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Copyright-Notice Requirements-Pitfalls for the Unwary

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COMMENTS

COPYRIGHT—NOTICE REQUIREMENTS—PITFALLS FOR THE UNWARY*—It is established law that an author has a common-law copyright in his work when the work is created, and that this copyright is lost when the work is published.¹ He may still, however, be protected under the United States copyright statutes if he gives copyright notice when he publishes a work.² This notice must be in the form and place prescribed by the statutes; the creation of a copyright is said to be conditioned upon the use of proper notice inscribed upon every copy published.³

The main shortcoming of the statutory requirements of copyright notice is that failure to meet these requirements may deprive an author of his property in his works without the public gaining any substantial benefit from his loss. These statutory requirements may unnecessarily operate as pitfalls for the unwary.⁴ Most frequently these situations are brought to light when copies of the work are published with no copyright notice whatsoever⁵ or when the notice used does not conform exactly to the statutory requirements which dictate where the notice is to be placed⁶ and what form⁷ the notice is to take. Both situations have elicited comments

* This article is a revision of an essay which was awarded the First Prize in the 1960 Nathan Burkan Memorial Competition at The University of Michigan Law School. It is published here through the courtesy of the American Society of Composers, Authors and Publishers.—Ed.

¹ *Holmes v. Hurst*, 174 U.S. 82 (1899); *Egner v. E. C. Schirmer Music Co.*, 139 F.2d 398 (1st Cir. 1943); *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374 (S.D.N.Y. 1952).

² There are several methods provided for creation of copyright under the statutes. If the work is to be published, the method to be used by United States citizens and certain others is prescribed by 17 U.S.C. § 10 (1958): "Any person entitled thereto by this title may secure copyright for his work by publication thereof with notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title." Ad interim protection is very limited in scope, but copyright notice need not be inscribed in the work to gain this protection. However, the clause of § 16 that frees 1500 copies of the work from the manufacturing clause demands that notice be inscribed on each of the 1500 copies. If the term of copyright is to be extended to the full 28 years, § 23 demands that all notice requirements be met. If the work is not to be reproduced for sale, a copyright may be obtained in the work without the use of a copyright notice, under the rules set forth in § 12. Foreign citizens must look to § 9 for the notice requirements that apply to their works.

³ *Mifflin v. Dutten*, 190 U.S. 265 (1903); *De Jonge & Co. v. Breuker & Kessler*, 235 U.S. 33, 36 (1914).

⁴ See generally Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025 (1956); SOLBERG, *COPYRIGHT IN CONGRESS—1789-1904* (1905); U.S. COPYRIGHT OFFICE, *GENERAL REVISION OF THE COPYRIGHT LAW, STUDY NO. 6, NOTICE OF COPYRIGHT* (1958) [hereinafter cited as *NOTICE OF COPYRIGHT*]; Halliday, *Losing Copyrights Under the Law of the United States*, 35 J. PAT. OFF. SOC'Y 343 (1953).

⁵ 17 U.S.C. § 10 (1958); see note 2 *supra*.

⁶ 17 U.S.C. § 9(c), § 20 (1958).

⁷ 17 U.S.C. § 9(c), § 19 (1958).

from the judiciary that the statutory requirements must be complied with strictly,⁸ although the modern trend may be to require a lesser degree of compliance.⁹ Whatever the judicial trend, a substantial number of authors and other unwary proprietors of copyrightable subject matter have lost their property rights by inadvertently publishing without notice or by failing to use copyright notice conforming to the statutory requirements. Moreover, further problems have arisen since the Supreme Court in *Mazer v. Stein*¹⁰ extended copyright protection to a great variety of works which had not previously been afforded protection.

Whether judicial remedy of the situation will be adequate or whether legislative change is necessary to remedy the situation presents another problem; but the need for remedy seems clear. The purpose of this comment is to discuss these pitfalls and to indicate present judicial trends regarding these problems. Proposed remedies, both legislative and judicial, will be listed and evaluated where possible.

I. THE COMPLETE ABSENCE OF ANY COPYRIGHT NOTICE

When a work is first published with no copyright notice appearing upon the work, judicial decisions have consistently held that the work has fallen into the public domain;¹¹ the author is said to have "dedicated" his work to the public.¹² Moreover, this principle also applies to every subsequent publication of the work.¹³

⁸ See authorities cited in note 3 *supra*, and *Public Ledger Co. v. Post Printing & Publishing Co.*, 294 Fed. 430 (8th Cir. 1923); *Advertisers Exchange, Inc. v. Anderson*, 144 F.2d 907 (8th Cir. 1944).

⁹ *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292, 305 (S.D.N.Y. 1959); NOTICE OF COPYRIGHT 11.

¹⁰ 347 U.S. 201 (1954); for more complete discussion of this case and the problems arising thereunder, see the text accompanying notes 72-93 *infra*.

¹¹ The loss of copyright most often lamented in this area is that of Oliver Wendell Holmes when it was held that his *Autocrat of the Breakfast Table* had fallen into the public domain because it had been first published in a periodical — *The Atlantic Monthly* — which bore no notice of copyright. *Holmes v. Hurst*, 174 U.S. 82 (1899).

¹² *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301, 302 (S.D.N.Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914); *Fleischer Studios v. Freundlich*, 73 F.2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935); see *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952), where Judge Learned Hand differentiated between the "abandonment" or "dedication" of property and the "forfeiture" thereof, saying that both "abandonment" and "forfeiture" necessitate an overt and intentional act, whereas "forfeiture" does not involve intent and is the proper term to use here. Whatever the term used, the result is the same — the work is in the public domain if published without notice of copyright.

¹³ 17 U.S.C. § 10 (1958), quoted in note 2 *supra*. See also *De Jonge v. Breuker & Kessler*, 235 U.S. 33, 36 (1914) (wrapping-paper design) where it was held that notice must appear on every reproduction of the work.

