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THE COPYRIGHT LAW—A REAPPRAISAL

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"Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public. Attempts to improve them by amendment have been frequent, no less than twelve acts for the purpose having been passed since the Revised Statutes. To perfect them by further amendment seems impracticable. A complete revision of them is essential."

*Message of President Theodore Roosevelt
to Congress, December 1905.¹*

NEED FOR REVISION

A half century after President Theodore Roosevelt delivered the message quoted above, it is still timely and descriptive of the legal problems besetting the protection of authors' rights in America. To

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1. 40 CONG. REC. 102 (1905).

understand why the law seems to have stood still, we must observe the pace of progress in science, literature and the arts during the past half century. Just as the copyright laws of 1870 failed to meet the needs of society at the dawn of the twentieth century, so the laws framed in 1909 are obsolete as applied to our mid-century economy and world outlook.

When President Roosevelt told Congress in 1905 that the copyright laws framed in 1870 "impose hardships upon the copyright proprietor which are not essential to the fair protection of the public," he was referring to laws enacted at a time when the physical rather than the cultural growth of the nation was paramount—an era of which a famous European observer said, "It was not the golden age of Jefferson. Gone was the time of good taste, of culture, and of the beautiful mansions of Virginia. . . . The first millionaire to be worth one hundred million dollars, Commodore Vanderbilt, 'had read a single book, *Pilgrim's Progress*, and that only after having reached the age of seventy.'"²

In the thirty-five year period which had elapsed since the Revised Statutes of 1870, America had grown from a rural to an industrial nation—just as we have been emerging during the latter part of the past half century from industrial greatness to cultural pre-eminence. Although in 1905, only two or three percent of the people lived near bookshops,³ there had already been planted the seeds of the greatest revolution in the methods of communicating thoughts, sentiments and emotions from the writer to his public since the days of Gutenberg. Its impact was first felt in music, where the phonograph and automatic piano were to usher in an age of mechanization, permitting the enjoyment of music without being near the performer, affecting the habits of our citizenry to an extent not yet fully appreciated even in our day.⁴

At the dawn of the twentieth century, whole new vistas lay open for the rapid world-wide circulation of ideas, intelligence and even the movement of people themselves. The first airplane flight of more than a half hour had just been made before President Roosevelt's message. This presaged an era of quick and easy transportation between the continents—an advance that was to be paralleled by even more startling developments in the means of communicating intelligence. We had freely pirated works of foreign authors until the enactment in

2. MAUROIS, *THE MIRACLE OF AMERICA* 310 (1944).

3. 2 SPILLER, THORP, JOHNSON & CANBY, *LITERARY HISTORY OF THE UNITED STATES* 960 (1948).

4. In 1902, there were over 70,000 pianolas in use and over one million perforated music rolls produced in the United States. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1, 9 (1908).

1891 of a law requiring payment for the use of such works,⁵ theretofore royalty-free in competition with works of native origin. This law greatly benefited American authors by freeing them from the unfair competitive advantage enjoyed by the publishers of imported works.

As ancient methods of industry and communications were pushed aside, more time was released for leisure and education. Aware of the necessity of encouraging authorship as a profession, the Register of Copyrights, Thorvald Solberg, complained in 1905 that authors seeking to earn a livelihood from their writings were still hamstrung by “. . . a highly technical copyright system . . . under which valuable literary and artistic property rights have come to depend upon exact compliance with statutory formalities which have in reality nothing to do with the equitable rights involved, and the defense of such property against infringement may be rendered nugatory by reason of failure to fully comply with purely arbitrary requirements.”⁶ In spite of the protests of President Theodore Roosevelt and his distinguished Register of Copyrights, there still remain at every turn unnecessary technicalities by which literary pirates reap a harvest from the forfeitures imposed upon authors by our antiquated copyright laws.

Among the famous literary works in which an author lost all rights because of a technicality was *The Autocrat of the Breakfast Table*. Dr. Holmes had authorized the publication of this work in twelve installments of the *Atlantic Monthly* during 1857 and 1858. Neither Holmes nor the publisher, however, complied with section four of the copyright law then in effect, which provided that “. . . no person shall be entitled to the benefit of this act, unless he shall, *before publication*, deposit a printed copy of the title of such book . . . in the clerk's office of the district court. . . .”⁷ Holmes failed to deposit the title until after publication of the *Atlantic Monthly* series, shortly before the publication of the work in book form in November, 1858. After Dr. Holmes' death in 1894, unauthorized editions of

5. Act of March 3, 1891, c. 565, 26 STAT. 1107. Says Sullivan: "The nineties was definitely a time of budding for American interest in American writers and American types in fiction. This had, to some extent, an economic basis. Before the International Copyright Act of 1891, American publishers could watch what English books were successful, and then print them in America without the expensive royalty arrangements involved in the case of American authors. A New York publisher testified . . . that 'the effect of absence of international copyright on the opportunities of American authors to get into print is most disastrous. . . .' A Boston publisher testified: 'For two years I have refused to entertain the idea of publishing an American manuscript.' After the passage of the new law, in 1891, the effect 'in encouraging the production of American rather than of foreign books has been little less than marvelous.'" 1 SULLIVAN, OUR TIMES 201 (1926). Even a greater development occurred in American drama. *Id.* at 219.

6. SOLBERG, COPYRIGHT IN CONGRESS—1789-1904, at 7 (1905).

7. Act of Feb. 3, 1831, c. 16, 4 STAT. 437. (Emphasis added.)

the work began to appear, whereupon suit was brought by Oliver Wendell Holmes, Jr., the author's son and executor, then Chief Justice of the Massachusetts Supreme Judicial Court. Notwithstanding the erudition of both the plaintiff and his testator, all the courts in which the matter was litigated held that Dr. Holmes had forfeited all rights in his work by failure to deposit the printed title at the prescribed time, namely, before first publication.⁸

Justice Brown recognized the hardship of the decision, but suggested that "these are evils which can be easily remedied by an amendment of the law."⁹

After this experience, Dr. Holmes' executor assigned to the publishing firm of Houghton, Mifflin & Co. the rights of the estate in another work which was then being reproduced without authorization, *The Professor at the Breakfast Table*. In a suit brought by the publisher against the R. H. White Co., the facts were rather more favorable to the plaintiff than in the earlier case. Here, the first ten parts were published in the *Atlantic Monthly* in 1859 without any endeavor to comply with copyright formalities, but the remaining two parts were published in the December 1859 issue of the *Atlantic Monthly* after the publisher had secured copyright for that issue in the publisher's name. After the completion of this serial publication, Dr. Holmes published the entire work in one volume, fully complying with the requirements of the copyright law as to deposit and notice in the author's name. There was no question but that the first ten parts were in the public domain under the Supreme Court's earlier decision. But the last two parts also appeared in defendant's publication. This time, the Court found that Dr. Holmes had failed to clear another hurdle—in fact two of them: first, registration of a work under the title *Atlantic Monthly* could not protect a work entitled *The Professor at the Breakfast Table*; and secondly, if Holmes was the copyright proprietor, the last two parts fell into the public domain when they were published in the *Atlantic Monthly* with a copyright notice indicating the magazine publisher, Ticknor & Fields, was the copyright proprietor. Said Mr. Justice Brown most apologetically:

"While owing to the great reputation of the work and the fame of its author, we might infer in this particular case that no publisher was actually led to believe that the book copyrighted by Dr. Holmes was not the same work which had appeared in the *Atlantic Monthly*, that would be an unsafe criterion to apply to a

8. *Holmes v. Hurst*, 174 U.S. 82 (1899), *affirming* 80 Fed. 514 (2d Cir. 1897) and 76 Fed. 757 (C.C.E.D.N.Y. 1896); *Holmes v. Donohue*, 77 Fed. 179 (N.D. Ill. 1896).

9. *Holmes v. Hurst*, 174 U.S. 82, 90 (1899).

work of less celebrity. . . . With the utmost desire to give a construction to the statute most liberal to the author, we find it impossible to say that the entry of a book under one title by the publishers can validate the entry of another book of a different title by another person.”¹⁰

At the same term of court, *The Minister's Wooing*, written by Mrs. Harriet Beecher Stowe, met the same fate. Mr. Justice Brown commented: “It is exceedingly unfortunate that, with the pains taken by the authors of these works to protect themselves against republication, they should have failed in accomplishing their object; but the right being purely statutory, we see no escape from the conclusion that, unless the substance as well as the form of the statute be disregarded, the right has been lost in both of these cases.”¹¹

Such cases continue to plague authors in spite of the enactment of a general revision of our copyright laws on the last day of President Theodore Roosevelt's administration—a statute which, with certain amendments, today forms title 17 of the United States Code. Thus the evils about which Mr. Solberg complained in 1904 are still with us a half century later. The need for a general overhauling was pointed out by Dr. L. Quincy Mumford, Librarian of Congress, and Arthur Fisher, Register of Copyrights, in urging the Legislative Appropriations Subcommittee of the Senate to appropriate funds for a three-year study relating to the revision of the copyright law.¹²

There is abundant evidence that in our laws protecting intellectual property, we have not heeded the admonition of the late Mr. Justice Jackson that “. . . each generation has a task of rewriting law,” that the “. . . substance as well as form of our law suffers from obsolescence,” and that those engaged in reshaping the law are generally “too occupied with the thrust to estimate with any accuracy its velocity, direction or probable recoil.”¹³

The shortcomings of our laws in this field are not accidental; their roots are to be found deep in history.

COPYRIGHT ASPECTS DESERVING RECONSIDERATION

We have seen literary property forfeited because of failure to comply with formalistic requirements which no longer make sense in modern society. Today we are the only nation in the world—except

10. *Mifflin v. R. H. White Co.*, 190 U.S. 260, 264 (1903).

11. *Mifflin v. Dutton*, 190 U.S. 265, 266 (1903).

12. *Hearings Before the Subcommittee of the Senate Committee on Appropriations on H.R. 7117*, 84th Cong., 1st Sess. 36 (1955).

13. Jackson, *Foreword to JURISPRUDENCE IN ACTION* iii, v (1953).

for the Philippines, which patterned its law after our own—where authors are exposed to forfeiture of all rights in their works if they fail to affix a copyright notice in the prescribed form, or at the specific place mentioned in a most intricate statutory formula.¹⁴ For example, we still provide for forfeiture at the expiration of twenty-eight years if the author fails to apply for renewal of his rights for an additional term, or if the application is filed in the wrong name¹⁵—a requirement abandoned in 1911 in Great Britain, where it first originated in 1709.

Another defect of our law is its refusal to permit each owner of a separate right to be the *legal* owner of that right. For example, if the author grants only serial rights to a magazine publisher, that publisher may not bring an action in his own name against an infringer of those rights. In other countries, such a publisher would be the copyright owner of the serial rights; a book publisher might own the book publishing copyright; another the translation right; another the recording right; but in the United States, there can be only one copyright owner, although he may hold certain rights in trust for others.¹⁶ If, perchance, a mere licensee—one who has acquired only one set of rights, *e.g.*, serial publication rights—should publish the work with his name as *the* copyright owner, the work becomes forfeit, as we have seen in the cases involving *The Professor at the Breakfast Table* and *The Minister's Wooing*.¹⁷

14. 17 U.S.C. §§ 10, 12-14, 16, 19-22, 24, 32 (1952). For cases in which forfeitures resulted from failure to comply with formalities, see note 89 *infra*. On the international scene the movement has been to do away with formalities. For example, the Berne Convention, Sept. 9, 1886, art. II, made works subject to the formalities of the country of origin; however, the Berlin Revision of the Berne Convention, Nov. 13, 1908, art. 4, did away with formalities; and the Buenos Aires Convention, Aug. 11, 1910, art. 3, abolished formalities but required a statement that indicated reservation of the property right. The Universal Copyright Convention, Sept. 6, 1952, art. III, states that all formalities shall be considered satisfied if the work is first published bearing ". . . the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright."

