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THE QUEST FOR INTERNATIONAL COPYRIGHT PROTECTION

*Harry G. Henn**

The past century has witnessed many efforts to establish an effective system of world-wide copyright protection. The most recent attempt, the Universal Copyright Convention of 1952, was signed at Geneva, Switzerland, on September 6, 1952, by forty nations,[1] including the United States.

Presently awaiting ratification by the nations of the world, the Universal Copyright Convention is best understood by a knowledge of (1) the preceding century-long quest for international copyright protection; (2) the present systems of such protection; and (3) the improvement in such protection reasonably to be anticipated from acceptance of the Convention by the nations of the world.

HISTORY OF INTERNATIONAL COPYRIGHT PRIOR TO 1852

The recognition of rights of copyright in foreign works has evolved gradually. So long as contemporary works were distributed almost exclusively within their authors' nations, lack of protection elsewhere caused no serious concern. With the expansion of the publishing industry in the early nineteenth century, however, interest in international copyright increased.[2]

Until a century ago, the general rule, with a few standout exceptions,[3] was that domestic works were eligible for protection and foreign works were not. In determining whether a work was to be treated as domestic or foreign, the two relevant factors were the nationality of the author and the nation of first publication. If both were the same, per the usual situa-

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* See Contributors' Section, Masthead, p. 100, for biographical data.

1 Andorra, Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Cuba, Denmark, El Salvador, Finland, France, German Federal Republic, Guatemala, Haiti, Holy See, Honduras, India, Ireland, Israel, Italy, Japan, Liberia, Luxembourg, Mexico, Monaco, Nicaragua, Norway, Netherlands, Peru, Portugal, San Marino, Spain, Sweden, Switzerland, United Kingdom, United States, Uruguay, and Yugoslavia. Notably absent are the Union of Soviet Socialist Republics and nations in its sphere of influence. Andorra has ratified. The Convention is open to all the nations of the world and not only to those which have signed. Nations which have signed may "ratify" or "accept"; other nations may "accede." Art. VIII. A nation when adhering may designate which of the other "countries or territories for the international relations of which it is responsible" are to be bound by such adherence. Art. XIII. An adhering nation may file a denunciation effective twelve months thercafter. Art. XIV.

2 For discussion of such "profound changes in the conditions upon which the rights of authors were based," see 1 Ladas, The International Protection of Literary and Artistic Property 23-24 (1938).

3 1 Ladas, op. cit. supra note 2, at 16-23.

tion, such nationality was attributed to the work; if they differed, the result frequently depended upon whether the nation where protection was sought followed the so-called "nationality-of-the-work" or "nationality-of-the-author" principle.

The "nationality-of-the-work" principle was a territorial concept, under which the place of first publication determined the matter.[4] Works first published within a nation's boundaries were regarded as domestic works and hence eligible for protection, regardless of the author's nationality, while works first published elsewhere were deemed foreign and denied protection.

The "nationality-of-the-author" principle emphasized personal status.[5] Works by nationals, whether citizens or domiciliaries, were deemed domestic works regardless of place of publication; works by foreign authors were denied protection.

Even where a work qualified for protection, by compliance with whatever formalities were prescribed by the domestic law, such protection often failed to protect against unauthorized translation—obviously the most important aspect of copyright for international purposes. At that time, "few countries placed translations of a work on the same footing as other reproductions of the original work . . . the author's exclusive right to authorize the translation of his work was subject to various restrictions." [6]

Such was the background in the early nineteenth century when the more intellectually-advanced nations of the world became increasingly concerned with international copyright: primarily, with the problem of protection abroad for their domestic works, and, secondarily, with the necessarily tied-in corollary, their protection of foreign works. Gradually, domestic copyright laws were revised and some treaties, both bipartite and multipartite, were negotiated to establish reciprocal national treatment under which eligible foreign works could enjoy the same copyright status as domestic works.[7] Because of conflicting interests and the necessity of compromise,[8] progress was slow until mid-century.

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[4] 1 Ladas, op. cit. supra note 2, at 32, 198-199. Most nations which applied this principle for published works resorted to the "nationality-of-the-author" principle for unpublished works. The Berne Convention incorporates such a mixed system. The Universal Convention establishes a somewhat involved combination of both principles. See note 86 infra.

[5] 1 Ladas, op. cit. supra note 2, at 32-33, 198-199.

[6] 1 Id. at 38-40, 58-61.

[7] 1 Id. at 24-27, 44-46.

[8] ". . . Some peoples, who had no literature of their own, lived at the expense of those with a rich and prosperous literature. National industries had developed supplying the domestic market, and they were reluctant to yield their interests to those of foreign authors and foreign publishers. On the other hand, foreign works were badly adapted or mutilated for the domestic market, and another group of persons interested in art and literature organ-

1852-1952

French Decree of March 28, 1852

The French Decree of March 28, 1852 was a landmark of international copyright progress, by extending protection to all works regardless of their place of publication or the nationality of their authors. This altruistic granting of protection to all foreign works without condition of reciprocity, was the converse of the then generally prevailing approach of nations which insisted on foreign protection for their works as a prerequisite or condition to their protection of foreign works. While the French example was not generally followed by other nations, it did provide substantial impetus to the adoption of widespread systems of treaties for reciprocal copyright protection.[9] Contemporaneously, the exclusive right to translate came more and more to be recognized as part of that growing bundle of rights encompassed by copyright.[10]

Berne Convention of 1886 *and Revisions*

In September, 1858, the first international congress of authors and artists met in Brussels and endorsed the principle of international recognition of copyright regardless of reciprocity, and the ideal of world-wide uniform copyright legislation. Subsequent international copyright sessions were held in 1861 and from 1877 on.[11]

The first Berne Conference in 1883 was also unofficial, but inter-governmental conferences at Berne followed in 1884, 1885, and 1886.[12] The Berne Convention of 1886 resulted.

This pioneer convention promulgated the principle of national treatment, but, by way of exception, prescribed that the enjoyment of such rights was "subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin"; limited duration of protection abroad to the period of protection in the country of origin;[13] and

ized and demanded that the social interest in the production and publication of the genuine works of foreign authors be secured and protected. Furthermore, national writers and artists found that their interests were prejudiced by the abundant publication and sale of unauthorized foreign works at cheap prices."

1 Ladas, op. cit. supra note 2, at 24.

[9] 1 Id. at 27-32, 46-67. At the present time, France, Luxembourg, and Portugal protect unconditionally all works regardless of the nationality of their authors or their places of first publication. For the current application of the domestic copyright laws of the various nations of the world, without the mollifying effect of multilateral conventions, bilateral treaties or special legislation (orders, proclamations, etc.) see 4 UNESCO Copyright Bulletin Nos. 1-2, pp. 14-15 (1951).

[10] 1 Ladas, op. cit. supra note 2, at 368-393.

[11] 1 Id. at 71-75.

[12] 1 Id. at 75-86.

[13] Berne Convention of 1886 and Annexed Acts, reprinted in 2 Ladas, op. cit. supra note 2, at 1123-1134, Art. II.

required protection against unauthorized translation until the expiration of ten years from the date of publication of the original work.[14]

The Berne Convention established the so-called Berne Union (or International Copyright Union) open to all the nations of the world.[15] Its five successive revisions in 1896,[16] 1908,[17] 1914,[18] 1928,[19] and 1948,[20] eventually abolished formalities altogether for convention purposes, making protection automatic upon the creation of a work by an author who was a national of a Berne Union nation, independently of existence of protection in the country of origin;[21] promoted the life of the author and fifty years thereafter as a minimum period for duration of copyright;[22] extended translation rights for the full duration of copyright[23] (permitting some reservations[24]); fostered the so-called doctrine of moral

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14 Id. Art. V.

15 Id. Arts. I, XVIII. Interestingly, the German delegation unsuccessfully proposed substituting the term Convention universelle for the word Union mainly on the grounds that the latter could not be readily translated into German and was not appropriate in view of the different copyright systems of the adhering nations. 1 Ladas, op. cit. supra note 2, at 81. The Berne or International Copyright Bureau, established by the convention, has substantially advanced the study of copyright, and has published the monthly French-language periodical on copyright entitled Le Droit d'Auteur.

16 Additional Act and Declaration, signed at Paris, May 4, 1896 (hereinafter sometimes called the Paris Revision), reprinted in 2 Ladas, op. cit. supra note 2, at 1135-1140.

17 Revised Berne Convention for the Protection of Literary and Artistic Works, signed at Berlin, November 13, 1908 (hereinafter sometimes called the Berlin Revision), reprinted in 2 Ladas, op. cit., supra note 2, at 1141-1154.

18 Additional Protocol to the International Copyright Convention of Berlin, signed at Berne, March 20, 1914 (hereinafter sometimes called the Additional Protocol), reprinted in 2 Ladas, op. cit. supra note 2, at 1155-1156. The Additional Protocol permitted retaliation against the works of non-Berne Union nationals. See note 26 infra.

19 Revised Convention for the Protection of Literary and Artistic Works, signed at Rome, June 2, 1928 (hereinafter sometimes called the Rome Revision), reprinted in 2 Ladas, op. cit. supra note 2, at 1156-1174.

20 Acts of the Brussels Conference (1948) for the Revision of the Berne Convention of the International Union for the Protection of Literary and Artistic Works (hereinafter sometimes called the Brussels Revision), reprinted in 1 UNESCO Copyright Bulletin No. 2, pp. 114-135 (1948). See 1 id. No. 2, at 10-29 for a short account of its chief innovations.

21 Rome Revision Art. 4; Brussels Revision Art. 4.

22 Rome Revision Art. 7; Brussels Revision Art. 7. Only the latter fixed the life of the author and fifty years after his death as a minimum term of protection for all works, excepting only cinematographic works, photographic works, and works of applied art (which are to enjoy national treatment but not exceeding term fixed in country of origin), and anonymous and pseudonymous works of unknown authorship (which are to be protected for fifty years from date of publication).