These basic principles were reiterated by Judge Learned Hand in 1951 in the influential case of *National Comics Publications, Inc. v. Fawcett Publications, Inc.*¹⁴—the “*Superman*” case. In that case the court held that when several strips of the Superman comic were published without notice appearing on the strips, the copyright in these strips was forfeited; however, those strips which did bear notice were validly copyrighted. Section 21 of the Copyright Law¹⁵ was held inapplicable for it is designed only to prevent the loss of copyright when the proprietor accidentally omits notice from “a particular copy or copies” of the work, but has otherwise sought to comply with the notice requirements; the section could have no application where all copies of a particular strip were without notice. Even when applicable the proprietor has only a limited remedy against an innocent infringer who has been misled by the omission of notice. Moreover, this section has been held to apply only where a very few copies were involved¹⁶ and has generally provided relief for the proprietor only where there has been an “occasional” omission.¹⁷ Recently, however, this section has been applied rather liberally¹⁸ and it may be that in the future section 21 can be construed to indicate a general statutory intent to prevent loss of copyright where the proprietor has shown that he has sought to comply with the statutory requirements.¹⁹

The need for notice upon works published abroad seems to be present also. Although dicta in the case of *Heim v. Universal Pictures*²⁰ indicated that notice upon works first published outside the United States was not a condition precedent to protection by a United States copyright, the United States adherence to the Universal Copyright Convention²¹ arguably vitiates that dicta both as

¹⁴ 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952) [hereinafter referred to as the *Superman* case]. For a detailed discussion of the case, see Reeves, *Superman v. Captain Marvel; Or Loss of Literary Property in Comic Strips*, 5 A.S.C.A.P. COPYRIGHT LAW SYMPOSIUM 3 (1952).

¹⁵ 17 U.S.C. § 21 (1958). The Copyright Law is Title 17 of the United States Code.

¹⁶ *Krafft v. Cohen*, 117 F.2d 579, 581 (3d Cir. 1941).

¹⁷ Judge Hand held that the omission in the *Superman* case was not such an “occasional” omission.

¹⁸ In *Christie v. Raddock*, 169 F. Supp. 48 (S.D.N.Y. 1959), the plaintiff deposited three copies of his doctorate thesis in public libraries without notice on the copies. Later, the work was published in abridged form with notice. In granting the preliminary injunction, the court held that § 21 would apply even if the copy the defendant had copied from bore no notice.

¹⁹ See Note, 73 HARV. L. REV. 1613 (1960).

²⁰ 154 F.2d 480 (2d Cir. 1946).

²¹ See generally KUPFERMAN & FONER, UNIVERSAL COPYRIGHT CONVENTION ANALYZED (1955).

to works published in countries adhering to the Convention²² and in countries remaining outside the Convention.²³ The Copyright Office, in its regulations²⁴ has indicated it will not be bound by the *Heim dicta* and will refuse to register claims of copyright in works not bearing adequate copyright notice at the time of their first publication.²⁵

II. WHERE THE WORK IS PUBLISHED WITH DEFECTIVE COPYRIGHT NOTICE

It is necessary for a United States citizen or domiciliary or one who first publishes in the United States to use the form of notice prescribed in section 19 of the Copyright Law²⁶ to obtain a valid copyright, and he must use the placement of the notice prescribed in section 20 of the Copyright Law.²⁷ Others must use either the form and placement prescribed in section 9(c) or that provided for in presidential proclamations issued pursuant to section 9(b).²⁸

A. Defects in Form of Notice

It was once said that the form requirements of the copyright statutes²⁹ were mandatory and had to be strictly complied with in order to prevent a work from falling into public domain.³⁰ It seems that the trend of the recent decisions has been toward a more lenient interpretation of the statutes. The test usually applied

²² A list of countries which have adhered to the Universal Copyright Convention appears following 17 U.S.C. § 9 (Supp. I, 1959).

²³ See Katz, *Is Notice of Copyright Necessary in Works Published Abroad—a Query and a Quandary*, 1953 WASH. U.L.Q. 55, 88; Cary, *The United States and Universal Copyright: An Analysis of Public Law 743*, in KUPFERMAN & FONER, *op. cit. supra* note 21, at 83, 91.

²⁴ 37 C.F.R. § 202.2(a)(3) (1960).

²⁵ See Cary, *Proposed New Copyright Office Regulations*, 6 BULL. COPYRIGHT SOC'Y 213 (1959).

²⁶ 17 U.S.C. § 19 (1958).

²⁷ 17 U.S.C. § 20 (1958).

²⁸ 17 U.S.C. § 9(b) (1958). See generally 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 701, 702 (1938).

²⁹ 17 U.S.C. § 19 (1958): "The notice of copyright required by section 10 of this Title shall consist either of the word 'Copyright', the abbreviation 'Copr.', or the symbol ©, accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in sub-sections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, that on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. . . ."

³⁰ See authorities cited in note 3 *supra*.

today is whether the notice *substantially* complies with the statute.³¹ Or, stated in another way, notice satisfies the statutory requirements if it provides notice of the copyright to "anyone looking for the truth and desiring to avoid infringement."³² There are still pitfalls to be found in the form requirements and these must be examined.

1. *The Date of Publication.* Section 19 provides several choices concerning the content of the notice. Classification is important because the notice must include the *name* of the copyright proprietor and the *date* of publication if it is a "printed literary, musical, or dramatic work," but the date need not appear on those works listed in subsection (f) through (k) of section 5.³³ Although most articles should easily fall into one of the listed categories, and although the regulations of the Copyright Office³⁴ afford further help, certain works, such as the comic strips involved in the *Superman* case,³⁵ defy classification. A mistake in classification is not fatal, however, for section 5 provides that no "error in classification [shall] invalidate or impair the copyright protection secured under this title."³⁶

If the work falls into a classification demanding that the date of publication be included in the notice, the proprietor of the work faces the problem of deciding what that date is. Section 26 defines the term "the date of publication" to be "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under

³¹ *Superman* case, 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952), where Judge Hand observed at 602: "[S]ince the purpose of the notice is to advise the public of the 'proprietor's' claim any notice will serve which does in fact advise it that there is a 'proprietor' who does claim copyright, provided the notice does not affirmatively mislead. . . . [A]ny notice is sufficient which gives the substance of what is prescribed in section 19." See also *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 406 (2d Cir. 1946); *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959); *Glenco Refrigeration Corp. v. Raetone Commercial Refrigerator Corp.*, 149 F. Supp. 691 (E.D. Pa. 1957).

³² *Hollywood Jewelry Mfg. Co. v. Dushkin*, 136 F. Supp. 738 (S.D.N.Y. 1955); *Fleischer Studios v. Ralph Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935); *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955).

³³ 17 U.S.C. § 5 (1958). These works are maps; works of art; models or designs for works of art; reproductions of a work of art; drawings or plastic works of a scientific or technical character; photographs; and prints and pictorial illustrations including prints or labels used for articles of merchandise.

³⁴ 37 C.F.R. §§ 202.4-.15 (1960).

³⁵ It was held in the *Superman* case that comic strips were "pictorial illustrations" under § 5 (k), and were not books or other printed literary matter, so that the omission of the date of publication from the notice was not a fatal defect.

