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## International Copyright and Musical Compositions

Marcellus R. Meek

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## INTERNATIONAL COPYRIGHT AND MUSICAL COMPOSITIONS

*When Music, Heav'nly Maid was young,  
While yet in early Greece she sung,  
The Passions oft, to hear her shell,  
Throng'd around her magic cell.*

*O Music, sphere-descended maid,  
Friend of pleasure, wisdom's aid.*

—WILLIAM COLLINS, *The Passions*

### INTRODUCTION

**M**USIC—defined as the art or science of rendering pleasing, expressive, or intelligible combinations of tones<sup>1</sup>—is as ancient as man's expression itself; it is as ubiquitous as the flowers or trees; and is so much a part of our everyday experience that we can scarcely fail to be aware of its magnetic influence upon us.

It is therefore difficult to conceive that, though the composer of music was from the earliest of times respected, it was not until comparatively recent times that he was protected against an unauthorized use of his artistic creations. This situation existed notwithstanding the fact that the means by which wholesale piracy might be, and was, accomplished were in existence hundreds of years before.<sup>2</sup> Nor does music know man-made boundaries, either political or geograph-

<sup>1</sup> Webster's New Collegiate Dictionary, 1949.

A musical composition has been defined by the courts as "a rational collocation of sounds, apart from concept, reduced to tangible expression from which the collocation can be reproduced either with or without continuous intervention," *White-Smith Music Publishing Co. v. Apollo Company*, 139 Fed. 427 (C.C. N.Y., 1905), aff'd 147 Fed. 226 (C.A. 2d, 1906), aff'd 209 U.S. 1 (1908); it was held in the case of *G. Ricordi & Co. v. Columbia Graphophone Co.*, 256 Fed. 699 (D.C. N.Y., 1919), 258 Fed. 72 (D.C. N.Y., 1919), 263 Fed. 354 (C.A. 2d, 1920), that the terms "Musical Composition" and "Musical Work" as employed in our copyright law refer to a composition which may be music alone or words and music.

<sup>2</sup> Reference is here made to Gutenberg's invention of the printing press in 1440; and the perfection of music printing from movable type by Ottaviano Dei Petrucci of the Republic of Venice prior to 1498. Music printing began in Germany and Switzerland about 1473. Shafter, A. M., *Musical Copyright* 16-18 (2d ed., 1939).

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MR. MARCELLUS R. MEEK, *the writer of this essay, is a senior student at De Paul University College of Law. The essay has been submitted in the Nathan Burkan Memorial Competition sponsored by the American Society of Composers, Authors, and Publishers.*

ical, yet the enjoyment in other nations of one's rights in his creation is dependent to a great extent upon the existent relations between the composer's country and the other countries of the world. Justice fervently bespeaks a need for adequate international protection of these rights.

It is the purpose of this essay to treat of the copyright protection afforded the composers of musical compositions on the international level. Such a work must, of necessity, review for comparative purposes some of the broader aspects of the evolution of domestic copyright which have contributed to, or are to be contrasted with, the development of musical copyright. Hence, in the hope that the existent international copyright protection afforded musical compositions be rendered more readily comprehensible, an historical approach to the material involved has, for the most part, been maintained.

#### THE HISTORY AND NATURE OF COPYRIGHT

The protection of literary property,<sup>3</sup> that is, the exclusive right or privilege to print, reprint, and sell an artistic or literary creation, is said to have had its inception in Venice in 1469 when John of Spira was granted by the Senate of that Republic the exclusive right to print the letters of Cicero and Pliny.<sup>4</sup> A similar right was granted Ottaviano Dei Petrucci to print music in 1598,<sup>5</sup> but in both cases such rights were restricted in their operation to the Venetian Territory, and in duration to a specific period of time.<sup>6</sup> It is anomalous that this exclusive right or privilege to print and copy a creative work did not extend in favor of its author or composer, but rather, only to printers, and in some instances, court favorites.

Even the Statute of Anne passed in 1710,<sup>7</sup> which was the first copyright law the world has known, and which forms the basis of copyright legislation in all English speaking nations, did not recognize the property right of an author or composer in his artistic or literary creation. It has been pointed out that this enactment was

<sup>3</sup> The term "literary property" as employed by the writer will include all forms of artistic creation and will not, therefore, be restricted in its application to books. The terms "artistic creation" and "artistic or literary work" or simply the term "work" will include musical compositions, and be used interchangeably.

<sup>4</sup> Kampelman, *The United States and International Copyright*, 41 *Am. J. Int. L.* 407 (April, 1947).

<sup>5</sup> Shafter, *Musical Copyright* 19-20.

<sup>6</sup> The privilege was limited to seven years in the former case and fifteen years in the latter.

<sup>7</sup> Act of 8 Anne, c. 19 (1710).

made in response to petitions of London booksellers for protection of their copyrights which had been invaded.<sup>8</sup> It was not until the famous case of *Donaldson v. Beckett*,<sup>9</sup> decided in 1774, that copyright was held to be a right of the author and not of a publisher or bookseller. This landmark case established also that an author or composer possessed certain common law rights in his unpublished works, giving him a right of first publication which was extinguished at the time such publication took place.

In America, the first copyright legislation enacted by Congress was the Copyright Act of 1790,<sup>10</sup> which, though restricted in its operation to maps, charts, and books, was similar to the British Act of 1710, which provided copyright protection for twenty-one years on works then in existence and fourteen years on works published after 1710, with a renewal period of fourteen years.<sup>11</sup> In 1831,<sup>12</sup> Congress repealed the Act of 1790, and the Act of 1802<sup>13</sup>—which supplemented it—and embodied into one statute the law relating to copyright. The Act of 1831 for the first time expressly provided for the copyrighting of musical compositions.<sup>14</sup>

The property right of an author in his creative work, however, is not entirely statutory, and as we know it today, involves a system of dual rights inherited from the English law. In its broadest sense, copyright may be defined as “the law’s cognizance of an author’s rights in his artistic creation secured either naturally or in compliance with statute.”<sup>15</sup> Respecting statutory copyright, it has been said that when the framers of the Constitution drafted their short statement of principle,<sup>16</sup> copyright was, in their minds, merely an inducement to an author or inventor to make his work public. The

<sup>8</sup> Ball, *The Law of Copyright and Literary Property* 17 (1944).

<sup>9</sup> *Donaldson v. Beckett*, 4 Burr. 2408 (1774); see also *Millar v. Taylor*, 4 Burr. 2302, 98 E. Rep. 201 (K.B., 1796).

<sup>10</sup> Enacted by the first Congress under the Constitution, it was entitled “An Act for the Improvement of Learning.” Act May 31, 1790, c. 15, 1 Stat. 124 (1790).

<sup>11</sup> Act of 8 Anne, c. 19 (1710).

<sup>12</sup> Act of Feb. 3, 1831, c. 16, 4 Stat. 436.

<sup>13</sup> Amendatory Act April 29, 1802, c. 36, 2 Stat. 171.

<sup>14</sup> *Herbert v. Shanley*, 222 Fed. 344 (S.D. N.Y., 1915), aff’d 229 Fed. 340 (C.C. N.Y., 1916), cert. granted 241 U.S. 665 (1916), rev’d 242 U.S. 591 (1917).

<sup>15</sup> Shafter, *Musical Copyright* 108.

<sup>16</sup> The United States Constitution provides: “The Congress shall have the power . . . to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” Art. 1, § 8.

Copyright Law, like the patent statute, makes the public benefit the primary consideration to which reward to the owner thereof is secondary.<sup>17</sup> But, as we have said, not all of an author's rights are statutory, and therefore statutory copyright is not to be confounded with what has been termed the common law right of an author.<sup>18</sup> At common law, the exclusive right to copy existed in the author until he permitted a general publication; the statute created a new property right giving to the author, after publication, the exclusive right to multiply copies for a limited period, which right is obtained in a certain way and by the performance of certain acts which the statute points out.<sup>19</sup>

Common law rights, on the other hand, take the author as the principal object of their protection and are based upon the claim of the artistic creator to an unpublished work theoried on the concept of production and labor.<sup>20</sup> To him alone belongs the right to determine if his work is to be published at all. This concept is given expression by separate provision in our present Copyright Law.<sup>21</sup>

The common law right of which we have spoken has been termed "copyright before publication" to distinguish it from the exclusive privilege of printing copies known as "copyright after publication," which the famous case of *Donaldson v. Beckett*<sup>22</sup> held to be entirely a creature of statute.<sup>23</sup> An inalienable right, therefore, exists in every writer or composer of an unpublished work to decide whether or not his work shall be communicated to the general public. This right is perpetual, but is lost upon the unrestricted dissemination of the

<sup>17</sup> *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

<sup>18</sup> Though retained in the American Law [*Wheaton v. Peters*, 8 Pet. (U.S.) 591 (1834)], the common law right of an author in unpublished works was abolished in England by the Copyright Act of 1911. Statutory copyright is now granted there in both published and unpublished works from the moment of creation of the work, and exists for the life of the author and fifty years after his death: 1 & 2 Geo. V. c. 46; see also Ladas, *The International Protection of Literary and Artistic Property* 879 (1938).

