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THE UNIVERSAL COPYRIGHT CONVENTION: ITS EFFECT ON UNITED STATES LAW

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On September 16, 1955, slightly more than three years after its execution at Geneva, Switzerland, the Universal Copyright Convention came into force.¹ Sixteen countries including the United States have now ratified the convention.² When the balance of the forty signatory nations³ have deposited their instruments of ratification with the Director-General of UNESCO,⁴ the long sought goal of a "universal republic of letters"⁵ may at last be realized.

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² The Universal Copyright Convention (hereinafter cited as U.C.C.) was signed at Geneva on Sept. 6, 1952 by thirty-six nations including the United States. Four other countries signed subsequently. See note 3 infra. President Eisenhower submitted the convention, Exec. M, 83d Cong., 1st Sess., to the Senate on June 10, 1953 for its advice and consent to ratification. 99 Cong. Rec. 6348 (1953). The Senate gave its approval on June 25, 1954. 100 Cong. Rec. 8495 (1954). Implementing legislation, H.R. 6616 and S.2559, 83d Cong., 1st Sess. (1953), was passed by the House on Aug. 3, 1954 and by the Senate on Aug. 18, 1954, and was approved by the President on Aug. 31, 1954. President Eisenhower signed the instrument of ratification on Nov. 5, 1954, and it was deposited in Paris on Dec. 6, 1954, completing the final step required for United States ratification. Under the terms of the U.C.C., the convention was to become effective three months after deposit of twelve instruments of ratification, acceptance, or accession. U.C.C. art. IV. Monaco, on June 16, 1955, became the twelfth country to deposit its instrument of ratification with the Director-General of UNESCO in Paris. N.Y. Times, June 17, 1955, p. 1, col. 7. See supra note 1.

³ Andorra (Dec. 30, 1952); Cambodia (Aug. 3, 1953); Chile (Jan. 17, 1955); Costa Rica (Dec. 7, 1954); German Federal Republic (June 3, 1955); Haiti (Sept. 1, 1954); Holy See (July 5, 1955); Israel (April 6, 1955); Laos (Aug. 19, 1954); Luxembourg (July 15, 1955); Monaco (June 16, 1955); Pakistan (April 28, 1954); Philippines (Aug. 19, 1955); Spain (Oct. 27, 1954); United States (Dec. 6, 1954). France deposited its ratification on Oct. 15, 1955. The convention will not become operative with respect to that country until Jan. 15, 1955. For current list of countries that have ratified the U.C.C., consult UNESCO, Information Officer, United Nations, New York 17, New York.

⁴ Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Cuba, Denmark, El Salvador, Finland, France, German Federal Republic, Guatemala, Haiti, Holy See, Honduras, India, Ireland, Italy, Japan, Liberia, Luxembourg, Mexico, Monaco, Netherlands, Nicaragua, Norway, Peru, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Yugoslavia. Of these, thirty-six countries signed at Geneva, and the following four countries added their signatures later: Belgium (Dec. 30, 1952); Israel (Dec. 16, 1952); Japan (Jan. 3, 1953) and Peru (Dec. 2, 1952). For a list of those signing U.C.C. and annexed Protocols 1, 2, and 3, see Exec. M, supra note 1.

⁵ U.C.C. art. VIII (1). Any state which has not signed the convention may accede thereto by deposit of an instrument of accession with UNESCO. U.C.C. art. VIII (2), (3).

⁶ Bowker, COPYRIGHT, ITS HISTORY AND ITS LAW v (1912). The Soviet Union and its satellites are not parties to the U.C.C. Iron Curtain nations may obtain protection under the convention by initially publishing their works in a member country of the U.C.C. with the appropriate copyright notice. U.C.C. art. II (1). Reciprocal protection is unavailable to convention nationals in Russia and other Iron Curtain countries. See Committee on Foreign Relations, Report on Exec. M, S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 16-17 (1954). However, Russia and any other nations which did not sign may hereafter accede. U.C.C. art. VIII (2).
The effective date of the convention is significant from two standpoints: (1) internationally, it marks the first time in United States history that this country has become a full-fledged participant in a world-wide system for the copyright protection of literary, scientific, and artistic works, and (2) domestically, it activates the first major group of amendments to the United States Copyright Act since that law was approved on March 4, 1909.

These amendments stem from the provisions of article X of the Universal Copyright Convention, under which each of the parties undertook to adopt such implementing legislation as might be necessary to insure application of the convention within its own jurisdiction. Prior to the deposit of the United States ratification, a number of revisions were enacted by Public Law 743 of the 83d Congress to bring our copyright law into harmony with the terms of the convention. These amendments became effective simultaneously with the coming into force of the Universal Copyright Convention.

It is appropriate, at this time, to examine the revisions introduced by Public Law 743 in the light of (1) the international copyright objectives which led to their enactment, (2) the growing trend toward liberalizing the formal requirements of the United States Copyright Act, and (3) the possibility of further changes in the Copyright Act.

I. The Trend Toward International Copyright

The delegations of the various governments convening at Geneva from August 18 to September 6, 1952, to draft the text of the Universal Copyright Convention were faced with a two-fold problem: (1) to eliminate or modify in the projected convention those provisions of the Berne Convention which had impelled the United States and most of the other countries of the western hemisphere to remain outside the Berne orbit, and (2) to preserve the support of the Berne Union countries. In seeking a solution to this problem, the

6. The United States is a party to the Mexico City Convention of Jan. 27, 1902 (effective now only as to El Salvador) and the Buenos Aires Convention of Aug. 11, 1910. Membership in these conventions is limited to countries of the Western Hemisphere. For the text of Mexico City, Buenos Aires and other inter-American copyright conventions, see CANNES, COLBORN, AND PIAZZA, COPYRIGHT PROTECTION IN AMERICAS (1950).

7. 35 STAT. 1075 (1909). For an excellent review of the general revision of 1909 and individual amendments to the copyright law to date, see GOLDMAN, THE HISTORY OF U.S.A. COPYRIGHT LAW REVISION, 1901-1954.


9. Id. § 4 states: "This Act shall take effect upon the coming into force of the Universal Copyright Convention in the United States of America."

Geneva delegates, particularly those from the United States, had to bear in mind the impediments that had deterred this country for more than half a century from participating in a worldwide system of international copyright protection.

For the United States, the road to Geneva was a long one. It was traversed in two stages. The first covered the period up to the closing of the nineteenth century when, for the first time, copyright protection was granted to foreign authors in this country, and the United States entered upon a series of reciprocal copyright pacts with other nations. The second stage was reached in recent years with the maturing conviction of commentators and spokesmen in the copyright field that the existing basis of American copyright protection abroad was insecure and inadequate. Even then, only through an effective multipartite convention there any real hope of achieving universal protection for the intellectual productions of creators of all nationalities.

A. Early Domestic Legislation

The first Copyright Act adopted in the United States in 1790 limited its benefits to American citizens or residents. This restriction echoed the prevailing practice under the copyright legislation enacted by various states before the adoption of the Constitution. The encouragement accorded to piracy of the works of foreign authors engendered considerable resentment, particularly by British authors who, because of the common language, suffered most from appropriation and alteration of their works by American booksellers. In

11. The United States delegation was made up of leading copyright experts of the major literary and artistic fields: Arthur Farmer (book publishing); Herman Finkelstein (performing rights); Sidney M. Kaye (broadcasting and records); John Schulman (author's rights). The delegation was headed by Luther H. Evans, then Librarian of Congress, and also included Arthur Fisher, Register of Copyrights, and Edward A. Sargoy, as unofficial advisor. See Dubin, The Universal Copyright Convention, 42 CALIF. L. REV. 89, 90 n. 14 (1954).


15. Act of May 31, 1790, 1 STAT. 124. The act stated: "... 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." See Copyright enactments of the United States, 1783-1906, II (2d ed. 1906).

16. Connecticut (1783); Georgia (1786); Maryland (1783); Massachusetts (1783); New Hampshire (1783); New Jersey (1783); New York (1786); North Carolina (1783); Pennsylvania (1784); Rhode Island (1783); South Carolina (1784); Virginia (1785) (all the original thirteen states); Bowker, op. cit. supra note 5, at 35.

17. For text of address of British authors presenting their grievances, which was attached to the Clay report presented to the Senate on Feb. 2, 1837, see Bowker, op. cit. supra note 5. at 341-344.
1837, Henry Clay presented to the Senate a petition signed by Thomas Moore and fifty-five other British authors, protesting the invasion of their property rights, together with a report\(^1\) on a bill extending copyright protection in the United States to subjects of Great Britain\(^2\) and France.\(^3\) In his report, Clay pointed out that the constitutional provision which authorizes Congress "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"\(^4\) did not restrict Congress's power to natives or residents of this country. He stated in that respect:

\[
\ldots \text{Such a limitation would have been hostile to the object of the power granted. That object was to promote the progress of science and useful arts. They belong to no particular country, but to mankind generally. And it cannot be doubted that the stimulus which it was intended to give to mind and genius, in other words, the promotion of the progress of science and the arts, will be increased by the motives which the bill offers to the inhabitants of Great Britain and France.}^{22}
\]

Petitions for extending the range of American copyright protection were not limited to those signed by British authors. Such distinguished American men of letters as Washington Irving and James Fenimore Cooper joined in 1852 in urging congressional action.\(^23\) The opposition, however, of American book publishers who feared that English publishers would seize control of the domestic market proved powerful enough to quash several attempts to pass appropriate legislation.\(^24\)

The Chace Act of March 3, 1891, for the first time made it possible for foreign authors to secure in this country copyright protection on the same basis as American citizens.\(^25\) The International Copyright Act, as it was known, extended copyright to citizens of a foreign country that either offered pro-

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19. England extended protection to works of foreign authors on the basis of reciprocal protection being accorded to British authors in 1844. International Copyright Act, 7 & 8 Vict., c.12 (1844). The British law required a copy of each foreign work to be deposited at Stationer's Hall and the title entered on the Register.
20. France was the first country to give equal protection to nationals and foreigners alike. Act of July 19, 1793. See Kampelman, The United States and International Copyright, 41 Am. J. Int'l L. 406, 410 (1947).
22. See Report, supra note 18.
23. See Bowker, op. cit. supra note 5, at 347.
24. E.g., H.R. 32 (Harris bill), 36th Cong., 1st Sess. (1860), referred to House Committee on Foreign Affairs, but not reported. H.R. 779 (Baldwin bill), 40th Cong., 2d Sess. (1868), referred to Joint Committee on Library, but no further action taken. H.R. 470 (Cox bill), 42d Cong., 2d Sess. (1871), referred to Committee on Library, but no report made by committee. S. 646 (Sherman bill), 42d Cong., 2d Sess. (1872), referred to Joint Committee on Library, and on motion of Sen. Morrill of Maine ordered "postponed indefinitely." H.R. 5463 (Robinson bill) 47th Cong., 1st Sess. (1882), referred to Committee on Patents; no further action recorded.
tection to American citizens on substantially the same basis as its own nationals or was party to an international agreement guaranteeing reciprocal protection to which the United States could adhere.26 In either event, it was required that the existence of such reciprocal conditions be determined by presidential proclamation.27