³⁶ 17 U.S.C. § 5 (1938).

his authority. . . ."³⁷ If a proprietor is uncertain when the work will be published, he should use a date close to the date when the work will be printed rather than attempting to guess when the work will be sold or distributed. It has been held that use of a date later than the actual date of publication is fatal error.³⁸ On the other hand, use of a date earlier than the actual publication date is permissible, for the notice in this case shortens the period of protection and does no injury to the public, whereas in the former case there has been an attempt to extend the period of protection allowed by law and thereby injure the public.³⁹

Recent cases seem to indicate that use of a date only slightly later than the actual publication date is an insignificant deviation which would not necessarily cause loss of the copyright. For example, in *Advisers, Inc. v. Wiesen-Mart, Inc.*⁴⁰ plaintiff gave in his application for registration a date of publication several months later than the actual date of publication. Preserving proprietor's copyright, the court said:

"It would seem that, in view of copyright protection for fifty-six years, a period of four or five months would be an immaterial variance without consequence to the public, unless there were some intention to secure an advantage in violation of the statute, or with a fraudulent purpose."

In direct response to this case,⁴¹ the Copyright Office amended its regulations to render only "doubtful" the registration of a work bearing a notice not more than one year later than the date on which the copyright was actually secured.⁴² Although the doctrine of the *Advisers* case shows the increasingly liberal trend in interpreting the statutory directives concerning the date appearing in the notice, use of a date considerably later than the actual date on which copyright was obtained involves the risk of a subsequent finding of invalidity.

³⁷ 17 U.S.C. § 26 (1938).

³⁸ *Baker v. Taylor*, 2 Fed. Cas. 478 (No. 782) (S.D.N.Y. 1848); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946); *Wrench v. Universal Pictures*, 104 F. Supp. 374 (S.D.N.Y. 1952).

³⁹ *Callaghan v. Myers*, 128 U.S. 617 (1888); *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S.D.N.Y. 1939).

⁴⁰ 238 F.2d 706, 707 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957); see also *Ziegelheim v. Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954); *Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939).

⁴¹ See Cary, *supra* note 25.

⁴² 37 C.F.R. § 202.2 (b) (6) (1960).

Related problems arise when a copyright has been obtained under section 12⁴³ and the work is subsequently reproduced for sale, or when an ad interim copyright has been obtained and an application for extension of the protection period is subsequently made.⁴⁴ The authorities seem to agree that the date when the prior copyright protection was obtained should be used.⁴⁵ The Copyright Office has said registration in these cases too will be "doubtful" if the prior protection was actually obtained less than one year prior to the date used in the published copies, but that registration would not be allowed at all if the period was greater than one year.⁴⁶ When a new edition of a work is published, the date to be used in the notice should be the date when copyright was secured on the prior edition, unless the new edition can be classified as a "new work" for which a new copyright may be obtained.⁴⁷ A recent case, *Wrench v. Universal Pictures*,⁴⁸ showed the liberal trend of statutory interpretation in cases of this kind. The court there held that if a notice bore two dates, the improper date was mere surplusage.

2. *The "Proprietor" of the Work.* The name of the proprietor of the work must appear in the notice of copyright. Because of the great complexity of modern contracts concerning copyrightable material, it is sometimes difficult to determine the proprietor of a given work. Recent cases have held that one who holds an exclusive license to use a work for a fixed number of years is not an assignee but a "mere licensee," and is therefore not a "proprietor."⁴⁹ However, in the *Superman* case the party which held exclusive syndication rights to the comic strip for five years was held to be the "proprietor" because only in this way could the strips be copyrighted.

Some courts have said that when the name used in the notice is not that of the true proprietor, the copyright will still be valid since the named person holds legal title to the copyright and the

⁴³ 17 U.S.C. § 12 (1958). See also note 2 *supra*.

⁴⁴ 17 U.S.C. §§ 22, 23 (1958).

⁴⁵ See 2 LADAS, *op. cit. supra* note 28; WEIL, *AMERICAN COPYRIGHT LAW* 306 (1917); 37 C.F.R. § 202.2 (b) (6) (1960).

⁴⁶ 37 C.F.R. § 202.2 (b) (6) (1960). See Cary, *supra* note 25.

⁴⁷ See the lower court decision in the *Superman* case, *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 93 F. Supp. 349 (S.D.N.Y. 1950), *rev'd on other grounds*, 191 F.2d 594 (2d Cir. 1951); see also *Wrench v. Universal Pictures*, 104 F. Supp. 374 (S.D.N.Y. 1952).

⁴⁸ *Wrench v. Universal Pictures*, *supra* note 47.

⁴⁹ *Ilyin v. Avon Publications, Inc.*, 144 F. Supp. 368 (S.D.N.Y. 1956); *Hirshon v. United Artists Corp.*, 243 F.2d 640 (D.C. Cir. 1957).

true "proprietor" holds equitable title; the named person is a constructive trustee of the copyright for the true proprietor.⁵⁰ This constructive trust theory is also used in cases where there are joint owners of the copyright and only one owner's name appears in the notice.⁵¹ Moreover, an "alter ego" theory has been used to enable the courts to call a named subsidiary the "proprietor" where the subsidiary and the parent corporation which was the true proprietor had the same officers and directors; the subsidiary was said to be the "alter ego" of the parent and without an independent will apart from the parent.⁵² However, older cases have rejected this theory and copyrights have been lost although the true proprietor owned virtually all of the shares of the corporation whose name appeared in the notice.⁵³

Section 32⁵⁴ permits substitution of an assignee's name in the notice after the assignment has been recorded. But substitution of the assignee's name prior to recording the assignment throws the work into the public domain.⁵⁵ This appears to be a rather harsh interpretation of the statute in light of the generally lenient view taken by the courts today.

It seems to be well accepted that the use of a trade name in the notice satisfies the statutory requirements as long as the state statutes regarding registration of trade names have been satisfied.⁵⁶

3. *The Copyright Symbol.* The statute requires that one of the symbols: "Copyright," "Copr.," or © to be used in the notice.⁵⁷ It has been held that these requirements must be met strictly, and that no words other than those prescribed may be used.⁵⁸ In light of the present trend of the courts, it is felt that any symbol or reservation that would give notice of copyright to "anyone looking for the truth and desiring to avoid infringement" would be held sufficient to satisfy the statute.⁵⁹ Of course, a work appearing with

⁵⁰ *Cohan v. Richmond*, 19 F. Supp. 771 (S.D.N.Y. 1937); *Bisel v. Ladner*, 1 F.2d 436 (3d Cir. 1924).

⁵¹ *Ted Browne Music Co. v. Fowler*, 290 Fed. 751 (2d Cir. 1923); *Maurel v. Smith*, 271 Fed. 211 (2d Cir. 1921).

⁵² *Superman case*, 191 F.2d 594 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952).