<sup>19</sup> *Caliga v. Interocean Newspaper Co.*, 215 U.S. 182 (1909); *Thompson v. Hubbard*, 131 U.S. 123 (1889).

<sup>20</sup> Blackstone recognized this concept when, in the "Origin of Property," he said, "It is clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor?" 2 Blackstone's Commentaries 7 (3d ed., 1768).

<sup>21</sup> Section 2 of the Act provides: "Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity. . . ."

<sup>22</sup> 4 Burr. 2408 (1774).

<sup>23</sup> Ball, *op. cit. supra* note 8.

work through issuance of "copies" by the holder of the "copyright before publication." After a first publication<sup>24</sup> there is no exclusive right to prevent others from multiplying copies of the work, or to do so oneself, unless the author or composer has secured statutory copyright.<sup>25</sup>

The means of publication in copyright is limited to the printed or written word, or other means by which the work may be visually perceived, and does not include public performance of the work, whether gratuitously made or for profit.<sup>26</sup> Nor are the rights lost by a restricted or limited communication of the work, as, for example, in the case of a private circulation of the work.<sup>27</sup> Common law rights in literary property end also when statutory copyright begins, that is, when all the necessary requirements prescribed by the Copyright Act are complied with, granting to the holder thereof a new property right in the use of the work.

#### STATUTORY COPYRIGHT

Statutory copyright in the United States has undergone a century-and-a-half-long period of development involving many extensions of principle and additions in subject matter. Our original Statute of 1790,<sup>28</sup> protecting only maps, charts, and books, conferred protection upon the owner for fourteen years, with a renewal for an additional period of fourteen years. In the Act of April 29, 1802,<sup>29</sup> which supplemented the Act of 1790, it was provided that prints, cuts, and engravings should become subjects of copyright. The Act of 1831,<sup>30</sup> which for the first time afforded protection to the composer of musical compositions, consolidated all previous Acts and extended the privilege of printing, reprinting, publishing, and vending the copyrighted work to a term of twenty-eight years with a right of

<sup>24</sup> The Act does not expressly define "publication," but speaking in general terms, "the date of publication would be the very day when copies of the first authorized edition were either (1) placed on sale, or (2) sold, or (3) publicly distributed, or (4) in the case of works of art not reproduced in copies for sale or public distribution, the day when the original was unrestrictedly exhibited to the public." Howell, *The Copyright Law* 65 (3d ed., 1952); see also Ball, *op. cit. supra* note 8, at 62-67.

<sup>25</sup> Conversely, in order to avail oneself of the copyright statute, it is necessary that the common law rights be maintained intact.

<sup>26</sup> *Ferris v. Frohman*, 223 U.S. 424 (1912); see also Shafter, *op. cit. supra* note 15, at 115, 131.

<sup>27</sup> *Werkmeister v. American Lithographic Co.*, 134 Fed. 321 (1904); *White v. Kimmell*, 87 U.S.P.Q. 407 (D.C. So. Calif., 1950).

<sup>28</sup> Act of May 31, 1790, c. 15, 1 Stat. 124.

<sup>29</sup> 2 Stat. 171, c. 36.

<sup>30</sup> Act of February 3, 1831, c. 16, 4 Stat. 436.

renewal for a second term of twenty-eight years in favor of the author or his family. Dramatic compositions were first protected by the Amendatory Act of August 18, 1856;<sup>31</sup> photos and negatives were added in 1865;<sup>32</sup> and in 1870 a new Act<sup>33</sup> was passed, repealing all prior Acts and extending copyright protection to drawings, chromos, statues, and statuary and models or designs intended to be perfected as works of fine art. By the Act of June 18, 1874,<sup>34</sup> prints or labels designed to be used for any other articles of manufacture were not to be entered under the Copyright Law, but were thereafter to be registered with the Patent Office.

The Amendatory Act of 1891,<sup>35</sup> known as the "International Copyright Act," extended the benefits of the copyright statutes to authors of any foreign countries which permitted copyright privileges to citizens of the United States on substantially the same terms as were granted to its own citizens.<sup>36</sup> The existence of such reciprocal conditions was to be determined by proclamation of the President of the United States.<sup>37</sup> In addition, the Act of 1891 provided for the granting of the exclusive rights of dramatization and translation of copyrighted works. By Act of January 6, 1897,<sup>38</sup> the composer of copyrighted musical compositions was given the exclusive right to its public performance.

Congress, in 1909, again enacted a complete new code of Copyright Law—a comprehensive revision of existing copyright legislation.<sup>39</sup> It provided protection for the first time to a copyright owner of a musical composition against the unauthorized mechanical reproduction of the work. It further imposed a limitation upon the protection, previously afforded, relative to the performance of a copyrighted musical composition, by providing that such performance constituted an infringement only if it were for profit as well as for the

<sup>31</sup> 9 Stat. 106. In this Act was included the granting of the exclusive right to perform the dramatic works publicly.

<sup>32</sup> Act of March 3, 1865, 11 Stat. 138.

<sup>33</sup> Act of July 8, 1870, 16 Stat. 212.

<sup>34</sup> 18 Stat. 78 (pt. 3).

<sup>35</sup> Act of July 1, 1891, 26 Stat. 1106. Prior to 1891, copyright protection in the United States was limited to authors who were citizens, residents, or inhabitants of the United States.

<sup>36</sup> At the present time, the United States has reciprocal copyright relations with over 50 other nations of the world.

<sup>37</sup> *Bong v. Alfred Campbell Art Co.*, 214 U.S. 236 (1908).

<sup>38</sup> 29 Stat. 481.

<sup>39</sup> Act of March 4, 1909, c. 320, 35 Stat. 1075.

public. In 1947<sup>40</sup> the Copyright Law of the United States was codified and enacted into positive law as Title 17 of the United States Code, which title presently contains the substance of the Act of 1909, as amended, with changes in form and in the arrangement and numbering of sections.<sup>41</sup>

Today, the specific rights which are granted to a copyright proprietor include the rights to print, publish, and vend the work; to translate the work or make other versions of it; to dramatize it, if it be a non-dramatic work; to perform the work publicly if it is a lecture or other non-dramatic work, or a musical composition; and to record the work if it is dramatic, non-dramatic, or musical in nature.<sup>42</sup> The latest addition to the group of rights afforded the copyright owner is the exclusive right to perform non-dramatic works in public and for profit, and to record them.<sup>43</sup> The enactment of this statute overrules the decision in the notable case of *Kreymborg v. Durante*,<sup>44</sup> wherein it was held that the Copyright Act of 1909 offered no protection against unauthorized performances of such works as poems and short stories.

In order to avail oneself of statutory copyright in the United States, however, it is necessary that certain formalities required by the Copyright Act be complied with. The first of these is notice of copyright which must be placed on every copy of the work published in the United States;<sup>45</sup> the second requirement is that of depositing with the Copyright Office two copies of the best edition of the work published in the United States;<sup>46</sup> and the third and final formal requirement is that books or periodicals printed in the English language and published within the United States, with certain minor exceptions, be printed within the limits of the United States upon type set in

<sup>40</sup> Act of July 30, 1947, 61 Stat. 652.

<sup>41</sup> The Copyright Law of the United States, Copyright Bulletin No. 14, revised to 1953, prefatory note, at II.

<sup>42</sup> 17 U.S.C. § 1; see Finkelstein, Public Performance Rights in Music and Performance Right Societies, Seven Copyright Problems Analyzed 71 (1952).

<sup>43</sup> Act of July 17, 1952, 66 Stat. 752 (Pub. L. No. 575) 82nd Congress, 2d Session, an amendment to § 1(c) of present Act.

<sup>44</sup> 21 U.S.P.Q. 557, 22 U.S.P.Q. 248 (rehearing) (S.D. N.Y., 1934); for discussion see Derenberg, Copyright Law, 28 N.Y.U.L.Q. Rev. 685, 1952 Annual Surv. Am. L. Section (March, 1953); see also "Truman Signs Bill to Protect Recording, Performing Rights," Vol. 162, No. 5 Publ. Wkly. 538 (August 2, 1952).

<sup>45</sup> 17 U.S.C. § 10. It is sufficient that the word "Copyright" or the abbreviation "copr.," accompanied by the name of the proprietor, and the year of first publication appears (§ 19).

<sup>46</sup> 17 U.S.C. § 13.



the United States.<sup>47</sup> This is the controversial so-called "manufacturing clause."