In response to demands of the American book manufacturing interests, the Chace Act also incorporated a provision requiring, in the case of books, photographs, chromos or lithographs, that typesetting of the works be done within the United States. This provision, the so-called "manufacturing clause," proved during the half century that followed to be one of the most serious obstacles blocking United States participation in international copyright conventions, and on several occasions threatened to disrupt entirely copyright relations between the United States and other nations.28

Unlike the 1909 Copyright Act, which excluded from domestic manufacturing requirements "books of foreign origin in a language or languages other than English,"29 the manufacturing clause under the Chace Act applied to books printed in foreign languages. The severe nature of this restriction prompted the passage in 1905 of an act granting ad interim protection to works published abroad, conditioned upon their being manufactured in the United States within a period of one year of the date of original publication.30

The general revision and consolidation of the copyright laws of 1909, constituting substantially the present copyright act,31 broadened the scope of protection for foreign authors in two respects: (1) it added a third alternative for establishing the existence of reciprocal conditions in a foreign country, namely, when the foreign nation of which the author is a citizen or subject grants to United States citizens copyright protection substantially equal to that accorded to such foreign author in the United States; (2) it completely freed photographs and chromos from the burdens of the manufacturing clause and, most importantly, limited the applicability of that clause to books of foreign origin published in the English language.32 The 1909 Act also introduced the provision permitting an alien domiciled in the United States at the time of first publication to secure copyright here even in the absence of reciprocal copyright relations between the alien's native country and this country.33

26. Id. § 13.
B. Proclamations, Treaties, and Conventions

Under the Copyright Act of 1891, the extension of American copyright privileges to foreign nationals was conditioned upon a presidential finding of reciprocal protection for United States citizens in the countries of such foreign nationals. Following the exchange of diplomatic notes containing official assurances of reciprocal relations, the first presidential proclamations were issued in 1891 with respect to Belgium, France, Great Britain and its possessions, and Switzerland. Since then, similar proclamations have been issued with regard to thirty-two other countries, the most recent ones being President Eisenhower’s proclamations of November 10, 1953 and October 21, 1954 pertaining to Japan and India respectively.

In a number of cases, presidential proclamations have adverted not only to the existence of reciprocal copyright conditions in general but have also made specific reference to mechanical reproduction rights in musical compositions in accordance with the provisions of section 1(e) of the United States Copyright Act. Where the general proclamation does not include coverage of these rights, and there has been no special proclamation by the President in this regard, a foreign author or composer is not entitled, except for the Universal Copyright Convention, to the benefits of mechanical rights accorded under section 1(e).

The issuance of presidential proclamations establishing the existence of reciprocal relations with foreign nations does not remove the necessity of compliance by foreign copyright claimants with the various formalities embodied in the United States statutes relating to copyright notice, local manufacturing, filing of application for registration, and deposit of copies.

C. Inter-American Conventions

Prior to ratification of the Universal Copyright Convention, the United States had ratified only two multipartite copyright conventions, both confined

34. Proclamations with these four countries were effective July 1, 1891. 27 Stat. 981 (1891).
36. Diplomatic notes exchanged with Japan provide for a four-year period of reciprocal protection dating from April 28, 1952, the effective date of the Treaty of Peace with Japan. See Copyright Office circular letter, Nov. 27, 1953, enclosing copies of documents reestablishing copyright relations between the United States and Japan.
37. See Copyright Office circular letter, Oct. 21, 1954, attaching copy of proclamation which clarifies the right of Indian nationals to obtain protection in the United States subsequent to Aug. 15, 1947.
38. In the case of three countries, China, Thailand, and Hungary, copyright relations have been established by formal treaties rather than by exchange of diplomatic notes. See annotation, 17 U.S.C.A. § 9 (Supp. 1954).
40. Todia America Musica, Ltda. v. Radio Corp. of America, 171 F.2d 369 (2d Cir. 1948); Portuondo v. Columbia Phonograph Co., 81 F. Supp. 355 (S.D.N.Y. 1948); see text at notes 110-13 infra.
to countries of the western hemisphere. The first of these was the Mexico City Convention of 1902, adhered to by Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, and the United States. This convention did not completely eliminate observance of specified formalities for securing protection in the participating nations. The second convention was that signed at Buenos Aires. Ratified by all Latin American countries except Bolivia, Chile, Cuba, El Salvador, and Venezuela, it accorded automatic protection in all countries party to the convention without requiring compliance with formalities. The only requirement was that the work must contain a statement reserving the property right.

Although the Buenos Aires Convention was, until the Universal Copyright Convention, regarded as the most progressive step taken by the United States in the direction of establishing international copyright on a truly reciprocal basis, it has been subject to criticism apart from its restricted Pan-American scope. It has been generally considered inapplicable to unpublished works, although this view has been challenged in some quarters. Furthermore, since the Buenos Aires Convention does not contain specific language referring to mechanical reproduction rights, it has been held that these rights are not conferred in the United States upon authors of foreign signatory countries. Unless a presidential proclamation pertaining to mechanical reproduction rights has been issued, a citizen of a Buenos Aires Convention country cannot rely on that convention to avail himself of the rights accorded under section 1(e) of our copyright law.

42. Convention on Literary and Artistic Copyrights, signed at the Second International Conference of American States, Mexico City, Jan. 27, 1902. See CANYES, COLBORN, AND PIAZZA, op. cit. supra note 6, at 190. This convention remains in effect only as between the United States and El Salvador and between El Salvador and Dominican Republic. See UNesco COPYRIGHT BULLETIN Vol. 2, No. 1, p. 108 (1949).

43. The Mexico City Convention, art. IV, requires registration and deposit of copies of the work in the countries in which protection is desired, such registration and deposit to be made through the instrumentality of the copyright office of the author’s country. CANYES, COLBORN, AND PIAZZA, op. cit. supra note 6, at 191.


45. Buenos Aires Convention art. 3d. CANYES, COLBORN, AND PIAZZA, op. cit. supra note 6, at 199.

46. Ladas, Inter-American Copyright, 7 U. Pitt. L. Rev. 283, 289 (1941).

47. 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 661 (1938); Dubin, The Universal Copyright Convention, 42 CALIF. L. REV. 89 (1954).


49. Todamerica Musica Ltda. v. RCA, 171 F.2d 369 (2d Cir. 1948). The Buenos Aires Convention was the subject of a presidential proclamation on July 13, 1914, but the proclamation does not mention mechanical reproduction rights. 38 STAT. 1785-98 (1914).

The Buenos Aires Convention was subsequently modified in 1928 by the Havana Convention and in 1946 by the Washington Convention. The United States was not a party to the former; the Washington Convention was signed, but never ratified, by this country.

D. The Berne Convention

Until the adoption of the Universal Copyright Convention in 1952, the closest approach to establishing a comprehensive system governing international copyright was achieved by the Berne Convention. This convention was originally signed by ten nations that met at Berne from September 6 to 9, 1886, at the invitation of the Swiss government. The United States was represented among the twelve delegations that attended the diplomatic conference, but this country along with Japan declined to sign the document which on September 9, 1886, created the Berne Union. Since then, most of the major countries of the world, with the exception of the United States, Russia, China, and the bulk of the Latin American countries, have become members of the Berne Union during the course of successive additions to, and revisions of, the convention at Paris, Berlin, Berne, Rome, and Brussels.

The United States from the outset expressed sympathy with the general aim of the Berne Convention that authors of literary or artistic works, whatever their nationality, should be protected everywhere on the same footing as domestic citizens. At the same time, although eager to take part in the con-
sultive deliberations and to be represented by observers at the various conferences, this country steadfastly refrained from active participation in the Union. The difference in tariffs among nations was cited as one hurdle. In 1884, Secretary of State Frederick T. Frelinghuysen wrote in answer to an invitation from the Swiss Federal Council to attend a conference on the Berne draft:

... [T]his government sees grave difficulties in the way of general arrangement to embrace all countries in one scheme of copyright protection. The difference of tariffs of the several countries, and the fact that many other industries besides that of the author or artist are concerned in the production and reproduction of a book or work of art, must be borne in mind when considering any plan by which the originator of the work is to be vested with the right to produce or to prohibit its production in all other countries. ... 63

The fact that Congress had not taken steps to pass legislation fixing the extent to which foreign authors might enjoy copyright privileges in this country also increased the reluctance of the United States to enter any international pact at that time.64 But the enactment of the Chace Act of March 3, 1891, granting copyright protection to foreign authors in the United States seemingly removed the obstacle of congressional inaction and stimulated hopes of the imminent accession of this country to the Berne Convention.65

Following the passage of the general revision of the copyright laws in 1909, further efforts were made to secure the entry of the United States into the International Copyright Union.66 These efforts fell short of success for two reasons: (1) the emphasis in the Chace Act and in section 8 of the Act of 1909 relating to protection of foreign authors was on the establishment of copyright reciprocity with other countries on a bilateral basis,67 and (2) the existence of

63. Ibid.
64. President Cleveland, referring to the international copyright conference held at Berne, stated in his annual message to Congress on Dec. 6, 1886: "Inasmuch as the Constitution gives to the Congress the power to 'promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries,' this Government did not wish to become a signatory pending the action of Congress upon measures of international copyright now before it; but the right of adhesion to the Berne convention hereafter has been reserved. I trust the subject will receive at your hands the attention it deserves, and that the just claims of authors, so urgently pressed, will be duly heeded." 18 Cong. Rec. 6 (1886).
65. The United States sent a delegate to the Paris Conference for the revision of the Berne Convention in 1896. As at the other conferences, the U.S. delegate was not authorized, however, to commit the United States to adhesion. See Solberg supra note 62, at 95.
66. S. 4101 (Lodge bill), 67th Cong., 4th Sess. (1922); H. R. 11476 (Tincher bill), 67th Cong., 2d Sess. (1922); H. R. 13567 (Davis bill), and H. R. 14035 (Tincher bill), 67th Cong., 4th Sess. (1923); S. 74 (Lodge bill), H. R. 573 (Tincher bill), H. R. 2663 (Bloom bill), and H. R. 2704 (Lampert bill), 68th Cong., 1st Sess. (1923); H. R. 9137 (Dallinger bill), 68th Cong., 1st Sess. (1923); H. R. 11258 (Perkins bill), 68th Cong., 2d Sess. (1925), re-introduced without change as H. R. 5841, 69th Cong., 1st Sess. (1925). See Solberg supra note 62, at 100; Goldman, op. cit. supra note 7, at 7-16.
67. From 1891 through 1912, the United States took steps to enter into copyright relations with some twenty-two nations and their possessions through (a) exchange of diplo-
certain fundamental differences between the Berne Convention, as revised at Rome in 1928, and our own copyright laws. The principal areas in which adherence to Berne required changes in our domestic law were:

1. Formalities. A fundamental concept of the Berne Convention is that the enjoyment of copyright in any country of the Union is independent of compliance with any formality. This tenet conflicted with such requirements under United States law as insertion of notice of copyright, deposit of copies, registration of claim of copyright, and domestic manufacture of books and periodicals printed in the English language.

