Comments

THE UNIVERSAL COPYRIGHT CONVENTION

As an aid to the free interchange of ideas and cultures among nations, the United Nations Educational, Scientific and Cultural Organization arranged a meeting of delegations representing 45 governments at Geneva last September to draft a Universal Copyright Convention. Forty countries have signed the Convention—thirty-six at the conclusion of the Conference on September 6, 1952,[1] and four more since that time.[2]

The participation of the United States and other countries of the Western Hemisphere in the drafting of the Universal Copyright Convention marks a significant step in the effort to bring both hemispheres together in an international pact uniformly assuring copyright protection to creators all over the world. Until this point, the United States and a number of Latin-American republics had allied themselves in a variety of inter-American copyright conventions,[3] but all but two of these republics[4] refrained from joining the vast majority of foreign governments of the Eastern Hemisphere in the International Copyright Union, commonly referred to as the Berne Convention.

These international developments merit a brief consideration of the foundations upon which the concept of literary property is based. The notion of property in literary works could hardly develop until after the invention of printing. As George Haven Putnam writing shortly after the enactment of our first International Copyright Act (26 Stat. L. 1106) said, "literary property dates from the time when authors first received compensation, not from the state or from individual patrons, but from individual readers throughout the community, who were ready to make payment in return for the benefit received***. Literary property could, therefore, come into an assured existence only after, or simultaneous with, the evolution of the publisher."[5]

The first grants of exclusive rights were made to printers—and often it was

[1] Andorra, Argentina, Australia, Austria, Brazil, Canada, Chile, Cuba, Denmark, El Salvador, Finland, France, German Federal Republic, Guatemala, Haiti, Holy See, Honduras, India, Ireland, Italy, Liberia, Luxemburg, Mexico, Monaco, Nicaragua, Norway, Netherlands, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom of Great Britain and North Ireland, United States of America, Uruguay, and Yugoslavia.

[2] Belgium, Israel, Japan, Peru.

[3] Mexico Convention of 1902, ratified by Guatemala, Salvador, Costa Rica, Honduras, Nicaragua, Dominican Republic, and the United States; Buenos Aires Convention of 1910, ratified by Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and the United States; five countries, Costa Rica, Ecuador, Guatemala, Panama, and Nicaragua have ratified the Havana Convention of 1928, which revised the Buenos Aires Convention.

[4] Brazil and Haiti.

[5] G. H. Putnam, Authors and Their Public in Ancient Times (1894) 3.

as a means of regulating the printing presses rather than encouragement to learning. The last of such grants in Great Britain disappeared with the expiration of the Licensing Act of Charles II in 1679.[6]

Commencing with the first genuine Anglo-Saxon Copyright Law—the Act of 8 Anne, c. 19 in 1709—and continuing until 1844 in Great Britain (7 & 8 Vict. c. 12) and 1891 in the United States (26 Stat. L. 1106), the copyright laws protected only native authors, or those residing within the country at the time of publication. Works of foreign or nonresident authors could be pirated at will. As recently as a century ago, French plays were freely translated and presented on the stage in England much to the consternation of the French playwrights who felt they were being robbed, as well as British playwrights who found themselves handicapped in competing with plays that had already been proved successful on the French stage and for which no royalty had to be paid by the British stage producers. This deplorable condition was particularly acute in the United States in the reprinting of the works of British authors. As early as 1837, a petition of British authors asking that their works be protected here was presented to the Senate by Henry Clay.[7]

In 1885 the delegates of twenty countries convened in Berne, Switzerland, for the purpose of formulating a Convention under which all signatory states would accord automatic protection to works originating in any signatory state which had secured domestic copyright protection in accordance with the laws of the country of origin of the work (Art. II). This Convention, known as the Berne Convention, was signed on September 9, 1886, by ten countries. Apart from automatic protection in other countries, the Convention of 1886 assured certain minimal rights including the exclusive right of translation for a ten year term (Art. V), and the right to present translations of plays as well as the original plays in public (Art. IX). The Berne Convention has been revised from time to time, the last revision having taken place at the Brussels Conference of 1948.