15. *Tobani v. Carl Fischer, Inc.*, 98 F.2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938).

16. See *In re Waterson, Berlin & Snyder Co.*, 48 F.2d 704, 710 (2d Cir. 1931); *Bisel v. Ladner*, 1 F.2d 436 (3d Cir. 1924); *T. B. Harms & Francis, Day & Hunter v. Stern*, 229 Fed. 42, 46 (2d Cir. 1915); *Cohan v. Richmond*, 19 F. Supp. 771, 773 (S.D.N.Y. 1937).

17. *Mifflin v. R. H. White Co.*, 190 U.S. 260 (1903) and *Mifflin v. Dutton*, 190 U.S. 265 (1903). See *Egner v. E. C. Schirmer Music Co.*, 139 F.2d 398 (1st Cir. 1943), *cert. denied*, 322 U.S. 730 (1944) (declaring *The Caisson Song* in the public domain because it had appeared in a compilation copyrighted in the name of one who owned only the publishing rights and therefore was a mere licensee and not the copyright proprietor, relying upon the earlier cases involving the Holmes works); *Public Ledger Co. v. Post Printing & Publishing Co.*, 294 Fed. 430 (8th Cir. 1923) (throwing into the public domain James W. Gerard's *My Four Years In Germany* because it had been published serially with a copyright notice in the name of one who owned only the "serial and book rights"); *Public Ledger Co. v. New York Times Co.*, 275 Fed. 562 (S.D.N.Y. 1921), *aff'd*, 279 Fed. 747 (2d Cir.), *cert. denied*, 258 U.S. 627 (1922) (suit for copyright infringement of Lord Grey's letter commenting

Another glaring defect relates to works which have been recorded on records, tapes or other devices but which have not been reduced to manuscript form. In such a case there has not been a copy of the work upon which a notice of copyright may be affixed. The record manufacturer need not imprint a copyright notice,¹⁸ and the performer obviously cannot. Yet under these circumstances, the author may lose not only his recording and performing rights but also his sheet music publication, motion picture and all other rights.¹⁹

In other countries, the ownership of one right cannot be affected by the acts or omissions of the owner of another right. They are separate and distinct.²⁰

It is appropriate to examine whether, in this respect, our laws have kept pace with the velocity and direction of modern society. If they are out of step, the process of reshaping should not be further delayed.

In addition to questions of formalities and forfeitures, of indivisibility and ancient concepts of equitable—as distinguished from legal—ownership, we must also examine the subject of duration, *i.e.*, term of copyright.

The United States is the only major country which today computes the period of copyright protection from the date of publication of the work. That was not always so. Other countries, beginning with the very first copyright law of Great Britain, followed that course but have since changed to a term equal to the life of the author plus a certain number of years after his death. It is interesting to observe that the shortest period of copyright in any major country is that of the Soviet Union, where it is the life of the author and fifteen years after his death.²¹ Before the communist revolution the period had been life and fifty years.²²

on the United States Senate's attitude toward the League of Nations, published and copyrighted in Great Britain by the *London Times* and published and copyrighted in the United States by plaintiff, could not be maintained because plaintiff's contractual relationship with the *London Times* was found to be that of a licensee having limited rights, *i.e.*, first North American publication rights to special news items which appeared in the *London Times*, and not that of a proprietor entitled to a valid copyright under the Act of 1909).

18. *Buck v. Lester*, 24 F.2d 877 (E.D.S.C. 1928); *Buck v. Heretis*, 24 F.2d 876 (E.D.S.C. 1928).

19. *Mills Music, Inc. v. Cromwell Music, Inc.*, 126 F. Supp. 54 (S.D.N.Y. 1954); *Shapiro, Bernstein & Co. v. Miracle Record Co.*, 91 F. Supp. 473 (N.D. Ill. 1950). But see *Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657 (2d Cir. 1955). See also Kaplan, *Publication in Copyright Law: The Question of Phonograph Records*, 103 U. PA. L. REV. 469 (1955).

20. For a discussion of divisibility, see Henn, "Magazine Rights"—*A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411 (1955).

21. Decree of Oct. 11, 1926, replaced by Ordinance of May 16, 1928, promulgating "Principles of Copyright," and Decree of Oct. 8, 1928. See 2 LADAS, *INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 1112-14 (1938).

22. Act of March 20, 1911, summarized in COPINGER, *LAW OF COPYRIGHT* 460-67 (5th ed., Easton 1915).

It is true that in cases where the author lives more than forty-one years after publication of a particular work, the Soviet term of life and fifteen years is longer than our two twenty-eight year terms, but it is always shorter than the copyright term of any other country which computes the duration of copyright protection from the death of the author.

In any revision of the law of copyright, it will be necessary to determine whether the United States should now depart from its practice of computing the term of copyright from the date of publication; whether it should abandon the idea of having an initial term and a renewal term conditioned upon making an application therefor; whether copyright should commence upon the creation of a "writing" which for all practical purposes might terminate the common law protection afforded by the several states; and if the term is to be measured by the life of the author, whether the United States should adopt a period of life plus fifty years which prevails in most of the western democracies, or whether it should adopt some other term.

If the term be measured from date of publication, then it is logical to expect some formality, such as a notice of copyright or registration, to fix the date indelibly. On the other hand, if the term is to be fixed in relation to the date of the author's death, the date of publication becomes unimportant, and therefore a forfeiture need not be decreed as a result of failure to affix the notice in the right place with the proper year and the name of *the* copyright proprietor. It is also simpler to permit divisibility if all rights in all works of an author terminate at the same time, *i.e.*, at a given period after his death.

As long as renewal rights are conferred only upon certain prescribed successors of the author—widows, children, executors, and next of kin—without a clear definition of the order of succession, there is bound to be much confusion and frequent litigation concerning the ownership of copyrights for the renewal period.²³

23. In the most recent contest, *DeSylva v. Ballentine*, 351 U.S. 570 (1956), involving the widow of a noted author and a son of the author born out of wedlock, it was held that the widow and child were co-owners of the renewal rights. In reaching its decision, the Court stated that "the widow and children of the author succeeded to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright." *Id.* at 580. Query, whether this decision means that if there were a widow and six children, the widow would only be a one-seventh participant instead of being entitled to one-half. In other words, should the widow be treated as a person whose rights are equal to those of all the children as a class, or each child have the same share as the widow? It is submitted that this question is still open. Incidentally, in amicus briefs of several associations—the Motion Picture Association of America, the Music Publishers' Protective Association, and ASCAP—it was unsuccessfully contended that the widow alone should own renewal rights in those works which came up for renewal during her lifetime (after the author's death), and that the children should own exclusively the renewals in works which came up for renewal after the widow's death. *Id.* at 578. For other problems related to the right of renewal, see *Fred Fisher Music Co. v. Witmark & Sons*, 318 U.S. 643

There are other problems to consider. Should the composers of symphonic works be entitled to payment only when their works are performed publicly for profit, while authors of dramatic works are entitled to compensation for *all* public performances whether or not they are given for profit? Is there any logical reason for permitting public performances of musical works by means of coin-operated machines without payment to the composer, while requiring such payment in the case of performances by means of machines in which a coin is not deposited?

In arranging for permission to perform musical compositions publicly for profit, collective action is necessary. Should this be regulated by our federal copyright laws, or should it be treated under state or federal laws regulating combinations? To what extent should the several states be permitted to require duplication of the filing of copyright data which may be readily obtained by inspecting the records of the Federal Copyright Office?

All these matters require re-examination in the light of the present-day economy in which works of authors form the very core of large industries, and provide entertainment and enlightenment to a populace among whom education is practically universal. We no longer speak of a "leisure class" at a time when all enjoy the leisure that was once the privilege of only a few. In this new world, authorship assumes an importance never before equaled. As the form of property created by this group of our citizenry enters the channels of commerce in ever-expanding form, the laws must be adjusted to meet the needs of our day. It is with this in mind that we shall approach our subject.

HISTORICAL DEVELOPMENT OF COPYRIGHT

System of "Privileges"—Encouragement of Printing

Copyright, as a form of property, is a creature of modern times. There is no authentic trace of it before the days of Queen Anne. True, more than two centuries earlier the Venetian Republic in 1498 had granted to one Democrito Terracina a monopoly to print all books in Arabic, Moorish, Syrian, Armenian, Indian and Barbary for a period of twenty-five years, and to another Venetian citizen a monopoly for all printing of figured song for twenty years.²⁴ These grants or priv-

(1943); Fox Films Corp. v. Knowles, 261 U.S. 326 (1923); Silverman v. Sunrise Pictures Corp., 273 Fed. 909 (2d Cir. 1921); Edward B. Marks Music Corp. v. Borst Music Publishing Co., 110 F. Supp. 913 (S.D.N.Y. 1953); Yardley v. Houghton Mifflin Co., 25 F. Supp. 361 (S.D.N.Y. 1938); Fitch v. Shubert, 20 F. Supp. 314 (S.D.N.Y. 1937).

24. BROWN, THE VENETIAN PRINTING PRESS 41-42 (1891).

ileges, however, were intended to encourage printing rather than authorship.

Within the next two decades (1517), the Venetian Senate recalled every privilege theretofore granted and provided that in the future no privilege was to be granted except for new works or works never before printed, and that the approval of two-thirds of the Senate should be required in each case.²⁵

Similar privileges were being granted elsewhere. In 1518, the Holy Roman Emperor Maximilian gave John Schoeffer the exclusive right to print *Livy* for a period of ten years after publication, and a like privilege for six years in the case of other books first published by Schoeffer in Germany, even though they had been previously published elsewhere.²⁶

The earliest grant of that nature in Great Britain which this writer has been able to find was in the year 1519, when Henry VIII granted to John Rastell for a period of seven years the exclusive right to print and sell in Great Britain Rastell's English translation from the French of an *Abridgement of Statutes*.²⁷ Translations from French to English were of great importance at that time. In 1530, a seven year privilege was granted to Jehan Palsgrave Angloys to publish a book of French instruction which he had written. The patent recites:

" . . . [W]e greatly moued and stered by dewe consyderation of his sayd long tyme and great dyligence about this good and very necessary purpose employed, and also of his sayd great costes and charges bestowed about the imprintyng of the same, haue liberally and benignely graunted unto the sayd Maister Palsgrau, our fauorable letters of priuilege, concernynge his sayd bouk, called, Lesclarissement de la langue francoyse, for the space and terme of seuyñ yeres next and immediatly after the date hereof enswyng." ²⁸

Here we find the law developing in a crucible. Patents and copyrights had not yet emerged as separate branches of the law. The

25. *Id.* at 74, 207.

