

COPYRIGHT LAW REVISION

---

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON  
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

EIGHTY-SIXTH CONGRESS, SECOND SESSION

PURSUANT TO

S. Res. 240

STUDIES 32-34

- 32. Protection of Works of Foreign Origin
- 33. Copyright in Government Publications
- 34. Copyright in Territories and Possessions of the  
United States



Printed for the use of the Committee on the Judiciary

---

UNITED STATES  
GOVERNMENT PRINTING OFFICE

## COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

ESTES KEFAUVER, Tennessee	ALEXANDER WILEY, Wisconsin
OLIN D. JOHNSTON, South Carolina	EVERETT MCKINLEY DIRKSEN, Illinois
THOMAS C. HENNING, JR., Missouri <sup>1</sup>	ROMAN L. HRUSKA, Nebraska
JOHN L. MCCLELLAN, Arkansas	KENNETH B. KEATING, New York
JOSEPH C. O'MAHONEY, Wyoming	NORRIS COTTON, New Hampshire
SAM J. ERVIN, JR., North Carolina	
JOHN A. CARROLL, Colorado	
THOMAS J. DODD, Connecticut	
PHILIP A. HART, Michigan	

---

### SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

JOSEPH C. O'MAHONEY, Wyoming, *Chairman*

OLIN D. JOHNSTON, South Carolina	ALEXANDER WILEY, Wisconsin
PHILIP A. HART, Michigan	
ROBERT L. WRIGHT, <i>Chief Counsel</i>	
JOHN C. STEDMAN, <i>Associate Counsel</i>	
STEPHEN G. HAASER, <i>Chief Clerk</i>	

<sup>1</sup> The late Hon. Thomas C. Hennings, Jr., while a member of this committee, died on Sept. 13, 1960.

## FOREWORD

---

This committee print is the 11th of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiciary Subcommittee on Patents, Trademarks, and Copyrights. The studies have been prepared under the supervision of the Copyright Office of the Library of Congress with a view to considering a general revision of the copyright law (title 17, United States Code).

Provisions of the present copyright law are essentially the same as those of the statute enacted in 1909, though that statute was codified in 1947 and has been amended in a number of relatively minor respects. In the half century since 1909 far-reaching changes have occurred in the techniques and methods of reproducing and disseminating the various categories of literary, musical, dramatic, artistic, and other works that are subject to copyright; new uses of these productions and new methods for their dissemination have grown up; and industries that produce or utilize such works have undergone great changes. For some time there has been widespread sentiment that the present copyright law should be reexamined comprehensively with a view to its general revision in the light of present-day conditions.

Beginning in 1955, the Copyright Office of the Library of Congress, pursuant to appropriations by Congress for that purpose, has been conducting a program of studies of the copyright law and practices. The subcommittee believes that these studies will be a valuable contribution to the literature on copyright law and practice, that they will be useful in considering the problems involved in proposals to revise the copyright law, and that their publication and distribution will serve the public interest.

This committee print contains the following three studies: No. 32, "Protection of Works of Foreign Origin," by Arpad Bogsch; No. 33, "Copyright in Government Publications," by Caruthers Berger; and No. 34, "Copyright in Territories and Possessions of the United States," by Borge Varmer. The authors of these three studies are all Attorney-Advisers of the Copyright Office.

The Copyright Office invited the members of an advisory panel and others to whom it circulated these studies to submit their views on the issues. The views, which are appended to the studies, are those of individuals affiliated with groups or industries whose private interests may be affected by copyright laws, as well as some independent scholars of copyright problems.

It should be clearly understood that in publishing these studies the subcommittee does not signify its acceptance or approval of any statements therein. The views expressed in the studies are entirely those of the authors.

JOSEPH C. O'MAHONEY,  
*Chairman, Subcommittee on Patents, Trademarks, and Copyrights,  
Committee on the Judiciary, U.S. Senate.*



## COPYRIGHT OFFICE NOTE

---

The studies presented herein are part of a series of studies prepared for the Copyright Office of the Library of Congress under a program for the comprehensive reexamination of the copyright law (title 17 of the United States Code) with a view to its general revision.

The Copyright Office has supervised the preparation of the studies in regard to their general subject matter and scope, and has sought to assure their objectivity and general accuracy. However, any views expressed in the studies are those of the authors and not of the Copyright Office.

Each of the studies herein was first submitted in draft form to an advisory panel of specialists appointed by the Librarian of Congress, for their review and comment. The panel members, who are broadly representative of the various industry and scholarly groups concerned with copyright, were also asked to submit their views on the issues presented in the studies. Thereafter each study, as then revised in the light of the panel's comments, was made available to other interested persons who were invited to submit their views on the issues. The views submitted by the panel and others are appended to the studies. These are, of course, the views of the writers alone, some of whom are affiliated with groups or industries whose private interests may be affected, while others are independent scholars of copyright problems.

ABE A. GOLDMAN,  
*Chief of Research,  
Copyright Office.*

ARTHUR FISHER,  
*Register of Copyrights,  
Library of Congress.*

L. QUINCY MUMFORD,  
*Librarian of Congress.*

## STUDIES IN EARLIER COMMITTEE PRINTS

---

**First print:**

1. The History of U.S.A. Copyright Law Revision From 1901 to 1954.
2. Size of the Copyright Industries.
3. The Meaning of "Writings" in the Copyright Clause of the Constitution.
4. The Moral Right of the Author.

**Second print:**

5. The Compulsory License Provisions of the U.S. Copyright Law.
6. The Economic Aspects of the Compulsory License.

**Third print:**

7. Notice of Copyright.
8. Commercial Use of the Copyright Notice.
9. Use of the Copyright Notice by Libraries.
10. False Use of Copyright Notice.

**Fourth print:**

11. Divisibility of Copyrights.
12. Joint Ownership of Copyrights.
13. Works Made for Hire and on Commission.

**Fifth print:**

14. Fair Use of Copyrighted Works.
15. Photoduplication of Copyrighted Material by Libraries.
16. Limitations on Performing Rights.

**Sixth print:**

17. The Registration of Copyright.
18. Authority of the Register of Copyrights to Reject Applications for Registration.
19. The Recordation of Copyright Assignments and Licenses.

**Seventh print:**

20. Deposit of Copyrighted Works.
21. The Catalog of Copyright Entries.

**Eighth print:**

22. The Damage Provisions of the Copyright Law.
23. The Operation of the Damage Provisions of the Copyright Law: An Exploratory Study.
24. Remedies Other Than Damages for Copyright Infringement.
25. Liability of Innocent Infringers of Copyright.

**Ninth print:**

26. The Unauthorized Duplication of Sound Recordings.
27. Copyright in Architectural Works.
28. Copyright in Choreographic Works.

**Tenth print:**

29. Protection of Unpublished Works.
30. Duration of Copyright.
31. Renewal of Copyright.

## CONTENTS

---

Study No.	Page
32. Protection of Works of Foreign Origin.....	ix
Comments and Views Submitted to the Copyright Office.....	15
33. Copyright in Government Publications.....	23
34. Copyright in Territories and Possessions of the United States.....	43
Comments and Views Submitted to the Copyright Office.....	53





---

---

**STUDY NO. 32**  
**PROTECTION OF WORKS OF FOREIGN ORIGIN**  
**BY ARPAD BOGSCH**  
**June 1959**

---

---

**ix**



## CONTENTS

---

	<b>Page</b>
I. History of the development of U.S. law since 1790.....	1
II. Present law.....	3
III. Reform efforts since 1909.....	7
IV. The laws of foreign countries.....	8
V. Questions to be considered in a revision of the law.....	9
A. Alternative bases for protection of foreign works.....	9
B. Observations concerning the alternatives.....	11
C. Recapitulation of basic issues.....	13



# PROTECTION OF WORKS OF FOREIGN ORIGIN

---

The question dealt with in this study is that of the basis on which the works of foreign authors should be given copyright protection in the United States.

After a brief survey of the development of our law on this subject since 1790 (Chapter I), the present law is analyzed (Chapter II). This is followed by a short summary of the legislative proposals since 1909 (Chapter III), and the solutions obtaining in some of the important foreign countries in this field (Chapter IV). Finally, possible alternatives for dealing with this question in a revision of the present law are presented (Chapter V).

Unlike any other country, the United States has two sets of rules governing the protection of literary and artistic works: common law and federal statute.<sup>1</sup> The basis for protecting works of foreign origin is different under the two sets of rules. This must be kept in mind and will be referred to throughout this study.

## *Chapter I*

### HISTORY OF THE DEVELOPMENT OF U.S. LAW SINCE 1790

In the case of unpublished works protected by the common law, the nationality of the author has not in the past, and does not at present, have any significance. Works of alien authors have the same status as works of U.S. citizens under the common law.<sup>2</sup>

Under our first federal statute, adopted in 1790, the published works of U.S. citizens and residents only were eligible for protection.<sup>3</sup> This situation remained unchanged for a hundred years. During that century, most of the leading European countries concluded bilateral arrangements for the reciprocal protection of the works of their authors, and in 1886, they "constituted themselves into a Union for the protection of the rights of authors"<sup>4</sup> by signing the so-called Berne Convention, a multilateral treaty for the protection of copyright, based on the principle of national treatment (i.e., that each member country would protect works originating in other member countries on the same basis as it protected its own domestic works). The United States did not participate in the creation of the Berne Union and has never become a member of it. Nor did the United States, during this first century of federal copyright legislation, make any bilateral arrangements with any foreign country for reciprocal copyright protection.

---

<sup>1</sup> Before the adoption of the Copyright Act of 1909, the works of authors were protected under the common law until they were published; upon publication protection was governed by the federal statute. Since 1909 the same rule applies except that certain classes of works may be registered before publication, and upon registration common law protection is replaced by protection under the federal statute (17 U.S.C. § 12).

<sup>2</sup> *Cf. Paige v. Banks*, 13 Wall. 608 (1872), and *Ferris v. Frohman* 223 U.S. 424 (1912).

<sup>3</sup> Act of May 31, 1790, ch. 15, §§ 1 and 5, 1 Stat. 124.

<sup>4</sup> Berne Convention, Article 1.

In 1891, Congress passed an Act which, for the first time, opened the possibility of protection for works of foreign origin. Their eligibility for protection in the United States depended on whether the author of the work was a citizen of a "proclaimed country," i.e., a country which was found by the President of the United States to meet either of two conditions: that it granted to U.S. citizens substantially the same protection as to its own citizens ("national treatment"), or that it was a party to an international agreement providing for reciprocity and open to adherence by the United States ("open convention").<sup>5</sup> The President's finding took the form of a proclamation—hence the designation "proclaimed country."<sup>6</sup>

The system was implemented on the same day the Act came into force by proclamations issued in respect to nationals of Belgium, France, Great Britain and Switzerland. Germany and Italy followed in 1892, Denmark and Portugal in 1893, Spain in 1895, Chile and Mexico in 1896, Costa Rica and The Netherlands in 1899, Cuba in 1903, Norway in 1905, and Austria in 1907. Thus, prior to the general revision of the copyright law in 1909, sixteen countries had been proclaimed under the Act of 1891.<sup>7</sup>

The Act of 1909 made some changes in the provisions for Presidential proclamations. The 1909 Act retained, as bases for proclamations, the two incorporated in the 1891 Act ("national treatment" and "open convention," discussed above) and it added a third one: The President could proclaim a country if he found that it gave substantially the same protection to our citizens as we gave its citizens ("reciprocal treatment").<sup>8</sup> The 1909 Act also provided that a special, separate finding by the President was necessary in respect to musical recording rights (so-called "section 1(e) rights"), that is, foreign authors would enjoy musical recording rights only if their country gave similar rights to our citizens, and if this circumstance was found and proclaimed by the President.<sup>9</sup> This resulted in two proclamations for many countries: one extending the benefits of the Act except for musical recording rights, and another extending musical recording rights. In other instances the proclamation for the latter rights was included expressly in the general proclamation.

The adoption of the 1909 Act was followed by the issuance of a new proclamation in respect to those sixteen countries which had already been proclaimed under the 1891 Act. Numerous other proclamations followed so that the present number of proclaimed countries is thirty-five.<sup>10</sup>

<sup>5</sup> Act of March 3, 1891, ch. 565, § 13, 26 Stat. 1106.

<sup>6</sup> The 1891 Act also imposed on all books and certain other works the requirement that copies be manufactured in the United States (§ 3). This, of course, was generally a far greater burden for foreign works than for domestic works. This requirement has been eased somewhat since 1891 by successive amendments. It does not now apply to foreign-language books by foreign authors; and English-language books manufactured abroad may now secure "ad interim" copyright for five years, which may be extended to full-term copyright upon the manufacture of an edition in the United States within the ad interim term, (17 U.S.C. §§ 16, 22, 23). Moreover the requirement of U.S. manufacture does not now apply to foreign works entitled to protection under the Universal Copyright Convention (17 U.S.C. § 9(c)).

<sup>7</sup> A reference list of these and the subsequent proclamations referred to below, and the text of the proclamations, are available from the U.S. Copyright Office.

<sup>8</sup> Act of March 4, 1909, ch. 320, § 8, 35 Stat. 1075.

<sup>9</sup> Act of March 4, 1909, § 1(e).

<sup>10</sup> Argentina, Austria, Belgium, Brazil, Canada, Chile, Costa Rica, Cuba, Czechoslovakia, Denmark, Finland, France, Germany, Great Britain, Greece, India, Ireland, Israel, Italy, Luxembourg, Mexico, Monaco, Netherlands, New Zealand, Norway, Philippines, Poland, Portugal, Rumania, Spain, Sweden, Switzerland, Tunisia, Union of South Africa. For three countries (Costa Rica, Mexico and Portugal) the proclamations do not include musical recording rights.

Excluded from this listing are proclamations that have lapsed, those relating to former countries no longer in existence, and those proclaiming the effectiveness of conventions and treaties.

It must be remembered that in addition to the 35 countries here named there are some 25 other countries whose works are now protected in the U.S. under treaties or conventions.

It should be noted that the protection of foreign works by virtue of a proclamation is subject to compliance with the general requirements of the U.S. statute as to notice, deposit, registration, and manufacture in the U.S.<sup>11</sup>

Prior to our adherence to the Universal Copyright Convention in 1954, the United States joined two international multilateral conventions, the Mexico City Convention (1902) in 1908, and the Buenos Aires Convention (1910) in 1914,<sup>12</sup> thus establishing copyright relations with a number of Latin American countries. The fact that the ratification of these two Conventions—still effective—was not accompanied by implementing legislation creates areas of some uncertainty, as both Conventions may be thought to exclude the applicability of some provisions in the present U.S. statute: the manufacturing clause (§ 16), the requirement of a specified form of copyright notice (§§ 19, 20), and—in the case of the Buenos Aires Convention—the requirement of deposit and registration in the U.S. Copyright Office (§§ 13, 14). The United States also entered into a few bilateral treaties dealing with copyright, as will be noted below:

By the forties of this century it became increasingly doubtful that a number of countries, and among them the United States, would ever become members of the Berne Copyright Union. Efforts were made, after the Second World War, to establish a new multilateral convention acceptable to these as well as to the Berne countries. The efforts resulted, in 1952, in the conclusion of the Universal Copyright Convention which the United States ratified in 1954.<sup>13</sup> Under this Convention, works of nationals of, or works first published in, the other Convention countries became eligible for protection in the United States subject, in the case of published works, to the insertion in each copy of a copyright notice which is a somewhat liberalized version of the traditional American notice. Works protected under the Convention became exempt from the manufacturing clause, and also from the requirements of deposit and registration except as a prerequisite to an infringement action. Details of protection under this and other theories are discussed in the following Chapter II of the present paper.