#### PUBLIC PERFORMANCE RIGHTS IN MUSIC

As we have seen, the Copyright Law of the United States has been broadened not only as regards subject matter and term of duration, but also as it relates to the rights conferred thereunder. An author or composer, by virtue of Section 1 of the Act of 1909, as amended, no longer merely secures the sole right to print and sell copies of his copyrighted work, but, if the work be dramatic, or dramatico-musical, he receives the exclusive right to perform it publicly;<sup>48</sup> and if it be a musical composition, lecture, or other non-dramatic work, the sole right to perform the work publicly for profit. Furthermore, in any of these works the copyright owner receives, in addition to the performing rights above, the right to record the work, though in the case of musical compositions this is limited somewhat by the so-called "compulsory license provision."<sup>49</sup>

The existence of the performing right was at first met with great opposition on the theory that a sale of the material object, such as a sheet of music or phonograph record, carried with it the privilege to use it in any manner whatsoever; however, it was held that such a construction was unconscionable in the light of the fact that such use might compete with the other express rights granted the copyright proprietor.<sup>50</sup> The need for such extensions in the Copyright Law as have been outlined above, insofar as they relate to music at least, is easily appreciated when we review the tremendous development of the media of mass communication—such as radio, television, and phonograph records—which have affected, most adversely, the sale of sheet music.

Performance rights were first granted to the owner of a copyrighted musical composition by the Act of January 6, 1897, but

<sup>47</sup> The manufacturing clause has been limited in the scope of its operation somewhat by provision in the Act granting a five-year ad interim protection for works published abroad in the English language, if one copy of the foreign edition is deposited with the Copyright Office not later than six months after its publication. In addition, up to 1500 copies of the work may be imported within said five-year period, if notice of copyright is contained in every copy thereof. 17 U.S.C. §§ 16, 22. See Derenberg, *Copyright Law*, 1949 Annual Surv. Am. L. 855 (1950).

<sup>48</sup> Note that the copyright owner of a dramatic or dramatico-musical work receives the sole right to perform the work, whether it be for profit or not. *Herbert v. Shanley*, 242 U.S. 591 (1917); *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 202 (1931).

<sup>49</sup> The compulsory license provision will be discussed more fully infra., at 62.

<sup>50</sup> *Finkelstein*, op. cit. supra note 42, at 72.

this was modified in 1909 to require that the performance be not merely public, but also for profit. In the very famous case of *Herbert v. Shanley*<sup>51</sup> it was held that in order to be *for profit* it was not necessary that a specific charge be made for admission to the premises where the performance occurs; thus the indirect benefit derived by a hotel or restaurant owner from playing copyrighted music to his customers was sufficient to bring them within the meaning of the statute. Mr. Justice Holmes, in his opinion, said:

The defendant's performances are not eleemosynary. They are part of a total which the public pays, and the fact that the price of the whole is attributed to a particular item which those present are expected to order is not important.

However, private performances for profit, and gratuitous public performance are not within the meaning of the Act. As a consequence, with the growth of radio as a means of mass communication, when copyright owners sought to recover for unauthorized performances of their copyrighted music over the air waves, it was contended that the performance was neither public,<sup>52</sup> nor for profit, since there was no charge to the listeners who were in the privacy of their homes. These propositions were unanimously dispelled by the courts, and radio-diffusion was held both public and for profit.<sup>53</sup> In American courts today it is universally so held.<sup>54</sup>

The practical impossibility of a copyright proprietor to adequately protect these rights, once established, however, may readily be observed when we consider the almost insurmountable task that confronted him in detecting the unauthorized performances of his works. This inability of the composer to safeguard his rights gave rise to the formation of "performing right societies," though similar protective associations in other literary endeavors were already in existence.<sup>55</sup>

<sup>51</sup> 242 U.S. 591, 594 (1917), Mr. Justice Holmes further stated: "If music did not pay it would be given up" and "Whether it pays or not the purpose of employing it is profit and that is enough."

<sup>52</sup> *Remick and Co. v. American Automobile Accessories Co.*, 5 F. 2d 411 (C.A. 6th, 1925), cert. denied, 269 U.S. 556 (1925). It was contended that since the rendition of the work took place in the seclusion of a broadcasting booth and the sound waves there converted into electromagnetic waves to be reconverted into sound waves to thousands of listeners who could not communicate with each other, the performance was not public, but merely private.

<sup>53</sup> *Buck v. Jewell LaSalle Realty Co.*, 283 U.S. 191 (1931).

<sup>54</sup> *Witmark v. Bamberger*, 291 Fed. 776 (D.C. N.J., 1923).

<sup>55</sup> As early as 1736 there was in existence in England the "Society for the Encouragement of Learning." In 1833 the "Society of Authors" was formed, and in America both musical and dramatic performing rights were protected by the "American Dramatists Club." Shafter, *Musical Copyright* 310-11.

By far the most well-known and influential of the performing right societies is the American Society of Composers, Authors, and Publishers, commonly known as ASCAP. This society was founded in 1914 by Victor Herbert and other outstanding composers and publishers for the two-fold purpose of providing a central means by which the performance of musical works could be licensed and infringements throughout the country be detected. Besides ASCAP there are other performing right societies: SESAC, Inc., or Society of European Stage Authors and Composers; the BMI, or Broadcast Music, Inc.; and the G. Ricordi Company of Milan—formerly the Radio Program Foundation—which is licensed through the BMI along with the American Performing Right Society, Inc. The well-known Associated Music Publishers, or AMP, was recently purchased by BMI.<sup>56</sup>

The American Society of Composers, Authors, and Publishers is a non-profit organization. All the members assign to the society the exclusive non-dramatic, or “small,” performing rights of all songs and music published for a specified period of time. The society thereafter issues licenses to the users of music who pay a blanket fee to perform, either by live talent or mechanical recordings, the works listed in the society’s repertory.<sup>57</sup> The dramatic, or so-called “grand” rights, however, are not handled by ASCAP, and, since the growth of the television industry, the blanket license which had been issued in television has been extended to include the use of costumes and scenery in conjunction with the performance of a musical composition, but only where there is no definite plot carried forth by action and the performance of the musical composition.<sup>58</sup>

Existing throughout the world are other societies similar to ASCAP with whom arrangements are made whereby each society in its own country grants licenses and protects the interests of the other societies in its own country. Reports and payments are made nine months after the end of each year for the performances occurring the preceding year.<sup>59</sup>

<sup>56</sup> Shafter, *Musical Copyright* 312–313; Finkelstein, *op. cit. supra* note 42, at 75.

<sup>57</sup> Finkelstein, *op. cit. supra* note 42, at 76–78; see also Ball, *op. cit. supra* note 8, at 415–16; and Shafter, *op. cit. supra* note 56, at 313.

<sup>58</sup> Finkelstein, *op. cit. supra* note 42, at 77. If such an extension had not been made, the television industry would have had to negotiate separately for the right to use costumes and scenery with the performance of the music.

<sup>59</sup> *Ibid.*, at 80.

## MECHANICAL REPRODUCTION RIGHTS IN MUSIC

The exclusive right to control the use of a musical composition with respect to its mechanical reproduction by means of perforated paper rolls, phonograph records, or similar mechanical devices was introduced for the first time in the Act of 1909, which provided such protection to composers of music who copyrighted their works under the statute, either under section ten as a "published" work, or under section twelve as an "unpublished" work.<sup>60</sup>

Section 1 of the Act of 1909, subsection (e), as amended, provides that the musical copyright proprietor shall have the exclusive right to

. . . make any arrangement or setting of it or the melody of it in any system of notation or any form of record in which the thought of the author may be recorded and from which it may be read or reproduced.

Prior to the enactment of subsection (e) above, no protection whatsoever was afforded by our Copyright Law against the unauthorized mechanical reproduction of copyrighted musical composition.<sup>61</sup>

Subsection (e), section 1, further provides "as a condition of extending the copyright control to such mechanical reproductions," that whenever the owner of a musical copyright has used or permitted others to use the copyrighted music upon the parts of instruments serving to reproduce the work, any other person may make similar use of the work upon the payment of a royalty of two cents on each part manufactured. This is known as the "doctrine of accessibility" in the so-called "compulsory license provision" of the Act. Recently, a report was submitted by the Subcommittee on Patents, Trademarks, and Copyrights to the full Judiciary Committee, which proposed an increase in the compulsory license royalty from two cents to three cents per part.<sup>62</sup>

In addition, it is provided that the copyright proprietor must file notice in the Copyright Office that he or his licensee is reproducing the copyrighted work mechanically: otherwise subsequent recording may be made by other firms without the necessity of complying with

<sup>60</sup> *Shilkret v. Musicraft Records*, 131 F. 2d 929 (C.A. 2d, 1942), cert. denied, 319 U.S. 742 (1942).

<sup>61</sup> *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908); *Shilkret v. Musicraft Records*, 131 F. 2d 929 (1942).