23 Rome Revision Art. 8; Brussels Revision Art. 8.

24 Rome Revision Art. 25; Brussels Revision Art. 25. Among permissible reservations, an adhering nation may substitute for Article 8 (supra note 23) the provisions of Article 5 of the Paris Revision of 1896 on the understanding that those provisions shall apply only to translations into the language or languages of that nation. Article 5 requires recognition of the author's exclusive right to translate after ten years following publication only if a

rights;[25] and covered works by nationals of non-Berne Union nations first (or simultaneously) published in a Berne Union nation.[26]

With the principal exception of the Union of Soviet Socialist Republics, most European nations and their colonies, the British Commonwealth of Nations (including Australia, Canada, India, New Zealand, Pakistan, and the Union of South Africa), Lebanon and Syria in the Near East, Morocco and Tunisia in North Africa, Japan and Thailand (Siam) in the Far East,

translation in the language involved was published within such ten-year period. Ireland, Japan, Thailand (Siam), Turkey, and Yugoslavia have made such reservations. Greece, by an earlier reservation, is bound by Article 5 of the Berne Convention of 1886 (supra note 14). It is considered "self-evident" that works and authors of a "reservation" nation may invoke no greater protection in another Berne Union nation than that granted by such "reservation" nation. 4 UNESCO Copyright Bulletin Nos. 1-2, p. 103 (1951).

25 Rome Revision Art. 6, bis; Brussels Revision Art. 6, bis: "Independently of the author's copyright, and even after the transfer of the said copyright, the author shall have the right, during his lifetime, to claim authorship of the work and to object to any distortion, mutilation or other alteration thereof, or any other action in relation to the said work, which would be prejudicial to his honour or reputation." See Roeder, "The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators," 53 Harv. L. Rev. 554 (1940).

26 Rome Revision Art. 6; Brussels Revision Art. 6. Non-Berne Union nationals enjoy the rights granted by the convention. Ibid. Berne Union nationals, on the other hand, are accorded the rights which the respective laws of the other Berne Union nations afford and "the rights specially granted" by the convention. Id. Art. 4. Because of the usual conformity between the convention and the domestic copyright laws of most Berne Union nations, the same protection is frequently available under the convention as under the domestic laws. See id. Art. 4: "In the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin." Under the Rome Revision, the word "simultaneously" probably means on the same day, notwithstanding the fourteen-day provisos in the Canadian Copyright Act [R.S.C. c. 32, § 3(2), (4) (1927)] and British Copyright Act [Copyright Act, 1911, 1 & 2 Geo. 5, c. 48, §35(3)] deeming publication simultaneous if no more than fourteen days intervene. 1 Ladas, op. cit. supra note 2, at 310; Kilroe, "Outline of Lecture on International Copyright" (Practising Law Institute, Nov. 30, 1944); Stern, "Reflections on Copyright Law," 21 N.Y.U.L. Rev. 506, 509 (1946). Contra: Wittenberg, The Protection and Marketing of Literary Property 53 (1937). The Brussels Revision Art. IV(3), added to the definition of simultaneous publication: "A work shall be considered as having been published simultaneously in several Countries which has been published in two or more Countries within thirty days of its first publication." The term "publication" is not defined in the Rome Revision Art. 4(4) which provides only that "By 'published works' ('oeuvres publiees') must be understood . . . works which have been issued ('oeuvres editees')," but is generally regarded as synonomous with "edition," which involves making available for public sale or distribution from a center of distribution copies of the work in quantities sufficient to satisfy the reasonable demands of the domestic market. The Paris Conference of 1896 expressly refused to adopt the requirement that works of non-Union authors be manufactured in the Union country of first publication. 1 Ladas, op. cit. supra note 2, at 297; Hearings before Committee on the Judiciary on H.R. 2285, 81st Cong., 1st Sess. 12, 14, 29 (1949). The Brussels Revision Art. 4(4) defines "published works" to be "works copies of which have been issued and made available in sufficient quantities to the public, whatever may be the means of manufacture of the copies." This English text is inconsistent with the French text which in case of dispute prevails. Fisher, the Berne Convention for the Protection of Literary and Artistic Works as Revised at Brussels, Belgium in June 1948 2-4 (1949). A Berne Union nation may limit its

and Brazil (alone of the western hemisphere republics[27]) are members of the Berne Union. The Rome Revision of 1928 still governs relations among most of such nations. However, fourteen Berne Union nations[28] have ratified the Brussels Revision of 1948, and three nations[29] have since joined the Union. As among these seventeen nations, the Brussels Revision, of course, controls. Thailand (Siam) and South West Africa have ratified only the Berlin Revision of 1908.[30]

Inter-American Copyright Conventions

Contemporaneously with the development of the Berne Union, another set of some six multipartite copyright conventions evolved in the western hemisphere.[31] The most notable of these so-called Inter-American or

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protection of works by non-Berne Union authors by narrowly defining "publication" (see note 117 infra) or by invoking the permissible retaliatory provisions "where any country outside the Union fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union." Brussels Revision Art. 6. Similar provisions date back to the Additional Protocol of 1914. Canada has invoked such provisions in order to apply its compulsory licensing provisions to works of American authors first (or simultaneously) published in any Berne Union nation. Unpublished works by non-Berne Union nationals are not protected under the Berne Union. Rome Revision Arts. 4, 6; Brussels Revision Arts. 4, 6.

27 Haiti was a member from December 5, 1887, to March 26, 1943.

28 Belgium, Brazil, France and Algeria, Holy See, Italy, Liechtenstein, Luxembourg, Monaco, Morocco (French Zone), Portugal, Spain, Tunisia, Union of South Africa, and Yugoslavia (maintaining translation reservations, supra note 24).

29 Israel, Philippines, and Turkey (filing translation reservation, supra note 24).

30 With translation reservation by Thailand (Siam). See note 24 supra.

31 Convention of Montevideo on Literary and Artistic Property, signed January 11, 1889 (hereinafter sometimes called the Montevideo Convention); Convention for the Protection of Literary and Artistic Copyright, signed at Mexico, January 27, 1902 (hereinafter sometimes called the Mexico City Convention); Convention for the Protection of Patents of Invention, Drawings and Industrial Models, Trade-Marks and Literary and Artistic Property, signed at Rio de Janeiro, August 23, 1906; Convention Concerning Literary and Artistic Copyright, signed at Buenos Aires, August 11, 1910 (hereinafter sometimes called the Buenos Aires Convention); Revision of the Convention of Buenos Aires Regarding Literary and Artistic Copyright, signed at Havana, February 18, 1928; Inter-American Convention on the Rights of the Author in Literary, Scientific, and Artistic Works, signed at Washington, June 22, 1946 (hereinafter sometimes called the Washington Convention). All are reprinted in Canyes, Colborn and Piazza, Copyright Protection in the Americas (Pan-American Union Law and Treaty Series No. 33) 187-213 (2d ed. 1950); 1 UNESCO Copyright Bulletin No. 2, pp. 94-113 (1948) and 2 id. No. 1, pp. 102-127 (1949); and all except the Washington Convention in 2 Ladas, op. cit. supra note 2, at 1175-1191. The Washington Convention has been criticized. Warner, S. B., International Copyright and the Washington Convention (Copyright Office, 1949); see also Note, "The Inter-American Copyright Convention: Its Place in United States Copyright Law," 60 Harv. L. Rev. 1329 (1947). It has been ratified by Argentina (deposit of ratification pending), Bolivia, Brazil, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Paraguay. There have been other Pan-American attempts to formulate copyright conventions, e.g., Caracas Convention of 1911, the General Treaties of Peace and Amity in 1907 and 1923. See Canyes, Colborn and Piazza, supra at 11-22.

Pan-American Copyright Conventions, which, with the exception of the Montevideo Convention of 1889, are open to adherence only by western hemisphere republics,[32] is the Buenos Aires Convention of 1910. The United States and all of the Latin-American nations except Bolivia, Chile, Cuba, El Salvador,[33] and Venezuela have ratified the Buenos Aires Convention. Mexico, while recently ratifying, has not yet deposited its ratification.

Of the sixteen articles comprising the Buenos Aires Convention, four of the more important are:

. . .

> "3rd—The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right, in all the other States, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.[34]

. . .

> "4th—The copyright of a literary or artistic work, includes for its author or assigns the exclusive power of disposing of the same, of pub-

[32] The Montevideo Convention was open to adherence by all nations, subject to the acceptance of the signatory nations. Art. 16; Montevideo Convention Additional Protocol Art. 6. Austria, Belgium, France, Germany, Hungary, Italy, and Spain have adhered. All of these adherences were accepted by Argentina; all except Belgium by Paragnay: and those of Austria, Germany, and Hungary by Bolivia. No adherences have been accepted by the two other signatory nations, Peru and Urugnay. 2 UNESCO Copyright Bulletin No. 1, p. 102 (1949). The Montevideo Convention Art. 2 provided that the author and his successors should "enjoy in the signatory States, the rights accorded them by the law of the State in which first publication or production took place."

[33] The Mexico City Convention still governs relations between El Salvador and the United States and between El Salvador and the Dominican Republic. The Mexico City Convention Arts. 4, 5, 6, require that the claimants comply with the law of the country of origin and, when filing appropriate applications there, state that protection is desired in specified convention nations and accompany the applications with extra deposit copies to be forwarded by such country of origin to the specified convention nations, as a basis for claiming the rights afforded under the laws of the latter to their own citizens. Article 3 of the Mexico City Convention defines copyright as including the exclusive translation right, but there is some doubt that El Salvador recognizes such right. 5 UNESCO Copyright Bulletin No. 1, p. 111 (1952).

[34] Presumably, once a copyright is acknowledged in any adhering nation, in conformity with its laws, compliance with any other formality in any other adhering nation (whether condition precedent to securing or enforcing copyright or condition subsequent) is not necessary for protection in the latter so long as the work carries a notice reserving the property right. Presumably, the United States form of statutory copyright notice constitutes "a statement that indicates the reservation of the property right," but the more cautious procedure is to add "all rights reserved" and even to refer to the Pan-American Copyright Conventions. See 1 Ladas, op. cit. supra note 2, at 661-663; see also Sanders, "The Protection of Intellectual Property of American Citizens in Latin America," 139 Publ. W'kly 2456-2457 (June 21, 1941). Cf. Todamerica Musica, Ltda. v. Radio Corporation of America, 171 F. 2d 369 (2d Cir. 1948); Portuando v. Columbia Phonograph Co., 81 F. Supp. 355 (S.D.N.Y. 1937). Article 3rd, it should be noted, does not use the terms "country of origin" or "publication." See note 37 infra.

lishing, assigning, translating or authorizing its translation and reproducing it in any form whether wholly or in part.[35]

. . .

"6th—The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin.[36]

. . .

"7th—The country of origin of a work will be deemed that of its first publication in America, and if it shall have appeared simultaneously in several of the signatory countries, that which fixes the shortest period of protection."[37]

The United States Copyright System

The United States scheme for protecting the works of authors has involved a dual system with somewhat paradoxical features. Generally speaking, protection is available before publication on common-law principles, and thereafter only by means of Federal statutory copyright.

