<sup>64</sup> the agreement's retroactive application,<sup>65</sup> and provisions which make it mandatory to enjoin publication of infringing works.<sup>66</sup>

#### INTERNATIONAL PROTECTION IN EUROPE:

##### THE BERNE UNION

While the United States pursued a nationalistic policy, European nations formed the Berne Union in 1886.<sup>67</sup> This

<sup>62</sup> Argentina, Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Paraguay have ratified this treaty. Communication to the *Yale Law Journal* from Manuel Canyes, Chief, Division of Law and Treaties, Organization of American States, dated June 4, 1954, in Yale Law Library.

<sup>63</sup> The treaty was presented to the Senate by President Truman, 93 CONG. REC. 9121 (1947), but the treaty, Executive HH, 80th Cong., 1st Sess., is still in the hands of the Senate Foreign Relations Committee. CCH CONG. INDEX, 83d Cong. 7004 (1953).

<sup>64</sup> Even though the Convention makes this "moral" right alienable. Inter-American Convention of 1946, Art. XI.

<sup>65</sup> If a work is in the public domain of the protecting country, protection will be restored unless some person in the protecting country has acquired a vested right in that work before ratification. *Id.*, Art. XVII(2).

<sup>66</sup> *Id.*, Art. XIII. In the United States, the injunctive remedy is permissive, 17 U.S.C. § 112 (Supp. 1952), as is seizure of infringing works, 17 U.S.C. § 101(d) (Supp. 1952). At least one author has suggested that the provision in Article IX, which permits copyright without formality, was the principal ground for rejecting the Inter-American treaty. See Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] WIS. L. REV. 297, 301-02.

<sup>67</sup> The following nations ratified the Berne Convention of 1886 (date of ratification is shown in parenthesis): Australia (1887); Belgium (1887); Canada (1887); Denmark (1903); France (1887); Germany (1887); Great Britain (1887); Haiti (1887) (but see note 14 *supra*); India (1887); Irish Free State (1887); Italy (1887); Japan (1899); Luxembourg (1888); Monaco (1889); New Zealand (1887); Norway (1896); Spain (1887); Sweden (1904); Switzerland (1887); Tunis (1887); Union of South Africa (1887). 1 LADAS, *op. cit. supra* note 9, at 121-22. There were numerous conferences prior to 1886, but their unofficial character prevented binding action. The first official conference met in Berne in 1884 to prepare a draft convention. Fourteen countries, most of them European, participated. A second official meeting at Berne in 1885 made slight modifications of the earlier draft. And the Convention was finally signed at Berne in 1886. For a detailed report of these conferences, with citations to the original documents, see 1 *id.* at 71-83.

multipartite organization granted any person publishing an original literary or artistic work in a nation belonging to the Union protection against unauthorized reproduction in other member nations.<sup>68</sup> Despite subsequent revisions—in 1908,<sup>69</sup> 1928,<sup>70</sup> and 1948<sup>71</sup>—the Union has retained this concept.<sup>72</sup> And the Union now has forty-three members, representing all of Europe, much of the non-American world, Canada, and Brazil.<sup>73</sup>

<sup>68</sup> Berne Convention of 1886, Art. 2, § 1. The complete text of the Convention, in French and English, is reproduced in 2 LADAS, *op. cit. supra* note 9, at 1123-24.

<sup>69</sup> The Berne Convention was revised at Berlin in 1908. 1 *id.* at 89-94. For the text of this revision, see 2 *id.* at 1141-54. For comments on the Berlin Revision, see BOWKER, COPYRIGHT: ITS HISTORY AND ITS LAW 326-30 (1912); Copyright Office, Report of the United States Delegate to the Berlin Conference (BULL. No. 13 1908); 1 LADAS, *op. cit. supra* note 9, at 89-94.

<sup>70</sup> For English and French texts of the 1928 Revision undertaken at Rome, see 2 *id.* at 1156-74. For comments on this revision, see Kilroe, *Adherence of the United States to the Berne Convention as Modified at Rome*, 9 COPYRIGHT MATERIAL (1936) (COPYRIGHT MATERIAL is a collection of miscellaneous literature on copyright, presented to Yale Law Library by Edwin P. Kilroe); *Minutes and Documents of the Rome Conference, 1928*, *id.* at 18-19; Solberg, *The International Copyright Union*, 36 YALE L.J. 68, 84-88 (1926).

<sup>71</sup> The latest revision of the Convention took place at Brussels. For the text see HOWELL, *op. cit. supra* note 4, at 311-25. For discussion see PLAISANT, REPORTER-GENERAL, GENERAL REPORT ON THE WORK OF THE DIPLOMATIC CONFERENCE FOR THE REVISION OF THE BERNE CONVENTION (1948) (translated from the French by the U.S. Copyright Office); U.S. STATE DEP'T, REPORT OF THE UNITED STATES OBSERVER DELEGATION TO THE INTERNATIONAL CONFERENCE FOR REVISION OF THE BERNE CONVENTION (1949); Chediak, *The Progressive Development of World Copyright Law*, 42 AM. J. INTERNATIONAL LAW 797 (1948); Fisher, *The 1948 Revision of the Berne Convention*, 10 FED. COMM. B.J. 53 (1949); Foster, *International Copyright Protection*, 3 SO. CAR. L.Q. 60 (1950); *The Revision of the Berne Convention in Brussels*, 1 UNESCO COPYRIGHT BULL. 10 (No. 2 1948).

<sup>72</sup> See Berlin Revision, Art. 4, § 1 (1908); Rome Revision, Art. 4(1) (1928); Brussels Revision, Art. 4(1) (1948).

<sup>73</sup> The following countries are members of the Berne Union. Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Great Britain 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, Thailand, Spain, Sweden, Switzerland, Syria, Tunisia, Turkey, Union of South Africa, Vatican City, Yugoslavia. DROIT D'AUTEUR 1-5 (Jan. 15, 1953). Also see communication to the *Yale Law Journal* from Dr. Benigne Mentha, Director of the Berne Union, dated April 20, 1953, in Yale Law Library (translated from the French by Miss Marie McMahon).

From the outset, conflicting forces molded the scope and character of Berne protection. Some members were reluctant to favor foreign authors over native creators, and hence sought "national treatment": they wished to confine the protection given the foreign author to that which he would receive if he published initially in the protecting nation.<sup>74</sup> On the other hand, there was a desire to abandon national treatment in some fields in favor of uniformity, particularly where member nations required foreigners to comply with formalities peculiarly designed for domestic purposes.<sup>75</sup> The Union which the interplay of these forces produced can be analyzed in terms of the following standards: what is protected, through what formalities, for how long. In addition, there is the question of adherence: to what extent members may accept some provisions and reject others.

#### SCOPE OF PROTECTION

*Works protected.*—Under binational arrangements prior to Berne, country *B* would protect a work from country *A* only if country *B*'s domestic legislation protected similar works produced by its own nationals.<sup>76</sup> But Berne continually, though gradually, supplanted domestic law with an international code; its copyright now embraces many classes of material not previously protected by domestic legislation.<sup>77</sup> The original Berne Convention extended uniform protection only to the most prevalent literary forms.<sup>78</sup> After the 1908 Berlin Revision, however, protected works, whether published or unpublished, included:

[A] . . . productions in the literary, scientific, or artistic domain, whatever the mode or form of reproduction, such as: books, pamphlets and other writings; dramatic or dramatico-musical works; choreographic works and pantomimes, the stage directions of which are fixed

<sup>74</sup> COPINGER, *op. cit. supra* note 12, at 270; 1 LADAS, *op. cit. supra* note 9, at 83-86.

<sup>75</sup> See authorities cited note 74 *supra*.

<sup>76</sup> 1 LADAS, *op. cit. supra* note 9, at 53-54.

<sup>77</sup> See 1 *id.* at 33, 53-55.

<sup>78</sup> BERNE CONVENTION OF 1886, Art. IV.



in writing or otherwise; musical compositions with or without words; drawings, paintings; works of architecture and sculpture; engravings and lithographs; illustrations; geographical charts; plans, sketches and plastic works relating to geography, topography, architecture or the sciences.

Translations, adaptations, arrangements of music and other reproductions transformed from a literary or artistic work, as well as compilations from different works, are protected as original works without prejudice to the rights of the author of the original work.<sup>79</sup>

This list was expanded in 1928 to include so-called "oral" works—lectures, sermons, and nonpolitical speeches<sup>80</sup>—and the 1948 Brussels Revision added photographic works.<sup>81</sup>

The Convention applied uniformly to all of the above works which had, at the time of ratification by the protecting country, a valid copyright in the country where the work was first published.<sup>82</sup> If the work was then in the public domain in the protecting nation, copyright was inaugurated.<sup>83</sup> After the 1908 Berlin Revision, signatory countries granted protection even if the formalities necessary for the copyright in the country of origin were not met.<sup>84</sup> Thus, if a French author published a book in 1905 and did not acquire copyright in France, he had no protection in Berne nations. But because of the 1908 amendment he would thereafter be protected in member nations, even though he did not have French copyright. If, however, French protection had lapsed through expiration of the *term* of copyright, the author could acquire no rights in member nations.<sup>85</sup>

<sup>79</sup> Berlin Revision of 1908, Art. 2. <sup>80</sup> Rome Revision of 1928, Art. 2(1).

<sup>81</sup> This document extended code treatment to "photographic works and works produced by a process analogous to photography." Brussels Revision of 1948, Art. 2(1).

<sup>82</sup> *Id.* art. 18, § 1.

<sup>83</sup> BERNE CONVENTION OF 1886, Art. XIV; Final Protocol to the Berne Convention Para. 4 in 2 LADAS, *op. cit. supra* note 9, at 1132; Additional Act of 1896 Art. II(2) in 2 *id.* at 1138.

<sup>84</sup> Berlin Revision of 1908, Arts. 4, 18. Also see 1 LADAS, *op. cit. supra* note 9, at 348-50.

<sup>85</sup> Brussels Revision of 1948, Art. 18, § 2; 1 LADAS, *op. cit. supra* note 9, at 349-50. On the general application of the retroactivity clause, see 1 *id.* at 343-59.



