LETTER

to the LIBRARIAN OF CONGRESS

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concerning

Certain Aspects of the Copyright Act of March 4, 1909

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in their relation to the

PUBLIC INTEREST *and* EXISTING PROBLEMS

of COPYRIGHT OFFICE ADMINISTRATION

WITH PROPOSED AMENDMENTS

PRINTED AS MANUSCRIPT COPY

LETTER OF TRANSMITTAL

LIBRARY OF CONGRESS
COPYRIGHT OFFICE,
Washington, September 17, 1938.

SIR: The present copyright law was passed twenty-nine years ago at a time when "the whole system, in the light of an interpretation by the courts," was held by Congress to call for revision (Report on H. R. 28192). Developments during the past quarter of a century in radio and cinema have had the effect of incalculably extending the field of protection of literary property and consequently of copyright. That the Copyright Act is as outworn with respect to present conditions as, in 1909, was the legislation which it then supplanted with respect to conditions as they existed at that time, seems to be recognized both by Congress and the general public. Representations to this effect have been submitted in great detail to every committee of Congress which in recent years has conducted hearings on projected copyright legislation.

It is the purpose of this presentation to bring to your attention certain problems of administration which--the Act being what it is--confront the Copyright Office as part of the daily routine of copyright business; and which, because of the direct relation between the services rendered by the office and each separate application for the registration of a claim of copyright, are intimately tied up with the interests of the author and those of the public at large.

I submit herewith for your consideration a statement setting forth the major difficulties involved, as well as suggestions for the necessary changes and amendments to remove them.

Respectfully,



Enclosure: Statement.

DR. HERBERT PUTNAM
Librarian of Congress,
Library of Congress,
Washington, D. C.

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LETTER TO THE LIBRARIAN OF CONGRESS

I

The existing Act went into effect July 1, 1909, and has remained substantially the same to date. It was the outcome of several years of careful study and discussion on the part of every interest involved, including eminent members of the bar. Care was taken to use in the text, as far as possible, words and phrases which had already received judicial construction; and around it has grown during the last thirty years a considerable body of court decisions.

But the Act in its final form was very largely a compromise measure, being a composite of several tentative bills and proposals embodying different points of view and interests, and changes were often made in one provision without the necessary corresponding changes in others, resulting in a lack of clearness and coherence which has caused no little perplexity not only to the Copyright Office, but to the public in connection with the practical administration of the Act.

Moreover, the subsequent development of the moving picture art and of the radio has brought new factors to be reckoned with, and while the courts have found the terms of the Act fairly well adapted to these new needs, there has been a lack of uniformity in their application to particular cases. [Reference may be made to *Tiffany Productions* v. *Dewing* (50 Fed. 2d. 911; 9 U.S.P.Q. 545) and *Metro-Goldwyn-Mayer* v. *Bijou* (3 Fed. Supp. 66)]. In several judicial decisions doubt is expressed whether motion pictures other than photoplays enjoy the sole right of exhibition under the present Act.

The Supreme Court has declared that broadcasting and "tuning in" by means of radio sets constitute performance or reproduction of a musical composition (*Buck* v. *Jewell-LaSalle Realty Co*., 283 U.S. 191). By analogy, the same rule would presumably apply to the delivery of a lecture, sermon, address or similar production, as well as to a dramatic composition. Applications are constantly received in the Copyright Office for radio material of this general character.

Section 1--Rights Secured by Copyright.

The following additions to Section I are therefore suggested:

(1) Subsection (b) : "To translate the copyrighted work into other languages or dialects, or make any other version thereof *including a motion picture*, if

It be a literary work; to dramatize it *or make a motion picture thereof* if it be a nondramatic work; to convert it into a novel or other nondramatic work if it be a *dramatic composition* or a *motion picture*" * * *

(2) Subsection (c) : "To deliver or broadcast the copyrighted work in public for profit if it be a lecture, sermon, address or similar production intended primarily for oral delivery" (See *Kreymborg* v. *Durante*, Copyright Bull. 20, p. 378.)

(3) Subsection (d): "To perform, *exhibit* or *broadcast* the copyrighted work publicly if It be a drama or a *motion picture*; and to vend any manuscript or any record whatsoever thereof;"

(4) Subsection (e): "To perform or *broadcast* the copyrighted work publicly for profit if it be a musical composition; and for the purpose of public performance for profit, * * *"

Note here the change of punctuation which the sense seems to demand by inserting a semicolon after the word "composition," which was inadvertently omitted when the Act was originally printed, and is omitted also in the United States Code, Title 17. The suggested punctuation of the text here agrees with the construction placed thereon by Judge Mayer in *Hubbell* v. *Royal Pastime Amusement Co.* (242 Fed. Rep. 1002). Note the first *proviso*: "That the provisions of this Act, so far as they secure copyright controlling the parts of instruments serving to reproduce mechanically the musical work, shall include only compositions *published* and copyrighted after this Act goes into effect * * *." This would seem to exclude from its operation *unpublished* musical compositions copyrighted under Section 11 which presumably was due to oversight rather than intention. It is suggested, therefore, that the last clause be amended to read:

shall include only compositions copyrighted under the privisions of this Act.

Section 3--Component Parts of Copyrightable Work.

This section was evidently intended to prevent a repetition of the situation in the case of *Mifflin* v. *White* (190 U.S. 263) which must have been well known to those in charge of the bill; where the copyright attempted to be secured by Dr. Holmes in his "Autocrat of the Breakfast Table" was found invalid because of the prior serial publication in *The Atlantic Monthly* without the author's notice and under circumstances disclosing no agreement between the author and the publisher sufficient to raise a trust in his behalf.

But it appears that this purpose was not fully achieved by the phraseology in Section 3. (See *Dam* v. *Kirke La Shelle Co*., C.C.A. 2d [175 Fed. R. 902; Bull. 17, pp. 55-56]; also *Mail and Express Co.* v. *Life Pub Co*., p. 161 of Bull. 17.) In these cases it was intimated that if the author of a story sells to a publisher the serial rights only, and reserves any of the subsidiary rights (to dramatize, etc.), the publisher of the magazine is merely a licensee, and the copyright taken out by him (the publisher) in the issue or issues of the magazine in which the story appeared would not be sufficient to protect

the author in the subsidiary rights. Because of the danger of the author's losing valuable rights in this way, by failure to secure separate copyright for his contribution, it is suggested that the following clause be added at the end of Section 3:

and such proprietor shall, in the case of any part not wholly owned by him and not separately copyrighted by the author, be deemed to be the trustee of the owner of the copyright in such part for the purpose of proceedings for infringement of any of the reserved rights in behalf of the author.

Section 5--Classification of Copyright Works.

(1) Subsection (b): *Periodicals, including newspapers.*

The statute does not define a periodical, but it is to be observed that Section 19 makes a distinction between a book or other printed publication, and a periodical, with respect to where the notice shall be applied. Moreover, in the case of a book, Section 16 requires the filing of an affidavit in connection with an application for registration.

The meaning of the term "periodicals" should be more clearly indicated. The rules of the office state that serial publications "which are not clearly periodicals should be registered as books." But the question still remains: What is clearly a periodical? Of course, the Copyright Office could not be expected to apply in detail the rules laid down by the Post Office Department in accordance with the postal laws for the purpose of applying rates of postage; for this would obviously exclude many publications commonly regarded as periodicals. Periodicity of appearance seems hardly adequate in itself for the purpose of differentiation without regard to the contents. The following amendment is suggested:

Periodicals, including newspapers *and similar serial publications containing miscellaneous matter and issued at regular intervals of less than one year*.

(2) Subsection (c): *Lectures, sermons, or addresses* (*prepared for oral delivery*). I would suggest including after "addresses" the words "or similar production" to bring it into harmony with Section 1 and Section 11. A monologue or radio skit, for example, is prepared for oral delivery and, therefore, a similar production to a lecture, sermon, or address; but it is not any one of these. Therefore, it would seem advisable, for reasons which follow, further to amend this section by including after the word "production" the phrase "or material prepared for radio broadcasting other than music."

Subparagraph 3 of the first section of the Act gives the author of “a lecture, sermon, address or similar production" the exclusive right to deliver or authorize the delivery of the copyrighted work in public for profit. Section 11 provides that copyright may be had of the works of an author which are not reproduced for sale, that is, not published, by depositing with claim of copyright "one complete copy

of such work if it be a lecture or similar production or a dramatic * * * composition."

The granting of copyrights in the case of unpublished works was an entirely new feature which originated with the present law. Under the preceding law, no unpublished material could obtain copyright protection. The outstanding feature of a "lecture, sermon, address or similar production, or of a dramatic work" is performance or delivery. Under our copyright laws, including the present law, performance or delivery does not constitute publication. In other words, under the prior Act the author who delivered a lecture, sermon or address or other similar production or whose dramatic work was performed, could not claim copyright protection because such performance did not constitute publication. The purpose of Section 11 of the present Act was to provide that such material could obtain copyright protection, while still adhering to the principle that performance or delivery did not constitute publication. This effect was brought about by providing under Section 11 that if an author desired to deliver a lecture, a sermon, an address, or other similar production or have his dramatic work performed, he could obtain this protection by filing one complete copy of the material to be performed or delivered with the Copyright Office with claim of copyright. Upon so doing, the applicant becomes entitled under Section 11 to the registration of this work and for such registration shall pay a fee of $1.00 for each such production. The intent of Section 11 seems to be perfectly clear in this: that for each such production a separate registration is required and a separate registration fee shall be paid.

The advent of radio and broadcasting has developed a new system of mechanics particularly in the field of commercial advertising. Fifty times a day various articles of merchandise are brought to the attention of the public through the process of radio skits. But the advertisers have realized that in order to hold the attention of the audience something more attractive is necessary than mere eulogies on the excellence of the material advertised. Steps had to be taken not only to have the public willing but anxious to listen. In order to create this state of mind, one of the most common devices employed has been and is to include in the advertising address some monologue, dialogue or skit continued in series, totally disconnected in the way of subject matter with the virtues of the article advertised. The progress of the story or skit is generally interrupted on several occasions in the course of the same advertising address with references to the merits of the article advertised. Because of the presence in the course of such, addresses of these skits which, if performed on the stage and standing alone, might fairly come within the definition of dramatic composition, the commercial address into

which they are injected might be said to contain, as far as such skits are concerned, something of the dramatic element. It is, however, difficult to conclude that the address itself is a "dramatic work" as the term is used in the first, or a "dramatic composition" as used in the fifth and eleventh sections of the Act. That Section 5 of the Act clearly differentiates between dramatic compositions on the one hand and "lectures, sermons, addresses (prepared for oral delivery) 11 on the other, is apparent from the fact that the latter are classified in that section under subparagraph (c) and the former under subparagraph (d). For sometime past, it has been the practice of the Copyright Office to classify such material as a dramatic work, but it has never been fully satisfied as to the correctness of the practice. A number of conferences have been held in the Copyright Office with respect to this point, the occasion therefor being the existence of two circumstances (1) that in a number of cases where applications for the registration of such material has been made on application forms corresponding to dramatic works or dramatic compositions and. The office has indicated to the applicants that in the particular instance it was felt that the matter sent in was wrongly classified and properly came within the classification of lectures, sermons, addresses or other similar productions, the applicants have in these instances insisted that the material was in effect a dramatic work, and on many occasions such insistence has met the reluctant assent of the Copyright Office; (2) in connection with the claim put forward that addresses of this type constituted dramatic works, applicants have filed with the office anywhere from ten to fifty of these addresses simultaneously with the request that they be covered by a single registration and fee on the theory that each such address, because of the fact that the addresses. as a whole dealt with the same characters and contained, as one might say, continuing installments of the adventures or experience of such characters, constituted not the complete story but only a portion thereof, and that, therefore, for a completed series of the story delivered to the public in the form of separate addresses on separate occasions, one registration and one fee was sufficient to cover the series.

The difficulty with this presentment lies in the fact that it treats the copyrighted matter involved as if it were a story rather than a series of addresses-as if a writing of a series of deliveries or performances was involved. Under the Copyright Act a story is a book, and there is no provision in the Act for the copyrighting of unpublished books. As before indicated, the purpose of giving copyright protection to unpublished material of this nature is to provide that matter the essence of which lies in delivery or performance, which does not constitute publication, shall be protected.

The fact is that each one of these addresses is, for the purposes of an address or similar production in itself one complete thing -- one complete delivery -- one complete performance. It is intended to, and presumably does, satisfy the requirements of the public for the purposes of the particular occasion on which such delivery or performance takes place. Even in connection with written stories published in separate installments, Mr. Justice Holmes in the case of *Smith* v. *Hitchcock* (226 U.S. 53, 59, 60), where the question was raised as to whether certain printed matter was a book or periodical under an order of the Postmaster General, excluding matter from the mails, recognized this principle of completeness. The court considered what constitutes a periodical, and what a book for the purposes of the issues before it, and in so doing said:

> Without attempting a definition, we may say that generally a printed publication is a book when its contents are complete in themselves, deal with a single subject, portray no need of continuation, and perhaps, have an appreciable size. There may be exceptions, as there are other Instances of books. It hardly would be an exception if, where the object is information and the subject matter Is a changing one, a publication periodically issued giving information for the time should be held to fall in the second class. From this point of view the Tip Top Weekly and Work and Win are books. They are large enough to raise no doubt on that score; each volume is complete in itself and betrays no inward need of more, notwithstanding that, as in the highwayman stories of an earlier generation, further adventures to follow are, promised at the end. (Ibid., pp. 59-60).

As a matter of obvious fact the circumstance that there may be embodied in an address to the public, for the purpose of advertising commercial wares, a skit having certain dramatic qualities, cannot change the nature of the process involved from an address to a drama. What the applicants seek to do is to obtain copyright protection not in one address but in a series of separate addresses on one application for one registration and one fee.

Doubt cannot for a moment be entertained that if application were made for the separate registration of each of ten addresses in a series of such addresses and the proper formalities were observed by the applicant, it would be the duty of the Register of Copyrights to register each such application singly and demand therefor, under the authority of the Act, the payment of a separate fee. Such action could only be predicated upon the fact that each such address constituted a complete copy of the unpublished work; for under Section 11 one of the conditions of registration is the deposit of one complete copy of the lecture, sermon, address, or other similar publication, or of a dramatic work. It is equally clear that the applicant, by simultaneously submitting complete copies of ten such addresses, cannot thereby transform any separate copy from a complete copy into a partial copy.

As a result of these conferences it has been definitely concluded that each broadcast constitutes not a part of a dramatic work, as the term is used in the Act) but rather a production similar in nature to a lecture, sermon or address prepared for oral delivery and that, consequently, in order to obtain the copyright for unpublished matter provided for in Section 11, registration must be made and an application fee of $1.00 paid for each separate broadcast.

(3) Subsection (d): Dramatic or *dramatico-musical compositions*. Doubt has sometimes been expressed whether this is sufficient to include pantomimes and choregraphic works, and in practically all of the bills heretofore submitted to Congress during the past decade, they have been expressly included. Of course, as remarked by Justice Holmes in *Kalem Co.* v. *Harper Bros.* (222 U.S. 55; Bull. 14, p. 152), drama can be achieved by action as well as by speech, and it is suggested that the subsection be clarified by including pantomimes and choregraphic works reduced to writing.

(4) Subsections (1) and (m): *Motion Pictures*. These subjects were added by the Act of August 24, 1912, since which time the so-called sound pictures have come into vogue. It would seem desirable, therefore, to add to each of these subsections the phrase "with or without sound."

Section 6 --Compilations, Abridgments, Etc.

The phrase "or works republished with new matter" apparently refers to new editions of works which may or may not be in the public domain. What constitutes new matter would, of course, depend upon the facts of each case, but it does seem that the term should be qualified in some way because it lends itself to the abuse of republishing works which are in the public domain and printing on the title page an unqualified claim of copyright, when in reality there may be nothing but a few trifling changes or additions to the original text. So, also, the life of a copyright may ostensibly be prolonged indefinitely by the subterfuge of minor changes or additions, such as "editing."

In recent copyright bills which have been reported, provision has been made for the copyrighting of the interpretations of musical compositions by the performer. This thought has been incorporated in the following suggested reading of the whole section:

That compilations or abridgments, adaptations, arrangements, dramatizations, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works, or new editions containing new matter shall. be regarded as new works subject to copyright under the provisions of this Act; but no change effected in a work in the public domain or in a copyrighted work shall constitute a new work subject to copyright under the provisions of this Act unless such change presents the character of new original work as distinguished from a reproduction of such work in the same form with nonessen-

tial changes; provided that the right mechanically to record any interpretation of music, vocally or instrumentally expressed, shall be in the person thus interpreting the same, and such interpretation shall, when mechanically recorded, be subject to copyright as a new work. The copyright of new works shall not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, or be construed to imply an exclusive right to such use of the original works or to secure or extend copyright in such original works.

It is the copyright of new works -- not the mere fact of their publication -- which, without this provision, might be deemed to affect the copyright in the original work, or restrict the use of a work already in the public domain. Moreover, these provisions are applicable in principle to unpublished as well as published works.

Section 7 --Non-Copyrightable Matter.

(1) Change the phrase "prior to the going into effect of this Act" to prior to July 1, 1909."

(2) "Any publication of the United States Government." There has been a difference of opinion as to whether this refers to the character of the work or the fact of publication. The courts have not as yet interpreted this phrase. Question arises with respect to gifts of manuscripts to the Library of Congress with the privilege of publication. If the phrase refers to the fact of publication rather than to the character of the work, then it seems probable that the publication of such private material by the Library would at once throw it into the public domain -- a result which would undoubtedly be in conflict with the intention of the original donor.

It is suggested that the phrase be amended by adding after the proviso the words:

And provided further, That publication by the United States Government of literary or artistic property acquired by it from non-governmental sources by way of gift, purchase, or devise shall not be regarded as a publication of the United States within the meaning of the foregoing provision; and that with respect to any copyright or common law rights subsisting in such literary property at the time the subject of gift, purchase, or devise vests in the United States Government, the latter shall enjoy in the same all the attributes of ownership of any other assignee of copyright under this Act.