2. Categories of works protected. Members of the Berne Union are pledged to protect choreographic works, pantomimes, works of architecture, and oral works such as lectures, addresses, and sermons. These are not included among the list of works to which copyright protection is extended under the United States Copyright Act.

3. Moral rights. The Berne Convention gives the author an inalienable right to object to “every deformation, mutilation or other modification of the work, which may be prejudicial to his honor or to his reputation.” The moral rights doctrine, although embodied in the domestic copyright law of many European nations, is entirely absent from United States copyright law.


68. Berne Convention art. 4(2).
73. Berne Convention art. 2(1).
74. The constitutional provision relating to copyright (art. 1, § 8, cl. 8) limits the scope of copyright to “writings.” The Copyright Act provides that the “works for which copyright may be secured . . . shall include all writings of an author.” 17 U.S.C. § 4 (1952). Oral works are not among the classes of works protected, 17 U.S.C. § 5, unless the spoken words are deposited as a lecture, sermon, or address (prepared for oral delivery). 17 U.S.C. § 5(c) (1952). There has been a question whether choreographic works may be registered as dramatic works. See Mirel, Legal Protection for Choreography, 27 N.Y.U.L.Q. Rev. 792 (1952); N.Y. Herald Tribune, Jan. 11, 1953, § 4, p. 10, col. 3. Architectural drawings or plans are included, but the work of architecture itself is not protected. Cf. Miller v. Triborough Bridge Authority, 43 F. Supp. 298 (S.D.N.Y. 1942).
75. Berne Convention, revised at Rome, June 2, 1928, art. bis (1). The Brussels Revision has changed the language slightly so that it reads “. . . any distortion, mutilation or other alteration thereof, or any other action in relation to the said work.” UNESCO Copyright Bulletin, Vol. 1, No. 2, p. 118 (1948).
Radio and motion picture interests in this country cited this doctrine as an objection to adherence to the Berne Convention. 77

4. Term of protection. Since the revision at Brussels in 1948, the minimum term of protection required of parties to the Berne Convention has been the life of the author plus fifty years after his death. 78 Until the Brussels revision, countries of the Berne Union were not required to accord protection to foreign works for a greater period than that applicable to their own authors. 79 The "life plus fifty years" provision presented a major difficulty for the United States. Under our law, the term of protection is calculated from the date of publication for published works 80 and from the date of registration for unpublished works. 81

For nearly three decades, efforts to bring the United States into the Berne Union invariably became ensnared in the legislative attempts to harmonize domestic law with the principles of Berne. 82 Several bills proposed general revision of the copyright law, incorporating as part of such changes provisions necessary to permit adherence to the Berne Union. 83 But the development of radio and motion picture technology during the 1920's introduced new interests into the orbit of intellectual properties, and made more difficult the task of securing agreement on proposals to effect a general revision of the copyright law. Impetus to the movement for international copyright was given in 1934 when the executive branch of the government, independently of congressional efforts to amend the copyright law, sought the consent of the Senate for accession to the Berne Convention as revised at Rome in 1928. 84

This move was spurred by a series of developments growing out of the dissatisfaction abroad with the American position toward Berne. First was the

77. Brown, International Broadcasting: Its Copyright Aspect, 15 So. Calif. L. Rev. 164 (1942); Note, Adherence to the International Copyright Union and Proposed Copyright Reform, 12 Air L. Rev. 49 (1941). "A moral rights" clause was inserted into the Washington Convention, signed June 22, 1946, art. XI. The right may be contracted away by the author.

78. Berne Convention, revised at Brussels in 1948, art. 7 (1). In the case of cinematographic and photographic works and works of applied art, the term of protection is governed by the law of the country where protection is claimed but shall not exceed the term fixed in the country of origin. Anonymous or pseudonymous works are protected for a period of fifty years from date of publication.

79. Berne Convention, Berlin and Rome Revisions, art. 7. The national treatment provision was limited by the fact that the term could not exceed that in the country of origin.


81. Shilkret v. Musicafct Records, Inc., 131 F.2d 929 (2d Cir. 1942), reversing, 43 F. Supp. 184 (S.D.N.Y. 1941), cert. denied, 319 U.S. 742 (1942); Marx v. United States, 96 F.2d 204 (9th Cir. 1938); Patterson v. Century Productions, 93 F.2d 489 (2d Cir. 1937).

82. See note 66 supra.

83. H.R. 12549 (Vestal bill), 71st Cong., 2d Sess. (1931); S. 3047 (Duffy bill), 74th Cong., 1st Sess. (1935); H.R. 10632 (Daly bill), 74th Cong., 2d Sess. (1936); S. 3043 (Thomas bill), 76th Cong., 2d Sess. (1940); see Pforzheimer, Copyright Reform and the Duffy Bill, 47 Yale L.J. 433 (1938); Legis., Revision of the Copyright Law, 51 Harv. L. Rev. 906 (1938).

so-called “retaliation” provision adopted by the Berne Union in 1914.\textsuperscript{85} This provision permitted Berne countries to restrict the protection accorded to authors of non-member nations that did not sufficiently protect Berne works. The threat of retaliation, though never carried out,\textsuperscript{86} was raised because American authors were enabled, through the “back-door” device of publishing simultaneously at home and in a Berne country, to reap all the benefits of the Berne Convention even though the United States remained outside the Union.

Through a restrictive interpretation of the term “publication,” the courts of the Netherlands sought to close this back-door to Berne.\textsuperscript{87} In the \textit{Fu Manchu}\textsuperscript{88} and the \textit{Gone With the Wind}\textsuperscript{89} cases, the Dutch courts took the position that mere distribution and sale of a limited number of copies of a work in Canada did not constitute “publication” within the meaning of the Berne Convention.

Finally, and as a counterbalance to these threats of retaliation, the Rome Convention of 1928 sought to induce the prompt adherence of the United States and the other nations remaining outside of the Berne orbit by holding open ratification of the 1908 Berlin Convention until August 1, 1931.\textsuperscript{90} In order to take advantage of this opportunity, President Hoover expressed his support of the convention when it came before the Senate Foreign Relations Committee. But the proposal never advanced beyond the committee stage. Again in 1935, the Senate actually went so far as to approve adherence, but on the following day voted to reconsider this action pending congressional deliberations on implementing legislation. No further steps in the direction of adherence were taken because in the meantime implementing legislation failed of adoption in Congress.\textsuperscript{91}

The lessons learned from these legislative experiences in connection with the Berne Convention proved to be of great value years later when proponents of the Universal Copyright Convention prepared to guide that treaty and its implementing legislation through Congress.

E. \textit{UNESCO} Leadership

The history of unsuccessful efforts to bring this country into the Berne Union led those who supported United States participation in a worldwide system of copyright protection to the following conclusions:

\begin{enumerate}
\item Berne Convention, Additional Protocol adopted at Berne, March 20, 1914, art. 6(2).
\item But see Can. Rev. Stat. c.32 (1927); Fox, \textit{The Canadian Law of Copyright} 305-09 (1944).
\item See Ballin, \textit{Copyright Protection of American Books in the Netherlands} (1950).
\item 88. Ward v. De Combinatie, Hooge Raad, June 26, 1936.
\item 89. Marsh v. Zuid—Hollandsche Boeken Handelsdrukkerij, Hooge Raad, 1941.
\item 90. Berne Convention, revised at Rome, June 2, 1928, art. 28(3); see Copinger, \textit{The Law of Copyright} 427 (7th ed. 1936).
\item 91. See Goldman, \textit{op. cit. supra} note 7, at 13; Ladas, \textit{The International Protection of Literary and Artistic Property} 856-61 (1938).
\end{enumerate}
(i) Any international convention that sponsored the theory of total abolition of formalities would meet with insurmountable opposition in the United States.

(ii) The international convention must generally leave to the domestic law of each country the scope of protection within its own borders. For example, the United States must be left free to determine whether moral rights of authors are to be recognized, and whether oral or architectural works are to be protected under its own copyright law.

(iii) The creation of any new convention must not supersede or impair existing international pacts, but must permit co-existence of established relationships among the nations of the western hemisphere on the one hand and among the Berne Union countries on the other.

(iv) The changes required in the domestic copyright law of the United States in order to permit entry into the international convention must be kept to an absolute minimum.

The translation of these lessons of history into a new worldwide convention was placed in the hands of the United Nations Educational, Scientific and Cultural Organization (UNESCO) shortly after the end of World War II.92 The program of UNESCO, from its initial meeting of copyright experts in Paris in 1947 until circulation of a draft of the convention in 1951, was geared to a massive fact-finding operation.93 On the international level, the reactions and advice of the various nations of the world with respect to each of the basic principles were solicited and published.94 In the United States, a copyright panel of the U.S. National Commission for UNESCO, consisting of representatives of all the major interests in the copyright field, undertook a general study to fix the areas of agreement and disagreement. As a result of this careful advance preparation, unmatched by any other international pact of comparable magnitude, the Intergovernmental Conference at Geneva—attended by ninety-seven delegates representing fifty countries—moved expeditiously and harmoniously to the completion of the Universal Copyright Convention on September 6, 1952.

F. The Universal Copyright Convention

In large measure, the Universal Copyright Convention95 bypassed the obstacles that had previously blocked United States participation in the Berne

93. Meetings of copyright experts were held in Paris in 1947 and 1949, in Washington in 1950, and in Paris again in 1951. The work of these committees is reviewed at length in the UNESCO COPYRIGHT BULLETIN for those years.
94. For a comparative study of the copyright laws of all countries of the world undertaken by UNESCO, see UNESCO COPYRIGHT BULLETIN Vol. 3, No. 3-4 (1950).
95. For a recent comprehensive study of the U.C.C. by the members of the United States delegation to the Geneva Convention and other copyright experts, see UNIVERSAL.
Union by adopting the principle of national treatment, i.e., each member nation grants within its own borders the same treatment to foreign authors as accorded to its own citizens. Even in areas where minimal rights are fixed, such as duration of protection and translation rights, there is no conflict between the provisions of the convention and the United States copyright law. Only with respect to copyright formalities was the convention at odds with existing United States law, necessitating certain domestic changes in order to give effect to the convention.

A basic concept in any international copyright convention is that copyright protection shall be accorded without the necessity of investigating and complying with cumbersome formalities under the local laws of each of the member countries. The Berne Convention incorporated the doctrine prevailing in the law of most European countries by providing for automatic copyright without any formalities. But the Buenos Aires Convention, formulated in 1910 by the United States and other western hemisphere nations that had found the Berne principle of complete abolition of formalities unacceptable, required as a sole formality a statement in the work indicating the reservation of the property right.