*Substantive rights protected.*—The author's substantive rights in protected works are also, broadly speaking, uniform. Prior to 1908, domestic law set the limits of protection.<sup>86</sup> But now the Convention guarantees to the author the exclusive power to print, copy, sell, or perform his work.<sup>87</sup> It also preserves the author's right to translate his works<sup>88</sup>—a valuable commodity in the world market. Under the 1886 Convention, the right to translate remained in force for only ten years following the original publication.<sup>89</sup> Although this protection in many cases surpassed that which member nations had previously bestowed upon foreign authors,<sup>90</sup> members later thought the ten-year period inadequate; translation was a widespread form of piracy.<sup>91</sup> Since 1908, the right to translate has been treated on a par with the author's other rights in the reproduction of his work.<sup>92</sup>

In addition, the Convention currently assures the author of control over radio, phonograph, and motion picture adaptations.<sup>93</sup> Berne grants him during his lifetime a nontransferable right "to object to every deformation, mutilation or

<sup>86</sup> Berne Convention of 1886, Art. II, § 1. And see 1 LADAS, *op. cit. supra* note 9, at 363–67.

<sup>87</sup> Brussels Revision of 1948, Arts. 8–14.

<sup>88</sup> *Id.* Art. 8. The author of the original has the exclusive right to translate or authorize another to translate. *Ibid.* In addition, the translator, whether the author or his assignee, may copyright the translation once it is made. See text at note 79 *supra*.

<sup>89</sup> BERNE CONVENTION OF 1886, Art. V, § 1. And see 1 LADAS, *op. cit. supra* note 9, at 84, 371–73.

<sup>90</sup> 1 *id.* at 38–40, 58–61. For example, in Germany, Austria, and Hungary no translation right existed for foreign authors unless they explicitly reserved the right to translate, and published a translation in the national language within one year from the end of the calendar year during which the original work appeared. 1 *id.* at 39.

<sup>91</sup> 1 *id.* at 368–71.

<sup>92</sup> Berlin Revision of 1908, Art. 8. The first step toward increasing the author's translation rights was taken in the Additional Act of 1896. Under that agreement, a national of a member state could translate without restriction only if, after ten years, the author had not published a translation in the national language of the translator's country. Additional Act of 1896, Art. 3, in 2 LADAS, *op. cit. supra* note 9, at 1135–36.

<sup>93</sup> Brussels Revision of 1948, Arts. 11–14. The author's rights in regard to these uses of his work were first mentioned in the 1928 Revision. Rome Revision of 1928, Arts. 11–13.

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other modification of the . . . work, which may be prejudicial to his honor or . . . reputation.”<sup>94</sup> This “moral rights” clause,<sup>95</sup> adopted in 1928,<sup>96</sup> had appeared in the domestic law of many Berne nations.<sup>97</sup> It strengthened the position of authors bargaining over rights to radio or movie reproduction, the two major channels of adaptation.<sup>98</sup>

### FORMALITIES

Formalities necessary to invoke protection outside the country of first publication also received code treatment. Before 1908, the author first had to obtain formal copyright in the country of origin.<sup>99</sup> Currently mere publication—issue of a work for public consumption<sup>100</sup>—in one ratifying nation is sufficient to secure protection in the others.<sup>101</sup> But signatory nations may make compliance by their own nationals with domestic formalities a condition precedent to copyright protection at home.<sup>102</sup>

<sup>94</sup> *Id.* at Art. 6 *bis* (1).

<sup>95</sup> The literature on moral rights is extensive. The leading work on the subject is Roeder, *The Doctrine of Moral Right*, 53 HARV. L. REV. 554 (1940). See also Katz, *The Doctrine of Moral Right and American Copyright Law* in ASCAP, FOURTH COPYRIGHT LAW SYMPOSIUM 79 (1952); 1 LADAS, *op. cit. supra* note 9, at 575–604.

<sup>96</sup> See note 94 *supra*. <sup>97</sup> 1 LADAS, *op. cit. supra* note 9, at 579.

<sup>98</sup> See 1 *id.* at 575–81. An author's moral rights may also allow him to object to mutilation in other types of adaptation, such as dramatization or translation. Roeder, *The Doctrine of Moral Right*, 53 HARV. L. REV. 554, 577 (1940). See pp. 197–98 *infra*.

<sup>99</sup> BERNE CONVENTION OF 1886, Art. II § 2.

<sup>100</sup> This definition appears in the Brussels Revision of 1948, Art. 4(4). For a critical discussion of the publication requirement as defined in the Convention, see 1 LADAS, *op. cit. supra* note 9, at 288–310. The 1948 Brussels Revision states: “. . . ‘published works’ shall be understood to be works copies of which have been issued *and made available in sufficient quantities to the public*.” Brussels Revision of 1948, Art. 4(4) (the italicized portion was added in 1948).

<sup>101</sup> Brussels Revision of 1948, Arts. 4(1), (2). Although there is some doubt, it appears that failure to fulfill formalities, such as deposit of copies with the court, cannot prevent a foreigner from seeking judicial relief for infringement. See 1 LADAS, *op. cit. supra* note 9, at 273–75; 2 UNESCO COPYRIGHT BULL. 94–103 (No. 2-3 1949).

For an instance in which the courts of a member nation have denied protection by construing “publication” narrowly, see pp. 195–96 *infra*.

<sup>102</sup> Brussels Revision of 1948, Art. 4(2). All texts of the Convention apply

## DURATION OF COPYRIGHT

Berne sets a uniform term of protection for most works—the author's life and fifty years after his death.<sup>103</sup> Initially, the duration of copyright in most works equalled the term provided by the domestic law of either the publishing country or the protecting country, whichever period was shorter.<sup>104</sup> This "comparison of terms" rule persisted through all revisions of the Berne Convention except the 1948 Brussels Revision,<sup>105</sup> which adopted the uniform life-plus term.<sup>106</sup>

## RESERVATIONS

However unifying Berne may appear to be, nations which were already members when a revision was enacted were permitted to reject all or part of the revision and remain bound *pro tanto* by the earlier version.<sup>107</sup> Japan, for instance, still adheres to the 1886 ten-year translation provision,<sup>108</sup> even though she has accepted other portions of the 1928 Rome Revision.<sup>109</sup> And Great Britain has refused to give retroactive application to any of the articles.<sup>110</sup> Berne, how-

only to copyright acquisition outside the country of origin. But the liberalization of copyright in the Union did prompt action to secure automatic copyright for nationals in their home countries. 1 LADAS, *op. cit. supra* note 9, at 187-89.

<sup>103</sup> Brussels Revision of 1948, Art. 7(1). Article 7(2) grants the foreign author the right to claim the longer period which a nation extends to its native authors. But only seven countries grant terms greater than fifty years *post mortem auctoris*: Brazil (60), Colombia (80), Cuba (80), Spain (80), Guatemala (perpetual), Nicaragua (perpetual), and Portugal (perpetual). 2 UNESCO COPYRIGHT BULL. 70-81 (No. 2-3 1949).

<sup>104</sup> BERNE CONVENTION OF 1886, Art. II, § 2.

<sup>105</sup> Berlin Revision of 1908, Art. 7; Rome Revision of 1928, Art. 7.

<sup>106</sup> See note 103 *supra*. The comparison of terms rule still applies to cinematographic and photographic works. Brussels Revision of 1948, Art. 7(3).

<sup>107</sup> See, e.g., Rome Revision of 1928, Arts. 25(3), 28.

<sup>108</sup> 1 LADAS, *op. cit. supra* note 9, at 92-93, 99, 141-44, 386-88.

<sup>109</sup> 1 *id.* at 121.

<sup>110</sup> 1 *id.* at 352-53. Of the members of the Berne Union, *supra* note 73, only twenty-two have ratified without reservations. DROIT D'AUTEUR 2 (Jan. 15, 1953). Seven countries have reservations to article 18 on retroactivity: Australia, Great Britain, India, New Zealand, Norway, Thailand, and Union of South Africa. *Id.* at 3. And nine nations remain bound by the original ten-year translation provision: Greece, Iceland, Irish Free State, Italy, Japan, Nether-

ever, requires a nation first signing the Convention after a revision to accept the then current text in its entirety.<sup>111</sup>

As the net result of periodic modification, Berne now relies only meagerly on domestic legislation to determine what kind of protection member nations must grant to works emanating from another signatory. The current version<sup>112</sup> protects any type of work published within the Union and extends its protection over a period which does not vary from country to country. Foreign authors need observe neither the formalities imposed by the protecting nations, nor those of the country of origin. Translations receive the same protection as originals. And although radio use of protected works may be regulated by domestic law,<sup>113</sup> the moral rights clause prevents any substantial diminution of the author's control. Nations remain free to legislate only on subsidiary issues such as newspapers' use of oral works,<sup>114</sup> retaliatory

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lands, Thailand, Turkey, and Yugoslavia. *Ibid.* For a complete list of reservations presently in force, see *id.* at 2-3.

<sup>111</sup> Rome Revision of 1928, Art. 28(3). Countries not already members of the Union were in fact given a three-year period after the 1928 conference in which they could ratify either the 1908 or the 1928 treaty. *Ibid.* But many nations were slow to ratify the 1928 revision. 1 LADAS, *op. cit. supra* note 9, at 121-22. Similar provisions applied to ratification of other revisions. Berlin Revision of 1908, Art. 25; Brussels Revision of 1948, Arts. 25, 27(2).

<sup>112</sup> The following sixteen nations have ratified the Brussels Revision of 1948: Belgium, Brazil, France and Algeria, Israel, Liechtenstein, Luxembourg, Monaco, Morocco (French Zone), Philippines, Portugal, Spain, Tunisia, Turkey, Union of South Africa, Vatican City, and Yugoslavia. DROIT D'AUTEUR 4 (Jan. 15, 1953) (translated from the French by Judith Caro). Thailand and South West Africa are the only Berne members still bound wholly by the Berlin Revision of 1908. All others listed note 73 *supra* have adopted the Rome Revision of 1928. Great Britain will probably ratify the Brussels Revision shortly. 103 L.J. 5 (1953).

For a detailed summary of the changes effected by the 1948 Revision, see *The Revisions of the Berne Convention at Brussels*, 1 UNESCO COPYRIGHT BULL. 10 (No. 2 1948).

<sup>113</sup> Brussels Revision of 1948, Art. 11 *bis* (2).