At common law, protection accrues automatically upon the creation of the work; vests in the author regardless of his nationality or the place of creation of the work; and includes full control over all uses of the work perpetually prior to publication.[38] Upon publication, this so-called com-

[35] While recognizing the right to translate, Article 4th prescribes no minimum period of protection therefor. The briefest period of protection of translation rights might constitute sufficient recognition. Bogsch and Roach, "Commentary on the Supplementary Request for Views," 4 UNESCO Copyright Bulletin Nos. 1-2, pp. 9, 27 (1951). Quaere, as to effect of special formalities relating to translation rights imposed by Argentina, Dominican Republic, Guatemala, and Nicaragua and limited recognition of translation rights by Colombia, Mexico, Panama, and Peru. Id. at 26. See note 36 infra.

[36] It has been contended that both authors and assigns, if any, must be citizens or domiciled foreigners of an adhering nation. See Note, 69 Harv. L. Rev. 1329, 1331 (1947). Presumably, the Buenos Aires Convention does not affect the domestic status of works by domestic authors. Protection is afforded by Article 6th on the principle of lex fori. For summaries of copyright protection under the domestic laws of the several Pan-American nations, see Canyes, Colborn and Piazza, op. cit. supra note 31, at 25-157; Bogsch and Roach, International Copyright Part III (South America and Mexico), 4 UNESCO Copyright Bulletin No. 4, pp. 12-95 (1951), Bogsch and Roach, International Copyright, Part IV (United States and Central America), 5 id. No. 1, pp. 78-151 (1952).

[37] Quaere, whether an unpublished work is protected. Literally, such protection is not precluded by the provisions of the Buenos Aires Convention. Bogsch and Roach, International Copyright, 4 UNESCO Copyright Bulletin No. 4, p. 17 n. (b) (1951). Contra: Canyes, Colburn and Piazza, op. cit. supra note 31, at 13; 1 Ladas, op. cit. supra note 2, at 661. This Article 7th definition of "country of origin" literally relates to duration of protection. It has been contended that the acknowledgment of copyright required by Article 3rd must be in the country of origin (1 Ladas, op. cit. supra note 2, at 660), and that the work must be published in an adhering nation by a national of that nation. Canyes, Colborn and Piazza, op. cit. supra note 31, at 13. No minimum period of protection, it should be noted, is preseribed.

[38] Palmer v. DeWitt, 47 N.Y. 532 (1872); Harper & Bros. v. M. A. Donohue & Co., 144

mon-law copyright ends and thereafter protection must be sought under the federal copyright statute.[39]

Federal statutory copyright protection is based on the United States Constitution, which empowers Congress to promote the progress of science by securing for limited times to authors the exclusive right to their respective writings;[40] is traditionally dependent upon strict compliance with prescribed formalities;[41] may be secured in the writings[42] only of eligible authors;[43] and comprises the bundle of exclusive rights specifically enumer-

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Fed. 491, 492 (N.D. Ill. 1905), aff'd per curiam, 146 Fed. 1023 (7th Cir. 1906); Baron v. Leo Feist, Inc., 78 F. Supp. 686 (S.D.N.Y. 1948), aff'd, 173 F.2d 288 (2d Cir. 1949). These rights are preserved by the United States Copyright Act. 17 U.S.C. § 2 (Supp. 1952). They are implemented by legislation in some states.

39 Wheaton v. Peters, 8 Pet. 591 (U.S. 1834). By "publication" is meant a "general publication" as distinguished from "limited publication." Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904). Publication which results in loss of common-law protection is not necessarily synonymous with publication necessary to secure statutory copyright. "It will be harder to prove a divestitive than an investitive publication." DeWolf, An Outline of Copyright Law 32 (1925). The term "publication" is not defined in the United States Copyright Act and has different meanings in different contexts. Unauthorized publication, in the absence of special circumstances involving acquiescence or estoppel, does not affect the proprietor's rights. Statutory copyright has been available since 1909 for certain classes of works not reproduced in copies for sale, that is, unpublished at the time registration and deposit are made, and hence generally denominated "unpublished works." 17 U.S.C. §12 (Supp. 1952). The securing of such statutory copyright probably terminates the common-law copyright. Photo-Drama Motion Picture Co. v. Social Uplift Film Corp., 220 Fed. 448, 450 (2d Cir. 1915); Supreme Records, Inc. v. Decea Records, Inc., 90 F. Supp. 904 (S.D. Cal. 1950). But see DeWolf, supra, at 34; Wittenberg, op. cit. supra note 26, at 13 (1937).

40 U.S. Const. Art. I, §8, cl. 8. Fenning, "The Origin of the Patent and Copyright Clause of the Constitution," 17 Geo. L. J. 109 (1929). The same constitutional provision, with its emphasis on the promotion of the public interest, also provides the basis for congressional patent enactments, and the courts draw frequent analogies between the two fields. Wolff, "Copyright Law and Patent Law; A Comparison," 27 Iowa L. Rev. 250 (1942); Umbreit, "A Consideration of Copyright," 87 U. of Pa. L. Rev. 932 (1939). American patents are available on equal terms to all inventors regardless of their nationality. 35 U.S.C.A. §101 (Supp. 1952). It has been contended that securing greater copyright protection abroad for American authors does not promote the public interest. Warner, "The UNESCO Universal Copyright Convention," 1952 Wis. L. Rev. 493, 496, criticized in Schulman, "Another View of Article III of the Universal Copyright Convention," 1953 Wis. L. Rev. 297.

41 Such formalities have traditionally included the affixation of a copyright notice on all published copies [since Act of April 29, 1802 (2 Stat. 171)]; the registration of claim to copyright and renewal and the deposit of copies [since Act of May 31, 1790 (1 Stat. 124)]; the recordation of assignments of copyright [since Act of June 30, 1834 (4 Stat. 792), cf. Act of May 31, 1790, §2]. See Heard, "Notice of Copyright," 27 A.B.A.J. 430 (1941); Warner, "What Should We Do About International Copyright?" Patent Law Ass'n. of Pittsburgh Pub'n No. 40, p. 7 (1949); Warner, "U.S. Copyright Act: Anti-Monopoly Provisions Need Some Revision," 34 A.B.A.J. 459 (1948). See notes 59 and 61 infra.

42 U.S. Const. Art. I, §8, cl. 8; 17 U.S.C. §§4, 5 (Supp. 1952).

43 See pages 52-55, infra. Generally, at the present time (1) United States citizens; (2) persons domiciled in the United States at the time of first publication of the work involved [cf. Leibowitz v. Columbia Graphophone Co., 298 Fed. 342 (S.D.N.Y. 1923) (domiciled alien of non-proclaimed country held not eligible to secure statutory copyright in unpublished

ated in the statute[44] for an original term of years and, if renewed properly, for a subsequent second (or renewal) term.[45]

The United States has been among the most parochial of nations so far as copyright protection for published works is concerned. For over a hundred years, this nation not only denied copyright protection to published works by foreigners, applying the "nationality-of-the-author" principle, but appeared to encourage the piracy of such works.[46] The automatic protection available under the common law for all works prior to publication regardless of nationality of the author, was of little comfort to most foreign authors and publishers to whom post-publication protection was of primary practical importance. Under such circumstances, other nations were understandably reluctant to protect American works.

Senator Henry Clay, in his famous Senate report of 1837, urged reform,[47] and there was considerable talk of "a universal republic of letters;

work)]; (3) citizens of "proclaimed countries" (see note 71 infra); and (4) so-called "stateless authors" [Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. 2d 306 (2d Cir. 1939), cert. denied, 308 U.S. 597 (1939)]; 17 U.S.C. §9 (Supp. 1952). Since the rights of copyright are derived from the author, although the Act prescribes that in all cases the copyright be secured in the name of the "copyright proprietor," the eligibility of the author is the controlling criterion. 17 U.S.C. §19 (Supp. 1952); Bong v. Alfred S. Campbell Art Co., 214 U.S. 236 (1909).

44 17 U.S.C. §1 (Supp. 1952); Kreymborg v. Durante, 21 U.S.P.Q. 557, 22 U.S.P.Q. 248 (S.D.N.Y. 1934); and Michelson v. Shell Union Oil Corp., 26 F. Supp. 594 (D. Mass. 1940) [changed by 66 Stat. 752 (1952)].

45 The Act of May 31, 1790 (1 Stat. 124) prescribed an original term of fourteen years and a renewal term of fourteen years. The Act of February 3, 1831 (4 Stat. 436) expanded the original term to twenty-eight years, and the Act of March 3, 1909 (35 Stat. 1075) increased the renewal term to twenty-eight years. Besides the United States, only the Philippines provides for renewal (thirty-year terms).

46 The first federal copyright law, the Act of May 31, 1790 (1 Stat. 124) afforded protection for maps, charts, and books by American citizens or residents and expressly provided that nothing therein should 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, printed, or published by any person not a citizen of the United States, in foreign parts or places within the jurisdiction of the United States." On May 2, 1783, the Continental Congress had recommended that the thirteen states enact copyright legislation to protect authors and publishers, citizens of the United States. From 1783 to 1786, all but Delaware passed such laws. Connecticut, Georgia, Massachusetts, New Hampshire, New York, North Carolina, and Rhode Island protected only works of United States residents, provided that the states of their residence passed similar laws. North Carolina excluded also works first published abroad. New Jersey and Virginia protected United States residents without reciprocity. The Maryland law, which had no nationality-of-author restriction, and the Pennsylvania law, which had, were not to come into force until similar laws were passed by all the other states. South Carolina excluded only "any book in Greek, Latin, or any other foreign language, printed beyond the seas." Copyright Enactments of the United States, 1783-1906, 11-31 (2d ed. 1906); Fenning, "Copyright Before the Constitution," 17 J. Pat. Off. Soc'y 379 (1935); Solberg "Copyright Reform: Legislation and International Copyright," 14 Notre Dame Law. 343, 354-355 (1939).