⁵³ *Public Ledger Co. v. Post Printing & Publishing Co.*, 294 Fed. 430 (8th Cir. 1923).

⁵⁴ 17 U.S.C. § 32 (1958).

⁵⁵ *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573 (S.D.N.Y. 1949).

⁵⁶ *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959); *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co.*, 171 F. Supp. 603 (S.D.N.Y. 1959); *Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kasio Co.*, 144 F. Supp. 577 (S.D.N.Y. 1956).

⁵⁷ 17 U.S.C. § 32 (1958), quoted in note 29 *supra*.

⁵⁸ *Jackson v. Walkie*, 29 Fed. 15 (N.D. Ill. 1886).

⁵⁹ See generally authorities cited in note 32 *supra*.

a complete lack of any symbol would not substantially comply with the statute.

4. *Form of Notice Required by the Universal Copyright Convention.* In works to which the provisions of the Universal Copyright Convention apply,⁶⁰ section 9(c) prescribes the form of notice to be used.⁶¹ Since section 9(c) allows only the use of the single © symbol, whereas section 17 allows other alternatives, it may be found that use of notice sufficient to satisfy section 17 will not be sufficient to satisfy the requirements of section 9(c).⁶²

B. *Defects in Placement of Notice*

After it has been decided what form the notice is to take, it must be decided where to place this notice in or on the work. Sections 19 and 20⁶³ provide the statutory language and section 202.2 of the Copyright Office regulations⁶⁴ provides additional guidance in placing the notice. Generally, the notice must appear on the title page or the page immediately following. It is not always clear which page constitutes the "title page"; it need not necessarily be the first page in the volume.⁶⁵

Although courts have invalidated copyrights in cases where the notice appeared five⁶⁶ and fifty-one⁶⁷ pages within the volume, a recent case⁶⁸ granted plaintiff proprietor a preliminary injunction despite the fact that the notice appeared in his catalog six pages beyond the front cover. This again appears to be an example of the

⁶⁰ The Universal Copyright Convention notice requirements do not apply to works of an author who is a citizen or domiciliary of the United States, or to works first published in the United States.

⁶¹ 17 U.S.C. § 9(c) (1958): "[A]ll the copies . . . shall bear the symbol © accompanied by the name of the copyright proprietor. . . ."

⁶² See Cary, *The United States and Universal Copyright: An Analysis of Public Law 743*, in KUPFERMAN & FONER, *op. cit. supra* note 21.

⁶³ 17 U.S.C. § 20 (1958): "The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical, either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work, either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice." See note 29 *supra* for the text of § 19.

⁶⁴ 37 C.F.R. § 202.2(b) (1960).

⁶⁵ *American Travel & Hotel Directory Co. v. Gehring Publishing Co.*, 4 F.2d 415 (S.D.N.Y. 1925).

⁶⁶ *Siewek Tool Co. v. Morton*, 128 F. Supp. 71 (E.D. Mich. 1954).

⁶⁷ *Freeman v. Trade Register, Inc.*, 173 Fed. 419 (W.D. Wash. 1909).

⁶⁸ *Perkins Marine Lamp & Hardware Corp. v. Long Island Marine Supply Corp.*, 185 F. Supp. 353 (E.D.N.Y. 1960).

lenient attitude of the present courts toward the fulfillment of formal requirements of the statutes.

There have been some instances where the courts have held a copyright to be invalid because the copyright notice was "dispersed," that is, because one or more parts of the notice were not "accompanied by"⁶⁹ the remainder of the notice. In some old cases the courts were very strict in requiring that the words of the notice appear together,⁷⁰ but more recent cases have shown that if the various words of the notice appear reasonably close to one another—at least on the same page with one another in the case of literary works—the notice will be satisfactory.⁷¹

1. *The Impact of Mazer v. Stein.* The advent of the decision of the Supreme Court in *Mazer v. Stein*⁷² has created new and difficult problems in the area of notice placement. The types of works to which copyright protection was extended by that case were, for the most part, works of copyright which had been converted into a commercially salable product⁷³ which was of such a nature that the appearance of notice on the product would injure its esthetic and commercial appeal.⁷⁴ Products of this nature which have been held to be proper subject matter for protection by copyright are costume jewelry⁷⁵ and designs on dress goods.⁷⁶ The problem for the proprietors of the above products is to apply the notice without marring the appearance of the product, and it is in the many recent cases concerning these items that the liberal

⁶⁹ 17 U.S.C. § 19 (1958).

⁷⁰ *Tompkins v. Rankin*, 24 Fed. Cas. 39 (No. 14090) (D. Mass. 1876); *Record & Guide Co. v. Bromley*, 175 Fed. 156 (E.D. Pa. 1909).

⁷¹ *Glenco Refrigeration Corp. v. Raetone Commercial Refrigerator Corp.*, 149 F. Supp. 691 (E.D. Pa. 1957); *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F. Supp. 703 (N.D. Ga. 1951).

⁷² 347 U.S. 201 (1954).

⁷³ The product held to be copyrightable in the *Stein* case was a lamp having a copyrightable figurine as a base. See Pogue, *Borderland—Where Copyright and Design Patent Meet*, 52 MICH. L. REV. 33 (1953).

⁷⁴ See NOTICE OF COPYRIGHT 23, 24.

⁷⁵ *Dan Kasoff, Inc. v. Palmer Jewelry Mfg. Co.*, 171 F. Supp. 603 (S.D.N.Y. 1959); *Boucher v. Du Boyes, Inc.*, 253 F.2d 948 (2d Cir. 1958), *cert. denied*, 357 U.S. 936 (1958); *Kramer Jewelry Creations, Inc. v. Capri Jewelry, Inc.*, 143 F. Supp. 120 (S.D.N.Y. 1956); *Hollywood Jewelry Mfg. Co. v. Dushkin*, 136 F. Supp. 738 (S.D.N.Y. 1955); *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551 (S.D.N.Y. 1955).

⁷⁶ *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800 (2d Cir. 1960); *H. M. Kolbe Co. v. Armigus Textile Co.*, 184 F. Supp. 423 (S.D.N.Y. 1960); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960); *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959).

trend of interpretation of the notice requirements has been most evident.

