Kentucky Law Journal

Volume 32 | Issue 4 Article 1

1944

Copyright in a World at War

Helen C. Stephenson

Department of Revenue, Commonwealth of Kentucky

KENTUCKY LAW JOURNAL

Volume XXXII May, 1944 Number 4

COPYRIGHT IN A WORLD AT WAR

HELEN STEPHENSON*

With practically the entire world at war with itself it is impossible to consider any subject without turning to thoughts of the relationship which that subject bears to the war. Copyright law is no exception. When one thinks of the quantity of literature and music written by aliens which Americans enjoy day by day, the problem naturally presents itself How is the war going to affect all of this?

The writer believes that this is such a pertinent question that it bears a rather close examination. Even under fire and in the midst of chaos, great books and great music are being written by persons who are supposed to be our enemies. Fine art knows no nationalities and no physical boundaries. It belongs to all of mankind, and nothing, not even a war, should be allowed to interfere with or hinder it.

It is common knowledge that America has become the refuge of many authors and artists driven from their native lands by the holocaust. They are still producing books and music and they have a right to expect protection for that which they produce. Less fortunate are those who have not been able to flee from the ruin which is Europe, but who still, because they are artists, are writing and composing, and who are friends of the American public. Will their work be protected when they seek to have it published in this country? Or, suppose that these aliens have American publishers and copyrights, how will they be able to collect royalties which are due them now that the United States is at war with their homelands?

* A.B., 1941, LL.B., 1943, University of Kentucky; Member of Kentucky Bar; Junior attorney, Legal Division, Department of Revenue, Frankfort, Kentucky.

All of these questions and more present themselves to the mind of one who knows that art is not confined to the English speaking people or their allies, to one who appreciates and enjoys the works of the German, the Italian, and other enemy authors and composers.

With this brief introduction to the subject, it seems advisable to discover what are the rights and privileges of aliens seeking to copyright works in America, and then to learn what effect a war will have upon those privileges and rights.

PART I

A. THE COPYRIGHT ACTS OF THE UNITED STATES

Prior to the copyright Act of March 3, 1891, no foreign author or assignee of a foreign author could avail himself of the copyright law [1] Though there had been agitation in Congress for a great many years, there simply was no provision by which aliens could obtain protection for their literary and musical works, barbarous as that may seem to us today

The Act of March 3, 1891[2], first extended under certain specified conditions the privileges of copyright to aliens by providing that the act should apply to a citizen or subject of a foreign state or nation when (a) such foreign state permitted to United States citizens the benefits of copyright on substantially the same basis as its own citizens, or (b) when such nation was a party to an international agreement providing for reciprocity in granting of copyright.

By section 8 of the Act of March 4, 1909,[3] which is the act still effective in the United States, it is provided

"The copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation, only·

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

"(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to the citizens of the United States the benefits of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty· or when such

[1] West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 100 C. C. A. 303 (1910).

c565, 26 Stat. 1110, Sect. 13.

[3] c320, Sect. 8, 35 Stat. 1077.

foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purpose of this title may require."

As amended[4] section 8 provides further

"That all works made the subject of copyright by the laws of the United States first produced or published abroad after August 1, 1914, and before the date of the President's proclamation of peace, of which the authors or proprietors are citizens or subjects of any foreign State or nation granting similar protection for works by citizens of the United States, the existence of which shall be determined by a copyright proclamation issued by the President of the United States, shall be entitled to the protection conferred by the copyright laws of the United States from and after the accomplishment before the expiration of fifteen months after the date of the President's proclamation of peace, of the conditions and formalities prescribed with respect to such works by the copyright laws of the United States: *Provided further,* That nothing herein contained shall be construed to deprive any person of any right which he may have acquired by the republication of such foreign work in the United States prior to March 4, 1909: Provided:

"That whenever the President shall find that the authors, copyright owners, or proprietors of works first produced or published abroad and subject to copyright or to renewal to copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States, or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States: *Provided Further* that no liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

"The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require."

Having seen what the statutes themselves say about the position of aliens in the United States, let us look at each section of the act and the decisions to learn how it has been interpreted.

---

[4] Dec. 18, 1919, c. 11, 41 Stat. 369 and Sept. 25, 1941, c. 421, 55 Stat. 732.