In the United States, copyright is not an automatic privilege granted to an author upon creation of his work. Copyright for published works is secured only if the appropriate notice is affixed to the work. Other formalities such as registration, deposit of copies and, in the case of certain works, manufacture within the United States, must also be observed. In many of the countries of Latin America, even more burdensome formalities are imposed.

The views solicited by UNESCO from the prospective parties to the new Universal Copyright Convention with respect to formalities indicated that a compromise would be necessary to achieve the goal of a truly global copyright


96. The minimum term of twenty-five years accorded under the U.C.C. is within the twenty-eight year initial term of copyright provided under the Copyright Act. Compare U.C.C. art. IV, with 17 U.S.C. § 24 (1952). Translation rights under the U.S. Copyright Act are granted for the full term of copyright. 17 U.S.C. § 1(b) (1952); cf. U.C.C., art. V, granting absolute translation rights for a ten year period with provision for compulsory licensing thereafter; see Finkelstein, The Right of Translation—Article V, Bulletin of the Copyright Society of the U.S.A., No. 4, Feb. 1955, p. 96.

97. Berne Convention art. 4(2).

98. Buenos Aires Convention art. 3.

99. See notes 69-72 supra.

100. E.g., in Peru, in addition to compliance with such formalities as deposit and registration, approval by the Ministry of Education must be secured; in Uruguay, compliance with the formalities required in the country of origin must be proved by a certificate legalized by the official Uruguayan agent in the country concerned; see UNESCO Copyright Bulletin Vol. 4, No. 4, p. 18 (1951), for a description of the treatment given by South American countries to foreign works and authors.
pact. The United States suggested that the form and extent of formalities that a country might impose on a work of foreign origin should be limited. Great Britain urged that the provision relating to formalities specifically prohibit requirements such as the "manufacturing clause." Germany and Switzerland expressed the fear that the new convention might jeopardize the Berne Convention, taking the position that protection should be independent of the observance of any formalities.

The compromise reached at Geneva in 1952 with respect to these areas of dissent is embodied in article III of the convention. This article provides that all formalities such as deposit, registration, notice, notarial certificates, payment of fees, and manufacture or publication in a contracting state shall be satisfied so long as all copies of the work from date of first publication bear a copyright notice consisting of the symbol © accompanied by the name of the proprietor of copyright and the year of first publication. Each of the signatory states may, however, as a condition for extending judicial relief, impose any formalities it chooses such as registration, deposit with a court or administrative office copies of the work involved in the litigation, or any other requirements.

II. Changes Required by the Convention

Article III of the convention necessitated a number of changes in the United States copyright law. These modifications, applicable only to works of convention nationals not domiciled in the United States which are first published abroad, exempt foreign authors from the following formal requirements of the copyright law: (i) issuance of presidential proclamations relating to mechanical reproduction rights under section 1(e) of the Copyright Act, (ii) deposit of copies of the work pursuant to sections 13 and 14, (iii) American manufacture of books or periodicals in the English language under section 16, and (iv) form and placement of copyright notice in accordance with sections 19 and 20.

It should be emphasized that the foregoing provisions of the law have not been wholly eliminated. The new legislation merely provides Universal Copyright Convention nationals with an exemption from these requirements.

104. U.C.C. art. III (3).
The changes are specifically made inapplicable to works of authors who are citizens of, or domiciled in, the United States regardless of place of first publication, or to works published in the United States.105

In addition to the modifications inserted into the law to comply with the requirements of the Universal Copyright Convention, certain other changes were made to assure equal status to American and foreign authors. These changes (a) extend to American authors and resident aliens the benefits of ad interim provisions formerly limited to foreign authors not residing in the United States, and (b) permit American authors to use the symbol © on all classes of works.

A. Mechanical Reproduction Rights

Section 1(e) of the Copyright Act, relating to the rights of a copyright owner of a musical composition, sets forth the conditions upon which foreign nationals shall enjoy the right to make mechanical reproductions of their works. Mechanical reproduction rights under this section are not granted unless the foreign state or nation of which the foreign composer is a citizen or subject grants similar rights to United States citizens either by treaty, convention, agreement, or law.106

Although section 1(e) does not specify the manner in which the existence of reciprocal conditions shall be determined, the Attorney General has ruled that the language of section 9 of the act requiring the issuance of presidential proclamations as proof of the existence of such reciprocity implies that “all reciprocal conditions upon which the right of foreign authors or composers depend, should be determined and proclaimed by the President.”107

The courts have twice concurred in the opinion of the Attorney General. In Portuondo v. Columbia Phonograph Co.,108 Judge Coxe dismissed the complaint of a citizen of San Domingo on the ground that there was no affirmative allegation that the President of the United States had proclaimed the existence of reciprocal conditions in the respective countries with regard to mechanical reproduction of copyrighted works.

The Portuondo case did not answer the question whether the proclamation of the Buenos Aires Convention of 1910 following its ratification by the Senate was sufficient compliance with the requirements of the law.109 That issue was later raised in Todamérica Musica, Ltda. v. Radio Corp. of America,110 in which the plaintiff, a Brazilian corporation, brought suit for infringement of mechani-

107. 29 Ops. Atty Gen. 64, 69 (1911).
110. 171 F.2d 369 (2d Cir. 1948).
cal reproduction rights in a copyright granted by the Brazilian government for the song "Tico Tico." In that case, Judge Augustus N. Hand, speaking for the Court of Appeals for the Second Circuit, (a) confirmed Judge Coxe's decision that a separate presidential proclamation is necessary for the enforcement of mechanical reproduction rights by a foreign copyright owner residing abroad, and (b) decided that, since neither the Buenos Aires Convention nor the proclamation issued by the President in 1914 making public that convention specifically mentioned mechanical reproduction rights, the plaintiff could not assert such rights in the song.\textsuperscript{111}

The court rejected the contention that articles 3 and 6 of the Buenos Aires Convention had conferred the substantive right of mechanical reproduction upon authors of foreign signatory countries.\textsuperscript{112} It expressed the view that article 3 merely dispenses with certain formal requisites such as registration if the substantive rights have otherwise been conferred, and that article 6 has the effect of subjecting the foreign copyright owner to the law of the United States. Judge Hand added that if the subject of mechanical reproduction rights was covered by the terms of a convention, it would be sufficient, in order to grant such rights to foreign authors, to have the President proclaim the convention in general terms without making specific reference to mechanical reproduction rights under section 1(e). However, neither the Buenos Aires Convention nor the proclamation relating thereto mentioned such rights.

The doctrine of the Portuondo and Todamerica cases served as an important guidepost to those drafting legislation in this country to implement the Universal Copyright Convention. Inasmuch as that convention makes no mention of mechanical reproduction rights,\textsuperscript{113} it is clear that in the absence of some provision exempting works of Universal Copyright Convention nationals from the requirements of section 1(e), foreign composers and authors of many countries of the world, other than the thirty-one nations with respect to which section 1(e) proclamations have been issued,\textsuperscript{114} would be unable to assert mechanical reproduction rights in this country.

\textsuperscript{111} Ibid.

\textsuperscript{112} Article 3 provides: "The acknowledgement of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the 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."

Article 6 provides: "The authors or their assigns, citizens or domiciled foreigners shall enjoy in the signatory countries the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin."

\textsuperscript{113} The Universal Copyright Convention does not specify particular rights or works subject to protection. Protection of records is a matter for the domestic law of each country. Recordings are not deemed "published" works under the convention. "Publication" is defined as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." U.C.C. art. VI.

It is a basic principle of the Universal Copyright Convention that each contracting state shall accord to the literary, scientific, and artistic works of authors of other contracting states the same protection as is granted to works of its own nationals. In order to give effect to this concept of "national treatment," a new subsection (c) extending copyright to works of nationals of Universal Copyright Convention countries, as well as to works first published in such countries, has been added to section 9 of the Copyright Act. Subsection (c) also provides, inter alia, that convention works shall be exempt from the requirement of section 1(e) that a foreign state or nation must grant to United States citizens reciprocal mechanical reproduction rights.

The importance of this exemption is best understood in the light of the reduced stature which the Buenos Aires Convention assumed in the eyes of Latin American nationals as a result of the Portuondo and Todamerica decisions. From the point of view of South American composers other than citizens of Argentina, Chile, and Cuba, the Buenos Aires Convention accords inadequate protection so long as unauthorized recordings of their works may be made in the United States. Bolivia, Chile, Cuba, El Salvador, and Venezuela have never ratified the Buenos Aires Convention. Mexico has ratified this convention, but has not yet deposited its instrument of ratification. It is, perhaps, ironic that citizens of Chile and Cuba, which are non-members of the Buenos Aires pact, have greater copyright protection in this country as regards mechanical reproduction of musical compositions than other Latin Americans whose countries have adhered to the Buenos Aires Convention, but with respect to which no section 1(e) proclamations have been issued.

Efforts to remedy this situation were made in the Washington Convention of 1946, but the failure of the United States to ratify that convention left Latin American composers and authors in the same predicament as before. Undoubtedly, the revision of the United States copyright law in respect to mechanical reproduction rights of convention nationals will provide a powerful incentive for Latin American participation in the Universal Copyright Convention.

115. U.C.C. art. III.
117. See text at notes 108-11 supra.
118. Mechanical reproduction rights for musical works under § 1(e) of the U.S. Copyright Act are accorded to citizens of Argentina, Chile, and Cuba as a result of the issuance of presidential proclamations relating to these countries. Argentina, 49 Stat. 3413 (1934); Chile, 44 Stat. 2900 (1925); Cuba, 37 Stat. 1721 (1911).
119. See note 51 supra.
120. See note 44 supra.
121. Pan American Union, Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, Washington, June 1-22, 1946 in Law & Treaty Series, No. 19 (1946). Signed by the United States and twenty other American republics, the Washington Convention has been ratified only by twelve countries. Article 11(d) of the Washington Convention grants the author the exclusive right to "adapt and authorize general or individual adaptations of it [his work] . . . mechanically or electrically." Id. at 7. This right was not expressly recognized by the Buenos Aires Convention. UNESCO Copyright Bulletin Vol. 2, No. 1, p. 116 (1949).
Foreign copyright owners will not, however, be exempt from another formality contained in section 1(e)—the notice of use clause.\textsuperscript{122} This provision, which applies to United States citizens as well as foreigners, requires the owner of the copyright, upon making or authorizing the making of a recording of his work, to file a notice thereof, accompanied by a recording fee, with the Register of Copyrights. The continuance of this formality is permitted under the terms of the Universal Copyright Convention because compliance with the notice of use provision of section 1(e) is not a condition of copyright but is a procedural requirement for seeking judicial relief for infringement of the right to produce the work mechanically.\textsuperscript{128}

B. Deposit of Copies

Under the provisions of section 9(c) enacted by Public Law 743, works of nationals of Universal Copyright Convention countries or works first published in those countries are exempt from the obligatory deposit requirements of the first sentence of section 13.\textsuperscript{124} This section requires that one complete copy of the best edition of the work, if it is a foreign work, be deposited "promptly" after publication in the copyright office or in the mail addressed to the Register of Copyrights. United States citizens and aliens domiciled within the United States are required to deposit two copies. The second sentence of section 13, to which the exemption does not apply, provides that no action for copyright infringement may be maintained until the requirements of deposit and registration have been complied with.\textsuperscript{125}

It is clear therefore that while Universal Copyright Convention nationals need not deposit any copies of their works in the Copyright Office they must, in order to bring suit for infringement of copyright, make the same deposit, file the same application, and pay the same fees required of any other foreign author publishing abroad. Such formalities are specifically permitted under the provisions of article III(3) of the convention because they fall into the category of "procedural requirements" for "seeking judicial relief."