In some of these cases the plaintiff attempted to place copyright notice on detachable tags tied to the product.⁷⁷ The courts have been unanimous in holding this method of notice placement does not satisfy the requirements of section 19 that the notice must be "on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted."⁷⁸ In the jewelry cases, the plaintiffs placed a small, but legible, notice on the clasps of necklaces and bracelets and on the inside surface of earrings. The use of these positions was held to satisfy the requirements of section 19.^{78a} In one case where the plaintiff had placed his notice on the clasp of a necklace, the court held that the notice, although it was small, appeared where it was customary for members of the industry to place the maker's name and was "located so as to apprise anyone seeking to copy the article of the existence of the copyright, and is, therefore, sufficient to satisfy the statutory requirements."⁷⁹

Proprietors of products in this area have a still further problem for they must satisfy the requirement that the notice "shall be affixed to *each copy* thereof published or offered for sale in the United States by authority of the copyright proprietor."⁸⁰ This point was litigated in an early case, *De Jonge & Co. v. Breuker & Kessler*,⁸¹ in which it was held that the copyright on a painting was lost because it was reproduced a dozen times on a sheet of wrapping paper which bore only one notice of copyright. This doctrine has also been applied to designs on dress fabrics.⁸²

Recently, considerable inroads have been made on this doctrine. In a case where a pair of earrings bore copyright notice on only one of the earrings, the court held that since the earrings were invariably sold as a pair, they were a "single work of art" and only one notice was necessary.⁸³ This new interpretation has been ap-

⁷⁷ *Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co.*, 144 F. Supp. 577 (S.D.N.Y. 1956); *Boucher v. Du Boyes*, 253 F. 2d 948 (2d Cir. 1958), *cert. denied*, 357 U.S. 936 (1958); *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, *supra* note 76.

⁷⁸ 17 U.S.C. § 19 (1958). The Copyright Office, in its regulations, states that it will reject applications for registration on goods bearing notice on detachable tags or wrappers which are not part of the work and will eventually be discarded when the work is put in use. 37 C.F.R. §§ 202.2(b)(9), (10) (1960).

^{78a} See cases cited in note 75 *supra*.

⁷⁹ *Trifari, Krussman & Fishel, Inc. v. Charel Co.*, 134 F. Supp. 551, 554 (S.D.N.Y. 1955).

⁸⁰ 17 U.S.C. § 10 (1958). (Emphasis added.)

⁸¹ 235 U.S. 33 (1914).

⁸² *Verney Corp. v. Rose Fabric Converters Corp.*, 87 F. Supp. 802 (S.D.N.Y. 1949).

⁸³ *Boucher v. Du Boyes*, 253 F.2d 948 (2d Cir. 1958), *cert. denied*, 357 U.S. 936 (1958).

plied in a case where a copyrighted design was placed on the front of a blouse and repeated on the back of the blouse.⁸⁴ Copyright notice was placed on a small tag sewn into a seam inside the blouse. Analogizing this case to the earrings case, the court held that the blouse could be considered as a single work of art. Although the courts have not yet held that use of a single notice on an article upon which a design is multiplied prolifically will serve to satisfy the requirement that notice appear on "each copy" of the work, there seems to be no logical distinction, in this consideration, between a pair and a multitude of reproductions.⁸⁵

The recent series of cases in which Peter Pan Fabrics was the plaintiff⁸⁶ has been very important to the development of the use of copyright notice in the dress goods industry and to the evolution of the liberal view taken toward formal notice requirements. In each of these cases plaintiff, a manufacturer of dress fabrics, had placed notice of copyright on the selvage edges of bolts of print cloth sold to dressmakers. The notice was repeated each time the design appeared on the cloth. However, it was shown that the dressmakers inevitably either cut off the selvage edge or sewed it into the seams of their finished dresses so that the notice was either totally absent or could not be seen without tearing the fabric apart when the dresses got to the consuming public.⁸⁷ Defendants in most of these cases argued that this application of notice to the selvage edge was analogous to the application of notice to hang tags.⁸⁸ In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*⁸⁹ the lower court refused to take judicial notice of the fact that the selvage edge was always covered or removed by dressmakers. Furthermore, the court said that the requirement that notice be affixed to "each copy" should be construed realistically in a manner consonant with business practices in order to "reasonably protect the

⁸⁴ *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 622 (S.D.N.Y. 1959).

⁸⁵ It has recently been held that a copyright was valid where only four notices were applied along the selvage edge to a portion of yard goods bearing 16 repetitions of the copyrighted design. *H. M. Kolbe Co. v. Armigus Textile Co.*, 279 F.2d 555 (2d Cir. 1960). Judge Friendly's dissent stated that the majority's opinion meant that a single notice would suffice for the whole bolt of cloth or at least for a whole dress.

⁸⁶ See cases cited in note 76 *supra*, and *Peter Pan Fabrics, Inc. v. Brenda Fabrics, Inc.*, 169 F. Supp. 142 (S.D.N.Y. 1959).

⁸⁷ The Copyright Office indicates that it will refuse registration to a work in which the notice is permanently covered so that it cannot be seen without tearing the work apart. 37 C.F.R. § 202.2(b)(7) (1960).

⁸⁸ See decisions cited in note 77 *supra*, in which hang tags were held insufficient for use as notice-bearers.

⁸⁹ 274 F.2d 487 (2d Cir. 1960), *affirming* *Peter Pan Fabrics v. Acadia Co.*, 173 F. Supp. 292 (S.D.N.Y. 1959).

copyright owner and the innocent copyist," and that the notice used by plaintiffs was the best they could have used without marring the appearance of the article. On appeal, the Second Circuit affirmed in a two-to-one decision with Judge Learned Hand writing the majority opinion. Judge Hand seemed to indicate that one of the purposes of the statute as a whole was to provide copyright protection for designs such as these and that this purpose would be defeated if a literal application of the statute were to be made in this case. "We do hold that at least in the case of a deliberate copyist, as in the case at bar, the absence of 'notice' is a defense that the copyist must prove, and that the burden is on him to show that 'notice' could have been embodied in the design without impairing its market value."⁹⁰ Since the case involved merely a preliminary injunction, Judge Hand stated that should the defendant show at the trial that notice could appear on the dresses without impairing their market value, the decision might be different. As Judge Friendly pointed out in his dissenting opinion, the preliminary injunction is the only valuable weapon in these cases because the life of the dress design is so short. Also Judge Friendly, unconvinced that the lawmakers had intended to provide the widest possible copyright protection, felt that the notice requirements served a valid function and should be complied with. Later decisions,⁹¹ however, have upheld the majority view in the *Weiner* case.

If the majority view is correct, a proprietor may be held to have complied with the notice provisions although no notice appears on the finished articles. One author⁹² has suggested that a better way to apply notice to the designs was available; the plaintiffs could have elicited a promise from the dressmakers to apply notice-bearing labels to the dress. This reasonable method would do much to solve this problem if the courts would hold that the use of a single notice would protect the many repetitions of the design on the dress.⁹³ However, until this method has been approved, no court should *demand* its use by a copyright proprietor in cases such as the *Weiner* case.