47 Sen. Rep. No. 134, 24th Cong., 2d Sess. (1837).

whose foundation shall be one just law." [48] Discussions continued almost unabated, except for the Civil War period, for more than half a century.[49] The author's exclusive right to translate, providing it was reserved, was recognized in 1870.[50]

Eventually, the Chace Act was enacted on March 3, 1891.[51] For the first time, American statutory copyright was made available to non-resident foreigners provided that their nation was proclaimed by the President as either permitting American citizens "the benefit of copyright on substantially the same basis as its own citizens" or being a party to an international agreement providing "for reciprocity in the granting of copyright" to which agreement the United States might, at its pleasure, adhere.[52] Introduced into American copyright law as part of the same enactment was the so-called manufacturing clause which required that a book, photograph, chrome or lithograph be "printed from type set within the limits of the United States, or from plates made therefrom, or from negatives, or drawings on stone made within the limits of the United States, or from transfers made therefrom."[53] Among other changes, the Chace Act recognized fully the exclusive right to translate.[54]

A form of temporary (interim) copyright protection was established in 1904 and made available to foreign-manufactured works intended for exhibition at the Louisiana Purchase Exposition,[55] and was extended in 1905 to foreign-manufactured books in a foreign language first published abroad.[56]

On April 9, 1908, the first of the only two multipartite copyright conventions which the United States has ever ratified—the Mexico City Convention of 1902—became effective between the United States and Costa Rica, Dominican Republic, El Salvador, Guatemala, Haiti, and Nicaragua.[57]

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[48] Nicklin, Remarks on Literary Property (1838), quoted in Bowker, Copyright, Its History and Its Law 345 (1912).

[49] Bowker, op. cit. supra note 48, at 341-363.

[50] Act of July 8, 1870 (16 Stat. 212) §86 stated ". . . and authors may reserve the right to dramatize or to translate their own works." Before then a translation was deemed not a copy and hence not an infringement. Stowe v. Thomas, 23 Fed. Cas. 201, No. 13,514 (C.C.E.D. Pa. 1853).

[51] 26 Stat. 1106 (1891).

[52] Act of March 3, 1891 (26 Stat. 1106) §13.

[53] Id. §3.

[54] Id. §1.

[55] Act of January 1, 1904 (33 Stat. 4).

[56] Act of March 3, 1905 (33 Stat. 1000).

[57] The Mexico City Convention still governs copyright relations between the United States and El Salvador. See note 33 supra.

The present United States Copyright Act of March 3, 1909[58] established publication with proper copyright notice[59] as the principal formality for securing statutory copyright; permitted certain limited classes of works not reproduced in copies for sale to be registered for statutory copyright prior to publication;[60] and made registration and deposit of copies of published works in the United States Copyright Office a condition precedent to suit for infringement of the copyright and not generally a condition to the securing of the copyright.[61] All copies of a copyrighted work published or offered for sale in the United States by authority of the copyright proprietor were required to bear a proper copyright notice to prevent the work from falling into the public domain,[62] and the renewal

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[58] 35 Stat. 1075 (1909).

[59] 17 U.S.C. §10 (Supp. 1952). The copyright notice must follow the statute precisely both as to form and as to location. The prescribed form is the word "Copyright" or the abbreviation "Copr." accompanied by the name of the copyright proprietor, and, in the case of a printed literary, musical, or dramatic work, the year in which the copyright was secured. An alternative form of notice—"©"—accompanied by the initials, monogram, mark, or symbol of the copyright proprietor, so long as his name appears elsewhere on the work, is permissible only for 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. 17 U.S.C. §19 (Supp. 1952). The loeation of the notice is rigidly specified for various classes of works. 17 U.S.C. §§19, 20 (Supp. 1952). Apparently exempted from the notice requirements are copies of works by foreigners first published abroad and protected there so long as such copies are not published in the United States. Heim v. Universal Pictures Co., 154 F. 2d 480 (2d Cir. 1946), noted in 22 N.Y.U.L.Q. Rev. 105 (1947); Italian Book Co. v. Cardilli, 273 Fed. 619 (S.D.N.Y. 1918), noted in 7 Cornell L.Q. 152 (1922). Contra: Basevi v. Edward O'Toole Co., 26 F. Supp. 41 (S.D.N.Y. 1939). See discussion in Katz "Is Notice of Copyright Necessary in Works Published Abroad?—A Query and a Quandary," 1953 Wash. U.L.Q. 55. See also Buenos Aires Convention Art. 3rd, note 34 supra and notes 61 and 65 infra.

[60] 17 U.S.C. §12 (Supp. 1952).

[61] 17 U.S.C. §13 (Supp. 1952). Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939), noted in 8 Geo. Wash. L. Rev. 184 (1939); 52 Harv. L. Rev. 837 (1939); 14 St. John's L. Rev. 169 (1939); 24 Wash. U.L.Q. Rev. 420 (1939); Lumiere v. Pathe Exchange, Inc., 275 Fed. 428 (2d Cir. 1921); National Cloak & Suit Co. v. Kaufman, 189 Fed. 215 (M.D.Pa. 1911). Registration and deposit are conditions precedent to the securing of statutory copyright in works not reproduced in copies for sale [17 U.S.C. §12 (Supp. 1952)] and to the securing of ad interim copyright (see note 66 infra). Failure to register and deposit upon the demand of the Register of Copyrights results in loss of copyright. 17 U.S.C. §14 (Supp. 1952). Prior to the 1909 Act, registration and deposit were a condition precedent to the securing of the copyright.

[62] 17 U.S.C. § 10 (Supp. 1952). Changes in the form of notice are permissible (1) where the copyright has been assigned by a written instrument recorded in the Copyright Office, in which case the name of the new proprietor "may" be substituted. 17 U.S.C. § 32 (Supp. 1952); Group Publishers, Inc. v. Winchell, 86 F. Supp. 573 (S.D.N.Y. 1949) (holding that substitution of assignee's name prior to recordation of assignment invalidates copyright); (2) where the copyright has been renewed, in which case the name of the renewal proprietor and the renewal date may be substituted. Fox Film Corp. v. Knowles, 274 Fed. 731, 733 (E.D.N.Y. 1921), aff'd per curiam, 279 Fed. 1018 (2d Cir. 1922), rev'd on other grounds, 261

term was extended from fourteen to twenty-eight years, making the maximum duration of protection fifty-six years.[63] The Act continued protection of works by American citizens or domiciliaries or by citizens or subjects of proclaimed foreign nations. To the two existing bases for Presidential proclamation prescribed by the Chace Act was added a third basis: the granting by a foreign nation to American citizens of "copyright protection substantially equal to the protection secured" such foreign nation's nationals by American law or treaty.[64] The manufacturing clause was revised to require that the text of all copies of a book or periodical (except a book of foreign origin in a foreign language) afforded protection be type-set, printed, and bound in the United States,[65] and ad interim copyright was accordingly limited to "The case of a book published abroad in the English language before publication in this country." [66]

On July 13, 1914, the ratification by the United States of the Buenos Aires Convention of 1910 became effective—the most progressive international copyright step taken to this day by the United States which has studiously avoided other international copyright convention commitments. Still in force between the United States and most of the Latin-American countries, as stated above, the Buenos Aires Convention requires that an eligible work protected in one of such countries and bearing simply a notice reserving the property right be protected in the others.[67]

In 1949, the manufacturing clause was relaxed to exempt from its requirements up to fifteen hundred copies of a book or periodical of foreign origin in the English langnage protected by ad interim copyright;[68] the

U.S. 326 (1923); and (3) where the work is included as part of another copyrighted work or has been revised and is copyrighted as a new version in which case the name of the proprietor of the new work or version and its copyright date may be used. 17 U.S.C. § 7 (Supp. 1952); National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2d Cir. 1951); Wrench v. Universal Pictures Co., 104 F. Supp. 374 (S.D.N.Y. 1952).

63 17 U.S.C. § 28 (Supp. 1952). In the case of works not reproduced for sale, the twenty-eight year period runs from the date of deposit. Marx v. United States, 96 F.2d 204 (9th Cir. 1938). The renewal provisions have presented numerous problems of construction. See Brown, "Renewal Rights in Copyright," 28 Cornell L.Q. 460 (1943); Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909," 44 Col. L. Rev. 712 (1944).

64 17 U.S.C. § 9 (Supp. 1952).

65 Act of March 3, 1909 (35 Stat. 1078) § 15. Appleman, "Compromise in Copyright," 19 B.U.L. Rev. 619, 627-632 (1939); Toulmin, "Printing in the United States under the Copyright Law," 10 Va. L. Rev. 427 (1924). The term "books" in the exception was construed to include periodicals. See note 68 infra.

66 Act of March 3, 1909 (35 Stat. 1080) §§ 21, 22. The Copyright Office also accepted otherwise qualified periodicals for ad interim registration and deposit. See note 69 infra.

67 See note 34 supra. A prominent American student of copyright law wrote: "Thus the American dream of 1838 of 'a universal republic of letters whose foundations shall be one just law' is well on the way toward realization." Bowker, op. cit. supra note 48, at v.

68 17 U.S.C. § 16 (Supp. 1952); Hearings Before Committee on the Judiciary on H.R.

duration of ad interim copyright was extended from one year to five years following first publication abroad;[69] and the four-dollar registration fee was waived, because of the difficulty of international monetary exchange, in the case of a foreign author or proprietor who within six months of first publication abroad submitted to the Copyright Office an extra copy of the work and a satisfactory catalog card.[70]

Presidential proclamations have been issued from time to time covering most of the nations of the world, including most of the Latin-American nations which have not ratified the Buenos Aires Convention.[71] Under such proclamations, works by foreigners are given American statutory copyright protection on the same basis as works by Americans (including compliance with prescribed formalities and the slightly-relaxed manufacturing clause) on the theory—not always realized in practice—that American works either are afforded national treatment abroad or are protected there substantially as works by foreigners are protected here.[72] At the present time, however, there are no existing reciprocal copyright relations between the United States and Bolivia, Egypt, Iran, Turkey, the Union of Soviet Socialist Republics, and Venezuela.[73]

2285, 81st Cong., 1st Sess. (1949); Ashford, "The Compulsory Manufacturing Clause—An Anachronism in the Copyright Act," 49 Mich. L. Rev. 417 (1951); See notes, 59 Col. L. Rev. 686 (1950); 35 Cornell L.Q. 452 (1950). The phrase "or periodical" was added to confirm existing construction. See note 65 supra.

[69] 17 U.S.C. §§ 22, 23 (Supp. 1952). Ad interim protection was expressly made available for qualified periodicals. See note 66 supra.

[70] 17 U.S.C. § 215 (Supp. 1952).