## Chapter II

### PRESENT LAW

There are three main sources for the protection of the works of an alien author in our present law: the common law, title 17 of the U.S. Code, and certain treaties.

#### (1) *Common law*

Under the common law, works of alien authors and those of U.S. citizens are protected indiscriminately as long as they are not published and not voluntarily registered in the Copyright Office. The protection is unlimited in time and free of formalities. The rights and remedies available under the common law are discussed in another study.<sup>14</sup>

<sup>11</sup> 17 U.S.C. §§ 10, 19, 20 as to notice; §§ 13, 14 as to deposit and registration; § 16 as to U.S. manufacture.

<sup>12</sup> The text of these conventions is set forth in 35 Stat. 1934 and 38 Stat. 1785.

<sup>13</sup> 6 UST 2731.

<sup>14</sup> Strauss, *Protection of Unpublished Works* [Study No. 29 in an earlier committee print in the present series].

*(2) Title 17 of the United States Code*

Under our federal copyright statute, 17 U.S.C., protection for works of alien authors that are published or voluntarily registered may be available in three situations:

- (a) if the alien author is domiciled in the United States,
- (b) if the alien author is the national of a proclaimed country,
- (c) if the alien author is a national of, or his work is first published in, a foreign country party to the Universal Copyright Convention.<sup>15</sup>

These three situations will now be considered in turn.

*Domicile.* The work of an alien author is eligible for statutory protection if he is domiciled in the United States "at the time of first publication of the work" (§ 9(a)). Since the provision speaks about publication, it might be interpreted as meaning that an alien domiciled here cannot, by virtue of that fact alone, apply for registration prior to publication.<sup>16a</sup> To this extent the provision is ambiguous.

*Proclamations.* Section 9(b) provides that a proclamation may be issued under any of three conditions:

(i) If the foreign country "is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto" (open convention). This provision seems anomalous. As will be seen, the underlying philosophy of the proclamation system is that we will grant protection only in respect to a country which grants some kind of protection to our citizens. The mere fact that a foreign country is a party to an open convention (to which the U.S. does not adhere) does not result in protection in that country for our citizens. No proclamations have ever been issued on this basis.

(ii) "If the foreign country grants either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens" (national treatment).

(iii) "If the foreign country [so] grants \* \* \* to citizens of the United States \* \* \* copyright protection substantially equal to the protection secured to such foreign author under this title or by a treaty" (reciprocal treatment).

It will be noted that the protection of our citizens by the foreign country, upon which a proclamation is based, may result either from a treaty between that country and our country, or from the existing law of the foreign country.

If our proclamation is based on the current status of the law of the foreign country, it has a somewhat tenuous basis. The foreign country, not being committed by any agreement to protect the works of U.S. citizens, may later change its law in a manner which deprives our citizens of the required protection. Theoretically, the proclamation could then be rescinded. But as a matter of fact, although there have been instances in which a proclaimed country may have failed to give U.S. works the protection which had been contemplated

<sup>15</sup> Protection for alien authors is also available under treaties other than the Universal Copyright Convention which are not mentioned in Title 17 of the U.S. Code. These other treaties are discussed separately below.

<sup>16a</sup> It was so held in *Leibowitz v. Columbia Graphophone Co.*, 298 Fed. 342 (S.D.N.Y. 1923). But in two later cases it was held that other references in the statute to "publication" included the registration of unpublished works: *Marx v. U.S.*, 96 F. 2d 204 (9th Cir. 1938); *Shilkret v. Musicraft Records, Inc.*, 131 F. 2d 929 (2d Cir. 1942), cert. denied 319 U.S. 742 (1943).



when the proclamation was issued, no proclamation has ever been rescinded for that reason.

All the requirements of the statute for domestic works apply to works of nationals of proclaimed countries, except that for foreign works the statute provides that one copy only need be deposited for registration (instead of the two copies required for domestic works), and that the registration fee need not be paid if two copies of a foreign work are deposited with a catalog card.<sup>16</sup>

Another point in the federal law which does not operate in the same manner in practice for proclaimed foreigners and U.S. citizens is the right of the Register of Copyrights to demand the deposit of copies of published works; noncompliance with the demand results in liability to a fine and loss of copyright (§ 14). Whereas such demands are constantly made in regard to works published in the U.S., no demands are made, for practical reasons, for copies of works published abroad.

Although, as indicated above, aliens may be favored in some minor respects, they are considerably more burdened than Americans as a practical matter, by the manufacturing clause which requires that English-language books be manufactured in the U.S. in order to be protected for longer than five years. While the manufacturing clause applies alike to works of citizens of the U.S. and of proclaimed countries, the usual place for the manufacture and publication of books is the author's country. The requirement of manufacture in the United States will much more frequently mean added expenses and legal complications for the alien than for the U.S. citizen.

*Universal Copyright Convention.* Our statute (§ 9(c)) provides in effect that it applies to works of aliens if they are authored by nationals of, or first published in, a country party to the Universal Copyright Convention.

Such works are exempt from obligatory deposit and registration, from the precise requirements of sections 19 and 20 of the U.S. statute as to form and placement of the copyright notice, and from the manufacturing clause, if the published copies bear a copyright notice in the form and location prescribed by the Convention and section 9(c) of the U.S. statute.

### (3) *Treaties other than the Universal Copyright Convention*

A foreign work may be entitled to copyright protection in the United States under a treaty other than the Universal Copyright Convention. Such treaties in effect today are the Mexico City Convention,<sup>17</sup> the Buenos Aires Convention,<sup>18</sup> and bilateral treaties with China,<sup>19</sup> Hungary,<sup>20</sup> and Thailand.<sup>21</sup>

As far as the United States is concerned, the Mexico City Convention now applies only to nationals of El Salvador. Works of nationals of El Salvador may secure protection under that Convention by the deposit of copies and registration in the U.S. (Art. 4 of the Convention).

Under the Buenos Aires Convention, to which 15 Latin American countries and the U.S. are parties, works of nationals and domicili-

<sup>16</sup> 17 U.S.C. §§ 13 and 215.

<sup>17</sup> 35 Stat. 1934.

<sup>18</sup> 38 Stat. 1785.

<sup>19</sup> 33 Stat. 2208, and 63 Stat. 1299.

<sup>20</sup> 37 Stat. 1631.

<sup>21</sup> 53 Stat. 1731.

aries of the foreign countries that are parties to the Convention are eligible for protection in the United States. The Convention (Art. 3) provides in substance that the works of an author of any one adhering country are to be protected in the other adhering countries if the formal requirements for protection in the country of origin have been fulfilled, and if there appears a statement in the work "indicating the reservation of the property right." It might be argued that works to which the Buenos Aires Convention applies are entitled to protection in the United States even though such works (1) bear a "reservation of property right" which is different from the U.S. copyright notice, (2) did not comply with the U.S. manufacturing requirement, or (3) have not been deposited and registered in the U.S. Copyright Office.<sup>22</sup> However, the statute makes no special provisions for works covered by the Buenos Aires Convention; and in the absence of judicial interpretation the validity of the foregoing argument remains uncertain.

The protection to be given to foreign works is clearly national treatment under the Mexico City Convention (Art. 5) and less clearly so under the Buenos Aires Convention (Art. 3). At least in one respect our courts have accorded less than full national treatment: the musical recording rights provided for in section 1(e) of our statute were denied to aliens claiming protection under the Buenos Aires Convention in the absence of a Presidential proclamation of such rights for their country.<sup>23</sup>

#### (4) *Overlaps*

A given alien's work may appear to qualify for protection under more than one theory. For example, he may be a national of a country which is proclaimed and is also a party to the Buenos Aires and/or the Universal Copyright Convention.

Since the requirements and conditions of U.S. protection differ under these various bases, such overlaps give rise to uncertainty and confusion. The following questions are mentioned by way of examples:

Is the work of a national of a foreign country which is proclaimed and is also a party to the Universal Convention exempt from the manufacturing clause if the work bears a notice which meets the prescription of the U.S. statute but not that of Article III of the Universal Convention?

Is the work of a national of a foreign country which is proclaimed and is also a party to the Buenos Aires Convention exempt from the manufacturing clause?

Is the work of a national of a foreign country which is a party to both the Buenos Aires and the Universal Conventions, and bearing no notice other than the words "Derechos Reservados," eligible for protection in the United States?

Much uncertainty regarding these and other similar questions exists under our present law.

<sup>22</sup> Some countries are parties to both the Buenos Aires and the Universal Copyright Conventions. Possible conflicts between the two are intended to be resolved by Article XVIII of the latter Convention. However, the problems arising in connection with the notice requirement are not expressly solved, and text writers have differed on the interpretation of Article XVIII. Cf. Arpad Bogsch, *The Universal Copyright Convention* (1958) p. 156; Plinio Bolla, *A propos de l'article XIX de la Convention Universelle sur le Droit d'Auteur*, in 8 UNESCO Copyright Bulletin 84 (1955); McConnell, *The Effect of the Universal Copyright Convention on Other International Conventions and Arrangements*, in ASCAP COPYRIGHT LAW SYMPOSIUM No. 9 (1958) 32, 63.

<sup>23</sup> *Portuondo v. Columbia Phonograph*, 81 F. Supp. 355 (D.C.S.D.N.Y., 1937).

*Chapter III*

## REFORM EFFORTS SINCE 1909

The half century since 1909 has been rich in legislative efforts to modify the status of foreign works. Some of the efforts succeeded, others did not. Among the former, the gradual liberalization of the manufacturing clause<sup>24</sup> and the changes made to conform our statute to the Universal Copyright Convention<sup>25</sup> have been the most important.

Most of the unsuccessful bills proposed a general revision of the copyright law, and were largely shaped by the desire of their proponents to enable the United States to join the Berne Union. The most significant of these bills of general revision were the Dallinger (1924), Perkins (1925), Vestal (1926, 1930), Sirovich (1932, 1936), Duffy (1935), Daly (1936), and Thomas (1940) bills.<sup>26</sup> In order to make our law conform to the Berne Convention, these bills either eliminated altogether the requirement of certain formalities for copyright protection, or exempted Berne Union works therefrom, including requirements as to notice, deposit, registration, and the manufacturing clause. In view of U.S. adherence to the Universal Copyright Convention in 1954, the movement for adherence to the Berne Union has diminished if not virtually ceased, and it seems superfluous to go into details of the various earlier bills regarding formalities. But mention should be made of the provisions in those bills, corresponding with section 9 of the present statute, regarding the bases for extending protection to foreign works.

In general, these bills extended protection to works of aliens domiciled in the U.S., of citizens of Berne Union countries (if the U.S. adhered thereto), and of citizens of other countries proclaimed by the President. With respect to countries not members of the Berne Union, most of these bills departed in some particulars from the 1909 Act as to the bases for Presidential proclamations.

As pointed out above, under the 1909 Act proclamations may be issued in respect to countries which are parties to an "open convention," even though the United States is not a party to, and its citizens do not receive protection under, such convention. This basis for proclamations was omitted from a number of the bills, for example, the Vestal (1926, 1930), Sirovich (1936), and Thomas (1940) bills, cited above.

It has also been mentioned that under the 1909 Act proclamations may be issued in respect to countries which grant either "national treatment" or "reciprocal treatment" to our citizens. According to that Act, a proclamation may be based on a finding that either form of treatment is granted to works of U.S. citizens by a treaty or agreement with the foreign country, or on a mere finding that such treatment is accorded by the law of the foreign country. This latter possibility was eliminated in some of the bills, for example the Perkins (1925) and Vestal (1926, 1930) bills, cited above.

<sup>24</sup> See note 6, *supra*.

<sup>25</sup> Act of Aug. 31, 1954, ch. 1161, 61 Stat. 655.

<sup>26</sup> Dallinger: H.R. 8177, 68th Cong., 1st Sess. (1924), and H.R. 9137, 68th Cong., 1st Sess. (1924); Perkins: H.R. 11258, 68th Cong., 2d Sess. (1925); Vestal: H.R. 10434, 69th Cong., 1st Sess. (1926), and H.R. 12549, 71st Cong., 2d Sess. (1930); Sirovich: H.R. 10976, 72d Cong., 1st Sess. (1932), and H.R. 11420, 74th Cong., 2d Sess. (1936); Duffy: S. 2465, 74th Cong., 1st Sess. (1935), and S. 3047, 74th Cong., 1st Sess. (1935); Daly: H.R. 10632, 74th Cong., 2d Sess. (1936); Thomas: S. 3043, 76th Cong., 3d Sess. (1940).

In the Thomas bill (1940) "reciprocal treatment" was dropped as a basis for a proclamation; the bases were to be "national treatment" or—and this was a new idea—treatment equivalent to that given us by other countries under a treaty.<sup>27</sup>

The Sirovich bill (1932) omitted "national treatment" as a basis for proclamations; the basis was to be treatment substantially equal to that given by the United States to its own citizens.<sup>28</sup>

So much as to the conditions for issuing proclamations. As to the contents of the proclamations, the situation under the 1909 Act is that the extension of musical recording rights to foreign musical compositions must be proclaimed explicitly and specially. This special requirement was maintained in some bills (e.g., Dallinger, 1924; Perkins, 1925; Vestal, 1930), but was eliminated in others (e.g., Vestal, 1926; Thomas, 1940).

Under the present Act, and under most of these bills, Presidential proclamations would operate to extend the full protection afforded by the U.S. law to works of the citizens of the foreign country (national treatment), with the possible exception of musical recording rights. Some of the bills, however, provided that the duration of copyright in the U.S. should not extend beyond the time when the foreign work has fallen into the public domain in the country of origin (Dallinger, 1924; Perkins, 1925; Vestal, 1926, 1930). The Sirovich bill (1936) contained a novel provision: whenever the President found that a foreign country placed restrictions on the importation, distribution, or use of U.S. works, he was to impose similar restrictions on works of that country.<sup>29</sup> The Thomas bill (1940) contained a somewhat similar provision to the effect that if a foreign country restricted the rights it accorded to U.S. works, the President could proclaim similar restriction on the rights accorded to works of that country.<sup>30</sup>

#### Chapter IV

##### THE LAWS OF FOREIGN COUNTRIES

Many foreign countries protect the works of an alien if the alien resides in their territory or first publishes his work in their territory. This is, of course, not essentially protection of foreign works, as the circumstances just mentioned are thought to give the works a domestic character.

