

COPYRIGHT LAW REVISION

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STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON  
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
EIGHTY-SIXTH CONGRESS, SECOND SESSION

PURSUANT TO

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STUDIES 29-31

31. Renewal of Copyright



Printed for the use of the Committee on the Judiciary

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<sup>1</sup> The late Hon. Thomas C. Hennings, Jr., while a member of this committee, died on Sept. 18, 1960.

## FOREWORD

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

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

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

The present committee print contains the following three studies: No. 29, "Protection of Unpublished Works," by William S. Strauss, Attorney-Adviser of the Copyright Office; No. 30, "Duration of Copyright," by James J. Guinan, an attorney formerly on the staff of the Copyright Office; and No. 31, "Renewal of Copyright," by Barbara A. Ringer, Assistant Chief of the Examining Division, Copyright Office. The preceding 28 studies appearing in earlier committee prints are listed below.

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

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

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

## COPYRIGHT OFFICE NOTE

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

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

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

ABE A. GOLDMAN,  
*Chief of Research,*  
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*Register of Copyrights,*  
*Library of Congress.*

L. QUINCY MUMFORD,  
*Librarian of Congress.*

## STUDIES IN EARLIER COMMITTEE PRINTS

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### First print :

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

### Second print :

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

### Third print :

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

### Fourth print :

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

### Fifth print :

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

### Sixth print :

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

### Seventh print :

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

### Eighth print :

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

### Ninth print :

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

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STUDY NO. 31  
RENEWAL OF COPYRIGHT  
By BARBARA A. RINGER  
WITH THE EDITORIAL ASSISTANCE OF  
JULIUS A. CULP

June 1960

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# RENEWAL OF COPYRIGHT

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## I. STATEMENT OF THE PROBLEM

The renewal provision of the present copyright law has three distinct aspects:

(1) *Duration*: The division of copyright duration into two terms of twenty-eight years each;

(2) *Formality*: The requirement of registration as a condition of the second term; and

(3) *Ownership*: The establishment, in explicit terms, of the persons who are entitled to claim and own the second term.

Renewals as aspects of duration and formalities present important policy questions which will be considered in their turn. However, these questions by themselves appear to be relatively clear-cut and free from the abstruseness for which the renewal section is famous. It is the third aspect—renewals as an absolute determinant of ownership—that makes the renewal provision unique, complicated, and infinitely troublesome. Any system limiting the ability to transfer property is almost certain to create problems. These problems are naturally increased with the creation of specific statutory classes of beneficiaries, and in the case of the renewal section they have been proliferated by inept legislative drafting.

An earlier revision study in this series<sup>1</sup> considered renewals as a part of the entire question of duration. It is the purpose of this paper to analyze the subject of renewal copyright in all its aspects—duration, formality, and ownership—in order to form the basis for an objective determination of renewals' value or lack of it. However, it should be emphasized that this study has been prepared for use in the general revision program, and is not intended as a definitive treatise covering every problem raised by the present renewal section.

## II. LEGISLATIVE HISTORY OF THE RENEWAL PROVISION

### A. LEGISLATION BEFORE THE ACT OF 1909

The principle of copyright renewal is as old as statutory copyright itself. The first copyright law, the Statute of Anne of 1710,<sup>2</sup> provided that, after a first term of fourteen years from publication, copyright for a second term of fourteen years was to be returned to the

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<sup>1</sup> Guinan, *Duration of Copyright* [Study No. 80 in the present committee print].