<sup>62</sup> No action has been taken, see Hearings before Subcommittee No. 3 of the Committee on the Judiciary on H.R. 5473, 82d Cong., 1st Sess. (1951), and 1952 Annual Surv. Am. L., Derenberg, Copyright Law, 685.

the requirement of paying the two-cent royalty altogether, being a complete defense for any such infringer.<sup>63</sup>

Mechanical reproduction rights are entirely separate and distinct from any of the other express rights secured under the Copyright Law. Thus, the printing of the words of a composition on music rolls does not come within the compulsory license that is granted, being a copy or publication, and not a mechanical reproduction.<sup>64</sup> Likewise, compliance with the compulsory license provision does not convey the right to publicly perform the musical composition for profit.<sup>65</sup> There is an exception, however, with respect to performances by means of coin-operated machines. The Act expressly provides that

The reproduction or rendition of a musical composition by or upon coin-operated machines 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.<sup>66</sup>

To alleviate such a condition that would, and does, constitute a performance in public, for which an actual deposit of money would be made, not within the purview of the copyright owner's right of public performance, bills have been introduced in both the House and Senate to eliminate the provision from the Act, but to date no decisive action has been taken.<sup>67</sup>

Recently, some important decisions have been handed down by the courts interpreting mechanical reproduction rights in music. These have had the result of focusing attention upon that phase of our copyright laws, both as relates to the nature of the right and to the scope of the protection thereby conferred. It is submitted that

<sup>63</sup> Shafter, *op. cit. supra* note 56, at 338. Inasmuch as such "parts of instruments" are not copyrightable, however, the provision in section 10 of the Act, requiring notice of copyright to be affixed to each copy of a published work, does not apply to these mechanical devices in order to protect reproduction of the music. *Buck v. Heretis and Buck v. Lester*, 24 F. 2d 876, 877 (1928). Nor is mechanical reproduction a publication in itself. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>64</sup> *Standard Music Roll Co. v. F. A. Mills, Inc.*, 241 Fed. 360 (C.A. 3rd, 1917), *aff'g* 223 Fed. 849 (D.C. N.J., 1915).

<sup>65</sup> *Irving Berlin, Inc. v. Daigle*, 31 F. 2d 832 (C.A. 5th, 1929); *Standard Music Roll Co. v. Mills, Inc.*, 241 Fed. 360 (C.A. 3d, 1917).

<sup>66</sup> 17 U.S.C. § 1 (e).

<sup>67</sup> H.R. 5473, introduced Sept. 25, 1951; S. 2186, introduced Sept. 27, 1951; see also Copyright Law, 1952 Annual Surv. Am. L. 685. "Paradoxically, in the very situation where the deposit of money itself proves that the performance is for profit, the copyright proprietor is deprived of any remuneration." Finkelstein, *op. cit. supra* note 42, at 71.

the attention thus centered militates to bring about some of the sorely needed changes in that field.

In keeping with the general concept that the right to record musical works is separate and distinct from the other rights conferred by the Act, as outlined above, it was held in the recent case of *Edward B. Marks Music Corp. v. Foulton*,<sup>68</sup> that the compulsory license provision of Section 1 (e) does not embody the right to make a version or arrangement of the music, but rather, such rights are separate and exist only in connection with the rights expressly enumerated in Subsection (a) of Section 1, thus having no connection with mechanical reproduction.<sup>69</sup>

The other outstanding case concerning the field of law to which we have alluded is that of *Shapiro, Bernstein & Co. v. Miracle Record Co.*,<sup>70</sup> in which an Illinois District Court held that the making and offering for sale of a phonograph record was a "publication" with a resulting loss of common law copyright.<sup>71</sup> Prior to this remarkable decision, it had been held, in accord with the famous *Apollo case*,<sup>72</sup> that the term publication was restricted to the printed or written word and did not include works which may be only audibly perceived. It has been said that if other courts should adopt this view, there would result a revolutionary change in one of the fundamental principles of musical copyright.<sup>73</sup>

#### INTERNATIONAL PROTECTION OF LITERARY PROPERTY

Probably the most grossly inadequate aspect of our Copyright Law is that part which relates to the international protection of literary and artistic property. Despite the fact that an almost universal recognition of the author's property right existed at an early date, as was evidenced by the willingness on the part of most of the countries of the world to enter into reciprocal agreements on the subject,<sup>74</sup> a period of 100 years elapsed from 1790, the date of the first copyright

<sup>68</sup> 79 F. Supp. 664 (S.D. N.Y., 1949).

<sup>69</sup> Consult 1948 and 1949 Annual Surv. Am. L., at 781 and 862 respectively.

<sup>70</sup> 91 F. Supp. 473 (N.D. Ill., 1950).

<sup>71</sup> Judge Igoe, speaking of records and sheet music, said, "I can see no particular distinction between the two, and if one constitutes an abandonment, so should the other."

<sup>72</sup> *White-Smith Music Publ. Co. v. Apollo Co.*, 209 U.S. 1 (1908).

<sup>73</sup> 1950 Annual Surv. Am. L. 706 (1951).

<sup>74</sup> U.S. Bureau of Foreign and Domestic Commerce, *Copyright Protection Throughout the World* 8 (1936).

legislation in the United States, to 1891, when copyright privileges were first made available in this country to foreign authors.<sup>75</sup> Prior to the enactment by Congress in 1891 of the so-called "International Copyright Act,"<sup>76</sup> protection was accorded in this country only to American resident authors for works printed in America with type set in America by American printers.<sup>77</sup>

In Europe, as early as 1858, a congress of authors and artists met for the purpose of discussing the international protection of authors' rights,<sup>78</sup> and in 1878, at Paris, under the leadership of Victor Hugo, "An International Literary and Artistic Association" was organized.<sup>79</sup> In 1883 a conference was called at Berne, Switzerland, to arrange for the formation of a "Union" for literary property. This was followed by conferences in 1884 and 1885. Finally, in 1886 a draft convention was approved and signed by ten countries.<sup>80</sup> It was ratified the following year. This Berne Convention, as it is often called, established an International Union for the Protection of Literary and Artistic Works, and, as subsequently amended, provides for automatic protection in all contracting states without the necessity of complying with any formalities whatever. It has operated so successfully that its membership has grown from ten to over forty countries,<sup>81</sup> the notable exceptions being the United States, Russia, and China.<sup>82</sup>

However, the greatest inadequacy in the copyright relations of

<sup>75</sup> Mr. Herman Finkelstein ably points this up when, speaking of that period, he states, "Works of foreign or non-resident authors could be pirated at will," and, citing 2 Sen. Doc., 24th Cong., 2d Sess., Rep. No. 134, he observes, "As early as 1837 a petition of British authors asking that their works be protected was presented to the Senate by Henry Clay." Finkelstein, *Universal Copyright Convention*, 2 Am. J. Comp. L. 199 (Spring, 1953).

<sup>76</sup> 26 Stat. 1106 (1891).

<sup>77</sup> Kampelman, *op. cit. supra* note 4, at 408.

<sup>78</sup> 1 Ladas, *op. cit. supra* note 18, at 71 (1938).

<sup>79</sup> Kampelman, *op. cit. supra* note 4, at 410. Later called *L'Association Littéraire et Artistique Internationale*.

<sup>80</sup> Signed Sept. 9, 1886 by the following countries: Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland, and Tunis. Consult 1 Ladas, *op. cit. supra* note 18, at 75.

<sup>81</sup> Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, Greece, Germany, Holy See, Hungary, Iceland, Ireland, India, Italy, Japan, Lebanon, Liechtenstein, Luxembourg, Monaco, Morocco, New Zealand, Netherlands, Norway, Pakistan, Poland, Portugal, Roumania, Spain, Sweden, Switzerland, Syria, Thailand, Tunis, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, and Yugoslavia.

<sup>82</sup> Howell, *The Copyright Law* 7 (1952). (Author's note: The provisions of the Berne Convention will be discussed at greater length under the subsequent heading, "International Copyright Conventions.")

the United States with other countries is not merely that it was late in coming, but rather, in the method adopted by Congress by which these relations are conducted, even to the present day.

By virtue of the Act of July 1, 1891, international copyright protection is accomplished by means of reciprocal treaties and agreements with the other countries of the world, but this does not mean automatic protection for the authors of the subscribing countries, as under the Berne Convention. Because of the fact that the laws of one country have no extra-territorial operation, an author must obtain separate and independent copyrights in the several countries by compliance with the formalities of their respective laws.<sup>83</sup> Thus, for example, if an American author or composer should desire copyright protection in England, with whom we have a reciprocal agreement, he would have to publish his work in England within fourteen days from the date of publication in the United States, and deliver a copy of a book to the Trustees of the British Museum within one month after publication, though such deposit is not made a condition for securing copyright.<sup>84</sup> The United States, on the other hand, imposes on foreign authors compliance with the hard condition of entry of the title of the work with the Register of Copyright, Washington, D.C., and the deposit of copies of the edition of the work with the Library of Congress, as well as that of American manufacture in the case of any book or periodical written in English, photograph, chromo, or lithograph.<sup>85</sup> It is of interest that the two copies required to be deposited with the Library of Congress need not be manufactured in the United States if the work is a musical composition, even though published in book form or made by lithographic process.<sup>86</sup>

In addition to the protection afforded by individual reciprocal agreements, American works are protected in most countries of the

<sup>83</sup> To the effect that the laws have no extra-territorial operation, *Carte v. Duff*, 25 Fed. 183 (1885).