26. GROLIER CLUB, EARLY PRINTED BOOKS OWNED BY THE GROLIER CLUB 24-26 (1895) (facsimile #8).

27. COWLEY, BIBLIOGRAPHY OF ABRIDGMENTS, DIGESTS, DICTIONARIES AND INDEXES OF ENGLISH LAW TO THE YEAR 1800, at 4-5 (1932). Another author tells us that Pynson's edition of Pace's *Oratio*, published in 1518, was the "first book in England to have a printer's *cum privilegio*." No mention is made of the number of years for which the privilege was given. GREENHOOD & GENTRY, CHRONOLOGY OF BOOKS & PRINTING 49 (1936).

28. As quoted in LOWNDES, AN HISTORICAL SKETCH OF THE LAW OF COPYRIGHT 6 (2d ed. 1842). A list of later patents and privileges may be found in SCRUTTON, LAW OF COPYRIGHT 293-300 (1st ed. 1883).

periods of patents, which were usually multiples of seven, were related to the time required to train an apprentice. A fourteen-year period was "just long enough to induct two sets of apprentices in the novel mystery."²⁹

These patents—for such they were—were not copyrights as we know them. A copyright does not depend on any royal favor or specific grant. It is a right which all may enjoy who comply with the requirements of a general statute. There is no advance examination to determine copyrightability. The early Anglo-Saxon statutes applied only to published works; the works were to be registered in a specified place, accompanied by the deposit of a prescribed number of copies.³⁰

The French Revolution—Term of Copyright Related to Life of Author

Prior to the revolution, the only forms of protection in France were by resort to the old privileges of the type in effect in Great Britain before the Statute of Anne. As early as 1542 a precursor of our copyright notice is found in a decree forbidding the offering for sale of any book not bearing a certificate showing that it had been examined and approved by the clerks or deputies of the faculty of the university having charge of the subject to which the book was devoted.³¹ Privileges had been granted earlier, as in the case of a five-year monopoly granted by Francis I to the King's printer, Conrad Néobar, for all books in Greek first published by him, whether these were the productions of modern scholars or were taken from old manuscripts.³² Such general privileges were being granted as late as 1703, as evidenced by

29. HAMILTON, PATENTS AND FREE ENTERPRISE 16 (TNEC Monograph No. 31, 1941), quoting as authority Coke, *Institutes* pt. 3, c. 85: "... the reason wherefore such a privilege is good in law is, because the inventor bringeth to and for the commonwealth a new manufacture by his invention, cost and charges, and therefore it is reason that he should have a privilege for his reward (and the encouragement of others in the like) for a convenient time; but it was thought that the times limited by this act were too long for the private, before the commonwealth should be partaker thereof, and such as served such privileged persons by the space of 7 years in making or working of the new manufacture (which is the time limited by law of apprenticeship) must be apprentices or servants still during the residue of the privilege, by means whereof such numbers of men would not apply themselves thereto, as should be requisite for the commonwealth, after the privilege ended." HAMILTON, *op. cit. supra* at 16 n.13. The Statute of Monopolies, 1623, provided that all patents to be granted in the future were limited to fourteen years; those already in existence were not to last longer than twenty-one years. 21 JAC. 1, c. 3, §§ 5, 6.

30. The Statute of Anne required registration of title to the copyright at Stationer's Hall "... in such manner as hath been usual . . ." and the deposit of nine copies of the book for the use of the Royal Library, the Universities of Oxford and Cambridge, the four universities in Scotland, Sion College in London, and the library of the Faculty of Advocates at Edinburgh. 8 ANNE c. 19, §§ 2, 5 (1710).

31. 2 PUTNAM, BOOKS AND THEIR MAKERS DURING THE MIDDLE AGES 443 (1897).

32. *Id.* at 448-49.

the ten-year privilege extended to the Bishop of Chartres covering all breviaries, antiphonals, processions, episcopal letters, psalters, hours, catechisms, pastoral instructions, etc., which were required under the general usage of the diocese.³³ All such special privileges were abolished, however, during the French revolution, with the consequence that there were then no laws in France protecting literary works.

At the very height of the revolution, a law was enacted granting to authors of dramatic works exclusive rights for the period of their lives plus five years.³⁴ This was a radical departure from the British precedent of calculating the period from the date of publication—an initial term of fourteen years from date of publication having been in effect since 1710, with a renewal term of fourteen additional years to the author, if living.³⁵ The British term was obviously based on the *privileges* or patents granted by the sovereign to publishers of certain works. The new French approach was unfettered by historical considerations. This new democracy considered copyright as a boon to authorship rather than an encouragement to printers, and related the period of copyright to the life of the author.

The Concept of Copyright as a Form of Property

As we have observed, the laws safeguarding rights in *literary* property were, at an early date, confused with concepts relating to *industrial* property—a handicap that has not yet been overcome.³⁶ Another early handicap was the fear of the sovereign that the existing order might be challenged through the spread of dangerous thoughts made possible by expansion of the art of printing. This gave rise to a requirement that all works be registered, which in practice often meant examined, before publication—a golden opportunity for cooperation between the Star Chamber and the Stationer's Company.³⁷

In addition, this new form of property had to meet the challenge of legal theorists who had long asserted that nothing could be regarded as the subject of property unless it was capable of being physically

33. *Id.* at 463.

34. Act of Jan. 13-19, 1791, translation in WEIL, COPYRIGHT LAW 783 (1917).

35. 8 ANNE c. 19, § 11 (1710).

36. Finkelstein, PUBLIC PERFORMANCE RIGHTS IN MUSIC AND PERFORMANCE RIGHT SOCIETIES 1-3 (rev. ed. 1956), reprinted from 7 COPYRIGHT PROBLEMS ANALYZED 69-70 (1952); see Finkelstein, *Anti-trust Laws and the Arts*, in CONFERENCE ON THE ARTS, PUBLISHING, AND THE LAW 66 (University of Chicago Law School Conference Series No. 10, 1952).

37. The Stationers' Company was organized in 1556; remnants of this particular type of censorship remained, despite the demise of the Star Chamber in 1641, until the ultimate repeal of the licensing acts in 1694. BIRRELL, SEVEN LECTURES ON COPYRIGHT 51-68 (1899). See *Holmes v. Hurst*, 174 U.S. 82, 84-85 (1899); Bowker, COPYRIGHT ITS HISTORY AND ITS LAW 21-23 (1912); DRONE, A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 54-59 (1879).

possessed to the exclusion of the whole world.³⁸ Of course, a published literary or musical work is not capable of that type of ownership, as Mr. Justice Yates pointed out in *Millar v. Taylor*.³⁹ But property, according to modern concepts, does not necessarily depend on its subject having these attributes. Even real estate is no longer the subject of absolute ownership from the center of the earth to the sky. Airplanes may fly overhead without committing trespass; zoning laws limit the use to which land may be put. A farmer no longer has the absolute right to determine what crops he will grow.

On the other hand, such intangible things as good will, the right of privacy—or the newer right of publicity⁴⁰—and the right to be protected against unfair methods of competition are constantly gaining additional sanctions as our society develops. The law now aims to protect one who has built up an intangible asset against the marauder who seeks to reap where another has sown, just as it protects the owner of real estate against trespassers and vandals.^{40a}

When the concept of copyright was first established, authorship was not yet recognized as one of the professions. It was regarded as a pastime for wits who had for generations been mere retainers of the nobility—the court jesters and fools⁴¹ who figure so prominently in many of Shakespeare's plays. The publishers regarded the author's output as their exclusive property, having generally purchased all rights in the work for a lump sum. It remained for a future generation of authors to insist on the present practice of publication on the basis of a continuing royalty. Writing on the subject more than a century ago, the elder D'Israeli devoted a whole chapter to the "Poverty of the Learned," listing many authors who perished in poverty while their works were enriching the booksellers.⁴² This rarely occurs in our own day. So long as an author's works have a continued public demand, he shares in the earnings of his publisher. But before the Statute of Anne, protection after first publication was of direct concern only to the publisher or stationer, as he was then known. It remained for the Statute of Anne to recognize the author as such. A twenty-eight year grant from the sovereign to the author or his assignee, with substantial statutory remedies, appeared far better than resort to the declining influence of Stationer's Hall.

38. See DRONE, *op. cit. supra* note 37, at 2-19.

39. 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769), citing Pufendorf at 2358, 2363, 98 Eng. Rep. at 231, 233 and Coke at 2374, 98 Eng. Rep. at 239.

40. There is an excellent discussion of the subject in Nimmer, *The Right of Publicity*, 19 LAW & CONTEMP. PROB. 203 (1954).

40a. See, e.g., *Ettore v. Philco Television Broadcasting Corp.*, 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956), 104 U. PA. L. REV. 1125.

41. See WILSON, *THE COURT WITS OF THE RESTORATION* (1948).

42. 1 D'ISRAELI, *CURIOSITIES OF LITERATURE* 48-55 (1833).

Progress in United States Before 1909 Contrasted With Other Countries

A brief review of the legislative history of copyright shows that we have lagged far behind other nations both in according rights to foreign authors and in the scope of the rights granted to authors generally. Although agitation for recognition of the rights of foreign authors in the United States had received a great impetus from a committee headed by Henry Clay as early as 1837, copyright protection was not accorded to them until 1891.⁴³ The Clay committee, which included Senators Preston, Buchanan, Webster and Ewing, submitted a report favoring international copyright. The report is a landmark in developing a sound approach to the rights of foreign authors at a time when the United States had not yet attained cultural as well as industrial world leadership. Criticizing our provincial attitude toward literary property of foreign origin, Mr. Clay wrote:

" . . . It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws, they throw around it effectual security. But if the work of a British author is brought to the United States, it may be appropriated by any resident here, and republished without any compensation whatever being made to the author. We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise, whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws.

" . . . The committee thinks that this distinction in the condition of the two descriptions of property is not just, and that it ought to be remedied by some safe and cautious amendment of the law. Already the principle has been adopted, in the patent laws, of extending their benefits to foreign inventions or improvements. It is but carrying out the same principle to extend the benefits of our copyright laws to foreign authors. In relation to the subjects of Great Britain and France, it will be but a measure of reciprocal justice; for, in both of those countries, our authors may enjoy that protection of their laws for literary property which is denied to their subjects here."⁴⁴

43. Act of March 3, 1891, c. 565, 26 STAT. 1106.

44. Report on Senate Bill No. 223, February 16, 1837, reprinted in PUTNAM, *THE QUESTION OF COPYRIGHT* 326, 327-28 (1st ed. 1891). See also BOWKER, *op. cit. supra* note 37, at 341-63; DRONE, *op. cit. supra* note 37, at 92-96; Kampelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 406, 413-16 (1947);

Not only were we viewed internationally as a haven for literary pirates because of our refusal to protect the works of foreign authors, we were virtually the last of the civilized nations to accord composers—domestic as well as foreign—the right to be compensated for public performances of their copyrighted musical compositions. Although such rights were recognized in Great Britain as early as 1842,⁴⁵ more than fifty years elapsed before the United States enacted any legislation in this field.⁴⁶ Thus in 1909, the right of composers of published musical works to benefit from public performances of those works had been vouchsafed for only twelve years. Although apparently no one attempted to enforce the right of public performance of musical works from 1897 to 1900⁴⁷—there had been almost no litigation on the subject since the right was created—the right was restricted in 1909 so as to limit the scope of the property of owners of musical copyrights to those performances which were both public and “for profit.”⁴⁸ The result was that symphonic and similar concert works which are per-

Solberg, *Copyright Law Reform*, 35 YALE L.J. 48, 50-57 (1925). For a glimpse into eighteenth-century piracy by English publishers of nationals' works, see BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 11 (1944). For problems of piracy of French works by Belgian publishers, see 1 LADAS, *op. cit. supra* note 21, at 14, 24-26. See also Report of British Commission for the Investigation of the Subject of Copyright Appointed by Queen Victoria, May 24, 1878, reprinted in PUTNAM, *op. cit. supra* at 212, 267-72.