[71] 2 UNESCO Copyright Bulletin No. 4, pp. 136-142 (1949). The status of India is uncertain. Reciprocal copyright relations between the United States and Japan were reestablished by Presidential Proclamation and exchange of diplomatic notes on November 10, 1953 for a four-year period beginning as of April 28, 1952, when the Treaty of Peace became effective. Japan will recognize translation rights in works by American authors for a minimum period of ten years. Musical recording rights are also covered. Prior American-Japanese copyright relations were governed by a bipartite copyright convention ratified in 1906 which become inoperative during World War II and was formally abrogated in April, 1953. The convention permitted the citizens of each nation to "translate books, pamphlets or any other writings, dramatic works, and musical compositions, published in the dominions of the other by the subjects or citizens of the latter, and print and publish such translations." 34 Stat. 2890-2891 (1905). Both governments have agreed to seek to conclude, at the earliest practicable date, a mutually satisfactory copyright agreement regularizing their copyright relationship. Japan is a member of the Berne Union. See note 24 supra, and note 99 infra.

[72] E.g., Mexico, see Canyes, Colborn and Piazza, op. cit. supra note 31, at 109-110. The proclamation with respect to Mexico was dated April 9, 1910; the Mexican Copyright Law was substantially revised in 1948 with the result that the basis upon which the proclamation was predicated no longer exists. The Netherlands and China have also been among the copyright troublespots.

[73] See note 71 supra. Turkey, of course, is a member of the Berne Union. See notes 24 and 29 supra and note 98 infra.

UNIVERSAL COPYRIGHT CONVENTION OF 1952

The Universal Copyright Convention of 1952 was promulgated pursuant to Article 27 of the Universal Declaration of Human Rights by the United Nations:

> Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
>
> Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Closely paralleling the United States Constitutional pronouncement on copyright, Article 27, like it, requires the striking of "a balance between the rights of the author and those of the public." [74]

The signed draft of the Convention was completed at the Inter-Governmental Conference on Copyright which met in Geneva, Switzerland, in the late summer of 1952, upon the joint invitation of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Government of Switzerland. It consists of a preamble, twenty-one articles, an appendix declaration to Article XVII, a resolution concerning Article XI, and three protocols subject to separate adherence by parties to the Convention.

The Convention substantially follows preliminary drafts which had been the subject of almost continuous study and report for more than five years.[75] No previous copyright convention has been based on such thorough preparatory groundwork, involving comprehensive analyses of the copyright laws of practically all of the nations of the world,[76] frank recognition of why previous conventions have failed of universal acceptance, widespread compromise of some long-cherished theories to achieve a realistic system reasonably acceptable to the multifarious copyright interests

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[74] Escarra, "Comment on International Copyright Protection," 2 UNESCO Copyright Bulletin No. 4, p. 2 (1949). Hepp, "Introduction to the Work of the Committee of Copyright Experts," 2 id. No. 2-3, p. 4 (1949). The Convention states in its preamble that it "will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts."

[75] The UNESCO Copyright Division has collected an extensive copyright library, including 25,000 file cards. Among its most valuable contributions has been the publication of its quarterly, bi-lingual (English and French) periodical entitled UNESCO Copyright Bulletin (UNESCO Bulletin du Droit d'Auteur).

[76] Bogsch and Roach, "Commentary on the Supplementary Request for Views," 4 UNESCO Copyright Bulletin Nos. 1-2, pp. 9-99 (1951); International Copyright, Part I (Europe), 4 id. Nos. 1-2, pp. 101-260 (1951); Part II (Asia, Africa, Australia, Canada, New Zealand), 4 id. No. 3, pp. 62-145 (1951); Part III (South America and Mexico), 4 id. No. 4, pp. 12-95 (1951); Part IV (United States and Central America), 5 id. No. 1, pp. 78-151 (1952).

not only within a particular nation but on a worldwide basis,[77] and painstaking attention to details of draftsmanship.

CONFLICTING COPYRIGHT THEORIES

To appreciate the problems facing the drafters of the Convention and how well the final draft solved such problems, it is necessary to understand certain fundamental aspects of international copyright. As would appear from the foregoing discussion of the Berne Union and American copyright systems, there are, in a broad sense, two almost diametrically-opposed theories of copyright.

The continental European concept, fostered by the Berne Union which was established primarily at the behest of authors, regards an intellectual work to some degree as an extension of the personality of the author and gives broad protection to the author and his heirs automatically upon his creation of the work for his life and a term of years thereafter.[78] There are no provisions for such formalities as copyright notice, registration of ownership, deposit of copies, etc.

The other theory, prevailing under the United States Constitution, and largely shared by the Latin-American nations, balances the author's interests with the public interest,[79] by insisting that copyright protection, at least for published works, be subject to compliance with prescribed formalities. These features have long comprised the copyright systems prevailing throughout most of the western hemisphere and have been maintained to insure the fullest possible use of intellectual works consistent with the encouragement of authorship.[80]

Obviously, the philosophies upon which the Berne Union and Pan-American copyright systems are predicated are difficult to reconcile. The result is that the United States and all of the Latin-American nations, except Brazil, are not members of the Berne Union.

Underlying the efforts which culminated in the Universal Convention

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[77] Schulman, "A Realistic Treaty," American Writer (Nov. 1952).

[78] Escarra, op. cit. supra note 74, at 2-4. Of all the Berne revisions, only the Brussels Revision Art. 1 (4) expressly provides that "This protection shall operate for the benefit of the author and his legal representatives and assigns." Cf. 1 Ladas, op. cit. supra note 2, at 206-207; 1 UNESCO Copyright Bulletin No. 2, pp. 16-18 (1948): "This concept would appear to go without saying, and regular and universal practice confirms it."

[79] See note 40 supra. Evans, Copyright and the Public Interest (1949); Rejent, "Copyright Law—Author: Promoting the Progress of Science and the Useful Arts," 16 Notre Dame Law. 344 (1941); Warner, "Copyrights and the Academic Profession," 35 Bull. Am. Ass'n U. Prof. 251 (1949).

[80] Evans, op. cit. supra note 79, passim. Warner, "U.S. Copyright Act: Anti-Monopoly Provisions Need Some Revision," 34 A.B.A.J. 459, 462 (1948). See DeWolf, "International Copyright Union," 18 J. Pat. Off. Soc'y 33 (1946) for an analysis of American objections to Berne Union membership.

were three main currents of copyright thought. One group regarded the Berne Convention as the standard *par excellence* of copyright protection and the object of the new Universal Convention to convert non-Berne Union nations to the Berne concept.[81] In contrast, there were those who stressed the vital importance of formalities in promoting the public interest.[82] Others urged a compromise *modus operandi* between automatic and formal copyright systems;[83] and it was this middle-of-the-road approach which prevailed.

THE GENEVA COMPROMISES

A compromise throughout, the Universal Convention has both the defects and the advantages inherent in compromise. It is not intended to abrogate existing international copyright relations, but only to improve certain unsatisfactory aspects.[84]

The Universal Convention is based generally on the time-tested principle of national treatment,[85] under which eligible foreign works[86] would enjoy in an adhering nation "the same protection" as the latter "accords to works of its nationals first published in its own territory"—this usually being the highest possible grade of protection currently recognized.

[81] Crewe, "National Treatment as the Basis for a Universal Copyright Convention," 3 UNESCO Copyright Bulletin No. 1, pp. 3, 6 (1950).

[82] Mendilaharzu, "The Bases of a Universal Convention on Copyright," 3 UNESCO Copyright Bulletin No. 1, pp. 35, 36-37 (1950).

[83] Mentha, "The Berne Union and the Question of Formalities," 3 UNESCO Copyright Bulletin No. 1, pp. 45, 47 (1950).

[84] From the point of view of authors and their assigns. The preamble of the Convention recites that the Convention is "additional to, and without impairing international systems already in force." Article I requires that each adhering nation undertake "to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific, and artistic works, including writings, musical, dramatic, and cinematographic works, and paintings, engravings, and sculpture."

[85] Universal Copyright Convention Art. II. Reprinted in 95 U.S.P.Q. (No. 1) II (1952); 5 UNESCO Copyright Bulletin No. 3-4, pp. 30-41 (1952).

[86] Article II defines the works entitled to protection under the Convention as "Published works of nationals of any Contracting State, and works first published in that State" (combining "nationality-of-the-work" and "nationality-of-the-author" principles for published works) and "Unpublished works of nationals of each Contracting State" ("nationality-of-the-author" principle for unpublished works). The former would permit Iron Curtain authors to achieve Convention protection by first publication in an adhering nation, a consequence to which the United States as a frequent user of the "back door" to Berne Union protection could hardly object. For the purposes of the Convention, "any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State." Protocol I provides that "Stateless persons and refugees who have their habitual residence in a State party to this Protocol shall, for the purposes of the Convention, be assimilated to the nationals of that State." Protocol 2 extends protection "to works published for the first time by the United Nations, by the Specialized Agencies in relationship therewith, or by the Organization of American States." Any Contracting State may impose its normal formalities "in respect of works first published in its territory or works of its nationals wherever published." Art. III(2).

Three exceptions to the principle of national treatment were incorporated in the Convention for obvious reasons. With respect to eligible works by a foreign author first published in another nation, the Convention sets forth certain maximum formalities. Minimum translation rights and duration of term are also prescribed.

The formalities which any adhering nation may impose as a condition of copyright for protection under the Convention (such as copyright notice, registration, deposit, payment of fees, local manufacture, local publication) are deemed fully satisfied:

> . . . if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.[87]

Thus, a reasonably-located copyright notice in the form of "© 1953 John Doe" (assuming the copyright is or was secured in such year and John Doe is the name of the "copyright proprietor") will, under the Convention, satisfy any and all formalities imposed by a nation as conditions precedent to copyright protection. A more technical copyright notice in a particular language—"©", as a universal symbol of copyright, avoids language differences—or manufacture in a particular nation, however, were ruled out as in effect discriminatory against the foreign work.

So far as unpublished works are concerned, the Convention requires that "unpublished works of nationals of each Contracting State shall enjoy in each other Contracting State the same protection as that other State accords to unpublished works of its own nationals" and that "there shall be legal means" of protection "without formalities." [88] This would require many nations to improve their system of protecting unpublished works of foreigners.[89]

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[87] Art. III(1).

[88] Arts. II(2), III(4). Article III(4) has been criticized on the ground that the Convention would preclude any state in the United States from abolishing common-law copyright. Presumably, the concept is presently recognized in all forty-eight states, even those of civil-law background, and is buttressed by statute in some states. 1953 Report of American Bar Association Committee on International Copyrights pp. 53, 82-84.

