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# THE COMPULSORY MANUFACTURING PROVISION-AN ANACHRONISM IN THE COPYRIGHT ACT

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THE COMPULSORY MANUFACTURING PROVISION—AN ANACHRONISM IN THE COPYRIGHT ACT—The protection afforded foreign authors under the United States Copyright Act[1] at the present time is

[1] Act of July 30, 1947, 61 Stat. L. 652, 17 U.S.C. (Supp. 1950). As amended by the Act of April 27, 1948, 62 Stat. L. 202; the Act of June 25, 1948, 62 Stat. L. 992; and the Act of June 3, 1949, 63 Stat. L. 154.

subject to stringent restrictions. Copyright will not be granted to a person who is neither a citizen nor a resident of the United States unless he complies with a great many formalities, and, in addition, conforms with the compulsory manufacturing requirement. It is the object of this comment to examine the manufacturing provision, section 16 of the Copyright Law, and to show why it should be deleted from the act.

### *Copyright Available to Nonresident Aliens*

Under the Act of 1947, as amended, a foreign author can secure copyright protection in the United States only if (1) he is domiciled within the United States at the time of the first publication of his work, *or* (2) the foreign state of which he is a citizen grants to citizens of the United States the benefit of copyright protection (a) on substantially the same basis as to its own citizens, or (b) substantially equal to the protection secured to such foreign authors under the act or by treaty, or (c) when the foreign state of which he is a citizen is a party to an international agreement which provides for reciprocity in granting copyrights, and the United States may, under the terms of the agreement, become a party thereto at its pleasure.[2] The existence of any one of the conditions named under (2) is sufficient, but the existence of these conditions is established only by Presidential proclamation. A proclamation conclusively establishes their existence.

Assuming that the alien author is a citizen or national of a country regarding which the President has issued such a proclamation,[3] he may secure copyright for his work in the United States if he follows the procedure specified in the act.[4] He must apply for copyright here within six months of the date his work is published abroad, and, on his application being granted, he is given an ad interim copyright which protects his book for five years. During that time, if his book is written in English, it must be printed, bound and published in this country in order to secure the regular twenty-eight year protection and right of renewal for an additional twenty-eight year period. If the book is not manufactured and published in the United States within that time,

[2] Section 9, Act of July 30, 1947, 61 Stat. L. 652.

[3] This article will be limited to a consideration of the rights of foreign authors not domiciled in the United States.

[4] The numerous formalities which are conditions precedent to obtaining copyright under the act are burdensome and in most cases unnecessary. The desirability of doing away with them is discussed in Solberg, "Copyright Reform," 14 NOTRE DAME LAWYER 343 (1939).

then he has lost all right to protection at any time in the future, and without protection he cannot profitably market his book in this country. If the alien author neglects to apply for copyright within six months of the time his work is published abroad, he cannot obtain copyright here.[5] While the requirement of manufacture in the United States applies to books by American authors as well as to the works of foreign authors, the time limits above mentioned apply only to the works of foreigners. As will subsequently appear, the requirement places a discriminatory burden upon them. At this point, it may be profitable to consider the manufacturing provision of the act in detail.

Section 16 provides that the text of all books and periodicals copyrighted under the act shall be (1) printed from type set within the limits of the United States, or (2) from plates made within the limits of the United States from type set therein, or (3) if the text is produced by lithographic or photo-engraving process, then through a process performed wholly within the United States. In addition, the book must be actually printed and bound within the United States. These requirements apply as well to illustrations produced by printing, lithographing, or photo-engraving. Other material copyrightable under the act, however, is not subject to the same regulation and, as respects books and periodicals, the following exceptions are made: (1) the original text of a book or periodical of foreign origin in a language or languages other than English; (2) illustrations of a subject located in a foreign country which explain a scientific work or reproduce a work of art; (3) works in raised characters for the use of the blind; (4) books or periodicals of a foreign origin in a language or languages other than English; (5) works printed or produced in the United States by any other process than those above specified; and (6) the first fifteen hundred copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication abroad if each copy contains notice of copyright and if ad interim copyright has been obtained prior to the importation of any copy other than those whose importation is permitted by section 107.[6]

[5] This statement is based on the interpretation that ad interim copyright is an essential prerequisite for an ultimate valid copyright, and that failure to apply for copyright within six months of publication abroad causes the book to fall into the public domain so that section 7 debars it from copyright. There is some question, however, whether compliance with the manufacturing clause, without regard to the procurement of an ad interim copyright, is sufficient.