<sup>114</sup> *Id.* Art. 2 *bis* (2). See Williams, *Newspaper Copyright and the International Copyright Union*, 8 TULANE L. REV. 98 (1933).

action,<sup>115</sup> seizure of pirated works,<sup>116</sup> and use of quotations.<sup>117</sup>

#### BERNE PROTECTION OF UNITED STATES WORKS

Despite the fact that United States copyright is practically unavailable to many foreign authors,<sup>118</sup> American authors find it easy to obtain protection in Berne countries. The Convention protects any work published in a member nation.<sup>119</sup> The treaty provides that "publication" consists only of issuing copies to the public<sup>120</sup> or, if the work is first published in a nonmember, putting copies on sale in a member nation.<sup>121</sup> Thus, an American can meet the technical requirements for protection in the Berne Union simply by shipping a few copies to a Canadian bookseller at the same time the work goes on sale here.<sup>122</sup>

#### RETALIATION

Despite a 1914 provision permitting Berne members to restrict the protection given to nationals of non-Berne countries failing to protect Berne works "in a sufficient manner,"<sup>123</sup> retaliation sufficient to force a change in American

<sup>115</sup> Brussels Revision of 1948, Art. 6.

<sup>116</sup> *Id.* Art. 16.

<sup>117</sup> *Id.* Art. 10. For a complete tally of the matters on which nations may legislate, see *The Revision of the Berne Convention in Brussels*, 1 UNESCO COPYRIGHT BULL. 10, 14 (No. 2 1948).

<sup>118</sup> See pp. 180-83 *supra*.

<sup>119</sup> See text at note 101 *supra*.

<sup>120</sup> Berlin Revision of 1908, Art. 4, § 4; also see Rome Revision of 1928, Art. 4(4).

<sup>121</sup> Berlin Revision of 1908, Art. 6.

<sup>122</sup> Canada is a Berne member. See note 73 *supra*.

<sup>123</sup> "When a country not belonging to the Union does not protect in a sufficient manner the works of authors within the jurisdiction of a country of the Union, [the Berlin Revision] can not prejudice, in any way, the right which belongs to the contracting countries to restrict the protection of works by authors who are, at the time of the first publication of such works, subjects or citizens of the said country not being a member of the Union, and are not actually domiciled in one of the countries of the Union." Additional Protocol to the International Copyright Convention of Berlin, Art. 1 (signed at Berne, 1914). The substance of this provision was carried into the Rome Revision of 1928, Art. 6(2)-(4). In the 1948 revision, a strengthening provision was added: "If the country of first publication avails itself of this right [to retaliate], the

copyright policy has not materialized. Throughout the 1930s, at least, the United States seemed on the verge of approving the treaty,<sup>124</sup> which had the support of Presidents Hoover<sup>125</sup> and Roosevelt.<sup>126</sup> Europeans probably considered large-scale retaliation unnecessary or inopportune.<sup>127</sup>

Only the Netherlands has attempted serious retaliation; that country, in the 1930s, refused copyright to many American works.<sup>128</sup> Dutch piracy was sanctioned not through recourse to the Berne clause legalizing retaliation, but by the Dutch courts' narrow interpretation of "publication."<sup>129</sup> In 1936, the highest court of the Netherlands upheld unauthorized use in Holland of a story which had first appeared in

other countries of the Union shall not be required to grant to works thus subjected to special treatment a wider protection than that granted to them in the country of first publication." Brussels Revision of 1948, Art. 6(2).

<sup>124</sup> See text at note 136 *infra*. The Senate actually ratified the treaty in 1935, without a recorded vote, but because of an agreement in the Senate the ratification was reconsidered. See REP. REGISTER OF COPYRIGHTS 12-13 (1935); *id.* at 13 (1936).

<sup>125</sup> See Statement of Wallace McClure, Treaty Division, Dep't of State, in *Hearings before Senate Committee on Patents on H.R. 12549*, 71st Cong., 3d Sess. 196 (1931).

<sup>126</sup> See Letter of President Franklin D. Roosevelt to Robert Underwood Johnson, in *Hearings before Committee on Foreign Relations on S. 1928*, Pt. 2, 73d Cong., 2d Sess. 57-58 (1934); *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress*, 75th Cong., 1st Sess. 45 (1937).

<sup>127</sup> SOLBERG, THE PRESENT INTERNATIONAL COPYRIGHT SITUATION 16-17 (1934). The British did not retaliate because, although they bore the brunt of the discrimination fostered by the manufacturing clause, they exported more to the United States than they imported from the United States. *Hearings*, *supra* note 6, at 221-22. Also see *Justice in Copyright Needed*, 126 Publishers Weekly 912 (1934); Ostertag, *Report of the Principal Events in the Domain of Copyright from 1931 to 1937*, DROIT D'AUTEUR (July, 1937) (translated from the French by Gertrude Rosenstein).

<sup>128</sup> See *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress*, 77th Cong., 1st Sess. 18-19, 21, 24, 28-29, 64-65, 77-81 (1941).

Canada also reacted during the 1920s, imposing the equivalent of a manufacturing clause on American publishers. This action was taken under the permissive Berne clause of 1914. See note 123 *supra*. But it was never implemented by ministerial action. 2 LADAS, *op. cit. supra* note 9, at 907-9; DROIT D'AUTEUR (Sept. 15, 1923) (translation from the French in 1 CAN. B. REV. 780 [1923]).

<sup>129</sup> For the Berne definition of "publication," which the Dutch courts construed, see p. 194 *supra*.

*Colliers'* magazine.<sup>130</sup> Although copies of *Colliers'* had been distributed in Canada to meet the Berne requirements, the court held that this was not sufficient publication within the meaning of the Convention.<sup>131</sup> A few years later, however, the court retreated part way by refusing to condone piracy of *Gone With The Wind*.<sup>132</sup> The book had been sent in unbound sheets to Canada, where it had been bound and distributed. The Dutch high court held that binding the books in Canada fulfilled the Berne requirements.<sup>133</sup> Since American publishers customarily have some copies bound in Canada, no effective retaliation now exists in the Netherlands.<sup>134</sup>

#### AMERICAN ATTEMPTS TO JOIN BERNE

Fear of retaliation did provoke numerous attempts by American publishers and authors and by the State Department to bring the United States into the Berne Union.<sup>135</sup> Between 1930 and 1941, at least seven separate bills designed to effectuate United States entry into the Berne Union were introduced in Congress.<sup>136</sup> But the threat of piracy did not

<sup>130</sup> Sax Rohmer (Pseudonym for A. H. Sarsfield Ward) v. Uitgeversmaatschappij "De Combinatie," Supreme Court of The Netherlands (1936), *DROIT D'AUTEUR* (July, 1937) (translated from the French by Gertrude Rosenstein). For a discussion of this case see WARNER, *RADIO AND TELEVISION RIGHTS* 725-27 (1953); Saher, *American-Netherlands Copyright Problems*, 1 *WORLD TRADE L.J.* 371, 379-80 (1946).

<sup>131</sup> See Saher, *supra* note 130, at 379-80.

<sup>132</sup> See *id.* at 380-82.

<sup>133</sup> See *Hearings*, *supra* note 6, at 48. For a discussion of the general problem of American-Netherlands relations and an account of the long legal history of the *Gone With The Wind* case, see Saher, *supra* note 130, at 380-82. The case was finally settled in 1945. *Ibid.*

<sup>134</sup> *Hearings*, *supra* note 6, at 37. But see *id.* at 213, indicating that there may still be scattered instances of retaliation by the Dutch.

<sup>135</sup> See authorities cited note 136 *infra*, *passim*.

<sup>136</sup> 1) *Hearings before Committee on Patents on H.R. 6990*, 71st Cong., 2d Sess. (1930); 2) *Hearings before Senate Committee on Patents on H.R. 12549*, 71st Cong., 3d Sess. (1931); 3) *Hearings before Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. (1932); 4) *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. (1934); 5) *Hearings before House Committee on Patents on Revisions of the Copyright Laws*, 74th Cong., 2d Sess. (1936); 6) *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress*, 75th Cong., 1st Sess. (1937); 7) *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress*, 77th



sway the printers or the motion picture and radio industries from their stand against membership.<sup>137</sup> United States adherence to Berne would have necessitated modifying the manufacturing clause to give protection to works printed abroad.<sup>138</sup> Printers and book manufacturers argued that since printing costs abroad were cheap, foreign authors might desert American printers.<sup>139</sup> In addition, they said, American publishers might print abroad and ship finished copies back to the United States.<sup>140</sup> The movie and radio industries feared that Berne's emphasis on authors' rights would make adaptation of literary works more expensive and less secure.<sup>141</sup> And

Cong., 1st Sess. (1941). For a summary of this history see Note, *Revision of Copyright Law*, 51 HARV. L. REV. 906 (1938). And for background of this legislation, see Solberg, *The Present Copyright Situation*, 40 YALE L.J. 184 (1930).

<sup>137</sup> See notes 140-43 *infra*.

<sup>138</sup> The Rome Revision, in force when this legislation was proposed, states unequivocally that no formalities may be required. Rome Revision of 1928, Art. 4, § 2.

<sup>139</sup> See authorities cited note 140 *infra*.

<sup>140</sup> *Hearings*, *supra* note 128, at 21-22, 116-28, 156-82; *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 10-18, 21, 27, 89-91 (1934). Periodical publishers also opposed the treaty. *Hearings*, *supra* note 128, at 115-17, 189-93; *Hearings before Senate Committee on Foreign Relations on Executive E*, 73d Congress, 75th Cong., 1st Sess. 31-34, 36-39 (1937); *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 85-88 (1934).

<sup>141</sup> See *Hearings*, *supra* note 128, at 89-106, 128-35, 141-56; *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 68-85 (1934); *Hearings before House Committee on Patents on Revision of the Copyright Laws*, 74th Cong., 2d Sess. 1005-44 (1936); *Hearings before Senate Committee on Foreign Relations on Executive E*, 73d Congress, 75th Cong., 1st Sess. 2-30, 47-50 (1937). On the international copyright problems of the broadcasting industry see Brown, *International Broadcasting: Its Copyright Aspect*, 15 SO. CALIF. L. REV. 164 (1942); Diamond & Adler, *Proposed Copyright Revision and Phonograph Records*, 11 AIR L. REV. 29 (1940); Duffy, *International Copyright*, 8 AIR L. REV. 213 (1937); Hepp, *Radio Broadcasting and the UNESCO Survey of World Copyright Law*, 10 FED. COMM. B.J. 67 (1949); Homburg, *Radio Broadcasting and the International Protection of Intellectual Rights*, 10 FED. COMM. B.J. 59 (1949); Simpson, *The Copyright Situation as Affecting Radio Broadcasting*, 9 N.Y.U.L.Q. REV. 180 (1931); Straschnov, *The Monaco Ordinance on Copyright with Respect to Radio-Broadcasting*, 10 FED. COMM. B.J. 189 (1949); Note, *Adherence to the International Copyright Union and Proposed Copyright Reform*, 12 AIR L. REV. 49 (1941); Note, 1 J. RADIO L. 390 (1931).



in their view, Berne's grant to authors of moral rights would straitjacket attempts to alter scripts.<sup>142</sup> These policy justifications were buttressed by the claim that granting copyright in "oral" works, such as speeches, was unconstitutional, since Article I of the Constitution limits congressional power to protection of "Writings."<sup>143</sup>

Other arguments advanced against ratification served largely as make-weights, but nevertheless may have been effective. Some claimed that ratifying before United States laws were amended to conform to the Convention would cause confusion by superimposing Berne on conflicting domestic law.<sup>144</sup> But this contention could hardly have represented a real motive for opposition. Congress could have amended domestic law before adopting the treaty or taken both steps at the same time.<sup>145</sup> Other objections were that the treaty had originated in Europe and was un-American<sup>146</sup> and also that Nazi Germany would be a fellow member.<sup>147</sup>

Poor strategy aborted Berne's adoption. In response to the charge that confusion would result unless domestic law were changed first,<sup>148</sup> American proponents of Berne incorporated

<sup>142</sup> See authorities cited note 141 *supra*.