B. DOMICILED ALIENS

Under Section 8 of the Copyright Act, all alien authors or proprietors who are domiciled within the United States at the time of the first publication of their works are entitled to its benefits. It is not necessary that the alien's country afford copyright privileges to citizens of the United States for no requirement of reciprocity is contained in this provision. All that is necessary is that the alien be domiciled in this country at the time of the first publication of his work.

In this respect, "domiciled" has retained its common law meaning of residence at a particular place with the intention of remaining there for an unlimited period of time. This definition of "domicile" is employed in the case of *G. Ricordi & Co., Inc. v. Columbia Graphophone Co.*,[5] in which a Canadian officer was refused an injunction in an infringement suit because he was not domiciled in the United States, the court saying that no officer of the British Army could acquire a domicile in this country However, in a later hearing,[6] it was held that since the officer had been discharged from military service and had come to New York with the intention of remaining, bringing practically all his property, he was domiciled in the United States within the meaning of the Copyright Act.

Domicile within this country must exist at the time of the first publication of the author's work. That means that an alien cannot have a book published abroad and then upon acquiring a domicile in the United States, be qualified to have that same book copyrighted here. However, if an alien is domiciled here, he may have a work published abroad and then be entitled to his copyright in this country for there is no specification that the work must first be published in the United States.

Under section 8(a) as set forth above, domiciled aliens are entitled to copyright when they are domiciled at the time of the first publication of their works. But section 11 of the Act provides that works may be copyrighted even though no copies are produced for sale. Suppose then that an alien domiciled in this country should copyright his work but not publish it. That situation arose in the case of *Liebowitz v. Columbia Graphophone*

[5] 256 Fed. 699 (1919)
[6] 258 Fed. 72, aff'd 263 Fed. 354 (1919)

Co.,[7] where a domiciled Roumanian author took out a copyright under section 11 at a time when Roumania was not a "proclaimed country" It was held that since the work had never been published and was copyrighted as an unpublished work under section 11, the author could not claim under the statute. Judge Hand said that he could not extend the words "at the time of the first publication," to mean "at the time of acquiring the copyright." Evidently then, a domiciled alien who will not publish his works can expect no more protection than that afforded by the common law Rights under the statute are only granted if copies of the work are reproduced for sale.

C. NON-RESIDENT ALIENS OR PROPRIETORS

As explained above, non-resident aliens were not allowed protection under our copyright statutes until after the Act of March 3, 1891, but under that act and the one of 1909, now in operation, copyright protection is extended to nationals of countries which either grant United States citizens the privilege of copyright on substantially an equal basis with their own nationals, or are a party to an international agreement which provides for reciprocity by the terms of which the United States may become a party A third possibility was added by the Act of 1909 by which the United States may grant protection if the foreign country grants United States citizens copyright protection substantially the same as the protection which is accorded the subjects of the foreign country in the United States.

According to the statute, the first essential element or requirement is that of citizenship. Mere domicile or residence in a country to which the President has issued a proclamation is not sufficient. The author or proprietor must be a citizen of the country to which the President by proclamation has extended copyright privileges. If we may draw an analogy, then as in the case of aliens domiciled in the United States, the author must be a citizen of the proclaimed country at the time of the first publication of his work.

The next requirement is that there must be a proclamation by the President of the United States. Whether or not there is actually reciprocity is something which only the President has

[7] 298 Fed. 342 (1923).

discretion to determine, and even though there may in fact be reciprocity, unless the President declares such reciprocity to exist, it is without effect until he does issue a proclamation. Having issued the proclamation and granted copyright privileges to a foreign country, the courts will not look into the facts to determine whether or not he was correct in granting those privileges. In the case of *Bong v. Campbell Art Co.*[8] the court said that the provision that the President must make a proclamation is not directory, but within his discretion, and the court will not review the facts upon which he bases his proclamation. This would seem to indicate, too, that no one except the President can determine when reciprocity has ceased to exist and thus revoke the proclamation. That is, if he has "proclaimed" a country, and that country revokes its copyright privileges for citizens of the United States, no one can prevent authors of that nation from obtaining copyrights under our law until the President himself sees fit to withdraw the proclamation. In other words, the President's proclamation is conclusive evidence of the existence of reciprocity so far as the courts are concerned. Thus in the case of *Chappell & Co. v. Fields*[9] it was held that where the President had issued a proclamation entitling citizens of Great Britain to the benefit of United States copyright laws, such proclamation was a conclusive determination that the laws of Great Britain permitted United States citizens reciprocal copyright privileges and the courts were bound to presume that such conditions of reciprocity continued to exist until a different proclamation was made.