45. 5 & 6 VICR. c. 45, § 20 (1842).

46. Act of Jan. 6, 1897, c. 4, 29 STAT. 481.

47. There were three cases in the federal courts which considered the issue of the right of public performance of copyrighted musical works between 1897 and 1909, all involving a defense that mimicry constitutes fair use. In no case was recovery allowed. All involved commercial theatrical uses and therefore cannot be said to have influenced the whittling down process by which the “for profit” limitation was introduced in the 1909 Act. The three cases are: Bloom & Hamlin v. Nixon, 125 Fed. 977 (C.C.E.D. Pa. 1903) (Fay Templeton's mimicry of plaintiff's song entitled *Sammy* held a fair use of the work); Savage v. Hoffman, 159 Fed. 584 (C.C.S.D.N.Y. 1908) (plaintiff failed to establish a sufficiently clear title to Franz Lehar's *The Merry Widow* to support an application for a temporary injunction against alleged infringement by mimicry of one of the songs in the play); Green v. Minzensheimer, 177 Fed. 286 (C.C.S.D.N.Y. 1909) (following Bloom & Hamlin v. Nixon, *supra*, under circumstances similar to that case).

48. Copyright Act of 1909, c. 320, 35 STAT. 1075, now 17 U.S.C. § 1(e) (1952). The general prohibition against public performance of copyrighted musical compositions without regard to the “profit” element is still the law in Great Britain. The Copyright Committee of the British Board of Trade, recently reviewing the British Copyright Act, advocates that this provision remain unchanged. Said the Committee, which included such authorities as F. E. Skone James and the late Sir John Blake under the chairmanship of H. S. Gregory: “In the first place we had to consider whether the right of public performance in respect of copyright material in the ordinary sense, i.e., the rights protected under Section 1 of the Copyright Act, is justified. We have come to the conclusion that it is. Plays and musical works are written to be performed, and dramatists and composers are entitled under all known canons to derive their incomes from the power to control performance. The fact that these works have been written is a pre-requisite to their attracting other rights. We make recommendations elsewhere to meet cases where these rights are used, or alleged to be used, in a monopolistic manner: otherwise we recommend no alteration in the law in this respect.” Copyright Committee, *Report*, CMD. No. 8662, para. 178, at 64 (1952).

formed primarily by eleemosynary groups have yielded little return to the composers.

To understand how far we were behind other civilized countries at that time in according to authors a fair measure of protection, let us trace parallel developments in international protection of the works of authors in other countries, especially in protecting the right of public performance, in eliminating traps causing forfeiture of rights in intellectual creations, and in securing protection for a reasonably adequate period of time.

As early as 1838, Great Britain had adopted an International Copyright Act,⁴⁹ followed by a statute in 1844 establishing a basis for full reciprocity between Great Britain and other countries.⁵⁰

France and Great Britain soon concluded a convention in 1851 providing for the protection in each country of published works protected under the laws of the other, including the right of translation. Two conditions were attached: (1) that such right be expressly reserved on the title page of the original work, and (2) that the original work be registered and deposited in one country within three months after publication in the other.⁵¹

When our copyright laws were revised in 1909, we had not yet reached this stage of international interchange—at least not as to books in the English language first published abroad.⁵² Only in 1954, with our adherence to the Universal Copyright Convention,⁵³ did we abandon the harsh provisions working a complete forfeiture of property rights in such works first published abroad unless within a limited period after first publication an American edition was printed and bound in the United States from type set in this country.⁵⁴

Abroad, England and France were not alone in subscribing to a policy of reciprocal protection of the intellectual products of foreign nationals without burdensome formalities. Before 1909, seventeen countries had adhered to the Berne Convention and thereby subscribed to a system under which, without any formalities, works first pub-

49. 1 & 2 VICT. c. 59 (1838).

50. 7 & 8 VICT. c. 12 (1844). This was supplemented by 15 & 16 VICT. c. 12 (1852) and 38 & 39 VICT. c. 12 (1875).

51. Paris Convention, Nov. 3, 1851.

52. Copyright Act of 1909, c. 320, §§ 15, 16, 35 STAT. 1078, 1079, now 17 U.S.C. §§ 16, 17 (1952); 37 C.F.R. § 201.8 (Supp. 1956) (import statements). For a discussion of the manufacturing clause, see Ashford, *The Compulsory Manufacturing Provisions*, in ASCAP, *FOURTH COPYRIGHT LAW SYMPOSIUM* 48 (1952).

53. United States instrument of ratification deposited with UNESCO in Paris, December 6, 1954.

54. The amended 17 U.S.C. § 16 (Supp. III, 1956) became operative as of the effective date of the Universal Copyright Convention, *i.e.*, September 16, 1955. The amendment does not apply to works of authors who are United States citizens or domiciliaries regardless of the place of first publication.

lished in any member country received the same protection in other member countries as was accorded to works of their own nationals.⁵⁵

Customary formalities had included not only a prescribed form of notice appearing in all copies of the work, registration of a claim of copyright, and deposit of copies of the work, but also first publication in the country where protection was sought, and even domestic manufacture, *i.e.*, printing and binding in such country of all copies of the work offered for sale therein.⁵⁶

Although the United States has at last abandoned certain formalities as applied to nationals of countries adhering to the Universal Copyright Convention, it has not yet subscribed to the principle of wholly automatic protection which has been a fundamental tenet of the Berne Convention since at least 1908.⁵⁷

The Buenos Aires Convention of 1910 and the Universal Copyright Convention of 1952 both encompass formalities. In the former, copies of the work must bear a notation that rights are reserved;⁵⁸ the latter retains this principle, but adopts a uniform method of satisfying the requirement—the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.⁵⁹

Liberal Approach to Copyright by Confederate States in Civil War

Although the federal government had failed to adopt the 1837 Clay committee's recommendations urging recognition of the rights of foreign authors on a reciprocal basis, that principle was adopted by the Confederate States on March 7, 1861. A resolution empowered President Jefferson Davis to authorize a commission visiting Europe to enter into treaty obligations for the extension of international copy-

55. Great Britain and colonies (1887); Germany (1887); Belgium (1887); Spain and colonies (1887); France and colonies (1887); Haiti (1887) (withdrew 1903); Italy (1887); Switzerland (1887); Tunis (1887); Liberia (1908); Luxembourg (1888); Monaco (1889); Montenegro (1893) (withdrew 1900); Norway (1896); Japan (1899); Denmark (1903); Sweden (1904).

56. Berne Convention, Sept. 9, 1886, arts. II & III, no formalities were required other than those prescribed by the law of the country of origin. Subsequently, formalities as a condition for copyright protection were wholly abolished. See note 14 *supra*.

57. *Ibid.* See Mentha, *The Berne Union and the Question of Formalities*, 3 UNESCO COPYRIGHT BULL. 45 (1950).

58. Art. 3 of the Buenos Aires Convention, Aug. 11, 1910, provided: "The acknowledgment of a copyright obtained in one State, in conformity with its laws, shall produce its effects of full right in all other States without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right."

59. Universal Copyright Convention, Sept. 6, 1952, art. III(1). See Schulman, *Another View of Article III of the Universal Copyright Convention*, 1953 WIS. L. REV. 297.

right privileges to foreign authors on a reciprocal basis.⁶⁰ Subsequently, an act was passed providing for such copyrights without any requirement of domestic manufacture such as was incorporated in our first international copyright act of 1891.⁶¹

DURATION OF COPYRIGHT TERM

The Principles Involved

We have seen that the idea of a term of copyright measured in multiples of fourteen years was a vestige of the time when privileges were granted as a means of encouraging printers. The fourteen-year term was then logical, being long enough to train two sets of apprentices in the new art. In an ideal system of law, the duration of an author's property rights in literary works would probably have some relation to the duration of other property rights. It is too late to urge that authors should have *perpetual* rights in their works; that was settled to the contrary by a closely-divided English court⁶² and by our Constitutional mandate that exclusive rights of authors in their works may be granted by Congress only "for limited Times."⁶³

Some of our greatest legal and literary minds have urged that, in principle, authors are entitled to enjoy their property rights for the same period as landowners. Lord Scrutton, one of Great Britain's outstanding judges, observed:

"Limit in the interests of the State the duration of property in books, if you like, but recognize that the same arguments may be used to limit the duration of property in land, the power of bequest at death, and the devolution of the property of an intestate. And above all, a caution which is most necessary in arguing the matter, and dealing with questions of so-called 'justice', 'right' and 'utility', let us be careful that we understand what we mean by these terms, for though such an investigation may be tedious to our lofty intellects, perhaps even fatal to our pet arguments, it will certainly result in greater clearness and brevity, and less idle declamation."⁶⁴

60. 1 J. OF THE CONG. OF THE CONFED. STATES 113 (1904).

61. Act of May 21, 1861, c. 65, 6 STATS. AT LARGE OF THE CONFED. STATES OF AMERICA 157 (Matthews ed. 1864) (Prov. Cong. 2d Sess.). For an excellent analysis of the attitude of the southern states toward copyright, see Page, *Copyright Laws in Georgia*, in ASCAP, SECOND COPYRIGHT LAW SYMPOSIUM 151, 156-59 (1940).

62. *Donaldson v. Beckett*, 2 Brown P.C. 129, 1 Eng. Rep. 837 (H.L. 1774); *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769). See HANSARD, *PARL. HIST. ENG.* 954-1003 (1774).

63. U.S. CONST. art. 1, § 8, cl. 8.

64. SCRUTTON, *op. cit. supra* note 28, 290-92.

Our ideal term of copyright must therefore be for a limited period of time, but should be as long as is commensurate with the public interest. The great public interest behind the enactment of copyright laws is the encouragement of authors by giving them the opportunity of obtaining fair rewards for their labors. It is submitted that the test should be, not how little may be vouchsafed to the author as a means of such encouragement,² but rather, what should the public consider as a fair reward for the contributions made by authorship to society? Our answer must depend on (a) the scope of the rights given, (b) the periods of protection in other fields of human endeavor, (c) historical considerations, (d) experience in other countries and (e) our national interest in both its domestic and international aspects.

What have been the arguments pro and con over the years? What validity do those arguments have today? Perhaps the most eloquent and certainly the most effective argument against extending the term of copyright was made by Lord Macaulay more than a century ago, at a time when the term of copyright was twenty-eight years from the date of publication but not less than the life of the author. Sergeant Talfourd proposed a term of life plus sixty years. Macaulay's opposition centered on five points: (1) No rights of property should survive death except to the extent that parliament deems proper. (2) Except for a system of patronage, which is undesirable, copyright is the only known means of encouraging professional authors, but copyright is a monopoly and monopolies are evil. "For the sake of the good we must submit to the evil; but the evil ought not to last a day longer than is necessary for the purpose of securing the good." (3) Copyright laws impose "a tax on readers for the purpose of giving a bounty to writers. The tax is an exceedingly bad one; it is a tax on one of the most innocent and most salutary of human pleasures; and never let us forget, that a tax on innocent pleasures is a premium on vicious pleasures." (4) A publisher will pay little more for a copyright having a duration of life plus sixty years than for one of life plus twenty-five years. "From the very nature of literary property it will almost always pass away from an author's family; and . . . the price given for it to the family will bear a very small proportion to the tax which the purchaser, if his speculation turns out well, will in the course of a long series of years levy on the public." (5) If the copyright does not fall in the hands of booksellers, but remains in the family, it may produce an even greater evil—"many valuable works will be either totally suppressed or grievously mutilated."⁶⁵

65. 5 MACAULAY, COLLECTED WORKS 228 (1899).

