

THE PRESENT COPYRIGHT SITUATION

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IN 1925 and 1926, I contributed articles to the YALE LAW JOURNAL under the titles: *Copyright Law Reform*¹ and *The International Copyright Union*.² The first article analyzed the slow development of our international copyright legislation and urged laws in amendment of our existing international copyright relations. The second dealt more specifically with the creation of the International Copyright Union, setting forth the considerations which might be advanced for the entry of the United States into that admirable association of nations for the better protection of literary and artistic property.

In the four years since the printing of the last of these articles, there has been a steady increase in the expression of the growing need for amendment of our copyright laws. This has led to the introduction from time to time of a number of bills suggesting either specific amendments or the general revision and re-codification of existing law and providing for the entry of the United States into the International Copyright Union.

It is a fact not without significance that, despite the very thorough methods employed in 1909 in framing a general revision³ of the existing copyright statutes, up to 1926 no less than five copyright acts were passed for the amendment of the Act of 1909. These included: the act of August 24, 1912, to protect motion pictures;⁴ the Act of March 2, 1913, to provide for the inclusion in the copyright certificate of certain additional facts of record with respect to a registered claim of copyright;⁵ the Act of March 28, 1914, to permit the deposit of one copy of a work by a foreign author published abroad in a foreign language in lieu of the two copies theretofore required;⁶ the Act of December 18, 1919, securing a longer *ad interim* term of protection for a book first published in England;⁷ and finally the Act of July 3, 1926, to secure protection for books which,

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¹ (1925) 35 YALE L. J. 48.

² (1926) 36 YALE L. J. 68.

³ 35 STAT. 1075 (1909); 17 U. S. C. A. § 1 *et. seq.* (1927).

⁴ 37 STAT. 488 (1912); 17 U. S. C. A. §§ 5, 11, 25 (1927).

⁵ 37 STAT. 724 (1913); 17 U. S. C. A. § 55 (1927).

⁶ 38 STAT. 311 (1914); 17 U. S. C. A. § 12 (1927).

⁷ 41 STAT. 368 (1919); 17 U. S. C. A. §§ 8, 21 (1927).

though not printed from type set or produced by lithographic or photo-engraving process, were nevertheless published and sold.⁸ These latter are for the most part books provisionally published by university professors, usually, no doubt, followed by type-set reprints. The Act of December 18, 1919, is still in force in so far as the increased term of *ad interim* copyright and the longer period of grace⁹ in which to procure the American manufacture of the English book are concerned; but the temporary provisions of that Act, for the safeguarding of the copyright in books published abroad during the great war, have elapsed by reason of a time limit.

Since the year 1926 only a single copyright act has been passed, the Act of May 23, 1928, increasing the copyright fees and the subscription price of the Catalogue of Copyright Entries.¹⁰ The fees paid to the Copyright Office for registration, fixed by law as far back as 1831 and never changed, had become entirely inadequate. The increase secured by the Act of 1928 was from \$1 to \$2, the certificate of copyright being included in this charge. The old fee of \$1 for registration including certificate was retained unchanged in the case of all unpublished works, the increase being made only in case the work had actually been published. The provision of the Act of 1909 permitting the registration of a published photograph for \$1 when no certificate was desired was also continued. The annual Catalogue of Copyright Entries had considerably increased in size with the passage of time, and following the war the cost of printing had also risen greatly; hence arose the need for raising the subscription price, a need which was met in the Act of 1928 by doubling the former price of \$5. The yearly cost of printing this Catalogue is now about \$45,000, but only a very small part of this sum is obtained from subscriptions.

In addition to the bills which materialized in the Acts referred to above, others providing for specific amendments have been presented from time to time. Many of these were of no great importance, and consequently were given little or no attention by the Congressional Committee to which they were referred, were not considered at public hearings, and were not reported to Congress. One such bill would have transferred the copyright registration of prints and labels for manufactured articles from the Patent Office to the Copyright Office.¹¹ Several others, pre-

⁸ 44 STAT. 818 (1926); 17 U. S. C. A. § 15 (Supp. 1929).

⁹ Four months in lieu of thirty days.

¹⁰ 45 STAT. 713 (1928); 17 U. S. C. A. §§ 57, 61 (Supp. 1929).

¹¹ On June 18, 1874, at the instance of Mr. Ainsworth R. Spofford, then Librarian of Congress, an Act was passed, 18 STAT. 78 (1874), of which § 3, interpreting the copyright laws then in force, provided: "That in the construction of this act the words 'engraving,' 'cut,' and 'print' shall be applied only to pictorial illustrations or works connected with the fine

presented to Congress at different times, concerned motion-picture films and their exhibition. These included Senator Brookhart's "Bill to prevent obstruction and burden upon interstate trade and commerce in copyrighted motion-picture films;"¹² a bill of the same title but different text introduced in the House of Representatives by the Hon. Clarence Cannon;¹³ and an elaborate measure of forty-one sections introduced in the House of Representatives by the Hon. Grant M. Hudson under the title, "A bill to protect the motion-picture industry against unfair trade practices and monopoly."¹⁴ No further congressional action concerning any of these bills is recorded.

A bill introduced on May 15, 1928 by Senator Tydings¹⁵ is significant as indicating the existence of direct opposition to the grant of the exclusive right to the public performance for profit of copyrighted music. This bill provided that publication of the music by the owner should authorize its private or public performance for profit, or otherwise, without contribution to the copyright owner of any payment beyond the publication price of the music. The bill has not been urged.

Five proposals for copyright amendments of major importance have been presented for congressional discussion during recent years: (1) legislation to protect applied designs by copyright in lieu of patent; (2) legislation to eliminate the bad results following the compromise measures in the Copyright Act of 1909 relating to the mechanical reproduction of music; (3) legislation to cure the growing inconveniences arising from the non-divisibility of copyright; (4) legislation with respect to an author's rights with reference to radio broadcasting; (5) legislation to authorize the entry of the United States into the International Copyright Union.

arts, and no prints or labels designed to be used for any other articles of manufacture shall be entered under the copyright law, but may be registered in the Patent Office. And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels, in conformity with the regulations provided by law as to copyright of prints, except that there shall be paid for recording the title of any print or label, not a trade-make, six dollars, which shall cover the expense of furnishing a copy of the record, under the seal of the Commissioner of Patents, to the party entering the same."

It has been considered illogical to continue any copyright registration in the Patent Office.

¹² Sen. Bill No. 1667, introduced on December 13, 1927. This bill was introduced in the House of Representatives by the Hon. Emanuel Celler on January 26, 1928, as H. R. 10087, 70th Cong., 1st Sess.

¹³ H. R. 9298, 70th Cong., 1st Sess., introduced January 13, 1928.

¹⁴ H. R. 13686, 70th Cong., 1st Sess., introduced May 11, 1928.

¹⁵ Sen. Bill No. 4467, 70th Cong. 1st Sess.

COPYRIGHT FOR DESIGNS

For a number of years the Committee on Patents of the House of Representatives has given almost continuous consideration to bills proposing to protect designs by copyright. The inadequacy of the slow and cumbrous procedure of design patent has become increasingly obvious; fewer and fewer design patents have been issued, such registrations, according to the Report of the Commissioner of Patents, never exceeding 1000 annually. At first the bills introduced proposed copyright protection with registration in the Patent Office. This involved an anomalous procedure. If, for design patent protection, copyright was to be substituted, obviously the registrations should be made in the Copyright Office. The Register of Copyrights, in his report for 1913, pointed this out and urged amendment of the copyright laws

“to secure the protection of ornamental designs for articles of manufacture, to provide suitable remedies in case of infringement, and to prescribe a sufficient but reasonably economical registration in behalf of the numerous American and foreign draftsmen engaged in the preparation of such designs, and also to provide the manufacturers of such articles with the necessary protection against infringement.”