[6] This latter exception formerly read "books published abroad in the English language seeking ad interim protection under this [act]. . . ." It was broadened by the amendment of 1949. Section 107 permits importation of copies for charitable institutions, libraries and so forth, but does not allow importation for commercial purposes.

A scrutiny of the exceptions will show that none of them allows the foreign author of a book in the English language to have his work protected and to obtain full benefit of the market here unless it is manufactured in the United States. Further, if he sells foreign-made copies of his work in this country, without securing copyright, then the book falls into the public domain and anyone here may publish it without accountability to the writer.

No other country in the world places such severe restrictions on the right of an alien author to have his work protected by copyright and to enjoy the benefits of marketing it within its domain. To the contrary, most countries are members of the International Copyright Union, and, as such, not only grant automatic copyright to foreign authors, but also allow them to sell their works freely, subject only to tariff restrictions if not internally manufactured. In this situation, it is important to inquire whether any circumstances peculiar to the United States require such harsh discrimination between nationals and foreigners.

*History of Copyright Protection in the United States*

The first federal copyright law was enacted May 31, 1790.[7] In the decade immediately preceding the passage of this law, twelve of the thirteen original states had enacted legislation to protect works of intellectual creation. For the most part, these laws were the direct result of the efforts of Dr. Noah Webster, of dictionary fame, to achieve protective legislation. In 1831, an amendment of the federal law enlarged the scope of protection, extended its term to twenty-eight years, and continued the fourteen year renewal term. Additional amendments made in succeeding years were followed by a consolidation in 1870 and a general revision of the act in 1878. It is important to note, however, that none of these acts granted protection to the works of foreign authors even though serious agitation for this protection had been commenced as early as 1837.[8] As a matter of fact, the copyright laws of the United States actually encouraged piracy of foreign works for over one hundred years because the Act of 1790 provided

> "That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written,

[7] 1 Stat. L. 124 (1848).

[8] Henry Clay introduced a bill in Congress at this time to extend copyright protection to citizens of other countries. For the text of his bill, see 15 J. PAT. OFF. SOC. 785 (1933).

printed, or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States."[9]

It was not until 1891[10] that the United States undertook any responsibility to the authors of other countries. Even then, the practical value of the protection afforded was seriously limited by the inclusion of the manufacturing clause. Publishers and typographers had violently opposed granting any protection to foreigners unless their works were subject to compulsory manufacture in the United States. A comparison of two bills submitted to Congress in 1872 furnishes an interesting example of their resistance. The bill prepared by the American Copyright Association, all of whose officers were distinguished authors, was very simple. In five short lines it provided that foreign authors whose governments gave reciprocal rights to United States citizens should be granted the same protection under our law as was granted to our citizens. On the other hand, a lengthy publishers' bill provided that foreign authors could secure copyright protection in the United States only if their works were manufactured here. The vehement opposition of publishers, typographers, and similarly situated groups continued in the following years. It was not until the Chace Bill, which eventually became the "international copyright" Act of 1891,[11] was amended so as to include the compulsory manufacturing provision that this resistance was withdrawn. Significantly, many of these groups then did an about-face and began to recommend the bill.

In 1909, the copyright law was again recodified[12] and the law then enacted is substantially the same as that which governs today. At that time, two important improvements were made on the previous act: the renewal term protection was extended to twenty-eight years, and books written in a foreign language were released from the compulsory manufacturing provision. The latter improvement and a recent relaxation of rules governing the importation of some foreign works[13] have been the only amendments substantially favorable to alien authors made in the fifty-nine years since they were first afforded some protection. On the other hand, the Act of 1909 increased the burden of the manufacturing

[9] 1 Stat. L. 124 (1790).
[10] 26 Stat. L. 1106 (1891).
[11] Ibid.
[12] 35 Stat. L. 1075 (1909).
[13] Act of June 3, 1949, 63 Stat. L. 154. This amendment extends the term of ad interim copyright, enables foreign authors to procure it without payment of the four dollar registration fee, and allows importation of 1500 copies of a foreign work in which ad interim copyright has been obtained.

provision by requiring that binding, as well as printing, be done in the United States.