These arguments must be examined in the light of both experience and logic. First, let us review the experience of the leading countries and the term now prevailing in most of the enlightened countries of the world.

General Development Before 1909

The United States and Great Britain

Exactly two centuries had elapsed between the Statute of Anne and the United States Copyright Law of 1909. At the time of the birth of our nation, when we looked to the mother country for the pattern of our laws, the term of copyright in Great Britain had not changed since the Statute of Anne. It was still two terms of fourteen years each. Before our own Constitution was ratified, Congress recommended that the several states enact copyright laws providing for an initial term of *not less than* fourteen years and a renewal of *not less than* fourteen years.⁶⁶ Connecticut and Maryland had previously provided for two terms of fourteen years each;⁶⁷ Massachusetts had provided for a single term of twenty-one years.⁶⁸ Nine other states subsequently enacted similar copyright laws.⁶⁹ Our first national copyright act, following this pattern, provided for two terms of fourteen years each.⁷⁰

Across the seas, more than a century after enactment of the Statute of Anne, the initial term was extended to twenty-eight years with a renewal to the author, if living, for the remainder of his life.⁷¹ This was the first departure in Great Britain from a period measured exclusively from the date of publication; it was the earliest recognition by the Anglo-Saxon world that an author's property rights should remain inviolate for at least as long as he remained alive, a concept first introduced, as we have seen, during the French revolution. That principle has never been adopted in the United States. Rather, the fixed terms dating from publication have been enlarged from time to time. In 1831 the initial term was extended to twenty-eight years

66. 8 J. OF CONG. 189 (1800) (Resolution of May 2, 1783).

67. *Connecticut*, Act of Jan. 1783, COPYRIGHT OFFICE, BULL. NO. 3, COPYRIGHT ENACTMENTS OF THE UNITED STATES 1783-1906, at 11 (2d ed. 1906); *Maryland*, Act of April 21, 1783, *id.* at 15.

68. Act of March 17, 1783, 1 LAWS OF MASS. 94 (1807).

69. *New Jersey* (fourteen plus fourteen), Act of May 27, 1783, COPYRIGHT OFFICE, *op. cit. supra* note 67, at 16; *New Hampshire* (twenty years), Act of Nov. 7, 1783, *id.* at 18; *Rhode Island* (twenty-one years), Act of Dec. 1783, *id.* at 19; *Pennsylvania* (fourteen plus fourteen), Act of March 15, 1784, *id.* at 20; *South Carolina* (fourteen plus fourteen), Act of March 26, 1784, *id.* at 21; *Virginia* (twenty-one years), Act of Oct. 1785, *id.* at 24.

70. Act of May 31, 1790, c. 15, 1 STAT. 124.

71. 54 GEO. 3, c. 156, § 4 (1814).

(as in Great Britain), but until 1909 the renewal period remained a specific term of fourteen years to the author or his surviving widow or children.⁷²

In the meantime, there was adopted in England a term of life plus seven years or forty-two years from the date of publication, whichever should prove longer.⁷³ This was the outcome of a spirited debate in which the champion of the authors was Sergeant Talfourd, seeking a term of life plus sixty years; the opponents were led by Lord Macaulay.

This was obviously better for authors than the term of twenty-eight plus fourteen years then prevailing in the United States. For the second successive time, the British copyright law protected the author for the minimum period of his lifetime.

There was no further change in the United States until the general revision of the law in 1909;⁷⁴ nor in Great Britain until the general revision of 1911.⁷⁵

Other Countries

In France the term of the author's life plus five years was extended in 1793 to ten years after death, and in 1866 to fifty years after death.⁷⁶

The Italian law of 1885 provided for a term of life and forty years, or a minimum of eighty years from the date of first publication. If the author died before the lapse of forty years after first publication, others could reprint the work during the final forty-year period upon paying to the author's heirs or representatives five per cent of the published price of each copy.⁷⁷

As the table below indicates, by the time our 1909 law was enacted, every major country of the world except the United States and Holland (including the Dutch East Indies) granted protection to the author at least for the period of his life. At the present time, 38 of the 60 countries having copyright laws provide for a term of life and fifty years or longer. The countries having the shortest terms at present are Russia (life and fifteen years) and the United States (twenty-eight years from publication plus an additional term of twenty-eight years). No country today has a term shorter than life and fifteen years, except Bulgaria and Yugoslavia where the rights terminate upon the author's death if he does not leave a widow or children under twenty-one (Bulgaria) or twenty-five (Yugoslavia).

72. Act of Feb. 3, 1831, c. 16, 4 STAT. 436.

73. 5 & 6 VICT. c. 45, § 3 (1842).

74. Copyright Act of 1909, c. 320, 35 STAT. 1075, now 17 U.S.C. §§ 24, 25 (1952).

75. British Copyright Act, 1911, 2 GEO. 5, c. 46, §§ 3 and 4.

76. WEL, *op. cit. supra* note 34 at 785, 791.

77. Translation of statute in COPINGER, LAW OF COPYRIGHT 755-67 (3d ed. 1893).

The following chart, showing the present periods of copyright duration throughout the world in contrast with the terms prevailing before the enactment of our 1909 revision, indicates a decided trend toward a term of life and fifty years:⁷⁸

	<u>Pre-1909 Period</u>	<u>Present Day Period</u>
<u>Perpetual</u>	Egypt (?) Guatemala Mexico Venezuela	Nicaragua
<u>Life and 80 Years</u>	Colombia Cuba Spain	Colombia Cuba Spain
<u>Life and 60 Years</u>	None	Brazil
<u>Life and 50 Years</u>	Belgium Bolivia Costa Rica Denmark Ecuador Finland France	Australia Austria Belgium Canada Chile Costa Rica Czechoslovakia Denmark Ecuador Egypt Finland France (plus period of two world wars) Germany Great Britain Greece Guatemala

78. For the pre-1909 situation, see table submitted by Herbert Putnam, Librarian of Congress, in *Hearings before the Joint Committees on Patents on S. 6330 and H.R. 19853 To Amend and Consolidate The Acts Respecting Copyright*, 59th Cong., 1st Sess. 401 (1906); COLLES & HARDY, *PLAYRIGHT AND COPYRIGHT IN ALL COUNTRIES* 62-63, 112-15 (1906); and COPINGER, *LAW OF COPYRIGHT* 495-759 (4th ed. 1904). The situation after the British Copyright Act of 1911 is detailed in BOWKER, *op. cit. supra* note 37, at xi-xiv. For the present day situation, see the charts in 2 UNESCO COPYRIGHT BULL. 70-81 (1949) and Dubin, *The Universal Copyright Convention*, 42 CALIF. L. REV. 89 (1954).

	<i>Pre-1909 Period</i>	<i>Present Day Period</i>
<u><i>Life and 50 Years (con'td)</i></u>		
	Hungary	Hungary
		Iceland
		India
		Israel
		Ireland
		Italy (plus period of two world wars)
		Lebanon
	Luxembourg	Luxembourg
	Monaco	Monaco
		Netherlands
		New Zealand
	Norway	Norway
		Paraguay
	Portugal	
	Russia	
	Sweden	
	Tunis	Syria
		Turkey
		Union of South Africa
<u><i>Life and 40 Years</i></u>		
	None	Uruguay
<u><i>Life and 30 Years</i></u>		
		Argentina
	Austria	Bolivia
		China
		Dominican Republic
	Germany	
	Japan	Japan
	Nicaragua	
		Rumania
		Siam
		Sweden
	Switzerland	Switzerland
		Venezuela
<u><i>Life and 25 Years</i></u>		
	Salvador	Salvador
<u><i>Life and 20 Years</i></u>		
		Liberia
		Mexico
	Peru	Peru
		Poland

*Pre-1909 Period**Present Day Period**Life and 15 Years*

None

Soviet Union

Life and 10 Years

Rumania

None

*Life and 7 Years**with 42 Year**Minimum*

Australia
 Great Britain
 India
 Natal
 New South Wales
 New Zealand
 Siam
 South Australia
 Victoria
 Western Australia

None

Life or 80 Years

Italy (subject to 5%
 compulsory license
 for last 40 years)

None

Life or 40 Years

Turkey

None

*Lives of Author and**Surviving Spouse**plus specified pe-
riod*

Haiti (if children, 20
 years; if no chil-
 dren, 10 years)

Haiti (if children, 20
 years; if no children,
 10 years)

Bulgaria (until children
 reach 21)

Yugoslavia (until chil-
 dren reach 25)

50 Years

Brazil
 Holland and
 Dutch E. Indies

None

Pre-1909 Period *Present Day Period*

28 Years and 14

Year Renewal

Canada	
United States	None
Newfoundland	

28 Years and 28

Year Renewal

None	United States
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30 Years and 30

Year Renewal

None	Philippines
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The trend toward standardizing the period of copyright protection at life and fifty years accords with the period prescribed in the Berne Convention, as modified at Brussels in 1948.⁷⁹ Such a term protects the author's widow and children or other beneficiaries for a reasonable period beyond the author's death. In an age and country where all are conscious of the importance of life insurance, this is not too generous a gesture to authors.

Macaulay's argument that no property rights should survive death in the absence of express statute cannot command much sympathy in our day. Opponents of a longer term of copyright have reiterated Macaulay's argument that a copyright is a monopoly; that monopolies are odious and that therefore "the evil [monopoly] ought not to last a day longer than is necessary for the purpose of securing the good [encouraging professional authors]." This assumes that a copyright confers a monopoly in the sense that a patent does—that is, that the whole world is excluded from the field covered by the copyright even though another author may arrive at the same result independently. This is true in the case of patents but not as to copyrights. Two cases in which opinions were written by the most outstanding judges of the century illustrate this important difference. In the first, *Arnstein v. Edward B. Marks Music Corp.*, Judge Learned Hand observed that "independent reproduction of a copyrighted musical work is not infringement," and that therefore it is "contrary to the very foundation of copyright law" to assert that "copyrights, like patents, are monopoly-

79. The Berne Convention for the Protection of Literary and Artistic Works, signed on September 9, 1886, revised at Brussels on June 26, 1948. See Fisher, *The 1948 Revision of the Berne Convention*, 10 *FED. COM. B.J.* 53 (1949).

lies of the contents of the work.”⁸⁰ In other words, copyrights, unlike patents, do not confer such a monopoly.

Turning now to a patent case, in which there had been a race between four distinguished inventors working independently on the important radio feedback circuit, Lee DeForest was held to have had the good fortune to arrive before the others. In announcing this decision, Justice Cardozo could not help but lament the plight of those who failed, remarking, “The prize of an exclusive patent falls to the one who had the fortune to be first. . . . The others gain nothing for all their toil and talents.”⁸¹

The decision would have been otherwise if the issue had been between four authors rather than between four inventors; as Judge Hand pointed out, if several authors independently create substantially the same play or other literary or musical work, each may secure a copyright without infringing on the other’s rights.