<sup>143</sup> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective *Writings* . . ." U.S. CONST. Art. 1, § 8 (emphasis added).

<sup>144</sup> *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 63-64, 77, 83 (1934); *Hearings before Committee on Patents on H.R. 6990*, 71st Cong., 2d Sess. 222 (1930); *Hearings before House Committee on Patents on Revision of the Copyright Laws*, 74th Cong., 2d Sess. 1012-13 (1936); *Hearings, supra* note 128, at 89-90. Also see Note, *Revision of Copyright Law*, 51 HARV. L. REV. 906, 908-9 (1938).

<sup>145</sup> Simultaneous amendment and ratification were finally undertaken, but combination of the two seemed improvident. See text at notes 148-152 *infra*.

<sup>146</sup> *Hearings before Senate Committee on Foreign Relations on Executive E, 73d Congress*, 75th Cong., 1st Sess. 32 (1937).

<sup>147</sup> Even book publishers, *Hearings, supra* note 128, at 106-8, and authors, *Hearings before House Committee on Patents on Revision of the Copyright Laws*, 74th Cong., 2d Sess. 238, 242, 514-15, 548-50 (1936), succumbed to this argument against the treaty, although they had previously been ardent supporters of Berne. See authorities cited note 135 *supra*.

<sup>148</sup> See text at note 144 *supra*.

treaty ratification in a general revision of the copyright code.<sup>149</sup> Quite apart from the provisions aimed at reconciling United States law with Berne, the revision included many controversial changes<sup>150</sup> which caused groups which had previously championed Berne to oppose any revision at all. Thus, the American Society of Composers, Authors and Publishers (ASCAP), faced with threatened repeal of Section 101(b)<sup>151</sup> guaranteeing minimum damages for infringement of musical copyrights, turned its full weight against both amendment and ratification.<sup>152</sup> As a result of such concerted opposition, Congress failed to ratify Berne.

#### THE UNESCO UNIVERSAL COPYRIGHT CONVENTION

##### THE POST-WAR PROBLEM

Dissatisfaction with international protection as it existed at the end of World War II was twofold. Europe wanted the United States brought into some organization for copyright control.<sup>153</sup> The alternatives—return to mutual piracy or mere perpetuation of America's one-way excursion into Berne via Canadian publication—would ruin Europe's chances of benefiting from the lucrative post-war market in America.<sup>154</sup> Con-

<sup>149</sup> See *Hearings before House Committee on Patents on Revision of the Copyright Laws*, 74th Cong., 2d Sess. (1936).

<sup>150</sup> For discussion of these changes see Pforzheimer, *Copyright Reform and the Duffy Bill*, 47 YALE L.J. 433 (1938).

<sup>151</sup> 17 U.S.C. § 101(b) (Supp. 1952).

<sup>152</sup> See BURKAN, PROPOSED AMENDMENT OF THE COPYRIGHT LAW 5 (1935); Pforzheimer, *Copyright Reform and the Duffy Bill*, 47 YALE L.J. 433, 436 (1938); statement of Sydney M. Kaye, attorney for the National Association of Broadcasters in *Hearings*, *supra* note 149, at 399: "The opposition to the Berne Convention on the part of A.S.C.A.P. is another smokescreen, . . . their real ground for opposition to this bill remains the elimination of the onerous minimum-penalty clause." See also Appleman, *Compromise in Copyright*, 19 B.U.L. REV. 619 (1939); Duffy, *International Copyright*, 8 AIR L. REV. 213, 221-22 (1937).

<sup>153</sup> See Ostertag, *supra* note 127; Saher, *supra* note 130, at 383. And a report of the Council of Europe Committee on Cultural and Scientific Questions charged that United States stalling on standardization of world copyright laws has prevented development of a world-wide television network. *New York Times*, Sept. 25, 1953, p. 29, col. 6.

<sup>154</sup> *Hearings*, *supra* note 6, at 217-23.

versely, the overseas demand for American literary and artistic products had soared. Because the motion picture, publishing, and music industries had found expanding markets abroad, the United States had become the world's leading net exporter of copyrightable materials.<sup>155</sup> American interests now feared loss of this European market which, despite instances of retaliation in the 1930s, they had previously thought secure.<sup>156</sup>

The problem was how to set up an organization which the United States would join and which would at the same time achieve fair copyright protection. The consensus was that any new arrangement would have to develop outside of the existing treaty structure.<sup>157</sup> Increasing the membership of Berne was considered impossible, since almost all the American nations had failed to approve that Convention.<sup>158</sup> And if Berne standards had to be lowered to attract more nations, its members would have protested strongly.<sup>159</sup>

UNESCO's study began in 1947;<sup>160</sup> and the finished product, the Universal Copyright Convention (UCC), was completed in 1952.<sup>161</sup> The UNESCO Convention differs markedly

<sup>155</sup> *Id.* at 3, 217-23.

<sup>156</sup> *Id.* at 63, 153.

<sup>157</sup> *Recommendations of the Committee of Experts*, 3 UNESCO COPYRIGHT BULL. 9 (No. 3-4 1950). And see *id.* at 38-43.

<sup>158</sup> See list of members, note 73 *supra*.

<sup>159</sup> For indications of the reluctance of many continental countries to tolerate diminished protection abroad, and their insistence on safeguarding the Berne Union standards among themselves, see text at notes 213-17 *infra*.

<sup>160</sup> 1 UNESCO COPYRIGHT BULL. 2 (No. 1 1948); Dixon & Goldblatt, *Toward a Universal Copyright Convention*, 24 DEP'T STATE BULL. 288 (1951); Kuhn, *The Work of Unesco on Copyright*, 43 AM. J. INT'L L. 343 (1949); note 15 *supra*.

<sup>161</sup> The Intergovernmental Copyright Conference took place in Geneva, Switzerland, and culminated on September 6, 1952, in the adoption and signing of the Universal Copyright Convention. For a complete text of the Convention and the Report of the Rapporteur-General, see 5 UNESCO COPYRIGHT BULL. 30 (No. 3-4 1952).

Fifty nations participated in the Geneva Conference, but only forty nations signed the Convention: Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Cuba, Denmark, Finland, France, German Federal Republic, Guatemala, Haiti, Honduras, India, Ireland, Israel, Italy, Japan, Liberia, Luxembourg, Mexico, Monaco, Nicaragua, Netherlands, Norway, Peru, Portugal,

from the Berne plan. While Berne developed an international code assuring uniformly high standards of protection, UCC relies heavily on the domestic law of the protecting country and hence provides variably lower standards.<sup>162</sup> To make UCC more palatable to the United States and other balky nations, UNESCO designed the Convention to require only minimal changes in domestic law.<sup>163</sup>

#### SCOPE OF PROTECTION

*Works protected.*—UCC obligates each member to protect “literary, scientific, and artistic works, including writings, musical, dramatic and cinematographic works, and paintings, engravings, and sculpture.”<sup>164</sup> A nation may adhere to the

Salvador, San Marino, Spain, Sweden, Switzerland, Great Britain and Northern Ireland, United States, Uruguay, Vatican City, Yugoslavia. The ten nations which participated but did not sign are: Colombia, Dominican Republic, Egypt, Greece, Indonesia, Iran, Thailand, Turkey, Venezuela, and Viet Nam. See UNESCO General Conference, Seventh Session, Report of the Results of the Inter-Governmental Conference on Copyright, 7C/PRG/8, (Oct. 10, 1952) (translated from the French); Communication to the *Yale Law Journal* from Dr. Arpad Bogisch, Copyright Division, UNESCO, dated March 31, 1953, in Yale Law Library. Andorra, Cambodia, and Pakistan are the only states which have deposited their instruments of ratification or accession to UCC. Liberia, Spain, and Haiti have ratified the Convention, but have not deposited their instruments with UNESCO. The Minister of Foreign Relations of Costa Rica has notified UNESCO that the Legislative Assembly of Costa Rica has approved his country's accession to the Convention, but the UNESCO Copyright Division is not certain whether such notification can be considered as a formal deposit. Communication to the *Yale Law Journal* from Juan O. Diaz-Lewis, Copyright Division, UNESCO, dated June 9, 1954, in Yale Law Library. On the Convention generally, see WARNER, RADIO AND TELEVISION RIGHTS §§ 195-96 (1953); Dubin, *The Universal Copyright Convention*, 42 CALIF. L. REV. 89 (1954); Honig, *International Copyright Protection and the Draft Universal Copyright Convention of Unesco*, 2 INT'L & COMP. L.Q. 217 (1952); Shulman, *A Realistic Treaty*, 1 AM. WRITER (Nov. 1952); Schulman, *International Copyright in the United States: A Critical Analysis*, 19 L. & CONTEMP. PROB. 141 (1954). [EDITOR'S NOTE. For countries ratifying to date, see note 16 *supra*.]

<sup>162</sup> Outside of European nations, protection afforded by domestic law is not so complete as that assured by the Berne Convention. See *Works Protected and Economic Rights*, 2 UNESCO COPYRIGHT BULL. 18 (No. 2-3 1949).

<sup>163</sup> See Escarra, *Comment on International Copyright Protection*, 2 UNESCO COPYRIGHT BULL. 2 (No. 4 1949); Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 198, 201 (1953); Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] WIS. L. REV. 297.

<sup>164</sup> UCC, Art. I.