Leaving these circumstances aside, most foreign countries having copyright laws grant protection to an alien only if their nationals receive some kind of protection in the alien's country. But there are a few countries—notably France and Portugal—which have traditionally granted protection to the works of all aliens irrespective of any *quid pro quo*.<sup>31</sup>

The legislation devices in foreign countries implementing the principle of *quid pro quo* are of infinite variety. The statutes of Germany, the Soviet Union, and the United Kingdom will be mentioned as typical examples.

<sup>27</sup> S. 3043, 76th Cong., 3d Sess., § 7.

<sup>28</sup> H. R. 12425, 72d Cong., 1st Sess., § 5(d).

<sup>29</sup> H. R. 11420, 74th Cong., 2d Sess., § 7(f).

<sup>30</sup> S. 3043, 76th Cong., 3d Sess., § 7.

<sup>31</sup> France: see Law No. 57-286 of March 11, 1957, Art. 70, "Journal Officiel" of March 14, 1957, page 2723; Portugal: Decree-Law No. 13725 of May 27, 1927, Art. 136, "Diário do Governo" of June 3, 1927.

In Germany,<sup>32</sup> there are no statutory provisions for the protection of works of aliens, but they are protected by virtue of international treaties. Germany is a member of the Berne Union and a party to the Universal Copyright Convention, and has made several bilateral treaties dealing exclusively or partly with copyright; and as international treaties take precedence over statutes, Germany protects the works of nationals of some sixty countries (including the United States) as well as the works of *any* alien if first published in a country party to the Berne or Universal Conventions.

In the Soviet Union, the statute provides that "copyright in a work published abroad or located abroad as a manuscript \* \* \* shall be recognized only if the U.S.S.R. has a special agreement to this effect with the country concerned."<sup>33</sup> So far as is known, the Soviet Union has not concluded any such agreements.

In the United Kingdom, protection is available for works of aliens if Her Majesty, by Order in Council, designates the foreign country of the author, or of the first publication, as one to which the British Copyright Act extends. Orders in Council may be issued in respect to a co-party with the United Kingdom in a copyright convention, or in respect to any other country whose laws give "adequate protection" to British authors.<sup>34</sup> Orders may contain restrictions on the scope or extent of the protection for a particular country "if it appears to Her Majesty that the laws of a country fail to give adequate protection to British works," and "in making [such a restrictive] Order \* \* \* Her Majesty shall have regard to the nature and extent of the lack of protection for British works."<sup>35</sup>

### *Chapter V*

#### QUESTIONS TO BE CONSIDERED IN A REVISION OF THE LAW

##### A. ALTERNATIVE BASES FOR PROTECTION OF FOREIGN WORKS

In revising our copyright law, what basis should be adopted for protecting works of foreign origin? Three alternatives will be presented:

- (1) Retain the present system (with possible changes in detail).
- (2) Provide protection to all foreign works without regard to their national origin.
- (3) Provide protection to all foreign works except as the President may otherwise proclaim.

1. Under the present system, works of alien authors are protected only if one of the following conditions is met: that the author is domiciled in the United States, or that the work is entitled to protection under a convention or treaty to which the United States adheres, or that the country of which the author is a national has been proclaimed by the President. If this basic system is retained, consideration might be given to changing or clarifying the present law in some of its particulars.

(a) As pointed out above, the present statute (§ 9(a)) is not clear as to whether an unpublished work of an alien domiciled in the United

<sup>32</sup> German Law of June 19, 1901, as amended by the Laws of May 22, 1910, and December 13, 1934.

<sup>33</sup> Joint Resolution of the U.S.S.R. Central Executive Committee and the Council of People's Commissars of May 16, 1928, Principle No. 1.

<sup>34</sup> U.K. Copyright Act, 1956, 4 & 5 Eliz. 2, Ch. 74, § 32.

<sup>35</sup> *Id.* § 35.

States is eligible for registration under section 12. This should be clarified. No reason is seen to exclude such works from the privilege of registration.

(b) Consideration might be given to treating works first published in the United States as domestic works irrespective of the author's nationality. This would amount to a general application of the principle we have already adopted in section 9(c) of the present law regarding the protection of works under the Universal Copyright Convention.

(c) The present statute (§9(c)) provides expressly that works protected under the Universal Copyright Convention are exempted from certain general requirements (see p. 5 *supra*). There is no reference in the present statute to the Buenos Aires Convention; and as pointed out above, there is some uncertainty as to the application of some provisions of the present statute to works coming under that Convention. The new statute should make such exceptions from its general rules as are necessary to conform with our obligations under the Universal and Buenos Aires Conventions.

(d) As to the conditions for Presidential proclamations for foreign countries with which no treaty relations exist, the present conditions that the foreign country grant either national treatment or substantially reciprocal treatment to U.S. works might be retained. But there would seem to be no reason to retain the "open convention" basis for proclamations.

(e) Protection by proclamation might be authorized not only for works of nationals of the designated country, but also for works first published in that country.

(f) The President might be authorized to impose limitations or conditions on the protection accorded to any country which imposes similar limitations or conditions on the protection of U.S. works.

2. The second alternative—protection for all works without regard to their national origin—would be a marked departure from the present system. Under this alternative, all foreign works would be accorded the same protection as domestic works without discrimination. This would extend to statutory copyright, the principle now followed in our common law regarding unpublished works.

If the new law purports to treat domestic and foreign works alike, but contains any requirements (e.g., as to deposit, registration, or manufacture in the U.S.) which conflict with our obligations under the Universal or Buenos Aires Copyright Conventions, it would be necessary to provide appropriate exemptions for foreign works entitled to protection under those Conventions.

3. The third alternative—protection for all foreign works except as the President may otherwise proclaim—would depart from the present system in regard to procedure, but could achieve the same result of reciprocity as far as that may be deemed desirable.

The President would be empowered to withhold or withdraw protection from the works originating in any particular country, or to impose conditions or restrictions on their protection, whenever he found it to be in the interest of the United States to do so. If there are countries in respect to which protection is deemed undesirable *ab initio*, the President could issue the appropriate proclamation with the same effective date as that of the new statute. If a foreign country imposed burdensome conditions or restrictions on U.S.

works, a proclamation could be issued to impose corresponding conditions or restrictions on that country when deemed desirable.

It could be expected that only a few proclamations denying or restricting protection in regard to particular countries would need to be issued under this alternative, while the present system has necessitated the issuance of a large number of proclamations extending protection to designated countries.

#### B. OBSERVATIONS CONCERNING THE ALTERNATIVES

Leaving aside those works originating in foreign countries which will be protected in any event by virtue of a treaty to which the United States adheres, certain observations may be made regarding the alternative bases for the protection of other foreign works.

1. The present system of requiring proclamations for the extension of protection to works originating in various foreign countries has proved to be cumbersome in operation: some 40 proclamations have been issued since 1909 extending protection to 47 countries. This does not include 15 proclamations extending the time for compliance with formal requirements because of wartime disruption and 3 proclamations terminating such time extensions, nor does it include the 16 proclamations issued before 1909. It should also be noted that the works originating in a number of other countries are given protection by virtue of their membership in the Universal or Buenos Aires Copyright Conventions although no proclamations have been issued with respect to those countries except the general proclamations of the effectiveness of those Conventions. And conversely, some of the proclamations relate to countries that are also members of one or both of those Conventions. The result of all this is that the determination of the status of works originating in various foreign countries now requires reference to a large number of documents which differ from one another in some respects.

Moreover, the present system of granting protection through numerous proclamations, co-existing with treaties with some of the same countries and other countries, is productive of many complexities and uncertainties. Thus, the eligibility of a foreign work for protection may require the determination, in various circumstances, of questions such as the following: What is the nationality of the author? Where is he domiciled? Where was the work first published? Is the country of origin (that of the author's nationality or of first publication) a member of the Universal Copyright Convention? Is the author's country a member of the Buenos Aires Convention? Has his country been proclaimed? Where was the work manufactured? What kind of notice is required? Does the author's country require registration, and if so, has such registration been made? What is the scope of the applicable proclamations (e.g., as to musical recording rights)? These questions are further complicated by the fact that a work may qualify for protection on several bases (a proclamation, the Universal Copyright Convention, the Buenos Aires Convention, a bilateral treaty) differing in their requirements, with consequent uncertainties.

Further, the present system of proclamations is based on a finding, at the time a proclamation is issued, that the foreign country then provides "national" or "reciprocal" treatment for U.S. works. In the

absence of a treaty or agreement for maintaining such treatment, there seems to be an implied need for the Government to review changes in the laws of the foreign countries to see that the treatment given U.S. works continues to provide an adequate basis for the proclamation.

Some of the complications referred to above will no doubt remain as long as works of the member countries of the two Conventions are treated differently from works of non-member countries. But beyond that, the cumbersome system of according protection to non-member countries by issuing individual proclamations could be simplified, and the complexities flowing from the differentiation between proclaimed and non-proclaimed countries and between one proclaimed country and another, could largely be eliminated by the second alternative to which we now turn.

2. The granting of protection to all foreign works regardless of the author's nationality, and hence regardless of reciprocity, would appear to have several advantages: first, its simplicity and the elimination or minimizing of many of the complexities of the present system referred to above.

Second, the principle of protection without regard to the author's nationality would be consistent with the concept of copyright as a species of property. Other forms of property are protected by our domestic laws without regard to the owner's nationality; and this is true of patents and other intangible rights. It is also true of an author's property rights in his unpublished works under the common law. The same principle might well be justified for an author's published works.

Third, the protection of all foreign works would be generally beneficial to U.S. publishers, producers, and distributors. For example, if a foreign work is to be published or is to be made into a motion picture in the United States, it is important to the American publisher or producer that the work be under copyright so that he can acquire the exclusive right to publish it or to make a motion picture of it.

Fourth, our adoption of the principle of protecting the works of all foreign authors might be of substantial psychological value abroad in demonstrating our respect for the cultural and intellectual creations of all nations and our desire to give all authors their due without national discrimination. This would probably contribute to our esteem, not only in those countries (mostly underdeveloped and nascent nations) to which we do not now extend copyright protection, but also among the intellectual circles in the advanced nations.

In opposition to the extension of protection to all foreign works, it can be argued that the principle of reciprocity is just, and that the requirement of reciprocity is desirable to obtain protection for U.S. works abroad.

It may be noted again in this connection that in three respects we already grant protection to works of authors who are nationals of countries that do not protect U.S. works, namely, their unpublished works, their works first published in a member country of the Universal Copyright Convention, and the published works of aliens domiciled in the U.S. or in a member country of the Buenos Aires Convention.



Aside from that fact, the requirement of reciprocity may have been important during the past when the United States was seeking to secure protection for its works in other countries in exchange for its protection of their works. It may be less important now, when virtually all foreign countries in which U.S. works have a significant market (except the U.S.S.R.) protect U.S. works and we protect theirs. Moreover, as already indicated, it is beneficial to U.S. publishers, producers, and distributors to have foreign works protected here even though the country of origin does not protect the works of U.S. authors.

As to securing protection of U.S. works in other countries if the U.S. protects all foreign works without requiring reciprocity, the experience of France may be enlightening. France has provided protection for the works of authors of all nations, and French works are now protected in a greater number of countries than are U.S. works, and probably in more countries than are the works of any other nation.

3. The third alternative represents an effort to achieve the simplicity and other advantages of the second alternative by providing basically for the protection of all foreign works, but with the authority reserved in the President to withhold or restrict protection by proclamation in regard to any particular country where reciprocity is deemed to be essential in the interest of the United States.

Presumably the number of proclamations issued under this third alternative would be very few, instead of the many necessitated by the present system. Insofar as reciprocity is not deemed essential—which may be the case in regard to the many small, underdeveloped, or new countries where there is little use made of U.S. works and little use of their works in the U.S.—the advantages mentioned above in connection with the protection of all foreign works could be realized.

At the same time, the authority reserved to the President to withhold or restrict protection in regard to any particular country would provide the means of imposing the requirement of reciprocity in any instance where it is deemed essential, as it might be, for example, under present conditions in relation to the U.S.S.R.

It should be pointed out that under such a proclamation, protection for the works of nationals of any particular country would not be denied absolutely. For example, whatever the nationality of the author, his works would be entitled to protection if first published in a country party to the Universal Copyright Convention.

#### C. RECAPITULATION OF BASIC ISSUES

In a new U.S. copyright statute, which of the following alternative bases should be adopted for extending protection to the works of foreign authors?

1. Retain the present basis of protecting only those works of foreign authors that meet specified conditions. If so, should the qualifying conditions be—

- (a) that the author is domiciled in the United States;
- (b) that the work is entitled to protection under a convention or treaty to which the United States is a party;
- (c) that the President finds and proclaims (1) that the country of which the author is a national protects works of United States

citizens, or (2) that the country in which the work is first published protects works first published in the United States;

(d) that the work is first published in the United States?

2. Extend protection to the works of all authors regardless of their nationality.

3. Extend protection to the works of all authors regardless of their nationality, except as the President by proclamation may withhold or restrict protection as to the works of nationals of any particular country.

---

---

COMMENTS AND VIEWS SUBMITTED TO THE  
COPYRIGHT OFFICE  
ON  
PROTECTION OF WORKS OF FOREIGN ORIGIN

---

---



# CONTENTS

---

Comments and views submitted by—	Page
Horace S. Manges.....	19
Harry R. Olsson, Jr.....	19
John Schulman.....	19
Elisha Hanson.....	20
Melville B. Nimmer.....	20
Herman Finkelstein.....	21
Walter J. Derenberg.....	21



COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT  
OFFICE ON PROTECTION OF WORKS OF FOREIGN  
ORIGIN

---

*Horace S. Manges*

JUNE 3, 1959.

\* \* \* \* \*

It seems to me that in a new U.S. copyright statute it would be preferable to utilize as a basis for the protection of works of foreign authors the third proposed alternative. Thus I would favor extending such protection to the works of all authors regardless of their nationality except as the President, by proclamation, might otherwise direct as to the works of nationals of any particular country. In this way, as Mr. Bogsch indicates, simplicity could be obtained and yet reciprocity preserved where deemed advisable in the interest of the United States.

HORACE S. MANGES.

---

*Harry R. Olsson, Jr.*

JUNE 19, 1959.

I have the following comments to make on the questions raised by this excellent study.