The remaining argument advanced by Macaulay and his successors against extending the term of copyright is that it would benefit publishers rather than writers and their families. This may have been a valid argument in the days when authors sold all their rights to publishers outright for a lump sum. But that is rarely done today. In any event, the writer’s family may be protected, if that is desirable. It could be provided that no assignment by an author should be valid for more than a given period unless the basis of payment is a royalty commensurate with the prevailing scale or a statutory scale. It might also be provided that no rights should continue beyond the present fifty-six year period unless the author has a widow or children or other prescribed next of kin surviving, or has bequeathed the rights to a charitable, religious or educational institution.

ADVANTAGES OF COMPUTING TERM ON BASIS OF LIFE OF AUTHOR PLUS PERIOD OF YEARS

The copyright laws have contributed greatly to the development of the literary profession. The resulting financial independence of the writing fraternity has helped to supply innocent pursuits for the leisure hours made available in our machine age. In fact, the product of the present-day author, as we may see nightly on television programs, helps to sell automobiles, refrigerators, washing machines, cigarettes, soap, perfumes, beer, etc.

80. 82 F.2d 275 (2d Cir. 1936).

81. *Radio Corporation of America v. Radio Engineering Laboratories, Inc.*, 293 U.S. 1, 3 (1934).

There was a time when extension of the term of copyright was considered a tax on the public, who were the purchasers of books—the main outlet for authorship. Today's consumer is largely the motion picture producer (who is both creator and user of the output of authorship), manufacturers of goods advertised on radio and television, the theatre-goer who pays \$8.80 for a seat at a Broadway musical and finally, of course, the relatively diminishing number of readers. Without authors, there would likely be no radio and television programs and no great industries manufacturing the remarkable apparatus for such mass communication.

Authors receive only a small fraction of the amount spent for entertainment in our time. The annual royalties paid to all authors probably do not equal the yearly payments for broadcast advertising by a single large advertiser.⁸²

Lord Macaulay's argument that a long term of copyright—indeed any term after death—was no inducement to authorship is not valid today. We can only speculate upon the extent to which Macaulay may have been influenced by the fact that "he had no wife, nor child, nor even a dog." The question, however, is not whether a given term of copyright will serve as an inducement to the creation of new works, but rather, whether fairness to authors does not demand that their rights be vouchsafed for as long a period as is consonant with the mores of modern society. Today, authors do not turn over all their rights to the booksellers for a lump sum. Their concern for their own future and that of their families is just as great as that of the industrial executive who carefully provides for a substantial pension in the winter of life and sufficient life insurance to take care of his loved ones after his death.

The typical agreement between composers of music and their publishers provides that all rights "shall revert to the writer upon expiration of the original term of the United States copyright or at the end of twenty-eight years from the date of publication in the United States, whichever period shall be shorter." Grants of dramatic rights to stage managers or producers are usually for even a shorter period. In fact, they are not grants, but mere "leases." The author reserves all rights not expressly leased to the manager. This method of dealing with theatrical properties would have shocked the managers of Macaulay's era, for the copyright law did not give any protection whatsoever to dramatic rights (*i.e.*, the right of stage presentation) until Bulwer Lytton's Act of 1833.⁸³

82. Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 LAW & CONTEMP. PROB. 275, 281 (1954).

83. 3 & 4 WILL. 4, c. 15. See DRONE, COPYRIGHT 11-12 (8th ed. 1948).

If it is fair that an author should be able to leave to his loved ones the right to receive income from the works created by him, then the author should be given as long a term of copyright as experience has shown practical.⁸⁴ Our sister democracies have found a term of life and fifty years to be a reasonable period. Great Britain was apparently not so convinced in 1911, when the present law was enacted; Parliament then provided for a compulsory license during the last twenty-five years of the copyright term. But no one has found it necessary to demand such a license, and Parliament is about to do away with it. In recommending this step, the Copyright Committee of the Board of Trade in its *Report to Parliament* in October, 1952, found (p. 9):

"We have received evidence, which we see no reason to challenge, that as a matter of general practice publishers do not wait for 25 years from the date of publication, let alone for 25 years after the death of the author, before they issue a cheap edition of works in popular demand. We are aware of instances to the contrary but, in general, we believe that this is the case. The publication of works in such series as 'Everyman's Library,' the 'World's Classics' or the 'Penguin Library,' all indicate that where it is not the practice of the original publisher himself to reach a new public by the issue of cheap editions under his own name, it is the generally accepted practice of the trade to authorise the issue of cheaper editions to the public, long before the period of unqualified protection prescribed in the Act has expired. So far as concerns the provisions of Section 4 of the Copyright Act, we understand that no applications have ever been made to the Judicial Committee of the Privy Council for their authority to issue works of deceased authors."

In addition to these considerations, we may briefly note the following advantages of a term measured by the author's life plus a period of years:

1. It avoids the necessity of distinguishing between "published" and "unpublished" works.
2. A copyright notice is unnecessary. Therefore forfeitures will be avoided

84. Judge Yankwich, after quoting Mr. Justice Willes' admonition that "he who engages in a laborious work (such, for instance, as Johnson's Dictionary) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family." (. . . *Millar v. Taylor*, 1769, 4 Burr. 2303, 2335, 98 Engl. Rep. (Reprint) 201, 218)," observes: "In adapting the rules of literary property to the present era of swift communication and constant changes in public taste, it is well to remember the admonition from an older practitioner of the art of judicature." Yankwich, *Originality in the Law of Intellectual Property*, 11 F.R.D. 457, 486 n.64 (1951).

- (a) In case of improper notice of copyright, or
- (b) In case of failure to file a timely application for renewal.

3. It protects the living author and his dependents against a form of unfair competition to which they are now exposed in cases where some of an author's works have fallen into the public domain but others are still protected. In such cases, users are inclined to resort to the author's royalty-free works, thus discriminating against and discouraging the use of those that are still entitled to copyright protection.

4. It would eliminate one of the greatest fields of controversy, the question of who is entitled to the renewal term of copyright for the second twenty-eight year period.⁸⁵

5. It would promote international understanding by bringing our views in line with leading democracies.

This last item—promoting international understanding—must not be minimized. The storm of protest that arises whenever a great foreign work is appropriated in America (before copyright expires at home) is well illustrated in an article in a recent issue of *Revue Internationale Du Droit D'Auteur* (July 1955), entitled "Twilight of the Classics" by Olav Lid, Secretary-General of Norwegian Radio-diffusion. Pointing out that Edvard Grieg died in 1908, and that his works will fall into the public domain in 1958, Mr. Lid recommended a further extension of copyright for a period equal to the war years, as has already been done in France and Italy. In insisting that, as regards the works of foreign nationals, this should be conditioned on reciprocity, he pointed an accusing finger at the United States, saying:

"Most of us can still remember the reaction provoked by the Americans' lack of piety for Grieg's music in *Song of Norway*. Grieg's works being still protected in all the countries having adhered to the Berne Convention, we have been able, in Norway, to avoid being faced with such an act of vandalism towards the music of the Master. But it will be hardly possible after 1st

85. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F.2d 569 (2d Cir.), *modified*, 223 F.2d 252 (2d Cir. 1955); *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F.2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951); *Rossiter v. Vogel*, 148 F.2d 292 (2d Cir. 1945); *Edward B. Marks Corp. v. Jerry Vogel Music Co.*, 140 F.2d 270 (2d Cir. 1944); *Edward B. Marks Corp. v. Jerry Vogel Music Co.*, 140 F.2d 268 (2d Cir. 1944); *Edward B. Marks Corp. v. Jerry Vogel Music Co.*, 140 F.2d 266 (2d Cir. 1944); *Shapiro, Bernstein & Co. v. Bryan*, 123 F.2d 697 (2d Cir. 1941); *Tobani v. Carl Fischer, Inc.*, 98 F.2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); *Harris v. Coca-Cola Co.*, 73 F.2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935); *White-Smith Music Publishing Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); cases cited in note 23 *supra*.

January 1958 to hinder the commercial prostitution of this music, a prostitution which has given magnificent financial results in America."⁸⁶

Considering the present international situation and the necessity of strengthening the leadership which we are now taking in world culture, a reappraisal of the period of protection of authors' rights in the light of developments abroad would be most timely. This would be particularly significant as a sequel to our approval of the Universal Copyright Convention.⁸⁷

OTHER SUGGESTED REVISIONS OF THE ACT OF 1909

Formalities—Avoidance of Forfeitures

With the development of new means of mass communication, the reasons for the requirement of a copyright notice are no longer valid. Consider, *e.g.*, the following:

- (a) It is not required on phonograph records, tape recordings, etc.
- (b) It is not visible in television.
- (c) Notice does not aid the user if the work is not registered—and registration is not required. The work may be registered under another title, or as part of a larger work. In these cases a notice is useless.

The role of formalities in international copyright has already been considered.⁸⁸ Now let us examine its domestic implications. As Judge Learned Hand reminds us in *National Comics Publications v. Fawcett Publications*,⁸⁹ a forfeiture results whenever a work falls into the public domain because of failure to comply with statutory formalities. As he points out, we may conceal the harshness of the results

86. Lid, *Twilight of the Classics*, 8 REVUE INTERNATIONALE DU DROIT D'AUTEUR 86 (1955).

87. Act of Aug. 31, 1954, c. 116, 68 STAT. 1030. See Cary, *The Universal Copyright Convention and the United States Public Law 743*, 8 UNESCO COPYRIGHT BULL. 5 (1955). The Universal Copyright Convention became effective September 16, 1955, three months after the deposit of ratification by Monaco, which was the twelfth country to adhere to the Convention. See Universal Copyright Convention, Sept. 6, 1952, art. IX. Countries which had previously ratified the Convention were Andorra, Cambodia, Chile, Costa Rica, German Federal Republic, Haiti, Israel, Laos, Pakistan, Spain and the United States. The Holy See, Luxembourg, France, Japan (effective April 28, 1956), and Switzerland (effective March 30, 1956) joined the Convention subsequent to Monaco. See Finkelstein, *The Universal Copyright Convention*, 2 AM. J. COMP. L. 98 (1953); Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43 (1953); Schulman, *International Copyright in the United States*, 19 LAW & CONTEMP. PROB. 141 (1954).

88. See text at pp. 1040-41 *supra*.

89. 191 F.2d 594, 598 (2d Cir. 1951), *opinion clarified*, 198 F.2d 927 (2d Cir. 1952) (where the proprietor of the copyright of the comic strip "Superman" failed to place notice of copyright on certain strips, a forfeiture resulted as to these particular strips but not as to other "Superman" strips). See Reeves, *Superman v.*

by labeling it "dedication" or "abandonment" of rights, but so long as there is no intent to dedicate or abandon, those terms do not appropriately describe the legal consequences of non-compliance with formalities. Assuming that certain formalities may be desirable, it is fair to question whether the penalty of absolute forfeiture of all property rights in the work is a proper or necessary sanction. The only purpose of a copyright notice or registration is to warn a user that the owner of the work has not authorized its reproduction without special permission.

