

IS NOTICE OF COPYRIGHT NECESSARY IN WORKS PUBLISHED ABROAD? — A QUERY AND A QUANDARY

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“The tide rises, the tide falls,
The twilight darkens, the curlew calls . . .”
Longfellow, “The Tide Rises, The Tide Falls.”

I.

A.

Every field of law has its “twilight zones,” those areas where ambiguous statutes, contradictory decisions and dearth of authority make for uncertainty and confusion. American copyright law is singularly possessed of many such “twilight zones.” The writer has undertaken this article in the hope that his comments may illuminate (and perhaps, eliminate) the shaded area concerning the eligibility for copyright protection of works initially published abroad without notice of copyright.

It is not the purpose of this article to question whether notice of copyright, either as a juristic concept, or as a commercial matter, is “right” or “wrong.” Notice of copyright, rightly or not, is with us. The question this article will attempt to answer is: Whether an American copyright may be secured by a work initially published abroad without notice of copyright being affixed thereto in the form and manner established by statute.

Generally speaking, statutory copyright is secured by a publication of the work with the requisite copyright notice attached. “Publication,” as a word of art, is here intended to mean the initial placing on sale or public distribution of the work in question.² A publication without proper copyright notice throws

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1. *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (S.D.N.Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914), *cert. denied*, 235 U.S. 704 (1914):

. . . [P]ublication with notice of copyright is the essence of compliance with the statute, and publication without such notice amounts to a dedication to the public sufficient to defeat all subsequent efforts at copyright protection.

Id. at 302. See also *Baker v. Taylor*, 2 Fed. Cas. 478, No. 782 (C.C.S.D.N.Y. 1848).

2. *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (1914):

What amounts to publication varies, of course, with the nature of the thing published; i.e., the publication of a book is naturally different from the publication of a picture. . . . If there be such a dissemination of the thing under consideration among the public as to justify the

the work into the public domain. The courts euphemistically call this catastrophe a "dedication to the public."³

A newcomer to the wilds of copyright law might well ask, "Why this emphasis on publication with notice of copyright?"⁴ In answering this query, reference must first be made to the fact that, under American law, copyright subsists in unpublished as well as in published works. Unpublished works are perpetually protected under common law principles. Upon publication, all works lose their common law copyright protection. The realm of published works is governed solely by statute. This statute⁵ grants protection for a fixed term of years to those works published in conformity with its provisions.⁶

Were there a merger of common law and statutory copyright in this country, as has been the case in England since 1911,⁷ it

belief that it took place with the intention of rendering the work common property, then publication [has] occurred.

Id. at 303. See also *Patterson v. Century Productions, Inc.*, 93 F.2d 489 (2d Cir. 1937), *cert. denied*, 303 U.S. 655 (1938).

For an extremely valuable discussion of the concept of publication in the United States and Great Britain for the period preceding 1879, see DRONE, *THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS IN GREAT BRITAIN AND THE UNITED STATES 285-292* (1879), (popularly called DRONE ON COPYRIGHT).

3. *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (S.D.N.Y. 1914); *Sieff v. Continental Auto Supply, Inc.*, 39 F. Supp. 683 (D. Minn. 1941).

4. It is to be noted that prior to the passage of the act of March 4, 1909, 35 STAT. 1075 (1909) *et seq.*, [which act, as amended, is currently the law and codified as 17 U.S.C. (Supp. 1952)], copyright was secured by filing the title of the work (or in certain cases, a description) before publication, [REV. STAT. 4956 (1875)], and by delivering or mailing certain copies to the Librarian of Congress within 10 days after the first publication, (*Ibid.*). For suit to be brought on an infringement it was necessary that each copy in each edition bear a notice of copyright, [REV. STAT. 4962 (1875)].

For a detailed analysis of United States statutory requisites for securing of copyright during the period from 1790-1874, see the scholarly treatise by DRONE, *op. cit. supra* note 2, at 262-277, 297.

The basic change of the Act of March 4, 1909 was to make publication with notice a condition precedent. All other formalities became conditions subsequent. See text supported by notes 16-19, *et seq., infra*.

Section 12 of the act of March 4, 1909 (hereinafter referred to as the copyright law) permits copyright to be secured in works, copies of which "are not reproduced for sale," *e.g.*, a musical score, by deposit of title and description. This procedure is commonly called "copyright by registration" as opposed to "copyright by publication." See note 27 *infra* for text of § 12.

5. See note 4 *supra*, paragraph 1.

6. Statutory copyright in the United States may subsist for a maximum period of 56 years. The "original term" is for 28 years. The second or "renewal term" is for an additional 28 years. The renewal period does not automatically vest; it must be made the subject of timely application by persons duly authorized by statute. See § 24 of the copyright law.

7. Copyright Act, 1911, 1 & 2 GEO. 5, c. 46.

might be argued that there was no practical need for publication with notice. Section 2⁸ of the copyright law, however, specifically preserves common law copyright. Of necessity, then, our formalistic copyright law (for so it is) requires that some distinguishing criteria be placed on a work seeking statutory benefits. This distinguishing criteria is the notice of copyright on each published work.

The notice serves a warning. As one court has aptly declared:⁹

The purpose in requiring publication or notice of copyrighting is to prevent innocent persons from suffering the penalty of the statute for reproduction of the copyrighted article.

The statutory basis for the requirement that publication with notice of copyright is a condition precedent to the securing of copyright is found in section 10 of the copyright law of the United States, which declares:¹⁰

PUBLICATION OF WORK WITH NOTICE.— Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and *such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor*, except in the case of books seeking ad interim protection under section 22 of this title. [Italics supplied.]

At first blush, it would appear that copyright may be obtained under American law merely by publishing the work with the

8. 17 U.S.C. § 2 (Supp. 1952):

RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK. Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor.

For an example of the recognition, by one of the states in the Union, of the concept of common law copyright, see CAL. CIV. CODE §§ 980, 983, 985 (1949). See also *Stanley v. Columbia Broadcasting System*, 35 Cal. 2d 653, 221 P.2d 73 (1950).

9. *Stecher Lithographic Co. v. Dunston Lithograph Co.*, 233 Fed. 601, 603 (W.D.N.Y. 1916); *accord*, *Sarony v. Burrow-Giles Lithographic Co.*, 17 Fed. 591, 592 (C.C.S.D.N.Y. 1883), *aff'd*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

Many able copyright counsel argue that the concept of copyright notice as a "warning" is a fiction, that our law, as drafted and applied, has long subordinated the *theoretical principle* underlying notice to the narrow, technical, *mechanical principle* that the purpose behind publication with notice of copyright is (a) to acquire copyright, and (b) to maintain it. These counsel advocate, therefore, that the grievous requirements of copyright notice be done away with.

10. 17 U.S.C. §10 (Supp. 1952).

required notice. Insofar as works published abroad are concerned, however, conflict of authority has arisen because of the ambiguous wording of the above section.

A literal reading of section 10 could sustain the view that a foreign work initially published abroad without copyright notice would not fall into the public domain in the United States, but, on the contrary, might even secure American copyright as a result! This view would tend to favor foreign published works over American published works, since it is clearly the law that domestic, *i. e.*, United States publication of works without proper notice constitutes a dedication to the public.¹¹

To determine whether the above interpretation, which favors foreign published works, is correct, it is incumbent upon us to examine the copyright law as a whole. This will be done in this part of the article. In Part II we will turn from statutory analysis to an examination of the pertinent case law. Part III will contain an examination of our country's international copyright commitments. And Part IV will contain our conclusions.

B.

In examining the copyright law we must attempt to reconcile its various sections and vagaries in order to give the entire statute a reasonable construction.¹² As the United States Supreme Court has clearly stated:¹³

. . . [I]n construing a statute we are not always confined to a literal reading, and may consider its object and purpose, the things with which it is dealing, and the condition of

11. *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301, 302 (S.D.N.Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914), *cert. denied*, 235 U.S. 704 (1914).

In regard to the aspect of favoring foreign published works over American published works, it must be noted that from 1790 to 1891 Congress clearly granted copyright solely to those authors who were citizens of the United States or residents thereof.

It was not until the passage of the act of March 3, 1891, 26 STAT. 1106, that certain classes of non-resident foreigners were given copyright protection in the United States. See text supported by note 22 *infra*.

It would be odd, indeed, to believe that Congress has intended to completely reverse its course and grant foreign works treatment more favorable than that accorded domestic works.