The last recodification of the copyright law, the Act of 1947, consolidated numerous amendments which had been made to the 1909 act, but unfortunately neglected to adopt many changes which had long been advocated by persons interested in copyright reform. Domestic production of English-language books by foreign authors is still required, although a 1949 amendment permits the importation of a limited number of copies manufactured abroad.[14]

### *Effect of the Manufacturing Provision on the Publishing and Printing Industries*

Some ten years after the Act of 1891 was passed, the Commissioner of Labor submitted to the Senate a document entitled "A Report on the Effect of The International Copyright Law." Mr. Thorvald Solberg, Register of Copyrights from 1897 to 1930, commented on the findings of the commissioner as follows:

> "While a certain number of printers and publishers, directly or indirectly indicated their approval of the type-setting provision of the Act of March 3, 1891, a much larger number . . . insisted that the stipulation had been of little or no use either to printers or to publishers, and that it should be done away with. . . .
>
> "The reasons advanced by leading publishers with respect to this still much debated type-setting requirement are of interest and value. Little, Brown & Company held that copyright should be extended to citizens of foreign countries as a matter of justice and without that requirement; D. C. Heath and Company thought international copyright was a matter which should not be mixed up with tariff laws; L. C. Page & Company believed the manufacturing requirement had deterred foreign authors from attempting to secure copyright and that it should be given up; Small, Maynard & Company argued that if copyright is a just principle, it should be applied without the manufacturing restriction; A. C. McClurg & Company believed that it worked a very great hardship to publishers and authors; the American Book Company held that it was in conflict with natural laws of trade and largely defeated its own purpose; George Haven Putnam, always a staunch supporter of international copyright, was emphatic in his declaration that 'The manufacturing condition should be eliminated from the law. It is entirely illogical to couple with the recognition of the

[14] Ibid.

right of copyright a condition forcing the producer of the copyrighted property to do his manufacturing with one set of printers or another. As far as it is necessary to guard American manufacturing interests, these should be cared for under the tariff system.' Frederick A. Stokes Company advocated the removal of the stipulation. P. Blakiston's Sons & Company, Lea Brothers & Company, and P. W. Zeigler & Company, all of Philadelphia, together with some others, averred their firm belief in the advantage of the typesetting clause."[15]

The Report shows that in so short a time as ten years after protection was granted to foreign authors, there was much doubt among those who had gained special security by the manufacturing clause of the need, desirability and wisdom of the restriction. It is doubtful, therefore, whether their original fears of competition were justified. Certainly there is no basis for such apprehension at the present time. It is to the credit of these groups that most of them, realizing their error, advocated repeal of the compulsory manufacturing provision. Continued opposition from others indicates there are some who are still not sufficiently well informed to realize that it would be to their benefit if the provision were abolished.

The critical reader may well think that little force can be ascribed at this time to opinions expressed half a century ago. It is easy to demonstrate, however, that the opinions of forward-looking publishers have not changed in the intervening years. In 1921, Major George Haven Putnam, head of a large publishing house, publicly stated:

"It is the conclusion of the American authors and publishers that, on the grounds of comity and prestige, the United States ought now, after waiting for one-third of a century, to accept membership in the Convention of Berne. It is further the conclusion of the American publishers, who are naturally interested in the development of book manufacturing—and many of whom are, like myself, owners of book-manufacturing establishments,—that under existing conditions there need be no apprehensions of interference in any way with the book-manufacturing interests in this country through a measure that should remove the restriction now placed upon securing American copyright protection for books produced outside of the country. The book-manufacturing trades have a direct interest in furthering the extension of American publishing undertakings. I trust that the representatives of these trades will decide that they are quite able, under conditions now

[15] Solberg, "The International Copyright Union," 36 YALE L.J. 68 at 104-5 (1926).

obtaining, to hold their own against any Transatlantic competition, and that they have a business interest, as well as a citizen's interest, in the removal of all restrictions on American publishing undertakings."[16]

An examination of testimony given at hearings on many bills which have sought revision of the Copyright Act and entry of the United States into the International Copyright Union in the past three decades will reveal similar expressions of opinion. Again, it is to be noted that the latest amendment to the Copyright Act, allowing some relaxation with respect to the importation of books manufactured abroad, was favored by numerous publishing houses and by the International Allied Printing Trades Council, the representative of all printing trades unions.[17]