It is submitted that a notice of copyright is not the only means of placing a user on notice; that registration of a claim of copyright would serve an equal, if not a more effective purpose; and that in any event omission of the notice or failure to register should not be a defense to anyone who is not an "innocent" infringer. Consideration should be given to the suggestion that in order to encourage registration of works, those who fail to do so may be denied certain remedies, such as statutory damages—or possibly the recovery of any damages—for infringements commenced prior to registration. This was the scheme proposed in the Vestal Bill which passed the House of Representatives

Captain Marvel; or, Loss of Literary Property in Comic Strips, in ASCAP, COPYRIGHT LAW SYMPOSIUM: NUMBER FIVE 3 (1954). Some of the cases in which the failure to comply with formalities resulted in forfeiture are: *DeJonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914) (copyright lost where notice of copyright was placed on only one square of a painting reproduced in eleven other squares as wrapping paper); *Mifflin v. Dutton*, 190 U.S. 265 (1903) (authorized appearance of Harriet Beecher Stowe's *Minister's Wooing* in a magazine without notice of copyright vitiated the copyright previously taken out by the author); *Holmes v. Hurst*, 174 U.S. 82 (1899) (serial publication of Dr. Holmes' book *The Autocrat of the Breakfast Table* in a magazine without copyright notice vitiated a copyright of the whole book obtained subsequently but prior to the publication of the book as an entirety); *Krafft v. Cohen*, 117 F.2d 579 (3d Cir. 1941) (first copies of a pamphlet which were printed with copyright notice only on the back cover and which lacked the name of the proprietor constituted an abandonment of copyright); *Smith v. Wilkinson*, 97 F.2d 506 (1st Cir. 1938) (microscopic notice which was indistinguishable from scroll on a series of prints resulted in improper notice); *Horsman & Aetna Doll Co. v. Kaufman*, 286 Fed. 372 (2d Cir. 1922), *cert. denied*, 261 U.S. 615 (1923) (notice fatally defective when plaintiff had given notice as prescribed by the statute for a work of art, i.e., "c" in a circle accompanied by initials of copyright owner, but had neglected to place his name on the back, base margin or pedestal of the work); *Herbert v. Shanley*, 229 Fed. 340 (2d Cir. 1916), *affirming* 222 Fed. 344 (S.D.N.Y. 1915), *rev'd on other grounds*, 242 U.S. 591 (1917) (publication of one of the serial songs of a copyrighted dramatico-musical work without copyright notice of the entire work resulted in forfeiture of that portion of the work); *Metro Associated Services v. Webster City Graphic*, 117 F. Supp. 224 (N.D. Iowa 1953) (copyright forfeited when plaintiff advertising service distributed its mats with a small "c" in a circle surrounded by a capital "M" without the name of plaintiff as copyright proprietor, and permitted its subscribers to publish the mats without designating the plaintiff as copyright proprietor); *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573 (S.D.N.Y. 1949) (substitution of the assignee's name in the copyright notice prior to recordation of the assignment resulted in an abandonment of plaintiff's copyright in the book *The Romance of Money*); *Wildman v. New York Times Co.*, 42 F. Supp. 412 (S.D.N.Y. 1941) (failure to include the year of copyright in the notice of copyright on the printed verse "Remember This" resulted in a forfeiture); *United Thrift Plan, Inc. v. National Thrift Plan, Inc.*, 34 F.2d 300 (E.D.N.Y. 1929) (notice placed on the bottom of the last page of pamphlet was misplaced and a forfeiture, and was not saved by § 20 as an accident or mistake). For cases in which forfeitures resulted from a licensee's attempts to copyright a work in his own name, see note 17 *supra*.

in 1931.⁹⁰ In reporting this bill to the Senate on February 23, 1931, Senator Hebert of Louisiana, Chairman of the Committee on Patents, wrote:⁹¹

"While under the provisions of the bill, authors are entitled to automatic copyright upon their works immediately they are created, there is a provision for the registration of copyright and the recording of assignments, licenses, etc. The ownership of a copyright is not made dependent upon its registration, or upon any other formality, but the bill provides that in case of failure to record a copyright, or to give notice thereof, such omission will excuse innocent infringers from the payment of any damages. In such cases the owner of the copyright is limited to a right of injunction. It is believed that the provisions of this section afford a distinct advantage to the owners of copyright. Under the act of 1909 a simple mistake in a copyright notice made by a printer's devil in a publishing house might invalidate the entire right of the author or of the publisher therein. Thus he might lose all his rights through no fault of his own. The pending bill protects the copyright under all circumstances by its automatic provision so that no one may be deprived thereof unless he wills to do so. His failure to register his claim to copyright, or to give notice of it upon the publication of it will not affect his claim, though it will under the provisions of the bill affect his right to recover damages in case of infringement. In these respects the simple requirements for recordation and notice are not unlike the laws in force in all the States in relation to land titles."

This principle was adhered to in the Thomas Bill.⁹²

Rights in Musical Compositions

The Right of Public Performance

Before 1833, all copyrighted works could be performed in Great Britain without permission of the copyright owner. This was remedied that year as to dramatic works,⁹³ although then, as now, legislation was slow in catching up with the spirit of the times. It was in 1822 that Lord Eldon had held that there was no remedy against an unauthor-

90. H.R. 12549, 71st Cong., 2d Sess. (1931). This would seem to resolve the dilemma posed by a noted authority who observed that "perhaps it is possible to attain both automatic copyright and recordation of ownership, but the task challenges the resourcefulness of statutory draftsmen." Chafee, *Reflections on Copyright Law*, 45 COLUM. L. REV. 503, 515 (1945).

91. S. REP. NO. 1732, 71st Cong., 3d Sess. (1931), reprinted in 34 REGISTER OF COPYRIGHTS ANN. REP. 77, 95 (1931).

92. S. 3043, 76th Cong., 3d Sess. (1940), prepared as a result of a long series of conferences under the chairmanship of Prof. James T. Shotwell.

93. Act Relating to Dramatic Literary Property, 3 & 4 WILL. 4, c. 15 (1833); extended to include musical entertainment in 1842, 5 & 6 VICT. c. 45.

ized performance of Lord Byron's copyrighted *Marino Faliero* given at the Drury Lane Theatre.⁹⁴ After eleven years of agitation for statutory relief, Parliament finally recognized that a dramatist would have little encouragement if he were denied performing rights.⁹⁵

Eleven years may seem a long time to wait for a legislative body to cure an existing evil, but the waiting period in the United States was much longer.⁹⁶ We seem to move with greater speed than any other nation in making industrial strides, but our energies seem to fail us when seeking to catch up with the rest of the world in safeguarding the rights of authors.

Though Great Britain has been ahead of us in its respect for authorship, France advanced more rapidly both in developing its literature and music, and in taking measures for the effective protection of its authors. As early as 1653, thanks to the efforts of the playwright Tristan, French dramatic authors had succeeded in making a voluntary arrangement with theatrical players whereby the authors received a royalty of one-ninth of the receipts of a play during its first run, after which it became the players' property absolutely.⁹⁷ This arrangement was later embodied in a government decree of 1697⁹⁸ and re-enacted with certain modifications in 1757.⁹⁹ Under the latter statute, if the receipts fell below 1200 livres on two successive evenings in winter or 800 livres in summer, the play could be closed without the author's consent, and its run deemed terminated, so that the performing rights in the play then became the absolute property of the players. Lemaitre thus describes the means used to cheat the author:¹⁰⁰

"The actors used all sorts of tricks to cheat the playwrights of even their slight legal share. Thus, when a play seemed likely to be successful, the actors would present it twice in succession when they knew that some important function was taking place at court. The courtiers, who always bought the most expensive seats, naturally stayed away from the theatres on those days. The receipts would be low, the play would fall 'within the rules,' and the actors would present it again and again without having to pay the author a single sou. Furthermore, in calculating the receipts, the actors regularly left out important items—for instance, the price of loges rented by the year—so the unfortunate authors were

94. *Murray v. Elliston*, 5 Barn. & Ald. 657, 106 Eng. Rep. 1331 (K.B. 1822).

95. See PHILLIPS, *LAW OF COPYRIGHT* 182 (1863).

96. Performing rights in dramatic works were first recognized in the United States by the Act of Aug. 18, 1856, c. 169, 11 STAT. 138, but the right was not extended to musical compositions until the Act of Jan. 6, 1897, c. 4, 29 STAT. 481.

97. 1 HAWKINS, *ANNALS OF THE FRENCH STAGE* 186-87 (1884).

98. 2 *id.* at 339-40.

99. LEMAITRE, *BEAUMARCHAIS* 254 (1949).

100. *Id.* at 254-55.

lucky if they received one-twentieth of the money the actors pocketed. Finally, to avoid unpleasant discussions, the actors never offered a playwright a detailed statement of account, but gave him a lump sum that they said was his share. If he was so ill-advised as to protest, some actress particularly well-acquainted with Richelieu or Duras would see to it that the man was promptly put into his place."

The players made the mistake of practicing these artifices on Beaumarchais in 1776 and 1777, while he was busy sending supplies overseas to aid the American Revolution and, at the same time, composing *The Marriage of Figaro*. Beaumarchais was never too pre-occupied to fight every inch of the way against any kind of injustice. He ultimately succeeded in doing two things: (1) securing a new decree of the Conseil d'Etat in 1780 giving playwrights a larger royalty, *i.e.*, one-seventh of the receipts, including rental of loges and all money paid by the spectators (but the minimum figure of daily receipts below which the play became the property of the players was raised from 1200 to 2300 livres in winter, and from 800 to 1800 livres in summer); and (2) organizing the French *Societe des Auteurs Dramatique*, which to this day protects French dramatic authors against abuses of managers.¹⁰¹

Governmental regulation of the playwrights' share was abandoned during the French Revolution; a 1791 law prohibited public performances of authors' works during their lives and for a period of five years after death in the absence of written consent of the author or his heirs. It further provided that in case of infringement the infringer's box office receipts would be confiscated in favor of the author.¹⁰² The term of protection was enlarged in 1793 to a period of *ten* years after death. The French copyright law has not required revision as new scientific developments brought new means of reproducing copyrighted works, since a distinction has never been drawn in France between such forms of reproduction as copying, performing or recording mechanically or electrically.¹⁰³

In the United States no right of performance was accorded until the Act of 1856, which applied only to dramatic works.¹⁰⁴ As pointed out above, such rights were first accorded to copyrighted *musical* compositions in 1897.¹⁰⁵

101. *Id.* at 255-59.

102. Acts of Jan. 13-19, 1791 and July 19-Aug. 7, 1791, translation in WEIL, *op. cit. supra* note 34, at 783-84 (1917).

103. LOWNDES, AN HISTORICAL SKETCH OF LAW OF THE COPYRIGHT 117 (2d ed. 1842).

104. Act of Aug. 18, 1856, c. 169, 11 STAT. 138.

105. Act of Jan. 6, 1897, c. 4, 29 STAT. 481.

When the 1909 Act introduced the "for profit" limitation as applied to public performances of musical compositions, it put those compositions in a class inferior to "dramatico-musical" works. Thus symphonic works which are often performed publicly, but not for profit, yield little return to the composers. There is no reason for this discrimination. It is unique in our law, and should be corrected.

Exemption of Coin-Operated Machines

Another discriminatory and anachronistic feature of the Copyright Act is the exemption accorded coin-operated machines in section 1(e).¹⁰⁶ Under this exemption, which first appeared in the 1909 Act, the performance of a musical composition by means of a coin-operated machine, in a place where admission is not charged, is not deemed a public performance for profit.