Section 8 --Copyright to Author or Proprietor.

(1) The phrase in the proviso "that the copyright secured by this Act" should read "that the copyright secured under this Act"; for it is the act of the copyright owner that secures the copyright. This is because it is not the Act which "secures" the copyright in any case; the Act merely provides how the copyright can be "secured" -- specifically that it is this action of the author or publisher or assignee of common law rights, etc., that secures copyright.

(2) Subsection (a): As this paragraph now stands, it appears, if taken literally, to cut off certain. domiciled aliens so far as their unpublished works are concerned, namely, those who do not belong to proclaimed countries, Russians, for example (at least it was so held in *Leibowitz* v. *Columbia Graphophone Co*., 298 Fed. R. 342; Bull. 19, p. 236).

It is suggested, therefore, that the following clause be added to this subsection after the word "or": "At the time of deposit made under Section 11 of this Act; or * * *." For it has never been the policy of the law to differentiate between domiciled aliens and citizens with respect to the privilege of securing copyright.

It is believed that the purpose of the Act is to recognize and apply the general principle that resident aliens have the same legal rights (as opposed to political) as nationals of the state of residence, but not more. Under (b) a citizen of a proclaimed state, living abroad, has the right to acquire copyright protection in the United States by complying with the provisions of our Copyright Act. As the office construes the Act, such foreign national, may publish in Germany a work in the German language with the adequate copyright notice prescribed by Section 12, and register his claim in the Copyright Office. Now how about a German resident in the United States who publishes a book in Germany with adequate copyright notice? Section 15 provides that "the original text of a book of *foreign origin in a language or languages other than English*." does not have to meet the provisions of the manufacturing clause. The Copyright Office construes this provision as one the primary purpose of which is to protect American printers, binders and typesetters. It believes that the term "book of foreign origin" has a definite meaning; i. e., that the book must be of "foreign origin" to make it an exception to the operation of the manufacturing clause. It believes that for the purposes of the Copyright Act a book is not of "foreign origin" if written by a citizen of the United States -- hence that the fact that he may write a book in a foreign country in a foreign language does not make it a book of foreign origin within the meaning of the Act. If it did, American citizens could defeat the purpose of Section 15 to protect the interests of American printers, binders and typesetters by the process of writing a book in a foreign language (either here or in some foreign country) and having it manufactured abroad. In other words, the test of "foreign origin" is the nationality of the writer in most cases, as the Copyright Office understands and applies the law.

But if nationality is made the test of "foreign origin" it would seem to follow that a foreign resident here who writes a book creates a work of foreign origin and should be able -- if that is all there is to

the question -- to write his book here and send it abroad to be printed and defeat the interests of American printers, binders and typesetters. On such a limited construction he would be in a preferential position over an American author. It is not believed that such was the intention of Congress. Such foreign resident author must base his claim of right to defeat such interests on the ground that he is a national of a proclaimed state; otherwise, he will have to base it on the ground that he, as a resident alien of the United States, is in a preferred position over citizens of this country. But this theory would be opposed to the general principle that, in the absence of treaty stipulations, the resident alien is entitled to the rights of nationals and *no more*, provided, of course, that the "minimum standard" of the requirements of the law of nations is met. The only reason why the "foreign origin" clause is an exception to the manufacturing clause must be assumed to be that with respect to such books, their publication abroad is their normal place of publication, and therefore does not affect the business of American printers, binders and typesetters. The normal place of a publication of a book is where the writer resides. The resident alien author does not enjoy copyright protection because be is a national of a proclaimed state; for the section covers all resident aliens without exception; and the author may be a national of a nonproclaimed state, and still, because of his residence in the United States, claim and be entitled to the protection of our copyright laws. Since residence in such case is the basis of the right to such protection -- and in the absence of the expression of a specific intention in the Act to place authors, citizens of the United States, in a position of disadvantage when compared to resident alien authors in connection with the manufacturing clause -- and particularly when so to construe the Act would be to run counter to the generally accepted principle that the alien residents shall enjoy legal rights equal to but not superior to those of the nationals of the state of residence, it seems necessary to conclude that a book written by a resident alien author in a foreign language --whether written in the United States in whole or in part -- does not meet the intent of the manufacturing clause if manufactured abroad; does not, in a word, constitute, within the terms and intent of the statute, a "work of foreign origin."

This view has occasionally been questioned by certain applicants for registration of claims of copyright in such material.

In order to avoid any misconception as to the meaning of the term "book of foreign origin" as used in Section 15, the following amendment to interpretative Section 62 is suggested, in the form of an addition to the Section:

A "book of foreign origin" refers to the work of a foreigner not a resident of the United States.

Section 9 --The Securing of Copyright in Published Works.

The second clause should be qualified by a -reference to Section 20 which provides what shall happen if the notice is omitted from certain copies.

The last phrase ("except" etc.) has no proper place here. It is a survival of an early draft of the bill which authorized importation and sale of copies of the foreign edition during the ad interim term.

The whole section will then read:

Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and, subject to the provisions of Section 20, such notice shall be affixed to each copy thereof published in the United States by authority of the copyright proprietor ["or offered for sale" omitted as superfluous because Section 62 by direct inference, consisting of the process of defining what is meant by "the date of publication," defines publication as the act of placing on sale, selling, or publicly distributing copies of the material submitted to the above process].

Section 10 --Registration of Copyright.

To the phrase "including the deposit of copies," add "or copy" so as to bring it more completely into harmony with the provisions of Sections 11 and 12 respecting works not reproduced for sale, foreign publications, and. contributions to periodicals. After the word "shall" insert the phrase "register the claim and."

Section 11 --The Securing of Copyright in Unpublished Works.

This Section, read in connection with Sections 2,10, and 23, offers serious difficulties of interpretation not only for the Copyright Office, but for the applicant; for no express provision is contained in the Act setting out the duration of "copyright" in an unpublished work. The question of when to renew such a copyright is problematical, as is the question as to whether or not to register the work when published, i. e., whether to register the work twice (a) as unpublished, (b) as published. The Copyright Office practice has been to accept registration of the unpublished work when published lest by refusing to do so the interests of the copyright owner might be unfavorably affected. There is, also the question of the appropriate copyright notice required in the case of the subsequent publication of an unpublished work covered by copyright.

The subject of unpublished copyrighted works, involving, as it does, references to other sections of the Act seems to call for detailed treatment.

Section 2 provides:

That nothing in this Act 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.

The immediate corresponding provision in the old law is found in Section 4967 of the Revised Statutes (as amended by the Act of 1891):

> Every person who shall print or publish any manuscript whatever without the consent of the author or proprietor first obtained, shall be liable to the author or proprietor for all damages occasioned by such injury.

Thus Section 2 preserved the time-honored protection at common law, but broadened the scope so as to include any "unpublished *work*," instead of merely "any manuscript"; and this presumably because the courts had held that certain works, such as paintings, were not manuscript within the meaning of this clause. (*Parton* v. *Prang*, 3 Clifford 537.)

This section also includes the right to bring suit in equity for an injunction, in addition to a suit for damages. But all these suits have to be brought in the State courts, except where diversity of citizenship confers jurisdiction upon the Federal courts; and only such damages are recoverable as can be proved.

Now coming to Section 11, we are at once confronted with the problem as to what extent, if any, this common law protection has been disturbed. For this section provides that "*copyright* [i. e., statutory copyright] may also be had [i. e., secured] 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 in the case of a lecture or similar production (class C), or a dramatic or musical work, or photograph; of a title and description with certain "prints" in the case of a motion picture; and of a photograph or other identifying reproduction if it be a work of art (class G) or a plastic work or drawing (class I). Such works are thus privileged because, being primarily adapted for performance or exhibition, it was urged that they became more exposed to infringement than is the case with other kinds of writings; and also because such works are in many cases not primarily intended for publication.

The phrase "of which copies are not reproduced for sale" is deemed practically equivalent to "not published" (i. e., not made available in copies to the general public). It appears to have been so understood by the court in *Leibowitz* v. *Columbia Graph. Co*. (298 Fed. R. 342; "the act recognizes expressly in section 11 copyright in an unpublished work"); and also in the recent case of *Patterson* v. *Century Productions* (C. C. A., 35 U. S. P. Q. 471; 93 Fed. 2d. 489), where we find the following observations: "Thus the Copyright Act of 1909 departed from the previous limitation of a statutory copyright to published works in the manner provided in Section 9," and "as the plaintiff did in the first instance comply with Section 11 his copyright so obtained was valid for an unpublished motion picture and so long as it remained unpublished he was not required to do

more to keep his copyright valid for the statutory period." And this is in line with the interpretation of Congress itself in the amendatory Act of 1928 with respect to the fees (Sec. 61) :

> In the case of any *unpublished work* registered under the provisions of Section 11 the fee shall be, etc.

So, also, in Section 60 we find the following:

> No manuscript of an unpublished work shall be destroyed during its term of copyright.

So there can be no doubt that Section 11 deals with unpublished material theretofore protected solely by the common law.

However, in the Werckmeister case already alluded to, the Supreme Court intimated very strongly that some classes of works (e. g., works of art in the form of original paintings or statues) might be capable of publication without reproduction, but merely by unrestricted *public exhibition*, and that apparently accounts for the language here, "works of an author of which copies are not reproduced for sale." On the other hand, we have seen that the exhibition of a motion picture is not a publication thereof (*Patterson* v. *Century Productions*, supra) ; nor the performance of a drama, (*Ferris* v. *Froham*,)[1] nor of a musical composition (*McCarthy* v. *White*) [2]; nor the oral delivery of a lecture or address (*Nutt* v. *National Institute*).[3]

Now under the old law, when copyright only applied to published works, the Supreme Court held that the remedies given in the copyright statute were the only ones open to those who had acquired a copyright, and the remedies at common law were abandoned (*Globe Newspaper* v. *Walker*, 210 U. S. 356; *Caliga* v. *Interocean*, 215 U. S. 182), and it seems that the same rule applies under the present law. In *Photo-drama* v. *Social Uplift Film Corp*. (220 Fed. R. 448), the Circuit Court of Appeals (2d Circuit) remarked:

> We do not concur in Judge Hand's holding that one who has obtained statutory copyright of a book or play has left in him any common-law right in literary property by virtue of Section 2 of the Act. We think that section is intended only to indicate that the statute does not displace the common-law right. Whoever elects to avail himself of the statute, however, must be held to have abandoned his common-law right.

And the same court held to the same effect in *Universal Film Co*. v. *Copperman* (218 Fed. R. 582):

> The Nordisk Company abandoned its common-law property in the United States when it took out the statutory copyright * * * under Section 11 of the Act of 1909, as amended in 1912.

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1 223 U. S. 424.
2 259 Fed. 364.
3 31 Fed. 2d, 236.

Thus it appears that while the method of procedure with respect to the new subjects has changed, the old rule of construction has not changed. And so when the deposit of the necessary copy is made in the Copyright Office with a claim of copyright, the common-law protection and procedure cease, and the statutory copyright begins -- but when does it end? To this I think there can be but one answer, namely, at the close of the twenty-eighth year from the date of deposit. For Section 8 provides that the author or proprietor of any work shall have copyright for such work "under the conditions and *for the terms specified in this Act*." Now apart from the renewal clause the only term specified is found in Section 23: "That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication." There is no specific provision in the Act as to the duration of copyright in an unpublished work, but Section 23 plainly shows the general intent of Congress to carry out the Constitutional direction by limiting the term to twenty-eight years in the case of any work published in the first instance, and there is nothing in the Act to indicate an intention to grant a different term to unpublished works, beginning upon deposit of copy and ending upon publication, and then resuming for a period of twenty-eight years from the date of first publication. Such a construction would, it seems to me, do violence to the intent of Congress. At that rate, one might defer publication indefinitely and thus defeat the intent of the law. In the Patterson case the court held the copyright secured under Section 11 for the unpublished motion picture "valid for the *statutory period*," which could only mean twenty-eight years from the date of the deposit, and this has been the interpretation of of the Copyright Office for many years. So that the first part of Section 23 must be understood as applying equally to unpublished works, and the qualifying clause solely to works published in the first instance.

To recapitulate: Sections 2, 11 and 23, considered together, contain provisions which, if literally construed, give rise to incongruous results. While to a certain extent these have been ironed out as the effect of judicial interpretation, nevertheless, the wording of the Act is such as still to leave the copyright owner in doubt as to what his rights really are. We have an Act, Section 2 of which purports in terms to perpetuate the common law rights of an author in his unpublished work -- rights the outstanding feature of which is that they are not affected by the lapse of time. On the other hand, in Section 11 it is provided that copyright shall be had in such works; but the Act sets in terms no limit to the period of statutory copyright and through such failure seems, at first blush, to conflict with Article 1, Section 8, of the Constitution which empowers Congress

to secure to authors exclusive rights in their respective works for "limited times" only. We have Section 23 which purports generally to deal with the length of the copyright term, and which specifically limits the period in the case of published works and fixes no limit thereto in connection with unpublished works. Again, this Section provides that the copyright term in a published work begins with the date of its publication while at the same time Section 11 recognizes that a work already copyrighted in unpublished form may be subsequently published. Thus the Act fails to designate with certainty when the copyright term begins to run in the case of the publication of the unpublished work in question. This lack of definiteness on the face of the Act has a tendency to complicate questions arising in connection with the renewal of copyright of unpublished works (see post p. 37). And while in several instances the courts have held that an author who copyrights his unpublished work waives his common law rights thereto, and that, consequently, on the expiration of the copyright term the work falls into the public domain, this conclusion, particularly in view of the specific provisions of Section 2, does not seem to afford a satisfactory explanation of the phenomenon of personal property becoming public property when the owner thereof has not published it, but on the contrary has been careful not to do so.

There are doubtless solutions to all these questions; and, as already stated, various Federal Courts have rendered decisions dealing with certain specific aspects of the subject which have been brought to their attention for adjudication. However, thus far the Supreme Court has not been called upon finally to act with respect to any one of these points. They have not, therefore, been finally judicially determined. The need of awaiting such determination could, it is believed, be obviated by appropriate amendments clarifying the situation through the medium of legislative expression.

REGISTRATION

The protection accorded under Section 11 was a departure from the normal process of securing copyright, and therefore must be deemed limited in its operation to the kinds of works named therein, under the rule *inclusio unius exclusio alterius*. Hence any literary work belonging to the category of "books" does not enjoy the privilege but is relegated to the common law protection preserved in Section 2 up to the time of publication, whereupon Section 9 comes into play. Such works include stories, treatises, essays, poems and the like.

Among the advantages of registration are (1) the certificate is prima facie evidence of ownership; (2) suit for infringement can be

brought in the Federal courts irrespective of diversity of citizenship or the amount involved; and (3) it gains statutory damages where actual damages and profits cannot readily be ascertained (which is usually the case in infringement suits). But on the other hand, it loses the common-law right of perpetuity.

Observe the concluding sentence of Section 11:

> But the privilege of *registration of copyright* secured hereunder shall not exempt the *copyright proprietor* from the deposit of copies, under sections 12 and 13 of this Act, where the work Is later reproduced in copies for sale [I. e., published].

No doubt here as to the legislative intent to grant statutory copyright, but the phrase "privilege of registration" comes in unexpectedly for nothing had been said in the preceding part of the section about registration, but merely deposit with claim of copyright. The explanation is that in the early draft the section began: "That *registration* may also be had," etc., and the whole section was applied to Section 10 as a second paragraph. But when the word "registration" was changed to "copyright," and this paragraph made a distinct section, the corresponding adjustment at the close was overlooked, just as the proper adjustment in Section 23 as to the term was overlooked. However, the covering provision is found in Section 54:

> and whenever deposit has been made in the Copyright Office of a copy of any work under the provisions of this Act, he [the Register of Copyrights] shall make entry thereof.

Section 12 affords another example of this constant failure to make adequate changes to harmonize various related sections during the prolonged discussions of the bill. The opening clause seems to overlook the copyright we have just been considering in the preceding section, and to recognize actual copyright status only in works which have been published in the first instance under Section 9. This we know was not the final intention of Congress as expressed in Section 11, but in order to harmonize the two sections, we must read into the opening clause of Section 12 the terminating clause of Section 11, something after this fashion:

> That after such work has been later reproduced in copies and published with the notice of copyright, or after copyright has been secured in the first instance by publication with the notice of copyright as provided in section 9 of this Act, here shall be promptly deposited in the Copyright Office * * * etc., two complete copies of the best edition thereof then published * * *.

Further on it takes up the thread again:

> 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 11 of this Act, such copies or copy to be accompanied in each case by a claim of copyright.

Now it is evident that this latter clause (except as it relates to "copies") is merely a repetition of the requirements in Section 11, and is quite unnecessary in Section 12, for all this has already taken place under Section 11. It is also clear that "such copies," when the work was published in the first instance under Section 9, must be "accompanied by a claim of copyright." But it is not so clear from a reading of Sections 11 and 12 taken together that "such copies" as constitute merely a published reproduction of a work already registered under Section 11, must also be "accompanied by a claim of copyright." Inasmuch, however, as under the concluding sentence of Section 12 no action or proceeding can be maintained for infringement of copyright "in any work" until the provisions with respect to "the deposit of copies *and registration* of such work shall have been complied with," I presume that some kind of registration should be made, if only to put of record the fact of publication and deposit of copies and to secure a certificate which can be used in court to show compliance with the law; but without thereby attempting to set up a new term of copyright beginning on publication. And for this reason it is the practice of the Copyright Office to register this material anew. In *Lumiere* v. *Pathe Exchange* (C. C. A. 275 Fed. R. 428), Judge Ward held that both deposit of copies and registration were necessary for the purpose of bringing suit for infringement occurring after publication of a work (photograph) originally registered under Section 11, but he did not intimate that a new term of copyright was thereby initiated.