Except for Brazil, Canada, Haiti, and Newfoundland, none of the nations of the Western Hemisphere has been a party to the Berne Convention. There have, however, been a number of inter-American conventions, such as the Mexico Convention of 1902, the Buenos Aires Convention of 1910, the Havana Convention of 1928, and the Washington Convention of 1946. The last inter-American convention ratified by the United States was the Buenos Aires Convention to which this country became a party in 1914.

The importance of an international copyright convention of universal application cannot be minimized. We are living in an age when every encouragement must be given to the free interchange of ideas. Today commerce in books and periodicals is just as important as commerce in physical goods. Never in history have we had greater proof that man does not live by bread alone. Developments of the twentieth century in methods of mass communication have provided a

[6] Birrell, The Law and History of Copyright (1899) 41–68.

[7] 2 Senate Documents, 24th Cong. 2d Sess. Rep. No. 134.

means for the enjoyment of the leisure made possible by technological advances which have saved so many man-hours in manufacturing, agricultural, and mercantile pursuits.

The size of the industries that are almost wholly dependent on the arts—music, literature, and related fields of entertainment and learning is staggering. Included are not only book and periodical publishing enterprises, but also motion pictures, radio, television, and the phonograph industry. None of these vast industries would be possible without the contributions of authors of literary and musical works. As the markets for authors increase, an increasingly larger part of our population joins the ranks of consumers of intellectual properties, and the investment in such properties rises in corresponding degree. Despite the valuable nature of literary and musical properties, these products of intellectual endeavor cross international boundaries with little control by those who create them. In this respect, such properties are unlike other forms of property which are tangible and have a situs and cannot easily be appropriated without running afoul of the criminal laws.

With our realization of the responsibilities of world leadership, we in the United States have become increasingly conscious of the necessity of joining the family of nations in according automatic protection to works of foreign authors. For selfish reasons alone this is important in order that our authors may be assured of adequate protection abroad. Several attempts have been made to secure United States' adherence to the Berne Convention, but these efforts have failed because of certain inconsistencies between our copyright law and the provisions of the Berne Convention, namely,

(1) whereas the Berne Convention requires automatic recognition of copyright without any formalities, the United States law requires a prescribed form of copyright notice, and in the case of works in the English language, manufacture of copies in the United States, in order to secure copyright protection;[8]

(2) whereas the Berne Convention requires protection of so-called moral rights, there is no such provision in our copyright law;[9]

(3) whereas the Berne Convention prescribes a term of copyright based upon the life of the author and a period of years after his death, the term of copyright in our law commences upon the date of publication (or registration in the case of unpublished works) and continues for a period of 28 years thereafter with a provision for renewal for an additional term of 28 years on appropriate application during the last year of the original term.[10]

American works have been protected in Berne Convention countries by publication of the works in Canada, England, or some other Berne country simultaneously with their publication in the United States.

In most Berne countries, there is an additional basis for protection of American works, namely, through reciprocal agreements arranged between the

[8] Compare Art. 4 (2) of Berne Convention with Title 17 U.S.C. §§9,15.

[9] Art. 6 *bis* of Berne Convention.

[10] Compare Art. 7 of Berne Convention with Title 17 U.S.C. §§23 24.

United States and each of those countries.[11] The latter method is not very effective in a country which demands compliance with local formalities, such as notice, registration, or local manufacture or publication. If these requirements were imposed upon American works by all foreign countries, we would be faced with an impossible burden of compliance.

For the most part, therefore, we in America rely on simultaneous publication in the United States and in a Berne Convention country. This gives the work a dual nationalty, so to speak. It takes on the quality of both American nationality and Canadian or other Berne country nationality.

The existing system through which United States copyright owners secure protection abroad under the Berne Convention has been a source of great friction.[12] Foreign authors feel that it is unfair to them to be compelled to comply with our formalities in order to enjoy copyright protection in the United States while we enjoy such protection automatically in their countries. We would be seriously handicapped if Berne Convention countries were to commence retaliation against the United States by imposing upon us the same conditions for the enjoyment of copyright which we impose upon them.