In 1939, some figures were made public in a "Memoranda Regarding Probable Effects on the Printing Industry of Adoption of the Copyright Convention."[18] These indicate that American publishers would not be harmed, but would benefit by the repeal of the manufacturing clause. In the year 1937, the printing and publishing business, as measured by the total value of its products and receipts, was more than a $2,000,000,000 industry. In that year the total imports of books and other printed matter amounted to $9,597,607, less than one-half of one per cent of the domestic production. Exports of books and other printed matter amounted to $22,832,871. These figures show that international trade was not a vital factor in the industry as a whole, but that so far as it affected the industry, more concern should be directed toward protection of exports than to competition of imports. The export trade and the rights of American authors abroad were prejudiced through action taken by Canada in 1924, in retaliation against the United States producing requirement. In recent years the danger of similar action being taken by other foreign countries has greatly increased. If the balance of trade is still so favorable as it was when the memoranda was issued, the presently existing danger is a cogent reason for repealing the manufacturing clause.

It may be insisted that the favorable balance of trade was due only to the existence of the clause, but in answer to this it can be stated that

[16] Solberg, "Copyright Law Reform," 35 YALE L.J. 48 at 69 (1925).

[17] S. Rep. No. 375, 81st Cong., 1st sess. (1949). The American Book Publishers Council, Inc., which includes the publishers of approximately eighty-five per cent of all the trade books published in the United States today, the American Textbook Institute, and the National Association of Magazine Publishers all favored the amendment.

[18] S. Doc. No. 99, 76th Cong., 1st sess. (1949).

the same result could be achieved through a protective tariff. In fact, the publication in this country of many foreign works has actually been prevented by the manufacturing provision and attendant time limits of ad interim copyright. "Some practical publishers say that American editions not now considered would be undertaken if the requirement were repealed."[19] It is clear, too, that the United States book-producing industry need have no fear that repeal of the manufacturing provision would cause foreign books now published here to be made abroad.

> "The question remains, Would business and employment, if any, now resulting from the manufacturing requirement in the United States be diminished if, in case of works of authors in other countries, writing in English, copyright should be accorded (under the treaty) without the requirement of manufacture here?
>
> "Such official estimates as have been made suggest that the reduction, if any, would be negligible. The works in English by writers who are domiciled in other countries, that are published or republished in the United States, seem to furnish too small a fraction of the publishing industry to be likely to affect employment or the general volume of business, even if all of it should be withdrawn.
>
> "But the probability is that little or none of it will be withdrawn."[20]

Many books by foreign authors are not registered for copyright because of the uncertainty of finding the market favorable to publishing them here within the time limit set by the ad interim provision. With the repeal of the manufacturing clause, a large number of these would be registered for copyright, with consequent benefit to American publishers and printers when it was found that they could be profitably published. The American manufacturers need not be concerned by the threat of foreign competition. If necessary, the tariff could protect them from original editions manufactured less expensively abroad, and importation restrictions could protect them against being undersold by cheap foreign reprints. It is doubtful whether either type of safeguard would be necessary. Granted that American labor is costly, mass production methods should more than offset that expense, particularly since the development of the "pocket editons." There are any number of these which sell for fifteen, twenty-five, and thirty cents. In the more permanently bound editions, many can be found which retail for

[19] Id. at p. 4.
[20] Ibid.

less than a dollar. What foreign editions or reprints could be imported and sold for less, even without a tariff?

### *Effect of the Manufacturing Provision on the Rights of Authors*

American authors secure benefits abroad not only by virtue of copyright treaties which the United States has negotiated with other countries, but also through protection afforded by the International Copyright Union. This union was established by the Berne Convention of 1886, ratified and effective September 5, 1887. It has been revised and extended by subsequent conventions, the most recent being that held at Brussels in 1948. Most of the smaller countries of the world are members, while the United States, Russia, and China are the only large nations that have not joined. Under the Articles of Convention, the acquisition of copyright in member countries is a very easy matter. Merely by complying with a simple procedure, an author, whether he is a citizen of a member country or not, can achieve nearly universal protection for the product of his intellect. If his work is first published in a member country, or is published there simultaneously with publication in a nonmember country, then it is ipso facto protected in all other member countries. This guarantees the author the same protection in each country as is given to nationals by the internal law. There are no formalities to be complied with in any of the countries and the protection afforded in each and all of them is separate and distinct from rights the author has in his own country, whether it is a member nation or not.