Convention even though it protects some art forms, such as applied art, under legislation other than copyright statutes.<sup>165</sup> And a country can ratify UCC although its domestic law prohibits it from protecting certain material—architecture, for example.<sup>166</sup> If, however, a nation refuses to protect a class of works, it defaults the right of its nationals to copyright similar works in other members.<sup>167</sup> UCC does not protect oral works.<sup>168</sup>

The Convention has no retroactive effect.<sup>169</sup> Berne provided that a work protected in the country of its origin at the time of ratification would thereafter be protected in other signatory nations, whether or not these nations had previously protected the work.<sup>170</sup> But certain American interests might have suffered from such a provision. It might, for example, force an American movie producer to start paying royalties to a foreign author whose novel the producer had adapted when it was not protected in the United States.<sup>171</sup> In deference to the American position, the Conference considered a compromise based on the Inter-American Agreement of 1946.<sup>172</sup> Under a stipulation like this, previously unprotected works become protected; but a person who has reproduced such a work before ratification can continue to do so without the author's consent.<sup>173</sup> The United States delegation to the UNESCO Conference, however, blocked the compromise by

<sup>165</sup> UCC, Art. IV, § 4. And see *Report of the Rapporteur-General*, 5 UNESCO COPYRIGHT BULL. 42-51-52 (No. 3-4 1952).

<sup>166</sup> *Ibid.* For example, the United States could adhere, even though the Constitution were construed to prohibit protection of "oral" works. See note 143 *supra*.

<sup>167</sup> *Report of the Rapporteur-General*, *supra* note 165, at 52.

<sup>168</sup> See text at notes 164 *supra* and 189-93 *infra*.

<sup>169</sup> UCC, Art. VII.

<sup>170</sup> See p. 189 *supra*.

<sup>171</sup> See *Hearings before Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. 54, 80-82 (1934); *Hearings*, *supra* note 128, at 20-21, 32, 75, 111, 128-35.

<sup>172</sup> Inter-American Convention of 1946, Art. XVII(2).

<sup>173</sup> *Ibid.* And see Report of United States Delegate to Inter-American Conference of Experts on Copyright, U.S. CONF. SER. No. 99, 28-29 (Dep't of State 1947).

maintaining that any provision for retroactive protection would make ratification by the United States virtually impossible.<sup>174</sup>

*Substantive rights protected.*—Generally, UCC leaves each member state free to decide what particular rights will be safeguarded and under what conditions of license, fair use, and assignment those rights may be exercised.<sup>175</sup> Some nations wished to guarantee moral rights, in addition to performance and reproduction rights.<sup>176</sup> But the Conference rejected these proposals because specific guarantees might be read to limit UCC's application and because they might conflict with local law.<sup>177</sup>

*Translation rights.*—Although UCC flatly states that "Copyright shall include the exclusive right of the author to . . . authorize the making and publication of translations,"<sup>178</sup> the Convention actually curtails this right.<sup>179</sup> During the seven years following the first publication of his work, the author has absolute control over its translation. At the end of seven years, however, he may lose his right to prevent unauthorized translation. If at that time no authorized translation has appeared in the national language of a member state or such translations are out of print, a national of that state may acquire a nonexclusive, nontransferable right to translate the work into his national language.

The would-be translator must show that he has contacted the copyright proprietor and has been denied permission. If he has been unable to find the proprietor, the translator must contact the publisher, or, failing that, the consular represen-

<sup>174</sup> *Report of Rapporteur-General*, *supra* note 165, at 55–56. See 6 UNESCO COPYRIGHT BULL. 24–25 (No. 1 1953).

<sup>175</sup> The Convention requires only that "each Contracting State [undertake] to provide for the adequate and effective protection of the rights of authors and other copyright proprietors. . . ." UCC, Art. I.

<sup>176</sup> *Report of the Rapporteur-General*, *supra* note 165, at 46–47.

<sup>177</sup> *Ibid.*

<sup>178</sup> UCC, Art. V, § 1.

<sup>179</sup> UCC, Art. V, § 2. See Evans, *Role of Translation in the Achievement of Peace*, LIB. CONG. INFO. BULL., App. (Dec. 22, 1952).

tative of the author's nation. A member state electing to take advantage of the translation provision of UCC must assure the author reasonable compensation. It must also provide a means for transmitting the money to the author, "assure a correct translation of the work," and guarantee that the original title and the author's name will appear on all copies.<sup>180</sup>

How long an author should be empowered to prevent unauthorized translation was debated extensively at the UNESCO Conference. Most of the delegations which fought to shorten the period represented less developed nations, in which making works of foreign authors readily available in the national language is essential to cultural growth.<sup>181</sup> Many of these nations, though members of Berne, had not adopted Berne provisions giving long-lasting translation rights to authors.<sup>182</sup> Another group, preponderantly Middle Eastern, had rejected Berne entirely.<sup>183</sup> The Conference hoped to attract all of these nations by making translation easier and less expensive. On the other hand, it sought to pacify the Continental countries, most of which opposed a short term as too likely to hurt an author's position in foreign nations.<sup>184</sup> The translation article strikes a reasonable balance between the two conflicting interests. It makes literature available in another language after a short period, and yet guarantees the author some economic benefit even after the seven-year term.

#### FORMALITIES

*Published Works.*—Any author publishing in a member nation, or a national of a member state no matter where he publishes, can easily acquire protection in all other na-

<sup>180</sup> *Ibid.*

<sup>181</sup> *E.g.*, Greece, India, Japan, Mexico, and Turkey led the fight for a short protected period before translation. *Report of the Rapporteur-General, supra* note 165, at 53-55. For the debates on Article V at the Conference, see UNESCO, MINUTES OF THE INTERGOVERNMENTAL COPYRIGHT CONFERENCE, COMMITTEE ON RIGHT TO TRANSLATE, DA/WG/SR/7-10, *passim* (1952); 6 UNESCO COPYRIGHT BULL. 18 *et seq.* (No. 1 1953).

<sup>182</sup> 1 LADAS, *op. cit. supra* note 9, at 386-88. <sup>183</sup> See notes 5 and 73 *supra*.

<sup>184</sup> UNESCO, MINUTES OF THE INTERGOVERNMENTAL COPYRIGHT CONFERENCE, COMMITTEE ON RIGHTS TO TRANSLATE, DA/WG/SR/7-10, *passim* (1952).

tions.<sup>185</sup> In a nation which grants copyright to its own nationals without formalities, mere publication suffices to protect the foreign author.<sup>186</sup> To protect the author in countries which, like the United States, require their own nationals to fulfill formalities, every published copy must contain notice of copyright—the symbol ©, the name of the copyright owner, and the year in which the work was first published.<sup>187</sup> Signatory nations may impose no other conditions precedent to protection.<sup>188</sup>

“Publication” means merely “the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read and otherwise *visually* perceived.”<sup>189</sup> Under United States pressure,<sup>190</sup> the Conference rejected the Berne rule that solely audible performance or reproduction of a work constitutes “publication.”<sup>191</sup> The American delegation claimed that inconvenience and con-

<sup>185</sup> UCC, Art. II, § 1: “Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.”

<sup>186</sup> *Ibid.*

<sup>187</sup> UCC, Art. III, § 1. And see *Report of the Rapporteur-General*, *supra* note 165, at 49–51. For a comprehensive analysis of Article III and its background in both American and European Law, see Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] Wts. L. Rev. 297.

<sup>188</sup> “[A foreign work shall be protected in a country imposing formalities] if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.” UCC, Art. III, § 1.

A member nation may continue to impose additional formalities on its own nationals. UCC, Art. III, § 2. It may also require appearance through domestic counsel and deposit of copies with the court as conditions precedent to seeking judicial relief. But failure to comply with these conditions does not affect the validity of the Copyright. *Id.* § 3.

<sup>189</sup> UCC, Art. VI (emphasis added).

<sup>190</sup> See *Report of Rapporteur-General*, *supra* note 165, at 55; AMERICAN BAR ASSOCIATION, REPORT OF THE CHAIRMAN OF THE COMMITTEE ON INTERNATIONAL COPYRIGHTS 16–22 (1953); AMERICAN BAR ASSOCIATION, REPORT OF THE CHAIRMAN OF THE SUB-COMMITTEE ON COPYRIGHTS OF THE COMMITTEE TO COOPERATE WITH THE UNITED NATIONS AND UNESCO, RESPECTING THE GENEVA UNIVERSAL COPYRIGHT CONVENTION 11 (1952).

<sup>191</sup> See *Report of Rapporteur-General*, *supra* note 165, at 55.



fusion would result if a broadened definition were adopted.<sup>192</sup> Furthermore, a definition of "publication" which would protect phonograph records would necessitate a change in United States domestic law, a prospect which would probably alienate American composers' groups otherwise disposed to support the treaty.<sup>193</sup>

Although UCC obligates all its members to protect a work published in one member state, residents of country *A* who publish work in country *B* and then seek protection in *A* must still comply with *A*'s formalities.<sup>194</sup> A concession to the United States, this provision guarantees that the Convention will not excuse American residents who publish abroad from complying with the United States manufacturing clause.<sup>195</sup>

*Unpublished works.*—UCC protects any unpublished work produced by a national of a member state, without requiring

<sup>192</sup> See authorities cited note 190 *supra*.

<sup>193</sup> A recording is not in itself a copy of the work recorded within the meaning of 17 U.S.C. § 1 (Supp. 1952). *Corcoran v. Montgomery Ward Co.*, 121 F.2d 572 (9th Cir. 1941) (phonograph records); *White-Smith Music Pub. Co. v. Apollo Co.*, 209 U.S. 1 (1907) (player piano rolls). And mere broadcast or performance of a recording or script is not a publication. *Ferris v. Frohman*, 223 U.S. 424 (1912) (theatrical performance); *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) (broadcast); *Nutt v. National Institute, Inc.*, 31 F.2d 236 (1st Cir. 1929) (lecture).

The general doctrine has, however, been surrounded by limitations. Thus, the sale of a phonograph record may be a publication. *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950). *Contra*: *Yacubian v. Carroll*, 74 U.S.P.Q. 257 (Calif. Dist. Ct. 1947). And using the musical laugh of "Woody Woodpecker" in broadcasts and motion picture cartoons constitutes "making [the laugh] public" under the California Civil Code. *Blanc v. Lantz*, 83 U.S.P.Q. 137 (Calif. Super. Ct. 1949). For a discussion of the peculiar problems of phonograph records and the publication issue, see Dubin, *Copyright Aspects of Sound Recordings*, 26 So. CALIF. L. REV. 139 (1953); MacDonald, *The Law of Broadcasting in FEDERAL BAR ASS'N*, 7 COPYRIGHT PROBLEMS ANALYZED 31, 44-46 (1952).