Whatever future adjudication might bring in this area, the *Weiner* case is important as a concrete expression of the new liberal

⁹⁰ *Id.* at 490.

⁹¹ *Peter Pan Fabrics, Inc. v. Candy Frocks, Inc.*, 187 F. Supp. 334 (S.D.N.Y. 1960); *Peter Pan Fabrics, Inc. v. Dixon Textile Corp.*, 280 F.2d 800 (2d Cir. 1960); *H. M. Kolbe Co. v. Armigus Textile Co.*, 184 F. Supp. 423 (S.D.N.Y. 1960).

⁹² See Note, 73 HARV. L. REV. 1613 (1960).

⁹³ See text accompanying notes 88-89 *supra*.

outlook which many judges have adopted toward fulfillment of the notice requirements. They appear to feel that the overriding purpose of the copyright statutes is to provide copyright protection to a broad range of works and that this purpose should not be defeated by the failure to comply literally with the statutory requirements. One cannot avoid the conclusion that the impact of *Mazer v. Stein* has been heavy upon the minds of judges.

2. *Other Theories That Operate To Prevent Loss of Copyright.* In cases where the copyright proprietor is threatened with loss of his copyright because some third party has published the work without notice, the courts have sometimes turned to the words of section 10 which require that the publication be "by authority of the copyright proprietor."⁹⁴ Obviously, a publication by an infringer is not a publication "by authority of the copyright proprietor." In cases where a third party has been allowed to "borrow" a work, or is a "mere licensee" of the work, and publishes without notice, it has been held that the loss of copyright depends upon whether the third party agreed to place notice on the work. If the third party did so agree, his publication is not "by authority of the copyright proprietor" unless the works appear with the copyright notice. If the proprietor allowed the third party to use the work unconditionally, the publication is said to be "by authority of the copyright proprietor."⁹⁵

A further, somewhat related, theory is often used where defendant in a copyright infringement suit produces evidence to show that certain of plaintiff's products appeared in public without notice. The *Superman* doctrine⁹⁶ requires that plaintiff bear the burden of showing that he has obtained a valid copyright on his work; after this has been shown, the burden shifts to defendant to show that there has been invalidation of the copyright. The defendant must then prove that plaintiff was responsible for the absence of notice from the items which defendant has produced in evidence.⁹⁷ This doctrine is valuable to plaintiffs in these cases

⁹⁴ 17 U.S.C. § 10 (1958).

⁹⁵ In the *Superman* case several of the comics were "borrowed" and published without notice. Judge Hand approved the above theory, citing *American Press Ass'n v. Daily Story Publishing Co.*, 120 Fed. 766 (7th Cir. 1902). See also *Perkins Marine Lamp & Hardware Corp. v. Long Island Marine Supply Corp.*, 185 F. Supp. 353 (E.D.N.Y. 1960).

⁹⁶ 198 F.2d 927 (2d Cir. 1952).

⁹⁷ *Modern Aids, Inc. v. R. H. Macy & Co.*, 264 F.2d 93 (2d Cir. 1959); *Peter Pan Fabrics, Inc. v. Acadia Co.*, 173 F. Supp. 292 (S.D.N.Y. 1959), *aff'd sub nom. Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F. 2d 487 (2d Cir. 1960); *Scarves by Vera, Inc. v. United Merchants & Mfrs.*, 173 F. Supp. 625 (S.D.N.Y. 1959); *Perkins Marine Lamp & Hardware Corp. v. Long Island Marine Supply Corp.*, 185 F. Supp. 353 (E.D.N.Y. 1960).

for it is often difficult to prove that the absence of notice was his fault.⁹⁸

3. *The Impact of the Universal Copyright Convention.* The Universal Copyright Convention requirements concerning placement of notice are found in section 9 (c). The statute requires that the notice be "placed in such a manner and location as to give reasonable notice of claim of copyright."⁹⁹

Although this section applies only to certain alien authors who do not first publish in the United States, at least one court has expressly stated this also to be the test intended by the legislators for all of the notice requirements.¹⁰⁰ This test is, indeed, very similar to tests used by many courts today and it seems that the acceptance of the terms of the Universal Copyright Convention has played a substantial part in the development of this view in the United States.¹⁰¹

II. THE PITFALLS — SUMMARY

There has been in recent years a considerable relaxation of the traditional requirement of strict compliance with the statutes concerning notice of copyright, but there are still certain basic requirements which must be met as a condition to obtaining and keeping a valid copyright. It seems clear that publication of a work having absolutely no notice of copyright will cause the work to fall into the public domain. The result would probably be the same if no word or symbol of claim of copyright were to appear in the notice used; if the name of the proprietor of the work did not accompany the symbol; or, in works where such date is required to be used, if the date when copyright was first obtained in the work did not appear in the notice.

With the exception of these pitfalls which seem to present a prospect of certain loss of copyright protection for a work, the courts seem inclined to uphold the validity of a copyright where

⁹⁸ The doctrine was especially useful to plaintiffs in the last three cases cited in note 97 *supra*, since it was used to award them preliminary injunctions.

⁹⁹ 17 U.S.C. § 9 (c) (1958).

¹⁰⁰ *Glenco Refrigeration Corp. v. Raetone Commercial Refrigerator Corp.*, 149 F. Supp. 691 (E.D. Pa. 1957).

¹⁰¹ It is to be noted that the Universal Copyright Convention test is whether the placement used would give *reasonable notice to the public* of the copyright claim; this claim should not be confused with the test propounded in *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960). In *Peter Pan* the test was whether the proprietor had done all that a reasonable man would have done toward compliance; it was not important that the notice gave no *actual* notice.

the notice used gives "reasonable" notice of copyright to the public, or, in the case of works whose commercial value would be impaired by appearance of notice on them, if the proprietor has done all that he can reasonably be expected to do toward compliance with the statutory requirements.

III. THE NEED FOR REMEDY

It is generally agreed that changes are needed in the copyright law of the United States, in order that the unwary author will not suffer loss of copyright due to failure to satisfy "unnecessary" formal requirements of the copyright statutes.¹⁰² There are, however, substantial differences of opinion concerning which formalities are "necessary" and which are "unnecessary." The parties expressing these differing opinions can generally be divided into two groups. The first group desires to retain the requirement of publication with notice as a condition precedent to gaining a copyright; the second group desires either to eliminate the notice requirement entirely or, if it is to be retained, to make it a condition subsequent to gaining a copyright.¹⁰³ To evaluate these positions, it is necessary to review the background of the notice requirements of the statutes.