For a discussion of the rights of foreigners to United States copyright protection see DRONE, *op. cit. supra* note 2, at 231, 232. See also REV. STAT. § 4971 (1875).

12. *Hoague-Sprague Corp. v. Frank C. Meyer Co., Inc.*, 27 F.2d 176 (E.D.N.Y. 1928).

13. *American Tobacco Co. v. Werckmeister*, 207 U.S. 284, 293 (1907).

affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact.

We begin our statutory analysis by noting that departmental construction of the copyright law is entitled to respectful consideration.¹⁴ These constructions, or rules, are found in the Regulations of the Copyright Office.¹⁵ For our purposes, these regulations are not at all helpful, being merely declaratory of the general language of the copyright law itself. This is apparent when we note that section 201.1 of the regulations states: "Copyright . . . is *ordinarily* secured by printing and publishing a *copyrightable work* with a notice of claim in the form prescribed by the statute. . . ." [Italics supplied.]

Now then, what does "ordinarily" mean? Does it apply only to domestically published works? And what is a "copyrightable work"? Is a work first published abroad without notice of copyright a "copyrightable work"? But is that not the very question that this article will attempt to answer?

No, unfortunately, these regulations will not be helpful in deciding whether notice of copyright is necessary in works published abroad. As a consequence, we turn to other sources in an attempt to authoritatively answer the query set forth above.

First, let us trace the genesis of section 10. According to the House of Representatives' Committee report on the Copyright Act of 1909,¹⁶ section 10, (then numbered 9) was drafted to eliminate the very formalistic requirement that copyright could be secured only by the proper filing of title and deposit of copies on or before the date of first publication. Inasmuch as many persons failed to comply with these complex preliminaries, their works fell into the public domain. "This requirement caused serious difficulties and unfortunate losses."¹⁷ The Committee, in its report,¹⁸ proposed, ". . . to so change this as to have the copyright effective upon the publication with notice . . . [with] the other formalities [to] become conditions subsequent. . . ." In

14. *Hoague-Sprague Corp. v. Frank C. Meyer Co., Inc.*, 31 F.2d 583 (E.D.N.Y. 1929).

15. These regulations may be found in 37 CODE FED. REGS. c. 2. They are also set forth in HOWELL, *THE COPYRIGHT LAW* 234 *et seq.* (2d ed. 1948).

16. The complete text of this interesting report may be found in HOWELL, *op. cit. supra* note 15, at 214 *et seq.*

17. *Mr. Justice McReynolds in Washingtonian Publishing Co. v. Pearson*, 306 U.S. 30, 37 (1939).

18. HOWELL, *op. cit. supra* note 15, at 223.

making the above recommendation, the Committee expressly excepted persons seeking *ad interim* protection.

An examination of the naked words of section 10 in the light of the Committee's report would seem to indicate that the Committee did not intend to create, by its action, an exception to the requirement that works must be published with proper notice in order to secure copyright protection. The new terminology of section 10 had as its prime purpose the softening of an extremely technical procedural requirement.¹⁹ Further, whatever exception was made was specifically limited to works published abroad in English, seeking *ad interim* protection. Therefore, under the doctrine of legal construction expressed by the maxim, *expressio unius est exclusio alterius*, no other exceptions may properly be inferred from a reading of section 10.

It would appear, too, that the Committee took cognizance of the 1908 United States Supreme Court decision in *United Dictionary Co. v. G. & C. Merriam Co.*,²⁰ which had held that a validly secured American copyright is not lost by publishing the work abroad and selling it there without notice of copyright. It seems safe to conjecture that the Committee in drafting section 9 (now 10) merely codified the substantive rule of the above case. Howell, in his authoritative text, *The Copyright Law*, is in accord.²¹

In the original draft of section 9 [10] of the Act, it was provided that "any person entitled thereto by this Act may secure copyright for his work by publication thereof *in the*

19. Act of May 31, 1790, 1 STAT. 124, did not require notice of copyright. Act of April 29, 1802, 2 STAT. 171, was the first United States act to require notice of copyright to be inserted in the copyrighted work. This requirement was not a condition precedent to the securing of copyright. By the act of July 8, 1870, 16 STAT. 198, the notice of copyright was given a statutory form. Said notice had to be inserted in each copy, or no suit for infringement could be brought; see § 97 of said act. Upon revision of the United States Statutes, § 97 was listed as REV. STAT. § 4962 (1875). The latter section was superseded by § 1 of the act of June 8, 1874, 18 STAT. 79, which provided one might also use the form currently required: "Copyright 18 —, by A.B."

By the terms of § 9 of the act of March 4, 1909, 35 STAT. 1077, 17 U.S.C. § 9 (1946), publication with notice of copyright became a condition precedent to the securing of copyright. Section 9 is now numbered section 10. See 17 U.S.C. § 10 (Supp. 1952). Section 19 prescribes the statutory form of notice, and section 20, the place of notice. See 17 U.S.C. §§ 19, 20 (Supp. 1952).

20. 208 U.S. 260 (1908). See Part II, text supported by notes 40-46 *infra*, where the instant case is discussed in detail.

21. HOWELL, *op. cit. supra* note 15, at 73.

United States with the notice of copyright required by this Act"; but in the final draft the *italicized* words were transferred to the next clause: "and such notice shall be affixed to each copy thereof published or offered for sale *in the United States* by authority of the copyright proprietor." This change makes it clear that a work duly copyrighted in the United States does not lose such copyright merely because there might be an edition published abroad without notice of United States copyright and sold only for use there.

If we turn from an examination of section 10 to that of the copyright law as a whole, we will note that the obvious intent of the law is to make the acquisition of statutory copyright dependent upon publication with proper notice. To illustrate this thesis, the pertinent sections of the copyright law will shortly be examined *seriatim*.

But first, an excursion into legislative history would be most helpful. On March 3, 1905, H. R. bill 6487 was enacted into law. This act amended Section 4952 of the then existing copyright law. The purpose of House bill 6487 is best described by quoting liberally from the report submitted to the Committee of Patents by Mr. F. D. Currier of New Hampshire, who introduced the bill:²²

This bill deals solely with books, and the purpose of the measure is to secure for the authors or owners of the copyrights of books in languages other than English the same measure of protection as is at present accorded to works by American authors or to works by British authors which have been entered for copyright under the American law.

Some legislation of this kind is not only required to make good the intention of the act of March 3, 1891, to secure copyright protection in the United States to foreign authors, but also to insure that international reciprocity in relation to copyright which the enactment of the international copyright law was expected to bring about.

The act of March 3, 1891 (26 Stat. L., 1106), provides that the citizens of any foreign country in whose favor a copyright proclamation has been made can obtain copyright in the United States. . . . The authors of those countries, therefore, may secure the privileges conferred by the copyright laws of the United States upon complying with the following statutory formalities:

1. File for record in the Copyright Office the titles of their books on or before the day of first publication.

22. COPYRIGHT IN CONGRESS 1789-1904 15 (Library of Congress, Solberg ed. 1905).

2. Deposit in the Library of Congress two copies of such books not later than the day of first publication, printed from type set within the limits of the United States, or from plates made therefrom.

3. Print in "the several copies of every edition published" the statutory notice of copyright. . . .
 . . . [F]oreign authors of books in other languages than English have found it practically impossible to comply with the statutory provisions set out above.

Under the conditions provided for in the law a work to secure copyrights must be printed and published in this country not later than the date of its publication in any other country. The editions published in this country must be manufactured from type set within the limits of the United States.

It is obviously difficult for a foreign author to decide in advance whether his book may count upon such a sale in the United States as to warrant the printing of a separate edition here. . . .

On account of this difficulty foreign authors, except English authors, have secured practically no advantage from the international provisions in the present copyright statute. . . .

It must be observed from the above excerpts that among the severe statutory formalities required of all authors, American or foreign, was the printing of the statutory notice of copyright in "the several copies of every edition published." Mr. Currier's original bill²³ did not specifically spell out the requirement of initial publication with notice. The final form of the bill, however, did include this requirement.²⁴ The legislative history con-

23. The pertinent provisions thereof are as follows:

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day of publication in this country, or his executors, administrators, or assigns, shall, within twelve months after the first publication of such book in a foreign country, obtain a copyright for a translation of such book in the English language, which shall be the first copyright in this country for a translation of such book, he and they shall have, during the term of such copyright, the sole liberty of printing, reprinting, publishing, vending, translating, and dramatizing the said book, and, in the case of a dramatic composition, of publicly performing the same, or of causing it to be performed or represented by others: *Provided, That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on the same basis as is given to its citizens by this act.* . . .