On the attitude of American groups toward incorporating the Berne rule in UCC, see AMERICAN BAR ASS'N, REPORT OF THE CHAIRMAN OF THE COMMITTEE ON INTERNATIONAL COPYRIGHTS 16-22 (1953); AMERICAN BAR ASS'N, REPORT OF THE CHAIRMAN OF THE SUBCOMMITTEE ON COPYRIGHTS OF THE COMMITTEE TO COOPERATE WITH THE UNITED NATIONS AND UNESCO, Respecting the Geneva Universal Copyright Convention 11-12 (1952). Also see HOWELL, *op. cit. supra* note 4, at 61-67.

<sup>194</sup> UCC, Art. II, § 3.

<sup>195</sup> See *Hearings, supra* note 6, at 69-82.

the author to fulfill any formalities.<sup>196</sup> Copyright issues even though the author both resided and created the work in a non-member nation.<sup>197</sup>

#### DURATION OF COPYRIGHT

In basing the duration of copyright on domestic law, UCC enacts the "comparison of terms" rule which Berne recently discarded.<sup>198</sup> Under the UNESCO plan, the term during which a published work receives protection is either that prescribed by the protecting nation or the one enacted by the nation in which the work was first published, whichever term is shorter.<sup>199</sup> For unpublished works, the period is similarly determined by comparing the law of the protecting nation of which the author is a national; again the shorter term prevails.<sup>200</sup>

UCC, however, assures a minimum period of protection. If the domestic law of a member state bases duration on the date of publication, that nation must protect the foreign author for at least twenty-five years thereafter.<sup>201</sup> A country which measures duration by the author's life must extend protection for a minimum of twenty-five years after the foreign author's death.<sup>202</sup> Since the domestic law of every principal nation currently provides a term longer than the minimum which the Convention guarantees,<sup>203</sup> simple comparison of terms will usually decide how long protection lasts.

<sup>196</sup> UCC, Art. II, § 2; *id.*, Art. III, § 4.

<sup>197</sup> This construction seems to follow from UCC, Art. II, § 2: "Unpublished works of nationals of each Contracting State the same protection as that other State accords to unpublished works of its own nationals."

<sup>198</sup> See p. 192 *supra*.

<sup>199</sup> For published works, the state in which protection is sought need not give protection for a longer period than that of the state of publication. UCC, Art IV, § 4. And the protecting nation may give a shorter term of protection if its domestic law so provides. See *id.*, Art. II, § 1; *Report of the Rapporteur-General*, *supra* note 165, at 51-52.

<sup>200</sup> The method of computing is the same as for published works, note 199 *supra*, but the term of the country of which the author is a national is used, instead of the country of first publication. UCC, Art. II, § 2.

<sup>201</sup> UCC, Art. IV, § 2.

<sup>202</sup> *Ibid.*

<sup>203</sup> See note 103 *supra*; 2 UNESCO COPYRIGHT BULL. 70-81 (No. 2-3 1949).

For the purposes of comparing terms, a nation which makes copyright renewable for consecutive periods is deemed to grant protection for the aggregate of the terms.<sup>204</sup> But a member state need not protect a work for longer than the first term if the author does not comply with renewal requirements.<sup>205</sup> For instance, United States law confers copyright for twenty-eight years, renewable for one identical period.<sup>206</sup> Hence, UCC considers the American term to be fifty-six years. But an author whom UCC protects by applying United States law must renew after twenty-eight years.<sup>207</sup>

The United States delegation argued that the period should depend solely on the domestic law of the *protecting* nation, since comparing terms would be unduly complex.<sup>208</sup> The Conference rejected this proposal on the ground that European experience with the comparison of terms rule had proved it workable.<sup>209</sup> The suggested alternative seemed to favor the United States, where copyright has a relatively short duration;<sup>210</sup> European and South American law would have granted American works lengthy protection abroad,<sup>211</sup> while United States law abbreviated protection of foreign works here.<sup>212</sup>

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The United States has the shortest fixed term, lasting at most fifty-six years. In Yugoslavia, protection endures after the death of the author, during the life of an unremarried spouse and until the author's youngest child reaches the age of twenty-five. *Ibid.*

<sup>204</sup> UCC, Art. IV, § 4.

<sup>205</sup> *Ibid.*

<sup>206</sup> 17 U.S.C. §§ 24-25 (Supp. 1952).

<sup>207</sup> See UCC, Art. III, § 5.

<sup>208</sup> *Report of Rapporteur-General*, *supra* note 165, at 51.

<sup>209</sup> *Id.* at 51-52.

<sup>210</sup> See authorities cited note 203 *supra*.

<sup>211</sup> See 2 UNESCO COPYRIGHT BULL. 70-81 (No. 2-3 1949).

<sup>212</sup> The dispute had limited significance. In the United States, only 11 per cent of all original copyrights are in fact renewed. Evans, *Copyright and the Public Interest*, 2 UNESCO COPYRIGHT BULL. 3, 10 (No. 1 1949). Also see Chafee, *supra* note 4, at 506-11. Only those concerned with musical works seem particularly interested in extending protection through renewal. Confidential Interview.

RESERVATIONS AND UCC'S EFFECT ON PREVIOUS AGREEMENTS

Unlike Berne, UCC permits no reservations.<sup>213</sup> Although the Conference realized that such a stipulation might make some nations hesitant to join, it felt that complete adherence was necessary to insure minimum standards of protection.<sup>214</sup> In addition, Berne nations feared that some Union members might renounce its high standards and enforce only the less stringent protection afforded by UCC.<sup>215</sup> Hence UCC specifies that the Berne Union shall remain in full force among its members.<sup>216</sup> To discourage any exodus from Berne, UCC provides that works originating in a nation which withdraws from the Union after January 1, 1951 (before final formulation of UCC) shall not enjoy protection in Berne countries.<sup>217</sup>

Although Berne was left in force to maintain high standards of protection, in at least one instance it undermines the protection guaranteed by UCC. Japan, a Berne member, has refused to accept revisions relating to the duration of the translation right.<sup>218</sup> She remains bound by the 1886 Convention which allows free translation ten years after publication.<sup>219</sup> Under UCC's requirement, a Japanese translator would have to compensate the author, no matter when he translated.<sup>220</sup> Since Japan objected to the UCC provision, she signed the UNESCO Convention<sup>221</sup> only when assured that she would have to apply it only to works from *non-Berne*

<sup>213</sup> UCC, Art. XX; *Report of Rapporteur-General*, *supra* note 165, at 64-66.

<sup>214</sup> *Report of the Rapporteur-General*, *supra* note 165, at 64-66.

<sup>215</sup> See *id.* at 62-63; UCC, Art. XVII.

<sup>216</sup> UCC, Art. XVII; Appendix Declaration to Art. XVII.

<sup>217</sup> See authorities cited note 216 *supra*.

<sup>218</sup> 1 LADAS, *op. cit. supra* note 9, at 393; 2 *id.* at 1054-56.

<sup>219</sup> BERNE CONVENTION OF 1886, Art. V.

<sup>220</sup> See pp. 203-4 *supra*.

<sup>221</sup> Japan was the last country to sign the treaty, doing so only two days before the treaty was closed for signatures. Communication to the *Yale Law Journal* from Dr. Arpad Bogsch, Copyright Division, UNESCO, dated March 31, 1953, in *Yale Law Library*. And see UCC, Art. VII, § 1; 163 *Publishers Weekly* 197 (1953).

countries.<sup>222</sup> Thus, despite the fact that UCC prohibits reservations, Japan does not have to meet the Convention's standards in this respect.

UCC would leave inter-American arrangements in force. In case of conflict, UCC would prevail over present treaties, but yield to agreements signed after its adoption.<sup>223</sup>

#### EFFECT OF UCC ON THE UNITED STATES

##### PROTECTION OF AMERICANS ABROAD

UCC measures the rights of foreign authors by those vested in nationals of the country where protection is sought; by deferring so frequently to domestic legislation, the Convention makes little attempt to equate substantive protection granted in one country to that afforded in others. As a consequence, ratification by the United States would assure American authors of greater protection abroad than at home. Unlike the United States, all European and most Latin-American nations protect an author's moral rights<sup>224</sup> and give composers considerable control over recordings and noncommercial uses of their music.<sup>225</sup>

Adopting UCC would not, of course, augment Americans' present rights in Berne countries. Since Berne remains in effect under UCC, publication in Canada might remain an open door to protection in Europe. But UCC would significantly increase protection granted to American authors in non-Berne regions—notably Latin America.<sup>226</sup>

<sup>222</sup> *Report of Rapporteur-General*, *supra* note 165, at 64–66. Technically, the 1886 ten-year translation provision is in force in Japan, but there seems to be considerable doubt whether or not Japan honors it. Ostertag, *Report of the Principal Events in the Domain of Copyright from 1931 to 1937*, DROIT D'AUTEUR (July, 1937) (translated from the French by Gertrude Rosenstein). An American publisher has recently charged the Japanese with wholesale piracy. See New York Times, Feb. 19, 1954, p. 5, col. 8.

<sup>223</sup> UCC, Art. XVIII.

<sup>224</sup> For a comparison of provisions on moral rights, see 2 UNESCO COPYRIGHT BULL. 58–67 (No. 2–3 1949).

<sup>225</sup> See 2 *id.* at 84, 86–88.

<sup>226</sup> For a discussion of the inadequacy of present protection in Latin America, see pp. 183–86 *supra*.

AMERICAN PROTECTION OF FOREIGN AUTHORS UNDER UCC

The substantive rights of foreigners in the United States would be confined to those which domestic law extends to native authors.<sup>227</sup> Even though the United States currently offers less substantive protection than Americans can get abroad, UCC would make it simpler for foreign authors to obtain American copyright. Publication with notice would still be required, but no further formalities could be imposed.<sup>228</sup> The United States could no longer require that foreign works appearing in English be printed here, nor could it force a foreign author to register or deposit copies in the Copyright Office.<sup>229</sup>

<sup>227</sup> See p. 203 *supra*. A foreign author will receive only limited protection against damage to his reputation by alterations by movie, television, or radio companies. See *Curwood v. Affiliated Distributors*, 283 Fed. 219 (S.D.N.Y. 1922) (motion picture producer acquiring movie rights to use author's name and story did not acquire right to use author's name on different story; enjoined); *Roeder, The Doctrine of Moral Right*, 53 HARV. L. REV. 554 (1940); note 95 *supra*. Also see cases collected in Note, 23 A.L.R.2d 244 (1952).