Even though the United States is not a member of the Union, American authors can reap the benefits of the Convention. For sixty-three years the United States has taken advantage of these benefits for its own citizens without extending similar protection to foreign authors. Indeed, the unfair advantage has often been remarked upon and the Articles of Convention criticized for their liberality. A lawyer of Canada, one of the member countries, recently suggested:

> "Authors of non-union countries should receive no protection in union countries by first publication in a union country. A non-union country, if it desires to obtain for its nationals copyright in other countries, should join the copyright union or at least adopt substantially the same term of copyright and comply with such rules and conditions as may be adopted by the union, and it should

extend to authors of union countries copyright identical as to term and extent of the right."[21]

The fact that more liberal-minded persons of the same member country oppose this view does not excuse the regrettable positon of the United States.

> ". . . we come first to the suggestion that mere publication in a union country ought not to be enough to protect any work, particularly if the author does not happen to be a national of the union country. This is to say in effect that, although the domestic law of union countries has recognized first publication in a union country, that domestic law is wrong in principle. It is wrong in principle, for the reason that people who are not citizens of the country have no right in what they have created because they are foreigners. Such a contention would not be admissible for a moment, if such nationals were to send their chattels into a union country. It would not be permissible if they sought to acquire other kinds of property in a union country. There is no basic reason for the suggestion, except that of national prejudice or the desire of some person in a union country to use the property of a non-national without compensation. It is not sound reasoning in a non-communist society."[22]

This criticism, while directed at a proposed change in the international law, is an equally forceful argument for compelling a change in our internal law.

There is no good reason for the United States neglecting to join the Union, and any number of reasons why it should join, but it is not proposed to consider that topic here.[23] The point must be made, however, that in order to join, the United States would have to amend its own copyright law. The Articles of Convention state that copyright protection shall not be conditioned on compliance with any formalities. This country would, therefore, have to repeal the many conditions precedent to getting copyright, and also do away with the requirement

[21] Rogers, "Copyright Confusion," 25 CAN. B. REV. 967 at 978 (1947).

[22] Manning, "'Copyright Confusion' Reconsidered," 26 CAN. B. REV. 671 at 676 (1948).

[23] See Solberg, "The International Copyright Union," 36 YALE L.J. 68 (1926); De Wolf, "International Copyright Union," 18 J. PAT. OFF. SOC. 33 (1936); Kampelman, "The United States and International Copyright," 41 AM. J. INT. L. 406 (1947). As regards the United States' part in the Pan-American Copyright Convention, see Ladas, "Inter-American Copyright," 7 UNIV. PITT. L. REV. 283 (1941); "The Inter-American Copyright Convention: Its Place in United States Copyright Law," 60 HARV. L. REV. 1329 (1947).

of compulsory American manufacture, at least as applies to books by foreign authors.

There is danger that if the United States does not correct the unfair situation which has so long existed with respect to its unequal participation in the international copyright field, the rights of American authors abroad will suffer, as they have in Canada. While copyright can be obtained in Canada by a citizen of the United States, in order to fully enjoy that copyright, he must publish his book there. The Canadian law contains provisions whereby any person, without consent of the owner of the copyright, may obtain a license to exploit copyrighted books. These licensing provisions "are the result of a long threatened policy of retaliation by Canada against the compulsory manufacturing provisions of the United States Copyright Law."[24] An examination of the Canadian Act will illustrate the burden which may be placed upon American authors by such retaliatory legislation.

The present Canadian Law went into effect on January 1, 1924.[25] In the previous month, the benefits of the law were extended to citizens of the United States by the Certificate of the Canadian Minister of Trade and Commerce, dated December 26, 1923, and the Proclamation of the President of the United States, dated December 27, 1923. Section 14 of the Law provides:

> "Any person may apply to the Minister for a license to print and publish in Canada any book wherein copyright subsists, if at any time after publication and within the duration of the copyright the owner of the copyright fails
>
> (a) to print the said book or cause the same to be printed in Canada;
>
> (b) to supply by means of copies so printed the reasonable demands of the Canadian market for such book."[26]

Insofar as it concerns citizens of the United States holding copyrights in Canada, this section means that they must publish their books in Canada and supply any reasonable demand for them or someone else will be allowed to do so. The act provides that notice must be sent to the owner of the copyright when an application is made for a license. If a United States owner does not, within two months and two weeks after the mailing of the notice, secure the printing in Canada of an edition of at least one thousand copies, then the Minister of Trade and Commerce may grant a license. The terms of the license and the

[24] DeWolf, AN OUTLINE OF COPYRIGHT LAW 186 (1925).
[25] C. 32, R.S.C. 1927, as amended.
[26] Id., §14.

royalty to be paid the copyright owner may be fixed by the Minister, who is required to give a hearing to the parties or reasonable opportunity therefor.[27] Nor can the owner get around the licensing provisions by shipping copies of his work into Canada, as the law prohibits the importation of books printed in the United States for two weeks after copyright is secured, and thereafter, if someone applies for a license within that period. There are certain exceptions to the importation prohibition, but these are not important here.