<sup>84</sup> Copyright Act of 1911, 1 & 2 Geo. V, c. 46, § 35 (3). Further, such simultaneous publication must not be "colourable only," and must be intended to satisfy the reasonable requirements of the public. *Francis Day & Co. v. Feldman & Co.*, 2 Ch. 728 (1914); 2 Ladas, *op. cit. supra* note 18, at 885; Howell, *op. cit. supra* note 24, at 196.

<sup>85</sup> As we have said (note 47 *supra*), the manufacturing clause has been liberalized respecting books and periodicals in English first published abroad. From the fiscal year July 1, 1950 to June 30, 1951, inclusive, foreign books in English registration have increased forty-three per cent. Copyright Office, Report of the Register of Copyrights 1 (1952); Consult also, Howell, *op. cit. supra* note 24, at 6.

<sup>86</sup> *Oliver Ditson Co. v. Littleton*, 62 Fed. 597 (C.C. Mass., 1894), *aff'd* 67 Fed. 905 (C.A. 1st, 1895).



western hemisphere through the provisions of the so-called Pan American Conventions, to which the United States is a signatory. American works are protected in Berne countries by virtue of a provision in the Berne Convention allowing protection for works of authors of non-member nations who secure first or simultaneous publication in any member country.<sup>87</sup> We see that our authors, therefore, obtain automatic protection by publishing their works in Canada or England simultaneously with publication in the United States. However, this practice is not the most desirable and has not met with complete approval in Berne countries. In 1936 the highest court of the Netherlands held that the mere distribution for sale of copies of an American work in Canada by an independent distributing agency was not sufficient publication to come within the meaning of the provision in the Berne Convention regarding simultaneous publication.<sup>88</sup>

Copyright privileges are extended in the United States to foreign authors under authority of the Act of 1891, as amended in 1909, but such protection is secured under varying conditions, depending upon the status of the author, and the nature of his residence in the country. Section 9 of the Act provides as follows:

. . . 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 citizens of the United States the benefit 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 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 purposes of this title may require.<sup>89</sup>

<sup>87</sup> Article 6, Berne Convention (1886).

<sup>88</sup> *Ward v. Decombinat*, decided June 26, 1936, Hooge Raad. It is sometimes referred to as the "Sax Rohmer" case, since it involved Rohmer's, Daughter of Fu Manchu, printed in *Colliers*.

<sup>89</sup> 17 U.S.C. § 9 (1947).

As may be readily observed, the class of alien authors protected is divided into two distinct groups: those domiciled in this country; and those, either resident or non-resident, who are citizens or subjects of a country with whom reciprocal relations have been proclaimed by the President of the United States.<sup>90</sup>

With respect to the domiciliaries, it is required that there be residence with the intention to remain in the United States; such intention, however, may be inferred from circumstances, such as declarations, payment of taxes, marriage to an American woman, and the establishment of a permanent home.<sup>91</sup> Once domicile is established, copyright protection may be obtained in the same manner as any citizen of the United States for works which are published while domiciled here.<sup>92</sup>

If reciprocal relations have been established between the author's country and the United States, as evidenced by a Presidential Proclamation, in accordance with one of the enumerated classifications above, the alien author may secure copyright whether he is domiciled, resident, or non-resident.<sup>93</sup>

In any event, a foreign author or composer who is entitled to protection under section 9 of the Act, no matter what his status as to residence or domicile, must follow the same procedural steps required of a citizen to secure protection. In addition to the American manufacture of the class of works hereinbefore mentioned,<sup>94</sup> notice must be affixed to the several copies of every published edition;<sup>95</sup> a printed copy of the title must be deposited before publication; and two copies of the work must be deposited with the Library of Congress.<sup>96</sup>

The deplorable condition existing whereby foreign authors must comply with all the statutory formalities connected with the perfec-

<sup>90</sup> The Presidential Proclamation is a condition precedent to the right of the particular class of authors treated in § 9 (b) of the Act to enjoy copyright privileges in the United States on the same terms as citizens. *Bong v. Campbell Art Co.*, 214 U.S. 236 (1909); consult also Ball, op. cit. supra note 8, at 221.

<sup>91</sup> *G. Ricordi v. Columbia Graphophone Co.*, 258 Fed. 72 (S.D. N.Y., 1919).

<sup>92</sup> *Liebowitz v. Columbia Graphophone Co.*, 298 Fed. 342 (S.D. N.Y., 1923). The court here also held that one domiciled in this country is not protected for his unpublished works.

<sup>93</sup> *Shafter*, Musical Copyright 469 (1939).

<sup>94</sup> See note 47 supra.

<sup>95</sup> It is of interest that no notice of copyright is required on books published abroad, and sold only for use there. *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260 (1907).

<sup>96</sup> *Thompson v. Hubbard*, 131 U.S. 123 (1889).

tion of an American copyright, while American authors, on the other hand, may secure automatic protection by simultaneous publication in a Berne country, has led to a great deal of international friction.<sup>97</sup> The unfair disadvantage to which the foreign author has been put may well lead to retaliation of like nature, unless legislation is enacted to relieve this oppressive burden.

None of the elements described above concerning international reciprocity, or other matters, such as status and residence encountered in statutory copyright have any operation in respect of the common law copyright protection extended in this country to aliens. The sole requirement that the foreign author must meet to secure common law rights in his unpublished works in the United States is that of residence in a particular state jurisdiction.<sup>98</sup> In *Ferris v. Frohman*,<sup>99</sup> the Supreme Court of the United States clearly enunciated this principle, and said, "An English author of an unpublished drama is entitled to protection against its unauthorized use in this country as well as in England." This was adhered to in a later case, notwithstanding the fact that the common law rights were abrogated in England in 1911.<sup>100</sup>

Mechanical reproduction rights in musical compositions of foreign composers are governed exclusively by reciprocal agreements, and the protection of such rights are dependent upon the existence of specific reciprocity relating thereto.<sup>101</sup> Unless the foreign composer's country grants similar mechanical rights to citizens of the United States, they are excluded from protection against unauthorized mechanical reproduction of their musical compositions in this country.<sup>102</sup> In the recent case of *Todamerica Musica Ltda. v. Radio Corporation of America*,<sup>103</sup> it was held that notwithstanding the ratifica-

<sup>97</sup> Finkelstein, *op. cit.* supra note 75, at 201.

<sup>98</sup> Actions to secure protection under common law rights in unpublished works are brought in state courts, except where there is diversity of citizenship or registration, in which case the action may be brought in a federal court. Howell, *op. cit.* supra note 24, at 183.

<sup>99</sup> 223 U.S. 424 (1912).

<sup>100</sup> *Roberts v. Petrova*, 126 N.Y. Misc. 86, 213 N.Y. Supp. 434 (S. Ct., 1925).

<sup>101</sup> Section 1(e) provides: "That the provisions of this title [insofar as they relate to mechanical reproduction] shall not include the works of a foreign author or composer unless the foreign state or nation of which the author or composer is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States similar rights."

<sup>102</sup> *Portuondo v. Columbia Phonograph Co., Inc.*, 81 F. Supp. 355 (S.D. N.Y., 1937); 29 Ops. Att'y. Gen. 64 (1911).

<sup>103</sup> 171 F. 2d. 369 (C.A. 2d, 1948).

tion of the Buenos Aires Convention, mechanical reproduction rights could not be claimed by a composer who was a subject of a convention country in the absence of a presidential proclamation determining the existence of reciprocal rights of that nature with such country. There have been twenty-eight such Proclamations by the President declaring the existence of reciprocal conditions relating to mechanical reproduction rights in music.<sup>104</sup>

#### INTERNATIONAL COPYRIGHT CONVENTIONS

In the realm of international copyright there are presently two distinct Conventions, constituting entirely independent systems of protection: one restricted in its operation to the American hemisphere, and the other open to the adherence of all governments of the world, though in the latter case only four countries of the American continent have seen fit to become members thereof.<sup>105</sup> The copyright union of the American world is termed the Pan American Convention and is governed substantially by the Buenos Aires Convention of 1910. The other conventional system referred to is the International Copyright Union, or the Berne Convention.

While there are certain dissimilarities<sup>106</sup> between the two systems other than the restriction of membership in the Pan American Convention to countries of the Western hemisphere, the expressed purpose of each of these unions is directed toward the international protection of literary and artistic rights of the authors of the contracting or signatory states.<sup>107</sup>

The need for adequate protection of an author's rights among all nations of the world becomes more pressing as greater technological advances are made, resulting in an ever increasing flow of literary and artistic works in channels of international commerce. Every encouragement must be given to the free exchange of ideas: commerce in intangible properties, the products of intellectual endeavors, such as literature, art, and music, is as important as commerce in physical goods.<sup>108</sup>

In most countries the rights of foreign authors were recognized

<sup>104</sup> Finkelstein, *op. cit.* supra note 42, at 83.