If a foreign composer grants one American record company a license to record his copyrighted music, he must permit all others to do likewise, 17 U.S.C. § 1(e) (Supp. 1952); *Shilkret v. Musicraft Records, Inc.*, 131 F.2d 929 (2d Cir. 1942) (same for unpublished music). Generally, see Dubin, *Copyright Aspects of Sound Recordings*, 26 SO. CALIF. L. REV. 139 (1953).

Neither works of applied art nor choreographic creations are entitled to copyright under 17 U.S.C. § 1 (Supp. 1952). But see *New York Times*, Jan. 11, 1953, § 2, p. 10, col. 1; *New York Times*, Dec. 28, 1952, § 2, p. 13, col. 5, reporting issuance of a copyright for a dramatic dance sequence. The issue seems to remain very much in doubt. Mirell, *Legal Protection for Choreography*, 27 N.Y.U.L. REV. 792 (1952). On the status of applied art, see *Mazer v. Stein*, 347 U.S. 201 (1954). See also Bernini, *Protection of Designs: United States and French Law*, 1 AM. J. COMP. L. 133 (1952); Blunt, *America Again Strives for Recognition of Design Rights*, 1 ARB. J. (N.S.) 392 (1946); Kelley, *Design Patents and Copyrights: The Scope of Protection*, 21 GEO. WASH. L. REV. 353 (1953); Note, *The Vestal Bill for the Copyright Registration of Designs*, 31 COL. L. REV. 477 (1931); Note, *Protecting the Artistic Aspects of Articles of Utility: Copyright or Design Patent?*, 66 HARV. L. REV. 877 (1953); Note, *Copyright Protection in the Area of Scientific and Technical Works*, 38 IOWA L. REV. 334 (1953).

<sup>228</sup> See note 187 *supra* and accompanying text.

<sup>229</sup> *Ibid.*; UCC, Art. III, § 1. For present United States formalities, see text at notes 24-31 *supra*.

## DESIRABILITY OF AMERICAN RATIFICATION

Some spokesmen strenuously oppose American participation in UCC. Several of their objections fail to comprehend the Convention's real effect on present protection. At least one commentator stands against ratification on the ground that UCC, by preventing Americans from reprinting Communist publications without permission, might restrict the flow of information from Iron Curtain countries.<sup>230</sup> But the Convention would require the United States to copyright only those works emanating from signatory nations. Communist ratification is unlikely; although some of the satellites joined Berne before they became Communist,<sup>231</sup> the USSR has never participated in an international copyright organization.<sup>232</sup> And to adhere to UCC, a nation must obligate itself to assure the foreign author of payment and of a "correct" translation of his work.<sup>233</sup> Living up to such standards would interfere with current Soviet practices.<sup>234</sup>

Even if Russia joined UCC, the real stumbling block would continue to be Communist censorship, not American copyright. So long as the Soviet regime controls the Communist press, she would probably be glad to have news reports reprinted in the United States.<sup>235</sup> Even if the USSR wished to

<sup>230</sup> Warner, *The UNESCO Universal Copyright Convention*, [1952] Wis. L. REV. 493, 499-503. But see Schulman, *Another View of Article III of the Universal Copyright Convention*, [1953] Wis. L. REV. 297.

<sup>231</sup> The satellite nations which are members of Berne are: Bulgaria (1921), Hungary (1922), Poland (1920), Rumania (1927), and Czechoslovakia (1921), DROIT D'AUTEUR 1 (Jan. 15, 1953). But no satellite country has yet ratified the Brussels Revision of 1948, *ibid.*, although Czechoslovakia, Hungary, and Poland attended the Conference at Brussels as accredited participants. U.S. STATE DEP'T REPORT OF THE UNITED STATES OBSERVER DELEGATION TO THE BRUSSELS COPYRIGHT CONFERENCE—1948 8-9 (1949).

<sup>232</sup> 2 UNESCO COPYRIGHT BULL. 152 (No. 4 1949).

<sup>233</sup> See pp. 203-4 *supra*.

<sup>234</sup> See Chafee, *supra* note 4, at 523.

<sup>235</sup> The same is true for artistic works, such as plays or novels, which are distributed in the Soviet Union, and can therefore be assumed to have some propaganda value. And the Soviets would probably be overjoyed if their scholarly works in economics, sociology, political theory, and philosophy were widely read in this country. In addition, if someone here did reproduce a

prohibit reproduction of Russian publications, she could not prevent the United States Government from reprinting.<sup>236</sup> And UCC would not prevent American commentators from analyzing the content of Communist publications.<sup>237</sup> Any Western observer in Russia could report whatever he learned about the state of the Soviet Union, without hindrance from UCC. In effect, the Convention permits the United States to keep its meager contact with the Communist world.

A second argument is that the UNESCO plan would force the United States to repeal the manufacturing clause, thereby allowing publishers to cripple the American printing industry by patronizing lower-cost printers abroad.<sup>238</sup> This argument does not seem valid. In the first place, UCC would not require total abolition of the clause; the United States could still require its own nationals to print their works domestically.<sup>239</sup>

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Russian book and sold copies to the public, it is unlikely that the Soviet author would bring suit in the United States to enjoin the infringement.

<sup>236</sup> If the Federal Government republishes any type of information—artistic, scholarly, technical, or military—it cannot be sued as an infringer. Section 8 of the Copyright Code states: "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." 17 U.S.C. § 8 (Supp. 1952).

<sup>237</sup> Under UCC, foreigners will receive the same protection against infringement that Americans receive in the United States. UCC, Art. II. The test of unfair use of or comment on, the copyright work of another is "whether or not so much as has been reproduced—will materially reduce the demand for the original. If it has, the rights of the owner of the copyright have been injuriously affected. . . . The reduction in demand . . . must result from the partial satisfaction of that demand by the alleged infringing production. A criticism of the original work, which lessened its money value by showing that it was not worth seeing or hearing could not give any right of action for infringement." *Hill v. Whalen & Martell*, 220 Fed. 359, 360 (S.D.N.Y. 1914). See *Sampson & Murdock Co. v. Seaver-Radford Co.*, 140 Fed. 539, 541 (1st Cir. 1905). Also see *HOWELL, op. cit. supra* note 4, at 125-26; *Schulman, supra* note 230, at 309-10.

<sup>238</sup> *Hearings, supra* note 6, at 69-82.

<sup>239</sup> The Convention does not limit the right of a signatory nation to impose conditions precedent to copyright on its own nationals. See pp. 204-7 *supra*.

Even if UCC did require total abolition of the manufacturing clause, American publishers would probably continue to have their printing done in this country. See statement of R. L. Crowell, of Thomas Y. Crowell Co. in *Hearings, supra* note 6, at 64: "So we sent the manuscript to Barcelona, having found out about a good printer there . . . not only could they not beat United States prices



And although the Convention would bind this country to copyright foreign works printed abroad, granting such protection would not significantly injure American printers. If the foreign publisher anticipates a large American demand for a book, he currently arranges to have it printed here, whether or not the manufacturing clause requires him to do so.<sup>240</sup> While the cost of *printing* each copy declines as the number of copies increases, the cost of *shipping* each copy remains relatively uniform.<sup>241</sup> Hence, when large lots are involved, printing in the United States is cheaper than printing extra copies in Europe and shipping them to this country.<sup>242</sup>

If the foreign publisher foresees only a limited demand in the United States, however, he will probably be unable to arrange for an American printing.<sup>243</sup> The manufacturing clause is designed to force him to print in the United States.<sup>244</sup> But English publishers, faced with such a situation, presently risk piracy by shipping copies into this country rather than pay American printing costs.<sup>245</sup> Although conclusive evidence is unavailable, the foregoing analysis indicates

but . . . it took them about as long to estimate to us as it would for us to get the whole book manufactured and we haven't got the manuscript back yet. As far as we are concerned, once is enough."

<sup>240</sup> Testimony of Arthur E. Farmer, American Book Publishers Council, in *Hearings*, *supra* note 6, at 150-74. Mr. Farmer states: "A lot of Penguin books, of course are public domain books. . . . Within the last year Penguin of England has established a Penguin of Maryland and is now manufacturing the Penguin books for sale in this country. They are no longer, and they never were, able successfully to export the books to this country, so they have established an American branch and are manufacturing in Maryland." *Id.* at 164. The same is true for scientific works which are rarely, if ever, pirated. Communication to the *Yale Law Journal* from Warren Sullivan, John Wiley & Sons, Inc., dated February 4, 1953, in Yale Law Library; and for sheet music, which is not subject to the manufacturing clause, see *Hearings*, *supra* note 6, at 187. Also see 17 U.S.C. § 16 (Supp. 1952). It is unlikely that any printers would actually be thrown out of work by the abolition of the clause. See *Memoranda Regarding Probable Effects on the Printing Industry of Adoption of the Copyright Convention*, S. Doc. No. 99, 76th Cong., 1st Sess. (1939).

<sup>241</sup> *Hearings*, *supra* note 6, at 181-85. <sup>242</sup> *Id.* at 177-85.

<sup>243</sup> *Id.* at 164.

<sup>244</sup> See pp. 181-83 *supra*.

<sup>245</sup> See UNWIN, *THE TRUTH ABOUT PUBLISHING* 193-99, 269-80 (4th ed. 1946).

that the manufacturing clause simply denies copyright to foreign authors without protecting the American printing trades against foreign competition. In any event, the United States could protect its printers through tariff legislation, without refusing to protect foreign works.<sup>246</sup>

A third objection to UCC is that United States ratification would serve only to bolster foreigners' protection here, without substantially enhancing American rights abroad.<sup>247</sup> America, the argument runs, already enjoys excellent protection throughout the Berne Union.<sup>248</sup> But UCC potentially assures protection in non-Berne countries as well.<sup>249</sup> Furthermore, there is no guarantee that the United States will continue to bask in European protection if it refuses to accept the UNESCO Convention.<sup>250</sup> Berne permits its members to deny copyright to works coming from a non-Berne nation which does not extend adequate protection to material originating in Berne countries.<sup>251</sup> In the past, European nations have not invoked this provision principally because the United States seemed on the verge of joining Berne.<sup>252</sup> Were this country to reject UCC, a compromise pointedly designed to appeal to the United States,<sup>253</sup> Europe might understandably despair of ever securing approval of Berne's more demanding provisions. Then wholesale piracy could be expected

<sup>246</sup> For an excellent discussion, suggesting that the General Agreement on Tariffs and Trade, if enacted, would supplant the manufacturing clause, see Note, *The Manufacturing Clause: Copyright Protection of the Foreign Author*, 50 COL. L. REV. 686, 697 (1950). To the same effect, see *Hearings before Committee on Foreign Affairs on International Trade Organization*, H.J. Res. 236, 66-70, 519-20, 539-48, 715-17 (1950); Communication to the *Yale Law Journal* from Dr. Clair Wilcox, Professor of Economics, Swarthmore College, dated October 15, 1952, in Yale Law Library.