[89] Apart from the Berne Union, which protects the unpublished works of Berne Union nationals only (see note 26 supra); the Buenos Aires Convention, under which protection of unpublished works is at best doubtful (see note 37 supra); the Montevideo Convention, which applies the principle of lex loci (see note 33 supra); and special reciprocal relations (see note 119 infra); only Belgium, Brazil, Chile (if registered), Cuba (if registered and deposited), Egypt, France, Honduras (if patented), Iran, Italy (subject to reciprocity), Lebanon, Luxembourg, Mexico (if registered), Panama (subject to reciprocity), Paraguay, Poland, Portugal, Rumania, Spain (subject to reciprocity), Turkey, United States, Uruguay, and Yugoslavia appear to offer legal protection to unpublished works by foreigners. See Bogsch and Roach, supra note 76.

Registration and deposit may be required as procedural conditions precedent to the legal enforcement of copyright under the Convention (but failure to do so "shall not affect the validity of the copyright"),[90] and the registration of renewal claims may be required as a prerequisite to any renewal [91]—both concessions to traditional practice in some nations, especially the United States.

Subject to all the benefits of national treatment with respect to duration of protection, the general minimum term of protection for works protected under the Convention is defined as the life of the author and twenty-five years after his death, except that nations which, upon the effective date of the Convention, do not compute the term of protection upon the basis of the life of the author, may compute the term at twenty-five years from the date of first publication or from registration prior to publication, as the case may be,[92] and photographic works and works of applied art (assuming such works are protected at all)[93] need not be protected beyond ten years. The principle of comparison of terms is recognized,[94] but is, of course, circumscribed by such minimum periods of protection. This is a substantial improvement over most prior multipartite copyright conventions, which provide for national treatment with respect to duration of protection subject to shortening by comparison of terms with the country

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90 Art. III(3). Presumably, the United States requirements of registration and deposit for unpublished works are not inconsistent with the Convention since they comply with the national treatment requirements of Article II(2) and since automatic common-law prepublication protection would be available to satisfy the provisions of Article III(4). See Art. IV(2); see also note 88 supra. Registration and deposit may also be maintained as prerequisites to filing a renewal claim.

91 Art. III(5). Furthermore, any renewal must be considered in any comparison of terms, thus possibly extending the term of protection abroad so long as the renewal copyright was duly maintained in the author's own nation. Art. IV(4). Cf. note 93 infra.

92 Art. IV(2).

93 Art. IV(3). The Report of the Rapporteur-General in this connection read:

> It was also understood that if the class to which a work belonged was not protected in the country of origin, so that the period of protection there was zero, other Contracting States need not protect the work, whereas, if the class of work was protected in the country of origin, the fact that the work itself was not so protected, due for example to failure to comply with formalities, would not relieve other countries from protecting it.

5 UNESCO Copyright Bulletin Nos. 3-4, p. 52 (1952).

94 Art. IV(2). Only nations which, upon the effective date of the Convention, do not compute the term of protection upon the basis of the life of the author may use twenty-five years from the date of first publication or from registration prior to publication. For comparison-of-terms principle, see Article IV(4), referring to nation of author of unpublished work and to adhering nation of first publication of published work. For the purposes of comparison of terms, a work by a national of an adhering nation first published in a non-adhering nation shall be treated as though first published in the nation of which the author is a national. Art. IV(5). In case of simultaneous (within thirty days) publieation in two or more adhering nations, the work shall be treated as though first published in the nation which affords the shortest term. Art. IV(6). See also note 91 supra.

of origin.[95] The minimum duration-of-term provisions would require a few nations to lengthen their periods of protection.[96]

Minimum translation rights for the full duration of copyright are also fixed by the Convention subject to possible stringently-circumscribed compulsory licensing of translation rights after seven years if the work has not been published in the national language involved or if all previous editions of a translation in such language are out of print except where the original author has withdrawn from circulation all copies of the work.[97] Such minimum translation rights would require some nations to recognize translation rights for the first time under their domestic laws,[98] and certain other nations to expand their present recoguition of the exclusive right of translation under their domestic laws,[99] in either case, for the

[95] See notes 22 and 37 supra.

[96] The term now is apparently fifteen years post mortem auctoris in the Union of Soviet Socialist Republics, twenty years post mortem auctoris in Chile, Haiti (ten years if no spouse or children survive), Liberia, Mexico, Panama, and Peru. In Honduras, the term is ten, fifteen, or twenty years from the issue of the patent. Yugoslavia extends protection for the life of the spouse (until remarriage) and children (until they are twenty-five years old). Duration of protection is unlimited in Guatemala, Nicaragua, and Portugal, and in most nations ranges from twenty-five to eighty years post mortem auctoris, with shorter terms for certain classes of works (notably ten to twenty years for photographs and/or films) or where the author dies without heirs or assigns. El Salvador recognizes an heir's rights only if they are exercised within one year after the author's death. Canyes, Colborn and Piazza, op. cit. supra note 31, at 173-174; Bogsch and Roach, "Commentary on the Supplementary Request for Views," 4 UNESCO Copyright Bulletin Nos. 1-2, pp. 23-24 (1951). No shortening of present longer periods of protection is anticipated. Finkelstein, "The Universal Copyright Convention," 2 Am. J. Comp. L. 198, 203 (1953).

[97] Art. V(2). Thus a minimum of absolute protection for seven years following first publication is guaranteed. Thereafter the translator (who must be a national of the nation granting the license) must first seek permission during a two-month period from the owner of the translation right; or if he cannot be found, through the publisher and the diplomatic or consular representative of the nation of which such owner is a national, if known. The correctness of the translation, the payment and transmittal of just compensation, the printing on all copies of the translation of the original title, and name of the author of the original work are all assured. The licenses granted would be non-transferable and non-exclusive.

[98] China, El Salvador, Iran, Liberia, Rumania (except for members of the Rumanian Writers' Society), Union of Soviet Socialist Republics; not recognizing the right of translation into the national language are Hashemite Jordan (Arabic), Panama (Spanish), and Turkey (Turkish). Bogsch and Roach, supra note 76.

[99] Greece and Nicaragua recognize the translation right for ten years after publication. Bulgaria recognizes such right for ten years if exercised within the first five years. Mexico recognizes the right to translate into Spanish for only three years unless exercised within that period. The following nations recognize the translation right after ten years only if exercised within that period: Iceland, India, Ireland, Japan, Luxembourg, Pakistan, Thailand (Siam), and the Holy See (limited recognition applicable only to scientific works). Special formalities to secure or maintain the translation right are imposed by Argentina (recordation of licenses), and Dominican Republic, Guatemala, and Nicaragua (special notices). Bogsch and Roach, supra note 76; see also note 24 supra and note 134 infra.

full term of copyright, subject, if any of such nations so prescribe, to the aforementioned compulsory licensing.

The concept of "publication" is important for several Convention purposes.[100] Since the term has different meanings in different nations and sometimes in the same nation in different contexts, the Convention provides that

> "Publication," as used in this Convention, means the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived.[101]

Inter-governmental disputes "concerning the interpretation or application" of the Convention are made determinable by the International Court of Justice.[102] The Convention is not to have retroactive effect in any nation with respect to "works or rights in works . . . permanently in the public domain" there.[103]

The Convention is not self-executing. At the time of the deposit of a nation's ratification, acceptance or accession, however, such nation must be in a position under its domestic law to give effect to the Convention.[104] Reservations to the Convention are not permitted.[105]

EVALUATION OF CONVENTION

From Berne Union Viewpoint

Berne Union nations regard the Berne Convention, as revised, as approximating the theoretical ideal of international copyright, and the Universal Convention as retrogressive by comparison. The refusal of most of the western hemisphere nations to join the Berne Union has prevented the full realization in practice of the Berne Union ideal.

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[100] With respect to the application of the Convention (see note 86 supra), the general term of protection (see note 94 supra), the right to translate (see note 97 supra), and formality requirements (see note 87 supra).

[101] Art. VI. Aurally-perceivable forms of a work were regarded as fixations of performances and not as copies of a work. This definition would seem to require (1) reproduction and (2) general distribution; the former might thus be deemed tantamount to a manufacturing clause. It would be practically fatal to American enjoyment of Berne Union protection "through the back door" if reproduction as an element of publication were read into the Berne Convention. See notes 26 and 39 supra and note 117 infra. See notes 26 and 87 supra. Compare White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908), and cases following it, with Shapiro, Bernstein & Co. v. Miracle Record Co., 91 F. Supp. 473 (N.D. Ill. 1950).

[102] Art. XV.

[103] Art. VII. Cf. Rome Revision Art. 18; Brussels Revision. Art. 18. Existing rights are, of course, not affected.

[104] Art. X(2).

[105] Art. XX. For discussion of Berne Convention reservations, see note 24 supra.

The Universal Convention is frankly a compromise of long-established principle on the part of Berne Union members to achieve an international copyright system which, while preserving the advances of the Berne Union system for Berne Union works, might prove acceptable to all nations, especially the United States. Many Berne Union proponents undoubtedly hope that the United States and other non-Berne Union nations will gradually accept Berne Union principles and that future revisions of the Universal Convention will tend in the direction of the Berne system.[106]

To preserve the Berne Union system for Berne Union works, the Berne Union nations represented at the Geneva meeting insisted upon an Appendix Declaration to the Universal Convention which provided that the latter Convention should not apply to the relationships among Berne Union members with respect to works first or simultaneously published in the Berne Union and that works first or simultaneously published in a Berne Union nation which has withdrawn from the Union after January 1, 1951 are not entitled to be protected under the Universal Convention in Berne Union nations.[107] Furthermore, the Universal Convention itself expressly provides that it shall not in any way affect the provisions of the Berne Convention or membership in the Berne Union.[108]

Berne Union nationals must now, in order to protect their works in most of the western hemisphere, comply with the different technical requirements imposed by the respective domestic laws of the numerous nations involved. Such compliance is prohibitively burdensome.[109]

In contrast, the securing of international copyright for eligible works under the Universal Convention would be subject to no more burdensome

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106 On the other hand, it is possible that reasonable copyright notice provisions are procedural requirements for copyright infringement suits, such as are outlined in the Convention, might find greater favor. See Statement of Chairman William I. Sirovich in Hearings before Committee on Patents on General Revision of the Copyright Law, 72d Cong., 1st Sess. 37-38 (1932): ". . . instead of having Europe to educate us, why can't we edueate Europe and have Europe adopt the principle of copyright notice and registration." The Convention provides for an inter-governmental committee to make preparation for periodic revisions. Art. XI. See also 1 Revue Internationale du Droit d'Auter 8 (1953).