In a new United States copyright statute, protection should be extended to works of foreign authorship regardless of the nationality of the authors except as the President by proclamation may withhold or restrict protection for the works of nationals of any particular country. I take this position only because of my belief that in the present state of the world our President would withhold protection from Russian nationals and perhaps nationals of other "iron curtain" countries. If it appeared a proclamation or proclamations having this effect were not to be made, I should then oppose a grant of protection on that basis and support granting protection to those works of foreign authors meeting specified conditions, which would include domicile of the author, convention or treaty protection and reciprocity. I should not protect the work merely because it was first published in the United States and I should not have any requirement of manufacture in this country.

Under present world conditions, I think this country would be very foolish to enrich Russian authors, if indeed royalty payments to them may be regarded as sure to compensate them privately, when our own authors receive no effective protection from their government. Nor is there any advantage to us in encouraging their present kind of intellectual output; the reverse is true. I am aware of and impressed by the argument that if you encourage a man to think, you cannot be sure he will respect the bounds you set, but I do not think many are likely to follow Pasternak's lead in Russia and actually write down what they think.

The fact that they may now receive protection in this country under the Universal Copyright Convention by first publishing in a member country is to be regarded as an unfortunate by-product of that convention rather than an effect of it which we should wish to extend.

The problem proposed by the undeveloped countries of the world which do not grant our authors protection is an entirely different matter, probably one where a soft heart does not mean a soft head. Here we should consider exceptions to what should be our general rule of reciprocity.

HARRY R. OLSSON, JR.

---

*John Schulman*

JULY 16, 1959.

\* \* \* \* \*

There is little doubt that the present state of our law concerning foreign works is not entirely satisfactory and should be eventually changed. I think, for example, that the work of an American author first published abroad should be entitled to copyright protection without the limitations of the manufacturing clause. It

would be more realistic to eliminate "reciprocity" under our proclamation procedure and to grant copyright protection to foreign works only on the basis of a specific treaty or convention.

I do not think it is feasible at the present time to provide protection to all foreign works without regard to their national origin, or to provide such protection subject to cancellation by Presidential proclamation.

Of course, a general grant of copyright protection to all foreign works would be a generous gesture and would in the abstract represent an ideal condition. On the other hand, it would be wholly impractical in the present posture of international copyright, and would destroy the primary incentive for foreign countries to adhere to the Universal Copyright Convention.

It is somewhat amazing that such countries as Canada and Australia have not adhered to UCC and have allowed so many years to elapse before taking advantage of its provisions. They have, of course, been working on a general revision of their copyright statutes and this has been a long drawn out process. Nevertheless, we must face the fact that in the absence of any incentive to adhere to UCC to obtain better copyright protection in the United States, it is entirely possible that they would never do so.

The same considerations apply to a number of countries which have not indicated any great desire to adhere to as simple a convention as the one created in 1952. It is my firm belief that, were we to grant unconditional protection to all works of foreign origin, the present trend toward adherence to the UCC would cease.

The suggestion that unqualified copyright protection might be cancelled by Presidential proclamation, although a theoretical safeguard, is also not realistic. It is one thing to withhold a proclamation in the first instance and another to denounce relationships after they are created. A good example of inaction is the copyright status of works of Dutch origin. Although The Netherlands has for many years made it clear that it does not afford reciprocal protection to American works, our own Government has done nothing about it. As far as I know, we have never cancelled or withdrawn a proclamation under the Copyright Act, and I suggest that there is very little likelihood of such action being taken against a friendly nation in the future.

Accordingly, it is my suggestion that we either keep our present structure in relation to foreign works, or else eliminate the proclamation feature and rely entirely on treaty or convention procedures.

At the same time we should eliminate the manufacturing clause in respect of works of American authors and should afford statutory protection of the unpublished works of alien authors who are domiciled in the United States.

\* \* \* \* \*

JOHN SCHULMAN.

---

*Elisha Hanson*

JULY 29, 1959.

In reference to the copyright revision study by Arpad Bogsch entitled "Protection of Works of Foreign Origin", it is my view that the present system should be retained subject to minor modifications needed for clarification.

Mr. Bogsch has clearly stated in Chapter V, 1(a), modifications which might properly be made. Quite definitely protection under the American system should not be opened to nationals of countries notorious for theft of American works.

ELISHA HANSON

---

*Melville B. Nimmer*

AUGUST 5, 1959.

With respect to the study "Protection of Works of Foreign Origin" by Arpad Bogsch, it seems to me that all foreign works should be accorded the same protection as domestic works without discrimination. Recognition by our government of the dignity and status of the creators of literary property should not be dependent upon the acts of foreign governments. Moreover, it would appear to be in the interests of domestic users of copyright as well as creators here and abroad that the present complex and archaic proclamation system be abolished. In order to achieve full equality of treatment between domestic and foreign works it would be necessary not only to abolish special conditions precedent for pro-



tection of foreign works, but also to eliminate certain formalities now required of domestic authors from which foreign authors are exempt under the Universal Copyright Convention and the Buenos Aires Copyright Convention. Such action is clearly indicated, but appears to be beyond the scope of this particular study.

\* \* \* \* \*

MELVILLE B. NIMMER.

*Herman Finkelstein*

AUGUST 7, 1959.

\* \* \* \* \*

It is my personal feeling that all authors, regardless of nationality, should be able to have their works protected in the United States, although they may be barred from receiving any income from those works if American authors are barred from receiving income when their works are used in the countries of which the particular authors are nationals.

In other words, it seems to me that a distinction should be drawn between the recognition of an author's property rights and the conditions under which he will be permitted to enjoy the fruits of his labors at a particular time.

We certainly hope that many of the countries which now do not have copyright relations with the United States will some day join the Universal Copyright Convention, or will amend their laws so as to protect American works. If that should happen, the authors should be able to receive income on works which were previously published rather than suffer those works to remain permanently in the public domain.

If this principle is feasible, Mr. Bogsch's alternative 3 on page fourteen, might be changed to read as follows:

"3. Extend protection to the works of all authors regardless of their nationality, except as the president by proclamation may (a) withhold or restrict protection as to the works of nationals of another particular country, (b) provide for issuance of licenses for the use of such works in the United States, (c) impose restrictions on the transfer to such nationals of any funds earned in the United States from the use of such works."

I have not thought this through enough to say that this expresses my final views but it is something that we may discuss further as a possible approach to the subject.

\* \* \* \* \*

HERMAN FINKELSTEIN.

*Walter J. Derenberg*

AUGUST 17, 1959.

\* \* \* \* \*

I think we should all look forward to the time when we will be able to do away entirely with the present proclamation system and would, therefore, vote in principle for adoption of that approach.

On the other hand, I think we should bear in mind that our foremost objective for the time being should be toward ratification of the Universal Copyright Convention on the part of those many countries which have not yet agreed to do so and which have failed thus far to make the necessary adjustments in their domestic copyright legislation. Were we to provide that copyright protection in the United States would be available to authors of those countries automatically, this might conceivably result in a reaction on the part of those countries either to delay or to forgo altogether accession and ratification of the U.C.C. This would, of course, be true to a greater extent with regard to those countries which would not immediately benefit from the resulting inapplicability of the manufacturing provision of our law; in other words, countries such as Canada or Australia would in all probability still make every effort to adhere to the Convention because only in that event would works first published there in the English language enjoy copyright in the U.S.A. despite foreign manufacture. But other non-member countries, in which books are published in a language other than English, might conclude that there would no longer be any real need for ratification of the U.C.C. if U.S. copyright protection were automatically extended by statute to all foreign works. I am not unaware that even these small misgivings about

slowing up ratification of the Convention may not be serious enough to prevent us from adopting the position that, as a matter of principle, works of foreign authorship should be afforded copyright protection regardless of proclamations.

Should it be decided, however, to adopt Dr. Bogsch's alternative No. 1, then I would suggest that favorable consideration be given to a few important modifications to which reference is also made at pages 9-10 of Dr. Bogsch's study:

1. In order to bring our overall copyright system into closer accord with the basic principles on which the Universal Copyright Convention is founded, we should place works first published in a proclaimed country in the same category with works of citizens of such country. In other words, the proclamation should apply to both these categories, as does the U.C.C. today. I need hardly add that I would like to see such protection extended even to works first published in proclaimed countries by U.S. citizens, since I strongly feel that a work by a U.S. author and published in a foreign country either in English or in a foreign language should be considered "a work of foreign origin".

2. As Dr. Bogsch points out on page 10, there would seem to be no need to retain the "open convention" basis for proclamations.

WALTER J. DERENBERG.

---

---

STUDY NO. 33  
COPYRIGHT IN GOVERNMENT PUBLICATIONS  
BY CARUTHERS BERGER  
October 1959

---

---



# CONTENTS

---

	<b>Page</b>
I. Statement of the problems.....	27
II. History of the present law.....	27
A. Judicial decisions before 1895.....	27
B. The printing law.....	29
C. The copyright law.....	31
III. Developments since 1909.....	33
A. Expansion of Government publishing.....	33
B. Experience in practice.....	33
C. Legislative proposals since 1909.....	35
IV. Comparison with other laws.....	36
A. Copyright in State publications.....	36
B. Foreign laws.....	36
C. Patent law.....	38
V. Government agency views.....	38
VI. Analysis of issues.....	40
A. Definition of "Government publications".....	40
B. Copyright in works of the Government.....	40
C. The saving clause.....	41
D. Misuse of Government publications.....	42
VII. Summary of issues.....	42



# COPYRIGHT IN GOVERNMENT PUBLICATIONS

## I. STATEMENT OF THE PROBLEMS

There are two statutory prohibitions against copyright in publications of the United States Government:

(1) The Copyright Law, in section 8, title 17, U.S.C., provides:

No copyright shall subsist \* \* \* in any publication of the United States Government, or any reprint, in whole or in part, thereof: \* \* \*.

This section also contains a saving clause that: "The publication or republication by the Government \* \* \* of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright \* \* \*."

(2) The Printing Law, in section 58, title 44, U.S.C., provides that the Public Printer shall sell to applicants duplicate stereotype or electrotype plates from which any Government publication is printed. The last sentence of this provision states:

No publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted.

In reviewing these provisions in contemplation of a general revision of the Copyright Law, two major questions are presented: what is meant by a "publication" of the Government, and whether the prohibition of copyright in all such publications should be retained or modified. A third question is whether the saving clause in section 8 of the Copyright Law is adequate.

## II. HISTORY OF THE PRESENT LAW

### A. JUDICIAL DECISIONS BEFORE 1895

The first Federal statute concerning copyright in Government publications was the Printing Law enacted in 1895. Prior to that time the courts had held that individuals could not have copyright in books consisting of the text of Federal or State court decisions, statutes, rules of judicial procedures, etc., i.e., governmental edicts and rulings. Copyright was denied on the grounds of public policy: such material as the laws and governmental rules and decisions must be freely available to the public and made known as widely as possible; hence there must be no restriction on the reproduction and dissemination of such documents.<sup>1</sup>

<sup>1</sup> *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *Gray v. Russell*, 10 Fed. Cas. 1035 (No. 4728) (C.O.D. Mass. 1839); *Little v. Gould*, 15 Fed. Cas. 612 (No. 8395) (C.O.N.D. N.Y. 1852); *Davidson v. Wheelock*, 27 Fed. 61 (C.O.D. Minn. 1866); *Chase v. Sanborn*, 5 Fed. Cas. 521 (No. 2628) (C.O.D. N.H. 1874); *Banks v. McDivitt*, 2 Fed. Cas. 769 (No. 961) (C.O.S.D. N.Y. 1876); *Banks & Bros. v. West Publishing Co.*, 27 Fed. 50 (C.O.D. Minn. 1896); *Banks v. Manchester*, 128 U.S. 244 (1888); *Callaghan v. Myers*, 128 U.S. 617 (1888); *Connecticut v. Gould*, 34 Fed. 319 (C.O.N.D. N.Y. 1888); *Howell v. Miller*, 91 Fed. 139 (6th Cir. 1896). There is also some indication that at common law official speeches and letters are not protectible under the public policy rule: see *Gilmore v. Anderson*, 38 Fed. 846 (C.O.S.D. N.Y. 1899).

While copyright was denied in the text of court decisions, material added by a court reporter on his own—such as headnotes, syllabi, annotations, indexes, etc.—was deemed copyrightable by him, although he was employed by the government to take down and compile the court decisions.<sup>2</sup> These cases may be said to have established two principles: that material prepared by a government employee outside of the scope of the public policy rule was copyrightable; and that the employee who prepared such material on his own could secure copyright therein.

There appears to be no court decision before 1895 dealing directly with the question of whether the United States Government might obtain or hold copyright in material not within the public policy rule.<sup>3</sup> But the question did arise with respect to State Governments. In the nineteenth century much of the public printing for the States was done under contract by private publishers. The publisher would not bear the expense of printing and publishing, however, unless he could be given exclusive rights. To enable the State to give exclusive rights to a publisher, a number of States enacted statutes providing that court reporters or other State officials who prepared copyrightable material in their official capacity<sup>4</sup> should secure copyright in trust for or on behalf of the State.<sup>5</sup> Such copyrights for the benefit of a State were sustained by the courts.<sup>6</sup>

Two cases before 1895 may also be noted in regard to the question of the rights of individual authors (or their successors) in material prepared for, or acquired by, the United States Government. In *Heine v. Appleton*, an artist was held to have no right to secure copyright in drawings prepared by him as a member of Commodore Perry's expedition, since the drawings belonged to the Government.<sup>7</sup> In *Folsom v. Marsh*, where a collection of letters and other private writings of George Washington had been published and copyrighted by his successors, the purchase of the manuscripts by the United States Government was held not to affect the copyright; the contention of the defendant that the Government's ownership of the manuscripts made them available for publication by anyone was denied.<sup>8</sup>

In summary, as regards the copyrightability of government material before 1895, the text of laws, court decisions, governmental rules, etc., had been held not subject to copyright as a matter of public policy; but other material prepared for State Governments by their employees, notably the headnotes, syllabi, annotations, etc. prepared by court reporters, had been held copyrightable on

<sup>1</sup> *Wheaton v. Peters*, *supra* note 1 (see dissenting opinion of Justice Baldwin as reported by James Van Norden, 1834); *Callaghan v. Myers*, 128 U.S. 717 (1888); and see *Paigo v. Banks*, 13 Wall. 608 (U.S. 1872).

<sup>2</sup> In *Banks v. Manchester*, 128 U.S. 244 (1888) the court adverted to the provision in the copyright statute then in effect, that copyright could be secured only by "citizens" or "residents" of the United States, and questioned whether a government could claim copyright. In *Heine v. Appleton*, 11 Fed. Cas. 1031 (No. 6,324) (C.C.S.D. N.Y. 1857), where the claim of a Government employee to copyright in drawings prepared by him for the Government was denied, the court said: "Congress, by ordering the \* \* \* drawings to be published for the benefit of the public at large, has thereby given them to the public."

<sup>3</sup> By that time it had become part of the official duties of court reporters to prepare headnotes, syllabi, etc., for State reports.