Id. at 14, 15.

24. The pertinent provisions thereof are as follows:

Whenever the author or proprietor of a book in a foreign language which shall be published in a foreign country before the day of publi-

cerning this change is set out in the summary²⁵ of said act as follows:

. . . [A]n amendment to the bill was suggested by Senator Bacon to provide for the printing of a notice of the reservation of copyright in all copies of the first foreign edition of the works sought to be protected by the act. Senator O. H. Platt submitted such an amendment as a substitute on February 2, 1905, and the bill, thus materially changed, was taken up, read and agreed to, and passed by the Senate on February 25 following [Italics supplied.]

It is obvious that as late as 1905, but four years before the drafting of section 10 of the current law, it was the intent of Congress to require all work seeking statutory copyright protection, whether domestic or foreign, to be published with proper notice of copyright.

C.

We turn our attention now to the examination of the pertinent sections of the current copyright law. With the opening sentence of section 1, it is made clear that copyright is secured only "upon complying with the provisions of this title."²⁶ If copyright could be secured in foreign works by their mere publi-

cation in this country, or his executors, administrators, or assigns, shall deposit one complete copy of the same, including all maps and other illustrations, in the Library of Congress, Washington, District of Columbia, within thirty days after the first publication of such book in a foreign country, and shall insert in such copy, and in all copies of such book sold or distributed in the United States, on the title page or the page immediately following, a notice of the reservation of copyright in the name of the proprietor, together with the true date of first publication of such book, in the following words: "Published —, nineteen hundred and —. Privilege of copyright in the United States reserved under the Act approved March third, nineteen hundred and five, by —," and shall within twelve months after the first publication of such book in a foreign country, file the title of such book and deposit two copies of it in the original language or, at his option, of a translation of it in the English language, printed from type set within the limits of the United States, or from plates made therefrom, containing a notice of copyright, as provided by the copyright laws now in force, he and they shall have during the term of twenty-eight years from the date of recording the title of the book or of the English translation of it, as provided for above, the sole liberty of printing, reprinting, publishing, vending, translating and dramatizing the said book: *Provided, That this Act shall only apply to a citizen or subject of a foreign State or nation when such foreign State or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens.* [Approved, March 3, 1905.] [Italics supplied.]

Id. at Addenda Section, 1, 2.

25. *Id.* at Addenda Section, 3.

26. 17 U.S.C. § 1 (Supp. 1952).

cation abroad without notice there would be need for very little in the way of procedural compliance. Yet, as will be seen, section after section make the obtaining of statutory copyright dependent upon publication with notice of copyright.

It is clearly recognized that in certain cases, American copyright may be secured only by *registration* alone. This privilege is accorded by section 12²⁷ of the copyright law to certain *works not reproduced for sale*, such as lectures, dramatic, musical or dramatico-musical works. Thus, it follows, that an unpublished foreign dramatic work (although performed abroad) may, by registration alone, acquire American copyright protection.

Nevertheless, "where a work is later reproduced in copies for sale," to quote the language of section 12, we must then look to section 13.²⁸ This section sets up the procedure for deposit of

27. 17 U.S.C. § 12 (Supp. 1952) :

WORKS NOT REPRODUCED FOR SALE. Copyright may also be had of the works of an author, of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or dramatico-musical composition; of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay; of a photographic print if the work be a photograph; of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay; or of a photograph or identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections 13 and 14 of this title, where the work is later reproduced in copies for sale.

28. 17 U.S.C § 13 (Supp. 1952) :

DEPOSIT OF COPIES AFTER PUBLICATION; ACTION OR PROCEEDING FOR INFRINGEMENT. After copyright has been secured by publication of the work with the notice of copyright as provided in section 10 of this title, there shall be promptly deposited in the copyright office or in the mail addressed to the Register of Copyrights, Washington, District of Columbia, two complete copies of the best edition thereof then published, or if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published in such foreign country, which copies or copy, if the work be a book or periodical, shall have been produced in accordance with the manufacturing provisions specified in section 16 of this title; or if such work be a contribution to a periodical, for which contribution special registration is requested, one copy of the issue or issues containing such contribution; or if the work is not reproduced in copies for sale there shall be deposited the copy, print, photograph, or other identifying reproduction provided by section 12 of this title, such copies or copy, print, photograph, or other reproduction to be accompanied in each case by a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this title with respect to the deposit of copies and registration of such work shall have been complied with.

copies “. . . after copyright has been secured by publication of the work with the notice of copyright as provided in section 10. . . .”

Although section 13 requires the depositing of two complete copies of the best edition of the work, it makes a specific exception if the work is “. . . by an author who is a citizen or subject of a foreign state or nation . . . ,” and if the work “. . . has been published in a foreign country . . . ,” in which case only one complete copy of the best foreign edition need to be deposited. But in no case does this section waive the requirement that copyright must first be secured by publication with notice.

In order to be able to commence an action or proceeding for copyright infringement, the complainant must “perfect his copyright.” To do this, he must complete two acts. First, he must have obtained statutory copyright by publication of his work with notice of copyright, and, second, he must deposit in the Copyright Office such copies of his work as are required by the terms of section 13. It is difficult to see how a complainant, author of a work initially published abroad without notice, can perfect his copyright in order to bring suit for infringement; not having complied with the publication with notice requirement of the law, he is not in a position to comply with the deposit of copies requirement.

Section 16²⁹ concerns itself with the mechanical or “manufac-

29. 17 U.S.C. § 16 (Supp. 1952):

MECHANICAL WORK TO BE DONE IN UNITED STATES. Of the printed book or periodical specified in section 5, subsection (a) and (b), of this title, except the original text of a book or periodical of foreign origin in a language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: *Provided, however,* That said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section,

turing" task of printing and binding which must be done in the United States if copyright is to vest in an English language work or periodical. Examination of this section again indicates the legislative intent to make publication with notice a condition precedent to the securing of American copyright. Section 16, as amended in 1949,³⁰ states that certain numbers of English language books and periodicals, initially published abroad, may be imported into the United States, free of the mechanical work requirements, if the importation occurs within five years after said first publication, and

. . . if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy [Italics supplied.]

It is to be observed that section 16 expressly exempts foreign language works from its manufacturing requirements, but it does not exempt these foreign works from any other of the copyright law's statutory requirements.

Section 19,³¹ in spelling out the form of copyright notice no-

or to copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title: *Provided further*, That the provisions of this section shall not affect the right of importation under the provisions of section 107 of this title, nor the extension of time within which to comply with conditions and formalities granted by Presidential proclamation, No. 2608, of March 14, 1944.

30. Act of June 3, 1949, 63 STAT. 153.

31. 17 U.S.C. §19 (Supp. 19522):

NOTICE; FORM. The notice of copyright required by section 10 of this title shall consist either of the word "Copyright" or the abbreviation "Copr.," accompanied by the name of the copyright proprietor, and if the work be a printed literary, musical, or dramatic work, the notice shall include also the year in which the copyright was secured by publication. In the case, however, of copies of works specified in subsections (f) to (k), inclusive, of section 5 of this title, the notice may consist of the letter C enclosed within a circle, thus ©, accompanied by the initials, monogram, mark, or symbol of the copyright proprietor: *Provided*, That on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear. But in the case of works in which copyright was subsisting on July 1, 1909, the notice of copyright may be either in one of the forms prescribed herein or may consist of the following words: "Entered according to Act of Congress,

where infers an exception for works initially published abroad. Section 20,³² which concerns the location and manner of applying the notice to various kinds of works, also makes no exception for works initially published abroad. Section 21,³³ which deals with the effect of accidental omission of the copyright notice, (to which further reference will be made)³⁴ also is silent as to works initially published abroad.

Section 22,³⁵ which concerns *ad interim* protection of books or periodicals published abroad in English, is the only section in the law which specifically permits publication abroad without notice. (Section 22, of course, was provided for by the appro-

in the year —, by A. B., in the office of the Librarian of Congress, at Washington"; or, at his option, the word "Copyright", together with the year the copyright was entered and the name of the party by whom it was taken out; thus, "Copyright, 19—, by A. B."

32. 17 U.S.C. § 20 (Supp. 1952):

SAME; PLACE OF APPLICATION OF; ONE NOTICE IN EACH VOLUME OR NUMBER OF NEWSPAPER OR PERIODICAL. The notice of copyright shall be applied, in the case of a book or other printed publication, upon its title page or the page immediately following, or if a periodical either upon the title page or upon the first page of text of each separate number or under the title heading, or if a musical work either upon its title page or the first page of music. One notice of copyright in each volume or in each number of a newspaper or periodical published shall suffice.