107 Appendix Declaration relating to Article XVII. Ratification, acceptance, or accession of the Convention by a Berne Union member includes the Declaration. Art. XVII. Presumably, works by non-Berne Union nationals first or simultaneously published in a Berne Union nation would be entitled in Berne Union nations adhering to the Universal Convention to protection under both the Berne Convention, as revised, and the Universal Convention.

108 Art. XVII.

109 Since all of the Pan-American countries impose formalities for recognition of copyright, the Berne Union author or publisher (unless they were from Brazil and qualified under the Buenos Aires Convention) would need some fifty deposit copies, would have to execute instruments in English, French, Portuguese, and Spanish, and would have to pay customs duties, postage, registration fees, and attorneys' fees. Canyes, Colborn and Piazza, op. cit. supra note 31, at 174-175.

formality than the reasonable affixation of the symbol "©" accompanied by the name of the copyright proprietor and the year of securing of copyright. From the point of view of Berne Union authors and publishers, this represents a substantial improvement over the present situation. To the extent that their works are more-readily protected outside the Berne Union, any reluctance on the part of their nations to protect works by non-Berne Union nationals should decrease.

From American Viewpoint

Evaluation of the Universal Convention, from the point of view of American interests, necessitates a two-fold analysis of: (1) the effect of the Convention on the copyright status abroad of American works; and (2) the changes necessitated by the Convention in the United States Copyright Law.

Effect of Convention on Copyright Status Abroad of American Works

At the present time, copyright protection abroad for works by American authors is generally available (a) directly by complying with the domestic copyright legislation of the particular nation under reciprocal copyright relations, and/or (b) indirectly by qualifying under applicable multipartite copyright conventions.

So far as the convention method of protection is concerned, American authors and publishers frequently rely on the Buenos Aires Convention of 1910 and, by means of Canadian or other simultaneous Berne Union publications, the Berne Convention. Such American resort to the benefits of the Berne Convention, in view of American non-adherence, is known as securing Berne Union protection "through the back door."

To achieve protection, by reliance on the Buenos Aires Convention, in Argentina, Brazil, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay, according to the respective laws thereof, American works need only be published and copyrighted under the United States Copyright Act.[110] It is questionable whether such works prior to publication are protected by the Buenos Aires Convention, which prescribes no minimum duration of protection or recoguition of translation rights.[111]

The Universal Convention expressly provides that it shall not abrogate any copyright relations in effect exclusively between two or more American Republics and that in the event of any difference in provisions, the most recently formulated shall prevail.[112] This provision is intended to

110 See note 34 supra.
111 See notes 35 and 37 supra.
112 Art. XVIII.

preserve existing advantages of authors and their assigns under the Buenos Aires Convention and other such copyright relations.

To achieve protection in the Berne Union, many American publishers attempt publication on the same day[113] in Canada (a Berne Union member) as in the United States. This automatically affords to such works in all other Berne Union nations the rights granted by the controlling revision of the Berne Convention.[114] Until publication, no Berne Union protection as such is possible for American works since such protection of unpublished works is limited to those of nationals of Berne Union members.[115]

The Universal Convention, as indicated above, does not in any way affect the provisions of the Berne Convention.

Some Berne Union nations seriously resent American formalities—feeling is especially adverse in English-speaking nations over the manufacturing clause—and American enjoyment of the advantages of Berne Union membership "through the back door" of Canadian or other simultaneous publication. Retaliation has occasionally been threatened.[116]

American adherence to the Universal Convention would undoubtedly gain the good will of Berne Union nations. Furthermore, it would improve the copyright status of American works in such Berne Union nations as the Netherlands which defines "publication" very technically for purposes of Berne Union recognition,[117] or as Greece, Ireland, Japan, Thailand

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113 See note 26 supra.

114 Rome Revision Art. 6; Brussels Revision Art. 6. In the Berne Union nation of first (or simultaneous) publication, the work is entitled to national treatment. Works by American authors are entitled to automatic Canadian copyright protection on the same basis as works of Canadian nationals. Canadian Copyright Act §§ 3, 4; 26 Canada Gazette 2157 (Dec. 29, 1923). This means such works are subject to the compulsory licensing provisions, registration provisions and the 14 or more day restriction on the importation of "books." Canadian Copyright Act §§ 13, 14, 15, 22, 28. Because of the importation restriction (which is apparently not enforced) and the fear that simultaneous publication in Canada might be deemed unlawful, some book publishers rely on simultaneous publication in Great Britain rather than Canada. Canadian works must comply with all the formalities to secure and maintain American statutory copyright. See Halliday, "Losing Copyrights Under the Law of the United States," 15 Can. Pat. Rep. 13 (1951). For the purpose of the British Copyright Act, 1911, and its Dominion counterparts, publication in Canada is deemed publication within a British dominion to which the Act extends. Bogsch and Roach, "International Copyright," 4 UNESCO Copyright Bulletin Nos. 1-2, p. 172 n. 2 (1951). Works are protected thereunder if first or simultaneously (within fourteen days—see note 26 supra) published in such a British dominion.

115 See note 26 supra.

116 Ibid.

117 In recent years, the Dutch courts have carefully scrutinized all attempts at simultaneous publication by non-Berne Union nationals. There is at least one reported Dutch decision holding that the forwarding of copies required for distribution in Canada to a Canadian distributing firm which served as the center of distribution for Canada does not constitute an "edition" in Canada under the Berne Union either by the American publisher or by the

(Siam), Turkey, and Yugoslavia which, pursuant to reservations permitted by the Berne Convention, afford more limited protection against unauthorized translations than is permitted by the Universal Convention.[118]

Quite apart from the Berne and Buenos Aires Conventions, American works are entitled to national treatment in many foreign nations, including nations adhering to those conventions, under the reciprocal copyright relations between such nations and the United States. Many Berne Union members, for example, have domestic copyright laws closely paralleling the Berne Convention. In such nations, protection equivalent to protection under the Berne Convention might result automatically upon the publication[119] or even the creation[120] of a work by an American author under the reciprocal copyright relations between such nations and the United States. However, some nations do impose such burdensome formalities as local registration and/or deposit, notarial certificates, special forms of copyright notice, etc.,[121] and, even after full compliance with such formalities, fail to provide adequate protection.[122]

Canadian distributing firm. However, in a more recent case, an "edition" in Canada was found to exist where the material was printed in the United States and shipped to Canada, where it was bound with Canadian-manufactured covers and title-pages and distributed—to the extent of 17,425 copies—by a Canadian corporation which was wholly owned by the United States publisher, notwithstanding that after the 17,425 copies had been disposed of, the Canadian corporation sold copies printed and bound entirely in the United States. See Hirsch Ballin, Copyright Protection of American Books in The Netherlands 7-9 (1950); Saher, "American-Netherlands Copyright Problems," 1 World Trade L.J. 371, 379-382 (1946). See notes 26 and 101 supra. The date of publication is often not readily determinable. See Cardinal Film Corp. v. Beck, 248 Fed. 368 (S.D.N.Y. 1918).

118 See notes 24, 71, 98 and 99 supra.

119 British Commonwealth except Canada (see infra) if first or simultaneously—within fourteen days—published in British dominions (supra note 114), Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Israel, Italy, Japan, Lebanon, Luxembourg, Norway, Portugal, Rumania, Sweden, and Switzerland subject to certain limitations on translation rights outside of the Berne Union system (supra notes 98 and 99). Bogsch and Roach, supra note 76.

120 British Commonwealth except Canada (see infra) if registered for statutory copyright in the United States, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, Germany, Greece, Hungary, Ireland (not after first publication in the United States), Israel, Italy, Japan, Lebanon, Luxembourg, Norway, Poland, Portugal, Rumania, Sweden, Thailand (Siam), and Yugoslavia (but not after publication). Bogsch and Roach, supra note 76. Such protection for unpublished American works is, of course, not possible under the Berne Convention. See note 115 supra.

121 Chile, China, Cuba, El Salvador (per Mexico City Convention), Liberia, Mexico, and Philippines; all of the nations adhering to the Buenos Aires Convention apart from the dispensations provided therein; Brazil, except as provided in the Berne or Buenos Aires Conventions; and Argentina, Bolivia, Paraguay, Peru, and Uruguay, except as provided in the Montevideo Convention, impose formalities. Bogsch and Roach, supra note 76.

122 See notes 96, 98, and 99 supra. Of the nations with which the United States does not

The Universal Convention expressly states, subject to certain exceptions, that it shall not abrogate any copyright relations in effect between two or more nations adhering to the Universal Convention, and that in the event of any difference in provisions, those of the Universal Convention shall prevail.[123] Thus, all the present foreign protective advantages of American reciprocal copyright relations are retained. In addition, the Universal Convention provisions prescribing maximum formalities and minimum standards of protection should facilitate protection for American works in nations adhering to the Convention which presently require other formalities, afford less protection, do not protect American works at all, or do not "provide for the adequate and effective protection of the rights of authors and other copyright proprietors" in general.[124]

In the words of the Secretary of State in submitting the Convention to the President for transmission to the Senate, the Convention "would provide a more adequate basis than presently exists for copyright protection abroad of United States books and periodicals, music, art, motion pictures, and similar cultural and scientific creations." [125]

Changes in American Law Necessitated by Convention

The Universal Convention principle of national treatment, as indicated above, represents no departure from the present reciprocal copyright relations between the United States and most of the civilized world.

The Convention's minimum standards of protection will not require any amendment to the United States Copyright Act, since the Act already prescribes an original term of twenty-eight years and a renewal term of equal duration,[126] and recognizes full exclusive rights of translation coterminous with the duration of the copyright.[127]

The maximum formality provision of the Universal Convention, however, will require some relaxation of present American technical copyright requirements, but only with respect to works by non-resident aliens first

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maintain reciprocal copyright relations [see note 73 supra], no protection for American works is available in Bolivia, Union of Soviet Socialist Republics, and Venezuela. Protection in Egypt is doubtful since the Native Tribunals replaced the Mixed Tribunals in 1949. Iran does not recognize the translation right and, apart from Berne Union commitment (see note 24 supra), neither does Turkey which may require registration and deposit under its domestic law. See Bogsch and Roach, supra note 76.

123 Art. XIX. Article XIX is not to affect the provisions of Articles XVII (supra notes 107 and 108) and XVIII (supra note 112).