<sup>2</sup> 8 Anne, c. 19 (1710).

author if still living.<sup>3</sup> This provision combined two of the fundamental elements of renewals as we know them today: the division of copyright duration into two terms, and the reversion of copyright ownership to the author if he is living at the end of the first term.<sup>4</sup>

Of the twelve States that passed copyright laws before adoption of the Constitution,<sup>5</sup> five provided straight terms of protection,<sup>6</sup> two followed the Statute of Anne,<sup>7</sup> and the other five took a somewhat different course.<sup>8</sup> These five statutes provided that, if the author survived the first term of fourteen years, a second term of the same length would be given to the author and his "heirs and assigns." This provision, which was the one suggested to the States by the Continental Congress in 1783,<sup>9</sup> apparently made the second term dependent upon the survival of the author, but did not provide for a reversion of ownership.<sup>10</sup>

The first Federal copyright law, adopted in 1790,<sup>11</sup> followed the pattern suggested by the Continental Congress and included in the five State laws just mentioned. Copyright was to last for fourteen years from the date of recording the title; if the author or authors survived the first term, a second fourteen-year term was to "be continued to him or them, his or their executors, administrators or assigns." An important innovation of the Act of 1790 was the establishment of renewal formalities. As a condition of renewal it was necessary to observe again the requirements connected with the

<sup>3</sup> The following is the text of the provision:

\* \* \* The author of any Book or Books already Composed and not Printed and Published, or that shall hereafter be Composed, and his Assignee, or Assigns, shall have the sole Liberty of Printing and Reprinting such Book and Books for the Term of Fourteen Years, to Commence from the Day of the First Publishing the same, and no longer; \* \* \*

Provided always, That after the Expiration of the said Term of Fourteen Years, the sole Right of Printing or Disposing of Copies shall Return to the Authors thereof, if they are then Living for another Term of Fourteen Years.

"It will be noted that most of the periods are multiples of seven, the original 14 year period being based on the time it would take to train two apprentices." Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 713 n.7 (1944); see Young, *The Copyright Term*, in 7 COPYRIGHT LAW SYMPOSIUM (ASCAP) 139, 162 (1956).

<sup>4</sup> Justice Frankfurter's majority opinion in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 648 (1943), contains the following comment on this provision of the Statute of Anne:

\* \* \* The statute did not expressly provide that the author could assign his renewal interest during the original copyright term. But the English courts held that the author's right of renewal, although contingent upon his surviving the original fourteen-year period, could be assigned, and that if he did survive the original term he was bound by the assignment. *Carnan v. Bowles*, 2 Bro. C.C. 80; *Rundell v. Murray*, Jac. 311; \* \* \*

<sup>5</sup> Only Delaware did not enact a copyright statute. The texts of the twelve State laws passed between 1783 and 1786 have been compiled and reprinted by the Copyright Office in *COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA, 1783-1957*, at 1-21 (1957).

<sup>6</sup> Massachusetts, New Hampshire, Rhode Island, Virginia, and North Carolina.

<sup>7</sup> Maryland and South Carolina.

<sup>8</sup> Connecticut, New Jersey, Pennsylvania, Georgia, and New York.

<sup>9</sup> Resolution of May 2, 1783. Reprinted in *COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA*, *op. cit. supra* note 5, at 1.

<sup>10</sup> The majority opinion in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), took the view that the Statute of Anne, as construed by the English courts, gave the renewal to the author's assigns. See note 3 *supra*. It thus inferred that the five State statutes and the resolution of the Continental Congress which explicitly mentioned "heirs and assigns" as renewal beneficiaries were merely incorporating the construction of the English courts. 318 U.S. at 649. If this construction is correct, then the various State statutes mentioning assigns were not essential departures from the Statute of Anne, and the same would be true of the Act of 1790, 1 Stat. 124, which followed the same pattern.

<sup>11</sup> Act of May 31, 1790, ch. XV, 1 Stat. 124.

original term of copyright—recording the title in the district court and publishing a notice in newspapers—within certain time limits.<sup>12</sup>

The Act of February 3, 1831,<sup>13</sup> which was the first general revision of the U.S. copyright law, doubled the first term of copyright and changed the nature of the renewal.<sup>14</sup> The second term was no longer to be a mere extension of the first; the author's "assigns" were not mentioned as renewal beneficiaries. The Act of 1831 also broke new ground in creating a class of beneficiaries—the author's widow and children—who were entitled to the renewal in their own right if the author was no longer living.