COPYRIGHT NOTICE ON PUBLISHED COPIES OF HITHERTO UNPUBLISHED WORKS

This leads to the question of year date in the notice on such copies. That the notice of copyright shall appear on all published copies is fundamental under our system, but no year date is required except in the case of "a printed literary, musical or dramatic work," and for these Section 18 provides that the notice "shall include the year in which the copyright was *secured by publication*." If this clause had stopped at "secured," it would have saved a good deal of bothersome doubt for all concerned, but as it stands one is confronted with the problem of determining whether to use in the notice on such works the year of original deposit under Section 11, or the year of subsequent publication (if it happens to be different), or perchance no year date at all. The latter conclusion would not be unreasonable, because in the case in hand, the copyright was not secured by publication, but by deposit and registration. Still as with Section 23, we may be permitted to do a little surgical grafting here and save the day for the year date by adding to the clause in Section 18 the words “or otherwise." -- but what year date?

The courts do not appear as yet to have definitely settled these perplexing questions. The nearest approach I have found is in *Turner* v. *Crowley* (C. C. A., 9th Circuit, 252 Fed. R. 749; Bull. 19, p. 393) where some question arose over a discrepancy in dates between the certificate and the allegations in the complaint, as to which the court remarked:

> This variance, possibly due to an error on the part of the plaintiff, or to a clerical error in the certificate of registration, ought not to deprive the plaintiff of the benefit of her original registration to secure copyright of the unpublished song * * * We assume that the rules of copyright require reasonable strictness of interpretation; but, where it is shown by a claimant that the essential steps have been taken to secure copyright of an *unpublished work* prior to publication, slight variance in dates ought not to destroy the proof of copyright. But in the present case, even if the first registration could not be sustained, surely plaintiff, by proof of the second registration, fulfilled the terms of the Copyright Act, inasmuch as the record proves that the copyright notice was appended to the published copies of the song.

Here the notice bore the year of original deposit (1914) and not the year of publication in 1916. It is to be observed, however, that the infringement had taken place some months before the second deposit and registration.[1]

In *Patterson* v. *Century Productions* (33 U. S. P. Q. 194). the film likewise bore in the notice the original date of deposit under Section 11 (1928) when published in 1933; but it was not found necessary to pass upon the question (though raised) as to the effect of publication with the original year date, because the infringement had taken place *before* such publication, as in the case just mentioned. But the court did hold that the plaintiff's copyright under Section 11 was valid for an unpublished motion picture and that so long as it remained unpublished he was not required to do more (i. e., than register under Section 11) to keep his copyright "valid for the statutory period."

My conclusion is that in the case of such works as require the year date in the notice, the year of original deposit should ordinarily be used rather than the later year of *publication*, for the worst that could befall (should the courts take a different view when the question comes squarely up for decision) would presumably be a shortening of the term of protection by so much; whereas if a later year date is used in the notice it might result in a total loss of the copyright, its being tantamount to claiming a longer term than the law allows. (See *American Code Co*. v. *Bensinger*, C. C. A., 282 Fed. R. 829.)

And so with respect to the application and certificate for the published copies; while it is proper to show the date of publication and

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[1] In the case as reported the infringement took place In May 1916; the original deposit in 1914; but the date of publication to given as September 10, *1914*, which is a typographical error for *1916*, as the records and copies plainly show.

deposit of copies, the date of original deposit should also be given, and the claim and the certificate should be based upon the latter date. This has been the general attitude of the office but its practice has not been quite in conformity therewith. Of course, in the case of some of the works mentioned in Section 11, such as a painting, the reproduction takes on a new form (engraving, photograph, etching) which then becomes eligible for registration as a new work in class H. And so with respect to many musical compositions, where only the melody is deposited for the purposes of Section 11 to be followed later by publication of a harmonized edition. But for dramas, lectures, dramatico-musical works, photographs, art works in the solid, and plastic works and drawings (class I), the reproductions would as a rule be practically the same as the originals, with little if any new authorship involved.

The inconsistencies in Section 11, when read in connection with other sections, could be cured by such amendments as follow:

The final sentence could be amended to read:

But the securing of a copyright in an unpublished work in the manner provided by this section shall not exempt, etc.

There should be added to the section following the word "sale" a semicolon, in turn followed by the phrase "but in such case no reregistration of the original claim of copyright shall be required."

Section 11 should be amended by the following proviso:

Provided, That in lieu of actual copies composed of wood, stone, metal or plastic material, the Register of Copyrights may at his discretion accept photographic or other identifying reproductions thereof.

Section 12 should be amended by adding after the word "copies" in the last sentence thereof the words "or copy" ; and by changing the last period in the section to a semicolon, followed by the words:

Provided, That in the case of the publication of a hitherto unpublished work copyrighted under Section 11 of this Act, the deposit of copies of said published work will entitle the copyright proprietor to maintain an action for infringement of the writing for which, such copyright has been secured..

Section 12. --Deposit of Copies or Copy.

(1) The word "promptly" has given rise to no little difficulty, both to the Copyright Office and to the courts and the public as well. Under the prior law the corresponding provision was that the copies should be deposited on or before the date of publication, and this was made a condition precedent to securing, a valid copyright. The

original hearings preceding the present Act disclose that publishers frequently lost valuable copyrights owing to the failure of the shipping clerk to mail the copies in time, or to delay in transmission through the mail; and in order to avoid such contingency, the framers of the present Act concluded not to specify the time for deposit beyond what may be implied by the term "promptly," which, in the absence of statutory definition, must be taken in its ordinary meaning of "without unnecessary delay." Should the Copyright Office accept copies which have not been "promptly" deposited after publication? Observe that in this connection Section 10 makes registration dependent upon compliance with the provisions of the Act, including the deposit of copies, and that the issuance of the certificate is contingent "upon such compliance." Upon what basis, therefore, may the certificate issue when the copies have not been promptly deposited?

The failure to make deposit within the proper time does not in itself invalidate the copyright which has already been secured by publication with notice; this can now result only after failure to make deposit upon actual notice as provided in Section 13.

It is true that Section 12 provides that no action or proceeding shall be maintained for infringement until the "deposit of copies and registration" have taken place, which presumably was added as a. special inducement to make prompt deposit; but this does not answer the question.

Heretofore, the practice of the office has been to accept copies at any time subsequent to publication with notice; thus, in effect, attaching no significance to the word "promptly"; and certain decisions of the courts seem to sanction the practice (*Lumiere* v. *Pathe Exchange*, 275 Fed. R. 428, Bull. 19, at p. 240; *Mittenthal* v. *Berlin*, 291 Fed. R. 714, Bull. 19 at p. 291) ; but see *Washington Publishing Co.* v. *Pearson* (32 U. S. P. Q. 113) and *Ebeling* v. *Reims* (28 U. S. P. Q. 366) where the court, referring to the word "promptly" in Section 12 comments:

> The neglect to observe the statutory requirements referred to, "promptly" (such is the *peremptory* word of Section 12) was fatal to the right to inaugurate the action or proceeding by which the plaintiff's importations were seized and detained.

It seems very desirable to remove this doubt and uncertainty by eliminating the word "promptly" from Section 12, leaving Section 13 as heretofore to take care of any delinquent.

(2) "Two complete copies of the best edition thereof then published." In view of certain material, applications for the registration of claim of copyright of which have been of recent years more or less frequently made -- and particularly in view of the nature of

the deposits which in some instances have accompanied such applications -- it would seem that there should be definitely stated in the Act just what is meant by the phrase "two complete copies of the best edition." Standing alone, the language seems to call for no interpretations; but the need for interpretation arises in view of the type of material which has been submitted in the form of deposits by certain members of the public.

First of all, it may be pointed out that in the Act special emphasis has been laid upon this subject of deposits. In Section 10 registration is made to depend upon the fulfillment of the deposit of copies as one of the conditions precedent thereto. In Section 11 it is provided that where the copyright owner of an unpublished work desires to publish that work, the fact that he has registered his unpublished work shall not exempt him from the duty of the deposit of copies required under Sections 12 and 13. Section 12 requires that in the case of a published work in which copyright has been secured "there shall be promptly deposited in the Copyright Office or in the mail * * * two complete copies of the best edition thereof then published." And such stress did Congress lay upon the necessity of such deposit that it provided in Section 12 that "no action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with." But Congress did not stop there, difficult though that provision made the path of the copyright owner in the case of infringement as long as he failed to deposit copies. Under Section 13 the principle is made clear that the Government has the right to demand the deposit of copies of a copyrighted work even though the owner of such work, rather than deposit the same of his own accord, might prefer to subject himself to the embarrassments, in the case of infringement, described in the last-quoted excerpt from Section 12. In Section 13 it is provided that unless he promptly deposits the copies referred to in Section 12 the Register of Copyrights may demand such deposit; and that a refusal to comply with such demand will subject the refusing party to a fine of $100, to pay to the Library of Congress an amount equal to twice the retail price of two complete copies of the best edition, and the loss of his copyright.

In order to facilitate from the financial standpoint the deposit of copies by the copyright owner, Section 14 provides that the postmaster to whom are delivered the articles deposited as provided in Sections 11 and 12 shall mail them to the Copyright Office without cost to the copyright claimant.

The importance attached to the deposit of copies indicates that such deposit has a very definite purpose.

The answer to the question "What is the purpose of the deposit?" is to be found in Section 59 of the present Act. But anticipating for the moment the announcement of the purpose as set out in Section 59, it is important again to emphasize the fact that under the Act preceding the present Act the deposit served a most important end which under the present Act it no longer serves. Under the preceding Act the acquisition of copyright in a given writing depended, in the case of books, upon the deposit of two copies of the book in the Copyright Office itself. That is no longer the case under the present Act in connection with published works, for under Section 9 copyright is secured through the action of the copyright claimant which takes the simple form of publication of the writing in question and the affixing thereto of the copyright notice prescribed by the Act.

If the securing of copyright in a published work no longer depends upon the furnishing of a deposit in the form of copies thereof, once more the question may be asked, What purpose do such deposits now serve? Is it in order that the deposits shall become records of the Copyright Office? That is, under the present Act, is the Copyright Office the official repository of such copies? The answer must be in the negative for the reason that under Section 59 the Librarian of Congress is given the authority and duty to select from all deposits made in the Copyright Office such copies as he may see fit to remove therefrom.

It follows from the above that the deposit of copies is not required by the Act for the purpose of securing a copyright in published works or to form part of the permanent records of the Copyright Office for purposes of reference, identification or otherwise.

There remain to be considered Sections 59 and 13 which are the only sections which reveal the purpose not only of the requirement of the deposit, but the requirement as to the form which such deposit shall take in the case of a published work, to wit, two complete copies of the best edition thereof. These sections make it clear that the purpose served by the deposits under the present Act is the enrichment of the Library of Congress.

During the lengthy proceedings of the third session of the Conference on Copyright at which the Librarian presided and which were held at the Library of Congress March 13-16, 1906, at a time when, under the law in force, there was no provision that the deposit required by the Act should constitute the best edition, certain comments were made by the then Register of Copyrights and the Librarian of Congress which are material to the point now under discussion. Mr. Putnam asked the Register to give the reason for the use of the word "best" in connection with the discussion as to the nature of the deposits to be submitted by publishers filing claims of copyright. Mr. Solberg

pointed out that in his opinion the needs of the National Library might well be considered; that --

the present experience of the Copyright Office is that it requires a good deal of insisting to get good copies. The claimants try to deposit very imperfect copies, and anything but fresh copies -- and a compromise has been arranged, if I may use the word, that these are accepted as preliminary deposits upon a promise that the perfect copies will follow (pp. 300-301).

The following remarks of the Librarian are found on page 303:

We find that in England the publisher is taxed for one copy of the best edition for the British Museum. We should be satisfied to have one copy of the best edition instead of two of the first edition if that would accomplish the purpose.

* * * * * * * *

It is this difficulty in the administration and experience of the office, in getting what the Government Is really intended to get, which would make us disposed to be sure that we would get a really complete and perfect copy of a really creditable edition.

In the "Arguments Before the Committees on Patents of the Senate and House of Representatives, Conjointly, on the Bills (S. 6630 and H. R. 19853) To Amend and Consolidate the Acts Respecting Copyright," June 6, 1906, pages 14-15, the Librarian, referring to the conference on copyright from which quotation has been made above, stated:

The original purpose of such deposits was the enrichment of the Library. This is clear from their history, both in this country and abroad. They were made a condition of securing copyright, but they had no continuing relation to the copyright once secured. In England, for instance, the copies required (now five) are to be for the use of the libraries -- five libraries -- no one of which is the office of registration for copyrights. The earliest act in this country was that of Massachusetts, in 1783, which exacted a copy as a gift to the Library of the University of Cambridge, Harvard University, "for the use of said University," which was not the office of copyright. The earliest act providing for deposit in the Library of Congress, that of 1846, provided that the copyright proprietor should give one copy of the book to this Library, and at the same time it provided that he should give one copy to the library of the Smithsonian for the use of that library.

In 1867 the library of the Smithsonian became a part of the Library of Congress. The act of 1870 provided two copies, both to be addressed to the Library of Congress. But by that same act of 1870 the Library of Congress became the office of registration for copyright; and from that time, and because the failure to deposit not later than the date of publication actually voided the copyright, an impression has grown up that the articles deposited are an integral part of the record of registration, and have a peculiar sanctity as such. The fact of the deposit has been and will be an integral part of the record, and in times past this could most readily be proved by the copies themselves, the law providing neither for a certificate to the claimant admitting the receipt of the deposit nor an entry in the official record showing it. But hereafter the fact of deposit will be proved by the certificate itself.

It is interesting to note in view of the provisions of Sections 13 and 59 of the present Act, the language used by the Librarian with respect to copyright deposits. He said:

> A large proportion of these are of great value to the Library and are drawn up into it. The rest remain in the cellar. The accumulations in the cellar now number a million and a half items. Many of these would be useful in other Government libraries; for instance, medical books in the library of the Surgeon General's Office. Some of them might be useful in exchange with other libraries. A few might have value in exchange with dealers. The remainder are a heavy charge upon the Government for storage and care, without any corresponding benefit. They ought to be returned to the copyright proprietors if they want them, or, if not wanted, destroyed.

With this material for a background, it is to be observed first how strictly there is recognized in Section 13 the principle that the deposits are for the enrichment of the Library; for, as already pointed out, it is the Congressional Library, not the Copyright Office, which is to be provided with twice the amount of the retail price of two copies of the best edition of a work for which the copyright claimant has refused, after demand, to make deposit. The obvious purpose is that not only shall the Congressional Library receive two copies of the work without cost but that they shall be two complete copies of the best edition thereof.

The use to be made of the deposits, as reflected in Section 59, is declarative and explanatory of the requirement that such deposits be made. The section provides that--

> * * * of the articles deposited in the Copyright Office * * * the Librarian of Congress shall determine what books and other articles shall be transferred to the permanent collections of the Library of Congress, including the Law Library, and what other books or articles shall be placed in the reserve collections of the Library of Congress for sale or exchange, or be transferred to other governmental libraries in the District of Columbia for use therein.

One would suppose that from the wording of Sections 12, 13 and 59 the purpose of the deposits and the duty imposed upon the copyright claimant with respect to the submission thereof to the Copyright Office in the form required in the specific terms of the Act would be so clear as to call for no doubt. However, such is not the case.

There have been presented to the present Register for registration, applications for material accompanied by deposits which not only have the physical appearance but actually perform the functions of page proof of the writing, registration of claim of copyright for which is requested. This has occurred mainly in connection with material intended as contributions to newspapers. Page proof of such material in the very form in which it is intended to be published and is actually published in newspapers -- separate page proof sheets of such material, each sheet constituting a chapter of a given story -- have been assembled

together under a paper cover containing a title, the copyright notice has been affixed thereto, the matter has been placed upon certain bookstalls, made available to the public and sold in this form, and in such form is labelled a "book," and two copies thereof sent as deposits of such "book" to support an application for the registration of the claim of copyright therein.

Technically, this material constitutes a book within the general meaning of the Copyright Act; but not, it is believed, for the purposes of the deposit provisions of Section 12. Technically the requirements as to the securing of copyright may possibly have been met; but the securing of copyright in a published work is one thing, and the submission of "two complete copies of the best edition thereof" is another. The objection of the Register that this does not meet the requirements of Section 12; that in the case of contributions to periodicals requiring special registration a copy of the issue or issues of the newspaper in which the contribution has been published shall constitute the deposit required by the very terms of the Act, is confronted with the argument that as collated and bound this page proof now constitutes a "book" and that although publication thereof is to follow in newspapers the material was published first as a "book"; that because at the time of publication it was the only edition, it was necessarily the "best edition," and that the provisions of Section 12 with respect to the deposit of two complete copies of the best edition of a book have been met.

If the Register accepts the material for registration as applied for, he must accept it as a book and in so doing he must accept for the Library of Congress two copies of page proof, and interpret Section 12 as reflecting the intention of Congress that when it required "two complete copies of the best edition" of a written published work, it only meant "two complete copies of page proof" thereof. If such an interpretation is to be followed by the Register this will mean that he must accept page proof, submitted under the same conditions as to publication and notice, of all other books, whether scientific works, novels, encyclopedic works, or periodicals. It means that the Register must accept for the enrichment of the Library of Congress page proof material instead of the finished article -- a step which would seem to run counter to the purposes and uses of such deposits as contemplated in Section 59.

But this submission of deposits in the form of page proof has taken another phase which seems to make it all the more desirable that the intention of Congress as to the requirement of the submission of copies of the best edition by way of deposit should receive legislative or judicial elucidation.

There have from time to time been submitted to the Copyright Office accompanying one application and a fee of $2.00, two copies, of accumulations of page proof of material intended to be, and which actually has been, published in newspapers, consisting of unrelated comic strips, unrelated newspaper cuts, separate cross-word puzzles and other similar material. These have been collected on separate sheets printed on one side only after the manner of page proof, each page containing from two to six unrelated contributions, the whole being bound in paper covers and entitled a book, application being made for registration thereof as a single book. The Copyright Act provides that a fee of $2.00 shall accompany each separate contribution to a newspaper and that a copy of the newspaper in which the contribution is published shall be submitted by way of deposit. Registration of this material has been refused, first, on the ground that it is page proof which constitutes an intermediate step in the process of final printing and publication; on the further ground that the deposit made does not consist of the copy of the newspaper required by Section 12; and finally on the ground that the process carried out is nothing but an obvious expedient to avoid the payment of fees. Inasmuch as affidavits are submitted to show that the material in this form has been placed on sale and sold at various bookstands a week before being published in the newspapers, the applicant for registration claims that it constitutes a "book," and the best edition of the material published in view of the fact that at the time of such publication it is the only edition. Here again, if this contention is correct, the Register will be obliged to accept on July 1, say, the page proof of a novel or scientific book which is in reality made available to the public at large in the form of an edition, as the term is understood by people generally, a month later.