124 Art. I. See notes 96, 98, 99, and 121 supra.

125 Exec. M., 83rd Cong., 1st Sess. 2 (1953).

126 See note 63 supra.

127 See note 54 supra.

published outside the United States.[128] The implementing legislation could be limited to the following:

1. Modification of the manufacturing clause so as to make it inapplicable to such works. Originally passed in 1891 to protect the infant American printing industry, the clause is certainly no essential element of a copyright system, formal or automatic. Organized labor has opposed amendment of the clause on the grounds that adequate tariff protection should first be made available.[129] Bills to modify the clause were introduced in both the last and the present Congresses but were not enacted possibly on the grounds of prematurity.[130]
2. Recognition of the symbol "©" as the equivalent of the word "Copyright" or the abbreviation "Copr." in the copyright notice on all classes of such works. At the present time, the symbol "©" is acceptable only on works of certain designated classes.[131]
3. Liberalization of the provision defining the location of the copyright notice on such works to permit placement "in such manner and location as to give reasonable notice of claim of copyright." At the present time the notice must be placed upon the title page or the page immediately following of a book or other printed publication; upon the title page, under the title heading, or upon the first page of text of each issue of a periodical; etc.[132]
4. Withdrawal of the sanction of forfeiture of copyright for failure to deposit a copy of such work after demand therefor by the Register of Copyrights.[133] At the present time the Register is not in the practice of demanding copies of foreign works.
5. Recognition of mechanical reproduction rights in such works on the same basis as such rights are recognized in the United States in works by American authors and composers without requiring the nation of any such foreign author or composer to grant United States citizens similar rights even though such nation does not recognize such rights for its own nationals.[134]

The present technical requirements, can, under the Universal Convention, as indicated above, be retained for works by American citizens or residents, regardless of whether or wherever published, and for works first published in the United States.

There has been some discussion in copyright circles as to whether the implementing legislation should be limited to changes necessitated by the

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128 Art. III(2).

129 Hearings before Committee on the Judiciary on H.R. 4059, 82d Cong., 2d Sess. (1952); cf. Ashford, "The Compulsory Manufacturing Clause—An Anachronism in the Copyright Act," 49 Mich. L. Rev. 417 (1951).

130 H.R. 397, 83rd Cong., 1st Sess. (1953); H.R. 4059, 82nd Cong., 2d Sess. (1952).

131 See note 59 supra.

132 Ibid.

133 See note 61 supra.

134 17 U.S.C. § 1(e) (Supp. 1952). Presumably a notice of user of mechanical reproduction rights of musical compositions could still be required. See note 100 supra, and cases cited in note 34 supra.

Universal Convention or should encompass other modifications which appear desirable. Of course, if the changes are so limited, somewhat lighter formalities would be required of foreign works than would be imposed on domestic works. Such different treatment would not represent any radical departure from present provisions in the Copyright Act which already somewhat relax such requirements with respect to foreign works[135] and in the Buenos Aires Convention of 1910 which merely require any notice reserving the property right in the work rather than a notice complying with the rigid form and location provisions of the Copyright Act.[136] To the extent that the formality requirements are relaxed, the higher would be the percentage, of course, of works copyrighted in the United States. Thus, the Universal Convention would not appear to prejudice the present formal system prevailing in the United States. All of its essential features so highly regarded by American copyright traditionalists would be retained, and it would continue to promote the public interest, in its three historic ways, by:

> 1. Without unduly discouraging authorship, resulting in the entry into the public domain of a vast body of works by requiring certain affirmative steps both to secure copyright for a twenty-eight year term and to renew the copyright for an additional twenty-eight year term;
>
> 2. Enabling prospective users merely by inspecting a published work generally to determine whether or not copyright therein is claimed, and also by consulting the records of the Copyright Office to learn the name and address of the person from whom an effective grant of rights therein can usually be had; and
>
> 3. Making for certainty and discouraging spurious infringement claims.

Present Status of Convention

The Convention is now awaiting ratification by the nations of the world. It is to come into force three months after the deposit of ratifications, acceptances, or accessions by twelve nations,[137] at least four of which must be non-members of the Berne Union.[138] Any nation may condition its adherence upon adherence by another nation.[139] These, like the compromise substantive provisions of the Convention, were included to encourage adherence to the Convention by non-Berne Union nations, especially the United States.[140]

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135 See notes 59 and 70 supra.

136 See note 34 supra.

137 Art. IX.

138 Ibid.

139 Protocol III, p. 1.

140 Farmer, "Universal Copyright Convention Signed, Now Awaits Ratification," 162 Publ. W'kly 1422, 1429 (Sept. 27, 1952).

The President, on June 10, 1953, with the recommendation of the Secretary of State, sent the Convention to the Senate "with a view to receiving the advice and consent" of that body "to ratification." [141] The Convention was referred to the Committee on Foreign Relations.[142]

The Convention does not purport to establish uniform world-wide copyright legislation but requires that each nation be, at the time of the deposit of its ratification, in a position under its domestic law to give effect to the Convention.[143] Thus, American ratification will not be deposited until after the enactment of the necessary modifications of the United States Copyright Law. Drafts of suggested legislation to this end have been submitted to both the Senate and the House of Representatives.[144]

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141 Exec. M, 83rd Cong., 1st Sess. 1 (1953). A two-third's Senate vote is required. U.S. Const. Art. II, § 2, cl. 2.

142 99 Cong. Rec. 6554 (June 10, 1953).

143 Art. X.

144 S. 2559, 83d Cong., 1st Sess. (1953) (referred to Senate Committee on the Judiciary); H.R. 6616 and H.R. 6670, 83d Cong., 1st Sess. (1953) (referred to House Committee on the Judiciary). All three bills are substantially identical, and provide that they are to take effect upon the coming into force of the Universal Copyright Convention in the United States. The bills provide that any work by a national of another adhering nation first published outside the United States, shall be exempt from:

> (1) The requirement in section 1(e) that a foreign state or nation must grant to United States citizens mechanical reproduction rights similar to those specified therein; (2) the obligatory deposit requirements of the first sentence of section 13; (3) the provisions of sections 14, 16, 17, and 18; (4) the import prohibitions of section 107, to the extent that they are related to the manufacturing requirements of section 16; and (5) the requirements of sections 19 and 20: Provided, however, That such exemptions shall apply only if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

Exemption from "the obligatory deposit requirements of the first sentence of section 13" is at best ambiguous and would not seem to be necessary (see notes 61 and 90 supra), and the abolition of all penalties under section 14 for failure to deposit is broader than necessary since only the forfeiture-of-copyright penalty is prohibited by the Convention (see note 133 supra). The exemptions in the bills are, of course, limited by the proviso requiring all of the published copies to bear "the symbol © accompanied by the name of the copyright proprietor and the year of first publication." To take advantage of the exemptions, the work must comply with the foregoing notice requirement by using the name of the present proprietor (presumably without the necessity of first recording any assignment, as required now by American law) but not a past record proprietor (as permitted now by American law) (see note 62 supra) and the year-date even though the work is not a printed literary, musical, or dramatic work (these being the classes for which the American law now requires a year-date). The bills would also automatically extend existing ad interim copyrights for a full term of twenty-eight years, which is not required by the Convention (see note 103 supra), and would substitute the phrase "of foreign origin" for the phrase "first published abroad" in the 1,500-copy ad interim copyrighted book or periodical exemption in the manufacturing clause (see note 68 supra). However, the reference to "book or periodical first published abroad" in the ad interim provision itself is left unchanged. The bills would also permit the use of the symbol "©" as the equivalent of the word "Copyright" or the abbreviation "Copr." for all classes of works. This change so far as works by American nationals or

Of the various groups interested in copyright which have expressed views on the Universal Convention, the prevailing sentiment is favorable. Objections have been raised by the printing and allied trade unions to any relaxation of the manufacturing clause, by a segment of the motion picture industry to the scope of the protection afforded by the Convention to the visual and sound portions of motion pictures and generally to works other than those generally distributed to the public by means of visually-perceivable copies, and by the former Register of Copyrights.[145] Although the Universal Convention contains a few minor drafting defects, they appear insignificant compared with the drafting defects which have existed in the United States Copyright Act since its enactment in 1909.[146]

The fate of the Universal Convention—and probably of international copyright at least in the foreseeable future—is now before the United States Congress. American ratification should insure prompt adherence by other nations. Without American adherence, there is little incentive for the rest of the world again—this being the thirteenth major effort—to promulgate a convention which would be universal in name only. American rejection of the Convention, in view of the monumental preparatory efforts and concessions embodied in the Convention and the close interest in its success of the most articulate, public opinion-forming groups abroad would undoubtedly discourage further attempts to improve international copyright, and the engendered disappointment might well result in copyright retrogression.

CONCLUSION

The Universal Convention, because of its incorporation of the principle of national treatment and its avoidance of objectionable departures from that principle is thoroughly in accord with American copyright tradition. At the same time, it offers substantial hope of simplifying the now highly-

works first published in the United States are concerned obviously goes beyond the requirements of the Convention.

145 See note 129 supra. The objections of segments of the motion picture industry seem to be aimed more at what the Convention fails to improve than at what it accomplishes. See also Warner, "The UNESCO Universal Copyright Convention," 1952 Wis. L. Rev. 493. But see Singer, "International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law," 62 Yale L.J. 1065, 1095-1096 (1953).

146 See notes 88 and 101 supra. In addition, the reference to "writings" as a class of copyrightable matter (Art. I), in fact the only class to which the compulsory translation license applies (Art. V(2)), seems odd in contrast with the United States Constitutional reference to "writings" as including every class of copyrightable matter (see note 40 supra); the phrases "works of" might have more precisely read "works by" (Art. II); and the provision that the "year of first publication" be included in the copyright notice (Art. III) might better have added the phrase "or the year of registration prior to publication, as the case may be." But see 17 U.S.C. § 10 (Supp. 1952).

complex and somewhat doubtful methods of achieving minimum effective copyright protection for American works throughout the world, especially in certain copyright troublespots abroad. Unlike earlier international copyright conventions which attempted more, the Universal Convention is deserving of favorable consideration by the Congress.

As so well stated by the Secretary of State:

> Participation in the Universal Copyright Convention by the United States will not only significantly improve the protection accorded to United States private interests abroad, but will make a substantial contribution to our general relations with other countries of the free world. Early action by the United States with respect to ratification of the convention will enable the United States to play a leading part in helping to improve international relations in this important field.[147]

147 Exec. M., 83rd Cong., 1st Sess. 4 (1953).