The English abandoned the renewal principle in 1842,<sup>15</sup> adopting a straight term of either the life of the author plus seven years, or 42 years from publication, whichever was longer. However, in the

<sup>12</sup> Act of May 31, 1790, ch. XV, § 1, 1 Stat. 124. The text of the renewal provision is as follows:

\* \* \* And if, at the expiration of the said term, the author or authors, or any of them, be living, and a citizen or citizens of these United States, or resident therein, the same exclusive right shall be continued to him or them, his or their executors, administrators or assigns, for the further term of fourteen years: *Provided*, he or they shall cause the title thereof to be a second time recorded and published in the same manner as is herein after directed, and that within six months before the expiration of the first term of fourteen years aforesaid.

In commenting on this provision the court in *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 250 (1st Cir. 1911), said:

\* \* \* There was here no reference to members of the author's family, or to any one who was not in the line of succession or in privity according to the rules of law, but only a repetition of exactly the same persons and successors to whom the first term was given. Therefore, without there being any specific authoritative construction given thereto by the Supreme Court, it was properly assumed that the further term of 14 years was strictly an extension or continuation of the original right, and flowed out of the same in accordance with the ordinary rules of law controlling the devolution of property; \* \* \*

<sup>13</sup> Act of Feb. 3, 1831, ch. XVI, §§ 2-3, 4 Stat. 436. The provisions read as follows:

Sec. 2. *And be it further enacted*, That if, at the expiration of the aforesaid term of years, such author, inventor, designer, engraver, or any of them, where the work had been originally composed and made by more than one person, be still living, and a citizen or citizens of the United States, or resident therein, or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, designer, or engraver, or, if dead, then to such widow and child, or children, for the further term of fourteen years: *Provided*, That the title of the work so secured shall be a second time recorded, and all such other regulations as are herein required in regard to original copyrights, be complied with in respect to such renewed copyright, and that within six months before the expiration of the first term.

Sec. 3. *And be it further enacted*, That in all cases of renewal of copyright under this act, such author or proprietor shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more of the newspapers printed in the United States, for the space of four weeks.

The committee report on this provision indicated that its purpose was to benefit the author's family if he should be dead at the end of the first term; it pointed out that under existing law if the author was not living when the first term expired, "the copy-right is determined, although, by the very event of the death of the author, his family stand in more need of the only means of subsistence ordinarily left to them." 7 CONG. DEB. app. cxix (1831).

<sup>14</sup> The opinion in *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 250 (1st Cir. 1911), considered the Act of 1831 as establishing a new renewal policy which returned to the revisionary theory of the Statute of Anne:

\* \* \* It broke up the continuity of title, and gave the right of renewal to the widow or child or children. This clearly recognized the fact that, unlike the view entertained early in England, a copyright is purely a matter of statutory grant, \* \* \*. Here, then, was an entirely new policy, completely dis severing the title, breaking up the continuance in a proper sense of the word, whatever terms might be used, and vesting an absolutely new title *eo nomine* in the persons designated.

In *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943), the Supreme Court held that the Act of 1831 did not restrain the author from assigning away his right of renewal, and suggested that the Act merely enlarged the class of beneficiaries rather than establishing an entirely new kind of right. It seems clear, however, that by permitting the renewal to survive the author and by designating the class of beneficiaries who would take the renewal if the author were dead, the Act of 1831 for the first time established the concept of copyright renewal as "a new estate." See *De Sylva v. Ballentine*, 351 U.S. 570 (1956); BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 192 (1944); Note, 33 N.Y.U.L. REV. 1027, 1028 (1958); see also *Pierpont v. Fowle*, 19 Fed. Cas. 652 (No. 11152) (C.C.D. Mass. 1846).