<sup>247</sup> See Warner, *The UNESCO Universal Copyright Convention*, [1952] WIS. L. REV. 493, 499-505.

<sup>248</sup> *Id.* at 505.

<sup>249</sup> See text at note 265 *infra*.

<sup>250</sup> *Hearings*, *supra* note 6, at 63, 88-99; Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 198, 201 (1953); Schulman, *supra* note 230, at 304. Confidential communications to the *Yale Law Journal*.

<sup>251</sup> See pp. 194-96 *supra*.

<sup>252</sup> See authorities cited note 124 *supra*.

<sup>253</sup> See text at note 163 *supra*.

to follow.<sup>254</sup> Hence, failure to ratify may seriously prejudice American authors' rights in the Berne Union.

When the foregoing arguments against ratification are disregarded it becomes clear that the real choice is whether or not to curtail international piracy. Piracy may have one distinct advantage; it may promote wider dissemination of foreign works. On the other hand, its major drawback is that it deprives creators of potential income in an era in which most of them must sell their works to live. Publishers who pirate are not noted for dividing their profits with authors.

The ultimate question for resolution, then, is whether it is a sound policy to deprive authors of income from foreign sales. Some writers espouse international piracy on the ground that the prospect of a foreign market does not motivate authors to create; that they generally anticipate domestic sales only.<sup>255</sup> Considering the volume of copyrightable materials presently flowing between countries,<sup>256</sup> this hypothesis is of questionable validity. Furthermore, failure to protect foreign works may stunt domestic authorship to some extent. Publishers, like those in nineteenth-century America,<sup>257</sup> may prefer to pirate foreign material rather than pay royalties to native creators.

Regardless of how much it stimulates artistic production, international copyright protection can be defended on the ground that artists, whose efforts provide the world with so much enjoyment and enrichment, deserve maximum compensation. Although most creators might continue to produce

<sup>254</sup> See authorities cited note 250 *supra*.

<sup>255</sup> Warner, *supra* note 247, at 505.

<sup>256</sup> For a description of the growth of American exports from \$2,000,000 in 1891 to over \$50,000,000 in 1950, see *Hearings*, *supra* note 6, chart B, at 221. And the number of translations made overseas has jumped since the end of World War II. UNESCO, STATISTICAL REPORT ON BOOK PRODUCTION 1937-1950 Table 4A, 33 *et seq.* (1952). See also Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 198, 199-200 (1953). On the rise in British exports, see 163 *Publishers Weekly* 292, 1360 (1953).

<sup>257</sup> See CAREY, *THE INTERNATIONAL COPYRIGHT QUESTION CONSIDERED* (1872); CAREY, *LETTERS ON INTERNATIONAL COPYRIGHT* (1853); MORGAN, *ANGLO-AMERICAN INTERNATIONAL COPYRIGHT* (1879).

even though ill-paid, a sound policy would assure them of something better.

. . . not long ago, a group of representatives . . . endeavored to do away with copyright altogether. . . . 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.<sup>258</sup>

#### CONCLUSION

While UCC is probably acceptable to the bulk of American authors,<sup>259</sup> publishers,<sup>260</sup> and representatives of the mass media,<sup>261</sup> it is opposed by a small, but vociferous group of printers' unions<sup>262</sup> and book manufacturers.<sup>263</sup> This opposition should not be allowed to prevail. American ratification will necessitate no harmful changes in domestic copyright law,<sup>264</sup> nor will it put this country at a disadvantage in the "Cold War." UCC's success will ultimately depend on the United States since most nations will probably condition their acceptances on American participation.<sup>265</sup> UCC calls upon this country to assume leadership in the world cultural community.

<sup>258</sup> WYLIE, OPUS 21, p. 13 (1949).

<sup>259</sup> *Hearings*, *supra* note 6, at 10, 102-8; New York Times, Apr. 9, 1954, p. 14, col. 7.

<sup>260</sup> *Id.* at 26, 63.

<sup>261</sup> *Id.* at 89 *et seq.*

<sup>262</sup> *Id.* at 56, 69, 76, 80.

<sup>263</sup> *Id.* at 35.

<sup>264</sup> The following changes in American law will be necessary: 1) repeal of § 16, the manufacturing clause, as applied to books and periodicals written by nonresident aliens in English, 17 U.S.C. § 16 (Supp. 1952); 2) repeal of § 14, giving the Register of Copyrights the power to demand copies for deposit from foreign authors, 17 U.S.C. § 14 (Supp. 1952); 3) repeal of § 1(e) in so far as it requires a special Presidential proclamation for protection of mechanical reproductions, 17 U.S.C. § 1(e) (Supp. 1952); 4) repeal of the formalities of registration and notice, 17 U.S.C. §§ 10, 11, 19 (Supp. 1952); and 5) amendment of § 9, exempting Convention members from the requirements of the foregoing sections, 17 U.S.C. § 9 (Supp. 1952). For the text of enabling legislation, see S. 2559, H.R. 6616, H.R. 6670, 83d Cong., 1st Sess. (1953). [EDITOR'S NOTE. These bills were enacted on September 2, 1954 as P.L. 743 (83rd Cong., 2d Sess.), which went into effect September 16, 1955.]

<sup>265</sup> Confidential communications to the *Yale Law Journal*. The treaty permits ratification by one country on the ratification by another. UCC, protocol 3, § 1.



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## Rules Governing the Competition

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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 8½" x 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 permanent *home address*.
  - (f) In fairness to all contestants, as papers are presumed to

## 248 *Rules Governing the Competition*

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 15th—or such earlier date as the dean may specify. Winning papers must be certified to the Society not later than August 31st.
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 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*

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### 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).

### UNIVERSITY OF ARKANSAS SCHOOL OF LAW

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

### BAYLOR UNIVERSITY SCHOOL OF LAW

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

### BROOKLYN LAW SCHOOL OF ST. LAWRENCE UNIVERSITY

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

### CHICAGO-KENT COLLEGE OF LAW

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

### UNIVERSITY OF COLORADO SCHOOL OF LAW

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

## 250 *Schools Contributing to Previous Symposia*

### COLUMBIA UNIVERSITY SCHOOL OF LAW

Franklin Feldman, *The Manufacturing Clause: Copyright Protection to the Foreign Author*, FOURTH SYMPOSIUM 76 (1952).

### DICKINSON SCHOOL OF LAW

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

### UNIVERSITY OF GEORGIA SCHOOL OF LAW

W. Marion Page, *Copyright Laws in Georgia History*, SECOND SYMPOSIUM 151 (1940).

### HARVARD UNIVERSITY LAW SCHOOL

Paul Gitlin, *Radio Infringement of Music Copyright*, FIRST SYMPOSIUM 61 (1939).

Melville B. Nimmer, *Inroads on Copyright Protection*, FOURTH SYMPOSIUM 2 (1952).

Arthur L. Stevenson, Jr., *Moral Right and the Common Law: A Proposal*, SIXTH SYMPOSIUM 89 (1955).

### UNIVERSITY OF IDAHO COLLEGE OF LAW

Reginald Ray Reeves, *Superman v. Captain Marvel: or, Loss of Literary Property in Comic Strips*, FIFTH SYMPOSIUM 3 (1954).

### STATE UNIVERSITY OF IOWA COLLEGE OF LAW

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).

Gilbert K. Bovard, *Copyright Protection in the Area of Scientific and Technical Works*, FIFTH SYMPOSIUM 68 (1954).

### UNIVERSITY OF LOUISVILLE SCHOOL OF LAW

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

## *Schools Contributing to Previous Symposia 251*

### UNIVERSITY OF MICHIGAN LAW SCHOOL

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

Richard W. Pogue, *Borderland—Where Copyright and Design Patent Meet*, SIXTH SYMPOSIUM 3 (1955).

### NEW YORK UNIVERSITY LAW SCHOOL

Arthur S. Katz, *The Doctrine of Moral Right and American Copyright Law: A Proposal*, FOURTH SYMPOSIUM 78 (1952).

### OHIO STATE UNIVERSITY COLLEGE OF LAW

Sheldon M. Young, *Plagiarism, Piracy, and the Common Law Copyright*, FIFTH SYMPOSIUM 205 (1954).

### UNIVERSITY OF OKLAHOMA SCHOOL OF LAW

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

### UNIVERSITY OF OREGON SCHOOL OF LAW

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

### ST. LOUIS UNIVERSITY SCHOOL OF LAW

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

### STANFORD UNIVERSITY SCHOOL OF LAW

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

### TEMPLE UNIVERSITY SCHOOL OF LAW

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

### UNIVERSITY OF TEXAS SCHOOL OF LAW

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).

## 252 *Schools Contributing to Previous Symposia*

### TULANE UNIVERSITY COLLEGE OF LAW

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

### WAKE FOREST COLLEGE SCHOOL OF LAW

Charles O. Whitley, *Copyrights and the Income Tax Problem*, FOURTH SYMPOSIUM 158 (1952).

James A. Webster, Jr., *Protecting Things Valuable—Ideas*, FIFTH SYMPOSIUM 158 (1954).

### WASHINGTON UNIVERSITY OF ST. LOUIS SCHOOL OF LAW

Milton H. Aronson, *The Development of Motion Picture Copyright*, THIRD SYMPOSIUM 338 (1940).

### WESTERN RESERVE UNIVERSITY SCHOOL OF LAW

Frank D. Emerson, *Public Performance for Profit, Past and Present*, THIRD SYMPOSIUM 52 (1940).

### UNIVERSITY OF WISCONSIN LAW SCHOOL

Paul P. Lipton, *The Extent of Copyright Protection for Law Books*, SECOND SYMPOSIUM 11 (1940).

Frank L. Bixby, *Hurn v. Oursler After Twenty Years*, SIXTH SYMPOSIUM 140 (1955).

### YALE UNIVERSITY SCHOOL OF LAW

Walter L. Pforzheimer, *Copyright Protection for the Performing Artist in his Interpretive Rendition*, FIRST SYMPOSIUM 9 (1939).

Irvin E. Bernstein, *The Motion Picture Distributor and the Copyright Law*, SECOND SYMPOSIUM, 119 (1940).

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