At first glance, it would appear that the convention did not require the elimination of the deposit requirements set forth in the first sentence of section 13. Article III(1) of the convention speaks only of eliminating those formalities compliance with which is required by a contracting state as a condition of copyright. Section 13 of the Copyright Act clearly states that deposit is required "after copyright has been secured by publication of the work with the notice of

\textsuperscript{122} 17 U.S.C. § 1(e) (1952).
\textsuperscript{125} Section 202.1(b) of the Regulations of the Copyright Office provides: "all works deposited for registration shall be accompanied by a 'claim of copyright' in the form of a properly executed application and the statutory registration fee."
The courts have confirmed that neither deposit nor registration are necessary to secure copyright. Why then was the exemption from deposit of copies written into the new domestic law?

The basis for eliminating the deposit requirement for convention nationals rests not so much on the provision of section 13 as on the penalties imposed under section 14. The latter section provides that if a foreign copyright proprietor fails to deposit a copy of his work within six months after demand is made by the Register of Copyrights, he is liable to a fine of $100, a payment to the Library of Congress of twice the amount of the retail price of the work, and "the copyright shall become void." It is this possibility of copyright forfeiture which conflicts with the provisions of the convention.

The exemption from the deposit requirements accorded authors of Universal Copyright Convention countries does not extend to works copies of which are not reproduced for sale. Statutory copyright of unpublished works is obtained by deposit of a copy of the work with an application for registration. Convention nationals are still required to comply with these formalities if they wish to secure statutory protection for unpublished works. The exemption in their favor relates only to the deposit provisions contained in the first sentence of section 13 and the enforcement provisions of section 14. There is no specific exemption from the provisions of section 12 dealing with unpublished works.

There appears to be an inconsistency, however, since part of the first sentence of section 13 reads "or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title. . . ." The exemption from this portion of section 13 appears to eliminate the necessity of deposit when an unpublished work is later reproduced in copies for sale.

The Universal Copyright Convention requires that each member country offer legal means of protecting without formalities the unpublished works of

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128. 17 U.S.C. § 14 (1952). Only a three-month leeway after demand is made by the Register of Copyrights is permitted in case deposit is to be made from any part of the United States. Ibid.

129. Article III(3) of the convention, which permits any contracting state to require compliance with certain procedural requirements as a condition to bringing suit, states that ". . . failure to comply with such requirements shall not affect the validity of the copyright."


131. Ibid.
nationals of other contracting states.\textsuperscript{132} At the Geneva Conference, the United States delegation pointed out that unpublished works are protected in the United States under the common law.\textsuperscript{133} The existence of state common law protection is understood to satisfy the requirements of article III(4) of the convention and to permit the continuance of formalities for statutory copyright of unpublished works. A problem would be created, however, if it were determined that common law protection for unpublished material was unavailable in any one of the individual states.\textsuperscript{134} In that event, it might become necessary to provide an exemption from section 12 of the Copyright Act.

Two caveats must be appended to the provision exempting convention nationals from registration and deposit requirements. After the completion of the first term of copyright, formalities are revived for the renewal term. In order to effect renewal of copyright, a foreign author, although a national of a convention country, is still required to make application for renewal and pay the statutory fee to the Copyright Office during the twenty-eighth year of the existing copyright.\textsuperscript{135} Presumably, notwithstanding the exemption from section 14, the Register of Copyrights may also demand a copy of the work at the beginning of the twenty-ninth year. In such event, the foreign copyright proprietor will have to make the deposit or risk forfeiture of the copyright. Finally, as with all other exemptions specified in section 9(c) of the revised law, the benefits thereof are applicable only if the required copyright notice appears on all copies of the work published with the authority of the author or other copyright proprietors from the time of first publication.\textsuperscript{136}

The exemption of convention nationals from both the deposit requirement and the duty to file an application accompanied by the statutory registration fee follows a gradual trend in the direction of relaxation of these formalities. Prior to the 1909 revision of the copyright law, deposit was a prerequisite for securing copyright.\textsuperscript{137} The registration provision in effect from 1891, when copyright protection was first granted to foreign authors in this country, until 1909, required deposit of a printed copy of the title page of the author's work on or

\textsuperscript{132} U.C.C. art. III(4).


\textsuperscript{134} For a comprehensive review of the laws of the individual states, see Stine, Report on State Legislation Concerning Copyright, Copyright Office Pamphlet (1950).

\textsuperscript{135} 17 U.S.C. § 24 (1952).

\textsuperscript{136} See text at notes 196-98 infra.

\textsuperscript{137} Under the original copyright law of 1790, 1 Stat. 124, a printed copy of the title of the work was required to be deposited for recording in advance of publication in the clerk's office of the district court. A copy of the copyright work also had to be delivered to the Secretary of State within six months of publication. The Act of Feb. 3, 1891, 4 Stat. 436, made it necessary to deposit a copy of the copyrighted work with the district court clerk within three months of publication. Copies were then to be transmitted by the clerk to the Secretary of State for preservation. The Act of March 3, 1831, 26 Stat. 1107, required deposit not later than the day of publication as a condition of securing copyright. See Callaghan v. Myers, 128 U.S. 617, 652 (1888).
before the day of publication. In addition, two complete copies of every published work had to be deposited not later than the day of publication, together with a copy of every subsequent edition if any substantial changes were made.138 Often the failure of a shipping clerk to forward copies of the work promptly to Washington resulted in destruction of a copyright.139 The burden was particularly severe for foreign authors. Along with the manufacturing clause, the rigid deposit requirements proved to be serious handicaps for those seeking protection in this country.140

The Act of March 4, 1909 abolished the preliminary filing of the title page and made prompt deposit of copies a requirement after copyright has been secured by publication with notice. Further relaxation of deposit for foreign authors was effected by an amendment in 1914 which permitted one copy instead of two to be deposited “if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country.”141

The most recent liberalizing change in the copyright law in respect to registration was made by the Act of June 3, 1949.142 Until that time, works of foreign origin were registered by payment of the copyright fee of four dollars accompanied by an application and one copy of the work. Compliance with these provisions was impeded, however, by regulations restricting the transfer of currency abroad. As a result of the 1949 amendment, a foreign author or copyright proprietor was enabled, in lieu of the four dollar registration fee, to deposit an extra copy of his work accompanied by a catalog card in form and content satisfactory to the Register of Copyrights.

In line with legislative relaxation of deposit and registration requirements during the past half century, the courts have permitted copyright owners wide latitude in complying with these formalities. In Washingtonian Publishing Co. v. Pearson,143 the Supreme Court held that a lapse of fourteen months in depositing copies of a work in the Copyright Office and obtaining a certificate of registration did not deprive the plaintiff of his right to sue for infringement of copyright. The provisions of the Copyright Act, authorizing the Librarian of Congress and the Register of Copyrights to return deposited copies to the copyright proprietor or to destroy the articles deposited,144 led the Court to believe that deposit is not intended to furnish a permanent record of copyrighted works.

Inasmuch as publication with proper notice of copyright serves to notify

143. 306 U.S. 30 (1939).
the world of the existence of copyright, the function of deposit is not to prevent unconscious infringement. Failure of the copyright owner to deposit copies does not injure one charged with notice of copyright. The Copyright Office has expressed the view that the word "promptly" should be eliminated from section 13, leaving the enforcement section to take care of eliciting deposit when the Register of Copyrights thinks it is necessary. Following the line of the Pearson decision, a recent case has held that even a delay of nine years in depositing copies does not result in abandonment of plaintiff's claim of copyright and does not constitute a meritorious defense to an action for infringement.

Still further liberalization of deposit requirements has been proposed through a bill introduced by Congressman Celler. This bill would amend section 13 of the Copyright Act to permit the deposit of photographs or other identifying reproductions in lieu of copies of certain classes of works whose size, weight, fragility, or monetary value makes their deposit impractical. The classes affected are the following: (1) works of art; models or designs for works of art; (2) reproductions of a work of art; (3) drawings or plastic works of a scientific or technical character; (4) prints and pictorial illustrations including prints or labels used for articles of merchandise.

The benefits of depositing a photograph instead of copies of certain bulky three-dimensional works would redound mainly to United States citizens and domiciled aliens. Artists and sculptors who are nationals of convention countries are, of course, exempt from deposit requirements except in the case of works for which a renewal application is made or in the case of works of which copies are not reproduced for sale. With regard to such works, the proposed legislation, if enacted, would prove of material advantage to convention nationals.

C. Manufacturing Clause

For many years one of the chief obstacles blocking United States entry into the Berne Union was the so-called "manufacturing clause," which also created the only serious objection to enactment of implementing legislation following United States adherence to the Universal Copyright Convention. The manufacturing provisions of section 16, which require the typesetting, printing, and binding of English language books and periodicals to be performed within the

148. Classifications itemized as (g) (h) (i) and (k) in 17 U.S.C. § 5 (1952).
United States, are unique among copyright laws of the world.\textsuperscript{150} Although compliance with the manufacturing clause is not a prerequisite to securing copyright in the United States, protection of a copyright is denied unless the book or periodical has been produced in accordance with the manufacturing requirements of section 16 of the Copyright Act.

At first glance, the provisions of article III(1) of the Universal Copyright Convention concerning formalities appear to have preserved this distinction between acquisition of copyright and the enjoyment of its benefits, and to have made unnecessary any changes in our manufacturing clause. The official English language text of article III(1) provides that “Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication . . . shall regard these requirements as satisfied” if the work is published with the specified notice of copyright.\textsuperscript{151}

The French and Spanish versions of article III(1) make clear, however, that the authors of the convention were actually concerned with those formalities compliance with which is a condition “for the protection of the rights of authors.”\textsuperscript{152} This reading, supported by the specific reference in article III(1) to “manufacturing” as a “formality,” removes any doubt that the manufacturing clause had to be revised in order to give effect to the convention.

The changes introduced by Public Law 743 do not abolish the manufacturing clause, but merely eliminate convention nationals from its coverage. Section 9(c)(3) and (4) exempts foreign authors residing and publishing abroad from the provisions of section 16 (the manufacturing clause), section 17 (affidavit of manufacture), section 18 (penalty for making false affidavit), and section 107 (prohibition on importing copies produced in violation of the manufacturing clause). These provisions remain operative for American authors, wherever the place of first publication, and for foreign authors—even convention nationals—who are domiciled in the United States or who first publish in this country. The sharp opposition levelled at even this limited curtailment of the manufacturing clause can best be understood in the light of the origin and development of the provision.