33. 17 U.S.C. § 21 (Supp. 1952):

SAME; EFFECT OF ACCIDENTAL OMISSION FROM COPY OR COPIES Where the copyright proprietor has sought to comply with the provisions of this title with respect to notice, the omission by accident or mistake of the prescribed notice from a particular copy or copies shall not invalidate the copyright or prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of the notice; and in a suit for infringement no permanent injunction shall be had unless the copyright proprietor shall reimburse to the innocent infringer his reasonable outlay innocently incurred if the court, in its discretion, shall so direct.

34. See Part II, text supported by and cases cited in notes 68, 69, 70, *infra*.

35. 17 U.S.C. § 22 (Supp. 1952):

AD INTERIM PROTECTION OF BOOK OR PERIODICAL PUBLISHED ABROAD. In the case of a book or periodical first published abroad in the English language, the deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and of the date of publication of the said book or periodical, shall secure to the author or proprietor an *ad interim* copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad. (As amended June 3, 1949, Ch. 171, § 2, 63 STAT. 154).

priate portions of section 10.)³⁶ It must be recognized, however, that much of the *ad interim* exception was whittled away by the 1949 Amendment to section 16, so that though a work may conceivably be published abroad without notice, if copies are to be imported they must bear notice of copyright. In practice, English language works and periodicals published abroad tend to carry the notice of copyright in the initial printing. Astute foreign publishers of foreign language works have long made the initial publication bear the appropriate United States copyright notice.

It is interesting to note that section 23,³⁷ which deals with the extension to a full copyright term of books initially published abroad under the scope of section 22, declares, that when, among other requirements, ". . . the printing of a copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical [published within the United States] for the term provided in this title. . . ."

It would seem then, whatever its other failings in respect to clear draftsmanship, that the copyright law has had securely woven into its fabric an endless thread evidencing the design of its draftsmen to make initial publication with notice a condition precedent to the securing of valid American copyright.³⁸

We have come to the end of Part I. In its course, we have raised the question whether an American copyright may be secured by a work initially published abroad without notice of copyright being affixed thereto in the form and manner established by statute. In attempting to answer it, administrative regulations have been examined, provisions of the copyright

36. For text of section 10 and discussion thereof, see text supported by note 10 *supra*.

37. 17 U.S.C. § 23 (Supp. 1952):

SAME; EXTENSION TO FULL TERM. Whenever within the period of such *ad interim* protection an authorized edition of such books or periodicals shall be published within the United States, in accordance with the manufacturing provisions specified in section 16 of this title, and whenever the provisions of this title as to deposit of copies, registration, filing of affidavits, and the printing of the copyright notice shall have been duly complied with, the copyright shall be extended to endure in such book or periodical for the term provided in this title. [As amended by the act of June 3, 1949 (63 STAT. 153)].

38. As an indicium of the importance in our copyright law of the concept of notice, the reader is referred to 17 U.S.C. §§ 105, 106 (Supp. 1952) which concern respectively: **FRAUDULENT NOTICE OF COPYRIGHT, OR REMOVAL OR ALTERATION OF NOTICE** and **IMPORTATION OF ARTICLE BEARING FALSE NOTICE OR PIRATICAL COPIES OF COPYRIGHTED WORK.**

statute have been analyzed, legislative history has been related. The answer, at this juncture in our inquiry, is this: section 10 must be read as meaning that the right to American copyright will be lost in works published or sold abroad without proper notice being affixed thereto, unless these works have been initially published in the United States or abroad with the requisite notice. The sole exception yet noted to the above conclusion is that concerning the greatly circumscribed *ad interim* provision respecting books or periodicals published abroad in the English language.³⁹ We need not, and ought not, however, base our answer on so circumscribed an examination. Accordingly, in continuing our inquiry, we turn to Part II, and an examination of the pertinent case law.

II.

We begin our examination of the leading cases with a 1908 decision by the United States Supreme Court.⁴⁰ The basic facts and the legal question involved are best stated in the Court's own language:

This is a suit brought by the appellee to restrain the infringement of copyright in a book entitled "Webster's High School Dictionary". . . . It published and sold the book in this country with the statutory notice of copyright, and made a contract with English publishers, under which it furnished them with electrotype plates of the work, and they published it in England, omitting notice of the American copyright. . . . The question is whether the omission of notice of the American copyright from the English publication, with the assent of the appellee, destroyed its rights, or, in other words, whether the requirement of the act of June 18, 1874, c. 301, Sec. 1, 18 Stat. 78 (Rev. Stat. § 4962), . . . that notice shall be inserted "in the several copies of every edition published" extends to publications abroad. . . .

. . . Of course, Congress could attach what conditions it saw fit to its grant, but it is unlikely that it would make requirements of personal action beyond the sphere of its control. Especially is it unlikely that it would require a warning to the public against the infraction of a law beyond the jurisdiction where that law was in force. . . .

. . . The argument for the appellant dwells somewhat fancifully on the possibilities of innocence being led astray. All those possibilities might exist if a pirated volume should be smuggled into the United States. . . .⁴¹

39. See Part III, text supported by notes 86-95 *infra*, where one other exception is indicated and discussed.

40. United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, (1908).

41. *Id.* at 263, 264, 266.

As is evident from the Court's words, it was held that an American copyright is not invalidated by the work's subsequent publication and sale abroad without notice of copyright.

The Court's rationale appears to be predicated upon the premise that the notice provision of the copyright law was intended to have no extraterritorial effect. The Court apparently supported this premise by reasoning that nations cannot effectively enforce their legal pronouncements beyond their own borders. Furthermore, the world was geographically immense. Was it rational to believe that the circulation, in a distant corner of the globe, of an American work without notice of copyright would harm innocent persons? Obviously not, felt the Court.

The writer seriously questions, however, whether the United States Supreme Court would decide the issue in the *United Dictionary* case in 1953 as it did in 1908. The fact that the police powers of a State do not generally, in time of peace, extend beyond its frontiers, does not prevent the State from enacting legislation which is intended to have extraterritorial effect.⁴² Failure to do an act abroad may validly serve as the basis for denying to a person the protection of domestic laws. Such legislation is extraterritorial only in the sense that a person wishing to obtain the benefits of the law must conform to its tenets no matter where he is situated.⁴³ The simplest example is a nation's laws on immigration.

As will be indicated in detail in Part III,⁴⁴ foreigners wishing to obtain copyright protection in the United States for their works, must comply with the formalities of our copyright laws. It seems clear to the writer that one of these formalities is initial publication of the work with valid notice of copyright.

Yet on still another ground can one question the *United Dic-*

42. For an admirable recital of the concept of jurisdiction in international law, see *The S. S. Lotus [France v. Turkey]*, Permanent Court of International Justice (Series A. No. 10, 1927) and reported in 2 HUDSON, WORLD COURT REPORTS 20 (1935). See also DRONE, *op. cit. supra* note 2, at 581.

43. In the case of *The S. S. Lotus*, *supra* note 42, it was further stated:

Now the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial

It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. . . .

44. See text supported by notes 75-84 *infra*.

tionary decision. The world of 1908 may have had many dark and isolated corners. The contemporary world does not. Continents are spanned in hours by passenger planes, in minutes by mass communication media. The sale or publication abroad of an American copyrighted work without copyright notice can lead the innocent astray. Americans are no longer the provincial "stay-at-homes" they were fifty years ago. Today, they are the world's leading travellers. *If the notice of copyright is intended to serve as an effective warning, it must spell out its message both at home and abroad.*

The cases have long established,⁴⁵ that the total omission of copyright notice, or a defective notice, in a work published or sold solely in the United States, will cause such work to fall into the public domain. The holding in the *United Dictionary* decision does not, however, let this same error affect one's American copyright if the error occurs abroad. This holding creates two classes of work: A favored class which may make errors with impunity in regard to notice, provided these errors are made abroad; and an unfavored class made up of domestic publications. An error of notice by this class is generally fatal to its claim of copyright. As the writer interprets the copyright law no such dual treatment is intended by its terms.⁴⁶

So much for the logic of the Court's decision concerning the *loss* of American copyright. Does the decision have anything to say on the *obtaining* of American copyright? Is it to be supposed, for instance, that the United State Supreme Court in the *United Dictionary* case was holding that valid American copyright could be obtained by initial publication abroad without notice of copyright? Obviously, it was not, since this question was not before it.