It is needless to point out that if the obligation to accept such material under Section 12 rests upon the Register, the Librarian in examining such material for the purpose of drawing it up into the Library will be limited to the choice of selecting page proof material or not obtaining the book at all. For there is no obligation on the part of the copyright claimant to submit to the Copyright Office an expensive edition of a book once a cheaper, though genuine, edition has been submitted as deposit with an application for registration of claim to copyright. If the Library is bound under the Copyright Act to accept on July 1, say, the page proof of any popular novel, such as "Gone With the Wind," three things at once become apparent. First, that all the Librarian has obtained for the permanent collections of the Library is page proof material which all will agree is not the proper subject of the permanent collections of the Library of Congress; second, having accepted such page proof on July 1, the Librarian might find himself in the difficult position of attempting

to sell or exchange on August 1 the page proof material in the possession of the Library in the face of the fact that on the latter date a regular bound edition of the book had already been placed upon the market. In such case the page proof would, of course, be useless for purposes of sale or exchange. Moreover, to obtain the regular bound edition of the book the Library would have to pay the retail price of a copy of the first real edition -- a situation obviously contrary to the intention of the Act that the Library and the people of the United States should be supplied with two copies of such regular edition without payment. Third, there would be no opportunity to distribute such page proof material to other libraries of the District of Columbia, for it is not conceived that any of such libraries would find it practicable or convenient to give space on their shelves to page proof.

It is therefore felt that the law should be amended in some way so as to make it more apparent that one of its main purposes, to wit, the enrichment of the Library of Congress, cannot be defeated by so transparent a device.

In the cases of this type which have come to the attention of the undersigned, this page proof material has been submitted for registration as the result of a purely colorable publication. In one case evidence of a sale of one copy -- in another, sales of a score of copies of material, which was within a few days after first publication published by the thousand in the public press, was presented in order to establish the fact of publication which, under the Act, is a condition precedent to registration. It needs no argument to show that popular reading material is not supplied the public in the form of page proof through the sale of even a hundred copies.

This tendency could be avoided by an amendment to the present Act defining what is meant by the term "complete copies of the best edition"; or perhaps what is meant by publication. In the British Copyright Act of 1911, Section 35 (3) "a work shall be deemed to be published * * * unless the publication * * * is colorable only and is not intended to satisfy the reasonable requirements of the public."

It might also be desirable to amend existing legislation by a provision which would make it plain that page proof or its equivalent of material intended to meet the requirements of the public in the form of what the man in the street understands by the term "best edition," does not meet the requirements of deposits made for enrichment of the Library of Congress in connection with copyright registration.

The place for such amendments might well be the interpretative Section 62. Amendments suggested will be found under that section heading.

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(3) Works of foreign origin. Here also the clause should be amended to read: "one complete copy of the edition so published." The addition of the clause about the notice (see suggested amendment on p. 42) seems necessary in order to make clear that it was not the intention to attempt to compel the use of the notice on every foreign edition, but only upon the edition intended for circulation in the United States, in line with the second clause of Section 9.

(4) * * * "which copies or copy * * * in Section 15 of this Act." This whole clause is out of place and meaningless, at least as far as the foreign copy is concerned, for the requirement of manufacture is fully taken care of under Section 15.

(5) Following the semicolon after the word "contribution" in line 16, eliminate the words "or if the work is not reproduced in copies for sale" to "or other reproduction," inclusive, and add: "to be accompanied in each case by an application for registration of a claim of copyright." The clause here eliminated is entirely unnecessary and out of place, being in substance merely a repetition of the requirements already contained in Section 11, and the copyright thereunder can only come into being by such deposit.

Moreover, inasmuch as no new copyright is initiated by publication in the case of works previously copyrighted under Section 11, there seems to be no purpose in requiring an application; and, therefore, to the clause "to be accompanied in each case by an application for registration of a claim of copyright," should be added, "except in the case of works originally copyrighted under the provisions of Section 11."

(6) "No action or proceeding shall be maintained," etc. After the word "copies" add "or copy" so as to cover the deposit of a foreign work and also of an issue of a periodical containing a contribution, as well as the deposit of copy made under Section 11.

In seeking an injunction to restrain threatened infringement, time may be of vital importance and the damage done before the act of registration can be completed. In *New York Times Co.* v. *Star Co.* (195 Fed. R. 110, affirmed by C. C. A. 204 Fed. R. 586), it was plainly intimated that a deposit in the mails would be sufficient to enable injunction to be sought to restrain threatened infringement, even though the copies might not yet have reached the Copyright Office.

(7) Changes seem to be indicated in that provision of the section which reads:

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 * * *.

The change suggested is embodied in the following:

* * * or if the work is by an author who is a citizen or subject of a foreign state or nation not domiciled in the United States, and has been published for the first time in a foreign country with the notice of copyright required by the Act, one complete copy of the best edition so published.

The reasons for this proposed change are: (a) It is not presumed that Congress meant to extend the privilege of depositing but one copy if the author, although an alien, was actually domiciled in the United States at the time of publication; and (b) in the case of *Italian Book Co.* v. *Cardilli* (273 Fed. R. 619; Bull. 19, p. 194) Judge Hough said that he could discover nothing in the Copyright Act which precludes a foreign proprietor from publishing a work abroad without the statutory notice and four years later securing a valid copyright in the United States by affixing the required notice and registering the claim as beginning from the date of first publication abroad, a situation which could hardly have been contemplated by the legislature.

(8) Change the opening clause to read: "That after the work has been published with the notice of copyright required by this Act * * *."

The whole section, amended as proposed, will then read:

That after the work has been published with the notice of copyright required by this Act, there shall be 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, or if the work is by an author who is a citizen or subject of a foreign state or nation not domiciled in the United States and has been published for the first time in a foreign country with the notice of copyright required by this Act, one complete copy of the edition so published; or if such work be a contribution to a periodical for which separate registration is requested, one copy of the issue or issues containing such contribution; to be accompanied in each case by an application for registration of a claim of copyright. No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies or copy and registration of such work shall have been complied with : *Provided,* That in the case of the publication of a hitherto unpublished work copyrighted under Section 11 of this Act, the deposit of copies of said published work will entitle the copyright proprietor to maintain an action for infringement of the writing for which such copyright has been secured.

Section 13 --Refusal To Deposit Copies.

To harmonize with the suggested changes in Section 12, change Section 13 to read :

That should the copies or copy called for by the foregoing section not be deposited promptly, the Register of Copyrights may at any time after the publication of the work, demand such copies or copy by written notice to the proprietor of the copyright and, in default of such deposit within three months thereafter from any part of continental United States, or six months from any outlying territorial possession of the United States, or from any foreign country, the proprietor of

the copyright shall be liable to a fine of $100 and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright shall become void.

Section 14 --Deposit in the Mails.

For the sake of uniformity, change "claimant" at the end to "proprietor."

Section 15 --Manufacturing Requirements.

This whole section needs to be simplified and clarified to remove difficulties that have arisen in the course of administration. For example, a citizen of the United States living abroad writes a book in a foreign language and has it printed and published abroad with a notice of United States copyright. That this is not a book "of foreign origin" which justifies the Copyright Office in accepting the deposit and making registration has been already indicated in the comments on Section 8.

Does the exception as to books of foreign origin in a language or languages other than English include periodicals as well as books of foreign origin?

In the provision for lithographs or photo-engravings it is obvious that it cannot be the *subjects* represented that illustrate a scientific work or reproduce a work of art, but the illustrations thereof.

No provision is made for an affidavit in the case of works covered by the last clause of Section 15.

It would appear that Section 16 (with a slight addition) is entirely sufficient to cover the manufacturing requirements, and it seems unnecessary to encumber Section 15 with the details of manufacture embodied in Section 16.

Suggested revision of Section 15:

That if the book or periodical specified in Section 5, subsections (a) and (b) of this Act, is in the English language, the text of all copies, except as below provided, shall be wholly manufactured within the limits of the United States as specified in the next section, including any illustrations therein produced by lithographic or photo-engraving process, as well as lithographs or photo-engravings separately published, except where in either case the subjects represented by such lithographs or photo-engravings are located in a foreign country and the representations thereof illustrate a scientific work or reproduce a work of art: *Provided, however,* That said requirements of American manufacture shall not apply to works in raised characters for the use of the blind, or to books or periodicals in foreign languages by foreign authors not domiciled in the United States, or to books or periodicals deposited for ad interim copyright under Section 21 of this Act.

The last clause in Section 15 should be transposed to Section 16, which will then read :

Section 16 --Affidavit of American Manufacture.

That in the case of a book, the copies so deposited * * * or if the work be produced by lithographic process, or photo-engraving process, or any other process,

that such process was wholly performed within the limits of the United States, and that the printing of the text and binding of said book have also been performed within the limits of the United States. Such affidavit shall state also the place where, and the establishment or establishments in which such type was set or plates were made or lithographic, photo-engraving or other process, and printing and binding, were performed, and the date of the completion of the printing of the book or the date of publication.

Sections 18 --19 --Notice of Copyright.

It will be remembered that under the old law it was found that many copyrights were lost by failure to deposit copies of the work within the prescribed time, namely, on or before the date of publication. But experience under the present Act has demonstrated that even more copyrights have been lost by failure to comply with the requirements as to the notice. Everything hinges upon the notice; if that is defective or misplaced, the copyright is lost beyond recovery. Section 20 offers little help, for its provisions are strictly limited to the accidental omission of the prescribed notice "from a particular copy or copies" and not the entire edition. It is to be observed, also that the statute contains no clearly defined provision with respect to the form and position of the notice for a motion picture or for a contribution to a periodical, and there has been a difference of opinion whether the notice may appear at the end of the reel or contribution instead of at the beginning.

Not only is there frequent failure to print an adequate notice, but it happens time and again that while the notice may itself be in proper form, it is printed in the wrong place.

Under Section 10 the registration is made dependent upon compliance with the provisions of the Act. This applies especially to the notice, for without a proper notice in the proper place the work falls into the public domain, and there would be no purpose in making registration of a claim already invalidated by the proprietor's own act. Of course, in certain cases it may be a nice question whether the notice, irregular in some respects, would pass muster in a court of law. If these two sections could be worded so as to minimize the danger of loss of the copyright through inadequate notice, it would be a boon to the public and a saving of much time and correspondence to the Copyright Office.

Suggested changes in Section 18:

That the notice of copyright required by this Act 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 literary, musical, or dramatic work, *or a motion picture*, the notice shall also include the year in which the copyright was secured. In the case, however, of works specfied in subsections (f) to (k) inclusive, of section five of this Act, the notice may consist of the letter C enclosed within a circle, thus ©, *accompanied by the name of the copyright proprietor*, or by his initials, monogram, identifying mark or symbol, to be

placed upon or in close proximity to the work itself: *Provided,* That if the notice contain the initials, monogram, identifying mark or symbol, his name shall appear in some accessible place, such as the margin, back, permanent base or pedestal, or upon the substance on which the copies shall be mounted. But in the case of any literary work for which a renewal of the copyright has been secured under the provisions of this Act, the notice shall consist of the word "Copyright" or the abbreviation "Copr.," the year date of the original publication, followed by the year date of the renewed copyright and the name of the proprietor of such renewed copyright.

Section 19.

Suggested amendment:

That the notice of copyright shall be applied, in the case of works specified in subsections (a) to (e), inclusive, of Section 5, either upon the title page or the page immediately following; in the case of a periodical, the notice may appear in the masthead or upon the contents page, or the first page of text; in the case of a musical work, it may appear on the first page of music; in the case of a motion picture, the notice may be applied under the title or at the end of the film; in the case of a contribution to a periodical, under the title or at the end of each installment: *Provided,* That one notice of copyright in each volume or in each number of a newspaper or periodical, or upon the first reel of a motion picture consisting of several inter-related reels shall suffice.

Section 20 --Inadvertent Defect in Notice.

Omission of notice by accident or mistake. The courts have differed somewhat in their construction of the application of this section. There are two decisions which found the section applicable even to a case where there was an attempted notice which proved to be illegible on all the copies *(Cohn* v. *Etchison,* 225 Fed. R. 135*;* Copyright Office Bull. 18, p. 73; and *Straws* v. *Penn Printing Co*., 220 Fed. R. 977, Bull. 18, p. 439). On the other hand, in *United Thrift Plan* v. *National Thrift Plan* (34 Fed. [2d] 300, Copyright Office Bull. 20, p. 739) and in *Smith* v. *Wilkinson* (35 U. S. P. Q. 113), it was held that the section plainly implies that a copyright must have been secured by publication with the prescribed notice on the bulk of the edition and that the omission must be the exception and not the rule.

Suggested change for clarification:

That where the copyright proprietor has sought to comply with the provisions of this Act with respect to notice, the inadvertent omission of the prescribed notice from a particular copy or copies, or the illegibility of the notice on 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 any person who has been misled by the omission or defect of the notice as aforesaid; etc., to the end.

Sections 21 and 22 --Ad Interim Copyright.

The provisions of these sections have given rise to several difficult administrative questions, resulting in a pertain lack of uniformity of

practice. It is to be observed that the deposit of copy is required to he made "in the Copyright Office" within the prescribed time. As a matter of fact, the copy often reaches the Copyright Office a day or two late, although it may have been mailed in ample time normally to reach the office within the sixty-day limit. Should the office reject? It would seem to have no choice but to insist upon the rigid requirements of the statute.

But assuming that the copy has arrived within the prescribed time, let us say on the fifty-ninth day, is the protection retroactive to the date of first publication abroad? In other words, was it the intention of the Act to give an absolute protection for sixty days to every work first published abroad in the English language, without any notice of copyright reservation or any indication (up to the time of such deposit) that it, was the intention of the proprietor to seek copyright in the United States? As the law now stands, it seems that it may leave a hiatus during which the book is apparently unprotected in the United States.

After the American edition has been published as prescribed in Section 22, from what date must be reckoned the beginning of the copyright term? The only "full term elsewhere provided in this Act" is found in the following Section 23: "That the copyright secured by this Act: shall endure for twenty-eight years from the date of first publication." Does this mean in the case of ad interim books that the term shall begin from the date of first publication abroad or from the date of first publication of the American edition? And if the latter, would it be in addition to the ad interim term?

Upon the correct answer to these questions depends, the form of the certificates of registration and, in some cases, the year date that should appear in the notice in the American edition. This is vitally important for the copyright owner, since under the rulings of the courts, postdating the notice results in forfeiture of the copyright. For example, if the ad interim book was published in 1937, the deposit of copy made in December of that year, and the American edition brought out in January 1938, which year shall appear in the statutory notice? Complications also arise when the book first appears abroad in installments.

There is necessity for a clear understanding of just what is meant by the words "ad interim term." It would seem at first sight that the ad interim term begins from the date on which the copy is received in the Copyright Office because, until such receipt, who is to say whether a claim for ad interim protection is going to be made at all ? On the other hand, if the term of protection is to commence within any time from one to sixty days after the publication of the writing for which protection is sought, what good does a term of protection do the author, if between the date of publication and the beginning of the term, there is opportunity more or less ample for infringement?

Two distinct periods of time are mentioned in this provision (a) sixty days from the date of first publication of the work abroad, during which time the author has the right to "request a reservation of the copyright" and deposit a copy of the work in the Copyright Office, (b) a period of four months following the day of such request and deposit filed in the Copyright Office.

Now Section 22 provides that "whenever, within the period of such ad interim protection" the book shall have been published in accordance with the manufacturing provisions of the Act and the usual provisions as to deposit and registration shall have been complied with "the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act." That full term is designated in the next sentence of the Act, which is the opening sentence of Section 23 and states that such full term "shall endure for twenty-eight years from the date of first publication."

It is obvious that the term of protection of the work shall not begin from the date of the republication thereof with notice in the United States, for such an interpretation runs counter to the provision that the writing itself shall be under ad interim protection during the ad interim period, which is intended to and must precede republication of the work in the United States. It runs counter to the provision in Section 23 that the term of copyright shall endure for twenty-eight years from the date of first publication. Such an interpretation would result in granting to a foreigner a period of copyright protection exceeding that given to American citizens.

Does the law mean that the period of protection shall run for twenty-eight years from the date of the deposit of the foreign book in the Copyright Office and the request for ad interim protection, which is necessarily a date subsequent to its actual publication abroad ? Such an interpretation would be subject to the same objection; for if the book is published in England on January 1, 1938, and deposit with claim of ad interim protection reaches the Copyright Office on March 1, 1938, the work would be protected by a copyright term which commenced to run two months after its first publication, which would cause the copyright term to expire, not twenty-eight years after its first publication, but twenty-eight years and two months thereafter. In other words, in such case the copyright would expire -- if not renewed -- two months after the expiration of the copyright term of a work published in the United States on the same date, January 1, 1938, and the enjoyment of freedom of the work by the general public of the United States as an item falling into the public domain would be delayed by a period of two months when compared to the publication of an American work under similar conditions.

But if the date of the commencement of the ad interim protection is the date of first publication, American citizens are placed on a par with the foreign author, and the provision of Section 23 that the copyright protection secured shall endure from the date of first publication of a work is fully met.

Moreover, it would seem that in fairness to the foreign author the ad interim term -- the period of ad interim protection -- should commence, with the date of first publication broad; for if it is not to commence until the date of deposit and request for such protection in the Copyright Office, there is a space of time -- that portion of sixty days elapsing between first publication abroad and the date of deposit and request for ad interim protection in the Copyright Office -- during which the work is apparently unprotected.