The following year a bill for this purpose was introduced by the Hon. William A. Oldfield, Chairman of the House Committee on Patents.¹⁶ This was followed by other substitute bills, one of which was favorably reported on August 18, 1916.¹⁷ The war intervened, however, and further discussion of this proposed legislation was delayed. On May 11, 1922, a conference was called by the Commissioner of Patents at which were present, among others, the Register of Copyrights and Mr. E. W. Bradford, the proponent of the design copyright bill. It was there agreed that a new bill should be drafted proposing the repeal of the design patent law and the protection under the copyright law of ornamental designs actually applied to or embodied in manufactured products. On December 5, 1924, Mr. Vestal, Chairman of the House Committee on Patents, introduced such a bill.¹⁸ Hearings took place on January 13, 14, and 27, 1925, and on February 19, 1925, an amended bill¹⁹ was favorably reported.²⁰ On December 21, 1925, in the first session of the 69th Congress, Mr. Vestal introduced a new bill,²¹ and, following public hearings on February 18 and 19 and May 7, 1926, a revised bill²² was brought forward

¹⁶ H. R. 11321, 63d Cong., 2d Sess.

¹⁷ H. R. 17290, 64th Cong., 1st Sess.

¹⁸ H. R. 10351, 68th Cong., 2d Sess.

¹⁹ H. R. 12306, 68th Cong., 2d Sess.

²⁰ HOUSE REP. No. 1521, 68th Cong. 2d Sess.

²¹ H. R. 6249, 69th Cong., 1st Sess.

²² H. R. 13117, 69th Cong., 1st Sess.

on June 28, 1926. In the first session of the 70th Congress, Mr. Vestal again introduced a bill²³ and, after public hearings,²⁴ another amended bill.²⁵ In the 71st Congress, 2d session, Mr. Vestal once more brought forward a new bill.²⁶ Long and detailed public hearings took place February 13 and 14, 1930, at which the bill was supported by Henry D. Williams, Esq., Chairman of the Copyright Committee of the Patent Law Association of New York City, who has been untiring in his efforts to secure a text of a bill that would meet all reasonable criticism. This bill was favorably reported by the House Committee on Patents on May 2, 1930,²⁷ and was passed by the House of Representatives on July 2. The House Act was presented to the Senate on July 3, but as that was the day of the final adjournment of Congress no action could be taken. It will no doubt be considered by the Senate Committee on Patents in regular order at the present session of Congress and its final enactment may be expected during this session.

This detailed record is interesting and enlightening as disclosing the long-continued service of the House Committee on Patents in its endeavor to secure an equitable and workable piece of very necessary legislation for the protection of thousands of people concerned with the production of new designs and their use in producing new and artistic articles of manufacture. More than a dozen separate bills have been introduced for this purpose since 1914, and on these bills there have been in all seven public hearings.

Briefly analyzed, the proposed Act provides that a citizen of the United States or a national of a foreign country with which the United States shall have established reciprocal copyright relations, who is the author of a design which has been applied to an article of manufacture, or his legal representative or assignee, may secure a copyright to protect the article for which the design has been used. The prerequisites for obtaining this protection are (1) that the design must have been actually applied to or embodied in a manufactured product; (2) that the manufactured article must have been marked "Design Copyrighted," or "D.copr.," together with the registration number; (3) that the manufactured article must have been sold or offered for sale; (4) that the required application for registration of the design must have been filed in the Copyright Office within six months after such sale. The application must be accompanied by a photograph or other identifying representa-

²³ H. R. 9358, 70th Cong., 1st Sess., introduced Jan. 16, 1928.

²⁴ March 16 and 24, 1928.

²⁵ H. R. 13453, 70th Cong., 1st Sess., introduced May 1, 1928.

²⁶ H. R. 7243, 71st Cong., 2d Sess., introduced December 11, 1929.

²⁷ HOUSE REP. No. 1372, 71st Cong., 2d Sess.

tion of the design and must state the date upon which the article was sold. The person filing the article must also state, under oath, that he is the author of the design or that he is the legal representative or assignee of such author. The design patent law is abrogated.

The initial period of copyright protection, for which a fee of \$3 is required, is for two years from the first sale or offer for sale of the manufactured article. This term may be extended at any time for an additional 18 years upon payment of \$20 more. These fees include a certificate of registration which is declared to be prima facie evidence of the facts stated therein.

The Act also provides for listing in the Catalogue of Copyright Entries all designs registered for the first term of protection together with an identifying representation. There are detailed and carefully considered provisions for remedies in case of infringement and for judicial procedure. A novel provision in copyright legislation is to be found in Section 17, that "if the copyright in a design shall have been adjudged invalid and a judgment or decree shall have been entered for the defendant a copy is to be filed in the Copyright Office and be made a part of its records."

The final House Committee report states:

"It has long been established that industrial designs are entitled to protection, but under the present laws it is not possible to obtain adequate protection, and in consequence thereof the original productions of artists and designers are pirated and sold in inferior goods so that their value is impaired or destroyed shortly after they appear on the market. . . The purpose of this bill is to encourage industrial design in the United States by furnishing adequate protection against piracy of original designs for manufactured products. No adequate protection has heretofore been provided for designs of this character, with the result that notwithstanding the high order of excellence of American artists and designers, and the desire of the manufacturers and merchants to supply such demand, America has failed of leadership in industrial designs, and other countries, particularly France, wherein industrial design is adequately encouraged and protected, have taken and hold that leadership."²⁸

RADIO BROADCASTING

The development of radio broadcasting has been followed by the introduction into Congress of bills dealing with the rights of composers with respect to the use of their music in connection with the radio. Senator Dill introduced a bill intended to establish the "analogy between the use of copyrighted music for broadcasting by radio and its use on phonograph records."²⁹ Joint

²⁸ *Ibid.*

²⁹ Sen. Bill No. 2328, 69th Cong., 1st Sess.

hearings took place on this bill before the Senate and House Committees on Patents³⁰ but no action has resulted. Meanwhile, in several decisions by the Federal courts, it has been held that the exclusive right to public performance of music, as granted by Section 1(e) of the Copyright Act of 1909, includes the exclusive right of radio broadcasting.

DIVISIBILITY OF COPYRIGHT

It has been found increasingly embarrassing under our present copyright laws that an author cannot separately assign the separate rights included in his general copyright. An author may obtain copyright for his book which will protect him against its republication without his authorization and against its use for translation, dramatization, or the making of a motion-picture film; but if he desires to transfer to another any one of these exclusive rights he cannot sell such right directly to a would-be purchaser so as to confer upon him the right to sue for any infringement. He can only license such use, and if the copyright is then infringed he must join with the licensee in a suit to protect the rights acquired by the latter. This situation had proved so troublesome that a bill was presented to the House of Representatives on January 29, 1927, for the purpose of obtaining a remedy.³¹ After a public hearing, held on February 10, 1927, the bill was reported to the House with certain amendments and with the recommendation that it be passed.³² The amended bill was reintroduced in the 70th Congress on January 9, 1928,³³ and, following two public hearings on March 2 and 20, it was again favorably reported on April 2, 1928.³⁴ The bill declared that "all rights comprised in a copyright are several, distinct, and severable," and that

"Where, under any assignment of less than the entire copyright or under an exclusive license, the assignee or licensee becomes entitled to any right comprised in copyright or to the exercise thereof, the assignee or licensee to the extent of the rights so assigned or conferred shall be treated for all purposes, including the right to sue, as the owner of the several and distinct rights and parts of the copyright so assigned or conferred; and the assignor or licensor to the extent of his rights not so assigned or conferred shall be treated for all purposes as the owner of the several and distinct rights and parts of the copyright not so assigned or conferred."

The Report declares that the bill does not enlarge any rights

³⁰ Extending from April 5 to 9 and April 19 to 26, 1926.

³¹ H. R. 16808, 69th Cong., 2d Sess.

³² HOUSE REP. No. 2225, 69th Cong., 2d Sess.

³³ H. R. 8913, 70th Cong., 1st Sess.

³⁴ HOUSE REP. No. 1103, 70th Cong., 1st Sess.

of the author, which remain the same as those granted by the Copyright Act of 1909, and that

“it simply permits these rights to be dealt with singly and separately by assignment and by suit for infringement in the assignee’s own name if occasion arises. There is thus no added burden imposed on the public, but, on the other hand, an increase of convenience in buying, selling, and enforcing the different rights which the law gives to the author or copyright proprietor. It was clearly brought out at the public hearings that the best business practice is already in accordance with what the bill proposes. What is desired is to legalize this practice so that it may prevail uniformly and not be confined to the better class of publishers and producers of books, plays, music, etc.”