Reference to the 1909 Congressional Committee's Report on its drafting of section 10⁴⁷ (then numbered section 9) would seem to bear out the writer's conclusion that neither the instant United States Supreme Court decision, nor the Congress, had the intention of creating exceptions favoring foreign works as

45. See text supported by and cases cited in notes 68, 69, 70, *infra*.

46. On the contrary, the writer believes that the intent of the legislature is to view foreign authors and their works with some disfavor. See note 11 *supra*.

47. See text supported by note 16 *supra*. See also HOWELL, *op. cit. supra* note 15, at 223.

against domestic works, insofar as publication with notice was concerned. Unfortunately, however, the *United Dictionary* decision and section 10, as adopted, permit this view to be made with some force.

Therefore, it should not be too surprising that some ten years later one of our better copyright judges seemed to incline to the view that a work initially published abroad without notice would not lose the right to later obtain valid American copyright. In the case of *Italian Book Co. v. Cardilli*,⁴⁸ Judge Hough, District Judge, wrote as follows:

An Italian wrote a song in Italy, and another Italian furnished music therefor; both words and music were published in Naples in 1913, and forthwith copyrighted in accordance with the law of Italy. Each copy of said words and music sold, stated in Italian who was the proprietor, that said proprietor owned the rights for all countries, and that all rights were reserved.

The song was popular, and four years later the Italian proprietor sold to the plaintiff, an American corporation, the privilege of copyrighting and selling the same in the United States, apparently on a royalty basis. Thereupon the plaintiff did copyright words and music; the registration being on December 10, 1917, and the date of original publication stated as September 1, 1913. . . .

The question . . . is this: Did the publication in Italy prevent American copyright four years later? . . .

. . . It seems to me as a matter of first impression that the publication in Italy was, by the terms of the notice printed or stamped on each copy sold, limited to Italy, and did not (in the absence of statutory prohibition) prevent the subsequent American copyright, if (as is the case here) there had been no publication in the United States prior to that of the copyright owner.

Finding no statutory prohibitions, Judge Hough held the musical composition eligible for American copyright.

This was the law for four years. In 1922 the Circuit Court of Appeals for the Second Circuit, in *American Code Co. v. Bensinger*,⁴⁹ was confronted with a problem resulting from the publication and copyrighting in the United States of a book whose contents were largely pirated from a work of similar nature, which had originally been published in England and

48. 273 Fed. 619, 620 (S.D.N.Y. 1918).

49. 282 Fed. 829 (2d Cir. 1922).

copyrighted there in accordance with its law. English law does not require publication with notice, and the pirated work contained none. The court, in holding that the copyright of the American edition was *prima facie* valid⁵⁰ declared:⁵¹

. . . If a British author, upon publication in England, copyrights his book in that country, the copyright protects him in that country; but, unless he has also copyrighted the work in the United States, his English copyright affords him no protection against anyone who brings out in this country a piratical edition of the work. The copyright laws of one country have no extraterritorial operation, unless otherwise provided. . . .⁵²

This decision, though neither citing, nor reversing the *Italian Book* case, is directly *contra*, and, in effect, reversed it. The writer does not feel unduly bold in making this statement for, happily, he has found authority to sustain him. In the very same court in which Judge Hough had sat earlier, Judge Woolsey, District Judge, indicated in the 1939 case of *Basevi v. Edward O'Toole Co.*⁵³ that he considered the *Italian Book* case to have been overruled by the above cited *American Code* decision. To buttress his arguments, Judge Woolsey added that an examination of Shepard's Citations indicated that Judge Hough's decision had never been cited or followed in any reported case.⁵⁴

The *Basevi* case dealt with the eligibility for copyright of art catalogues published abroad without notice of copyright therein. Judge Woolsey held the catalogues were not eligible for United States copyright declaring:⁵⁵

50. 17 U.S.C. § 7 (Supp. 1952) grants copyright protection to ". . . other versions of works in the public domain . . ." as well as to ". . . works republished with new matter. . . ."

The court, in *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922), declared on this point:

. . . If one takes matter which lies in the public domain, or which has been dedicated to the public by publication without securing copyright under the acts of Congress, and adding thereto materials which are the result of his own efforts publishes the whole and takes out a copyright of the book, the copyright is not void because of the inclusion therein of the uncopyrightable matter, but is valid as to the new and original matter which has been incorporated therein. . . .

Id. at 834.

51. *Id.* at 833.

52. For a discussion of the extraterritorial operation of copyright laws, see *Ferris v. Frohman*, 223 U.S. 424, 433-435 (1912). See also notes 42, 43 *supra* and text supported thereby.

53. 26 F. Supp. 41, 46 (S.D.N.Y. 1939).

54. *Ibid.*

55. *Id.* at 45.

In view of the fact that . . . the United States has not joined the [Berne] International Copyright Union, if, for example, a foreign author, . . . plans to take out a United States copyright which will be valid, in a book, or the component parts thereof, he must have maintained intact under our law his common law copyright therein, and then he must take such steps as our Copyright Act requires.

The *Basevi* and *American Code* cases, coming "back to back," so to speak, would seem to have calmed and settled muddled waters, permitting a clear legal pattern to be discerned. But, to quote the inimitable rhythms of Vachel Lindsay:⁵⁶

Somebody's always throwing bricks,
Somebody's always heaving cinders,
Playing ugly yahoo tricks

And, "somebody," a very distinguished somebody, Judge Jerome N. Frank by name, did throw a brick, and the water is all muddied again. Judge Frank did it by holding in the 1946 case of *Heim v. Universal Pictures Co., Inc.*⁵⁷ that the American copyright law did not require:

. . . as a condition of obtaining or maintaining a valid American copyright, that any notice be affixed to any copies whatever published in [a] foreign country, *regardless of whether publication first occurred in that country or here, or whether it occurred before or after registration here*
[Italics supplied.]

Judge Frank carefully drew attention to the fact that it was the belief of certain commentators that ". . . the first copy published abroad must have affixed to it the notice described in section 18 [19].⁵⁸ The decision contained the appropriate remark that ". . . there is no doubt textual difficulty in reconciling all the sections as has been often observed. . . ."⁵⁹ However, it was his opinion that:⁶⁰

. . . the most practicable and, as we think, the correct interpretation, is that publication abroad will be in all cases enough, provided that, under the laws of the country where it takes place, it does not result in putting the work into the public domain

56. The above lines are from his humorous poem, "Factory Windows Are Always Broken."

57. 154 F.2d 480, 486 (2d Cir. 1946).

58. In his footnote to this statement Judge Frank cited LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 698 (1938). *Id.* at 487.

59. *Ibid.*

60. *Ibid.*

Judge Clark, while concurring in the result of the case, did strongly disagree with Judge Frank's reasoning on the issue of notice. Judge Clark pointed out that the gist of the Frank decision is this:⁶¹ "The opinion holds that an American copyright is secured by publication abroad without the notice of copyright admittedly required for publication here. . . ." Judge Clark declared that the rationale of the Frank decision escaped him,⁶² but he believed it to be based on the second portion of section 9 [10], which required that notice of copyright "shall be affixed to each copy . . . published or offered for sale in the United States by authority of the copyright proprietor." "But," Judge Clark

61. *Id.* at 488.

62. *Id.* at 489. The writer believes that Judge Frank's decision may have been motivated, in large measure, by his desire to place American copyright law closer in line with international practices. Perhaps Judge Frank felt the situation called for "judicial legislation."

Ironically, Article III of the International Copyright Convention, signed at Geneva, Switzerland, on September 6, 1952, by representatives of over 40 countries, the United States among them, declares that all works shall be published with an inscription containing a ©, date of publication and name of copyright proprietor.

The world, evidently, has grown tired of waiting for the United States to fall into line, and has decided to accept the most basic of our publication formalities. It would be odd for the United States to discard the notice requirement just when the majority of other nations were ready to accept it.

The pertinent provisions of Article III of the International Copyright Convention declare:

1. Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as deposit, registration, notice, notarial certificates, payment of fees or manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.