There is a provision dealing with assignments of copyright which contains a principle which might seem to be pertinent to the case under discussion. In Section 44 it is provided that every assignment of copyright shall be recorded in the Copyright Office within three calendar months after its execution in the United States or six months after its execution abroad, in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded. The idea is that for the purposes of the assignment the recording assignee is protected for the whole period of such three calendar months even if he records on the last day thereof -- in other words that a recording performed on the last day has the same legal effect as if he had recorded on the first day of the three months' period. The original recording assignee is protected as against a subsequent assignee taking in good faith, even though the latter records within the three months' period following the original assignment, provided that the original assignee records within such period.

The law puts such subsequent assignee in good faith on notice with respect to the privilege of recording by the original assignee within three months following the original assignment, i. e., a subsequent assignee is put on notice by the Act that if there has been a previous assignment of the work to another person, that person has a right to record the assignment within three months of the date of its execution which, if done, will make it good as against the subsequent assignee, even though he may have recorded his assignment during that three months' period.

So it would seem to follow in the case of works in the English language first published abroad. It may well be argued that Section 21 puts the public on notice that application for ad interim copyright may be made by the foreign author at any time within sixty days following the first publication abroad. It is conceivable that deposit

and request for ad interim protection of a work in the English language may reach the Copyright Office on the very day on which it is published aboard. The act of publication may be deferred unti1 the volume is in the custody of this office. This result is one which under the Act the foreign publisher has a legal right to bring about. It would seem to follow that the person who, knowing of such foreign publication, within sixty days thereafter infringes it in the thought that at the time of such infringement the foreign author may not have already applied for ad interim protection, or may not do so at all, should infringe at his peril, and cannot escape the ensuing legal and financial responsibilities.

If this is what is meant by the use of the term "period of such ad interim protection" contained in Section 22, the intention does not clearly appear, and the ambiguity should be removed. This could be accomplished by amending Section 21 by interpolating after the words "expiration of" the words "six months after the date of first publication of such work abroad." This amendment would give the foreign copyright owner no more time to acquire ad interim copyright than the law now grants him; for he has already sixty days in which to deposit his work here, and if he does so on the sixtieth day he is protected for the ensuing four months. Such amendment would, however, grant him real protection from the date of publication, should he see fit to request it within the sixty-day period. And it would protect him in specific terms from an unscrupulous infringement by an infringer who might see fit to gamble on the chance that the opportunity to exercise a right which the law provides him may not be grasped.

Complications, also arise when the book first appears abroad in installments.

Suggested amendments:

SEC. 21. That in the case of a book first published abroad in the English language, whether as a whole or in installments, the deposit in the Copyright Office not later than sixty days after such. publication, of one complete copy, with a request for the reservation of 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, if published in installments, of the date of publication of the last installment, shall secure to the author or proprietor an ad interim copyright which shall have all the force and effect given to copyright by this Act, for the period of six months from the date of first publication of such work abroad.

SEC. 22. That whenever within the period of such ad interim copyright an authorized edition of such book shall be printed or produced in the United States in accordance with the manufacturing provisions specified in Section 15 of this Act, and published in the United States with the required copyright notice, followed by deposit of copies with the affidavit and application for registration elsewhere provided in this Act, the copyright shall be extended

to endure for the term of twenty-eight years including the ad interim term: *Provided., however,* That the failure of the copyright proprietor to publish the American edition of such book within the ad interim term shall not be deemed to preclude such proprietor from securing copyright in such book upon subsequent compliance with the manufacturing provisions of this Act.

This proviso is suggested because it does not appear to have been the intention to compel the foreign author to secure ad interim copyright, but rather to offer it as an additional privilege to safeguard his work against infringement during the interval between publication abroad and publication here. If, however, he is willing to take the chance of foregoing ad interim copyright, that is his affair; but why should it necessarily prevent him from securing copyright if he afterwards complies with the manufacturing and other provisions of the law? For the manufacturing provisions were inserted in the law merely to safeguard American labor against foreign competition in the printing of books in the English language. This purpose is accomplished when the book has been reprinted in the United States from type set therein, etc.

Section 23 --Copyright Term -- Renewals.

This section, which deals with the renewal of copyrights, applies only to copyrights secured since July 1, 1909. Like various other sections it was the result of welding several drafts into one. At first, it was not proposed to give the proprietor, as such, any renewal privilege, but merely a straight term of thirty-six years, and the renewal privilege was restricted to the author and those naturally dependent upon him, but in the course of the welding process the author seems in effect, rather than intention to have been confined to very narrow limits with respect to the renewal privilege. One of the results is the receipt in the Copyright Office of many apparently conflicting applications for renewal of the same work.

In connection with this phase of copyright law certain questions of administration have arisen which can be intelligently presented and discussed only if the following principles be constantly borne in mind :

The provision dealing with renewals is a reflection of the specific intent of Congress to safeguard the interests of the author or his family in the work created by him.

It was urged before the Committee [on Patents of the House] that it would be better to have a single term without any right of renewal, and a term of life and fifty years was suggested. Your Committee, after full consideration, decided that it was distinctly to the advantage of the author to preserve the renewal period. It not infrequently happens that the author sells his copyright outright to a publisher for a comparatively small sum. If the work proves to be a great success and lives beyond the term of twenty-eight years, your Committee felt that it should be the exclusive right of the author to take

the renewal term, and the law should be framed as is the existing law so that he could not be deprived of that right. The present term of twenty-eight years with the right of renewal for fourteen years [Act of March 3, 1891] in many cases is insufficient.

* * * Instead of confining the right of renewal to the author, if still living, or to the widow or children of the author, if he be dead, we provide that the author of such work, if still living, may apply for the renewal, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executor, or, in the absence of a will, his next of kin. * * *

In the case of composite or cyclopedic works to which a great many authors contribute for hire and upon which the copyright was originally secured by the proprietor of the work, it was felt that the proprietor of such work should have the exclusive right to apply for the renewal term. In some cases the contributors to such a work might number hundreds and be scattered over the world, and it would be impossible for the proprietor of the work to secure their cooperation in applying for renewal.

Section 24 deals with the extension of copyrights subsisting when this Act goes into effect and has the same provision regarding those who may apply for the extension of the subsisting term to the full term including renewal, as is found in the preceding section regarding renewals generally. (Rept. No. 2222 to accompany H. R. 28192, 60th Cong., 2d sess., pp. 14, 15.)

Section 23 gives the right of renewal to the proprietor of the copyright in case of--

(a) Any posthumous work.

(b) Any periodical, cyclopaedic or other composite work upon which the copyright was originally secured by the proprietor thereof.

(c) Any work copyrighted by a corporate body (otherwise than an assignee or licensee, of the individual author).

(d) Any work copyrighted * * * by an employer for whom such work is made, for hire.

In the case of all other copyrighted works (including a contribution by an individual author to a composite work where such contribution has been separately registered), the right to renew is vested in the author, or in case of death, the widower, widow, or children of the author, or if they be not living, the author's executor, or in the absence of a will, in the next of kin, as stated in the abstract from the report of the Committee quoted above.

It is apparent from what has been stated thus far that it was the purpose of Congress to provide, and that Congress in fact did provide that certain persons "may apply for the renewal" of copyright. This phrase is used repeatedly by the Committee in reporting on Sections 23 and 24, and in noting the "change in existing law as to those who may apply for the renewal." It seems likely that this term was thus used by the Committee because of its consciousness of the fact that many applications for renewal might be made by members of the classes defined who in good

faith might believe themselves to be vested with the right to renew, but who, as a matter of fact and

law, might not be thus vested; or of the fact that as between two or more members of the classes entitled to renew, a conflicting claim or claims might exist and that, irrespective of where the substantive right might actually be lodged, the statutory right to file the claim of renewal with the Copyright Office within the period defined by the statute should, pending the determination of the question of the substantive right, if and when raised in the proper forum, not be taken away. It is precisely in connection with such questions that certain difficulties of administration arise.

The normal process of renewal registration involves the following steps: (a) Receipt of an application to renew which (1) identifies the work for which copyright renewal is sought; (2) identifies the applicant as coming within the general class of those entitled under Sections 23 and 24 to apply for renewal; (b) identification of the work originally copyrighted, and of the author and copyright owner by reference to the volume of the Registry in which the claim of original copyright was recorded; (c) registration of the renewal and despatch to applicant of a certificate of registration thereof.

Suppose that A has within the renewal period applied for and obtained registration of renewal copyright as the author thereof. Thereafter, but still within the renewal period, B applies for a renewal of the same copyright alleging in his application that he is an employer for hire, having hired A to do the work on a salary. Here are two conflicting claims of the right to renewal. If A did the work as an individual author not under hire, he is vested with all substantive rights of renewal. In such case, B has actually no right to renew; and vice versa. Each party in his application sets out facts which, if true, create substantive statutory rights of renewal. From the standpoint of administrative mechanics, three courses are open to the Copyright Office: (1) It may refuse to register both applications; (2) it may register one claim and refuse to register the other; (3) it may register both applications.

Course (1) the Copyright Office should not pursue because in so doing it is practically certain to deny one of the claimants a right to which he is entitled in the words of the statute.

Course (2) the Copyright Office cannot follow, for this involves the investigation by the Register of a question of substantive rights, and its determination in favor of one party and against the other.

Course (3) while unpalatable in that it registers two conflicting claims (seeing that the purpose of registration is to indicate to the public, if possible, who the real owner of a renewed copyright is) appears to be the one which it is the duty of the Register to follow if an adequate record of

such renewal claims is to be kept at all. This because each applicant has provided the Copyright Office with

statements which establish prima facie that he is entitled to file an application for renewal of copyright. On this state of facts alone the duty of the Copyright Office to register is clear. The act of registering the claim does not add to or take away from any substantive right which either party may have -- it is the mere recording of *a claim of renewal* which may be sound or unsound. That is to say, as a matter of law, registration of A's claim to copyright can do him no good if the claim is in fact without foundation; nor can it harm B's claim if the latter is sound. It may be admitted that the purpose of copyright registration is to make of record claims of copyright in copyrightable works -- works which persons other than the copyright owner cannot copy without his consent. This purpose is not actually thwarted by the fact that the record books of the office show there are two parties instead of one claiming copyright ownership in the matter which has been renewed. Nevertheless, the record is clearly confused by the registration of conflicting claims.

There is, however, this additional point to consider in connection with renewals of copyright.

The securing of a renewal copyright is conditioned upon timely application to the Copyright Office on the part of members of the class entitled to apply therefor. The application shall be made within one year prior to the expiration of the term of copyright. Section 23 states that such persons shall be entitled to a renewal when application shall have been made "and duly registered" in the Copyright Office within one year prior to expiration of the original term of copyright, and that "in default of the registration of such application" the copyright shall determine at the expiration of twenty-eight years from the first publication.

It has not been the custom of the Copyright Office to interpret the above provision concerning registration literally. It has construed Section 23 to mean that once a person entitled under the Act to file an application for renewal files it within the renewal year, he has done all that can be required of him to secure registration of his claim, and that absence of the performance of the physical act of registration by the Copyright Office should not and could not affect his legal right to renew.

To construe the law literally could mean that an applicant who has done all that the law tells him to do, or that *he* can do to safeguard a right granted him by statute, may be subjected to the loss of the right by virtue of the nonperformance of an act of administration over which he has no control. Documents received by Government offices are sometimes lost or not acted upon promptly. Is the applicant to suffer because registration

was not actually made within the renewal period of an application for renewal duly filed within

the designated time in the Copyright Office? Applications for renewal have often been received at a time so late in the renewal year as to make the physical act of registration impracticable, if not impossible, within that period unless the orderly process of recording other current copyright business is set aside, and preference given to renewal applications. If it is suggested that Sections 23 and 24 put the applicant on notice that his application must be filed at so early a date in the renewal year as to make registration physically possible in the ordinary course of business within the designated time, the answer may well take the form of another inquiry, to wit: How is the applicant to know how much time is required to make registration of renewals in the ordinary course of copyright business?

It is such considerations as the above which have constrained the Copyright Office to construe the term "duly registered" in Sections 23 and 24 as synonymous with the filing by the applicant of his application for renewal within the renewal period. It is suggested, therefore, that the words "and duly registered" towards the end of the first proviso, and also in the second proviso) be eliminated; and that the closing sentence beginning "That in default of the registration of such application for renewal and extension," etc., be changed to read: "That in default of such application for renewal"; and add at the end of Section 23 "or from the date of deposit under Section 11."

From yet another aspect the system of renewal of copyrights raises certain difficulties.

The securing of copyright in the case of published works is accomplished by the mere publication of the material thing sought to be copyrighted with the notice of copyright required by the Act (Sec. 9). Let us say that the author of such a work files his renewal application within the renewal year, that it is duly registered and certificate of renewal issued to him. The book has gone out of print, and he desires to republish it. The courts hold that a renewed copyright is not really the extension of an existing right, but a new grant. It seems evident that, with respect to the subject matter of the new grant of copyright, a new copyright must be secured. In the case of the original work, copyright was secured by the method provided by Section 9, and by publishing the work with the notice, say, "Copyright by John Smith 1909." What notice is required for the same work when republished after a renewal is secured? The Act is silent on this point; nor does it state expressly whether *republication* is a requisite of the securing of the new term of

copyright in such work. These questions are of practical importance from the standpoint of Copyright Office administration for, as already observed, Section 10 provides that registration shall be made only if the provisions of the

Act are complied with. And they are of practical importance when an author inquires: "I am the holder of a renewal copyright in a book. This right vested in me August 1, 1937. The original copyright term ended August 1, 1938. I want to republish this book January 1, 1939. Do I need a copyright notice at all? If so, what notice is adequate?"

These questions seem pertinent in view of the fact that the only process which the Act prescribes of securing an original copyright in a published work consists of publishing it with a notice that gives (a) the word "Copyright" or "Copr.," (b) the year date of publication, and (c) the name of the copyright owner. It is from the date of *first publication* that the first period of copyright protection in a work begins to run (Sec. 23). But in the case of a book republished under the new grant of copyright, the act of publication plays no part in securing the second term of copyright; for this must necessarily begin to run by operation of law on the expiration of the first term where application for renewal has been made in due course. In the hypothetical case before us, the book which is to be republished under the new grant will not be published until January 1, 1939 -- five months after the expiration of the original copyright term. It should, of course, when published have a copyright notice as a warning against innocent infringement; for under our American conception of copyright the public is entitled to such notice. But should the notice be limited to the original year date of first publication as required by Section 18? It seems not -- for the purpose of the date in a copyright notice is to inform the public of the year when the first term of copyright protection began to run -- and in the assumed case this came to an end August 1, 1938, whereupon the now grant came into being. A copyright notice bearing only the original year date of publication might, standing alone, more than 28 years thereafter, be regarded almost as an inducement to infringe. It is, therefore, believed that not only the year date of the original publication, but the year date of renewal, should appear in the book quite irrespective of when it may happen to be republished under the new grant. This would constitute notice to the public that the work had been renewed.

In the case of a "periodical, cyclopaedic or other composite work" the question is occasionally presented as to whether the renewal right given to the proprietor thereof (usually the publisher) secures to him control only of the work as a whole or the individual parts as well. No

court appears as yet to have determined this question; but the applicable provisions of the Act seem to point to an interpretation unfavorable to the author contributing to such work.

Section 3 of the Act provides that "the copyright upon composite works or periodicals shall give to the proprietor thereof all the

rights in respect thereto which he would have if each part were individually copyrighted under this Act." This means that if the owner of a periodical copyrights the periodical, he gets the same right in each separate contribution thereto as if he had taken out a separate copyright for such article. This, of course, is predicated on an existing right in him *ab initio* to copyright each article. Put in another form, if he has the right to copyright each contribution, he can copyright them all by copyrighting the periodical containing them and his right in each article is the same as his right in the periodical. Since his right in the periodical consists of a copyright therein, his right to each article must consequently consist of a copyright in each such article.

Section 23 specifically provides that in the case of a composite work upon which the copyright was originally secured by the proprietor thereof, the proprietor of such copyright is entitled to the right of renewal upon application made in accordance with the requirements of the section.

It is further provided that in the case of any other copyrighted work, *including a contribution to a composite work when such contribution has been separately registered,* the author, if still living, or the widow, widower, or children of the author, or if they are not living, the author's executors, or in the absence of a will, his next of kin shall be entitled to renewal. It seems plain that unless at the time of copyrighting the original composite work the contribution was registered as the subject of an individual copyright apart from the copyright of the composite work, the author of such separate contribution is not entitled to a renewal. In many cases the original proprietor has, when the renewal term commences, long since gone out of business without a successor, and unless the author is permitted to register a renewal, the copyright is gone forever. This seems to be the only logical construction of the Act, and the practice of the Copyright Office is accordingly to make search to see whether the contribution was separately registered and to base its action upon the result of such search. Nevertheless, this provision seems opposed to the general intendment of the Act that renewal by authors is looked upon with a kindly eye by Congress. Unless the author is given more consideration, the effect of the section as it now stands might well

be regarded as defeating to an important extent the purpose for which the renewal provisions were inserted in the law.

"Any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author)." The original hearings (see volume for 1908 at p. 88) indicate that this was intended to cover works of an *impersonal* character, such as law digests, dic-

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tionaries, directories, etc., made by the staff or others whose individual work was merged in the whole and incapable of identification. But applications are coming to the office under this clause for works of a more personal character (e. g., textbooks), and the office is in doubt whether it ought to register on that basis, especially where a conflicting claim is filed by the individual author. For the proprietor must have secured his original rights either as assignee of the author, in which case the clause would not apply, or as employer for hire, in which case the next clause would apply (as it would likewise for the impersonal works mentioned before).