It is logical that reciprocity will exist from the date of the proclamation, but the proclamation may be retroactive in the sense that it may proclaim reciprocity to exist from a date earlier than that of the proclamation. An action for infringement then, may be maintained for acts occurring anytime after the date published in the proclamation.[10]

Upon what grounds may the President base his determination of the existence of reciprocity? Under the statute there seem to be three such bases namely, (1) if the law of the particular foreign country provides for protection for United

[8] 214 U. S. 236, 53 L. Ed. 679 (1909)
[9] 210 Fed. 864 (1914)
[10] Sec. (1911) 29 Op. Atty Gen. 64.

States citizens, (2) where there is a treaty, convention or agreement between the United States and the foreign country and both agree to grant substantially the same privileges, and (3) where there is an international agreement (*i. e.* a multipartite convention) which provides for reciprocal privileges to which both the United States and the foreign country are parties. It is not necessary that the multipartite agreement provide for anything except the granting of reciprocity of copyright, but where there is a bipartite treaty, the law of the country in question must provide for copyright protection to United States citizens on the same bases as that which we accord the nationals of the foreign country, or protection substantially equivalent thereto.[11]

Section 8 in the case of both domiciled and non-resident aliens, refers to the "author or proprietor" of the work. This does not mean that if one or the other is a citizen of a proclaimed country and entitled to copyright protection such protection will be granted. It has been held that it is the author who must qualify to have his work copyrighted. If the author is not entitled to copyright, neither is his assignee although the country of the assignee grants reciprocity[12] Thus, where a Peruvian artist (Peru not being a proclaimed country) assigned his painting to a German firm, the proprietor was not entitled to copyright even though Germany had been granted copyright protection by presidential proclamation.[13]

The converse is also true. Even though a non-resident alien is not entitled to copyright under our laws, by assignment, he may take and hold a copyright granted to one of our own citizens.[14] It only stands to reason, however, that the copyright obtained by the assignor must be absolutely in compliance with the statutes, since the assignee can in no way apply for registration of the copyright.

D. STATELESS PERSONS

Quite recently an interesting problem arose in the law of

[11] LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY (1938) v. 2, p. 704.
[12] Bong v. Campbell Art Co., 214 U. S. 236, 53 L. Ed. 679 (1909).
[13] *Ibid.*
[14] Black v. Henry G. Allen Co., 42 Fed. 618 (1890), Carte v. Evans, 27 Fed. 861 (1886).

copyright pertaining to the rights of stateless persons to protect their works. The case[15] has been discussed before, but it will bear brief attention here because of its relationship to the problem under consideration.

Two rival editions of Adolf Hitler's book *Mein Kampf* were being published at the same time. The one published by defendants, Stackpole & Sons, was without claim of copyright, the defendants contending that the book was in the public domain. On the other hand, the plaintiff's edition, actually published by Reynal & Hitchcock, Inc., was produced under a claim of copyright assignment from the German publishers.

The facts showed that under the certificate of copyright registration issued to the German publishers for volume one of *Mein Kampf*, the author's nationality was given as German, but in the certificate of registration to the same firm for volume two, the author's country was given as Austria. The defendants, claiming that the work was in the public domain, produced evidence to show that on both occasions, Hitler was a stateless person, since he was born in Austria but served in the German Army and refused to answer the call to military service in the Austrian Army By this act he lost his Austrian citizenship and had never thereafter become a citizen of Germany, service in the German army not conferring citizenship upon him.

Plaintiff contended that even if Hitler were a stateless person, he could still obtain a copyright under our statute, under the first broad grant of protection specifying that "The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title."

This contention was answered by the defendants' pleading that aliens could only acquire copyright protection under the remainder of section 8 which granted such protection to domiciled aliens and to non-resident aliens when the alien's country allowed reciprocal protection for American authors.

The court, however, granted an injunction to the plaintiffs and held that a stateless person *is* entitled to protection under

[15] Houghton Mifflin Co. v Stackpole Sons, Inc. 104 F (2d) 306, cert. den. 308 U. S. 597, 84 L. Ed. 499, 60 Sup. Ct. 13 (1939)

our copyright laws. No limitation upon the broad grant of the first sentence is expressed and there is no reason why one should be read into it. The court maintained that this is a general grant of protection to all authors, with the second sentence excepting a particular class for special treatment.