Further public hearings took place on April 20, 1928. The bill as reported was brought up in the House of Representatives on May 7 and again on May 21 and 28, 1928, but, objection being made to its further consideration, it was passed over. As will be seen further on, its essential provisions were later included in a bill for the general revision of the copyright laws.

STATUTORY ROYALTY FOR THE MECHANICAL REPRODUCTION OF MUSIC

In the formulation and enactment of the Copyright Act of 1909, it was felt necessary, in order to secure a general revision of the copyright laws, to agree to a compromise provision with respect to the mechanical reproduction of music. While granting to the musical composer the exclusive right “to perform the copyrighted work publicly for profit” and “to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced,” there was interjected the much criticised provision:

“That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured.”³⁵

This compulsory royalty provision has been challenged on the ground that it is not permitted by the Constitution of the United States—a point which was raised and emphasized at the hearings on a bill to repeal the clause. It is generally conceded that its inclusion in the copyright law as a compromise was a deviation from sound principle, a mistake which, in the words of the

³⁵ 35 STAT. 1076 (1909); 17 U. S. C. A. § 1(e) (1927).

Chairman of the House Committee on Patents, has resulted in "abuses and evils and injustices which have prevailed for nineteen years." On February 7, 1928, Mr. Vestal introduced a bill to amend Section 1(e) and to repeal Section 25(e) of the Act of 1909.³⁶ Public hearings on this bill were held by the House Committee on Patents from April 3 to 11, 1928. The bill was also presented to the Senate on February 13 of the same year.³⁷ On May 1, an amended bill was introduced³⁸ which was referred to the House Committee on Patents. The Chairman of that Committee presented on May 4, 1928, a favorable report entitled: "Repeal of price-fixing clause for mechanical reproduction,"³⁹ recommending the enactment of the bill. The same bill was presented to the Senate by the Hon. George H. Moses.⁴⁰ The purpose of the bill is to repeal all provisions concerning the royalty of two cents required to be paid for each phonograph record manufactured and to substitute provisions permitting the owner of the copyright of a musical composition to make his own terms for such reproduction of the music. But the bill provided, in line with the provisions of existing law, that when music was so reproduced any other person might make like use of the music upon the same terms and conditions. On December 9, 1929, Mr. Vestal presented a bill "To amend the Act . . . of March 4, 1909 . . . in respect of mechanical reproduction of musical compositions, and for other purposes,"⁴¹ which bill contains the same text as the previous one favorably reported. This was followed, however, on February 7, 1930, by a bill which amends Section 1(e) by granting to the authors of music without any conditions or reservations whatever, the exclusive right to perform their music publicly for profit and "to make any arrangement or setting of it or of the melody of it in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read or reproduced," and further repeals Section 25(e) and any other provision of the Act of 1909, "in respect of the royalty of two cents on each part manufactured of instruments serving to reproduce mechanically a copyrighted musical composition."⁴² Later it will be shown to what extent the provisions of this bill have been included in the latest bill for the general revision of the copyright laws.

³⁶ H. R. 10655, 70th Cong., 1st Sess.

³⁷ Sen. Bill No. 3160, 70th Cong., 1st Sess.

³⁸ H. R. 13452, 70th Cong., 1st Sess.

³⁹ HOUSE REP. No. 1520, 70th Cong., 1st Sess.

⁴⁰ Sen. Bill No. 4369, 70th Cong., 1st Sess.

⁴¹ H. R. 6989, 71st Cong., 2d Sess.

⁴² H. R. 9639, 71st Cong., 2d Sess.

ENTRY OF THE UNITED STATES INTO THE INTERNATIONAL
COPYRIGHT UNION

One of the most pressing and serious considerations with respect to copyright is the question of the entry of the United States into the International Copyright Union. It was felt by many friends of copyright advancement, including the Register of Copyrights, that the accomplishment of this was so supremely important that it would be better to press for the enactment of a bill providing simply for the adherence of the United States to the so-called Berne Convention for the Protection of Literary and Artistic Works, without the inclusion of any special amendment of the copyright laws. It was realized that it would be possible to propose a special act to secure such entry and on April 28, 1922, the Hon. Jasper N. Tincher of Kansas introduced a bill to authorize the President to effect and proclaim the adherence of the United States to the International Copyright Convention and to extend to foreign authors the rights and remedies accorded by our copyright laws.⁴³ Senator Lodge presented this bill to the Senate on December 6, 1922.⁴⁴ A bill to the same effect was introduced in the House of Representatives by the Hon. Ewin Lamar Davis of Tennessee on January 5, 1923.⁴⁵ Mr. Tincher on January 26, 1923, reintroduced his bill with amendments,⁴⁶ and again reintroduced it, without change, on December 5, 1923.⁴⁷ The next day, the Hon. Sol Bloom reintroduced Mr. Davis' bill without change. It is understood that these various bills were due to the personal efforts of Mr. Eric Schuler, at that time the Secretary of the American Authors' League.

In December 1923, with the friendly encouragement of Senator Lodge, the Register of Copyrights drafted a simpler bill, "to permit the United States to enter the International Copyright Union," which the Senator presented on December 6, 1923.⁴⁸ It was introduced on the same day in the House of Representatives by the Hon. Florian Lampert of the House Committee on Patents.⁴⁹ This bill contained only a simple proposal for the adherence of the United States to the Berne Convention and the extension of copyright to foreign authors without formalities; it contained no provisions for any other amendment of the copyright laws. No congressional action was taken on any of these bills and there was an interval of several years without any consideration of international copyright. On January 18, 1928,

⁴³ H. R. 11470, 67th Cong., 2d Sess.

⁴⁴ Sen. Bill No. 4101, 67th Cong., 4th Sess.

⁴⁵ H. R. 13676, 67th Cong., 4th Sess.

⁴⁶ H. R. 14035, 67th Cong., 4th Sess.

⁴⁷ H. R. 573, 68th Cong., 1st Sess.

⁴⁸ Sen. Bill No. 74, 68th Cong., 1st Sess.

⁴⁹ H. R. 2704, 68th Cong., 1st Sess.

however, Mr. Vestal again introduced a bill,⁵⁰ "to amend the copyright law in order to permit the United States to enter the International Copyright Union," containing the same provisions as Senator Lodge's bill of 1923. All these bills proposed entry into the International Copyright Union by adherence to the Copyright Convention signed at Berlin on November 13, 1908. An International Copyright Conference held at Rome from May 7 to June 2, 1928, however, adopted a new and revised text of the International Copyright Convention. Thereupon Mr. Vestal, on December 10, 1928, introduced a bill⁵¹ to authorize the President to effect and proclaim the adherence of the United States to the Convention signed at Rome on June 2, 1928. It was a very simple bill authorizing the President to notify the Swiss Government of our desire to enter the Copyright Union and of our intention to adhere to the Convention of 1928, and providing that after January 1, 1930, nationals of Union countries should enjoy for their works, whether unpublished or published after July 1, 1909, "such rights as the laws of the United States now accord or shall hereafter accord to citizens," and that the enjoyment of the rights and remedies thus accorded should not be subject to the performance of any formalities. It permitted registration, if desired, upon the deposit of one copy of the foreign work in the Copyright Office. On December 9, 1929, Mr. Vestal, at the request of the Register of Copyrights, presented an even simpler bill of four short sections. The second section of this bill provided that:

"On and after January 1, 1930, foreign authors who first publish their works in any country which is a member of the Copyright Union, as well as all authors who are within the jurisdiction of any one of the countries of the said union, shall enjoy for their works published for the first time in one of the countries of the said union such rights as the laws of the United States now grant or shall hereafter grant to citizens of the United States."

In the third section it was provided that copyright protection should extend to all works by such authors first published after July 1, 1909.