<sup>4</sup> The trust device, instead of claiming copyright in the name of the State, was apparently adopted in view of the question raised by the court in *Banks v. Manchester* as noted *supra* in note 3.

<sup>5</sup> *Little v. Gould*, 15 Fed. Cas. 612 (No. 8,395) (C.C.N.D. N.Y. 1852); *Banks v. West Publishing Co.*, 27 Fed. 60 (C.C.D. Minn. 1886); *Conn. v. Gould*, 34 Fed. 319 (C.C.N.D. N.Y. 1888). The court in *Little v. Gould* observed that a prior law preventing copyright in the notes of court reporters had resulted in publishers being unwilling to print and publish the reports at their own expense.

<sup>6</sup> See note 3 *supra*. This appears to be an application of the principle that a work made by an employee for hire belongs to the employer. See 17 U.S.C. § 26.

<sup>7</sup> 9 Fed. Cas. 342 (No. 4,601) (C.C.D. Mass. 1841). This appears to be an application of the principle that ownership of a manuscript does not necessarily carry with it the ownership of copyright. See 17 U.S.C. § 27.



behalf of the States. An employee of the Federal Government had been held to have no right to claim copyright in a work prepared by him for the Government; but the courts had had no occasion to consider any claim of copyright on behalf of the Government itself.<sup>9</sup>

#### B. THE PRINTING LAW

The Printing Law of 1895, which was designed to centralize in the Government Printing Office the printing, binding, and distribution of Government documents, contained the first statutory prohibition of copyright in Government publications. Section 52 of that Law,<sup>10</sup> which is still in force, provides for the sale by the Public Printer of "duplicate stereotype or electrotype plates from which any Government publication is printed," with the proviso "that no publication reprinted from such stereotype or electrotype plates and no other Government publication shall be copyrighted."

The history of that section of the law is interesting and enlightening.<sup>11</sup> At the time when the Printing bill was being considered the Joint Committee on Printing, of which Representative Richardson was chairman, was in the process of preparing for publication a compilation of the "Messages and Papers of the Presidents of the United States." In the Printing bill as presented by the Joint Committee to the House,<sup>12</sup> section 53 (which later became section 52 of the Law of 1895) provided for the sale of duplicate plates by the Public Printer, this provision apparently having been suggested by Mr. Richardson with a view to facilitating the private republication of the Presidential Messages. Section 53 was attacked on the floor of the House on the ground that private persons might assert copyright claims upon republishing Government documents from the plates.<sup>13</sup> It was then proposed that a proviso be added to section 53, "that no publication reprinted from such stereotype or electrotype plates shall be copyrighted."<sup>14</sup> The opposition was not satisfied with that but accepted a further proposal that the proviso be extended by inserting the words "and no other Government publication."<sup>15</sup> The bill was passed with the proviso in that form.

Perhaps the opposition had anticipated and sought to forestall what happened subsequently. After several volumes of the Presidential Messages were compiled by Mr. Richardson and Congress authorized them to be printed and distributed by the Government Printing Office, some of the volumes were printed with a copyright notice in the name of Mr. Richardson.<sup>16</sup>

When this was questioned in Congress, he said that he was not claiming copyright as against the Government but only against third persons, and that his claim was limited to the original matter created by his editorial work.<sup>17</sup> Other members of Congress expressed the view that he had no right to claim copyright in the product of his editorial work since it was produced for a publication authorized by

<sup>9</sup> It is pertinent to note that in two instances Congress had passed private acts directing that copyright be granted to the heirs of private authors whose works had been published by the Government: an Act for the Relief of Mistress Henry R. Schoolcraft, 11 STAT. 557 (1859), and an Act for the relief of Mrs. William Herndon, 14 STAT. 587 (1866).

<sup>10</sup> 28 Stat. 608 (1895); codified in 44 U.S.C. § 58.

<sup>11</sup> This history is traced in S. REP. NO. 1473, 56th Cong., 1st Sess. (1900).

<sup>12</sup> H. R. 2850, 53d Cong., 1st Sess. (1893).

<sup>13</sup> 25 CONG. REC. 1764 (1893).

<sup>14</sup> *Id.* at 1765.

<sup>15</sup> *Id.* at 1767.

<sup>16</sup> See S. REP. NO. 1473, 56th Cong., 1st Sess. 2 (1900).

<sup>17</sup> 30 CONG. REC. 1032-1033 (1897).

Congress.<sup>18</sup> Subsequently the Senate Committee on Printing reviewed the matter and expressed its opinion that the proviso in section 52 precluded Mr. Richardson's claim of copyright.<sup>19</sup> The report of the Committee stated in part:

[T]he prohibition contained in the Printing Act was intended to cover every publication authorized by Congress in all possible forms \* \* \*.

Your committee thinks that copyright should not have issued in behalf of the Messages, and that the law as it stands is sufficient to deny copyright to any and every work once issued as a government publication. If the services of any author or compiler employed by the Government require to be compensated, payment should be made in money, frankly and properly appropriated for that purpose, and the resulting book or other publication in whole and as to any part should be always at the free use of the people, and this, without doubt, was what Congress intended.

The import of this statement as to what constitutes a "Government publication" is not entirely clear. If it is literally true that copyright is denied "to any and every work once issued as a government publication," then works produced by private authors and incorporated in a publication issued by the Government would be denied copyright. Perhaps the Committee was thinking only of the publications referred to in the last part of the quoted statement, that is, publications resulting from "the services of any author or compiler employed by the Government."

The ambiguity of the Committee's statement demonstrates the confusion that has arisen as to the meaning of "Government publication." The confusion may be traceable to the dual meaning of the word "publication"; it may refer to the act of reproducing and distributing copies (printing and distribution by the Government), or it may refer to the work that is being published (a work produced by the Government, i.e., produced for the Government by its employees). This will be discussed further below.

The Superintendent of Documents had occasion in 1911 to define the term "Government publication" as used in a different context. The Printing Law provides that he shall prepare a "comprehensive index of public documents" at the close of each session of Congress, and a "monthly catalogue of Government publications."<sup>20</sup> For the purpose of compiling such indexes and catalogs, he defined "public document" as including:

Any publication printed at Government expense or published by authority of Congress or any Government publishing office, or of which an edition has been bought by Congress or any Government office for division among the Members of Congress or distribution to Government officials or the public.<sup>21</sup>

The Superintendent of Documents was not here concerned with the question of copyright; he had no occasion to consider the copyright status of the contents of public documents, such as material contained therein that had been produced by a private author.

However, a series of bills introduced between 1913 and 1919 to revise the Printing Law, none of which were passed, contained a similar definition in providing that:

The term "Government publication," as used in this Act, shall be held to mean and include all publications printed at Government expense or published or distributed by authority of Congress. No Government publication nor any portion

<sup>18</sup> *Id.* at 1028-1033 *passim*.

<sup>19</sup> S. REP. NO. 1473, 56th Cong., 1st Sess. (1900).

<sup>20</sup> 44 U.S.C. §§ 76, 77.

<sup>21</sup> I Superintendent of Documents, *Checklist of United States Public Documents 1789-1909* vii (3d ed. 1911).

thereof shall be copyrighted \* \* \*, and hereafter every publication printed at the Government Printing Office shall bear its imprint and the name of the committee, commission, office, department, or establishment of the Government causing the same to be published.<sup>22</sup>

The committee reports on the bills pointed out that the proposed definition "is similar to that which has been adopted by the Superintendent of Documents," and observed that "requiring the name of the committee, commission, department, etc., to be printed on all publications which it causes to be published \* \* \* makes it certain whether such matter is a Government publication."<sup>23</sup>

Such a construction of "Government publication" ignores the fact that material published by a Government agency may contain works of private authorship; and it also seems to ignore the fact that works produced or owned by the Government may sometimes be issued through private publishers. Both of these facts may be pertinent to the question of copyright, as will be pointed out below.

#### C. THE COPYRIGHT LAW

The first mention of Government publications in the copyright statutes is found in the Copyright Act of 1909,<sup>24</sup> which consolidated and revised the prior statutes. The bill as first introduced in Congress in 1906<sup>25</sup> was the outgrowth of preliminary drafts by the Register of Copyrights and discussions of the drafts at a series of conferences held by the Librarian of Congress and the Register with representative of various interested groups. The preliminary drafts<sup>26</sup> purported to incorporate in the statute both the common law prohibition of copyright in laws, judicial decisions, etc., and the Printing Law prohibition of copyright in Government publications. Thus, section 15 of the draft of 1906 provided:

That no copyright \* \* \* shall subsist: \* \* \* (b) In official acts, proceedings laws, or ordinances of public authorities—federal, state, or municipal—or judicial decisions; [or] (c) In any government publication, or any reprint, in whole or in part, of any government publication.

Objections to this language were voiced at the conference,<sup>27</sup> principally by the publishers of State reports on the ground that it might be construed as prohibiting copyright in State publications which the courts had held copyrightable. Perhaps because of these objections, the bill as redrafted and introduced contained only the language that became section 7 of the 1909 Act (now section 8 of title 17 U.S.C.):

No copyright shall subsist \* \* \* in any publication of the United States Government, or any reprint, in whole or in part, thereof: \* \* \*.

At the hearings on the bill the only discussion of this provision concerned a suggestion that copyright in the text of State laws and court decisions should be expressly prohibited, lest the statute be deemed to overturn the common law prohibition in this regard.<sup>28</sup> This suggestion

<sup>22</sup> See, e.g., H.R. 6539, 63d Cong., 1st Sess. § 44 (1913); S. 1107, 64th Cong., 1st Sess. § 82 (1915); S. 7795, 64th Cong., 2d Sess. § 18 (1917); H.R. 8362, 66th Cong., 1st Sess. § 31 (1919).

<sup>23</sup> See S. REP. NO. 438, 63d Cong., 2d Sess. 50 (1914).

<sup>24</sup> 35 Stat. 1075 (1909). That act, with subsequent amendments, was codified and reenacted in 1947 as Title 17 of the United States Code.

<sup>25</sup> S. 6330 and H.R. 19853, 59th Cong., 1st Sess. (1906).

<sup>26</sup> Set forth in Copyright Office Bulletin No. 10 (first draft in print of Dec. 20, 1905, and second draft in print of Feb. 28, 1906).

<sup>27</sup> Stenographic Report of the Proceedings of the Conference on Copyright, First Session, 119-126 (May-June 1905); Third Session, 298-299 (1906).

<sup>28</sup> *Hearings Before Joint Committee on Patents on S. 6330 and H.R. 19853, 59th Cong., 1st Sess. 133-135 (Dec. 1906).*

was dropped, apparently on the assumption that the statute would not remove the common law prohibition as to the text of State laws and court decisions. There was no discussion of the reason for permitting copyright in other State publications while prohibiting copyright in all publications of the United States. Nor do the hearings shed any light on the meaning of "publications of the United States Government."

There have since been two court decisions bearing on the meaning of that term. In *Sherrill v. Grieves*,<sup>29</sup> the plaintiff, an Army officer and instructor at an Army school, wrote a book on military topography in his spare time, the writing of the book not being within his official duties. With his permission the Army authorities printed parts of the book as a pamphlet for use in the school, a copyright notice in the plaintiff's name being inserted in the pamphlet. In a suit for infringement the defendant contended that the pamphlet was a Government publication and hence the material therein was in the public domain. The court, finding that the preparation of the work was not within the scope of the plaintiff's employment by the Government, sustained the copyright. The court held that the work belonged to the plaintiff, not to the Government, and that the printing of the pamphlet at the Government's expense for Government use did not make it a "Government publication" for purposes of copyright.

The reverse situation was presented in *Sawyer v. Crowell Publishing Co.*,<sup>30</sup> where the plaintiff, a Government employee, directed a subordinate employee to prepare a map of Alaska from material in the Government files. The map was first published privately by the plaintiff with a copyright notice in his name, and was later published in a Government document. In an infringement suit the court, without referring specifically to the question of copyright in a Government publication, sustained the defense that the plaintiff had no property right in the map. Finding that the map had been produced for the Government by its employee in the course of his employment, the court said that any property rights in the map belonged to the Government. On this point the court said:

It is true that the mere fact that one has created or invented something while in the employ of the Government does not transfer to it any interest in it \* \* \*. But it is equally true that when an employee creates something in connection with his duties under his employment, the thing created is the property of the employer \* \* \*.

These two cases seem to point rather clearly to the following conclusions: that a work is not a "Government publication" for purposes of copyright by mere virtue of its printing and publication by the Government; that a work produced privately (including one produced by a Government employee on his own time outside the scope of his employment)<sup>31</sup> is not a "Government publication," even though printed and published by the Government; and that a work produced for the Government by its employee within the scope of his employment belongs to the Government even though first printed and published privately.<sup>31a</sup> In short, "Government publication" refers to a

<sup>29</sup> 57 WASH. L.R. 286 (Sup. Ct. D.C. 1920).

<sup>30</sup> 46 F. Supp. 471 (S.D. N.Y. 1942), *aff'd* 142 F. 2d 497 (2d Cir. 1944).

<sup>31</sup> On the point that a work produced by a Government employee outside the scope of his employment belongs to him and not to the Government, see the recent cases of *United States v. First Trust Co. of Saint Paul*, 251 F. 2d 686 (8th Cir. 1958), *aff'g* *First Trust Co. of St. Paul v. Minnesota Historical Society*, 146 F. Supp. 652 (D. Minn. 1956); and *Public Affairs Associates v. Rickover*, 177 F. Supp. 601 (D.D.C. 1959), *rev'd. on other grounds*, 284 F. 2d 262 (D.C. Cir. 1960). See also 7 DECS. COMP. GEN. 221 (1927); 22 DECS. COMP. GEN. 715 (1943).

<sup>31a</sup> *Cf.* 3 DECS. COMP. GEN. 645 (1924); 7 DECS. COMP. GEN. 221 (1927).

published work produced by the Government, and perhaps to one owned by it, not to the mere act of printing and publishing by the Government.

This result is further indicated by the saving clause in section 7 of the Copyright Act of 1909 (now section 8 of title 17 U.S.C.) which reads:

The publication or republication by the Government, either separately or in a public document, of any material in which copyright is subsisting shall not be taken to cause any abridgment or annulment of the copyright or to authorize any use or appropriation of such copyright material without the consent of the copyright proprietor.

The committee report on the bill that became the Act of 1909 explains that this clause was inserted

\* \* \* for the reason that the Government often desires to make use in its publications of copyrighted material, with the consent of the owner of the copyright, and it has been regarded heretofore as necessary to pass a special act every time this was done, providing that such use by the Government should not be taken to give to anyone the right to use the copyrighted material found in the Government publication.<sup>32</sup>

It might be argued that the fact that this saving clause was deemed necessary indicates that "Government publication" would otherwise include all material published by the Government.