The far-reaching effects of this case are only now being realized. This decision means that even though the citizenship of a foreigner has been taken away from him by his native land, still he can have protection for his literary and musical property in the United States if no place else. Thus, a German author deprived of his citizenship by Hitler's regime may have his work copyrighted and published in the United States even though he is a refugee in France or England, and has not acquired citizenship in any other country With the present tendency of the European governments to take away the rights of citizenship of individuals who dare to oppose their regimes, it seems that this decision which grants copyright to stateless persons will provide a refuge for works of art driven out of Europe by the present tyranny

E. INTERNATIONAL RELATIONS

The United States, by Presidential proclamation, allows copyright privileges to the authors and composers of many countries among which are Austria, France, Germany, Great Britain and British Possessions, Italy, Mexico, Norway, Sweden, and Argentina. Such protection is granted to China, Japan, Hungary and Siam under bipartite conventions and this country is also a party to two multipartite treaties, namely, the Pan-American Convention of 1902, proclaimed April 9, 1908, and the Pan-American Convention of 1910, proclaimed July 13, 1914.[16]

With respect to the Copyright Act in the United States, non-resident aliens of "proclaimed" countries must follow certain specifications set out in the Act. Thus, under section 12 of the 1909 Act, they are required to deposit one copy of their work which was published in a foreign country with the Registrar of Copyrights. The statute says that the Registrar may make a formal demand for the copy in case it is not deposited "promptly" as the law requires, and under section 13, the

[16] See, Ladas, *op. cit. supra,* note 11 at p. 836 for a complete list.

foreign proprietor has six months in which to comply with that demand.

The Act (Section 15) extends the requirement of manufacture in the United States, as to certain classes of work, to foreigners. However, where the original text of a book of foreign origin is in a language other than English, the requirement of American manufacture is not made.

Temporary copyright protection for books in the English language originally published abroad is provided for in section 21. This is supposed to give time to bring out an American edition printed in the United States. This ad interim copyright can be secured by depositing a copy of the foreign edition in the Copyright Office within sixty days after publication, thus securing a four months' copyright. If in that time an American edition is published, the copyright is extended to the full term of twenty-eight years.

This, in brief, then, is the position of aliens who attempt to acquire copyright in the United States (1) Domiciled aliens have all the rights of American nationals regardless of whether or not the citizens of their own countries have such rights by proclamation, (2) Non-resident aliens have the rights of American nationals, if their country has been proclaimed by the President as a nation which grants reciprocal rights, or if both nations are parties to a treaty or to an international convention, (3) Residents of unproclaimed countries have only common-law copyright protection, and (4) Stateless persons have all the rights of American nationals to copyright.

PART II

It has been universally recognized as a rule of law that where war breaks out between two nations, the citizens of one country cannot sue in the courts of the belligerent country during the progress of the war.[17] The controlling reason for the rule seems to be that if the enemy alien were to win the suit and obtain a judgment, it would obviously add the sum he recovered to the resources of the enemy country[18] The true effect, how-

[17] Speidel v. N. Barstow, 243 Fed. 621 (D. C. R. I., 1917), Chappelle v. Olney, 5 Fed. Cas. 503, No. 2613 (C. C. Ore., 1870).

[18] Han v. Heilker, 21 Ohio N. P N. S. 257, 29 Ohio Dec. N. P 338 (1919), Bonneau v. Dinsmore, 23 How. Pr. 397 (N.Y., 1862).

ever, of the disability of an alien enemy to institute an action during the war is only to suspend the right of action or remedy during hostilities,[19] and at the termination of the war, the right of action is restored and the doors of the courts are opened.[20] Of course, the disability under which non-resident aliens are, does not attach to alien enemies who are residents in this country [21]

In relation to copyright law this means that domiciled aliens whose countries are at war with the United States are perfectly free to sue in the courts of this country for protection of their copyrights or to require the registrar of copyrights to register their works. On the other hand, if a non-resident enemy has already obtained his American copyright, he cannot sue to prevent an infringement of that copyright until after the war is over and peace has been restored.

Can a non-resident enemy alien obtain an American copyright during the progress of the war? The Trading with the Enemy Act of 1917[22] has a bearing on this subject. It defines who is an enemy alien and provides that nothing therein contained shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of an enemy prior to the end of the war except as provided in Section 10 of the Act, which states.