The draft of this bill had been presented to the Director of the International Copyright Bureau at Berne and was pronounced by him as sufficient to secure the admission of the United States into the Copyright Union. It was admitted, however, that the enactment of this bill implied an obligation upon Congress to enact such further legislation as might be found necessary to secure to foreign authors, nationals of the Copyright Union countries, the protection accorded to them by the bill.

⁵⁰ H. R. 9586, 70th Cong., 1st Sess.

⁵¹ H. R. 15086, 70th Cong., 2d Sess.

This brought about insistence upon the enactment beforehand of the necessary amendatory legislation and resulted in the final effort to draft a bill for the general revision of the copyright laws which would contain also provisions for the entry of the United States into the International Copyright Union.

GENERAL REVISION OF THE COPYRIGHT LAWS

The movement for the fourth general revision of the copyright laws of the United States started, so far as Congress is concerned, with the introduction in the House of Representatives on March 24, 1924, of H.R. 8177, by the Hon. Frederick William Dallinger. This bill was reintroduced by Mr. Dallinger on May 9, 1924, as H.R. 9137. Late in the same year the Council of the Authors' League of America requested the Register of Copyrights to draft a bill providing for the general revision of the copyright laws and the entrance of the United States into the International Copyright Union. This draft was completed and printed by the Copyright Office on December 1, 1924. It was promptly submitted to the Authors' League, was indorsed by that association without change, and was presented to Congress. The bill was introduced in the House of Representatives at the request of the Authors' League by the Hon. Randolph Perkins, of New Jersey, on January 2, 1925,⁵² and was presented to the Senate by the Hon. Richard P. Ernst of Kentucky on February 17, 1925.⁵³

A brief analysis of the principal new proposals contained in this bill may be of value at this point. It was primarily an author's bill, that is, a project of law prepared fundamentally for the adequate protection of the creator of intellectual productions. It was a copyright code based entirely upon sound principles of copyright legislation and applied to the existing conditions relating to the exploitation of an author's work by publication, by dramatization and representation, by use for motion pictures, phonographic records, radio broadcasting, etc.

The bill proposed "automatic copyright," that is, copyright secured for all the writings of an author from the time of the making of the work, to continue for fifty years after his death. Copyright was extended to scenarios for motion pictures, works of architecture, choreographic works and pantomimes. The bill provided also for the protection of phonographic records and perforated music rolls, and granted to copyright owners the exclusive right "to communicate the copyright work to the public by means of radio broadcasting, telephoning, telegraphing, or any other method of transmitting sounds or pictures." The bill

⁵² H. R. 11258, 68th Cong., 2d Sess.

⁵³ Sen. Bill No. 4355, 68th Cong., 2d Sess.

granted to the composer the exclusive right to perform his music publicly or to make any mechanical reproduction of it, without conditions, and repealed the price-fixing clauses of existing law. It provided for the divisibility of copyright and contained careful provisions for restraining infringements. The bill likewise eliminated the necessity of American manufacture and repealed all restrictions upon the importation of authorized copies, while declaring the absolute prohibition of piratical works. It abrogated the obligatory deposit of copies except for the benefit of the Library of Congress and eliminated registration as a condition precedent to obtaining copyright, although it permitted registration if desired. Finally, it authorized the President to effect and proclaim the entry of the United States into the International Copyright Union and declared that foreign authors should enjoy copyright in the United States without any formalities.

Public hearings were held on this bill by the Committee on Patents of the House of Representatives on January 22, and February 3, 10 and 24, 1925. It was supported by a large delegation from the American Authors' League, by representatives of book and music publishers, and was recommended by the press. There was little opposition except from the printers and from Major George Haven Putnam, who refused to support the bill because of the omission of his proposed restrictions upon the importation of copies of the authorized editions of books by English authors which had been reprinted in the United States. His attitude was approved by the *Publishers' Weekly*.

The brief section of the bill relating to importation was printed in the YALE LAW JOURNAL for November, 1926,⁵⁴ together with the long and involved provisions proposed by Major Putnam. They can there be studied and compared. Notwithstanding the general support of the bill, before the close of the hearings the Committee accepted a motion made by the Hon. Sol Bloom on February 24, 1925, for the appointment of a subcommittee to consider copyright revision during the recess. Mr. Bloom called meetings in New York on April 22, May 8, and July 8, 1925, which were attended by representatives of the various interests, including book publishers, printers, motion-picture and phonograph record makers, music publishers, and the attorney for the Authors' League.

The results of these deliberations were embodied in a new bill for general revision introduced by Mr. Vestal, on March 17, 1926.⁵⁵ Meanwhile Mr. Perkins had reintroduced his bill (the Authors' League Bill) without change on December 17, 1925. These two bills, therefore, were before the House Committee on Patents at the public hearings held on April 15, 16, 29, and 30,

⁵⁴ 36 YALE L. J. at 107-110.

⁵⁵ H. R. 10434, 69th Cong., 1st Sess.

1926. No report followed these hearings, but on January 9, 1928⁵⁶ and again on December 9, 1929,⁵⁷ Mr. Vestal reintroduced his bill, in each case without change. This last bill came before the House Committee on Patents at the public hearings held on April 3, 4 and 11, 1930. A statement adverse to the bill made on May 10, by Mr. William A. Brady, the well-known dramatic manager, was printed as Part 2 of the Report of the Hearings.

After the hearings a new bill was introduced by Mr. Vestal on May 22, 1930, and was printed as H.R. 12549, 71st. Congress, 2d Session. On May 28, 1930, this bill was reported with verbal amendments and with the recommendation "that the bill so amended do pass."⁵⁸ On June 3, the Hon. William Sirovich, a member of the House Committee on Patents, submitted a minority report in support of Mr. Brady's opposition to the bill.⁵⁹ Owing to the late date in the session and the crowded Congressional Calendar an attempt to bring the bill up for final discussion by the Congress ended in failure and it was thereupon recommitted to the Committee on Patents. On June 13 a revised report was submitted by the Chairman of that Committee; but on June 23, the bill was a second time recommitted. On June 24, the bill was again reported to the House with a finally revised report,⁶⁰ and, under authority of a resolution by the Committee on Rules, the bill was taken up for discussion by the "Committee of the Whole House on the State of the Union" on Saturday, June 28. There was a lively debate, the stenographic report of which occupied more than twenty-four pages of the *Congressional Record* of that date. A considerable number of amendments were adopted which will be referred to later. The debate on the bill, however, had reached only a few sections when the time allowed for discussion was exhausted. Further consideration of the bill was necessarily postponed until this session of Congress.

THE COPYRIGHT BILL NOW BEFORE CONGRESS⁶¹

The pages of the *Congressional Record* of June 28 indicate to some extent the character of the opposition to this proposed legislation. It is obvious that many more amendments will be urged and that the provisions of the bill, already sufficiently complex, will be rendered even more confused as these amendments are accepted; for it is not to be expected that amendments so proposed will be either well considered or carefully drafted. The bill is a compromise measure, the result of bargain and agree-

⁵⁶ H. R. 8912, 70th Cong., 1st Sess.

⁵⁷ H. R. 6990, 71st Cong., 2d Sess.

⁵⁸ HOUSE REP. No. 1689, 71st Cong., 2d Sess.

⁵⁹ This was printed as Part 2 of HOUSE REP. No. 1689, *supra* note 58.

⁶⁰ HOUSE REP. No. 2016, 71st Cong., 2d Sess.

⁶¹ H. R. 12549, 71st Cong., 2d Sess.

ment, drafted to meet the alleged needs of a great number of persons whose interests are likely to be affected by its provisions. For that very reason, however, the bill presents a special interest. It may be considered an inclusive measure containing proposals for consideration by Congress of everything that can be demanded at this time in the way of copyright legislation. For this reason an analysis of its provisions may have a special value, and a brief summary of its leading features may profitably be presented. The amendments adopted by the House of Representatives must be taken into consideration as well and will be referred to in their proper places.