In total effect, the licensing provisions[28] of the Canadian law operate in the same manner as does the manufacturing clause of the United States law. In practical effect, the United States is the only major country affected by these provisions, as they do not apply to copyrights held by authors who are nationals of countries included in the membership of the International Copyright Union.[29] While it is unlikely that European countries would go farther than this in retaliation, the danger is real. In 1949 the Congress, motivated in part by this threat, alleviated the harshness of the manufacturing requirement to some extent.

> "During the hearings on H.R. 2285, the representative of the State Department pointed out that there were grave threats of retaliation by England and other foreign countries against the United States because of the existence of the requirement, in order to secure United States copyright, that a work first published abroad in the English language be published in the United States. . . . It is our belief that the amendments . . . will give such relief to the foreign publishers and authors that the threat of retaliation may be dissipated—a result which is not only desirable from a business point of view, but is also desirable as a matter of policy."[30]

*Effect of the Manufacturing Provision on the American Public*

Up to this point, the effect of the compulsory manufacturing clause has been considered from the standpoint of authors on the one hand and of publishers on the other. But a third group, the American public, not being organized, has never been adequately represented in the numerous fights that have been waged over the Copyright Act.

[27] For an explanation of the licensing procedure and governing regulations, see FOX, THE CANADIAN LAW OF COPYRIGHT 305-9 (1944).

[28] Additional licensing provisions are to be found in §§13 and 15 of the act.

[29] The exception is made by §16(8).

[30] S. Rep. No. 375 at 3, 81st Cong., 1st sess. (1949).

> "This battle-royal has risen to unprecedented bloodthirstiness because in recent years the conflicting interests have become highly organized. The marketing intermediaries act as units. ASCAP has brought together the authors and composers. Then the state legislatures jumped into the fray. The typographical unions take a position all their own on neither side of the fence; the manufacturing clauses hurt everybody else—authors, publishers, readers. In short, everybody is organized except the readers and consumers who have more at stake than anybody else. Congress ought to speak for them, but it is subjected to tremendous pressure from the groups which are organized. Consequently, every attempt to overhaul our antiquated Copyright Act arouses as much emotional heat as a coal-strike. Everybody gets angry and little is done."[31]

The fact that only a small percentage of the English-language books published abroad has been made available for the American market attests to the damage done to their interest. Though more than fourteen thousand English-language books written abroad were published in foreign countries in the year 1949, only one hundred and thirty-nine were registered in the United States Copyright Office.[32] The same situation has obtained in previous years and with the retention of the manufacturing clause will continue in the future.

In the present situation, the obvious best-sellers of foreign origin are made available to the American as United States publishers know they can make a profit by producing the book in this country. These are relatively few in number, however, and with a few exceptions, usually just fiction. Likewise, a limited number of English-language books which appeal to special intellectual interests are available. Some booksellers import a few, without bothering to secure a copyright, knowing they can sell enough to make the venture worth their while, but that there will not be sufficient demand to cause an American publisher to print a United States edition and undersell them. The vast majority of foreign books in the English language falls in neither of the above categories. With most of them, there is no way to determine whether it would be worthwhile to manufacture an American edition so no ad interim copyright is obtained. Neither will a publisher import a limited number of copies for sale because he fears that if they sold well another publisher would bring out his own edition and under-

[31] Chafee, "Reflections on the Law of Copyright," 45 COL. L. REV. 503 at 516-17 (1945).

[32] S. Rep. No. 375, 81st Cong., 1st sess. (1949).

sell them. The result, illustrated by the figures given above, is that only a very small number of English-language books from abroad may be obtained in the United States. The 1949 amendment to the Copyright Act, allowing importation of fifteen hundred copies of a foreign work to test the American market, is a step in the right direction. However, this slight relaxation of the requirement will not make even the majority of foreign works available to the American public as the procuring of an ad interim copyright is a conditon precedent to importation. If the market is not sufficiently favorable, and, therefore, no American edition is published within five years, the way is open for pirates to exploit the book. This fact is likely to dissuade publishers from importing copies to test the market unless they are quite sure that the book will sell extensively.