<sup>15</sup> 5 & 6 Vict., c. 45 (1842).

next revision of the U.S. copyright law in 1870,<sup>16</sup> the renewal provisions of the Act of 1831 were retained without substantial change, and in the fragmentary history there is no indication that any change was considered or even suggested.<sup>17</sup> The American renewal provisions were adopted in the Canadian Copyright Act of 1875<sup>18</sup> and the Newfoundland Copyright Act of 1890,<sup>19</sup> but were abandoned in the Canadian Copyright Act of 1921.<sup>20</sup>

#### B. BACKGROUND OF THE ACT OF 1909

During most of the 19th century the renewal provision appears to have attracted little attention or criticism in the United States, probably because there was no desire to renew more than a small percentage of copyrights.<sup>21</sup> Beginning in the 1890's, however, attacks on copyright renewal began to mount,<sup>22</sup> and the following were some of the principal defects noted:

(1) *Beneficiaries too limited.* Since the right of renewal was limited to living authors or their surviving widows and children, a work went into the public domain at the end of the first term if none of these persons was still living. This was considered a hardship, especially where there were others in the author's family for whom he would normally wish to provide.<sup>23</sup>

(2) *Renewal formalities difficult and cumbersome.* It was claimed that the six-month period for renewal registration might easily be overlooked at the end of 28 years,<sup>24</sup> and that the requirement for publishing newspaper notices of the renewal was meaningless and troublesome.<sup>25</sup>

<sup>16</sup> Act of July 8, 1870, ch. CCXXX, § 88, 16 Stat. 212. The provision reads as follows: *And be it further enacted*, That the author, inventor, or designer, if he be still living, and a citizen of the United States or resident therein, or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, upon recording the title of the work or description of the article so secured a second time, and complying with all other regulations in regard to original copyrights, within six months before the expiration of the first term. And such person shall, within two months from the date of said renewal, cause a copy of the record thereof to be published in one or more newspapers, printed in the United States, for the space of four weeks.

<sup>17</sup> CONG. GLOBE, 41st Cong., 2d Sess. 2683, 2854 (1870).

" \* \* \* There is no legislative history, either when the 1870 Act was passed or in the subsequent sessions of Congress, to indicate that Congress in fact intended to change in this respect the existing scheme of distribution of the renewal rights. Rather, what scant material there is indicates that no substantial changes in the Act were intended. \* \* \* De Sylva v. Ballentine, 351 U.S. 570, 576 (1956).

<sup>18</sup> CAN. REV. STAT. c. 62 (1886).

<sup>19</sup> NEWFOUNDLAND CONSOL. STAT. c. 110 (1892).

<sup>20</sup> CAN. REV. STAT. c. 55 (1952), which came into effect by proclamation on Jan. 1, 1924.

<sup>21</sup> Spofford, *The Copyright System of the United States—Its Origin and Its Growth*, in *CELEBRATION OF THE BEGINNING OF THE SECOND CENTURY OF THE AMERICAN PATENT SYSTEM* 145, 155 (1892); *Hearings Before Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 183 (June 1906); *Hearings Before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess. 127 (1908). At the June, 1906, hearings a publisher stated that "the records of the copyright office show that last year but 2.7 per cent of the copyrights completing their original term of twenty-eight years were thought by the authors of sufficient value to renew them \* \* \*." *Hearings* (June 1906), *supra* at 183.

<sup>22</sup> ELDER, *OUR ARCHAIC COPYRIGHT LAWS 18-19* (1903); Elder, *Duration of Copyright*, 14 *YALE L.J.* 417-18 (1905); Putnam, *Revision of the Copyright Laws*, 59 *THE INDEPENDENT* 1164, 1166 (1905); Spofford, *supra* note 21, at 155; 48 *ALBANY L.J.* 321 (1893); 28 *L.J. (London)* 853 (1893).

<sup>23</sup> Elder, *Duration of Copyright*, 14 *YALE L.J.* 417-18 (1905); 48 *ALBANY L.J.* 321 (1893); 28 *L.J. (London)* 853 (1893).

<sup>24</sup> ELDER, *OUR ARCHAIC COPYRIGHT LAWS 18-19* (1903); Spofford, *supra* note 21, at 155.