### III. DEVELOPMENTS SINCE 1909

#### A. EXPANSION OF GOVERNMENT PUBLISHING

In 1895, and still in 1909, the publishing activities of the Government were comparatively limited in volume and scope. In large measure its publications then consisted of laws, rulings, official proceedings and pronouncements, etc.—the kinds of documents that the courts had previously held not copyrightable under the common law on grounds of public policy. Since that time the research and informational activities of the Government, particularly in the fields of science and technology, and its production and publication of research reports and other general informational material have grown substantially. Insofar as the statutory prohibition of copyright in Government publications is based on the earlier common law rule, therefore, it may need to be reexamined in the light of the more recent development of the Government's research and publishing activities.

#### B. EXPERIENCE IN PRACTICE

Some Government agencies have encountered practical problems arising from the copyright prohibition. These have been due in part to the prohibition itself and in part to the uncertainty as to the scope of the term "Government publication" to which the prohibition applies.

One such problem arises in connection with contracts under which private organizations conduct research for the Government at the Government's expense: what is the copyright status of research reports prepared by the contractor for the use of the Government? Some agencies have taken the position that the contractor may be

<sup>32</sup> H.R. REP. NO. 2222, 60th Cong., 2d Sess. 10 (1909). On at least two occasions between 1895 and 1909 Congress had passed special acts to preserve the copyright in private works that were to be incorporated in Government documents: 32 Stat. 746 (1902) and 34 Stat. 836 (1906).

permitted to secure copyright in such reports, with the agency being given a non-exclusive royalty-free license to use and publish them.<sup>33</sup>

As shown by registrations in the Copyright Office, copyright has been claimed in a substantial number of works (chiefly historical, instructional, or technical materials) which were prepared by employees of a Government agency or of a quasi-governmental organization and were used or published by the agency or organization. In some of these cases the Government agency presented or supported the application for registration of a copyright claim by the employee. The employee was said to have prepared the work outside of his official duties or on behalf of an organization operating with non-appropriated funds (such as a military service school, officers' association, or Army post exchange), or copyright was said to be justified by the publication of the work at the expense of such an organization or of a private publisher. In some instances the copyrights claimed have been assigned to the Government.

During the 1930's the question arose as to copyrighting the works of authors employed in the Federal Writers' Project of the Works Progress Administration. This was an unemployment relief project in which the writers were paid out of public funds. Their works were turned over to various public and private organizations to sponsor their publication; some were published privately and some by the Government. Copyright was claimed in many of those published privately, usually by a committee of sponsors; and royalties in excess of the sponsors' expenses were turned in to the United States Treasury.<sup>34</sup>

Beginning in the 1930's and during World War II, the practice grew of having scientific and technical works produced by or for the Government published in private journals. Thus, in a 1938 report<sup>35</sup> the National Resources Committee said:

The general inadequacy of publication funds and the delays incident to Government printing have led in many cases to the selection of second choice media for the publication of scientific articles \* \* \*. [T]o an increasing extent important findings are released through technical societies and nongovernmental scientific journals. The Bureau of Chemistry and Soils is speaking for governmental research agencies when it reports that "most of the technical papers prepared in the Bureau appear in outside publications."

In 1943 the Director of the Bureau of the Budget recommended this procedure to the executive departments:<sup>36</sup>

Information developed through research and investigations should be made available, whenever feasible, to nongovernmental publications, especially to technical journals, to avoid the expense of printing and distributing a Government publication.

Many of the private journals in which material supplied by the Government was published no doubt contained copyright notices purporting to cover such material. To some unknown extent this practice of having such material published in copyrighted private journals presumably continues.

<sup>33</sup> See, for example, the regulations of the Department of Defense, 32 CFR, 1958 Supp., 9.202-5. An earlier regulation of that Department had provided further that in some cases the contractor might be required to secure copyright and assign it to the Government: 32 CFR 9.203 (1954).

<sup>34</sup> See 135 *The Publishers' Weekly* 1134 (1939).

<sup>35</sup> United States National Resources Committee, Science Committee, *Research—A National Resource* 39 (1938).

<sup>36</sup> Budget Circular No. A-16, Aug. 1, 1943, quoted in United States War Production Board, *Report on the Reproduction and Distribution of Printed Matter for Executive Agencies* 26 (1944).

Instances are also known in which Government agencies have had works produced or owned by them published by private book publishers, with a copyright notice in the name of the publisher. In some instances private publication may be preferred over publication through Government facilities for several reasons: private publication may be more expeditious, it may provide an edition of higher quality, the private publisher may cover the market more effectively, and—perhaps most important—the private publisher will bear the cost of printing and distribution. The last has been said to be the principal reason why the States have wanted their works to be copyrightable. Private publishers may be unwilling to assume the cost of printing and distribution, however, unless they can be given the exclusive rights afforded by copyright.

#### C. LEGISLATIVE PROPOSALS SINCE 1909

Between 1918 and 1921 a series of bills<sup>37</sup> was introduced to permit the Government to secure copyright for “any Government document or work” by placing a notice of copyright on the published copies. The bills further provided that such copyrights could thereafter be released by inserting a notice of the release on any copy. What prompted these bills is not known. No action was taken on any of them.<sup>38</sup>

The various bills introduced between 1924 and 1940 to revise the Copyright Law of 1909 all retained the prohibition of copyright in “any publication of the United States Government”, except that the Thomas (Shotwell) bill<sup>39</sup> referred instead to “any work of the United States Government.” The prohibition does not appear to have been discussed in the legislative proceedings on any of these bills.

A series of bills<sup>40</sup> introduced between 1913 and 1919 to revise the Printing Law, while leaving intact the prohibition of copyright in Government publications, proposed to deal with a related problem. They would have required private persons who reproduce Government publications to insert in the reproductions a statement that they were not published by the Government, and would have prohibited the use of the Government Printing Office imprint and the insertion of any advertising matter in such reproductions.<sup>41</sup> None of these bills was enacted.

In addition to the private use of Government publications for advertising purposes, instances have occurred in which Government publications have been reproduced and sold at high prices without

<sup>37</sup> S. 3983, 65th Cong., 2d Sess. (1918); S. 579, 66th Cong., 1st Sess. (1919); S. 637, 67th Cong., 1st Sess. (1921).

<sup>38</sup> In 1938 an act was passed authorizing the Postmaster General to secure copyright on behalf of the United States in philatelic catalogs to be prepared by him from time to time: 52 Stat. 6, 39 U.S.C. § 371. That act is referred to in 17 U.S.C. § 8. By a series of joint resolutions Congress has authorized Representative Cannon to secure copyright in the successive editions of *Cannon's Procedure in the House of Representatives* printed by the Government: e.g., 62 Stat. 1052 (1948); 73 Stat. 20 (1959). Other bills not enacted have proposed to authorize Government copyrights in particular works: e.g., H.R. J. RES. 467, 75th Cong., 1st Sess. (1937) (*The Story of the Constitution* by Representative Bloom); H.R. 1331, 81st Cong., 1st Sess. (1949) (illustrated history of U.S. coins and currency proposed for preparation by the Treasury Department); H.R. 5541, 85th Cong., 1st Sess. (1957) (official dictionary to be prepared by a proposed Government Commission).

<sup>39</sup> S. 3043, 76th Cong., 3d Sess. § 11 (1940). Some of the revision bills proposed minor changes in the language of the saving clause, e.g., the Vestal bill, H.R. 12549, 71st Cong., 3d Sess., § 7 (1931); the Strovich bill, H.R. 12425, 72d Cong., 1st Sess., § 5 (1932).

<sup>40</sup> Bills cited at note 22 *supra*.

<sup>41</sup> The committee reports on these bills, e.g., S. REP. NO. 183, 64th Cong., 1st Sess. (Dec. 7, 1915), commented on “the pernicious practice . . . of reprinting Government publications . . . by private concerns for advertising purposes. . . . A presumption might very well arise in the minds of the public that the reprinted bulletin was issued by the Government and carried with it an endorsement of the company named and the implements advertised for sale by it. It is highly desirable that such practices should be prohibited.”

indicating their origin as Government documents (which were available from the Government at nominal prices or free).

In several cases the Federal Trade Commission has acted to stop some of these practices by cease and desist orders<sup>42</sup> but within a limited range due, perhaps, to its limited jurisdiction.<sup>43</sup>

#### IV. COMPARISON WITH OTHER LAWS

##### A. COPYRIGHT IN STATE PUBLICATIONS

The common law rulings before 1895 denying copyright in the text of statutes, court decisions, official rulings and pronouncements, governmental proceedings, etc., are still deemed applicable to such materials emanating from the States and their political subdivisions. But no bar has been imposed on copyright in other publications of the State or local governments.

Most of the States have enacted statutes for the securing of copyright in certain of their publications or in their publications generally. And even in the absence of any statute, almost every State has claimed copyright in some of its publications. A survey by the Copyright Office shows that during the 5-year period 1950 through 1954, about 4,700 copyright claims were registered in the name of a State or a State agency or in the name of an official on behalf of a State.<sup>44</sup> Included are registrations by or for 47 States, ranging from one to 484 registrations for an individual State during that period.

As indicated in *Little v. Gould*,<sup>45</sup> perhaps the principal motivation for the States to secure copyright in their publications is to enable them to give exclusive rights to a private publisher to induce him to print and publish the material at his own expense. The United States Government, with its own facilities for printing and publishing, may ordinarily have little need to procure private publication; but instances have occurred in which agencies of the United States Government wished to arrange for the private publication of material prepared or owned, or compiled and edited, by them. The Federal Government, as well as State Governments, may also have other reasons for wishing to secure copyright in some works. In theory, at least, there seems to be little reason to differentiate between the Federal and State Governments in regard to permitting or prohibiting copyright in their publications.

If the copyright prohibition is to be retained in regard to publications of the Federal Government, no compelling reason is seen to withdraw from the States the privilege they have exercised for many years of securing copyright in some of their publications.

##### B. FOREIGN LAWS

The laws of foreign countries do not generally contain any blanket prohibition of copyright in the publications of their governments.

<sup>42</sup> See 43 F.T.C. 756 (1946) (use for advertising of Government reports of product tests made by the Government for its own confidential use); 46 F.T.C. 1205 (1940) (use for advertising of reports of a Government agency where such use is prohibited by the agency or where such use indicates approval of the advertised product by the agency); 47 F.T.C. 1729 (1951) (private republication of Government publication under a different title and without indicating its source).

<sup>43</sup> See Stiefel, *Piracy in High Places—Government Publications and the Copyright Law*, 24 GEO. WASH. L. REV. 423, 434 (1956); also in ASCAP COPYRIGHT LAW SYMPOSIUM, No. 8, 3, 17 (1957).

<sup>44</sup> Not included is some additional number of State or local government publications not identified as such.

<sup>45</sup> Note 6 *supra*.



Some of them expressly provide for copyright in such publications.<sup>46</sup> Some specifically exclude laws, edicts, court decisions, official proceedings, etc., but provide for (or apparently permit) copyright in other government publications.<sup>47</sup>

It may also be noted that Protocol 2 annexed to the Universal Copyright Convention (to which the United States adheres) provides for copyright protection for "works published for the first time by the United Nations, by the Specialized Agencies in relation therewith, or by the Organization of American States."

The policy and practice in the United Kingdom is worthy of special mention. Under the Copyright Act of 1956, all government works are under Crown copyright.<sup>48</sup> A circular issued by the British Treasury on Jan. 9, 1958,<sup>49</sup> restated the policy that had previously been in effect, in substance as follows: (1) Bills and acts of Parliament and other statutory documents, Parliamentary papers, and the reports of Parliamentary debates are normally permitted to be reproduced freely; but reproductions must not purport to be official copies and reproductions from the Parliamentary debates must not be used in connection with advertising. (2) Other government publications, "including many which explain the operation of Acts of Parliament, or make available the results of research, and other activities of departments \* \* \* should be widely known; but official publication is the usual channel for this purpose and, subject to the exercise of discretions \* \* \*, my Lords see no reason why free reproduction should be allowed of this kind of material for commercial purposes. The exercise of Crown copyright is also necessary to protect official material from misuse by unfair or misleading selection, undignified associations, or undesirable use for advertising purposes. The rights of the Crown will therefore normally be enforced for publications in this class, which will bear an indication that Crown copyright is reserved. Acknowledgment of sources and of the permission of the Controller \* \* \* should be required, and suitable fees imposed for reproduction \* \* \* subject always to his discretion to waive or reduce fees in appropriate circumstances \* \* \*. The Controller will waive or reduce fees \* \* \* for reproductions for professional, technical or scientific purposes where profit is not a primary purpose of reproduction and consideration of reduction or remission of fees will also be given to reproductions in works of scholarship, in the journals of learned societies and similar non-profit-making bodies, for educational purposes, and in other cases where the need for fullest dissemination of official information is paramount and the commercial or other aspects are relatively unimportant."

The Treasury circular also states: "It is the responsibility of a Department which proposes to reproduce privately-owned copyright

<sup>46</sup> *E.g.*, The United Kingdom, Copyright Act of 1956, § 39; Australia, Copyright Act 1912-1935, § 8, by reference to the Schedule thereto (U.K. Copyright Act of 1911, § 18); Bolivia, Law of Nov. 13, 1909, Art. 3; Canada, Copyright Act, R.S. 1952, c. 32, § 11; Germany, Act of June 19, 1901, § 3; India, Copyright Act of 1957, § 17(d); Spain, Law of Jan. 10, 1879, Art. 4(1).

<sup>47</sup> *E.g.*, Austria, Copyright Act of Apr. 9, 1936 as amended, § 7(1); Belgium, Law on Copyright of March 22, 1886 as amended, Art. 11; Brazil, Law No. 3071 of Jan. 1, 1916, Arts. 662, 665 (IV); Colombia, Law No. 86 of Dec. 26, 1946, Arts. 17, 18; Denmark, Law No. 149 of Apr. 26, 1933, § 8; Finland, Law No. 174 of June 3, 1927, § 3; Italy, Law No. 633 of Apr. 22, 1941, Arts. 5, 11; Mexico, Copyright Law of Dec. 29, 1956, Arts. 18, 20; The Netherlands, Copyright Law approved by Royal Decree of Sept. 23, 1912, Art. 11.

<sup>48</sup> Sec. 39. The system of Crown copyright, which existed under § 18 of the U.K. Copyright Act of 1911 and was retained in the Act of 1956, was discussed at some length in the Parliamentary debates on the bill that became the Act of 1956: Debates in House of Commons, Standing Committee B, on the Copyright Bill, July 19 and 24, 1956, pp. 446-470.

<sup>49</sup> G.S. 90/2/01, T.C. No. 1/68.

material, either for official use only or for publication, to obtain the permission of the copyright holder. \* \* \* When a Department commissions a work from an author, artist or composer, not a Crown servant, who wishes to retain copyright in the work, the Controller \* \* \* should be consulted before any agreement is signed. The Controller should also be consulted before any agreement is concluded by a Department with a private publisher to publish a work which has been prepared under its direction and control and is therefore Crown copyright. It is exceptional for Crown copyright work to be privately published."