The provisions of the bill which are new, in the sense of going beyond existing law, are, very briefly stated, as follows: (1) The bill proposes the so-called automatic copyright, *i.e.*, a declaration that copyright is secured and granted to authors from and after the creation of their work "in all their writings, published or unpublished, in any medium or form or by any method through which the thought of the author may be expressed;" (2) the obtaining of this protection does not involve "compliance with any conditions or formalities whatever." (3) The protection granted is "for the life of the author, if living, and for a period of fifty years after his death, except that where the author is not an individual, the term shall be fifty years from the date of completion of the creation of the work."

(4) The bill declares that "copyright shall subsist in the work of alien authors by virtue of adherence to the International Copyright Union, signed at Berne, Switzerland, September 9, 1886, and revised at Berlin, Germany, November 13, 1908, and to the 'Additional Protocol' to the said convention executed at Berne, Switzerland, March 20, 1914."

(5) The bill also proposes that copyright shall include the exclusive right in the case of a musical composition, "to arrange or adapt said work, to perform said work publicly for profit, or to make any arrangement or setting thereof or of the melody thereof in any system of notation or any form of record in which the thought of an author may be recorded and from which it may be read, broadcast, produced, performed, exhibited, represented, delivered, transmitted or communicated." This provision will abrogate not only the payment of the royalty of two cents on each phonographic record made from copyrighted music but also the further provision of Section 1(e) of the existing copyright law, to the effect "That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work. . . ." But as a compromise, and with the very evident view of allowing makers

of phonograph records time to readjust their business to the forthcoming new conditions when the bill goes into effect, there has been inserted in the repealing clause,⁶² as an exception, that Sections 1(e) and 25(e) of the Act of 1909 "shall continue in full force and effect in respect of musical compositions copyrighted subsequent to July 1, 1909, and up to January 1, 1932." This would put into effect, after a delay of a full year, the proposals made in the bill of February 7, 1930,⁶³ which were favorably considered by the House Committee on Patents.

(6) In the long and carefully worded Sections 9 and 10, relating to the assignment of copyright, provision is made for the divisibility of copyright and for the bringing of suits for the protection and enforcement of any separate rights by the author or by the assignee of any separate rights. (7) In Sections 15-27, dealing with infringement of copyright and remedies, there are embodied many changes from existing law, including careful provisions devised to safeguard against undue severity of penalties in cases of "innocent infringement," and some reductions of the minimum penalty.

(8) Provisions of existing law as to American manufacture are also greatly changed. Section 28 provides that:

"Except as in this Act otherwise expressly provided, all copies of any copyright material which shall be distributed in the United States in book, pamphlet, map, or sheet form shall be printed from type set within the limits of the United States or its dependencies, either by hand or by the aid of any kind of typesetting machine, and/or from plates made within the limits of the United States or its dependencies from type set therein; or, if the text be produced by lithographic, mimeographic, photo-gravure, or photo-engraving, or any kindred process or any other process of reproduction now or hereafter devised, then by a process wholly performed within the limits of the United States or its dependencies; and the printing or other reproduction of the text, and the binding of said book or pamphlet, shall be performed within the limits of the United States or its dependencies. Said requirements shall extend also to any copyright illustrations within any book, pamphlet, or sheet, except where the subjects represented are located in a foreign country and/or illustrate any scientific or technical work or reproduce a work of art. . . ."

The obligatory manufacture in the United States of the works of foreign authors is, in actual practice under the present law, confined to the books of English authors. The new bill releases foreign authors from that obligation, but Section 28, extending the obligation of American manufacture to every production of the American author in "book, pamphlet, map or sheet form," includes practically all productions by Americans except works

⁶² § 64.

⁶³ H. R. 9639, 71st Cong., 2d Sess.

of the fine arts. And whereas the present law merely requires an affidavit that the type of books by American and English authors is set in the United States, the new bill not only provides that such an affidavit be filed in the Copyright Office within sixty days after publication in the case of every work of the character described by an American author, but also declares that, if the affidavit is not so filed, "no action in respect of an infringement of copyright in said work or any right or rights therein shall be instituted or maintained." (9) The bill contains long and detailed provisions prohibiting the importation of copies of "any work published in the country of origin with the authorization of the copyright proprietor;" but so far as unauthorized copies are concerned, in lieu of the direct prohibition of importation of "piratical copies" found in our present copyright law, there is substituted in Section 31 the following provision:

"The importation of any copies or substantial reproductions in whole or in part, of any work in which copyright exists, into the United States which if made, published, distributed, exhibited, or performed in the United States would infringe such copyright is hereby prohibited."

(10) Under existing law copyright may be secured by publication of the work with a notice of copyright. The bill abolishes this obligatory notice, but provides that "a legible notice of copyright or a notice with reference to any right included in a copyright in any work *may* be placed on copies of the work by the owner of the copyright or an assignee or licensee." (11) In lieu of the present obligatory registration of a claim of copyright, necessary in order to maintain an action or proceeding for infringement, the bill provides that "the author or other owner of a copyright in any work or any right, title, or interest therein" *may*, if he desires, "obtain registration of a claim to copyright in such work, or in any of the rights comprised therein, by the deposit in the Copyright Office of one copy of the work accompanied by an application for registration."⁶⁴ (12) It is, however, made obligatory upon the *publisher* that, "whenever any literary, dramatic, dramatico-musical, musical or artistic work has been published in book form," a deposit must be made in the Copyright Office within thirty days after the date of publication "for the use of the Library of Congress."⁶⁵ In a proviso, such deposit is declared not to be obligatory in the case of works by authors who are nationals of a country which is a member of the International Copyright Union or who first publish their works in such country, "unless and until such work, if it be a book, shall have been republished in the United States under an as-

⁶⁴ § 36.

⁶⁵ § 41.

signment of the copyright for the United States, or under a license to print and sell such book in the United States." The provisions of existing law for the final disposition of all deposited articles remain unchanged.

(13) To the list of works for which copyright may be obtained under the existing law there have been added in the bill, in an enumeration of works "expressly recognized as subject matter of copyright," the following: "abridgments, adaptations and translations" of books, contributions to periodicals and newspapers, "dramatizations." This last, in addition to the present enumeration, "dramatic and dramatico-musical composition," Class (h) of the present law, comprises "Reproductions of a work of art." To this the bill adds: "including engravings, lithographs, photo-engravings, photogravures, casts, plastic works, or copies by any other method of reproduction." To "prints and pictorial illustrations," there has been added, "prints or labels for articles of manufacture and trade-union labels;" to motion pictures there has been added the qualification "with or without sound and/or dialogue." (14) As new subject-matters of copyright there have been added: "works of architecture, models or designs for architectural works;" "choreographic works and pantomimes, the scenic arrangement or acting form of which is fixed in writing or otherwise;" "phonographic records, perforated rolls, and other similar contrivances, by means of which sounds may be mechanically recorded for purposes other than public performance, exhibition or transmission." An explanation follows to the effect that this copyright:

"... shall consist solely of the exclusive right to print, reprint, publish, copy, and vend said phonograph records, rolls, and contrivances, and that any such copyright and each and every right thereunder, shall be subject to each and every right of the owner of the copyright in any existing or previously existing work, written on said records, rolls, or other contrivances, at all times in the absence of express contract to the contrary."

Finally there has been added to the list of copyright articles, "Works not specifically hereinabove enumerated." And the designation, "Models or designs for works of art," has been eliminated.

AMENDMENTS ADOPTED BY THE HOUSE OF REPRESENTATIVES

During the debate upon the bill H.R. 12549 on June 28 a number of amendments were adopted in addition to those incorporated in the reported bill, which latter were for the most part merely verbal and intended to remove duplications. In Section 1, the exclusive right "to transmit" the copyright work was eliminated, and where the bill grants the right to make any form of record of the work "from which it may be read, broadcast,

produced, reproduced, performed, exhibited, represented, delivered, transmitted or communicated," the last three words were stricken out. In Section 9, covering assignments, the words "no grant by him of any interest therein" were changed to eliminate "interest" and substitute "right or rights comprised therein." In Section 1(a), the words "a foreign country adhering to the International Copyright Union" were changed to read "adhering to the Convention of Berne for protection of literary and artistic work" [sic], a correction requiring to be made in at least five other places in the bill. The distinction was lost sight of between entry into the International Copyright Union and adherence to the International Copyright Convention. In the paragraph of the bill which provides for the exclusive right

"To communicate said work to the public by radio broadcasting, rebroadcasting, wired radio, telephoning, telegraphing, television, or by any other methods or means for transmitting or delivering sounds, words, images, or pictures whether now or hereafter existing,"

the first line was changed to read: "To have communicated the said work for profit." A proviso was also voted to the effect:

"That the provisions of this Act shall not apply to the reception of such work or works by the use of a radio-receiving set or other receiving apparatus, unless a specific admission or service fee is charged therefor by the owner or operator of such radio-receiving set or other receiving apparatus."