The present-day juke box was unknown when the so-called coin-operated machine exemption was written into the 1909 Act. Nevertheless, today the juke box industry, whose income is directly attributable to public performances of copyright musical works for profit, pays nothing to the copyright owners of such musical works for these performances. Of all commercial users of copyrighted music, only the juke box industry is permitted, through this outmoded provision of the copyright law, to exploit the creative efforts of composers and authors without payment. Elimination of this inconsistency in our law has been widely recommended during the past few years by various bar associations, the Copyright Office, the Department of State and many other groups.¹⁰⁷ Recent legislative proposals to repeal the coin-operated machine exemption failed of enactment.¹⁰⁸

106. 17 U.S.C. §1(e) (1952).

107. The Register of Copyrights, the American Bar Association, the American Patent Law Association, the Federal Bar Associations of New York, New Jersey and Connecticut, the Chicago Bar Association, the American Book Publishers Council, the National Music Council, the National Federation of Music Clubs and others have endorsed the repeal of the coin-operated machine exemption. See, e.g., *Hearings Before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 5473*, 82d Cong., 1st Sess., ser. 11, pt. 1, at 56-61, 80-81, 94-95 (1951); *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary on H.R. 5473*, 82d Cong., 2d Sess., ser. 11, pt. 2, at 117, 367-79 (1952); *Hearings Before a Subcommittee of the Senate Committee on the Judiciary on S. 1106*, 83d Cong., 1st Sess. 16, 17-20, 28-36, 49, 174-77 (1953).

108. S. 590, 84th Cong., 1st Sess., introduced January 21, 1955 by Senators Kilgore, Kefauver, Morse, Langer, Barrett, Humphrey, O'Mahoney, Johnston of South Carolina, Payne and Neely; H.R. 4316, 84th Cong., 1st Sess., introduced February 23, 1955 by Congressman Thompson of New Jersey; H.R. 6654, 84th Cong., 1st Sess., introduced on June 6, 1955 by Congressman Murray of Illinois; H.R. 6855, 84th Cong., 1st Sess., introduced on June 15, 1955 by Congressman Philbin of Massachusetts; H.R. 6890, 84th Cong., 1st Sess., introduced on June 16, 1955 by Congressman Delaney of New York.

Compulsory Recording License

Prior to 1909, a copyright did not protect the owner from unauthorized recordings of his work on phonograph records or music rolls.¹⁰⁹ It appeared in the 1906-09 hearings that if an exclusive right to record musical works was to be given, the Aeolian Company, a manufacturer of music rolls, would have a monopoly because it had bought up rights in so many compositions. Under the circumstances, Congressman Charles G. Washburn of Massachusetts introduced a compromise measure which has been the subject of controversy ever since. It provides, "[W]henever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on each such part manufactured, to be paid by the manufacturer thereof. . . ." ¹¹⁰

In recommending that this clause be eliminated, the late Register of Copyrights, Thorvald Solberg, quoted the following letter written by Mr. Washburn on April 2, 1926:

"That royalty clause was a 'makeshift' made necessary to get the bill through. Without it, there would have been no copyright legislation in 1909. The author should have 'complete control' of his rights. The constitutional right expressed in the provision that Congress may secure for limited times to authors and inventors the exclusive right to their respective writings and discoveries should, if exercised, not be abridged by legislation—that I believe to be a sound principle." ¹¹¹

Other subjects to which attention has been directed in connection with the prospective general revision of the copyright law are indivisibility of copyright ¹¹² and common law rights in unpublished works.¹¹³

Divisibility

Under our copyright law, an author may transfer the legal title to his copyright only in totality; the copyright may not be split up and partially assigned as to the various rights encompassed therein.¹¹⁴

109. *White-Smith Music Co. v. Apollo Co.*, 209 U.S. 1 (1908).

110. 17 U.S.C. § 1(e) (1952).

111. *Hearings Before the House Committee on Patents on H.R. 10434*, 69th Cong., 1st Sess. 240 (1926).

112. Henn, "Magazine Rights"—*A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411-74 (1955).

113. Dubin, *AN EXCLUSIVE FEDERAL SYSTEM FOR ALL WORKS* (mimeo. 1955).

114. See *M. Witmark & Sons v. Pastime Co.*, 298 Fed. 470, 474-75 (E.D.S.C.), *aff'd*, 2 F.2d 1020 (4th Cir. 1924).

In an action for infringement brought by a licensee of such rights, the copyright proprietor is an indispensable party,¹¹⁵ and, if unwilling to join as a plaintiff, may be made a party defendant.¹¹⁶

These by-products of the so-called "indivisible copyright theory" have proved burdensome.¹¹⁷ Provisions for divisibility of copyright have been included in the Thomas bill¹¹⁸ and other earlier legislative efforts to revise the copyright law.¹¹⁹ Whether divisible copyright will become part of our law may, in large part, hinge on the question of elimination of formalities from our copyright system. Acceptance of the doctrine of automatic statutory copyright on creation would remove the need for retaining the theory of indivisible copyrights.¹²⁰

Should Federal Law Supersede Common Law Rights in Unpublished Works?

It has also been suggested that, in revising the copyright law, consideration be given to the proposal that common-law rights in unpublished works should be superseded by federal law.¹²¹ It is urged, on behalf of this proposal, that an exclusive federal system covering all literary and artistic property, whether published or unpublished, will promote uniformity and certainty in the law by taking the protection of unpublished works out of the hands of the several states and investing federal law with sole jurisdiction.¹²²

CONCLUSION

Revisions of our copyright laws have occurred periodically since the first act of May 31, 1790, each subsequent revision having occurred within a forty-year period, namely, in 1831, 1870, and 1909.¹²³ Almost a half century has elapsed since the last revision. In the interim there has been a complete revolution in the arts of mass communication.

115. *Buck v. Elm Lodge, Inc.*, 83 F.2d 201 (2d Cir. 1936); *Alexander v. Irving Trust Co.*, 132 F. Supp. 364 (S.D.N.Y. 1955); *Field v. True Comics, Inc.*, 89 F. Supp. 611 (S.D.N.Y. 1950); *New Fiction Publishing Co. v. Star Co.*, 220 Fed. 994 (S.D.N.Y. 1915).

116. *Hoffman v. Santly-Joy, Inc.*, 51 F. Supp. 778, 779 (S.D.N.Y. 1943).

117. Solberg, *The Present Copyright Situation*, 40 YALE L.J. 184, 190 (1930).

118. S. 3043, 76th Cong., 3d Sess. (1940).

119. *E.g.*, H.R. 9137, 68th Cong., 1st Sess. §§ 45, 46 (1924); H.R. 11258, 68th Cong., 2d Sess. (1925); S. 4355, 68th Cong., 2d Sess. (1925).

120. Henn, *DIVISIBILITY OF COPYRIGHT* 6 (mimeo. 1955).

121. Dubin, *op. cit. supra* note 113.

122. *Id.* at 10-11.

123. The revisions after 1790 were: Act of February 3, 1831, c. 16, 4 STAT. 436; Act of July 8, 1870, c. 230, 16 STAT. 198; Copyright Act of 1909, 35 STAT. 1075. For the many attempts to revise our copyright laws after 1909, see GOLDMAN, *HISTORY OF U.S.A. COPYRIGHT LAW REVISION—1901-1954* (1955).

Yet our copyright laws have remained relatively static with the exception of the recognition of motion pictures in 1912¹²⁴—before the days of sound films—and the belated grant of recording and performing rights to poets and other authors of non-dramatic literary works in 1952.¹²⁵ We have made progress in our international relations by adherence to the Buenos Aires Convention in 1914¹²⁶ and the Universal Copyright Convention in 1954.¹²⁷

In a day when many musical compositions are recorded on phonograph records or on tape before they are published, authors run the risk of losing all rights.¹²⁸

There is also danger that, with the adoption of the Universal Copyright Convention, foreign courts may limit the period of protection which American works enjoy abroad to that which they enjoy at home.¹²⁹ Heretofore, although the United States has accorded copyright protection for a period of twenty-eight years with an additional twenty-eight year period in the event of proper renewal, practically every other country where our works have had a substantial market has accorded protection to those works for a period equal to the life of the author plus fifty years. We cannot expect such generous treatment in the future unless we are prepared to grant similar treatment to foreign nationals in the United States.

Before the Second World War, the Carnegie Foundation made an exhaustive study of the subject under the leadership of Professor Shotwell,¹³⁰ but the advent of the war and the necessity of strengthening our international copyright relations through a Universal Convention before turning our attention to domestic issues have postponed a critical examination of the existing law. Congress has now made an appropriation for a study by the Copyright Office under the leadership of Arthur Fisher, Register of Copyrights.¹³¹ It is understood that

124. Act of Aug. 24, 1912, c. 356, 37 STAT. 488.

125. Act of July 17, 1952, c. 923, 66 STAT. 752, effective January 1, 1953 as 17 U.S.C. § 1(c) (1952).

126. Convention on the Protection of Literary and Artistic Property, Buenos Aires, signed August 11, 1910, ratified by the United States March 12, 1911, and proclaimed July 13, 1914.

127. See note 53 *supra*.

128. See note 19 *supra*.

129. The Universal Copyright Convention provides that no contracting state shall be obliged to grant protection to a work for a period longer than that fixed for the particular class of works by the country of origin. Universal Copyright Convention, Sept. 6, 1952, art. IV(4).

130. The Thomas Bill, S. 3043, 76th Cong., 3d Sess., which was introduced on January 8, 1940, incorporated the results of Professor Shotwell's study.

131. Act of Aug. 5, 1955, c. 568, 69 STAT. 499. See *Hearings Before the Subcommittee of the House Committee on Appropriations on H.R. 7117*, 84th Cong., 1st Sess. 115-19, 122 (1955); *Hearings Before a Subcommittee of the Senate Committee on Appropriations on H.R. 7117*, 84th Cong., 1st Sess. 36 (1955).

the same pattern of consultation with experts in the various fields of intellectual property which resulted in the formulation and approval by Congress of the Universal Copyright Convention will be followed by the Copyright Office in its study of copyright law revision. In this way all groups may be heard.

In the limited space available, no attempt has been made to cover all of the issues requiring re-examination. We have presented some of the highlights in the hope of stimulating discussion.

Perhaps no one in our time was more devoted to the cause of copyright reform in our country than the late Register of Copyrights, Thorvald Solberg, who summarized the following needed reforms more than a quarter century ago:

“(1) The abrogation of such ‘formalities’ as notice of copyright, deposit of copies and registration of claim of copyright; (2) abolishment of the arbitrary distinction in the treatment of published and unpublished works; (3) the separation of the various rights included in copyright, so that each can be dealt with singly; (4) the substitution of a single, continuous term of copyright protection, based on the life of the author, in place of the present system of first term and a renewal term.”¹³²

These reforms have not yet been achieved. They are long overdue. The intervening years with frequent and often disappointing litigation have shown the wisdom of these suggested changes. The inquiry now in prospect by the Register of Copyrights will receive the hearty endorsement and cooperation of the entire copyright bar.

132. Solberg, *Introduction* to DEWOLF, *AN OUTLINE OF COPYRIGHT LAW* xxii-xxiii (1925).