#### C. THE PATENT LAW

The prohibition of copyright in publications of the United States Government stands in contrast with the securing of patents in inventions of Government employees. Under the Patent Law patents in such inventions may be secured by the Government in certain circumstances, or by the employee in other circumstances.<sup>50</sup> This is implemented by an Executive Order<sup>51</sup> which provides in substance that (with certain exceptions) the Government shall obtain all rights to inventions made by an employee pursuant to his official duties, and that in other cases the rights shall be left in the employee subject to the reservation of a non-exclusive, irrevocable, royalty-free license to the Government.<sup>52</sup>

The ownership of a patent by the Government is not deemed to dedicate the invention to the public.<sup>53</sup> Government agencies may grant revocable non-exclusive licenses of their Government-owned patents, but their authority to grant exclusive licenses or to assign the patents has apparently not been resolved,<sup>54</sup> and this has been the subject of proposals for curative legislation.<sup>55</sup>

In the copyright field, the Comptroller General has held that a Government agency may not grant exclusive rights to a private company to make and sell geographical globes reproducing map drawings prepared by the agency.<sup>56</sup>

#### V. GOVERNMENT AGENCY VIEWS

The Copyright Office recently made inquiries of a number of Government agencies that carry on extensive publication programs, requesting their views as to (1) whether the prohibition of copyright in Government publications should be retained or modified, and (2) whether and how the term "Government publication" should be defined for this purpose.

<sup>50</sup> See 35 U.S.C. §§ 266, 267. The history and rationale of the rule permitting Government employees to secure patents in their inventions is reviewed in *United States v. Dubiller Condenser Corp.*, 289 U.S. 178 (1933).

<sup>51</sup> Executive Order No. 10096, Uniform Government Patent Policy for Inventions by Government Employees, 15 Fed. Reg. 389 (1950).

<sup>52</sup> The Executive Order is supplemented by the regulations of various agencies, e.g., the Defense Agency (32 C.F.R. §§ 9.100-9.112), the Department of the Navy (32 C.F.R. § 739), the Veterans Administration (38 C.F.R. §§ 1.650-1.667), the Department of the Interior (43 C.F.R. §§ 6.5-6.6).

<sup>53</sup> See 38 OPS. ATT'Y. GEN. 425 (1936); 39 OPS. ATT'Y. GEN. 164 (1938).

<sup>54</sup> See I REP. ATT'Y. GEN. *Investigation of Government Patent Practices and Policies* 112 (1947); FORMAN, *United States Patent Ownership and Some of its Administrative Implications*, 38 J. Pat. Off. Soc. 420-424 (1956). But cf. 40 U.S.C. § 488.

<sup>55</sup> See *Second Report of the National Patent Planning Commission*, H.R. DOC. NO. 22, 79th Cong., 1st Sess. (1945); 27 J. Pat. Off. Soc. 80 (1945); III REP. ATT'Y GEN., *Investigation of Government Patent Practices and Policies* 198, 202-208 (1947).

<sup>56</sup> The practices of various Government agencies in regard to their acquisition and use of patents or licenses thereunder is currently under study by the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary: see S. REP. NO. 97, 86th Cong., 1st Sess. (1959); Preliminary Reports of that Subcommittee on *Patent Practices of the Tennessee Valley Authority and Patent Practices of the National Science Foundation*, 85th Cong., 2d Sess. (1959).

<sup>57</sup> 25 DECS. COMP. GEN. 909 (1946).

Most of the agencies responding indicated that they saw no need to copyright any of their publications. Some of the agencies in this group expressed their opposition to modifying the prohibition for one or more of the following reasons: as a matter of principle, material produced by the Government is public property and should be freely available to the public for reproduction; the widest possible dissemination of information developed by the Government should be encouraged, and dissemination might be inhibited by copyright; no private person or firm should be given the exclusive right to publish material prepared at Government expense; the centralization of the printing and publishing of Government material in the Government Printing Office and the Superintendent of Documents should be maintained; the Government should not seek to exact payment for the private use of its published material; if copyright were made available for Government publications, the agencies would receive many unnecessary requests for permission to reproduce their uncopyrighted publications.

Some of this group, however, stated the assumption that "Government publications" refers only to works prepared for the Government by its employees in the course of their official duties, and indicated that they would favor such a definition in the statute. They would not wish to prohibit contractors from securing copyright in works prepared by them under contracts with the Government (the Government receiving a non-exclusive license to publish and use such works); nor would they wish to preclude the Government from obtaining copyrights by assignment from contractors or other private authors. Some of these agencies also recognized the importance of the saving clause in providing assurance to private owners that they could permit the Government to use their material in its publications without jeopardizing their copyrights.

A few agencies indicated that while there was no need to secure copyright in the vast majority of their publications, there were special cases, such as those referred to in the next paragraph below, in which copyright would be desirable. Like some of the agencies in the first group, they wished to maintain the practices of permitting contractors to secure copyright in works prepared under contract for the use of the Government, and of acquiring copyright ownership in the Government by assignment; at least, therefore, they would wish to have "Government publications" defined narrowly in terms of works prepared for the Government by its employees in the course of their official duties. These agencies also referred to the importance of being able to assure private owners that they could permit the inclusion of their material in publications of the Government without jeopardizing their copyrights.

This latter group of agencies would favor some provision whereby copyright in works prepared for the Government by its employees could be authorized in special cases. They referred to instances such as the following: where private publication, for which copyright is necessary, may be advantageous to the Government as a matter of economy, or to procure distribution to a particular group of interested persons, or to have an edition of special quality published; where copyright may be desirable as a safeguard against the reproduction of Government material in distorted form or in connection with commercial advertising; where a Government agency is given a grant of private funds to produce a work; where works are produced

in a Government research project that seeks to be self-supporting, so that the agency would like to charge a fee for the commercial publication of such works.

## VI. ANALYSIS OF ISSUES

### A. DEFINITION OF "GOVERNMENT PUBLICATION"

The term "Government publication" in the Printing Law, and the corresponding term "publication of the United States Government" in the Copyright Law, as used in connection with the prohibition of copyright, have proved to be ambiguous. Within the context of the Printing Law, "Government publication" has been construed as including all material published by the Government. From the standpoint of the copyright prohibition this definition seems unsatisfactory since it would include privately owned material when used in a document published by the Government; and it would exclude material produced or owned by the Government if it were published through private channels only.

The saving clause in section 8 of the Copyright Law purports to preserve the copyright of private persons when their material is used in a Government document. Within the context of the Copyright Law, "publication of the United States Government" has been construed as referring only to works produced or owned by the Government, however published.

Moreover, some Government agencies have assumed that the copyright prohibition applies only to works produced by the Government (i.e., produced for the Government by its employees in the course of their official duties), but not to privately produced works in which the Government acquires ownership by gift or purchase. Government agencies have purported to hold copyright by assignment in works so acquired. If the copyright prohibition is based on the principle that all works owned by the Government are public property and should therefore be freely available for use by everyone, it might be argued that the prohibition should extend even to works acquired by the Government, through gift or purchase.

It has also been assumed by some Government agencies that the copyright prohibition does not apply to works prepared for Government use under contracts with the Government; and that copyright in such works may be assigned to and held by the Government. If the copyright prohibition is based on the principle that works produced at Government expense should be public property freely available to everyone, then it might be argued that the prohibition should extend to all works paid for by the Government under contracts.

A definition in the statute of "Government publications" in which copyright is prohibited seems highly desirable. A number of Government agencies would apparently prefer to define that term so as to limit the copyright prohibition to works prepared for the Government by its employees.

### B. COPYRIGHT IN WORKS OF THE GOVERNMENT

Some Government agencies (a minority of those responding to the inquiries by the Copyright Office) have indicated a desire to have copyright available, in special cases, for works prepared by or for them in which copyright would otherwise be prohibited. Other

agencies have indicated no interest in having copyright available for any of their works, and some of them have expressed opposition to permitting copyright in any Government works. The reasons for the views on each side are outlined above.

If copyright in selected works of the Government were made permissible, it seems likely that relatively few such works would be copyrighted. It is assumed that those to be copyrighted would be required to bear a notice of the copyright; the public could use freely the great bulk of Government works which would be published without such a notice.

The suggestion has been made that if copyright is to be permitted for selected works of the Government, the general prohibition should remain, but a central Government agency, such as the Congressional Joint Committee on Printing or the Bureau of the Budget, might be authorized to make exceptions so as to permit any agency to copyright particular works. This suggestion is designed to provide a measure of uniformity in the policy of selection by the various agencies, to assure that copyright will be confined to the special cases where it is needed, and to prevent resort to somewhat doubtful procedures where in particular cases the protection of copyright has been sought by Government agencies.

If this suggestion were adopted, the same central agency might also be authorized to regulate or permit the granting of exclusive licenses and the disposition of copyrights owned by the Government. Problems have arisen as to the exclusive licensing and disposition of Government-owned patents, and similar problems may arise concerning Government-owned copyrights. It should be recalled in this connection that Government agencies now claim the ownership of some copyrights by assignment to them.

#### C. THE SAVING CLAUSE

The preservation of the owner's rights in privately-owned material used in Government publications is considered important, not only in fairness to the owner, but also to enable the Government to secure his consent to its use of the material. Even with the present saving clause in section 8 of the Copyright Law, some agencies have reported difficulties in securing consent because the owners are sometimes fearful that publications of their material by the Government may impair their rights.

The present saving clause may be deficient in two respects. First, it refers to the preservation of the "copyright" in "any material in which copyright is subsisting." This may be taken to refer only to copyright secured under the statute. Publication by the Government, with the consent of the owner, of previously unpublished material (not copyrighted under the statute) might be deemed to terminate the owner's literary property rights under the common law; and in the absence of a copyright notice such publication might be thought to throw the material into the public domain. The law should be clarified to preserve the owner's rights in any event.

Second, in the absence of notice that a Government publication contains privately-owned material, a person contemplating reproduction of a Government publication cannot be certain of his right to do so, and his reproduction may unwittingly infringe a private owner's rights.

It is suggested that the Government, when using privately-owned material in its publications, might be required to insert an appropriate notice of copyright in the name of the owner with reference to such material. The owner of previously unpublished material would thereby secure statutory copyright.

#### D. MISUSE OF GOVERNMENT PUBLICATIONS

In the absence of copyright in Government publications, some consideration might be given to the means of preventing their reproduction without indicating the source, or in a distorted form, or in commercial advertising. Legislation to penalize such misuse has been proposed in the past.

In a few cases certain misuses of Government publications have been stopped by proceedings before the Federal Trade Commission, and in some other cases a complaint by the agency concerned has been sufficient to persuade the user to discontinue a misuse. Whether these are adequate means of control may be questioned, particularly since the jurisdiction exercised by the Federal Trade Commission may be too limited to deal with some misuses, and the possibility of a cease and desist order by the Commission may be a weak deterrent. It might be argued, however, that possible misuses are so varied, and what constitutes improper uses may be so vague, that a statutory specification of the uses to be prohibited would not be practicable; and that misuses are not made so frequently or so defiantly as to require a penal statute.

### VII. SUMMARY OF ISSUES

1. Should Government publications in which copyright is prohibited be defined in terms of:
  - (a) Publications issued by the Government, or
  - (b) Published works produced by the Government (i.e., produced for the Government by its employees in the course of their official duties), or
  - (c) Published works owned by the Government (including those produced by it and those acquired by it through assignment)?
2. Should provision be made to authorize the copyrighting of selected Government publications? If so:
  - (a) Should each Government agency determine for itself whether to copyright any of its publications, or should the approval of a central agency (such as the Congressional Joint Committee or the Bureau of the Budget) be required?
  - (b) Should the individual agencies, or a central agency, be authorized to grant exclusive licenses and otherwise dispose of copyrights held by the Government?
3. Should the saving clause be extended to common law literary property rights in previously unpublished works of private owners when published by the Government? Should the Government be required to insert a copyright notice in the name of the owner when publishing privately owned material?
4. Should any provision be made to penalize the reproduction of a Government publication without indicating the source, or in a distorted form, or in commercial advertising?

---

---

STUDY NO. 34  
COPYRIGHT IN TERRITORIES AND POSSESSIONS  
OF THE UNITED STATES  
BY BORGE VARMER  
March 1959

---

---





## CONTENTS

---

	<b>Page</b>
I. Introduction.....	47
II. Extension of copyright law to unorganized territories.....	47
III. Territories as geographical parts of "The United States" for purposes of the copyright law.....	49
IV. Summary of issues.....	50

---

Appendix 1. Status of "organized territories" of the United States...	51
Appendix 2. Organic acts extending the copyright law to the "organized territories".....	51



# COPYRIGHT IN TERRITORIES AND POSSESSIONS OF THE UNITED STATES

---

## I. INTRODUCTION

The territories and possessions of the United States are: Hawaii,<sup>1</sup> the Panama Canal Zone, Puerto Rico, the Virgin Islands, Guam, American Samoa and the Trust Territory of the Pacific Islands. Except for American Samoa and the Trust Territory of the Pacific Islands, Congress has enacted organic acts relating to each of these territories. The organic acts for the Panama Canal Zone, the Virgin Islands, and Guam expressly mention the copyright law of the United States as being extended to those territories. The organic acts for Hawaii and Puerto Rico do not mention the copyright law specifically; but they extend to those territories all the laws of the United States which are "not locally inapplicable," and this has been thought to include the copyright law.<sup>2</sup> Moreover, the United States Government has notified UNESCO that the Universal Copyright Convention shall apply to Alaska (which has since been admitted to the Union as the forty-ninth State), Hawaii, the Panama Canal Zone, Puerto Rico, and the Virgin Islands (Notification of Dec. 6, 1954) and to Guam (Notification of May 17, 1957).

All of the territories to which the United States copyright laws and the Universal Copyright Convention have thus been extended are in the category of "organized territories," that is, territories having an organized system of local self-government under an act of Congress.<sup>3</sup>

## II. EXTENSION OF COPYRIGHT LAW TO UNORGANIZED TERRITORIES

American Samoa and the Pacific Trust Territory are not "organized territories." There is no act of Congress for their self-government and the copyright law is not thought to extend to them. The first question to be considered here is whether the copyright law should be extended to these territories.

American Samoa is a possession of the United States consisting of a group of islands with a total area of 76 square miles and a population of about 20,000. Its indigenous inhabitants are considered to be American nationals. The executive authority is vested in a Governor appointed by the President of the United States. A bicameral legislature elected by the local people has advisory legislative functions, and a council of Paramount Chiefs also serves as an advisory body to the Governor. There are five district courts and a High Court, the Chief Justice being appointed by the United States Secretary of the

<sup>1</sup> At the time of this writing, an act had just been passed to admit Hawaii to statehood: Act of March 18, 1959, P.L. 86-3. A number of procedural steps remain to be completed before Hawaii becomes the 50th State.