<sup>105</sup> Brazil, Canada, Newfoundland, and Haiti; of these the latter left with effect from March 26, 1943.

<sup>106</sup> To be discussed at greater length subsequently.

<sup>107</sup> Compare Art. 1, Berne Convention (1886), as amended, and Art. 1, Pan American Conventions.

<sup>108</sup> Finkelstein, *op. cit.* supra note 75, at 199-200.

during the nineteenth century. This period was characterized by individual bipartite agreements and treaties, and in some instances multipartite agreements between many of the nations of the world, but these proved to be unsatisfactory because of the imposition of harsh formalities and the resultant lack of uniformity.<sup>109</sup> Consequently, after a number of conferences held for the purpose of instituting a union of all countries for the protection of intellectual property, a Convention was signed at Berne, Switzerland, on September 9, 1886, establishing an "International Union for the Protection of Literary and Artistic Works."

This Berne Convention was the first real union of unlimited international scope, and, as we have seen,<sup>110</sup> there are presently forty member countries, representing a population of approximately one billion persons.<sup>111</sup> Despite several attempts to secure its adherence, the United States had declined to become a member of the Berne Convention because of certain inconsistencies between our domestic Copyright Law and the provisions of the Union.<sup>112</sup>

The fundamental principle of the Union is automatic protection among all the member states through the medium of the so-called "national treatment," i.e., an author who is a national of one of the countries of the Union enjoys in each country of the Union, without formality, the rights which the laws of the latter countries grant to their own nationals.<sup>113</sup> In addition, protection is accorded to nationals of non-member countries who publish their works for the first time, or simultaneously, in a member country. The extent of protection, in every case except where it involves the duration thereof,<sup>114</sup> is governed exclusively by the laws of the country where the protection is sought.<sup>115</sup>

The term of protection granted by the Convention is the life of

<sup>109</sup> 1 Ladas, op. cit. supra note 18, at 12.      <sup>110</sup> See list note 81 supra.

<sup>111</sup> Report of the United States Observer Delegation to the International Conference for the Revision of the Berne Convention for the Protection of Literary and Artistic Works 8 (March 22, 1949).

<sup>112</sup> Finkelstein, Universal Copyright Convention, 2 Am. J. Comp. L. 200 (Spring, 1953). Three main provisions prohibit the adherence to the Berne Union, namely: (1) automatic protection without formality of any kind, (2) the existence of the *droit moral*, or moral right, and (3) the term of copyright being for the life of the author and fifty years after his death.

<sup>113</sup> Art. 4, Berne Convention.

<sup>114</sup> Arts. 4, 6, Berne Convention.

<sup>115</sup> It is provided that if any country outside the Union fails to adequately protect the works of nationals of a member country, the latter may restrict the protection given to authors who are nationals of the other country.

the author and fifty years after his death.<sup>116</sup> Herein lies the only departure from national treatment, that is, the term of protection shall not exceed the term fixed in the country of origin of the work, in cases where one or more countries of the Union grant a term of protection in excess of the prescribed period.<sup>117</sup>

The Berne Union further provides for the protection of the so-called moral right of an author, which has been defined as "the right of inalienable control which will permit authors to oppose any public reproduction or exhibition of their altered, mutilated, or revised works," and as "the right to claim authorship of the work."<sup>118</sup>

Public performance rights are granted exclusively to authors and composers,<sup>119</sup> as well as the exclusive right to authorize recording of their works for mechanical reproduction.<sup>120</sup> Conferred upon the author separately from the above is the right to control radio-diffusion of the work,<sup>121</sup> but in connection with recording and radio-diffusion, there are special provisions that the conditions under which the rights may be exercised shall be a matter for legislation in the countries of the Union to determine.

The other union of countries for the protection of literary and artistic property is the Pan American Convention. Like the Berne Union, it exists by virtue of a series of Conventions, the first of which was held at Montevideo<sup>122</sup> in 1889 to which the United States was not a signatory. The second Convention was held in Mexico in 1902, and was ratified by the United States and six other American Republics.<sup>123</sup> The Third Convention was held at Rio de Janeiro in 1906,<sup>124</sup> and in 1910 the fourth and most important was held at Buenos Aires.<sup>125</sup> The United States and fourteen other American countries

<sup>116</sup> Art. 7, Berne Convention.

<sup>117</sup> *Baschet v. London Illustrated Standard Co.*, 1 Ch. 73 (Eng., 1900).

<sup>118</sup> Art. 6 *bis*, Berne Convention; consult also Honig, *International Copyright Protection and the Draft Universal Copyright Convention of UNESCO*, 1 *Int. & Comp. L. Q.* 225 (April, 1952).

<sup>119</sup> Art. 11, 11 *ter*, Berne Convention.

<sup>120</sup> Art. 13, Berne Convention. The performance of works thus recorded is granted by separate provision of this Article.

<sup>121</sup> Art. 11 *bis*, Berne Convention.

<sup>122</sup> *Treaty on Literary and Artistic Copyright*, February 11, 1889.

<sup>123</sup> *Convention on Literary and Artistic Copyrights*, January 27, 1902. Ratified by Guatemala, Salvador, Costa Rica, Honduras, Mexico, Nicaragua, Dominican Republic. Note Dept. State, Office of the Legal Adviser, *International Copyright Relations of the United States* (Aug. 1, 1951).

<sup>124</sup> *Convention on Patents of Invention, Drawings and Industrial Models, Trademarks, and Literary and Artistic Property*, August 23, 1906.

<sup>125</sup> *Convention on Literary and Artistic Copyright*, August 11, 1910.

have ratified this convention.<sup>126</sup> Five of these countries have ratified the Havana Convention of 1928 which revised the Buenos Aires Convention.<sup>127</sup> At Washington, in 1946, the latest inter-American copyright Convention was held, but to date only ten<sup>128</sup> countries have ratified it.<sup>129</sup>

The United States has become a party to only two of these inter-American Conventions: that of Mexico, and Buenos Aires. The latter of these, which the United States ratified in 1914, is by far the most widely accepted of the Pan American Conventions, having been ratified by all except six<sup>130</sup> South American countries.<sup>131</sup>

With respect to formalities, the Buenos Aires Convention adopts the principle of the Berne Convention of 1886 in that all formalities except those of the country of origin are abandoned. It differs from the latter, however, since the work must contain some indication that the copyright is reserved.<sup>132</sup> Thus, though the Pan American countries have not gone as far as the countries adhering to the Berne Convention regarding the abolition of all formalities for the perfection of international copyright, the principle of *lex fori*, or national treatment, is observed. As set forth in Article 3 of the Buenos Aires Convention:

The acknowledgment of a copyright obtained in one state, in conformity with its laws, shall produce its effects of full rights in all the other states, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the copyright.

<sup>126</sup> The other ratifying countries are: Argentina (1949); Brazil (1915); Colombia (1936); Costa Rica (1916); Dominican Republic (1912); Ecuador (1914); Guatemala (1912); Haiti (1919); Honduras (1914); Nicaragua (1913); Panama (1913); Paraguay (1917); Peru (1920); and Uruguay (1919).

<sup>127</sup> Costa Rica, Ecuador, Guatemala, Panama, and Nicaragua; consult Finkelstein, Universal Copyright Convention, 2 Am. J. Comp. L. 198 (Spring, 1953).

<sup>128</sup> As of May 27, 1952, Copyright Office Press Release, the countries that have ratified are Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, and Paraguay. Consult also, 1952 Annual Surv. Am. L. Section, 28 N.Y.U.L.Q. Rev. 684 (March, 1953).

<sup>129</sup> Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, June 1-22, 1946.

<sup>130</sup> Bolivia, Chile, Cuba, El Salvador, Mexico, and Venezuela.

<sup>131</sup> Because of the greater adherence to the Buenos Aires Convention, signed at the Fourth International Conference of American States, the provisions of that union will be discussed more fully than the others; however, a very able and complete analysis of all the Conventions is found in a publication of the Pan American Union, entitled, Copyright Protection in the Americas under National Legislation and Inter-American Treaties, Law and Treaty Series No. 33 (Canyes ed., 1950).

<sup>132</sup> *Ibid.*, at 13.

Automatic protection may be secured, therefore, if the following circumstances are present: (1) the copyright laws of the country of first publication must be complied with; (2) the author must be entitled to protection in his country; (3) the work must be published in one of the member countries; and (4) there must appear in the work some indication that the property right is reserved, such as "Copyright Reserved."