In order to arrive at a Convention to which the United States as well as the majority of the other nations of the world would subscribe, UNESCO called the Intergovernmental Conference which resulted in the Universal Copyright Convention. That Convention does not attempt to prescribe minimum requirements for protection to the extent that the Berne Convention does. On the contrary, in general it provides that each state adhering to the Convention must accord to nationals of other adhering states the same protection that it accords to its own nationals. It makes the enjoyment of copyright protection independent of any formalities other than a copyright 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 (Art. III). In order for the United States to ratify this Convention, it will mean that with respect to nationals of countries adhering to the Universal Convention, we must repeal the provisions of our law requiring domestic manufacture of works in the English language.[13]

The Universal Convention prescribes a minimum term of protection of 25 years from either the date of first publication or the death of the author de-

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[11] Such agreements exist between the United States and the following Berne countries: Australia, Austria, Belgium, Canada, Czechoslovakia, Danzig, Denmark, Finland, France, Germany, Great Britain and possessions, Greece, Ireland, Israel, Italy, Luxemburg, Netherlands and possessions, New Zealand, Norway, Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Tunisia, and Union of South Africa.

[12] See Report of Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 2285, 81st Cong. 1st Sess. Feb. 25, 1949, Letter of Ernest A. Gross, Acting Assistant Secretary (For the Secretary of State), February 25, 1949, p. 20.

[13] See Report of Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 4059, 82nd Cong. 2d Sess. Jan. 28, 30, Feb. 1, 1952; the House Judiciary Committee failed to report favorably on H. R. 4059.

pending upon whether at the time of the effective date of the Convention the particular state computes the term of copyright from date of publication or the death of the author; however, in the case of photographic works and works of art, protection need not be for a period greater than ten years; in any event a state need not accord a greater term of protection than is accorded in the country of origin (Art. IV).

A further minimum requirement under the Universal Convention relates to the right of translation (Art. V). Copyright protection means very little if a work may be freely translated from the language of the country of origin to a different language prevailing in the state where protection is sought. The Universal Convention therefore provides that the author's right to authorize translations must be recognized, and that it shall be absolute for a period of seven years. This is three years shorter than the minimum of ten years prescribed in the original Berne Convention of 1886 (Art. 5). But the Universal Convention extends certain translation rights to the original author for the full term of minimum protection accorded to other works. After the seven year period expires, the work may be translated without the author's consent upon certain conditions prescribed in the Convention. Such a translation may then be authorized by an appropriate authority in each country, if the work has not theretofore been translated into the national language of that country. A license so granted, however, must provide for a correct translation and for actual payment to the authority or owner of the right of translation of an amount which provides for just compensation in conformity with international standards. Moreover, such a license is valid only for publication in the territory of the contracting state where it is applied for, but copies so published may be imported and sold in another contracting state, if (a) one of the national languages of the contracting state is the same language as that into which the work has been translated and (b) if the domestic law in such other state makes provision for such licenses and does not prohibit such importation and sale. It is further provided that such a license may not be granted if the author has withdrawn from circulation all copies of the work.

The subject of retroactivity received a great deal of attention, and it was finally provided that the Convention shall not apply to works or rights in works which, at the effective date of the Convention in a contracting state where protection is claimed, are permanently in the public domain in the said contracting state (Art. VII).

Articles VIII to XXI, inclusive, contain miscellaneous provisions which need not be reviewed in detail here. It is well to point out that the Convention will not come into force unless and until 12 countries have ratified, including four which are not members of the Berne Union (Art. IX).

The Convention is not self-executing. Our domestic laws must be modified by changing the form of copyright notice and eliminating our manufacturing clause as to works of other Contracting States (Art. X).

The Convention may be denounced by any country on 12 months notice (Art. XIV).

Disputes between two or more Contracting States may be brought before the International Court of Justice for determination (Art. XV).

No reservations to the Convention are permitted (Art. XX).