Though better than before, the situation is still far from ideal.

*Unsuccessful Attempts to Reform the Copyright Act*

In the six decades since the United States adopted "international copyright," there have been many attempts to change and reform the law, some successful and some not. None of the efforts designed to bring about the entry of the United States into the International Copyright Union, or to change the copyright law so that it would meet the requirements of the Convention have been successful. Bills advocating entry of the United States into the Union have followed two lines: those proposing immediate entrance, to be effected by treaty with the requisite changes in the copyright law then following either by legislation or automatically; and those proposing changes in the law first, with subsequent entry into the Union. No complete review of the history of these attempts is intended here, but an examination will be made of the more important bills which have sought to abrogate the compulsory manufacturing provision. Although all of these bills suffered several changes and were often re-introduced, each will be considered as an entity under the name of its sponsor.

The Perkins Bill was first introduced in the House on January 2, 1925.[33] Hearings were held that year and again the following year, but it was never passed. The bill was designed to revise the United States Copyright Law and authorized the President to effect and proclaim entry of the United States into the Union. It was drafted by Thorvald Solberg, Register of Copyrights and longtime proponent of

[33] H.R. 5841, 68th Cong., 2d sess. (1925). Re-introduced without change Dec. 17, 1925, H.R. 11258, 69th Cong., 1st sess. (1925).

international copyright, at the instance of the Council of the American Authors League. Of all the bills which proposed the abolition of the compulsory manufacturing provision, this was perhaps the most forward-looking. It abolished that clause entirely, and removed the restrictions against importing copies from abroad when publication had been authorized by the writer. The bill also provided that the American copyright owner could record, with the Bureau of Customs, the Post Office Department, and the Treasury, an agreement stipulating that the foreign publisher to whom he had given publishing rights should not export any reprint copies to this country. In this manner the author would be protected against having his original edition undersold and American publishers, who had undertaken the mass publication of cheaper editions, would not be threatened by competition from abroad.

The Vestal Bill was considered in hearings at the same time the Perkins Bill was discussed, but it had a much longer life in Congress. First brought before Congress early in 1926,[34] it was changed, re-introduced and considered in committee at various times during the ensuing four years. Like its predecessors and successors, it was never passed. This bill did not suggest complete repeal of the compulsory manufacturing clause, but proposed that it be abrogated only with respect to the works of foreign authors. Curtailing the operation of the provision in this manner would have been sufficient reformation to allow United States membership in the International Copyright Union, as a requirement that the works of United States nationals be locally manufactured would not have run afoul of the International Convention. The burden on American authors under the new stipulation was greatly increased, however. Obligatory manufacture was extended to cover practically everything except works of art, and if he failed to comply with those provisions, an American author could not sue for infringement of his copyright. Again, the long and detailed provisions of the bill governing importation of authorized copies from abroad seem to have left much to be desired.

The Duffy Bill resulted from hearings held by the Inter-departmental Committee on Copyright Legislation, organized by Dr. Wallace McClure of the State Department. It was introduced in the Senate in April 1935, and after being amended in committee, was re-introduced[35]

[34] H.R. 10434, 69th Cong., 1st sess. (1926). This bill and its successors are discussed in Solberg, "The Present Copyright Situation," 40 YALE L.J. 184 (1930).

[35] S. 3047, 74th Cong., 1st sess. (1935).

and passed by the Senate on April 7, 1935. While no other bill had been so fortunate, this bill did not achieve complete success. It was not reported out of the House committee in 1936, so failed to pass Congress. An amended bill, introduced in both the House[36] and the Senate,[37] was also unsuccessful; principally because its proposed elimination of the minimum damage clause incurred the opposition of powerful pressure groups.[38] While the requirement was retained for works by American authors, the bill did not necessitate United States manufacture of foreign books. The importation of editions produced abroad was allowed, but only if no American edition had been authorized. That is, whether or not the compulsory manufacturing provision was applicable to the book in the first instance, if an edition was in fact published in this country, then subsequent foreign editions in English were excluded. This provision would have effectively compromised the requirements of membership in the International Copyright Union and the demands of American typographers.