It would seem, therefore, that this obscure and bothersome clause may profitably be dropped entirely without thereby depriving the "corporate body" of any right now fully guaranteed by its status as "an employer for whom such work is [obviously a misprint for "was"] made for hire." This clause likewise gives rise to the filing of conflicting applications, the author claiming that the work was produced under a contract of sale and not of employment. The hearings disclose that this clause was intended to cover works produced by salaried employees in the course of their employment, and it would conduce to clarity if the clause so read: "or by an employer for whom such work was made by salaried employee or employees in the course of employment." With these suggested amendments, the section would read:

That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, or in the case of unpublished works deposited under Section 11, from the date of such deposit in the Copyright Office: *Provided,* That in the case of any posthumous work or of any periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or by an employer for whom such work was made by salaried employee or employees in the course of employment, the proprietor of such copyright shall be entitled to a renewal of the copyright in such work for the further term of twenty-eight years when application for such renewal shall have been made to the copyright office within one year prior to the expiration of the original term of copyright: *And provided further,* That in the case of any other

copyright work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal of the copyright in such work for a further term of twenty-eight years when application for such renewal shall have been made to the copyright office within one year prior to the expiration of the original term of copyright: *And provided further,* That In default of such application for renewal, the copyright in any work shall determine at the expiration of twenty-eight years from first publication or from the date of deposit under Section 11.

Section 31 --Prohibition Against Importation of Literary Works.

Subsection (c) was inadvertently allowed to remain in its original form after it was concluded to except from the manufacturing clause in Section 15 "the original text of a book of foreign origin in a language or languages other than English." The subsection applied to the situation under the old law but is wholly inconsistent with the present law. For inasmuch as copyright can be secured in a book of foreign origin in a language or languages other than English without the necessity of being reprinted here, it necessarily follows that free importation must be permitted or the copyright would be of no value. It is suggested therefore that the subsection be brought into line with Section 15 to read as follows:

To the authorized edition of a book of foreign origin in a language or languages other, than English.

Section 43 --Assignments of Copyright.

With respect to the provision that "every assignment of copyright executed in a foreign country shall be acknowledged by the assignor before a consular officer or secretary of legation of the United States authorized by law to administer oaths or perform notarial acts," it was stated in the Report to accompany H. R. 28192 (Rept. No. 2222, 60th Cong., 2d, sess.) that, referring to assignments executed in foreign countries, it was thought better in such case to provide that the assignment should be acknowledged before a consular officer or secretary of legation of the United States." Occasionally assignments have reached the Copyright Office which do not show such acknowledgements. The question of the right of the Register to record such unacknowledged assignment has occasionally been the subject of discussion in the office. The upshot of such conferences has been that irrespective of how the absence of such an acknowledgment might affect

the rights claimed under the assignment, it was not the purpose of the provision to provide that no assignment, unless thus acknowledged, could be made of record in the Copyright Office. Consequently, such assignments are accepted for registration. However, the authority of the Register to do so may be considered open to doubt in view of the language of Section 45 "that the Register of Copyrights shall upon payment of the prescribed fee, record such assignment." For it is open to argument that the words "such assignment" refer back directly to, the assignment executed abroad provided for in Section 43.

Section 44 --Effect of Assignments.

This section provides that every assignment of copyright shall be recorded in the Copyright Office within three calendar months after

its execution here or within six calendar months after its execution abroad "in default of which it shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded." Here, too, the practice of the office has been to register assignments of copyright even though domestic assignments have been received for recording after the passage of three months following their execution in this country or after the passage of six months following their execution abroad. For the office has proceeded on the theory that Section 44 is subject to the construction that the failure to so record these instruments within the time stated carries its own penalty as set out in the previous statement. The office has felt that the power further to penalize the assignee because he has failed to record on time, is not clear. It has been further felt that the phrase "whose assignment has been duly recorded," read in connection with its context, lacks clarity. If A makes an assignment of copyright to X on January 1, X has apparently either three or six months, depending upon the locus of the execution of the assignment, in which to record it; but if A makes another assignment of the same copyright to Y on February 1, and Y, acting in good faith, records that assignment on March 1 -- within a month following the execution of the second assignment -- has this been "duly recorded" at a time when X's right to record within three months has not yet been exercised? It is the view of the office, as expressed in connection with the discussion of ad interim copyright (ante p. 32), that Section 44 places an assignee of a copyright on notice that there is a three months' period provided for the recording of an assignment of any copyright; and that unless he knows that there has been no prior assignment, he may not be able to get the full benefit of the provisions of Section 44 before the expiration of the three months' period following the execution of a prior domestic assignment of copyright, if any. Yet in the case submitted Y would be certain to argue

that his assignment had been "duly recorded"; and surely, regarding Y's assignment as he would regard it as the only assignment, it would have been duly recorded by him.

As the section stands, it presents no little difficulty from this aspect alone. And here again the question can be asked, Does the term "such assignment" in Section 45 refer with respect to Section 44 to assignments recorded in the Copyright Office within three or six months?

It is believed that existing difficulties of construction and practice could be avoided by the following amendment to Section 44 which is patterned after the corresponding provision of the Patent Law [Sec. 4898 (U. S. C., Title 35, See. 47)].

A comparison follows:
Suggested amendment:

Every assignment of copyright shall be void as against any subsequent purchaser. or mortgagee for a valuable consideration without notice unless it is recorded in the Copyright Office within three months after the date of its execution in the United States or within six months after the date of its execution without the limits of the United States, or prior to such subsequent purchase or mortgage. For the purpose of such recording it will be sufficient to deposit in the Copyright Office either the original document or a duly authenticated copy thereof. The date of filing in the Copyright Office shall be regarded as the date of recordation.

Corresponding provision of, the Patent Law:

SEC. 4898, (U. S. C., title 35, sec. 47). Every patent or any interest therein shall be assignable in law by an instrument in writing, and the Patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice unless it is recorded in the Patent Office within three months from the date thereof or prior to such subsequent purchase or mortgage.

Section 46 --Substitution of Assignee's Name in Notice.

Correct last line to remove redundancy by eliminating the word "statutory" before the word "notice."

Section 54 --Record Entries.

Strike out the clause "and whenever deposit has been made in the Copyright Office," etc. This phraseology is not quite in harmony with

the other provisions of the Act. Moreover, the registration is covered by changes in Sections 10 and 11 already suggested (ante p. 11).

Section 55 --Certificate of Registration.

Suggested reading of the first sentence:

That in the case of each work, the person recorded as the claimant of copyright therein shall be entitled to a certificate under seal of the Copyright Office, to contain the title of the work, the name and address of said claimant, the name of the author (if revealed by the application or the work deposited), the name of the country of which the author is a citizen or subject, or if an alien author domiciled in the United States, his place of domicile, the date of deposit of the copy or copies of such work, the date of publication if it be a published work, and such marks as to class designation and number as shall fully identify the registration.

This because it may well happen that the claimant of a copyright may not be the owner thereof.

In lieu of the last sentence "In addition to such certificate * * * registration," substitute:

The Register of Copyrights shall furnish, without fee, a receipt for copies deposited after publication of works registered for copyright under Section 11 of this Act.

Note that Section 55 covers only an original certificate and does not seem to provide for a *renewal certificate*.

Section 58 --Access of Public to Records.

The provision that the record books of the Copyright Office, together with the indexes to such record books, and all works deposited and retained in the Copyright Office shall be open to public inspection, has led to abuses which have been felt in the administration of the Copyright Office, and to many complaints emanating mainly from the authors of unpublished works who have obtained copyright under the provisions of Section 11. The chief cause of complaint has arisen because of what has turned out in the long run to be too liberal an interpretation of this provision flowing from the desire of the office to accommodate the public at large. This resulted in a practice of permitting persons who, for no reason other than that of soliciting business, would seek and were granted permission to use the record books of the office for the sole purpose of obtaining the names and addresses of the authors of such unpublished works. Once this information was obtained, authors who, by the very fact of having registered their unpublished works in the Copyright Office indicated that they were not ready to publish them, were flooded with offers by soliciting firms to examine their material -- largely musical material -- arrange it for publication and in some cases follow this up by registering a claim of copyright of the published work in the Copyright Office. For this service various sums were demanded by the soliciting parties running from $10 or $15 to much higher

amounts. From five to six letters are received daily from such authors of unpublished works requesting in many instances to know whether the firms soliciting their business are known by the Copyright Office to be acting in good faith; at times complaining of the fact that they had paid such firms material amounts of money for the promised work of examination and arrangement, to be followed perhaps by registration, and inquiring whether such registration, promised in some cases from six months to a year before, had been effected; and in certain instances not hesitating to charge the firms in question with deliberate fraud. The Copyright Office itself has come in for a fair amount of criticism in permitting persons other than the author of the unpublished work to ascertain from the original records that the material had been actually registered in the Copyright Office. It is believed that it was not the purpose of Congress to provide that the record books of the office should be open to members of the public for business which in no real sense was a copyright business; and difficult indeed to conclude that Congress intended that the records of the office should be open for the purposes of soliciting such business.

From the standpoint of business administration the practice finally became so injurious as to cause it to be stopped on August 1, 1937. During the year preceding that date the influx of representatives of such soliciting firms increased to an extent where almost any day there might be found in the office busily copying names and addresses from such records from five to six different representatives of different soliciting firms. This interfered materially with the work done by the Record and Certificate Section, and the use of these books at the same time interfered with their use by or in behalf of persons who applied to the office on legitimate copyright business. While it is felt that the action taken was quite in accord with the intent of Congress and: wholly essential to the adequate administration of copyright business, the office has been made the subject of spirited attacks on the ground that the Register, by putting an end to the practice in question, was secreting copyright records.

Under Section 12 of the "Memorandum Draft of a Bill to Amend and Consolidate the Acts Respecting Copyright," submitted in contemplation of the revision of the copyright laws which finally took the form of the present Act, it was provided that the record books and indexes thereto, together with the articles deposited and retained in the office, should be open to public inspection "at convenient times." It was apparently recognized by the authors of the draft that if the right of public inspection were not stated in the law to be subject to some limitation, trouble might

ensue. Perhaps the qualifying phrase "at convenient times" was considered by the legislators either too broad or wholly unnecessary. In any event, it was eliminated, and its elimination, or rather the absence of any qualification has resulted in the abuses above described. That, however, appears to be the only form of abuse which has so far been noted. It is suggested that the section be amended by adding after the words "public inspection" the words "other than solicitation of business." The alternative amendment may be further suggested, that following the words "open to" there shall be inserted the phrase "members of the public for inspection in connection with copyright business."

The section further provides that copies may be taken of the copyright entries actually made in such record books subject to such safeguards, and regulations as shall be prescribed by the Register of Copyrights and approved by the Librarian of Congress. As the section reads, Congress appears to have acted with considerable caution with respect to the matter of copies, since the taking of copies is specifically limited to copyright *entries* actually made in the record books of the office.

The practice in the office is to construe this provision literally. This course of action is viewed with much disfavor by members of

the public who charge others with infringement or themselves are charged therewith. Many requests are received in the Copyright Office for photostatic copies of works registered here, the usual ground for the request being expectation of suit, or proceedings actually commenced. A great many of these suits are settled out of court with the aid of counsel. This occurs in all parts of the country. Charges of infringement occur in scores, if not hundreds of cases where the subject matter claimed to have been infringed may be very difficult to obtain, or may even be out of print. As a matter of fact, the requests for copies in most cases refer to unpublished material. It may, for all practical purposes, be inaccessible to the alleged infringer except through access to the Copyright Office or the Library of Congress. One can very well understand the need of counsel representing a party charged with infringement to have at hand in his office a copy of the material on which the claim of infringement is based for the purposes of a study which may call for days or weeks before decision can be reached as to whether settlement or defense of the action in court is the proper step to take. The availability of such material in the office of counsel may not be devoid of aspects even of public interest. This office is one of registration and record. Consequently it is not at all surprising that demands for such copies are made in the circumstances above set out based in large part on the proposition that since such writings as may have been deposited with the Copyright Office are public records, the public should have a right to

obtain certified copies thereof. While, however, copies of all deposits are kept in the Copyright Office for varying lengths of time, that office is not the permanent depository of such material. It is the Congressional Library which is the real depository, as has been pointed out at an earlier page.

These requests for copies are refused by the office not only on the ground that such deposits are not public records in the sense claimed, but on the additional ground that the right to make copies, is exclusively vested by the Act in the copyright owner, and the material which may be copied by the public is in the terms of the statute limited to entries actually made in the record books of the office. The reason for this specific limitation is not difficult to divine. It would seem strange, indeed, in the light of subparagraph (a) of the first section of the Act, which gives the person entitled thereto the exclusive right to copy the copyrighted work, for a copy to be made of such work in the-institution created to handle all matters of administration under the Copyright Act; and stranger still for that office to provide other members of the public with such copies on request, thereby affording an opportunity, however remote, for infringement. In view of the significant limitation of Section 58 with respect to the

furnishing of copies; the Copyright Office refuses to honor such requests, except in compliance with court order or unless authorized in writing by the copyright owner to do so.

It would seem that, both from the standpoint of inspection and from that of the copying of entries current record books should be, until completed, immune from public inspection. The contents of the record books, whether current or not, are always communicable to the public under office regulations, in connection with copyright business. An amendment of the section by inserting the word "completed" before the words "record books" in the first line of the' section may be advisable.

Section 61---Registration and Other Fees.

In the phrase "recording the transfer of the proprietorship" the word "recording" seems to have been .inadvertently used for. "indexing." It is the document itself which is recorded, and the' transfer-. of proprietorship' is not actually recorded but is indicated by means of an index card.

Many searches are made in the Copyright Office which require in point of time the greater part-, of an hour--some. which require a number of hours, particularly where search on a group of items is requested. The section at present provides "'for any requested search of Copyright Office

records, indexes, or deposits of $1.00 for each full hour of time consumed in making such search." Requested searches are special events which interrupt the ordinary process of search which continues throughout the day in connection with applications for registration, correspondence independent of or relating thereto, assignments renewals, and the like. As the section is worded, a searcher might have his routine work interrupted by requests for six special searches, each one of which would employ the best part of an hour; which would result in his inability to perform his routine search work for five hours of a given day with no increment to the Government in the way of special search fees.

The' following amendment is therefore-suggested

For any requested search of Copyright Office records, indexes or deposits involving any entry, renewal or assignment of copyright; or any notice of user of musical compositions, $1.00 for each hour or fraction of an hour of time consumed in making such search, and 50 cents for each succeeding hour or fraction thereof devoted to such search.

Amend the last proviso to read:

That only one registration and one fee shall be required in the case of several volumes of the same book published on the same date and deposited at the same time

Otherwise, when volumes appear at widely scattered intervals, if would be necessary to record several dates of publication for the

same book, whereas the record books of the office are not adapted to the insertion of more than one date of publication for each work.

Section 62---Interpretation of Terms.

It has been held that this section was intended to fix the date from which the copyright term should begin to run in the case of certain works, and not a general definition of what constitutes publication. *(Cardinal Film Co. v. Beck,* 248 Fed. R. 368; Bull. 19, p. 40.)

So much difficulty has arisen over the failure of the Act clearly to define what constitutes publication that it would be a distinct gain to do so here, both to the Copyright Office and to the public. Inasmuch as the public are required to publish their works with the copyright notice, they should know what acts amount to a publication.

Suggested reading:

(1) That in the interpretation and construction of this Act "the date of publication" shall be held to be the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority * * *

Or---

(2) That in the interpretation and construction of this Act a work shall be deemed to have been published on the date when copies thereof were first issued to the public by the proprietor of the copyright or under his authority * *

Also after the words "for hire" put a semicolon and add "and the term ‘model or design for a work of art’ shall not include any work belonging to the industrial arts for which a design patent may be secured."

The reason for this suggested clause is that there seems to be an impression among the legal profession that for designs intended for articles of manufacture, they may secure adequate protection by proceeding either under the Copyright Act or under the Design Patent Act. If this be correct, then the Design Patent Act would be practically nullified, for no one will go to the expense and delay of seeking a patent for his design if he can equally as well secure a copyright at small expense and no delay. It seems reasonable to suppose that if Congress had intended any such result it would have said so in no uncertain terms.

In all prior Copyright Acts the word "designs" was associated solely with works of the "fine" arts. The reason for eliminating the word "fine" from the present Act is not entirely clear, but surely it was not intended thereby to repeal the Design Patent Law. Repeal by implication is not favored by the courts, and yet applications are constantly received in the Copyright office for registration of industrial designs, and this leads to a great deal of correspondence.

The further amendments are suggested (a) as to publication, (b) as to "best edition" in connection with deposits.

(a) "Where publication is colorable only and is not intended to satisfy the reasonable requirements of the public, it shall not be deemed to constitute publication for the purposes of this Act."

For example: The placing on sale, selling, or publicly distributing in page proof or other analogous form, of material primarily intended for publication as contributions to newspapers or periodicals.

(b) "The term 'best edition' does not include page proof material or printed or pictorial matter in any form other than that in which a work is intended to satisfy the reasonable requirements of the public."

II

In-addition to the comments already presented, there is a matter of outstanding importance which I believe should be brought to your attention at this time. The point in question is the nature of the power exercised by the Register of Copyrights in the process of making registrations of claims of copyright and issuing the corresponding certificates of registration. With respect to this point, it has been made perfectly plain to me from communications received in many instances from applicants for registration and from expressions of opinion contained in the works of writers on copyright that the exact situation is misinterpreted more or less generally by the public. As an example, I quote from a book published in 1932, by Alfred M. Shafter of the New York Bar, entitled "Musical Copyright." On page 43 of this work there appears the following statement:

> Composers in the United States need have no fear as long as a work is not openly seditious or defamatory to the Government. The whole question of "taste and morals" may be reduced, then, to the simple criterion that the law bars from copyright, works that are adjudged to be lascivious, revolting or lacking in decency and respect. This rule remains constant. But who is to determine the nature of the work? The Register of Copyrights, who hae no judicial' status like the Commissioner of Patents, cannot decide himself. The final ruling is always a court matter.

The effect of the above paragraph is that if a member of the public, after having published with proper copyright notice a work which may be "lascivious, revolting or lacking in decency and respect," thereupon applies to the Copyright Office for registration of this work, he can insist upon its registration--or, put another way, that in connection with the request for registration of such a work, the Register of Copyrights is bound to register it whether copyrightable or not, merely because all the formal steps required to obtain registration in the case of copyrightable works have been taken by the applicant.