Although the manufacturing clause was first incorporated in the Act of 1891,\textsuperscript{153} its origin can be traced to the report Henry Clay made to the Senate in

\textsuperscript{150} Canada has a provision in its copyright law for issuing a compulsory license to print and publish any copyrighted book that is not printed in Canada in sufficient quantities to supply the demands of the Canadian market. \textit{Can. Rev. Stat.} c. 32 (1927).

\textsuperscript{151} See official text of Universal Copyright Convention in French, English, and Spanish published by UNESCO.

\textsuperscript{152} \textit{Ibid.}

\textsuperscript{153} 26 \textit{Stat.} 1107 (1891).
1837. That report recommended that the benefits of copyright in this country be extended to British and French authors on the following conditions:

... that, unless an edition of the work for which it is intended to secure the copyright shall be printed and published in the United States simultaneously with its issue in the foreign country, or within one month after depositing as aforesaid the title thereof in the clerk's office of the district court, the benefits of copyright hereby allowed shall not be enjoyed as to such work.

No action was taken on the Clay Report in the Twenty-fourth Congress, and it was not until 1891 that foreign authors were granted copyright protection in this country. Opposition to the legislation proposing the removal of restrictions upon foreign authors came largely from publishing and printing groups. A limited market for American books existed abroad at that time, and it was feared that a flow of literature from Europe would jeopardize our infant publishing and printing industries, and damage labor's interest in these trades. Because of vigorous opposition raised by publishers and typographers, Congress inserted a provision in the Chace Act of 1891 requiring, as a condition of the extension of American copyright protection to foreign authors, that books, photographs, chromos, and lithographs of foreign origin be printed from type set or plates made within the limits of the United States.

Under the 1891 Act there were no effective enforcement provisions to insure compliance with the manufacturing clause. That act prohibited the importation of copies of foreign editions not produced in accordance with the manufacturing provisions. But the violation of such importing restrictions was an offense against the United States and resulted only in seizure and condemnation of the books wrongfully imported in the same manner as articles imported in violation of the customs laws.

It was claimed that some books were being deposited in the Copyright Office and were given copyright protection although they had failed to comply with the manufacturing provisions. Noncompliance with these provisions made invalid the deposit of copies by a foreign copyright proprietor, but such noncompliance was held to be a matter for affirmative defense in an infringement action and not to nullify a copyright automatically.

In the process of formulating the general revision and consolidation of

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155. Ibid.
156. See Solberg, The International Copyright Union, 36 Yale L.J. 68, 104 (1926).
157. See Currier Committee Report, supra note 139, at 11-12.
158. See Bentley v. Tibbals, 225 Fed. 247, 252 (2d Cir. 1915). Prior to the 1891 Act, there were no importing restrictions under the Copyright Act except as to piratical copies. Bentley v. Tibbals, supra note 158, at 251.
the copyright laws in 1909, the manufacturing clause was reenacted with a number of substantial revisions including several enforcement provisions still in effect: (a) in the case of each book deposited in the Copyright Office, an affidavit is required stating that the copies deposited have been produced in compliance with the manufacturing provisions; (b) penalties for making a false affidavit include a fine and forfeiture upon conviction of all rights under the copyright.163

To the requirement that every book accorded protection in this country must be printed from type set within the limits of the United States, the 1909 Act added the provision that the printing of the text and binding of the book had to be done in this country. The Currier Committee Report submitted to the House of Representatives on the bill enacted as the Copyright Act of 1909 indicated congressional belief that protection was necessary in this regard for the men engaged in the work of printing and binding books, as well as for those setting type and making plates.164

Prior to the 1909 Act, books, photographs, chromos, and lithographs were covered by the manufacturing clause. That act limited this coverage to books or periodicals specified in section 5(a) and (b) of the existing law.165 Lithographic or photoengraved illustrations within a book, as well as separate lithographs or photoengravings, are still covered by the manufacturing requirements subject, however, to certain exceptions.166

The most important change introduced by the 1909 law was the exemption from manufacturing restrictions accorded "the original text of a book of foreign origin in a language or languages other than English." The limited circulation of foreign language books in this country was, of course, a primary reason for relaxing the requirements in respect to these works. In addition, studies made of the actual effects of the compulsory manufacturing requirements during the ten-year period from 1891 to 1900 showed that a substantial number of printers and publishers believed that the manufacturing clause had outlived its usefulness.167 The arguments advanced were essentially variations of three contentions: (1) typesetting and production methods in this country had become not only cheaper but also better than those abroad, (2) the tariff laws offered sufficient protection, if needed, against importation of foreign books, and (3) the

164. See Currier Committee Report, supra note 139, at 12.
165. Under § 5(a), the classification "books" includes composite and cyclopedic works, directories, gazetteers, and other compilations. The classification "periodicals" includes newspapers. 17 U.S.C. § 5(a) (1952).
166. The exception pertaining to local manufacture of illustrations within a book takes effect where "... the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art." 17 U.S.C. § 16 (1952).
167. See Solberg, supra note 62, at 104.
manufacturing clause was unfair to domestic book buyers, who were being de-
prived of foreign editions, and to foreign authors who lost their rights.

These arguments were, of course, applicable with just as much force to
books in the English language as they were to foreign language publications,
but Congress, in enacting the Copyright Act of 1909, relaxed the requirements
only to the extent of the latter class of works. At the same time, the importing
prohibitions were made less onerous by permitting single copies of any book,
even though not domestically manufactured, to be imported not for resale but
for individual use,168 for libraries, educational and eleemosynary institutions,
and for the federal government.169

In compensation for the continued application of the manufacturing re-
strictions to foreign works in the English language, the 1909 Act granted ad
interim copyright to books of foreign origin written in English.170 This form
of temporary protection, designed to permit testing of the market in this coun-
try, originated under the 1905 Act171 and was then applicable only to books in
a foreign language. A foreign author who deposited a copy of his work within
thirty days from date of first publication abroad was given a year in which to
comply with all formalities, including manufacture in this country.172 Upon
such compliance, the copyright was granted for the full twenty-eight years.

Inasmuch as the 1909 act abolished manufacturing requirements for for-
eign language books, it was unnecessary to continue ad interim protection for
such works. In shifting the benefits of this protection to works in the English
language, the maximum term of ad interim copyright was limited to thirty days
after deposit of the work. This period was increased to four months in 1919173
and finally to a term of five years from date of first publication abroad under the
amendment of June 3, 1949.174

Concomitantly with the expansion of the ad interim term, however, the
number of copies of books or periodicals that could be imported into the United
States within the five-year period without complying with manufacturing pro-
visions was limited to 1500 copies by the 1949 Act.175 The exemption from

168. Even a single copy may not be imported where the book sought to be brought in is
a foreign reprint of a work by an American author copyrighted in the United States. 17
169. Ibid.
170. Act of March 4, 1909, §§ 21, 22, 35 Stat. 1080. Until § 22 was amended by the Act
of June 3, 1949, 63 Stat. 154, ad interim copyright was not available to periodicals. However,
the copyright office, even prior to the 1949 amendment, accepted periodicals for ad interim
copyright as “books.”
171. 33 Stat. 1000 (1905).
172. The work deposited and all other copies sold or distributed in the United States
were required to contain on their title pages a notice of reservation of copyright. Ibid.
174. 63 Stat. 154 (1949). The maximum period allowed for deposit of the work in the
Copyright Office after publication abroad was increased from sixty days to six months.
17 U.S.C. § 22 (1952). See Note, Relaxation of the Manufacturing Requirement for For-
the manufacturing clause granted to *ad interim* copyrights was further confined to works "of foreign origin." Although some dissenting opinion on the subject exists, the prevailing interpretation of the term "of foreign origin" is that it refers to nationality of authorship rather than place of publication.

Accordingly, after the 1949 amendment, American authors who had their works first published abroad in the English language were able to secure *ad interim* protection under section 23, but could not take advantage of the opportunity to test the market in this country offered to foreign citizens. American authors (and their publishers) found themselves faced with the unhappy choice of (a) footing the bill for running an edition in the United States without knowing whether the work would win public acceptance, or (b) losing copyright protection in this country.

Public Law 743 remedied this situation by changing the phrase "books or periodicals of foreign origin" to "books or periodicals first published abroad" in the clause exempting 1500 copies from manufacturing requirements during the *ad interim* period. This change in wording in the manufacturing clause was not motivated by any need to implement the Universal Copyright Convention but solely by a desire to give American authors the same importing rights as foreign authors for the *ad interim* term of protection. However, a United States citizen who publishes abroad in a foreign language is still subject to manufacturing clause requirements and cannot avail himself of *ad interim* protection.

Until the enactment of Public Law 743, the opponents of various bills proposing the abolition or modification of the manufacturing clause had successfully resisted legislative attacks on this sixty-four year old provision. At the congressional hearings on the Universal Copyright Convention and its implementing legislation in 1954, the only opposition was voiced by the printing unions. The Book Manufacturers Institute, a trade association composed of most of the book printers and binders, withdrew its opposition to the modification of the manufacturing clause.

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176. 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 765 (1938). Ladas, citing Amdur's *Copyright*, contends that "foreign origin" refers to foreign publication rather than foreign authorship.


179. See Committee on Foreign Relations Report on Executive M, S. Exec. Rep. No. 5, 83d Cong., 2d Sess. 9-10 (1954). Public Law 743 provides, with respect to convention nationals who have subsisting *ad interim* copyrights, that upon the coming into force of the convention, the copyright shall automatically be extended to a term of twenty-eight years from date of first publication abroad without the necessity of complying with the formalities specified in § 23. 17 U.S.C. § 9(c) (Supp. II 1954).


181. *Id.* at 17. See letter from Book Manufacturers' Institute, Inc. to Mr. C. C. O'Day, Clerk of Senate, Committee on Foreign Relations, March 30, 1954, quoted, *id.* at 179-80.
The argument of the printing unions was a two-fold one: (1) lifting of manufacturing requirements would produce a flood of foreign made English language books into this country, resulting in loss of employment for the American printing trades, and (2) foreign books in the English language now being printed in the United States because of the requirements of the manufacturing clause would no longer be manufactured here, resulting in loss of an advantage now enjoyed by American labor.

Statistical evidence refutes both of these contentions. Although since the amendment of June 3, 1949 foreign publishers have been able to import up to 1500 English language books or periodicals into the United States without complying with the manufacturing clause, no flood of imported editions has occurred. During the first two and one-half years after the 1949 amendment went into effect, import licenses were issued for 2,644 works permitting, at the rate of 1500 copies per book, a total importation of nearly four million copies of works in English. The number of copies that actually were imported during this period was only 174,000, or little more than 4% of the authorized number. More complete figures for the five-year period from 1949 to 1954 indicated that no deluge of English language works produced abroad was likely to occur as a result of the suggested modification of manufacturing requirements. Of a total of eight and one-half million copies that could have been imported under ad interim provisions, only 400,000, or less than 5% of the amount authorized, were actually brought into the United States.