The Daly Bill,[39] which was introduced in 1937 and again in 1939, was the least beneficial of all to foreign authors. Instead of dropping the manufacturing clause altogether, it retained the essentials of that provision in their entirety. The requirements of the Convention were met by allowing foreign authors to have automatic copyright in this country, but while the copyright owner could sue for infringement, he could not get the full benefit of his copyright unless he manufactured in the United States. The proposed law disallowed sale of books in this country unless they had been made here and prohibited the importation of English editions manufactured abroad. Thus, the copyright owner, unless he published in this country, was deprived of most of the benefit of the copyright. While he could prevent piracy, he could not take advantage of the United States market.

The Shotwell Bill,[40] introduced in the Senate in January of 1940, followed the lead of the Vestal and Daly Bills by drastically extending the scope of the manufacturing clause. In requiring all copies of any copyrighted work to be manufactured in the United States if placed on sale here, it included many books, pamphlets, maps, and so forth

[36] H.R. 2695, 75th Cong., 1st sess. (1937).

[37] S. 7, 75th Cong., 1st sess. (1937).

[38] Duffy, "International Copyright," 8 AM. L. REV. 213 (1937). See also Pforzheimer, "Copyright Reform and the Duffy Bill," 47 YALE L.J. 433 (1938).

[39] H.R. 5275, 75th Cong., 1st sess. (1937). Both the Daly Bill and the Duffy Bill are discussed in 51 HARV. L. REV. 906 (1938).

[40] S. 3043, 76th Cong., 3d sess. (1940). Discussed in 12 AM. L. REV. 49 (1941).

which had not been covered by the manufacturing clause of the 1909 act.

> "This proposal to extend compulsory American printing beyond American works and to include every article that can be produced by the printing press, and the proposed enactment of severe penalties for failure to print in the United States, is the most retrogressive copyright proposal possible to present to Congress."[41]

In the case of a work by a foreign author, the bill allowed importation of five hundred copies, but no more than that without loss of protection against the publishing of piratical editions in this country. As noted above, the harshness of these provisions was strongly condemned by many persons interested in freeing copyright of existing restrictions.

### *Conclusions*

It may be observed that only one of the bills just considered advocated the repeal of the manufacturing clause in its entirety and would have allowed the free importation (so far as the Copyright Act was concerned) of books produced abroad. While most of the evils attendant upon the manufacturing provision could be avoided by discontinuing its application to the works of alien authors alone, together with the abolition of copyright restrictions on importation, this writer favors repeal of the compulsory manufacturing provision entirely. American publishers certainly need have no fear of foreign competition, whether the work being published is of American or foreign authorship. In any event, restrictions on manufacture and importation have no place in the Copyright Act and if a change of conditions should necessitate taking steps to protect the United States book-producing industry, this could easily be accomplished through the tariff, which this writer feels is the only proper medium of regulation.

If the whole provision is to be abrogated, several other changes would have to be made concurrently in order to keep the body of the act consistent. It is suggested, then, that along with the repeal of section 16 in its entirety, the act also be changed in the following respects:

1. Section 17, requiring submission of an affidavit showing compliance with the compulsory manufacturing provision, and section 18, imposing a penalty for making a false affidavit, should be repealed.

[41] Solberg, "The New Copyright Bill," 15 NOTRE DAME LAWYER 123 at 135 (1940).

2. In section 13, dealing with the deposit of copies, the reference to the manufacturing clause should be deleted.

3. Section 22, providing for ad interim copyright, should be repealed. This section was originally enacted in order that a foreign author and his American publisher might be protected during the time arrangements were being made to have the work published in the United States. Now, it serves also to protect the author and his prospective American publisher while they are testing the market for the foreign book. With the repeal of the manufacturing provision, there would be no need for this ad interim protection as an alien writer could apply for and obtain copyright in the same manner as do resident authors. Similarly, section 23, which provides for the extension of ad interim to full term protection should be repealed. In section 10, dealing with securing copyright by publication with notice, the exception in favor of books seeking ad interim protection should be deleted.

4. Section 107, preventing importation of piratical editions and of foreign-manufactured books in the English language should be repealed. Section 106 is sufficient to state the prohibition against importation of piratical copies and section 109 appears to provide a method for adequately distinguishing between piratical and authorized copies of a foreign-made book. With the repeal of section 107, however, it might be wise to enact a section excluding foreign reprints even though their publication abroad had been authorized by the writer. This would protect American publishers from being undersold with respect to editions they had undertaken to publish in this country.

The many reasons for repealing the anachronistic manufacturing provision have been stated. It is to be hoped that the provision, which has given rise to more evils than Pandora's Box, will soon be repealed.

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