"An enemy, or ally of enemy, may file and prosecute in the United States an application for letters patent, or for registration of trade-mark, print, label, or copyright, and may pay any fees therefor in accordance with and as required by the provisions of existing law and fees for attorneys or agents for filing and prosecuting such applications. Any such enemy, or ally of enemy, who is unable during war, or within six months thereafter, on account of conditions arising out of war, to file any such application, or to pay any official fee, or to take any action required by law within the period prescribed by law, may be granted an extension of nine months beyond the expiration of said period, provided the nation of which the said applicant is a citizen, subject or corporation shall extend substantially similar privileges to citizens and corporations of the United States."

It is further provided[23] that the President is authorized to

[19] Chappelle v. Olney, 5 Fed. Cas. 503, No. 2613 (C. C. Ore., 1870) Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939 (1868)
[20] Hanger v. Abbott, 6 Wall. 532, 18 L. Ed. 939 (1868), Kershaw v. Kelsey, 100 Mass. 561, 97 Am. Dec. 124, 1 Am. Rep. 142 (1868)
[21] Speidel v. N. Barstow Co., 243 Fed. 621 (D. C. R. I., 1917)
[22] Oct. 6, 1917, c. 106, Sect. 10, 40 Stat. 420.
[23] Section 10 (c).

grant a license to a citizen of the United States to use patented or copyrighted matter belonging to aliens during a war if he is of the opinion that such grant is for the public welfare and the applicant is acting in good faith. The licensee must pay not more than five per cent of the value for use of the patented or copyrighted matter to the Alien Property Custodian, which shall be deposited by the Custodian in the Treasury of the United States as a trust fund for the licensee and owner of the patent or copyright;[24] and the owner must sue the licensee within a year after the war to obtain the money so set aside, in which suit the court may decree payment of a reasonable royalty [25]

The Act itself provides then that an enemy, or ally of an enemy, may file for registration of a copyright during the prosecution of a war. There are no cases directly dealing with this Act in relation to copyright, but in the case of *Rothbarth* v *Herzfeld*[26] the court said "Section 10 of the Trading with the Enemy Act permits maintenance of suits after the end of the war by the owner of patents, trade-marks, etc., permitted to be applied for during the war." The words, "permitted to be applied for during the war" are important and relevant because they mean that as long as Germany, or Italy, or any other enemy country has not revoked its copyright privileges for American authors, non-resident enemy aliens can still apply for registration of copyright of their work despite the fact that a war is in progress.

If the President grants a license to use an alien's copyright to an American citizen, the licensee must, according to the Act, pay a portion of the income from such use to the Alien Property Custodian, who in turn will deposit said sum in the Treasury for the benefit of the "owner." Now, when the war is over, the former enemy alien may sue in the United States courts, recover royalties for the use of the copyright during the war and have the license granted to the United States national revoked. Once again the true owner will be in possession of his copyright and enjoy privileges which were his before the war.

That is the interpretation which might be given to Section

[24] Section 10 (d)
[25] Section 10 (f)
[26] 179 App. Div 865, 167 N. Y. S. 199 (1917)

10 of the act. However, it would seem to be futile to allow enemy aliens to register copyrights during the war (and note, this is a special exception to the general rule) and then allow an American citizen to use the copyright during the war, paying royalties to the Alien Property Custodian. Nevertheless, this seeming inconsistency exists in the Act itself.

Unfortunately, the Act provides further[27] that the Alien Property Custodian may seize alien property (including copyrights) and sell it, thus cutting off the rights of the owner.[28] Though it is unlikely that the Custodian would seize and sell the rights to a book or musical composition, still under the Act this is possible and remains a threat to the almost sacred rights of an author or composer to the exclusive privilege of reproducing the art which he has created.

We have seen, then, what provisions the United States copyright law has made for the protection of the creative works of aliens and how that protection is affected by war between this country and the alien's homeland. It would seem that one of the questions which will be presented in our effort to establish an international union of some nature will be that of international copyright. Steps toward such a union have already been made, but general post-war planning should hasten the cooperation of all nations in this tremendous effort to give protection to the creative works of the world. It is to be hoped that even though war may not be eliminated, some means may be found whereby not even war will interfere with the protection granted to the fine arts—both here and abroad.

---

[27] Oct. 6, 1917, c. 106, Sect. 7, 40 Stat. 420.

[28] Chemical Foundation v E. I. Du Pont de Nemours & Co., 29 F (2d) 597, aff'd, 39 F (2d) 366 (1928)