The writer tells us that the reason why the Register must accept this material for registration is because he "has no judicial powers." This implies, of course, that judicial powers inhere in the function of first determining whether material sent for registration is copyrightable, and, second, refusing registration when it is found by the Register not to be copyrightable. The writer assumes that the process of interpreting the law and applying it constitutes the exercise of a judicial function. With the author's assumption that the interpretation of a statute, followed by its application to a particular case, involves an exercise of judicial discretion, I am in entire accord. And I am all the more in agreement with his statement when, as in the case put, there is involved a determination of the existence of a substantive right in the applicant. But I am completely opposed to his view that the Register has not the discretion in question. The bald facts are that these powers are exercised by the Register every day, on every occasion when application for registration is denied on the ground that copyright is found by the Copyright Office not to exist in a given work.

The question of the existence of such substantive right in the example presented by Mr. Shafter is obvious; for if the Copyright Office refuses to register a claim of copyright in noncopyrightable material, such as that described above, the real basis for the decision is that the applicant never acquired the copyright which he claims to own. The existence or nonexistence of such copyright in the claimant is the basic feature on which registration or nonregistration is made to depend. As a matter of fact, it is the invariable rule of this office to refuse to register such material and to inform the applicant for registration that the reason why registration is refused is because the work has been found not to be copyrightable -- in other words, because the applicant has been found not to be the owner of copyright in the work. So that the fact is that it is the recognized practice of this office, in the case above described, through the process of interpreting the law and applying it, to pass upon the question of a claimed substantive right. Of course, this is a very different matter from an attempt to determine, as between two parties claiming copyright in the same material, which one of them owns the copyright when each one has apparently performed the conditions which entitle him to registration. That determination, desirable though it might be, is one for which, under the Act, no machinery is provided.

If the deposit and application state that A is the owner of material found to be copyrightable by the Copyright Office, the Register goes no further, unless on the face of the record the claim is contradicted. But the Register must always pass on the documents before him,

regarded in the light of the statute and judicial decisions, in order to determine whether the applicant has acquired a copyright in the material in question. This copyright he claims as of substantive right. Whether the right exists is a matter of law, and on the solution of the question the right to register depends.

The announcement of lack of power on the part of the Register to do what he does every day, and has consistently claimed the power to do, is expressed in the form of what has become, from the mere impulse of repetition, a shibboleth voiced in two versions : (one) That the Register is a "purely ministerial officer" or '(two) he is "vested with no judicial discretion."

That there is no room for the contention appears plainly from an examination of the Act; from the fact that suggestions made in earlier drafts for new legislation to destroy the discretion vested in the Register under the Act were not incorporated in later drafts; from the fact that the power of the Register acquired under the present Act to pass on the existence of copyright in a given work in deciding whether registration can be made was recognized and the fact established that Congress never intended that the Register should be deprived of the power; from the fact that the power is exercised daily in the Copyright Office; and from the further fact that if it were not exercised, the record of claims of copyright would be a ridiculous crazy-quilt of fact and fiction misleading both to the applicants and the misinformed public alike.

THE ATTEMPT UNDER THE VESTAL BILL TO DIVEST THE REGISTER OF DISCRETIONARY POWERS VESTED IN HIM UNDER THE PRESENT ACT

In 1930 when hearings were held on the Vestal Bill before the House Committee on Patents, that bill contained a provision in Section 36, p. 30, line 19, reading as follows:

> The Copyright Office shall have no discretion to refuse to receive such application nor to refuse to register such work

And in Section 8, p. 42, line 13, among the provisions for assignments, the bill read:

> The Register of Copyrights shall have no discretion to refuse to record any instrument presented to him for recording.

This resulted in a protest to the Committee by William L. Brown, then Assistant Register of Copyrights. Mr. Brown: stated *inter alia:*

> The office is there to execute the provisions of the law. We are most anxious to execute them when it comes within the provisions of the law, but we do not wish to be deprived of any exercise of discretion in those things.
>
> Mr. LANHAM [Acting Chairman of the Committee]. In things which are not subject to copyright?
>
> Mr. BROWN. In things which are not subject to copyright.

Mr. LANHAM. I assume that there is no intention to deprive you of that right.

[Hearings on the General Revision of the Copyright Law before the Committee on Patents, House of Representatives, 71st Cong. 2d Sess. on H. R. 6990, p. 181, Part I.]

The Vestal Bill never became law. When the present Chairman of the Committee on Patents of the House, Dr. Sirovich, took charge of copyright measures in 1932, this proposal to deny discretion to the Register appears to have been abandoned, and has not since appeared in any copyright bill presented to Congress.

No such provision is to be found in the present Act; but it is to be noted that in the report of the Committee on Patents of the House to accompany H. R. 28192, which became the present Act, it was stated:

Section 53 provides for the making of rules and regulations and does not confer upon the Register any judicial functions.

It is apparent from the above language that it was not the intention of the framers of the bill that the authority given to the Register to make rules should involve an exercise of judicial functions. But even if this provision authorizing him to make rules had not been included in the Act, it is plain that it was made his duty to register only copyrightable matter. As already pointed out, inasmuch as the performance of this duty calls for the determination of what is copyrightable and what is not, and for action on a contention the basis of which is the alleged existence of a substantive right, the action taken must involve an exercise of judicial discretion.

THE FUNCTIONS OF THE REGISTER SPECIFICALLY PRESCRIBED BY THE PRESENT ACT

Section 9 of the present Act provides in part---

That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; 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 * * *

Section 10 continues:

That such person may obtain registration of his claim to copyright by complying with the provisions of this Act, including the deposit of copies, and upon such compliance the Register of Copyrights shall issue to him the certificate provided for in Section 55 of this Act.

In interpreting Section 10 of the Act the report of the Committee on Patents of the House submitted to accompanying H. R. 28192, which became the present Act, contains the following statement:

Section 10 explains the method of obtaining registration of the claim to copyright and what must be done before the register of copyrights can issue to the claimant a certificate of registration.

Section. 54 provides:

That the register of copyrights shall provide and keep such record books in the Copyright Office as are required to carry out the provisions of this Act, and whenever deposit has been made in the Copyright Office of a copy of any work under the provisions. of- this Act, he shall make entry thereof.

Now it seems obvious that where the Act provides for certain conditions to be carried out by the applicant for registration of a claim of copyright before registration can be made or certificate of registration issue, no registration can be made and no certificate of registration can be issued until those conditions are carried out by the applicant. The Act makes perfectly clear what these conditions are. In its first section it is provided that "any person entitled thereto, upon complying with the provisions of this Act," shall have certain exclusive rights in his work.

Section 9 provides that copyright for a published work may be secured by the publication thereof with notice.

Section 11 provides:

That 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'the work or in some cases an identifying reproduction thereof.*

Sections 9, and 11, then, provide how copyright may be secured in published and unpublished works respectively.

Section 12 provides:

That after copyright has been secured by publication of the work. with the notice of copyright as provided in Section 9 of this Act, there shall be promptly deposited in the Copyright Office or in the mail addressed to the Register, Washington, District of Columbia, two complete copies of the best edition thereof then published.

In the case of certain other published material, and in certain cases of unpublished works, only one copy or other identifying reproduction shall be deposited.

Section 5 provides by implication that in the case of all works *application for registration shall be made to the Copyright Once and*, expressly, that the class of work shall be specified in the application.

Section 61 provides that the Register shall receive and the applicants shall pay certain registration fees.

It follows from the above that the conditions which must be fulfilled before registration can be made are as follows:

(1) In the case of both published and unpublished works, copyright must be secured by the person entitled thereto. In the case of published works, he must secure it by publication of the writing with the notice prescribed by the Act; in unpublished works he secures it by

making the required deposit in the Copyright Office accompanied by a claim of copyright.

(2) In the case of published works he must furnish the Copyright Office with the deposits required by the Act.

(3) He must make his application for registration.

(4) In the case of both published and unpublished works he must pay the fee required, by the Act.

Now, as made plain by both the language of Section 10 and the interpretation thereof contained in the Committee Report to accompany H. R. 28192, these acts must be done "before the register of copyrights can issue to the claimant a certificate of registration," which means, of course, that. they must be done before registration itself is effected. But who is to decide whether the acts required as conditions precedent to registration have taken place? Obviously no one other than the Register of Copyrights.

Of course, no difficulty is ever experienced in determining whether deposits have been made, or whether application has been filed or a fee has been paid. These are simple facts for the existence of which the Register has only to depend upon the records of the Copyright Office. No discretion of any kind is required in connection with the determination of these three simple facts. But when it comes to the question as to whether copyright has been secured or whether *the deposits*, which lade been submitted by the applicant to support his application, *are the deposits required by the Act*, a very different situation is presented. The Register has no authority to cause registration to be made or the certificate of registration to issue unless these conditions have been fulfilled. And whether they have been fulfilled calls in every instance for an interpretation of the Act and its application to the given case.

Let us take the case of a published work.

(1) In every instance before registration is made the Register must be satisfied that the person presenting the application is entitled to copyright protection in the United States. Generally speaking, this question is susceptible of determination without difficulty. Under the Act citizens of the United States, alien residents and nonresident aliens nationals of foreign countries which, by proclamation, have been announced by the President to be countries the nationals of which are entitled to copyright protection in the United States, are entitled to copyright protection.

However, in this connection it is not always clear that a foreign national is entitled to the protection claimed. Changes of nationality complicate cases. Russian nationals, are not nationals of a "proclaimed" state, and consequently are not entitled to copyright protection here. A Russian national writes and publishes a work containing the copyright notice required by the Act, on January 1. On June 1 of the same year he adopts the nationality of Germany,

which is a proclaimed state. On July 1 he applies for registration of his work. Under out Act the copyright term in a published work begins with the period of publicaton with notice. But when published in Russia, the author was not entitled to cpyright protecton in the United States. The Copyright Office must, before registering, decide the question as to whether or not the fact that when the book was published the author was not entitled to copyright protection in this country, affects the protection of the work under our law; for the statutory right to obtain registration must be based on an acquired right to cpyright protection.

(2) The Register must, in the case of every registration, by examination of the deposit, answer the queston as to whether the work, written by a person himself belonging to a case entitled to obtain copyright, is copyrightable. Such a person publishes a book which appears to the Copyright Office beyond any question to be a book of forms containing no authorship. Authorship is essential to copyright. The courts have consitently held that books which are mere collections of forms are not copyrightable, when they contain no authorship. The application is rejected and registration denied on the ground that the material is not copyrighable and the applicant is so informed. He takes issue with the Register stating that the work in question is not a book of forms but is, on the contrary, a writing of an author. Who is to decide this? Obviously the Register, for he connot shift the burder of determining his duties under the statute to any member of the public. Registration is refused, and this refusal involves a determination by the Register of the nonexistence of the substantive right of copyright in the book claimed by the applicant. Needless to say, his determination of the legal point is based upon the holdings of the courts. The same process occures in connection with the case of licentious work. A person belonging to a class entitled to copyright publishes a work of abuse and vituperation directed against the Govermnent of the United States and the principles upon which it is founded; or a work containing obscene pictorial matter. It seems to be clear that such works as these are not copyrightable. Registration is refuesed; and here once more its refusal involves a determination that the author has not secured copyright in his material, because it was not copyrightable. The Register perforce in such

cases as these decides a case in which the issue is the existence of a substantive right claimed by the applicant.

(3) As a condition to registeration, the filing of the deposits required by the Act is essential. An author prepares for publication in a periodical ten separate contributions. In the course of a month

following this preparation all ten of these articles appear in newspapers as originally intended. Thereafter the applicant binds together the proof sheets of all ten of these contributions, necessarily replicas of the form in which they appeared in the periodical, puts a paper or cardboard cover on it, affixes the adequate copyright notice, and applies for its registration as a book, and encloses a fee of $2.00 to meet registration. Section 12 of the Copyright Act provides that in the case of contributions to periodicals the proper deposit is one copy of the issue or issues of the periodical containing such contribution. For each such contribution a fee of $2.00 is required under Section 61 of the Act. The Register has to decide the question as to whether or not, for the purposes of original registration and deposit under the Copyright Act, a group of separate contributions to a periodical can be transformed into a book. He has also to pass upon the question as to whether or not the payment of fees can be avoided by such a device.

Or suppose that a publisher of what promises to be a best seller, for the purpose of avoiding providing the Library of Congress with two copies of the best edition of the book places the copyright notice on a few copies of the proof sheets thereof and exposes them for sale on book stands. Registration is refused on the ground that they are proof sheets and do not constitute the best edition of the work; and that, being proof sheets, they do not meet the requirements of the Copyright Act in that they cannot serve the purposes of Section 59, which provides that of the deposits made in connection with applications for registration the Librarian of Congress may select such as he desires for transference to the permanent collections of the Library of Congress, including the Law Library, or for placing them in the reserve collections of the Library for sale or exchange, or for transference to other governmental libraries in the District of Columbia for use therein. The publisher admits that they are proof sheets but alleges at the time they were published they were the best edition, because they were the only edition, and asserts that he has met the requirements of the statute and that by so doing he has acquired the statutory right to registration. Registration is again refused on the ground stated. In refusing to grant registration, the Register of

Copyrights has dealt with the situation which involves in the particular case a claim of statutory right as opposed to a claim of substantive right in literary property. He is bound to take action in this matter under the mandate placed upon him by the Act in the form of Section 10 thereof. In reaching his conclusion he has of necessity interpreted and applied the statute in accordance with such interpretation.

(4) An American citizen goes abroad on a visit, still retaining his domicile in the United States. While there, he writes a book in a

foreign language and causes it to be published abroad with the copyright notice required by our Copyright Act. He then seeks to register a claim of copyright in his work in the Copyright Office. Under Section 15 of the Act it is provided that with the exceptions stated in the section, in order to obtain copyright protection under the Act, the text of all copies of works shall be printed from type set within the limits of the United States or from plates made within those limits from type set therein. The purpose of this clause is the protection of' an American industry. One of the exceptions is "the original text of a book *of foreign origin* in a language or languages other than English." Does the work in question come within the exception? The Register has to determine whether or not the work, being written in Europe, although written by a citizen of the United States, is of foreign origin. If he concludes that it is not, registration must be refused on the ground that the material is not copyrightable. In the course of the duty imposed on him under Section 10 the Register passes on a claim of a substantive property right. The claim of the applicant that he is entitled to the statutory right of registration based on the alleged substantive right of copyright ownership must be denied again.

(5) A German author, resident of the United States, writes a book in German while a resident of this country. Manufacturing the book is a cheaper process in Germany than in the United States. He sends the book to be manufactured in Germany where it is published with the adequate copyright notice. He applies for registration alleging that this book does not come within the provisions, of the manufacturing clause, because it is a book of foreign origin in a language other than English. The Register has to decide the question as to whether, for the purposes of the Copyright Act, a book written by a resident alien in the United States is of foreign origin. The applicant claims, moreover, that, being a national of a proclaimed country, Germany, like other nationals of such country, he is entitled to secure copyright protection for a work published in Germany with the copyright notice. The Register has to determine, whether or not there is merit to his claim. If that claim is sound, the applicant has a statutory right to registration. But such claims are considered unsound by the Register; and he acts accordingly. Here, again, by virtue of the duties imposed upon him by the Act, the Register has, in connection with the question of registration, to consider and decide the existence of a claim to a substantive right of property

(6) An application is made for the registration of a published work. The deposits submitted contain no statutory notice. The application shows that the edition was published in this form. Of

course, the applicant claims copyright in the work. Registration is refused for the simple reason that by publication without notice the claimant, contrary to his belief, never secured copyright thereof; that as a result of being published with no notice, his common law ownership in the work came to an end and that such ownership is in the public--not in the applicant. Here, again, the Register, even in this comparatively simple case, passes on the existence of a claim of substantive right of ownership in literary property.

(7) An author writes a literary work. He lives well into the renewal year, and during that year files an application with the Copyright Office for registration of his claim of renewal. He dies within the renewal year. Under Section 23 of the Act it is provided that--

> the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work * * * when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright.

The widow of the author within the renewal year informs the Copyright Office of the death of her husband during that year and applies, under the authority of the above section, for a renewal of the copyright in her name. The Register has to decide whether she has any such right or whether the right of renewal has vested in the estate of the deceased. If the application for renewal has not been made by the proper party within the renewal year, the right to renew is gone forever. The responsibility imposed on the Register to decide the question correctly is not a light one.

(8) Again, the author, prior to the advent of the renewal year, assigns or purports to assign all his rights in copyright, including that of renewal, to a party who is not himself under the statute vested with an inchoate right to renew. The renewal year arrives, and the author is still living. The assignment is recorded in the Copyright Office. During the renewal year the assignee, pointing to and relying on the assignment, makes an application to renew. As before stated, he himself is not one of the special class vested by the statute with an inherent, though dormant, right of renewal. Does the assignment change his status? This is another type of purely legal question which the Register has to decide; and here again the subject of a claim of substantive right is involved.

The claim of the power to deny registration on these grounds is based exclusively on the express terms of the Copyright Act set out in the above quotations from the statute, as well as on an interpretation which the language of the law necessarily implies. As a matter

of fact, no registration is made or refused in the Copyright Office which does not call for an interpretation of the law and facts, resulting in a finding in each case as to the existence or non-existence of either a claimed substantive right of ownership in literary property or a claimed statutory right of registration resulting from such ownership dependent upon the performance of the conditions essential to establish the statutory right. If an exercise of the judicial functions is inherent in the interpretation and application of the law resulting in the administrative solution of questions dealing with such rights, and if, as stated by Mr. Lanham, there is no intention to deprive the Register of Copyrights of such powers, it would seem idle to contend that under the will of Congress, and in accordance with specific statutory provision, he does not every day exercise such functions.

Of course, if there is vested in an applicant for registration a substantive right of literary ownership in the work in question--that is, a copyright--the failure of the Register to make registration thereof cannot affect that substantive right. But the point made here is that in making registration or refusing it, the question of the substantive right is in most cases one which, on the evidence before the Register, must be made the basis of registration or the denial of it.

What the Register does not do, and what the equipment of the Copyright Office does not make possible for him to do is to decide, as between A and B, who have both applied for registration of the same material under claim of copyright, in which one of the two the substantive right of literary ownership is vested.