While this virtually automatic protection renders the copyright relations of the United States with other American republics more stable than with Berne countries, there is yet much to be desired in this respect. As heretofore pointed out, the ratification of the Buenos Aires Convention does not carry with it the right to control the mechanical reproduction of music in all the contracting states.<sup>132a</sup> Furthermore, the overlapping of Conventions, Treaties, and Proclamations renders extremely difficult the task of determining the extent to which American authors are protected in a particular Pan American country, if any protection exists at all.<sup>133</sup> Bolivia and Venezuela, for example, have no reciprocal copyright relations with the United States whatsoever, while Mexico and Cuba have entered into such relations by Presidential Proclamation, though they are not members of the Buenos Aires Convention.<sup>134</sup>

Far more unfortunate than the complexity of the American method of protection is the dichotomy that exists between the Pan American countries and the countries which adhere to the Berne Convention.<sup>135</sup> Since it is difficult, if not impossible, to set up borders in the intellectual sphere, the side-by-side existence of two independent systems for international copyright protection is obviously unsatisfactory, especially so in a world which is daily drawn closer and closer by the advancement of technical inventions.<sup>136</sup> This

<sup>132a</sup> See pages 69-70 *supra*.

<sup>133</sup> Shafter, *op. cit.* *supra* note 2, at 450.

<sup>134</sup> Dept. State, *International Copyright Relations of the United States* (1951).

<sup>135</sup> The Washington Convention of 1946, which was held in pursuance of a resolution adopted at the Eighth International Conference of American States, in 1938, at Lima, Peru, approximates more closely than any other the provisions of the Berne Union, in that it does not require that a statement appear in the work to indicate the reservation of copyright; and the moral right of the author is protected, so long as he does not consent to modification of his work, or otherwise waive it. Consult the publication of the Pan American Union, entitled *Inter-American Conference of Experts on Copyright* (1946).

<sup>136</sup> Deak, *Report on the Status of International Copyright Protection*, National Committee of the U.S. on International Cooperation (1938).



situation has long been the subject of extensive international consideration and agitation, and through the years, several propositions have been advanced in an effort to reach a workable solution to the problem.<sup>137</sup>

The greatest achievement toward universal copyright protection, however, has been made by the United Nations Educational, Scientific, and Cultural Organization (UNESCO), which has only recently succeeded in securing the signature of forty nations to a "Universal Copyright Convention." The magnitude of this achievement, in its tremendous effect upon international copyright relations, requires that it be reviewed under a separate heading.

#### THE UNIVERSAL COPYRIGHT CONVENTION

The signing of the Universal Convention by the representatives of thirty-six<sup>138</sup> countries at a formal ceremony on September 6, 1952, at Geneva, Switzerland, marked the culmination of many years of concentrated efforts on the part of UNESCO to formulate an international copyright convention acceptable to all nations. The splendid results of the work done by the Copyright Division of UNESCO merits a brief consideration of the development of that organ.

Devoted to the promotion of international peace and understanding through education, science, and culture, UNESCO was established as a specialized agency of the United Nations at the London Conference which met from November 1 to 16, 1945. Its constitution, which became effective November 4, 1946, expresses the aim of the organization:

To collaborate in the work of advancing mutual knowledge and understanding of peoples . . . and . . . recommend such international agreements as may be necessary to promote the free flow of ideas by work and image; . . . by initiating methods of international cooperation calculated to give the people of all countries access to the printed and published materials produced by any of them.

The first General Conference of UNESCO opened in Paris on November 19, 1946, and many activities were instituted for 1947.

<sup>137</sup> Consult 1 UNESCO, *Copr. Bull.*, No. 1 (July, 1948).

<sup>138</sup> Andorra, Argentina, Australia, Austria, Brazil, Canada, Chile, Cuba, Denmark, El Salvador, Finland, France, Germany, Federal Republic, Guatemala, Haiti, Holy See, Honduras, India, Ireland, Italy, Liberia, Luxembourg, Mexico, Monaco, Nicaragua, Norway, Netherlands, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom of Great Britain and Northern Ireland, the United States of America, Uruguay, and Yugoslavia. Four other countries have signed; they are Belgium, Israel, Japan, and Peru.

In February of 1947 the views of the member countries were sought concerning a proposed conference for world copyright.<sup>139</sup> At the Second General Conference, a resolution was proposed by Dr. Luther Evans of the United States Delegation to undertake the comparative study of copyright problems in the various nations, giving consideration to both the legal rights and material necessities of the authors, editors, and general public of all the nations.<sup>140</sup>

In October of 1949, a Conference was held at Paris, and at this time questionnaires were sent to all countries, soliciting their views concerning the advisability of a universal copyright convention as a possible solution to the existing problem regarding international protection of copyrights, and requesting information regarding their own respective problems in connection therewith.<sup>141</sup>

Nearly forty countries responded favorably to this request and, as a consequence, a Committee of Copyright Experts was authorized to meet at Washington, D.C., from October 23 to November 4, 1950.<sup>142</sup> While the experts did not appear as representatives of their respective governments, the meeting terminated in proposed recommendations for a full diplomatic conference.<sup>143</sup>

The *Official Report of the Committee of Experts* recommended that the proposed universal copyright convention should not in any way prejudice the existing Berne Convention and should be based upon the principle of "National Treatment." It should<sup>144</sup> require no formality other than the symbol ©,<sup>145</sup> so placed as to give reasonable notice of copyright, and, as to duration, the laws of the country where protection is sought should govern, with certain minimum protections. With respect to translation rights, it was recommended that the right was to be exclusive for a fixed period of years, but subject thereafter

<sup>139</sup> Chediak, *The Progressive Development of World Copyright Law*, 42 *Am. J. Int. L.* 800 (1948).

<sup>140</sup> 1 UNESCO, *Copr. Bull.*, No. 1 (July, 1948); Chediak, *op. cit. supra* note 139, at 808.

<sup>141</sup> 2 UNESCO, *Copr. Bull.* 16-20, No. 4 (1949).

<sup>142</sup> 1950 *Annual Surv. Am. L.* 701-2 (1951).

<sup>143</sup> Experts from thirteen countries and representatives from the Bureau of the Berne Union and Pan American Convention took active part in the deliberations. The United States experts were Dr. Luther Evans, Charles E. Wyzanski, Jr., and John Schulman. Arthur Fisher was technical adviser. Note, *Annual Report of the Register of Copyrights* 4-5 (1952).

<sup>144</sup> Report in *App. 2, Lib. Cong. Inf. Bull.* (Nov. 6, 1950).

<sup>145</sup> Accompanied by the name of the author or proprietor and the year of first publication.

to the issuance of a license to translate by a competent authority within a contracting state. It was further recommended that the work of the Committee of Experts be submitted to the various governments for their comments, and a draft universal convention be prepared on the basis of their replies.<sup>146</sup>

As a result of this survey, at the Sixth Session of UNESCO's General Conference, which met at Paris from June 18 to July 13, 1951, a special Copyright Committee consisting of thirty copyright specialists representing twenty-four countries<sup>147</sup> was appointed to prepare a draft of the universal convention. The tentative draft followed closely the recommendations made at the Washington meeting of experts, and was submitted to the governments in August, 1951, for their consideration and observations.<sup>148</sup> On February 11, 1952, all the governments were invited to attend an Inter-Governmental Conference for the Adoption of the Universal Copyright Convention at Geneva to be held from August 18 to September 6, 1952.<sup>149</sup>

The Conference was attended by delegations from fifty nations<sup>150</sup> and by observers from nine inter-governmental organizations<sup>151</sup> and six non-governmental organizations.<sup>152</sup>

The Opening Plenary Session of the Conference took place on August 18, and thereafter, the working committees prepared the Universal Copyright Convention, which was adopted with three Proto-

<sup>146</sup> 1950 Annual Surv. Am. L. 703 (1951).

<sup>147</sup> The United States was represented by Dr. Luther Evans, John Schulman, and Abraham L. Laminstein.

<sup>148</sup> Res. 4.321 adopted at the sixth session of the Paris Conference: "To communicate to the Governments of all States, whether Member States of UNESCO or not, and to the Berne Bureau and the Pan American Union, the preliminary draft of a Universal Copyright Convention prepared by the Committee of Copyright Specialists . . . as well as the comments received."

<sup>149</sup> In pursuance of Res. 4.322, 6th Sess., Paris Conf. (1951).

<sup>150</sup> In addition to those nations signing the Convention enumerated note 138 supra, the following countries sent delegates: Colombia, Dominican Republic, Egypt, Greece, Indonesia, Iran, Thailand, Turkey, Venezuela, and Viet-Nam.

<sup>151</sup> The United Nations, the International Labour Organization, the International Civil Aviation Organization, the International Telecommunication Union, the Universal Postal Union, the High Commission for Refugees, the Organization of American States, the Bureau of the Berne Convention, and the International Institute for the Unification of Private Law.