The second fear of the printing unions, namely that of serious economic injury through loss of work on English language books by foreign authors presently manufactured in the United States, should be dispelled by the analysis of an economic consultant to the American Book Publishers Council. Only two per cent of the 1953 output of all books manufactured in the United States consisted of American editions of works in English by foreign authors. This indicates that only a small percentage of the book business is likely to be shifted to imported editions by lifting the manufacturing restrictions for convention nationals.

Of course, for practical reasons even a two per cent volume of business will probably not be lost by local printers to tradesmen abroad. The cost of paper and the binding expense are cheaper in the United States, and little difference exists in the cost of actual printing of the pages. American publishers have found it more economical, on editions in excess of 2500 copies, to print and

182. *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 4059, 82d Cong., 2d Sess. 199 (1952) (statement of Arthur Fisher, Register of Copyrights).*

183. See *Hearings, supra* note 180, at 27.


bind books in this country rather than seek a cheaper labor market abroad. 186 A number of cogent arguments support these statistical findings:

(i) Public domain works are produced locally rather than imported from abroad. Classics in the English language, such as Shakespeare, Dickens, Scott, editions of the Bibles, and other works as to which copyright is not a factor and which may be imported without regard to manufacturing requirements in unlimited quantities, are generally printed in this country because it is more economical than importing copies from England.

(ii) Musical compositions and plays are printed in the United States although not subject to manufacturing clause. Courts, strictly construing the provisions of the manufacturing clause, have held that dramas and musical compositions are not included in the term "book" and therefore need not comply with manufacturing requirements. 187 Similarly, picture books without printed text are exempt from the manufacturing clause. 188 Even though these works may be printed anywhere in the world and imported into the United States without loss of copyright, the facts indicate that printing and manufacturing is done in the United States for practical commercial reasons. American music publishers do not print their works abroad. 189 The absence of the manufacturing clause in the field of music has not affected American labor in that sphere of activity. 190

(iii) The copyright law is the wrong place to impose restrictions for the benefit of any one class. The copyright law is designed to promote the progress of the useful arts and to spread information and knowledge. A provision in that law placing a burden on the importation of books is an anomaly. Foreign inventors may obtain patents in this country without manufacturing their patented articles here. Foreign trademark owners are not stripped of protection because their trademarked products are manufactured abroad. Protection of an industry or a product belongs within the scope of tariff laws and should not rest on a law whose purpose is to encourage creative abilities. 191

(iv) The United States is now a heavy exporter rather than importer of printed matter. In 1891, when the manufacturing clause was first incorporated into the law, the United States was an importer of printed matter. In that year, this country imported $3,996,085 worth of books, maps, engravings, and other

186. Id. at 145-46.
189. See testimony of Sidney W. Wattenberg, representing trade associations of the music publishing industry in Hearings, supra note 180, at 102.
190. See testimony of Herman Finkelstein, General Attorney of ASCAP, in Hearings, supra note 182, at 187.
191. Statement of John Schulman in Hearings, supra note 180, at 48-49.
printed matter and exported only $1,943,328 of these commodities.\textsuperscript{192} In 1950, the value of all printed matter imported into the United States was $13,958,461, whereas exports had grown to $51,639,704. In the light of the growth of the publishing and printing industries—the annual output of books stood at $33,753,000 in 1891 and rose to an estimated $619,370,000 in 1950\textsuperscript{198}—there seems little doubt that the original reason for enactment of the manufacturing clause has long since vanished.

The foregoing arguments apply with equal forcefulness to works of American and foreign authors alike and should furnish a cogent basis for future attempts to eliminate the manufacturing clause entirely. For the time being, however, the Copyright Act still requires that works published outside or within this country by United States citizens or aliens domiciled here comply with this anachronistic clause.

D. Notice of Copyright

The only formality which the Universal Copyright Convention permits an adhering state to impose as a condition of copyright is a notice consisting of 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.\textsuperscript{194} This provision was a concession by Berne Union proponents to whom any copyright notice, even one liberally conceived and applied, represented a compromise with the principles of automatic copyright upon creation.\textsuperscript{195}

Under United States law, notice of copyright has always been regarded as an irreducible minimum for securing statutory copyright. That the United States consented to change its copyright law with respect to form and placement of notice indicates, in part, a willingness to make certain domestic adjustments in order to achieve the desired goal of international copyright unity and, in part, a recognition of the liberalizing influence of recent judicial rulings on the traditionally rigid concepts of copyright notice.

The Copyright Act provides that copyright is secured by publication with notice.\textsuperscript{196} Such notice, in the form and location prescribed by the act,\textsuperscript{197} must be affixed to each copy published or offered for sale in the United States by

\textsuperscript{192} Hearings, supra note 182, at 218.
\textsuperscript{194} U.C.C. art. 111(1) Schuelman, Another View of Article III of the Universal Copyright Convention, 1953 Wis. L. Rev. 297.
\textsuperscript{197} 17 U.S.C. §§ 19, 20 (1952).
authority of the copyright proprietor, except in the case of books seeking *ad interim* protection.\textsuperscript{198}

Prior to the Act of 1909, the belief that notice was necessary to protect the public against innocent violations of the copyright law was ingrained even deeper in our copyright law. Under the original copyright act of 1790, protection was granted only after filing an entry of the title of the work, deposit of a copy, publication of the record of entry of the title in a newspaper for four weeks, and delivery of a copy to the Secretary of State within six months after publication.\textsuperscript{199} The Act of 1790 did not, however, require notice of copyright to be inserted in the copyrighted work itself. Under the Act of April 29, 1802, the prescribed notice was, for the first time, required to be inserted in every copy of the published work\textsuperscript{200} and it was held by the Supreme Court that all of the conditions prescribed by Congress, including publication of the record in a newspaper and delivery of a copy to the Secretary of State, had to be complied with in order to validate the copyright.\textsuperscript{201}

In the case of books, the requisite notice was a copy of the record of title inserted at full length on the title page or the page immediately following. The Copyright Act of 1831 specifically made affixation of the prescribed words to each published copy of the book a condition of enjoyment of the benefits accorded by the act.\textsuperscript{202} Under this act, the requirement of insertion in the work of a copy of the record of title was eliminated.

When the Librarian of Congress was invested with control of all records and matters relating to copyright by the Act of July 8, 1870,\textsuperscript{203} the following form of notice was prescribed: "Entered according to Act of Congress in the year ———, by A. B., in the office of the librarian of Congress, at Washington." This form of notice was applicable to all works then subject to copyright. The Act of 1870 changed the language of the copyright law of 1831 by providing that no person could "maintain an action for the infringement of his copyright" unless the required notice was inserted in the published copies of his book.\textsuperscript{204}

One further change made prior to the general revision of the copyright law in 1909 is worthy of note. The Act of 1874 modified the previous act by

\textsuperscript{198} But see the provisions of § 16, which require appropriate notice to be affixed to all copies of books or periodicals imported into the United States free of manufacturing requirements within five-year period of *ad interim* copyright. 17 U.S.C. § 16 (1952).

\textsuperscript{199} Act of May 31, 1790, 1 Stat. 124.

\textsuperscript{200} 2 Stat. 171 (1802).

\textsuperscript{201} Wheaton v. Peters, 33 U.S. (8 Pet.) 591 (1834); Thompson v. Hubbard, 131 U.S. 123, 150 (1889).

\textsuperscript{202} Act of Feb. 3, 1831, 4 Stat. 437.

\textsuperscript{203} 16 Stat. 214 (1870).

\textsuperscript{204} The Act of 1831 had declared that no person should be entitled to "the benefit" of the act unless he inserted the prescribed words in the published copies. 4 Stat. 436-37 (1831).
permitting, as an alternative to the statement of entry in the office of the Librarian, the use of the word "Copyright" together with the date of copyright and the name of the party by whom it was secured.

The strong emphasis which Congress placed, from the very beginning, on giving the public notice of copyright was echoed in the strictness with which the courts construed the statutory rules. In Mifflin v. White, a variance in the prescribed form of notice was held sufficient in itself to deny recovery for infringement, regardless of whether or not the imperfection had been such as to mislead anyone. The Supreme Court said:

"In determining whether a notice of copyright is misleading we are not bound to look beyond the face of the notice, and inquire whether under the facts of the particular case, it is reasonable to suppose an intelligent person could actually have been misled. . . ."

As a result of the enactment of Public Law 743, two separate sets of notice requirements are now in effect—one for works published by convention nationals and the other for works by United States citizens and aliens domiciled in the United States. Under newly enacted section 9(c)(5), convention nationals whose works bear the proper symbol © and accompanying data, i.e., the name of the copyright proprietor and the year of first publication, are exempt from the following provisions of the Copyright Act relating to placement of notice still applicable to United States citizens: in the case of books or other printed publications, notice is to be affixed to the title page or the page immediately following; in the case of a periodical, notice is to be affixed either upon the title page or upon the first page of text of each separate number or under the title heading; in the case of a musical work, notice is to be affixed either upon the title page or the first page of music. These detailed requirements for placement of notice, which have been strictly interpreted by our courts, will no longer apply in the case of convention authors. Instead, foreign authors who qualify under section 9(c) are only required to insert the specified copyright notice "in such manner and location as to give reasonable notice of claim of copyright."

The determination of whether a particular notice has given "reasonable" notification of copyright now becomes a factor in copyright infringement suits for the first time in our copyright law. Heretofore American courts have refused to consider the argument that no "intelligent" person could have been


207. Id. at 264.

misled by a variance in the required form of notice.\textsuperscript{209} Public Law 743, however, appears to have introduced into the copyright law the "reasonable man test," long a basic concept in the law of negligence.\textsuperscript{210}

Works by United States authors or by aliens domiciled in this country, as well as works first published in the United States, continue to be governed by the detailed place-of-notice provisions of section 20. For these authors, the consequences of improper location of copyright notice continue to be drastic. For example, where notice of copyright appeared at the bottom of the last page of plaintiff's booklet rather than on the title page or the following page, plaintiff was denied relief for infringement of its copyright.\textsuperscript{211} Similarly, a notice appearing on the back cover of a pamphlet was held to be fatally defective.\textsuperscript{212} One court has held invalid the copyright on a portfolio of drawings because the notice had not been placed on the reverse side of the cover of the folio which constituted the title page of the work.\textsuperscript{213} Instead, the copyright notice appeared on the first leaf following the cover. The court stated that this did not meet the requirements of the statute because a page intervened between the title page and that containing the copyright notice:

Books consist, generally speaking, of leaves bound within covers and each side of a leaf constitutes a page. In order, therefore, that there be compliance with section 19 of the Act, the copyright notice must appear on the left hand side of a leaf if the matter comprised in the title page is on the right hand side; if the title page material be printed on the left hand side of the leaf, then the copyright notice must be printed on the right hand side of the leaf immediately following.\textsuperscript{214}

The Universal Copyright Convention does not require contracting states to change notice provisions applicable to their own nationals seeking domestic copyright protection. Nevertheless, in order to make uniform the form of notice required for protection under the convention and under the United States Copyright Act, Public Law 743 has amended section 19 to authorize domestic authors to use the symbol © as an alternative to the word "copyright."\textsuperscript{215} The effect of this change is that an American copyright owner desiring international copyright protection for printed literary, musical, or dramatic works will be able to use a single copyright notice.