A. *The Nature of the Copyright*

The Constitution of the United States authorizes Congress to legislate with respect to copyrights: "The Congress shall have 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."¹⁰⁴ This provision has been interpreted by the Supreme Court in several cases. In an early case, *Wheaton v. Peters*,¹⁰⁵ it was said, in considering the copyright statute then in force:

¹⁰² The Copyright Office sent questionnaires to various leaders of groups concerned with copyrights. These questionnaires asked whether the reader thought there was need for change and what changes were needed. The letters answering these questions have been set forth in the appendices to NOTICE OF COPYRIGHT and U.S. COPYRIGHT OFFICE, GENERAL REVISION OF THE COPYRIGHT LAW, STUDY No. 17, USES OF THE COPYRIGHT NOTICE (1959) [hereinafter cited as USES OF THE COPYRIGHT NOTICE]. See also Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV 1025 (1956); 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 740-41 (1938).

¹⁰³ See the authorities cited in note 102 *supra*.

¹⁰⁴ U.S. CONST., art. I, § 8.

¹⁰⁵ 33 U.S. (8 Pet.) 591, 661 (1834).

"The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author having complied with the statute and given up his common law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right, it created a new one."¹⁰⁶

This interpretation has been often criticized,¹⁰⁷ and one author has said: "Notification to the public of the claim is not necessary once it is admitted that the creation of an author should be protected equally with any chattel property of such author; no notice is required for the latter."¹⁰⁸ The view of the Supreme Court has withstood the attacks of these writers. With this in mind the purpose of the notice requirements must be examined.

B. *The Purpose of the Notice Provisions*

The following quotations express the older, traditional view taken by the courts:

"The object of the statute was to give notice of the copyright to the public; to prevent a person from being punished, who ignorantly and innocently reproduces the photograph without knowledge of the protecting copyright."¹⁰⁹

"[T]he object of the statute is to give notice of the copyright to the public, by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained."¹¹⁰

These views should be compared with the more recent views of some courts which, although not attacking the basic premise of

¹⁰⁶ See also *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182, 188 (1909); *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769); *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 291 (1907).

¹⁰⁷ DRONE, *THE LAW OF COPYRIGHT AND PLAYWRIGHT* 2, 26 (1879); 2 LADAS, *op. cit. supra* note 102, at 10, 740; Taubman, *Creation, Copyright and the Constitutional Clause*, 6 BULL. COPYRIGHT SOC'Y 167-76 (1959).

¹⁰⁸ 2 LADAS, *op. cit. supra* note 102, at 740.

¹⁰⁹ *Sarony v. Burrow Giles Lithographic Co.*, 17 Fed. 591, 592 (S.D.N.Y. 1883), *aff'd* 111 U.S. 53 (1884).

¹¹⁰ *Burrow Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 55 (1884).

the view quoted above, have emphasized a slightly different viewpoint. In *Washingtonian Publishing Co. v. Pearson*,¹¹¹ the Supreme Court said that the statute was intended "definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary works of lasting benefit to the world.'" Thus, it seems that at least some courts will remember that while the purpose of the notice requirements is to provide actual notice of copyright, the overall intent of the statute is to provide incentive to authors. This overriding intent should be weighed against the need for actual notice to the public. Apparently this was done in the previously-discussed *Weiner* case.¹¹²

C. *Retention of the Notice Requirements as Conditions to Copyright Protection*

The group that is in favor of retention of the present system largely agrees that some of the formalities should be relaxed.¹¹³ For example, this group would probably be amenable to substitution of a notice requirement similar to that used in the Uniform Copyright Convention for the requirements of sections 19 and 20 which currently govern the form and placement of notice. Beyond this, however, this group argues that a system which demands publication with notice as a condition precedent to grant of a valid copyright is too valuable to scrap; they feel that "the notice requirements are not too burdensome to those who take reasonable care to preserve their rights."¹¹⁴

It is true that the copyright notice is very useful to publishers, broadcasters, and some manufacturers. In a recent survey conducted by the Copyright Office¹¹⁵ it was found that a large proportion of the industries polled used the copyright notice in some way;¹¹⁶ about sixty percent of those who did use the notice, used it in their everyday operations to determine whether there was a

¹¹¹ 306 U.S. 30, 36 (1938); see also *United States v. Backer*, 134 F.2d 533 (2d Cir. 1943); *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706 (6th Cir. 1956), *cert. denied*, 352 U.S. 949 (1957).

¹¹² *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960).

¹¹³ See, e.g., letters written by Vincent T. Wasilewski, Robert Gibbon, and George Link, Jr., quoted in *USES OF THE COPYRIGHT NOTICE*, appendix 12-14.

¹¹⁴ *Hearings Before the House Committee on Patents on H.R. 10434*, 69th Cong., 1st Sess. 57 (1926).

¹¹⁵ See *USES OF THE COPYRIGHT NOTICE*.

¹¹⁶ *Id.* at 5.

copyright on the work and to see who the proprietor was.¹¹⁷ Almost two-thirds of those polled stated that absence of the notice would make their operations more difficult.¹¹⁸

In addition to the commercial use which is made of the notice, the courts recognize its value in providing actual notice to the public of claim of copyright. In a recent case¹¹⁹ the defendant purchased motion pictures from a party who had authority from the true proprietor only to license the use of the films. Plaintiff, the true proprietor, had properly placed notice of his copyright on the film. The court, denying that plaintiff was guilty of laches, found that the notice on the film was an assertion of the interests of the proprietor, and that defendant could have easily ascertained the facts by making inquiry of plaintiff.

Another argument often used to defend the operation of the notice requirements is that a system in which notice was not required would hamper free communication and scholarship, for a person might be discouraged from using a work for fear that it was copyrighted.¹²⁰ On the other hand, the argument continues, publication without notice is a convenient way for an author to express his intent that the work be freely circulated and used.¹⁰¹ In short, this group argues that the notice requirement should continue to be a condition precedent because the presence of the notice is useful to both industry and the courts, and that any "automatic" copyright law would tend to stifle communication and scholarship.¹²²

D. *Abolishing Notice as a Condition of Copyright*

The arguments of those who desire to abolish notice as a condition precedent are several. First, it is stated that the courts have a mistaken idea of the nature of a copyright. This group believes that the author's property right in his work ought to be of the same nature as his property right in a chattel.¹²³ This argument is supported by showing that only the Philippines, which patterned her copyright statutes after ours, and four other countries in the Americas, have statutes that make notice a condition of copy-

¹¹⁷ *Id.* at 5, 9-12, 14-16.

¹¹⁸ *Id.* at 6, 21-25.

¹¹⁹ *Hampton v. Paramount Pictures Corp.*, 279 F.2d 100 (9th Cir. 1960).