2. The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.

3. The provisions of paragraph 1 of this article shall not preclude any Contracting State from providing that a person seeking judicial relief must, in bringing the action, comply with procedural requirements, such as that the complainant must appear through domestic counsel or that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation; provided that failure to comply with such requirements shall not affect the validity of the copyright, nor shall any such requirement be imposed upon a national of another Contracting State if such requirement is not imposed on nationals of the State in which protection is claimed. . . .

hastened to add, "this deals with the preserving of the copyright after the original publication has secured it. . . ." ⁶³ He cited as authority such cases as *Fleischer Studios v. Ralph A. Freundlich, Inc.*,⁶⁴ and *Basevi v. Edward O'Toole Co.*⁶⁵

It is also interesting to note that Judge Clark in his detailed analysis of the cogency of Judge Frank's decision, indicated that section 12 [13], which deals with the deposit of copies after publication, is opposed in letter and spirit to said decision.⁶⁶ Judge Clark declared⁶⁷ that he believed the 1909 version of section 9 [10] stated:

. . . [T]he rule settled by *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260 . . . that notice of copyright must be carried only on copies published or offered for sale here; but it does not suggest an exception operating against American authors, in the process of originally securing the copyright by publication.

Our case law indicates that it is contrary to statutory intent to grant more favorable treatment to works initially published abroad, insofar as notice requirements are concerned, than is accorded domestic works. The cases are legion which hold that a defective notice will destroy one's claim to copyright.⁶⁸ It is equally the law that copyright cannot be secured where there is a total omission of notice.⁶⁹ The only statutory exception to the requirement that notice of copyright must appear on a work each time it is published is found in Section 21.⁷⁰ Section 21 makes no exceptions for foreign works.

Under the *Heim* case theory a valid American copyright can be obtained by publication abroad without notice. Yet the

63. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 489 (2d Cir. 1946).

64. 73 F.2d 276 (2d Cir. 1934).

65. 26 F. Supp. 41 (S.D.N.Y. 1939). See text supported by note 53 *supra*.

66. *Heim v. Universal Pictures Co.*, 154 F.2d 480, 489 (2d Cir. 1946).

67. *Ibid.*

68. Some examples of copyright claims invalidated by defective notice are: *Mifflin v. R. H. White Co.*, 190 U.S. 260 (1903) (notice bore name of one not full proprietor of work); *Deward & Rich v. Bristol Savings & Loan Corp.*, 34 F. Supp. 345 (W.D.Va. 1940), *aff'd*, 120 F.2d 537 (4th Cir. 1941) (illegible notice); *J. A. Richards, Inc., v. New York Post, Inc.*, 23 F. Supp. 619 (S.D.N.Y. 1938) (notice in improper place).

For a most rewarding discussion of recent decisions concerning defective copyright notice, see Derenberg, *Copyright Law*, 1951 ANNUAL SURV. AM. L. 712, 722, 725 (N.Y.U. 1952)

69. *Krafft v. Cohen*, 117 F.2d 579 (3d Cir. 1941); *Goes Lithographing v. Apt Lithographic Co.*, 14 F. Supp. 620 (S.D.N.Y. 1936); *United Thrift Plan, Inc., v. National Thrift Plan, Inc.*, 34 F.2d 300 (E.D.N.Y. 1929).

70. For text of this section, see note 33 *supra*.

The scope of section 21 was ably analyzed recently by Judge Learned

preceding cases and statutory analysis clearly indicate that faulty compliance with the requirements of notice is almost invariably fatal. Was it intended, then, that total non-compliance by foreign works should have no ill effects on their securing of copyright? We think not. We do not believe our statute intended to accord foreign works a more favorable position in respect to notice requirements than it permits domestic works.

In support of the foregoing theses, consider the following: It has been held that publication abroad will cause the loss of common law rights in the published works.⁷¹ If publication abroad will destroy American common law copyright, it should follow that American statutory copyright is similarly lost by initial publication abroad without notice.

It is Hornbook law that the mere act of publication is an abandonment of common law copyright, and that the act of publication without notice destroys the right to secure statutory copyright. This is certainly the law within the confines of the United States. It is logical to presume that what is sauce for the "domestic" goose is sauce for the "foreign" gander.

It must be noted that, if American copyright can be secured only by having the initial publication of the work appear with the notice required by our statute, we are, to all intents, giving an extraterritorial effect to our domestic copyright legislation.⁷² This, however, appears correct in principle since, if one wishes protection under our laws, one should comply with the law's requirements.

Contrarily, it might well be maintained that in the interest of international copyright comity our copyright requirements should fall into line with international custom. Our nation is one of the few that make the securing of copyright dependent upon adherence to specific formalities. Article 4 (2)⁷³ of the

Hand in National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 601 (2d Cir. 1951).

71. *Carte v. Duff* [The Mikado Case], 25 Fed. 183, 184 (S.D.N.Y. 1885).

72. For a discussion of this point, see notes 42, 43 *supra* and text supported thereby. See also *Ferris v. Frohman*, 223 U.S. 424 (1912).

73. Part of article 4(2) of the Berne International Copyright Union provides as follows:

. . . The enjoyment and the exercise of such rights [accorded works by the Convention] are not subject to any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the stipulations of the present Convention, the extent of the protection, as well as the means of redress guaranteed to the author to safeguard

Berne International Copyright Union declares that the enjoyment and exercise of the rights granted by it "are not subject to any formality." But, as Judge Woolsey pointedly remarked in the *Basevi* case, the United States is not a party to the Berne Convention.⁷⁴

Thus, if one is to adopt the reasoning of the *Basevi* case, a work initially published abroad *must* contain the copyright notice required by our statute, or be thrown into the public domain in the United States. That this appears to be so, subject to limited exceptions, may be gathered from an examination of our international copyright commitments. Part III, which follows, discusses this point.

III.

A.

The benefits of the United States copyright law are extended to alien authors or proprietors subject to the provisions of section 9.⁷⁵ If the alien author or proprietor is ". . . domiciled

his rights, are regulated exclusively according to the legislation of the country where the protection is claimed.

74. *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41, 45 (S.D.N.Y. 1939). See quotation supported by note 55 *supra*.

75. 17 U.S.C. § 9 (Supp. 1952):

AUTHORS OR PROPRIETORS, ENTITLED; ALIENS.—The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title: *Provided, however*, That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:

(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright by the terms of which agreement the United States may, at its pleasure, become a party thereto.

The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamation made from time to time, as the purposes of this title may require: *Provided*, [That whenever the President shall find that the authors, copyright owners, or proprietors of works *first produced or published abroad* and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply *with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States*, because of the disruption or suspension of

within the United States at the time of the first publication of his work," he is immediately eligible to ". . . have copyright for such work under the conditions and for the terms specified in this title. . . ." The alien author or proprietor is placed on an equal footing with an American citizen, and, like him, must comply with the various statutory formalities, including publication of the work with proper notice of the copyright.

However, the terms of section 9 also grant copyright protection to certain classes of alien authors or proprietors who are not domiciled in the United States at the time of first publication of their work. These alien authors or proprietors may obtain copyright protection for their creations if they are citizens or subjects of a country whose laws grant substantially equal protection in copyright matters to United States citizens as it accords to its own, or if said country is a party, with the United States, ". . . to an international agreement which provides for reciprocity in the granting of copyright. . . ."76

Notwithstanding the actual existence of reciprocal copyright conditions between a foreign country and the United States,

facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States:] *Provided further*, That no liability shall attach under this title for lawful uses made or acts done prior to the effective date of such proclamation in connection with such works, or in respect to the continuance for one year subsequent to such date of any business undertaking or enterprise lawfully undertaken prior to such date involving expenditure or contractual obligation in connection with the exploitation, production, reproduction, circulation, or performance of any such work.

The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require. [Italics supplied in bracketed portion.]

76. The United States and the Soviet Union do not enjoy reciprocal copyright relations. It is for this reason that even the most modern Soviet works are in the public domain in the United States. However, Soviet authors may be protected against violation of their moral right resulting from mutilation or other improper use of their creations. This is so since the moral right, being a right of personality, exists separate from statutory copyright, and may even exist in works in the public domain.

In the celebrated case of *Shostakovich v. Twentieth Century Fox Film Corp.*, 190 Misc. 67, 80 N.Y.S.2d 575 (Sup. Ct. 1948), *aff'd mem.*, 275 App. Div. 695, 87 N.Y.S.2d 430 (1st Dept. 1949), the attempt by Soviet composers to raise the moral right as the basis for an injunction barring the use of their music and their names in connection with the film, "The Iron Curtain," was rejected. For a discussion of this case, see Katz, *The Doctrine of Moral*

the alien author or proprietor, who is a citizen or subject of that country, does not automatically become eligible to such copyright protection of his works. The existence of reciprocal conditions must be established by proclamation of the President.