<sup>2</sup> The relevant provisions of the several organic acts are reproduced in Appendix 2.

<sup>3</sup> See 86 C.J.S., Territories, §§ 1 and 12 (1964). The status of these various territories is outlined in Appendix 1.

Interior and all other judges being Samoans. The local laws are contained in the Code of American Samoa; some of the local laws apply only to indigenous citizens, and native customs not inconsistent with the applicable laws of the United States are respected.<sup>4</sup>

The Trust Territory of the Pacific Islands consists of several groups of islands in the Pacific north of the Equator which were German possessions prior to World War I and were under Japanese mandate thereafter prior to World War II. In 1947 the United Nations placed them under trusteeship of the United States. Article 3 of the Trusteeship Agreement provides that "the United States shall have full powers of administration, legislation and jurisdiction over the territory and may apply to it such of the laws of the United States as seem appropriate to local conditions and requirements." The islands are scattered over an area of the ocean approximately the size of the continental United States; their total land area is about 650 square miles and their local population about 67,000. They are divided into seven administrative districts, and are presently administered in part by the Department of the Interior, and in part by the Department of the Navy. General administrative authority is vested in a High Commissioner, and local district legislatures are gradually being introduced.<sup>5</sup>

The extension of the copyright law to an unorganized possession of the character of Samoa or to a trust territory such as that of the Pacific Islands, appears to be primarily a political question. And whether or not the Copyright Law is extended to Samoa or to the Pacific Trust Territory would seem to be a matter of little practical importance at the present time.

It might be urged, particularly with respect to American Samoa, that since the principles of copyright protection are embodied in the laws of virtually all countries of the world, and in view of the importance of international copyright protection and the desirability of fostering the movement toward the adoption of universal standards, the United States should extend its copyright law, and its participation in the Universal Copyright Convention, to all territories under its jurisdiction.

Other considerations, however, may point to the contrary. In addition to the fact that the copyright law would now have little or no practical application in Samoa or in the Pacific Trust Territory, the political status of these territories and their relationship to the United States—particularly as regards the Pacific Trust Territory—may change in the future. And whether the United States copyright law is appropriately suited to the local conditions and customs in these territories would have to be considered. Inasmuch as there is no present urgency for copyright legislation in these territories, it might be advisable to defer this question for consideration in the broader context of organic or other general legislation that Congress might eventually have occasion to consider for a particular territory, rather than dealing with it in the copyright statute as a special matter.

<sup>4</sup> For this and other general information regarding American Samoa, see THE STATESMAN'S YEAR-BOOK 1958, pp. 788-790.

<sup>5</sup> *Id.* at 790-791.

### III. TERRITORIES AS GEOGRAPHICAL PARTS OF "THE UNITED STATES" FOR PURPOSES OF THE COPYRIGHT LAW

In its application to the organized territories to which it has been extended, the present copyright statute <sup>6</sup> is not entirely clear as to whether its various provisions relating to events occurring in "the United States" would apply to these events occurring in the several territories.

Thus, section 9(a) of the statute refers to the works of aliens domiciled "within the United States"; sections 10 and 23 refer to works published in "the United States"; section 16 refers to the manufacture of copies of certain works "within the limits of the United States"; section 30 provides different time periods for the recording of assignments executed "in the United States" and those executed "without the limits of the United States"; section 107 refers to the importation of books "into the United States."

Does the work of an alien domiciled, say, in Puerto Rico qualify for copyright under section 9(a)? Does publication in the Panama Canal Zone constitute publication in the United States? Does the manufacture of copies in Guam satisfy the requirements of section 16? Which of the time periods applies to the recording of an assignment executed in the Virgin Islands? Does section 107 apply to the importation of books into Guam?

No judicial decisions have been found answering these precise questions with respect to any of the territories. Inasmuch as the several organic acts for the organized territories state that the laws of the United States thereby extended to the particular territory "shall have the same force and effect" in the territory "as in the United States" or "as elsewhere in the United States" or "as in the Continental United States," <sup>7</sup> it seems likely that these territories are to be considered as covered within the various references in the copyright statute to "the United States." <sup>8</sup> But this is not free from doubt.

It is suggested that this be clarified in a revision of the copyright statute. This might be accomplished by an appropriate definition in the statute of the term "United States" as used therein.

Such definitions are found in the present patent and trademark laws. The patent law <sup>9</sup> contains the following definition:

When used in this title unless the context otherwise indicates \* \* \* (c) The terms "United States" and "this country" mean the United States of America, its territories and possessions \* \* \*.

The trademark law <sup>10</sup> provides similarly:

In the construction of this chapter, unless the contrary is plainly apparent from the context—The United States includes and embraces all territory which is under its jurisdiction and control.

<sup>6</sup> Title 17, U.S. Code.

<sup>7</sup> See Appendix 2.

<sup>8</sup> It can be argued that this conclusion is indicated by the provision in section 14 of the copyright statute, 17 U.S.C., that the deposit of copies, when demanded by the Register, is to be made "within three months from any part of the United States, except an outlying territorial possession of the United States, or within six months from any outlying territorial possession of the United States, or from any foreign country." The exception seems to indicate that the "outlying territorial possessions" would otherwise be subject to the rule for "any part of the United States."

<sup>9</sup> 35 U.S.C. § 100.

<sup>10</sup> 15 U.S.C. § 1127.

Note should also be made of somewhat similar provisions in bills heretofore introduced in Congress to revise the copyright law. Thus, the Dallinger bill of 1924<sup>11</sup> provided in section 66:

For the purpose of the provisions of this Act, the terms "United States" and "American" whenever used, shall be deemed to include the Philippines, Porto Rico, Hawaii, and the Canal Zone, and the inhabitants thereof, as the case may be.

The Vestal bill which passed the House of Representatives in January 1931<sup>12</sup> provided more generally in section 1 "that copyright throughout the United States and its dependencies is hereby secured and granted to authors \* \* \*"

The Sirovich bill of 1932<sup>13</sup> provided in section 42:

This Act \* \* \* shall be in effect throughout the United States, and in all Territories subject to its jurisdiction and including the Canal Zone, the Virgin Islands, the Philippine Islands, and the Territory of Hawaii.

Finally, the Thomas bill of 1940<sup>14</sup> contained the following definition in section 3:

"United States," when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia.

It will be observed that the foregoing definitions proposed in the several copyright revision bills (other than the Vestal bill) have become outmoded by subsequent developments: for example, in their inclusion of the Philippines. This would seem to indicate the inadvisability of enumerating in the statute the particular territories to be covered. It would seem better to use general terms such as "its territories and possessions" (as in the patent law), or "all territory under its jurisdiction and control" (as in the trademark law).

Regarding these latter phrases, however, a further observation should be made. They would seem to include American Samoa, and might even be considered (especially the phrase used in the trademark law) to include the Pacific Trust Territory.

If it is deemed advisable to exclude American Samoa and the Pacific Trust Territory, leaving the matter of copyright in regard to those areas for future legislation of a general nature, it may then be suggested that for purposes of the copyright law, "the United States" might be defined as including its organized territories, or alternatively, as including all areas to which the copyright law has been or is hereafter extended by any act of Congress.

#### IV. SUMMARY OF ISSUES

1. Should the United States copyright law be extended to American Samoa and to the Trust Territory of the Pacific Islands?

2. Should the copyright law contain a definition of "the United States" as used therein with regard to the place of domicile, publication, manufacture, etc.? If so, should the areas to be included as within "the United States" be defined in terms of (a) "its territories and possessions," (b) "all territory under its jurisdiction and control," (c) "its organized territories," (d) "all areas to which this title [the copyright law] has been or is hereafter extended by any act of Congress," or (e) in some other terms?

<sup>11</sup> H. R. 9137, 68th Cong., 1st Sess. (1924).

<sup>12</sup> H. R. 12549, 71st Cong., 3d Sess. (1931).

<sup>13</sup> H. R. 12425, 72d Cong., 1st Sess. (1932).

<sup>14</sup> S. 3043, 76th Cong., 3d Sess. (1940).

# APPENDIXES

## APPENDIX 1

### STATUS OF "ORGANIZED TERRITORIES" OF THE UNITED STATES

"Organized territories" are those in which a system of local self-government has been established under an organic act of Congress.

Hawaii\* is an "organized incorporated territory"; i.e., in addition to being "organized," it has been incorporated into the United States as an integral part thereof but not yet admitted to statehood: *Territory v. Yoshimura*, 35 Hawaii 324 (Hawaii Cir. 5, 1940). See 48 U.S.C., c.3. Alaska also had this status before its recent admission to statehood: *United States v. Farwell*, 76 F. Supp. 35 (D.C. Alaska 1948).

The Virgin Islands and Guam are organized unincorporated territories. See, as to the Virgin Islands, 48 U.S.C., c. 12; as to Guam, 48 U.S.C., c. 8A. And see *U.S. ex rel. Leguillou v. Davis*, 115 F. Supp. 392 (D.C. Virgin Islands 1953); *Government of Guam v. Pennington*, 114 F. Supp. 907 (D.C. Guam 1953).

Puerto Rico was formerly an organized unincorporated territory (see *N.L.R.B. v. Gonzales Padin Co.*, 161 F. 2d 353 (1st Cir. 1947)); but it now has the special status of a "Commonwealth" with its own constitution. See 48 U.S.C., c. 4, and 66 Stat. 327 (1952). In a strict technical sense it may no longer be a "territory" (see *Cosentino v. International Longshoremen's Association*, 126 F. Supp. 420 (D.C. Puerto Rico 1954); but references in statutes to "territories" of the United States have been construed as including the Commonwealth of Puerto Rico: *Detres v. Lions Building Corp.*, 234 F. 2d 596 (7th Cir. 1956); *Moreno Rios v. U.S.*, 256 F. 2d 68 (1st Cir. 1958).

The status of the Panama Canal Zone is unique. By treaty with Panama, the United States has in perpetuity the use, occupation and control of the Canal Zone, with general sovereignty therein: STATESMAN'S YEARBOOK 1958, pp. 1304-1305. The organic act, 37 Stat. 561 (1912) as amended, has been incorporated in title 2 of the Canal Zone Code, 1934. See *Panama Agencies Co. v. Franco*, 111 F. 2d 263 (5th Cir. 1940).

## APPENDIX 2

### ORGANIC ACTS EXTENDING THE COPYRIGHT LAW TO THE "ORGANIZED TERRITORIES"

#### GUAM

#### Act of August 1, 1956<sup>1</sup>

"An Act To implement section 25(b) of the Organic Act of Guam by carrying out the recommendations of the Commission on the Application of Federal Laws to Guam, and for other purposes.

\* \* \* \* \*

SEC. 24. The laws of the United States relating to copyright, and to the enforcement of rights arising thereunder, shall have the same force and effect in Guam as in the Continental United States."

<sup>1</sup> 70 Stat. 911 (1956); 48 U.S.C. § 1421n.

\*EDITOR'S NOTE: Since the above was written Hawaii has been admitted to statehood.

## HAWAII

Act of April 30, 1900<sup>2</sup>

"An Act To provide a government for the Territory of Hawaii.

\* \* \* \* \*

SEC. 5. The Constitution, and, \* \* \* all the laws of the United States \* \* \*, which are not locally inapplicable, shall have the same force and effect within the said Territory [of Hawaii] as elsewhere in the United States \* \* \*."

## PANAMA CANAL ZONE

Canal Zone Code, 1934<sup>3</sup>

"ARTICLE 4—PATENTS, TRADE-MARKS AND COPYRIGHTS.

391. *Patent, trade-mark, and copyright laws extended to Canal Zone.*—The patent, trade-mark, and copyright laws of the United States shall have the same force and effect in the Canal Zone as in continental United States, and the district court is given the same jurisdiction in actions arising under such laws as is exercised by United States district courts."

## PUERTO RICO

Act of April 12, 1900<sup>4</sup>

"An Act Temporarily to provide revenues and a civil government for Puerto Rico, and for other purposes.

\* \* \* \* \*

SEC. 14. The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States \* \* \*."

## VIRGIN ISLANDS

Act of June 22, 1936<sup>5</sup>

"An Act To provide a civil government for the Virgin Islands of the United States.

\* \* \* \* \*

SEC. 18. \* \* \*. The laws of the United States relating to patents, trade marks, and copyrights, and to the enforcement of rights arising thereunder, shall have the same force and effect in the Virgin Islands as in the continental United States, \* \* \*."

<sup>2</sup> 31 Stat. 141 (1900) as amended; 48 U.S.C. § 495.

<sup>3</sup> Enacted by 48 Stat. 1122 (1934).

<sup>4</sup> 31 Stat. 77 (1900) as amended; 48 U.S.C. § 734. This section was amended in 1955 (69 Stat. 427) after Puerto Rico had become a "commonwealth." As to its continuation in effect, see *Moreno Rios v. U.S.*, 256 F. 2d 68 (1st Cir. 1955); *Dario Sanchez v. U.S.*, 256 F. 2d 73 (1st Cir. 1955).

<sup>5</sup> 49 Stat. 1807 (1936); 48 U.S.C. § 1405q. And see 68 Stat. 497 (1954); 48 U.S.C. § 1574c.



---

---

COMMENTS AND VIEWS SUBMITTED TO THE  
COPYRIGHT OFFICE  
ON  
COPYRIGHT IN TERRITORIES AND POSSESSIONS  
OF THE UNITED STATES

---

---



## CONTENTS

---

Comments and views submitted by—	Page
Harry R. Olsson, Jr.-----	57
Richard H. Walker-----	57
	55

---



**COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT  
OFFICE ON COPYRIGHT IN TERRITORIES AND POSSES-  
SIONS OF THE UNITED STATES**

---

*Harry R. Olsson, Jr.*

APRIL 22, 1959.

\* \* \* \* \*

*Copyright in Territories and Possessions of the United States*

(1) This copyright group should not recommend that United States copyright law be extended to American Samoa and the Trust Territories of the Pacific Islands. It might not "fit" well in several particulars, including the statutory damage schedule. Such extension is a political question with many facets to be judged altogether. Perhaps we can advise the group doing the judging at the proper time in the light of conditions then.

(2) The copyright law should define "United States" as including its organized territories. It is unnecessary to provide that the copyright law should extend to all areas to which it has been or is hereafter extended by any act of Congress. Of course it does and will.

HARRY R. OLSSON, JR.

---

*Richard H. Walker*

(The Curtis Publishing Company)

MAY 4, 1959.

\* \* \* \* \*

*Copyright in Territories and Possessions of the United States*

It is my belief that the United States copyright law should extend to all territories under its jurisdiction and control. To the extent that it does, the definition of "the United States" in the law should include them. If, however, organized territories establish their own copyright law at variance with that of the United States, then the definition should exclude them.

RICHARD H. WALKER.

57