In one respect, the notice requirements for convention nationals are more

\begin{footnotesize}
\begin{enumerate}
\item[209.] Mifflin v. R. H. White Co., 190 U.S. 260 (1903).
\item[210.] \textit{Quaere:} Is failure of "reasonable notice" ipso facto made out by a showing by the infringer that he had been misled by placement of the copyright notice? \textit{Cf.} innocent infringer test in 17 U.S.C. § 21 (1952).
\item[211.] United Thrift Plan Inc. v. National Thrift Plan Inc., 34 F.2d 300 (E.D.N.Y. 1929).
\item[214.] 32 F. Supp. at 823.
\end{enumerate}
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stringent than the requirements for United States citizens and domiciled aliens. The Copyright Act provides that in the case of works of art, photographs, maps, prints, and the like, the notice need not contain the year of copyright.216 It is sufficient if there is affixed the symbol © accompanied only by the initials, monogram, mark, or symbol of the copyright proprietor, as long as on some accessible portion of each of the copies—the margin, back, permanent base, pedestal, or substance on which such copies are mounted—the full name of the owner of the copyright appears.

Whereas section 19 of the Copyright Act requires the notice to include the year of copyright only if the work is a printed literary, musical, or dramatic work, the newly enacted section 9(c) relating to Universal Copyright Convention protection for foreign citizens requires the year of first publication and the full name of the copyright proprietor to appear on all works, including works of art, in order to qualify convention nationals for exemption from other formalities. Presumably, too, American artists and photographers, if they are to secure international protection for their works of art under the Universal Copyright Convention, will have to forfeit the concession to aesthetics accorded them under the United States Copyright Act.

1. The Heim Case. Discussion of the effects of Public Law 743 on the notice provisions of the Copyright Act would be incomplete without some reference to Heim v. Universal Pictures Co.217 That decision involved the question of whether required notice of copyright must be affixed to works published and sold entirely abroad. Section 10 of the Copyright Act, which provides that copyright is secured by publication with notice, states that notice “shall be affixed to each copy thereof published or affixed for sale in the United States except in the case of books seeking ad interim protection.”218 It does not make clear whether works published or offered for sale solely outside of the United States may secure copyright in this country even though the prescribed notice has been completely omitted.

The decisions leading up to the celebrated dictum of Judge Frank in the Heim case were inconclusive on that issue. On the one hand, the Supreme Court in United Dictionary Co. v. G. & C. Merriam Co.219 had held that, once copyright in the United States is secured by publication in this country with the required notice, copies of the work subsequently published or sold abroad need not contain copyright notice. On the other hand, Judge Woolsey in Basevi v. Edward O'Toole Co.220 had handed down a ruling that prior publication of a

217. 154 F.2d 480 (2d Cir. 1946); see Katz, Is Notice of Copyright Necessary in Works Published Abroad?—A Query and a Quandary, 1953 WASH. U.L.Q. 55.
book in a foreign country, without the copyright notice required under our law, prevented the owner of the book from thereafter securing a valid copyright in the United States.

In the Heim case, the majority of the court took the position that a work does not enter the public domain when copies of it are published and sold outside the United States without the notice prescribed by our law, so long as publication in the foreign nation does not dedicate the work under the law of that country. In a vigorous dissenting opinion, Judge Clark pointed out that the effect of this ruling was to set up two standards for securing United States copyright: (a) publication with notice when publication occurs in this country—the usual situation for American citizens, and (b) publication without notice when publication occurs in a foreign country.

At first glance, it appears that the controversy engendered by the Heim case has become moot since the ratification of the Universal Copyright Convention and the enactment of Public Law 743. The convention undertakes to eliminate all formalities except notice of copyright. Public Law 743 provides that works of convention authors must bear the specified notice in order to secure copyright in the United States without complying with other formalities prescribed by the Copyright Act. It seems fairly clear that hereafter a foreign author whose work is in the English language and who desires to take advantage of the exemption from the manufacturing clause accorded by the new section 9(c) of the Copyright Act will make sure to insert the required notice on all copies of his work, even though publication and sale occurs wholly abroad. In this light, courts are likely to take the position that the law of the Heim case has been changed and that proper notice of copyright is a minimal requirement for all convention authors seeking the benefits of section 9(c).

On the other hand, a convention author of a work printed in a language other than English, since his work is unaffected by the manufacturing clause, may choose to decline the exemptions granted by section 9(c) and claim copyright protection in the United States in the same manner as prior to the Universal Copyright Convention, i.e., as a citizen of a proclaimed country. The author of such a work may argue, with some basis, that the notice requirement in section 9(c) does not pertain to him and that the Heim doctrine is still applicable. Support for this position is furnished by the fact that the notice provision in article III of the Universal Copyright Convention is a maximum formality which may be imposed by contracting states as a condition of copyright.221 If any country, under its local law, has a more liberal notice provision than that devised under the convention, or no notice requirements at all, the convention

does not require that the domestic law be made more stringent. Accordingly, under certain circumstances, the continued viability of the *Heim* doctrine may be deemed unaffected and even strengthened by this country's ratification of the Universal Copyright Convention.

2. Judicial trends. Under Public Law 743, notice requirements for works of convention nationals have been relaxed to the extent that location of the symbol ©, the name of the copyright owner, and the year of copyright must serve only to give "reasonable" notice of copyright. American authors have been given the choice of using the symbol © as an alternative to the word "copyright." These changes follow the trend toward liberalizing notice requirements apparent in recent decisions. Judge Learned Hand's opinion in *National Comics Publications, Inc. v. Fawcett Publications, Inc.* highlights the increasingly prevalent note of realism that emphasizes "the inequity of allowing a barefaced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public."

In that case, a syndicated newspaper publisher brought suit for infringement and unfair competition in connection with its comic strip, "Superman." The district court dismissed the complaint on the ground that plaintiff had abandoned its copyright by publishing the comic strip without proper copyright notices. In reversing the decision of the lower court, the Court of Appeals for the Second Circuit indicated that it did not believe "abandonment" could occur without some "overt act which manifests his [the copyright owner's] purpose to surrender his rights in the 'work' and to allow the public to copy it." The court felt that the copyright notices inserted by the syndicated newspaper publisher, though not in proper form, clearly showed a desire to claim copyright in the strips.

As to the question of how closely the notice must conform to the requirements of section 21 of the Copyright Act, the court said any notice is sufficient that gives the substance of the information prescribed in section 19. Support for this view rested on the rationale of the many decisions upholding notices carrying an earlier date than the true year: the public is notified, despite the erroneous notice, of a proprietor claiming copyright. In line with this position, the court expressed two interesting and novel views. First, on the question of whether the symbol © could be used as an alternative to the word "copyright" even as to works not within section 5(c) through (k), the court volunteered the opinion

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224. 191 F.2d at 597-98 (2d Cir. 1951).
that such a notice should be deemed sufficient. Second, the court took the position that the copyrights on the “Superman” strips were not forfeited because the notice contained the name of a subsidiary corporation, Superman, Inc., rather than the actual proprietor. The court said:

Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy’s name as proprietor. 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 that corporation was only a dummy; certainly Detective could not for that reason have escaped any liability. 226

The changes introduced by Public Law 743 in the notice provisions of sections 19 and 20 of the Copyright Act convey legislative sanction to these views aimed at liberalizing notice requirements and forestalling copyright forfeiture. However, except for the use of the symbol ©, the benefits of liberalized notice provisions are not available to Americans.

3. Proposed legislation. A recent bill introduced by Congressman Keating seeks to extend to United States authors the new notice provisions available to foreign authors of convention nations under Public Law 743. 227 The bill goes even further than Public Law 743 by specifying the circumstances under which notice of copyright shall be deemed (a) to be placed in such location as to give reasonable notice of claim of copyright, and (b) to be accompanied by the name of the copyright proprietor and the year in which copyright was secured by publication. 228 Despite some feeling on the part of bar groups that the revisions proposed by this bill require further study, the reformulation of notice provisions appears inevitable.

III. Conclusion

Enactment of Public Law 743 last year represented the fruition of the efforts of many years to revise the United States copyright law in those respects


228. In the case of a book or other printed publication, including a periodical or a printed musical work, a satisfactory location for copyright notice would be either the title page, the page containing the title heading, the first page of text of each separate number, the first page of music, the front cover, or any one of the ten pages next preceding or following such title page, page containing the title heading or first page of text, or first page of music cover. Ibid.

Even though the copyright proprietor or the year of publication is not designated as such in immediate conjunction with the words or symbol signifying “copyright,” H.R. 782 proposes to validate such notice if the copyright proprietor is the author, composer or publisher named on the title page, first page of text or music, or front cover of the work, and if date appears in any one of the aforementioned portions of the work. Ibid.

H.R. 782 also continues substantially the provisions of the present act in relation to form of notice to be affixed to works of fine art. It also would authorize the use of a
necessary to permit this country to become a member of a truly worldwide copyright convention. The burdens of formalities such as deposit, registration, rigid notice specifications, and the manufacturing clause have been lifted for foreign authors of convention countries. At the same time, now that the Universal Copyright Convention has become effective at least among some of the nations of the world, United States authors will be assured of protection for their intellectual creations in these countries, not by sufferance but as a matter of right.

The implications of the Universal Copyright Convention and Public Law 743 extend, perhaps, even beyond the prospect of increased harmony in international copyright relations. Formalities, at which the courts have steadily been chipping away, have now been legislatively curtailed. "Copyright on creation" is closer at hand than ever for foreign authors. Further copyright reforms are in prospect for American authors. Public Law 743 may supply the needed impetus for a general revision of the copyright laws long in the offing.229 Broad changes in notice provisions applicable to domestic authors have already been put in the form of legislation. Bills to eliminate the outmoded exemption given in section 1(e) to coin-operated machines by the 1909 Act are also pending in Congress.230 The sweeping change from the earphone and penny parlor days of 1909 to the present multi-colored, multi-coined juke box is only one illustration of the vast technical alteration that has taken place in the entertainment fields over the past half century.

Now that the goal of United States participation in a workable international copyright system has been achieved, the future lies open for much needed copyright reforms on the domestic level.

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229. The Copyright Office has recently been voted an appropriation of $20,000 to undertake a three-year study aimed at the complete revision of the Copyright Act. See Extension of Remarks of Congressman Frank Thompson, Jr., 101 Cong. Rec. A5080 (July 12, 1955). A general appropriation, including this sum, was provided for by PUB. L. No. 242, 84th Cong., 1st Sess. (Aug. 5, 1955); see H.R. REP. No. 1036, 84th Cong., 1st Sess. 6 (1955).