Do such Presidential Proclamations expressly or impliedly exempt foreign authors or proprietors from compliance with all or some of our statutory formalities? To answer this query we turn to an examination of one of the most recent of these proclamations, that extending the protection of American copyright laws to citizens of Israel.⁷⁷ The instant proclamation contains a proviso representative of those found in practically every other Presidential Copyright Proclamation:

. . . [T]he enjoyment by any work of the rights and benefits conferred by the said title 17 shall be *conditioned upon compliance with the requirements and formalities* prescribed with respect to such works by the copyright laws of the United States. . . . [Italics supplied.]⁷⁸

Publication with notice of copyright is, obviously, the key formality which must be complied with if statutory copyright is to be secured or enforced. The only exception yet noted to this requirement was that accorded by section 22⁷⁹ to books or periodicals published abroad in English and seeking *ad interim* protection.

We have already observed from an examination of section

Right and American Copyright Law—A Proposal, 24 So. CALIF. L. REV. 375, 413, 414 (1951).

77. Proclamation No. 2885, 15 FED. REG. 2617, 64 STAT. A402 (1950).

78. These presidential proclamations are intended to establish the exchange of copyright privileges between the United States and the foreign country which is made the subject of the proclamation.

As a leading commentator has indicated:

This exchange of privilege was hardly a *quid pro quo*, since the President's proclamation expressly required that "the enjoyment by any work of the rights and benefits conferred by the Act of March 4, 1909, and the acts amendatory thereof, shall be conditioned upon compliance with the requirements and formalities prescribed with respect to such works by the copyright laws of the United States." This of course has reference particularly to the "manufacturing clause" in section 15 [16] of our Act, in the case of a book or periodical. The anomalous result is that if a French Canadian publishes his book in Canada in the French language, with the copyright notice required by our law, he thereby acquires copyright protection for the book in the United States, including the sole right of translation into other languages. But if he does publish a translation thereof into English, then in order to protect such translation in the United States he must print or reprint it in the United States and otherwise conform to the requirements of our law.

HOWELL, *op. cit. supra* note 15, at 167.

79. For text of this section, see note 35 *supra*.

13,⁸⁰ that no action or proceeding for infringement can be commenced until two copies of the best edition of the work are deposited in Washington, “. . . after copyright has been secured by publication of the work with the notice of copyright as provided in Section 10.”⁸¹ We have also seen that section 13 requires but one copy of a work to be deposited if it is by an alien author and has been published abroad.

Judge Frank has waived the statutory formality of publication with notice for works published abroad. A court following in his footsteps must of necessity waive the formality of deposit of copies. What good is a waiving of the notice requirements when a foreign complainant may not sue since he must still deposit his one copy? But he cannot deposit his copy, for he has not secured his copyright by publication with notice. To stop this legalistic merry-go-round, a court wishing to follow Judge Frank would have to waive the deposit of copies formality. Might it properly do so? We think not.

We support our conclusion by noting that section 9,⁸² in addition to granting protection of our copyright laws to certain classes of aliens, also contains a “saving clause.” Having made the citizens or subjects of “proclaimed countries” eligible for American copyright, providing they have complied with our statutory formalities, section 9 generously permits the President, by proclamation, to save the rights of such alien authors or proprietors who:

. . . have been temporarily unable to comply with the *conditions and formalities* prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance. . . . [Italics supplied.]⁸³

The Presidential Proclamation “saves” the rights of these alien authors or proprietors by extending the time for compliance with our formalities.⁸⁴

The President may “forgive” temporary non-compliance with

80. For text of this section, see note 28 *supra*, and text supported thereby.

81. For text of this section, see text supported by note 10 *supra*.

82. For text of this section, see note 75 *supra*.

83. 17 U.S.C. § 9 (Supp. 1952).

84. The periods of global conflict such as those during World Wars I and II create conditions which necessitate the issuance of presidential copyright extension proclamations. An example of such an extension proclamation is that regarding Australia, issued on December 29, 1949, 14 FED. REG. 7283, 64 STAT. A385 (1949).

statutory formalities, but he may not abrogate the necessity for eventual compliance with these formalities. Neither may the courts. If formalities are to be waived, only the legislature may do it. There is no evidence that the Congress has abdicated its control over the copyright laws of the United States. It follows, therefore, that Judge Frank's decision in the *Heim* case is directly opposed, in spirit and letter, to legislation governing much of our international copyright relations.

B.

Up to this point we have noted but one explicit exception to the express requirement in our law that copyright, in published works, must be secured by publication with proper notice. This one exception concerns books or periodicals published abroad in English and seeking *ad interim* copyright protection.⁸⁵ We will now examine the only other explicit exception to the requirement of publication with notice.

The United States Government prefers to regulate the overwhelming bulk of its international copyright relations by private agreements between itself and individual foreign states. It is not a member of the Berne International Copyright Union. But it has become a member of a regional copyright convention made up of states in the Pan-American Union. In 1911, the United States ratified the Fourth International American Convention on Literary and Artistic Copyright which had been signed at Buenos Aires in 1910.⁸⁶

Article 3 of the Buenos Aires Convention reads as follows:

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.⁸⁷

85. For text of this section, see note 35 *supra*. For a discussion thereof, see text supported by notes 35-39 *supra*.

86. The complete text of this convention is conveniently set forth in HOWELL, *op. cit. supra* note 15 at 254 *et seq.*

87. *Id.* at 255. Reservation of the property right is generally indicated in United States publications by adding the words "all rights reserved" to the usual notice of copyright. A book published in Latin America, in the Spanish language, will usually carry a phrase such as *todos derechos reservados*.

Article 6 of the same Convention declares, in part:

The authors or their assigns, citizens or domiciled foreigners, shall enjoy in the signatory countries the rights that the respective laws accord, without those rights being allowed to exceed the term of protection granted in the country of origin.⁸⁸

These Articles set forth two principles: (a) That when copyright protection has been obtained in a Convention country, it may be obtained in other Convention countries without further formalities; (b) That the protection enjoyed shall be in accordance with the law of the country in which protection is claimed. According to one of the leading authorities on international copyright matters, Mr. Luther H. Evans, Librarian of Congress, the above principles form “. . . part of the law of the United States.”⁸⁹ Using terms peculiar to the field of conflict of laws, the *lex loci* prevails as to the granting of the copyright; the *lex fori* prevails as to the remedies concerning such copyright.⁹⁰

The principles found in Articles 3 and 6 of the 1910 Buenos Aires Convention have been incorporated into Article IX⁹¹ of the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works, which was signed in Washington, D.C. in 1946. Article X⁹² of the 1946 Washington

88. *Ibid.*

89. Report of the United States Delegate (Luther H. Evans), INTER-AMERICAN CONFERENCE OF EXPERTS ON COPYRIGHT 20 (Dep't of State Publication 2827, Conference Series 99, 1946).

Said conference was held at Washington, D. C., June 1-22, 1946.

90. See *Warren v. Copelin*, 4 Metc. 594, 597 (Mass. 1842).

91. IX. When a work created by a national of any Contracting State or by an alien domiciled therein has secured protection in that State, the other Contracting States shall grant protection to the work without requiring registration, deposit, or other formality. Such protection shall be that accorded by the present Convention and that which the Contracting States now accord to their nationals or shall hereafter accord in conformity with their laws.

For text and discussion of this article, see Report of the United States Delegate (Luther H. Evans), INTER-AMERICAN CONFERENCE OF EXPERTS ON COPYRIGHT 19, 20 (Dep't of State Publication 2827, Conference Series 99, 1943).

92. X. In order to facilitate the utilization of literary, scientific, and artistic works, the Contracting States agree to encourage the use on such works of the expression "Copyright" or its abbreviation "Copr." or the letter "C" enclosed within a circle, followed by the year in which the protection begins, the name and address of the copyright owner, and the place of origin of the work. This information should appear on the reverse of the title page in the case of a written work, or in some accessible place according to the nature of the work, such as the margin, on the back, permanent base, pedestal, or the material on

Convention contains a provision, recommended by the United States Delegation, that the word copyright or its abbreviations be placed on the works covered by the Convention merely for informational purposes.

Luther Evans, in his report on the 1946 Washington Convention stated, "It is made very clear, however, that notice of copyright, whether in the proposed form, or in any other form, is not a condition of protection under the Convention."⁹³ It is clear then, that insofar as our copyright relations with our Pan-American neighbors are concerned, that publication with notice is not a condition precedent to the securing of valid United States copyright.