<sup>152</sup> The International Law Association, the International Literary and Artistic Association, the International Confederation of Societies of Authors and Composers, the International Federation of Newspaper Proprietors and Editors, the International Federation of the Phonographic Industry, and the International Union of Architects. See UNESCO, Report of the Results of the Inter-governmental Conference on Copyright 1, 7C/PRG/8 (October 10, 1952).

cols annexed thereto. The signing remained open for a period of 120 days from the date it was signed to allow subsequent accession by all nations.<sup>153</sup>

The Universal Copyright Convention is not intended to substitute a new international agreement for the Berne Convention or existing bilateral and multilateral agreements.<sup>154</sup> Its purpose is to provide a broad protection based upon the principle of "national treatment" with certain minimum requirements which are acceptable to both members of the Berne Convention and non-member countries, such as the United States. It is designed to provide a basis upon which the conflicting copyright legislation and practices of all nations may be reconciled, and attempts to bridge the gap between the hemispheres, a step long desired to bring better understanding among diverse cultures, and an urgently needed safeguard for the creative works of all countries.

Accordingly, the Preamble expresses the mutual desire of the Contracting States for a system of copyright protection open to all nations of the world "additional to, and without impairing international systems already in force." Article I provides for the protection of the rights of authors and proprietors in "literary, scientific, and artistic works, including writings, musical, dramatic, and cinematographic works, and paintings, engravings, and sculpture." No enumeration was made of the particular rights of the author or creator in his work, because there was concern that it might be read limitatively.<sup>155</sup>

The basic provision of the Convention is embodied in Article II, which establishes a dual basis for copyright protection: first, the nationality of the author or copyright proprietor, and second, the place of first publication.<sup>156</sup> In Article II it is provided:

Published Works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory.<sup>157</sup>

<sup>153</sup> Art. VIII, Universal Copyright Convention.

<sup>154</sup> Art. XVII provides that the Convention "shall not in any way affect the provisions of the Berne Convention," and Art. XVIII likewise specifies that it "shall not abrogate multilateral or bilateral agreements or arrangements . . . in effect . . . between two or more American republics."

<sup>155</sup> Blake, Report of the Rapporteur General of the Inter-governmental Copyright Conference 9, DA/DIV/6 (Sept. 6, 1952).

<sup>156</sup> Farmer, Universal Copyright Convention Signed, Now Awaits Ratification, 162 Publ. Wkly. 1422 (Sept. 27, 1952).

<sup>157</sup> Subsec. 2 of Article II protects the nationals of each State for his unpublished works according to the law of the State where protection is sought.

With respect to formalities, it is sufficient if the symbol © appears accompanied by the name of the author or copyright proprietor and the year of first publication, placed so as to give reasonable notice of the claim of copyright.<sup>158</sup> A minimum term of protection is prescribed by Article IV which provides that works shall be protected for a term not less than the life of the author and twenty-five years after his death, or twenty-five years from the date of first publication, in countries that do not compute upon the basis of the life of the author.

The last minimum requirement of the Convention relates to right of translation and is contained in Article V. By far the most controversial of the rights protected, it was not until many sessions and conferences were held that an acceptable compromise was reached.<sup>159</sup> It was finally provided that the right to translate should be absolute in the author for a period of seven years, at the expiration of which time, such protection becomes subject to a compulsory license in the hands of a competent authority of each state. Such license, however, is subject to certain limitations, i.e., the work must not theretofore have been translated into the national language of that country, and the applicant must establish that he has requested, and been denied the authority to translate the work by the author thereof, or after due diligence, he has been unable to find such author. A license so granted must provide for a correct translation of the work, and compensation which is just and in conformity with international standards. Moreover, the original title of the work and the name of the author must appear on all copies of the translation.

The term "publication" is defined in Article VI<sup>160</sup> and includes only works which can be visually perceived or read. The late Arthur E. Farmer has pointed out<sup>161</sup> that this definition is in conformity with the domestic law of the United States, and any other definition would create havoc in this country. As we have seen, phonograph records, and other means of reproduction from which a work may be audibly

<sup>158</sup> Art. III; however, subdiv. 2 reserves to each State the right to impose greater formalities upon works first published within its territory or works of its nationals wherever published. This means that the only change required in the manufacturing clause of the United States Copyright Law would be to make it inapplicable to non-resident aliens whose works in the English language are not first published in the United States.

<sup>159</sup> Farmer, *op. cit. supra* note 156, at 1426-27.

<sup>160</sup> "Publication, as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." Art. VI, Universal Copyright Convention.

<sup>161</sup> Farmer, *op. cit. supra* note 156, at 1427-28.

perceived are not, by the weight of authority, publications. Furthermore, it was agreed that the definition be limited in its application to the purposes of the Convention so as not to affect the concept of publication existing in other states.<sup>162</sup>

The Convention is not retroactive,<sup>163</sup> and neither is it self-executing. It will come into effect three months after the deposit of twelve instruments of ratification, among which there must be those of four states which are not members of the Berne Convention.<sup>164</sup> This means that the United States will have to modify its domestic laws so as to give effect to the terms of the Convention.<sup>165</sup> The form of notice of copyright will have to be changed and the application of the manufacturing clause would have to be eliminated as to works of nationals of other contracting states not first published in the United States.<sup>166</sup>

As may be perceived from the foregoing, the Universal Copyright Convention was designed not to replace existing Treaties and Conventions, or establish an International Copyright Code, but rather, as a supplementary instrument tending to establish a limited number of rules common to all nations.<sup>167</sup> The ratification of the Convention by the United States would remove a great source of irritation felt by foreign authors and publishers, and eliminate the necessity of invoking "simultaneous publication" in Berne countries to secure protection there for works of American authors.<sup>168</sup> The Universal Copyright Convention, moreover, may present at long last an adequate means of world-wide dissemination of copyrighted works, the numbers of which have been so enormously enlarged in recent years.

While no specific provision is made in the Convention for the protection of public performance rights in music, or its mechanical reproduction,<sup>169</sup> it is certain that the resulting better international relations between the United States and the other contracting states will lend a great deal to the protection of these rights throughout the world. The conflicts of interest between the producers of literary, musical

<sup>162</sup> Blake, *op. cit.* supra note 155, at 21.

<sup>163</sup> Art. VII, Universal Copyright Convention.

<sup>164</sup> 13 U.N. Bull. 301, No. 6 (Sept. 15, 1952).

<sup>165</sup> Art. X, Universal Copyright Convention.

<sup>166</sup> 162 *Publ. Wkly.* 1278 (Sept. 20, 1952); and, United States Delegation at Geneva Copyright Conference, 162 *Publ. Wkly.* 817-18 (Aug. 30, 1952).

<sup>167</sup> To insure the equality in all respects of the obligations and rights of each Contracting State, Art. XX of the Convention provides that "Reservations to this Convention shall not be permitted."

<sup>168</sup> See *supra*.

<sup>169</sup> 5 UNESCO, *Copr. Bull.* 98, No. 2 (1952).

and artistic works and their users affect large groups and prohibit the absolute remedy of all problems at once. The first great step has been taken, and, since the law of copyright is not marked by rigid or unvarying lines, most assuredly the rest will follow.

Historically, the evolution of the law of copyright has been one of distinct progression. While not an altogether harmonious development, it has been a logical one, being influenced to a large degree by principles of reason and comparative jurisprudence. Authors and composers, whom we have found to be the repositories of distinct property rights in their creations, are becoming more and more adequately protected. The progress has been slow, to be sure, but it has nevertheless been progress. We must choose at every step in the gradual striving toward a desired end. Compromises must be made.

It has not been the endeavor of this study to propose a solution to existent problems confronting the international protection of copyrighted musical works. Little more has here been done than to state the existence of such problems. In this, recourse has been had to the genesis and growth of the copyright law, and perhaps it will be said that too great an emphasis has been placed there. But the office of historical research is that of explaining, and in many cases the law is intelligible only in the light of history.<sup>170</sup>

We have seen the domestic development of the copyright protection afforded to creators of musical compositions, as well as the creators of literary and artistic works. We must yet see the corollary protection of these rights throughout the world. It is submitted that the fruition of that endeavor will take form in the not too distant future. Just as the author of a poem is now for the first time protected against an unauthorized rendition of his creative work,<sup>171</sup> so, too, a new era in international copyright may have been inaugurated by the signing of the Universal Copyright Convention at Geneva.<sup>172</sup>

In conclusion, if the same spirit of progress and compromise that was manifested in the recognition of performance and recording rights of a composer finds like expression in the task of conciliating the traditions of all nations, there is little doubt that there will be achieved a true and lasting international understanding based upon the protection of those very rights.

<sup>170</sup> Cardozo, *Selected Writings*, *The Nature of the Judicial Process* 128-9, wherein he states further, "I mean simply that history, in illuminating the past, illuminates the present, and in illuminating the present, illuminates the future."

<sup>171</sup> Cane, *Belated Justice for Authors*, *Sat. Rev. Lit.*, at 21 (August 22, 1953).

<sup>172</sup> 1952 *Annual Surv. Am. L. Section*, 28 *N.Y.U.L.Q. Rev.* 681 (March, 1953).

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