The present copyright law permits the use of copyrighted music by public schools, church choirs, or vocal societies, "provided the performance is given for charitable or educational purposes and not for profit." The bill added "unless a fee is charged for admission to the place where the music is so used." By an amendment offered in the House this proviso was abrogated, leaving the provision of existing law unchanged.

The rendition of copyright music is permitted upon coin-operated machines by existing law. In the bill this provision was eliminated altogether; but by an amendment proposed and adopted in the House the provisions of the law now in force were reinstated as a proviso to Section 1(d), but altered by the insertion of the following italicized words to read:

"Provided, the reproduction or rendition of a musical composition, by or upon a coin-operated machine or on parts of instruments serving to reproduce mechanically the musical work, shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs."

Finally a paragraph was voted to be added to Section 1, reading as follows:

"It shall be unlawful for any copyright owner to contract, combine, or conspire with any other copyright owner or owners, either directly or through any agent or agents, to fix a price or royalty rate for the use of any copyrighted works upon parts of instruments serving to reproduce the same mechanically, and any such act shall be a complete defense to any suit, action, or proceeding for any infringement of any copyright of such copyright owner."

AMERICAN MANUFACTURE OF COPYRIGHT WORKS

The Copyright Act of 1891⁶⁶ brought into our legislation for the first time the requirement of American manufacture as a condition precedent to obtaining copyright in the United States. It was carried over into the Act for the general revision of our copyright statutes of March 4, 1909, although that Act released from the type-setting stipulation books of foreign origin printed in a language or languages other than English. This requirement is the principal obstacle which prevents the entry of the United States into the International Copyright Union whose Articles of Convention provide that copyright protection shall not be conditioned upon compliance with any formalities. The new bill proposes a compromise. While still providing that copyright works shall be printed from type set within the United States or its dependencies, the last sentence of Section 28 reads:

"Said requirements shall not apply to works in raised characters for the use of the blind, nor to *works by authors who are nationals of a foreign country.*"⁶⁷

These italicized words are the only ones in the bill that declare foreign authors released from the obligation to print their works in the United States. The bill, while thus releasing foreign authors from the obligatory type-setting of their works in the United States, not only retains that requirement in the case of works by American authors, but extends it to a very much larger number of works, many of which have not heretofore come within the obligation. American manufacture is required by the bill in the case of "all copies of any copyright material which shall be distributed in the United States in book, pamphlet, map or sheet form."⁶⁸

AFFIDAVIT OF AMERICAN MANUFACTURE

The present law requires that an affidavit of American type-setting shall be filed with each book so produced. While not a very large number of affidavits have been so filed each year, this

⁶⁶ 26 STAT. 1106 (1891).

⁶⁷ § 28. Italics are the writer's.

⁶⁸ § 28.

filing has been, to all intents and purposes, absolutely useless. These documents have never been referred to. Under the provisions of the new bill a very large number of affidavits will be called for, imposing a considerable burden upon the applicants as well as upon the Copyright Office, and—what is more serious—inevitably causing distressing delay in making registrations, as thousands of applications will need to be held pending the receipt of corrected documents where the requirements of the law have not been complied with. Most of the large book publishers have printing plants and naturally will do their printing therein; it is a useless formality to compel the filing in each case of an affidavit that their own presses were used. The absurdity is even greater where the leading newspapers are concerned. They register many thousands of articles every year and would be compelled to file an equal number of affidavits to prove that they had made use of their own printing facilities and had not gone out of the country to print!

The natural procedure is to manufacture within the United States. There is no evidence presented even of attempts to evade the printing requirements. Some years ago the printers spent weeks carefully examining many thousands of books and pamphlets deposited in the Copyright Office during a considerable period of time without discovering a single case where these requirements had not been complied with.

The intention is to compel the manufacture within the United States of all products of American authorship, and to enact the forfeiture of the copyright in all cases where there has been a failure to comply. But the bill does not so provide. It requires the filing of an *affidavit* of manufacture in the Copyright Office within sixty days after the date of publication of the work and provides that failure to file *this document* within that brief time shall lead to the forfeiture of the protection. And this may happen even though there had been full compliance with law so far as actual American manufacture was concerned. The exact provision of the bill is as follows:

“At any time or times when compliance with such preceding section [requiring American manufacture] is requisite, unless said affidavit shall be filed or the court shall find the failure to file said affidavit was due to excusable neglect, no action in respect of an infringement of copyright in said work or any right or rights therein shall be instituted or maintained by any person who, under the provisions of this section, might have filed this affidavit.”⁶⁹

As it is obvious that this drastic result might seriously affect the

⁶⁹ § 29.

rights of an assignee the following safeguarding provision has been inserted at the end of the Section:

"But nothing herein contained shall limit or suspend the right of the assignee or licensee of the author of any right under such copyright other than those in this section specified to bring any action or proceeding for the infringement of the rights which such assignee or licensee may own."

It would seem feasible to amend Section 28, to declare directly that compliance with the manufacturing requirements is a condition for obtaining copyright. The Section might begin:

"As a condition for securing a continuing copyright therein, all copies of any copyright material (except as in this Act otherwise expressly provided) which shall be distributed in the United States in book, pamphlet, map, or sheet form shall be printed from type set within the limits of the United States or its dependencies . . ."

Then Section 29 might be amended to require, in lieu of filing an affidavit in the Copyright Office with every article deposited, the filing of the affidavit of American manufacture *with the court* when suit for infringement is brought. That Section might be changed, by inserting the words in italics, to read:

"Whenever the manufacture of any work is required in the United States or its dependencies under the preceding section, no action in respect of an infringement of copyright in said work or any right or rights therein shall be instituted or maintained until there has been filed with the court an affidavit . . . setting forth the manner in which compliance has been had with all requirements of the preceding section. . ."

PROHIBITION OF IMPORTATION

Until the enactment of the so-called International Copyright Act of March 3, 1891,⁷⁰ our copyright legislation contained no provisions for the exclusion of other copies than purely piratical reprints. But upon the insertion in that Act of our obligatory manufacturing provisions there was brought into our copyright legislation for the first time the restrictions upon the importation of copies of the authorized editions of books by foreign authors in order to render more effective the type-setting provisions of the Act by shutting out competing copies. At the time there was doubt expressed as to its justification. The head of one old and important publishing house pointed out that the laws of the United States theretofore prohibited the importation of only three things—Chinese, counterfeit money and lottery tickets—and that a proposal to add as a fourth a good book was likely to arouse criticism. The Act of 1891 contained exceptions to the

⁷⁰ *Supra* note 66.

prohibition of importation, permitting a limited importation by libraries and individuals.

As it had been demonstrated that the obligatory manufacture in the United States of books by foreign authors in foreign languages was preventing the spread of such works in our country, the Act of 1909 excepted from the type-setting clause "the original text of a book of foreign origin in a language or languages other than English." The prohibition of importation of copies of the authorized foreign edition is therefore limited to books by foreign authors in the English language. The American publishers who reprinted such books proposed legislation to exclude automatically all copies of the original English book when an American edition had been produced. Owing to the steady opposition of American librarians, however, the publishers' demand was qualified to provide for such importation if made through the American reprinter and with his consent. The Copyright Act of 1909 permits importation of books for the use of the United States; books for the blind; books in foreign languages when only a translation into English has been copyrighted; one copy of a book "for individual use and not for sale;" and one copy in any one invoice for societies or institutions for educational, literary, philosophical, scientific, or religious purposes, or for libraries. In the bill for general revision,⁷¹ discussed at the public hearings in April, 1930, the sections prohibiting importation were very detailed, filling 95 lines of the bill. They can be read in the YALE LAW JOURNAL for November, 1926.⁷² It has been the contention of the publishers that where they have reprinted an English author's book, under an assignment to them of the copyright in such book for the United States, they were entitled to legislation automatically excluding competing copies of the original authorized English edition.