The powers and duties of the Register described above are exercised every day in the Copyright Office. To my mind they clearly involve the exercise of a judicial discretion for the reasons which have been set out at such length above. If this circumstance could in some way become manifest to the public, the misconception more or less broadly entertained that the Register's duties are simply ministerial would serve to lighten the work, particularly of the Correspondence Section, to a great extent. If the Register's duties are purely ministerial--if, as Mr. Wail in his work "American Copyright Law" states, "the authority given too the officers charged with the administrative aspects of the Copyright Act is of the most meager description"--if, as he continues, "they are, in brief, to act as registrars and depositories of works in which copyright is claimed" ("American Copyright Law," edition 1917, pp. 207-8)—then the Register's duties are confined to acting as a rubber stamp to a public not as a rule versed in the technicalities of the Copyright Act. In such case, not only would he be under the duty of fostering and developing a registration system which would contain a vast amount of

misinformation, but by the issuing of certificates based on registrations *not contemplated by the Act*, he would lead thousands of applicants into a snare. For example, the protection to the American printing industry afforded by the manufacturing clause of the Act might be evaded and denied.

Further, by registering claims of copyright with respect to works which the law itself recognizes as uncopyrightable--whether by virtue of their contents, as a matter of public policy, or because of their having entered the public domain by virtue of dedication to the public through publication without notice, or due to some other cause--and by issuing the corresponding certificates of registration, not only would the public be deceived as to the actual situation in the case, but the applicant himself would be utterly misled. If a work, published without copyright notice, is registered and a certificate issued thereon, the applicant receives in effect an assurance from an officer of the Government that he is vested, at least prima facie, with copyright in the work. He does not fear infringement because, with the certificate in his hand, he is given reason to believe that he can go into a Federal Court, make out a prima facie case, and secure heavy damages. What he does not realize is that once confronted by the defendant with a copy of his work without copyright notice, the certificate is not worth the paper it is written on, and he loses not only his case but his costs, and his attorney's fees will have been paid in vain. It seems to me that in such case the average man would feel justified in complaining that he had been deceived by the failure of the Copyright Office to perform its duty to the public.

PROPOSED REMEDY

The above analysis has for its purpose the characterization of the functions vested in the Register by the Act, which have been actually exercised by him, in passing upon applications for registration of claims to copyright. It is believed that a statement is now in order setting out certain relations which have developed between the Copyright Office and the public as the result of the exercise of those functions. There would be no need for the following observations had the work of this office been of a purely, or even approximately, ministerial nature. It is precisely because the contrary is the case--that communications are occasionally received from disappointed applicants for registration, the purport of which may be summarized as follows:

> You have refused to register my application for claim of copyright because you state that my work is not copyrightable. I believe that it is. If you persist in your refusal to register, I am left without recourse. Either the Copyright Act, under which you claim power to refuse to register, is misinterpreted by you, or else the law operates unfairly in my case.

Of course, if in a given instance the Register is wrong and the applicant is right--if the latter has in fact secured a copyright--he has been deprived of the statutory right to registration and the receipt of a certificate of registration. Apart from the circumstance that he has in fact, on this hypothesis, been deprived of a right to which Congress intended he should be entitled, the effect thereof is such as to cause serious inconvenience, even the loss of opportunity to obtain possibly large financial returns. For Section 12 of the Act provides that--

> No action or proceeding shall be maintained for infringement of copyright in any work until the provisions of this Act with respect to the deposit of copies and registration of such work shall have been complied with.

It was not intended that a copyright owner could obtain judicial relief for infringement of his copyright unless he registered it. It is true that in at least one case it has been held that failure to register did not bar a copyright owner from relief from infringement in a Federal court, provided he could show to the court that as a matter of law he had complied with all the requirements of the Act incident to registration and had attempted to register but registration had been refused. In the case of *White-Smith Music Publishing Co. v: Goff* (C. C. A. 1st Circuit. March 1, 1911-187 Fed. 247) the court, referring to the publisher, stated:

> It offered registration under the statute and, although registration was refused, yet it fully complied with the requirements of law, and is entitled to maintain this suit if it had any statutory right to the extension.

The term "extension" refers to the application for renewal of a copyright; but as registration applies to original copyrights, as well as renewals thereof, the language of the court would seem to cover every case of copyright.

However, registration, aside from guaranteeing the registrant access to a Federal Court for the purposes of prosecuting an infringement suit, also carries with it the issuance to the registrant of a certificate of registration.

The value to the copyright owner of such evidence in his possession cannot be overestimated; for, aside from the part played by the certificate in infringement suits, it is hardly less important to him for commercial purposes. In the world of publishers, radio broadcasting and motion pictures, more and more importance is being laid on the presence of the certificate in the hands of the copyright owner, who puts up his wares for sale, as evidence of ownership in them.

As matters now stand, an applicant for registration of claim of copyright whose claim is denied on the ground that the material in question is not copyrightable, has heretofore had no recourse other than by a mandamus action,

The main characteristics of this type of action are, generally-speaking, that relief will be granted only in case the action taken by the respondent has been arbitrary; that the judicial discretion will not be substituted for an administrative discretion with which the official involved is vested by law; and that the purpose of the proceeding is to correct an alleged abuse of administrative power or discretion and not a decision on the merits of the case. Under the new Rules of Civil Procedure for the District Courts of the United States adopted by the Supreme Court of the United States, effective September 16, 1938, the writ of mandamus is abolished (Rule 81 (b)). This paragraph provides that.--

> Relief heretofore available by mandamus * * * may be obtained by appropriate action or by appropriate motion under the practice prescribed in these Rules.

It is not believed that the change of procedure effected is intended to change the corrective nature of the relief sought or the conditions under which it will be granted.

The Commissioner of Patents bases his conclusion upon whether or not a patent should issue to an applicant upon a finding as to whether the invention claimed belongs to the class of articles entitled to patent protection; whether the invention is properly described and claimed; whether the proper formal steps have been taken with respect to the application, and whether the invention is new or is antiquated. If the applicant feels aggrieved, he can appeal to the Court of Customs and Patent Appeals, or he can bring a bill in equity in the District Court for the District of Columbia in which the Commissioner of Patents is named as the defendant. Either court will thereupon pass upon the merits of the case.

The Register of Copyrights bases his conclusion as to whether registration of a claim of copyright is in order upon a finding as to whether the applicant belongs to a class entitled to obtain copyright, as to whether the work in which copyright is claimed is copyrightable, and as to whether the formal steps prescribed by the Act have been taken. The evidence on which he takes action is that afforded by the copy of the work deposited and the information contained in the application, and such correspondence as may accompany the application. The task of reaching this conclusion is, of course, in most cases a more simple one than that which must be undertaken in many cases by the Commissioner of Patents. However, should the Register, on the evidence before him, be forced to conclude either that the applicant does not belong to a class entitled to obtain copyright or that the work is not copyrightable, or that the work, if copyrightable, is not protected by copyright, or that for some other reason registration cannot be made, the only relief open to the applicant for regis-

tration under existing procedure is recourse to the courts on the ground that the Register has acted arbitrarily. There is no provision for a judicial review of the Register's action on the merits of the case. In this way an applicant for registration of copyright is at a distinct disadvantage when compared with the applicant for the issuance of a patent. This circumstance would seem to call for all the greater consideration in view of the fact that with the advent of radio and the cinematograph the potential value of copyrights has probably increased in many instances a hundredfold in comparison with what it was before the era of motion pictures or radio broadcasting.

In the reorganization of the Copyright Office special efforts were directed to do, what could be done toward alleviating this situation. All that could be accomplished was to try to provide a system which would minimize to the greatest extent felt possible the chances of depriving any member of the public of an existing statutory right of registration and the receipt of a certificate of registration. This was accomplished by providing that all cases recommended for rejection by the Examining Section shall, before final action, be subjected to the scrutiny of the Chairman of the Revisory Board--a lawyer by profession and a member of the Bar, well versed in copyright law and copyright procedure. If he feels that there is any doubt with respect to the propriety of acting in accordance with, the recommendation of rejection, he sets the case aside to be taken up by the Revisory Board, which is composed at present of three members, one of whom is also a member off the Bar and familiar with the Copyright Act and copyright procedure, and the other a person of long experience in passing upon applications and likewise familiar with copyright procedure. If the Revisory Board concludes unanimously to accept or reject the application, that decision is final and action is taken by the office in accordance with it. If, however, there is any difference of opinion between the members of the Board as to the propriety of rejecting or accepting the application, a memorandum is drawn up by the dissenting member and the case automatically becomes the subject of conference with and action by the Register, or in his absence the Assistant Register of Copyrights.

It may be further pointed out that in view of the intention of the Act to extend copyright protection and all the satutory benefits flowing from registration to the copyright owner, the principle is adopted that any doubt as to the existence of the right of registration is solved in favor of the applicant. Under instructions duly issued this principle is put into effect by the examiner in the first place, next by the Revisory Board when its finding is unanimous, and finally by the Register or, in his absence, the Assistant Register of Copyrights when

the matter is brought to the attention of either of these officers for action following a difference of opinion in the Revisory Board.

However, in spite of all these safeguards, it is conceivable that the unanimous opinion of the Revisory Board rejecting a case may be in error, or that an error may result from final action taken by the Register or Assistant Register of Copyrights when the case comes up to either on appeal from the Revisory Board. It seems safe to state that such possible errors are not, intentionally at least, the result of arbitrary action.

As already indicated, property rights of great importance are often involved in the final action taken by the office. It is even the fact that in many instances such property rights may equal or even exceed in value property rights involved in patents. Unless persons claiming ownership in copyright are to be placed at a disadvantage with respect to the final determination of their claims when compared with the claimants of patent rights, this situation, in the opinion of the undersigned, calls for remedy. That remedy should take the form of an adjudication of the merits of the claim by a court before which the applicant for registration should have a right to be heard. Under present procedure these decisions are now often reached *ex parte*.

However, it seems obvious that all questions which might arise in connection with the refusal on the part of the Register to record a claim of copyright should not call for judicial review. For instance, registration cannot take place in the absence of an application, or of the required deposits or fee.

On the other hand, whether or not the claimant is a person entitled to enjoy copyright protection and whether or not the material on which the claim of copyright is based is in itself copyrightable are questions of law involving claimed substantive rights in literary property.

It sometimes happens that more than one party files an application for the registration of a claim to copyright in the same work. When the evidence afforded by the deposit itself and the contents of the application are regarded as sufficient by the Copyright Office to justify registration, the office has no choice but to register both claims; for each applicant has apparently fulfilled those requirements which the Act provides shall entitle him to registration; each seems to belong to a class of persons entitled to copyright; the material is copyrightable, and certainly seems to have been copyrighted by either one applicant or the other. The result is that one of the registrations must be wrong. This is a situation which is lamentable for the purposes of the dignity of the record; but it has of necessity existed during the life of the Copyright Office under the present Act. For the Register has never claimed the power to make

registration depend upon a decision by him on the merits of two conflicting claims of substantive rights of copyright as between A and B, when upon the face of the documents submitted by each, each seemed to make out a prima facie case for registration.

It is, however, in the case of renewals that a double claim for registration most frequently arises. This has been the subject of special comment elsewhere in this Letter (p. 39). The author of a copyrighted work, who is living when the renewal year arrives, files an application for renewal. The record of the original copyright shows him to have been the author and that publishing firm X was the copyright owner. After the author has filed his application for renewal, publishing house X files its application for renewal in which, it, is set out that the work was written by the author, as an employee for hire. Section 62 of the Act provides that an employer in the case of works made for hire shall be deemed the author thereof for the purposes of the Act. So here we have a case where two persons have applied for renewal registration covering the same work, each claiming as author; that is, as a member of a class specially entitled under the statute to apply for renewal.

Here again the Copyright Office has no choice in the matter of making registration. Section 23 of the Act provides in substance that unless such application for renewal made during the renewal year is registered, all rights to renewal are lost. Such renewal rights may represent property of considerable value. No purpose would be served in applying for renewal except upon this supposition. The applications for renewal of both parties are registered and each applicant is sent a certificate of registration.

If the Register of Copyrights were to decide in favor of one as against the other, it might well result that at the end of the original term the work would go into the public domain, because registration might be made in the name of the wrong party. There is no provision in the statute which authorizes the Register, in the average case, to call upon an applicant for special evidence to supplement that afforded by the contents of the application, the office records, and, the original deposit. I know of no authority in the Register to refuse to record one claim of renewal which, standing alone, is apparently good on its face, because it is in conflict with another claim of seemingly equal merit. But the fact remains that both should not be registered, because it is obvious that one of the applicants is not entitled to renewal. And, in the case of renewals, as opposed to original copyrights, the existence of the new grant is made by statute to depend on registration following timely application.

While there exists in the Copyright Office today, as has been made clear, elaborate machinery intended to minimize the risk to applicants

of undue denial of applications for registration of claims of copyright, there is no statutory obligation placed on the Register to adopt any given system. This is not as it should be. When the full enjoyment of statutory remedies or benefits dealing with rights of private property is made by law to depend on administrative action taken, the administrative procedure followed which results in such action should receive legislative sanction.

Of course, an administrative hearing in the Copyright Office should precede requests for judicial review, since it is the result of such a hearing that would give rise to the claim for judicial relief.

In the circumstances, it would seem that there should be statutory provision made for hearings in the Copyright Office and opportunity for review of the decisions reached at those hearings in cases where registration has been denied on any one of the following grounds:

(a) That the applicant for registration does not belong to a class entitled under the Act to secure an original copyright in the work, or a renewal thereof.

(b) That the work itself is not copyrightable.

(c) Where different parties apply for registration of the same material after performing the conditions which entitle an applicant to registration.

(d) Where different parties present during the renewal year applications for renewal of the same original copyright in which each party is described as a member of a statutory class entitled to renew.

This process would involve in its first step a hearing before the Revisory Board. Where a single application is involved, the applicant should be given a right of appeal from the decision of the Board to the Register of Copyrights. Where two or more applicants, either for the registration of the same original copyright or a renewal thereof, are interested, either should have the right of appeal from the Board to the Register of Copyrights or, in his absence, the Assistant Register of Copyrights.

From the decision of either of the latter there should be a right of appeal for judicial review to the District Court for the District of Columbia, or to the Court of Customs and Patent Appeals provided that either Court were given jurisdiction of such appeals in the cases mentioned.

At the present time the law contains no specific provision for the cancellation of erroneous entries on the records of the Copyright Office. This situation could be cured by legislative action.

By the adoption of the procedure suggested claimants of copyright and of the consequent right to registration upon the fulfillment of the formal conditions required by the Act would be placed in a position which could be favorably compared with applicants for patents before

the Patent Office. Justice demands that such applicants be given the opportunity to have questions of substantive rights in literary property decided in the last instance at a judicial hearing in which they are permitted to participate.

The purpose of such a judicial finding in favor of the applicant in these circumstances would be in the proper case to effect registration and the issuance of a certificate of registration, and, if ordered, cancellation of the registration, if made in the name of the unsuccessful litigant.

It is possible that the system above described may evoke the suggestion that it would serve to complicate an already more or less complicated situation. The experience of the undersigned has been that in the majority of cases where applicants have had occasion to confer personally with him or senior members of the Copyright Office staff following a refusal to register, such conferences have led to mutual understanding. I very seriously doubt that the system suggested, if put into play, would result in an undue number of appeals for judicial relief. The general feeling expressed by applicants following the conferences to which I refer has been disappointment at the provisions of the Act rather than at its construction and application by the Copyright Office. The majority of such appeals as it is believed might be taken would in all probability be limited to the question of the copyrightability of the work involved or the right of the appealing applicant, to renew a given copyright. In all cases, judicial relief, if obtained, would presumably take the form of an order of the court requiring registration or cancellation to be made.

The above observations are addressed to you in order that you may have before you my conception of three consummations which, under the Conditions above presented, seem highly desirable.

New legislation which would--

(1) Provide that hearings may be had in the Copyright Office as a matter of statutory right where registration is refused for any cause. At present such hearings as are had are granted as a matter of fairness to a disappointed applicant and in the interests of good administration. But the Register is under no statutory duty to grant them. For reasons already stated, this statutory right to an administrative hearing is one to which the applicant for registration of a claim of copyright is as fully entitled as the applicant for a patent.

(2) Provide for appeals to the courts in cases where registration has been refused (a) on the ground that the applicant is not a member of a class entitled to copyright protection under the Act, or (b) on the ground that the material involved is itself not subject to copyright protection. The power and duty of the Register to refuse registration on either of the above grounds seems definitely to be contemplated by

the words and spirit of the Copyright Act and to have been recognized in the course of the hearings on the Vestal Bill referred to (p. 55). Judicial relief seems clearly appropriate, but I feel should be limited to cases where the denial to register is based on a finding by the Register that a substantive right claimed does not exist.

(3) Provide for administrative hearings in the Copyright Office in cases where applications for registrations of copyright or renewals thereof are made by two or more parties claiming the same copyright or right of renewal of copyright, where they have performed all the statutory steps essential to registration; and also for a decision by the Register on the merits of the question as to the right of registration claimed. Under the present practice of registering both applications in such cases the authority of the copyright records is impaired. The necessity for legislation avoiding the continuance of this system is obvious, if the integrity of those records is to be maintained. From the action taken by the Register an appeal to the courts would necessarily lie under (2) supra, because in each such case the decision would involve consideration and action by the Register on a claimed substantive right in literary property.

In conclusion, the following general observations may emphasize the basic purpose and effect of the changes suggested:

Under present conditions there is no road to judicial relief from the action of the Register in refusing to register a claim of copyright except by way of an action in the nature of mandamus. It may be stated as a general rule that registration is denied by the Copyright Office on one of two grounds: (a) because the formal steps essential to the registration of a copyrighted work have not been performed; (b) because the applicant is found by the Register not to belong to a class entitled to copyright protection in this country, or because the work is found by the Register to be uncopyrightable--both of which findings involve administrative decisions on the existence of claimed substantive rights of literary property in the work. The changes suggested maintain in the Register the right of final decision in cases covered by (a) provided that he acts within the authority vested in him by the statute; but with respect to action predicated on the claims of substantive rights of property indicated in (b) they provide that such action shall be subject to appeal to the courts on the merits of the case.

Respectfully,