In view of the fact that several countries in the Western Hemisphere, excluding the United States, have ratified the Inter-American Convention of 1946,[14] we should note that in the event of a conflict between the Universal Convention and the Inter-American Convention, the provisions of the Universal Convention will control (Art. XVIII). If there is any conflict between a bilateral arrangement to which the United States and other signatory States of this Convention are parties, the provisions of this Convention rather than of the bilateral arrangements will control. However, rights which have already been acquired under existing conventions or bilateral arrangements will not be affected by the provisions of this Convention (Art. XIX).

Although the Universal Convention does not represent much advance over the original Berne Convention of 1886 in basic copyright protection, nevertheless its ratification by the United States would mark a step forward for us by providing for the automatic protection of American works abroad as a matter of right, rather than by sufferance, as at present, through the backdoor arrangements for individual Berne protection by simultaneous publication in Canada or England. One of the dangers of the Universal Copyright Convention is that foreign countries which now extend protection to American works for a period of the life of the author and 50 years thereafter, may enact legislation limiting such protection to a period of 56 years from the date of first publication. In this writer's opinion, it is not likely that countries such as France and England will resort to this. They could have done so under the Berne Convention, but chose not to. It is, of course, possible that certain countries may invoke this provision, but then we will be much better off having definite protection for a period of 56 years in such countries, rather than having a very tenuous, if any, protection for life and 50 years.

There will always be a fear in some quarters that foreign nationals may make false infringement claims in the United States as a result of eliminating the requirement of compliance with the formalities required by our law at the present time. For all practical purposes however, such formalities were made nonexistent by the decision of the United States Circuit Court of Appeals in *Heim* v. *Universal Pictures*, 154 F. 2d 480 (2d Cir. 1946). Moreover, such formalities do not exist under the Buenos Aires Convention to which we have been a party since 1914. Under that Convention, the only formality that can be required is a statement in the work that indicates the reservation of the property right (Art. 3). Yet there has been no avalanche of unfounded suits by Latin-Americans claiming protection under that Convention.

[14] Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay.

The basis for support of the Universal Convention lies in its simplicity as a common ground upon which most civilized nations should reach agreement.[15] There is the hope that this will lead ultimately to improved systems of copyright protection throughout the free world. It has the advantage of overcoming most of the resistance that has heretofore made it impossible for the United States to adhere to the Berne Convention.

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[15] Farmer, "Universal Copyright Convention Signed, Now Awaits Ratification," Publishers' Weekly (Sept. 27, 1952) 1422.

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WHY NO TRUSTS IN THE CIVIL LAW?

In the field of property, the trust furnishes a striking antinomy between the common law and the civil law. The purpose of this comment is limited to an examination of the considerations commonly supposed to exclude this institution in the civil law. For the present purpose, it is unnecessary to survey the extent to which the trust nevertheless is recognized or paralleled in various civil law countries at the present time—a topic recently covered in a leading article in this Journal.[1] As there indicated, the basic obstacles, aside from the existence of domestic civil law institutions analogous to trusts, are: first and chiefly, that the principle of indivision of property, supposed to be fundamental in the Roman legal system and therefore presumptively also in modern civil law, precludes acceptance of an institution, such as that of the trust, by which property is divided into legal and equitable rights; and, secondarily, that the principle of registration of interests in property necessitates a *numerus clausus* of rights in rem, limited to the categories received in the modern codes and not including even traditional rights involved in fiduciary arrangements. As will appear, neither of these arguments is tenable in history or in logic, but the fixed beliefs which they represent are of consummate comparative interest.

The major premise that the Roman and civil law tradition does not allow division of the claims to a thing among several persons at the same time, is refuted by the record. This exhibits a long and flexible evolution of property rights in response to current social needs in the Romanic as well as in the English legal system, which cannot in reason be expunged by authoritarian efforts, however pretentious, to oversimplify the concept of property in terms of autonomous, absolute, abstract power, such as appear in the *Corpus Iuris*

[1] Joaquín Garrigues, "Law of Trusts," 2 American Journal of Comparative Law (1953) 25 *et seq.*