At the copyright hearings in April the Department of State submitted a long and carefully written statement on the provisions of Section 30 of the bill. This was printed in full in the report of the hearings. After quoting the first part of Section 30, this document continues:

"This proposed provision of law contains two distinct elements, both of which are designed for the protection of American manufacturing industry, are consequently purely economic provisions and are without necessary connection with copyright or with a statute governing copyright."

It is pointed out that such proposed exclusion of copies of the foreign book must be based upon provisions in the contract for republication, and that "if the American publisher does not ob-

⁷¹ H. R. 6990, *supra* note 57.

⁷² 36 YALE L. J. at 108-110.

tain an exclusive agency by virtue of his contract there is surely no reason why the Government should try to make one for him." It is declared that Section 30 of the bill is "nothing more or less than a rider designed to give protection and legal assistance to American manufacturing industry;" that its chief purpose is "to protect American producers and distributors of books by authors who are nationals of other countries from competition by importations of the same books printed and manufactured in foreign countries," and that this object can be attained through other and less objectionable means. Careful analysis is made of various treaty stipulations, and the decision is reached that the provisions of Section 30 not only would be in violation of certain articles of treaty but would seem to be contrary to the spirit of the International Copyright Convention itself. The statement concludes: "In view of the foregoing reasons the Department of State respectfully urges that Section 30 be stricken from the bill." It was suggested, however, that if something analogous to its provisions must go into the bill the following be inserted in lieu of the first paragraph of Section 30:

"During the existence of the copyright in any work when such work has been published and manufactured within the limits of the United States or its dependencies, under an assignment covering stated rights in the United States and its dependencies, or any of them, registered at the Copyright Office, and such assignment stipulates exclusive sales rights within the United States and its dependencies or any of them, the importation into the United States of any copies thereof printed or produced by any of the processes mentioned in sections 28 and 29 of this Act, or of plates or mediums of any kind for making copies thereof, whether or not authorized by the author or proprietor of any foreign copyright, except used copies, shall be reported by the customs authorities at the port of importation to the Register of Copyrights, and if registration of a claim to copyright or rights under section 36 of this Act and the deposit of two copies of the American edition shall have been accomplished prior to such importation, such imported copies, plates, or other mediums for making copies shall be subject to seizure at the instance of the assignee of publication rights in the United States. If found to be imported in violation of the terms of the contract of assignment, such copies, plates, or other mediums for making copies shall be forfeited to the assignee or otherwise disposed of at the discretion of the district court of the United States having jurisdiction of the case."

Section 30 was thereupon changed in the bill finally reported,⁷³ to conform to this suggestion, Subsection (a) being altered to permit the importation of:

" . . . not more than one copy of any such work on any one in-

⁷³ H. R. 12549, *supra* note 61.

voice, for use and not for sale or hire, by and for any free public library or branch thereof, any privately owned or endowed library open to free use by the public or by scholars, or any school, college, society, or institution organized and conducted in good faith for educational, literary, philosophical, scientific, or religious purposes, or for the encouragement of the fine arts, and not for profit."

This change was made to meet the opposition of the librarians, and leaves libraries with the same privileges they now enjoy to import a single copy of a book at one time. But the individual book-buyer—the student, the teacher, the university professor, the book-lover—while still ostensibly permitted to import, as under the law now in force, "not more than one copy of any such work on any one invoice, for individual use and not for sale or hire," can only do so subject to the following restrictions, quoted verbatim from Section 30 (b) :

"Provided that within ten days prior to the date of the ordering of such copy for importation, the proprietor of the United States copyright or rights to such work, within ten days after written demand for a copy of such work specifying that such copy is desired for use and not for sale or hire, shall have declined or neglected to agree to supply the copy demanded at a price equivalent to the foreign price thereof and transportation charges, plus customs duties when subject thereto; or provided that at the date of the order of such copy for importation no such registration and deposit of such copies of the American edition shall have been made as aforesaid."

This language is not very clear, but it is clear enough to indicate that the American student or university professor who sees the announcement of an English book which he desires to buy cannot order it directly from London. He must first take the trouble to ascertain whether the book has been reprinted in the United States and if it has been duly deposited and registered. He may then send an order for it to the American publisher and must wait ten days to ascertain whether the latter will decline to supply the book or simply neglect his order. In either case, whether his order is refused or discourteously ignored, he may order the copy from abroad. But the American publisher is permitted, when proposing to publish an American edition of an English book, to send notice to the customs authorities of that fact and to request the prohibition of importation of copies of the original edition. It seems probable that our would-be bookbuyer may fail to secure his English book after all his efforts.

The individual book buyer was not represented either at the copyright conferences on the copyright bill, or at the public hearings on that measure before the House Committee on Patents.

It would seem that his present privilege under the Copyright Act of 1909 is sufficiently restricted. There are no prohibitive provisions which parallel these now proposed in the copyright legislation of any country. As the Department of State says, they seem "altogether inappropriate in legislation relating to copyright." An example of the absurdity of such legislation is before the customs authorities at the present time. A well-known American bookseller secured for a customer a copy of the first edition of a book by a prominent English author. The book was registered for copyright in the United States in 1894. Now, 36 years later, a single copy of the work, for which a large price was paid, is refused importation because it is imported "*for sale.*"

The copyright bill should be amended before enactment to leave the individual book buyer his present privilege to import directly the authorized edition of a book by a foreign author "one copy at one time, for individual use and not for sale." This can be accomplished by striking out entirely Subsection (b) of Section 30, and by amending Subsection (a), by the addition of the following italicized words, to read that the prohibition of importation shall not apply:

"(a) To any work published in the country of origin with the authorization of the copyright proprietor, when imported not more than one copy of any such work on any one invoice *by any person for individual use and not for sale or hire, or when imported* by and for any free public library or branch thereof, any privately owned or endowed library open to free use by the public or by scholars, or any school, college, society, or institution organized and conducted in good faith for educational, literary, philosophical, scientific or religious purposes, or for the encouragement of the fine arts, and not for profit."

Under existing law a person arriving in the United States from a foreign country is allowed to bring into this country such books as he may possess which form part of his personal baggage and are not intended for sale. The bill adds: "*Provided*, however, That no one person shall so import more than five such works at any one time." No explanation has been made as to the supposed need for this extraordinary provision of law. It is to be hoped that this proviso will be stricken from the bill, leaving the law on this point as it is to-day.

THE INTERNATIONAL COPYRIGHT UNION

The entry of the United States into the International Copyright Union is undoubtedly the one most important forward step with respect to international copyright advancement which our country can now take. Our entry into the Union would also

mean much for the actual extension of world protection for intellectual productions.

The copyright Union was founded in 1887. The United States has held aloof for more than forty years, but there has been a gradual crystalization of opinion—at least among educated people—that our country should become a member. At the copyright hearing in April, 1930, there was a very general expression of opinion that the provisions of the copyright bill to permit the United States to enter the Union should be enacted.

The original Convention creating an International Union for the Protection of Literary and Artistic Works was formulated at various international conferences held at Berne, Switzerland. The final draft, accepted and signed there on September 9, 1886, was ratified on September 5, 1887, at which date the International Copyright Union came into actual existence. This Convention of 1886 was slightly amended at a copyright conference held at Paris in 1896, and was thoroughly discussed at a conference in Berlin in 1908 where a much revised text was adopted and signed on November 13, 1908. At a conference held at Rome in 1928 further modifications were discussed, some of which were incorporated in a new text signed in that city on June 2, 1928.