We have demonstrated in previous portions of this Article that it is the intent of our copyright law, albeit imperfectly expressed, that works published abroad and seeking American copyright protection must be published with notice of copyright. We have discovered but two explicit exceptions which are currently the law: the limited *ad interim* provisions of Section 22,⁹⁴ and the terms of Article 3 of the 1910 Buenos Aires Convention.⁹⁵ Were it not for the *Heim* case, the law on notice would be clear-cut. Instead, it is not. To briefly illustrate the commercial confusion caused by Judge Frank's decision, we turn to Part IV, the conclusion.

IV.

If one follows the path set by the rationale of the *Heim* case, namely that a work published abroad need not bear notice of copyright in order to secure American copyright, a number of practical obstacles will be encountered along the way. The most serious of these will beset the motion picture and television film industries. These industries make substantial investments in time, talent, and dollars in each of their film productions. An awesome structure of pyramiding costs is usually based on the purchase of certain literary and musical properties. It follows,

which the work is mounted. However, notice of copyright in this or any other form shall not be interpreted as a condition of protection of the work under the provisions of the present Convention.

For text and discussion of this article see *id.* at 21.

93. *Ibid.*

94. For text of this section, see note 35 *supra*. For a discussion thereof, see text supported by notes 35-39 *supra*.

95. See text supported by note 86 *supra*, for text thereof.

therefore, that an attack on the validity of the rights obtained in such properties may cause the whole structure to collapse.

Imagine, for instance, the purchase by the *X* Motion Picture Company, at considerable expenditure, of the exclusive world motion picture rights in a novel written by a German, in German, and published solely abroad. No edition carried the notice of copyright in the form required by our law. Motion picture production is well under way when the trade journals carry the news that a rival studio, the *Y* Company, is all set to preview a film based on the identical literary property.

The legal departments of both companies might have an exchange of correspondence in this wise:

"You can't do this," the *X* Company says, "we bought world motion picture rights in the German novel."

"But the underlying work is in the public domain in the United States," counters the *Y* Company, citing the *Basevi* case. The *Y* Company adds, "One of our producers, while in Europe read the book concerned and noted it carried no notice of American copyright. We checked with the Register of Copyrights and were informed that the work had not been filed in the United States for copyright; nor was there a record of assignments or licenses in respect to such work." The *Y* Company also notes sarcastically, "A record of assignment would not have affected us, for an assignment of a work in the public domain has no bearing on our usage of the same material."

The *X* Company then replies citing the *Heim* case. Assume that both companies are California corporations. Any action or proceeding which may follow will find venue laid in the Ninth Circuit in California. The *Heim* case is a Second Circuit decision. This raises a question of "first impression" in the Ninth Circuit. Perhaps the Ninth Circuit will agree with its Eastern counterpart, perhaps not. But months of litigation lie ahead. And all the while, two motion picture companies have productions on their hands which will rapidly become expensive white elephants.⁹⁶

96. It might be remarked that motion picture counsel are notoriously conservative, that they would hesitate in acquiring the above hypothetical property on the ground its "chain of title was suspect." True, the literary work may be protected in Berne Convention countries, yet, in the United States, and in other non-Berne Convention areas, the work would very probably be in the public domain. If distribution of the film were limited

Suppose both companies did not engage in litigation but, instead, released their individual films. Consider the effect such duplication would have on box office receipts. Perhaps one version is greatly inferior to the other, consider the confusion in the public's mind; consider, too, the loss of "good will" which such confusion might cause the superior production.

The above theoretical litigation aside, yet another problem faces the movie makers. Because the "chain of title" is suspect, many legitimate American film producers would not venture to transform the underlying novel into a motion picture. Doubt as to freedom of foreign exploitation would cause the novel to remain unpurchased. As a result, the work would be left unexploited by American film makers. Are we chauvinists to believe that this would be a loss to the world of art? In any event, the non-exploitation by Americans would be a loss to American industry.

How does the uncertainty resulting from the *Heim* case affect American publishing houses? The pecuniary danger to American book publishers would be as grave as those confronting American motion picture producers. The average motion picture company would frown on producing a film which might enjoy only limited foreign rights, since its investment is generally costly. Contrarily, the publishers of English translations of the instant German novel would generally be able to make substantial monetary returns in the United States market alone. Consequently, many would not hesitate in making or publishing non-authorized translations.

Such acts might be deemed "intellectual thievery" by some. But, nevertheless, these acts would be countenanced by our courts. Note the following remarks, for they represent the law today:⁹⁷

To reproduce a foreign publication is not wrong. There may be differences of opinion about the morality of repub-

to the above "safe" areas the question as to the validity of title would be unimportant dollar-wise.

It should be noted, too, that with the advent of television and the great commercial possibilities this medium gives for the exploitation of motion pictures, the question of non-foreign rights might lose even more of its commercial cogency. Of course, if the televised motion picture were transmitted across international boundaries into Berne Convention countries, the problem of non-foreign rights might arise again.

97. *Scribner v. Stoddart*, 21 Fed. Cas. 876, 879, No. 12, 561 (C.C.E.D. Pa. 1879).

lishing here a work that is copyrighted abroad; but the public policy of this country, as respects the subject, is in favor of such republication. It is supposed to have an influence upon the advance of learning and intelligence.

The situation would obviously become complicated should the German publisher of the instant literary work license an American firm to issue an authorized English translation.

Continued application of the *Heim* case doctrine would destroy that degree of certainty which complex business transactions require of the law. All too quickly, the weeds of confusion would spring forth in another of copyright's many twilight zones.

Accordingly, the foregoing examination leads the writer to conclude that our copyright law, unlike that of most nations in the world, requires the performance of certain specific conditions precedent before valid statutory copyright may be secured in published works. Therefore, the answer to our query raised in Part I, whether an American copyright may be secured by a work initially published abroad without notice of copyright being affixed thereto in the form and manner established by statute, must be answered in the negative.⁹⁸

The foregoing conclusion does not accord with the writer's own subjective approach to the question of copyright notice. American copyright law is unquestionably a snarled web of overly technical formalities. The writer confesses that he approached his subject matter with the hope that an objective examination might support his subjective beliefs. To his academic sorrow he found that the deeper he delved the more apparent it became that the copyright law, as currently drafted, required notice of copyright in works published abroad.

Exercise of the doctrine of "judicial legislation" is often

98. This, apparently, is also the conclusion of the Copyright Office. In the instructions to its Form A-B (Foreign) which concerns registration of a claim to copyright in a book or periodical published abroad in a foreign language, it states:

Publish the work with the statutory notice of copyright, which for books and periodicals consists of the word "Copyright" or the abbreviation "Copr.," accompanied by the year date of publication and the name of the copyright proprietor. Example: "Copyright 1949 by John Doe." The copyright law provides that the notice of copyright be placed upon the title page of the book or the page immediately following and in the case of a periodical either upon the title page or upon the first page of text of each separate number or under the title heading. After publication with the notice of copyright . . . send all the required items to the Register of Copyrights. . . .

most efficacious in accelerating the progress of the law.⁹⁹ However, its application to the field of copyright law with its complex statutory basis, is questionable, at least insofar as notice of copyright is concerned. What appears to be required is clear-cut legislative action.¹⁰⁰ It is suggested that it is time for a thorough re-appraisal of the concept requiring adherence to detailed statutory formalities in order to secure United States copyright or to enforce rights thereunder.

If the requirement of publication with notice of copyright could be safely divorced from other formalities in the law, the writer would be in accord with the decision in the *Heim* case. Unfortunately, under the present state of the law, any softening, or waiving, of notice requirements can only cause new problems to arise.

99. . . . He [the Judge] legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart.

. . . . No doubt there is a field within which judicial judgment moves untrammelled by fixed principles. Obscurity of statute or of precedent or of customs or of morals, or collision between some or all of them, may leave the law unsettled, and cast a duty upon the courts to declare it retrospectively in the exercise of a power frankly legislative in function.

CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 113, 114, 128 (1921).

100. A possible solution to the question of necessity of notice in works published abroad may be the adoption by the United States of some simple copyright notice, such as "c" in a circle, as a substitute for the complex notice, and other formalities now required of works published abroad.

The writer has particularly in mind the provisions found in Article III of the recently drafted International Copyright Convention. See note 62 *supra* for the text of pertinent portions of Article III.

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