¹²⁰ *Hearings Before the House Committee on Patents on H.R. 10434*, *supra* note 114.

¹²¹ *Ibid.*

¹²² See the review of the basic problems set forth in NOTICE OF COPYRIGHT 55-59.

¹²³ See 2 LADAS, *op. cit. supra* note 102, at 740.

right.¹²⁴ Furthermore, the Berne Convention does not make notice a condition,¹²⁵ and the only reason it was made a condition in the Universal Copyright Convention was that the United States delegation insisted upon it.¹²⁶ Although the notice is very useful, this group argues that this usefulness cannot offset the loss forever of an author's property rights in his works; the price paid for this usefulness is too high. A further argument, seen very frequently, is that the notice requirements are antiquated and obsolete, and that they are not now serving to give actual notice of claim of copyright to the public—the purpose for which they were designed. In support of this contention a number of instances are cited in which works appear in public without notice, arguably thereby informing the public that there is no copyright on the works, when in reality there is a valid copyright on the work; phonograph records and tape recordings, it is argued, are not required to bear notice. Moreover, any notice used on television programs is not visible to the viewer.¹²⁷ Furthermore, occasional copies from which notice has been accidentally omitted can appear in public and the copyright on the work will not be lost because of the provisions in section 21. Substantiation of this line of argument has recently been aided by the decision in the *Weiner* case. It will be recalled that *all* the dresses manufactured from the cloth bearing notice on the selvage edge appeared in public with no notice attached, yet copyrights were recognized.

Those members of this group who admit that there is some utility left in the use of notice argue that notice should be mandatory, but that the grant of a copyright should not be conditioned upon such use. It is argued that the price is altogether too high to pay and that some other penalty would suffice to create incentive for use of the notice.¹²⁸

IV. REMEDIES AVAILABLE

Judicial remedy of the situation cannot solve the basic problem in these cases unless it is agreed that the statutory language does not bind the courts and that the nature of the copyright is similar

¹²⁴ See NOTICE OF COPYRIGHT 27-40 for a summary of the laws of other countries concerning notice.

¹²⁵ *Id.* at 25a-26.

¹²⁶ See Kaminstein, ©: *Key to Universal Copyright Protection (Article III: Formalities)*, in KUPFERMAN & FONER, *UNIVERSAL COPYRIGHT CONVENTION ANALYZED* 21-28 (1955).

¹²⁷ See Finkelstein, *supra* note 102, at 1054-55.

¹²⁸ *Hearings Before the House Committee on Patents on H.R. 10434*, *supra* note 114; compare the purists' answer to this proposition in *Hearings Before the House Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. 88 (1932).

to a chattel right and is not a new entity created by statute. Since this idea does not appear to be gaining support, the only avenue for remedy at the present is through legislation.

Many suggestions and bills have been submitted to Congress.¹²⁹ These plans may be divided into three general categories: those plans which advocate the continuance of notice as a condition to copyright, those which urge the elimination of all formalities as conditions to copyright, and those which favor elimination of formalities as conditions, but support a system for providing other incentives toward use of notice. The second alternative probably is not feasible at this time, for various groups use the notice and depend upon it in their business operations; this valuable aid should not be taken away from them.¹³⁰ It is unlikely that a mere change in the form and location requirements will be sufficient to remedy the present problems. Elimination of the notice requirement as a condition for copyright protection is necessary to prevent loss of copyright by unwary authors, but a strong incentive must be offered to encourage the use of notice.¹³¹ If the incentive is chosen carefully, the system should prove more reliable than the present system in correctly notifying the public of the lack or presence of copyright claim in a work.¹³²

¹²⁹ See the various proposed changes in NOTICE OF COPYRIGHT 41-55.

¹³⁰ Note that attempts to pass this type of legislation have failed on several occasions. *Id.* at 41-43.

¹³¹ Bills incorporating such incentives are set forth, *id.* at 43-55. To date they too have failed.

¹³² The proposal suggested by Professor Harry G. Henn in his letter, *id.*, appendix 13, seems to present the best plan. It follows:

"(1) Copyright notice should be abolished as a mandatory condition of copyright protection.

"(2) Incentives should be offered for the voluntary use of notice, by limiting the remedies available against one who uses the work in reliance on the absence of notice.

"(3) The limitations on the remedies available against an innocent infringer should be as follows:

"a. The innocent infringer should be subject to an injunction only upon reimbursement of his reasonable outlay innocently incurred.

"b. The innocent infringer should not be liable for a reasonable license fee for the infringing use.

"c. No other remedy should be available against an innocent infringer.

"d. Actual notice given to the infringer should have the effect of removing his defense of innocence for undertakings begun thereafter.

"Under the foregoing, the courts would have to distinguish in cases where actual notice was given to the infringer during the course of infringement, between the innocent undertaking and undertakings begun after the giving of notice.

"(4) a. The form of notice should be the symbol © accompanied by the name of the copyright proprietor and the year of first publication.

"b. The notice should be placed in such a manner and location as to give reasonable notice of claim of copyright.

"c. The notice should not be required in the case of copies published or re-published abroad."

CONCLUSION

It seems evident that despite the substantial inroads now being made upon the old "strict compliance" doctrine, there are still many existing pitfalls which can cause loss of copyright. It is also evident that the use of copyright notice is valuable to many segments of United States industry, and to the courts, in providing a fairly accurate guide to ascertain the presence of claim of copyright. However, the usefulness of the present law has recently been substantially diminished by court decisions which have held copyrights valid although the works have appeared in substantial numbers in public without the presence of notice. The notice provisions are no longer serving the purpose for which they were designed; they no longer assure actual notice to the public of a claim of copyright. Since the present statutes, as interpreted, do not fill this purpose, the law should be changed to provide that publication with notice is not a condition to obtaining copyright protection. Instead, a strong incentive system should be instituted to encourage use of the notice. If the proper incentive is chosen, the system would tend to return a measure of confidence to those who depend upon the notice statutes in the operation of their businesses.

Although it would seem best to eliminate notice as a condition to copyright protection, it is unlikely that this will happen in the near future. The recently enacted provisions of the Copyright Law which brought the Universal Copyright Convention into force in this country indicate that the intent of Congress is to continue the present system. At the very least, however, the requirements of sections 19 and 20 of the present law should be changed to conform with the provisions of the Universal Copyright Convention, if only for the purpose of catching up with the recent judicial decisions. Nevertheless, since many deficiencies will remain, and since the absence of notice can no longer be relied upon to indicate absence of a valid claim of copyright, it is hoped that elimination of the notice requirement as a condition to copyright protection will be included in any revisions of the United States Copyright Law.

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