The first paragraph of Section 61 of the bill, H.R. 12549, provides that:

“Copyright shall subsist in the work of alien authors by virtue of adherence to the International Copyright Union, signed at Berne, Switzerland, September 9, 1886, and revised at Berlin, Germany, November 13, 1908, and to the “Additional Protocol” to the said convention executed at Berne, Switzerland, March 20, 1914, as provided by this Act, on and after the date on which the adherence of the United States to the convention creating an international union for the protection of literary and artistic works goes into force.”

The language is confusing in more than one particular and may well be amended; but the important consideration is the proposal for adherence to the Convention of 1908 instead of the Convention of 1928. The reason for this has not been explained. Why should the United States, after a delay of more than forty years, propose adherence to a Convention which is already twenty-two years old and which will be definitely discarded on August 1, 1931?

One of the main purposes of the Copyright Union is to secure to the fullest extent all possible uniformity in the legal protection of intellectual productions throughout the world. It would be a great gain if all the countries of the Union could subscribe to one and the same text of convention. With the necessity felt for facilitating entry into the Union this has not been possible and provision was made that when a country adhered to the 1908

revision it could make reservations by accepting some articles of the 1886 (the original) Convention in lieu of the corresponding articles of the 1908 Convention. On January 1, 1930, nineteen countries now in the Union had accepted the Convention of 1908 without any reservations, and eighteen countries had accepted that Convention with the substitution of a few articles of the Convention of 1886 in lieu of the corresponding articles of the Convention of 1908. The most popular reservation (made by seven countries) is Article 7 of the Convention of 1886 which permits reproduction or translation of periodical contributions unless expressly forbidden, whereas the Conventions of 1908 and 1928 declare that they may not be reproduced without the consent of the authors.

The next most frequent reservations are Articles 5 and 14 of the Convention of 1886 as modified in 1896 (six countries in each case). These provide that "the exclusive right of translation shall cease to exist when the author shall not have made use of it within a period of ten years." This provision disappears in the Conventions of 1908 and 1928, in both of which authors are given the exclusive right to translate their works during the whole term of the copyright.

All three Conventions provide that the Articles of the Union "Apply to all works . . . which have not fallen into the public domain of their country of origin;" but the final protocol of the Convention of 1886, as modified in 1896, provides that the application of this provision to works that have not fallen into the public domain shall be in accordance with stipulations contained in special conventions or shall be regulated by the domestic legislation of the respective countries. The Conventions of 1908 and 1928 both provide in Article 11 that authors of dramatic or dramatico-musical works are protected against unauthorized public representation of translations of such works, whereas the 1886 Convention (accepted by four countries) grants this right only during the existence of their exclusive right of translation. Japan accepted as a reservation Article 9(3) of the Convention of 1886 concerning the public performance of musical works, requiring notice on the title-page that it is forbidden. Norway accepted the qualified provisions of Article 4 of 1886, protecting plastic works relative to works of architecture; and France and Tunis reserved the right to accept the previous stipulations relating to "œuvres d'art appliqué."

It is declared in the Rome Convention that it shall replace the Convention of Berne of 1886, "and the Acts by which it has been successively revised" (1896 and 1908); but it is specially provided that, provisionally, Article 5 of 1886, as revised in 1896, concerning translations, may be substituted for Article 8 of the Convention of 1928. It is further declared that new countries

may, until August 1, 1931, enter the Union by adherence to the Convention of Berlin of 1908, or the Convention of Rome of 1928; but that after that date they can adhere only to the Convention of Rome of 1928. Any country outside of the Union which assures legal protection of the rights which are the object of the Convention may accede to it upon its own request, made in writing to the Government of the Swiss Confederation and sent by the latter to the other countries of the Union. It should be noted that it is a wholly mistaken idea that such declaration is subject to any examination before or after notification or that there is any question raised as to the sufficiency of the domestic copyright legislation of the entering country. In a long and most interesting study of the present movement for the entry of the United States into the Copyright Union, which the Director of the Berne International Copyright Bureau has contributed to *Le Droit d'Auteur* for October 15, 1930, it is declared that it is "incontestable" that the United State may enter the Copyright Union without any change beforehand of its copyright legislation. But such entry might imply the necessity for such changes in our laws as would guarantee to the authors of Union countries the protection in the United States called for by the Articles of Convention. In any event entry into the Union may be made before or after the date of August 1, 1931. If made before that date it can be done by adherence to the Convention of 1908; if after that date it must be by adherence to the Convention of 1928.

Article 24 of the Convention provides that it may be subject to revision in conferences to take place for that purpose successively in the different countries of the Union. No change is valid except by the unanimous consent of all the countries of the Union. The Convention adopted at Berlin in 1908 was a thoroughly revised document embodying many important changes. But its text was changed only slightly at Rome in 1928. Of its 30 articles, 24 were left without any change whatever. In other articles there were only the necessary alterations of references and dates and a few administrative changes such as the doubling of the sum provided for the expenses of the Berne Copyright Bureau and the addition of a provision to permit any country to change its class in accordance with the payment of its share of such expense. New articles were added to meet the changed conditions brought about by the war relative to colonies, protectorates and territories under mandate; and the provisions of the "Additional Protocol" adopted at Berne on March 20, 1914, were made a part of Article 9. As new subject matter of copyright, there has been added "lectures, addresses, sermons and other works of like nature," and in a new article, 2 *bis*, it is provided that the domestic legislation of each country of the

Union shall enact the conditions under which such lectures, etc. may be reproduced by the press. Furthermore,

“Authority is reserved to the domestic legislation of each country of the Union to exclude, partially or wholly, from the protection provided by the preceding article political discourses, or discourses pronounced in judicial debates.”

In addition to the exclusive rights enumerated in Article 14, there is included the right of the “adaptation” of the work; and whereas the 1908 text provided that:

“Cinematographic productions are protected as literary or artistic works when by the arrangement of the stage effects or by the combination of incidents represented, the author shall have given to the work a personal and original character,”

in the 1928 text this protection is secured only when “the author shall have given to the work an original character.” If this is lacking, the production shall “enjoy the same protection as photographic work.” In the bill H. R. 12549, there is shown a steady persistence in referring to such productions as “a dramatic work in the form of a motion picture.” The 1908 text provides that, with the exception of serial stories and novels, any newspaper article may be reproduced by another newspaper if not expressly forbidden. The 1928 text provides that:

“Articles of current economic, political or religious discussion may be reproduced by the press if such reproduction is not expressly reserved. But the source must always be clearly indicated; the confirmation of this obligation is determined by the legislation of the country where the protection is claimed.”

There remain to be noted only three wholly new articles whose brief texts are here reprinted verbatim:

Article 6 bis

(1) Independently of the patrimonial rights of the author, and even after the assignment of the said rights, the author retains the right to claim the paternity of the work, as well as the right to object to every deformation, mutilation or other modification of the said work, which may be prejudicial to his honor or to his reputation.

(2) It is left to the national legislation of each of the countries of the Union to establish the conditions for the exercise of these rights. The means for safeguarding them shall be regulated by the legislation of the country where protection is claimed.

Article 7 bis

(1) The duration of the author’s right belonging in common to collaborators in a work is calculated according to the date of the death of the last survivor of the collaborators.

(2) Persons within the jurisdiction of countries which grant a shorter period of protection than that provided in paragraph 1 can not claim in the other countries of the Union a protection of longer duration.

(3) In any case the term of protection shall not expire before the death of the last survivor of the collaborators.

Article 11 bis

(1) The authors of literary and artistic works enjoy the exclusive right to authorize the communication of their works to the public by radio diffusion.

(2) It belongs to the national legislatures of the countries of the Union to regulate the conditions for the exercise of the right declared in the preceding paragraph, but such conditions shall have an effect strictly limited to the country which establishes them. They can not in any case adversely affect the moral right of the author, nor the right which belongs to the author of obtaining an equitable remuneration fixed, in default of an amicable agreement, by competent authority.

This detailed analysis of the changes made in 1928 in the text of the 1908 Convention and the complete presentation of all additions made in 1928 will enable any person interested to determine what, if anything, contained in the 1928 text is not found in the 1908 text of Convention, and whether it is of a character to prevent the adherence of the United States to the latest and improved text of 1928.