<sup>25</sup> ELDER, *op. cit. supra* note 24, at 19; Elder, *supra* note 23, at 417-18.

(3) *Rights of assignees unclear.* It was pointed out that the existing law failed to define the rights of assignees of the author's renewal right, whether the author survived or not, and that this uncertainty placed a burden on publishers.<sup>26</sup> There was particular emphasis on the difficulties of renewing copyright in encyclopedias and other "composite" works.<sup>27</sup>

#### C. REVISION CONFERENCES, 1905-1906

In 1905 and 1906 Herbert Putnam, the Librarian of Congress, held a series of conferences aimed at preparing the way for a general revision of the copyright law.<sup>28</sup> Author-publisher interests predominated at the conferences, and among these groups there was a "common view,"<sup>29</sup> with "no dissent,"<sup>30</sup> that renewals should be abandoned in favor of a single term. As a result of this unanimity there was very little meaningful discussion of the principle of renewals at the conferences,<sup>31</sup> yet some significant points emerged:

(1) *Different terms necessary.* There was considerable feeling that a single long term based on the life of the author would be unreasonable or impractical for certain types of works.<sup>32</sup> Special terms were suggested for photographs, prints and labels, art reproductions, sculpture, translations, arrangements and other derivative works, periodical contributions, pseudonymous and anonymous works, composite works, periodicals, and "corporate" works.

(2) *Reversion to the author.* While not clearly expressed, the prevailing view at the conferences seemed to be that future authors would no longer need to be "treated as children" and guarded against their own improvidence by the renewal device.<sup>33</sup> On the other hand, it was generally agreed that the author's rights should revert to him in two special cases:

(a) *Contributions to periodicals.* Where the work was copyrighted by the periodical publisher, it was proposed that copyright revert to the author after three years.<sup>34</sup>

(b) *Subsisting copyrights.* It was proposed that the duration of subsisting copyrights be extended to the longer term proposed, and that ownership of the extension revert to the author or his family.<sup>35</sup>

(3) *Notice of author's death.* There seemed to be considerable sentiment favoring a requirement that the date of the author's death be recorded in the Copyright Office, to permit a definite determination of the date the copyright would expire.<sup>36</sup> However, it was pointed out

<sup>26</sup> Elder, *supra* note 28, at 418.

<sup>27</sup> *Id.* at 417.

<sup>28</sup> The records of the conferences were not published, but a complete stenographic report of the proceedings has been bound in three volumes and is in the collections of the Copyright Office. The reports will be cited hereinafter as *Stenographic Report*.

<sup>29</sup> 1 *Stenographic Report* 61 (May-June 1905).

<sup>30</sup> *Id.* at 65, 145.

<sup>31</sup> The following represent the most significant discussions of the principles and problems of copyright renewal during the conferences: 1 *Stenographic Report* 63-66, 109-10 (May-June 1905); 2 *Stenographic Report* 35-48, 64-66, 73-74, 866-69 (Nov. 1905); 3 *Stenographic Report* 474-86 (1906). See generally Putnam, *Revision of the Copyright Laws*, 59 THE INDEPENDENT 1164 (1905).

<sup>32</sup> See, e.g., 1 *Stenographic Report* 14, 31-32, 149, 156-61 (May-June 1905); 2 *Stenographic Report* 27-31, 46, 66-68 (Nov. 1905); 3 *Stenographic Report* 48, 486-88, 493-95 (1906).

<sup>33</sup> See, e.g., 2 *Stenographic Report* 50 (Nov. 1905).

<sup>34</sup> 1 *Stenographic Report* 14, 31-32 (May-June 1905); 2 *Stenographic Report* 50 (Nov. 1905).

<sup>35</sup> 2 *Stenographic Report* 866-69 (Nov. 1905); 3 *Stenographic Report* 474-86 (1906).

<sup>36</sup> See, e.g., 2 *Stenographic Report* 64-66, 70-71, 73-74, 85 (Nov. 1905).

that if length of the term were made to depend on recording the death date, this in effect could constitute a renewal device.<sup>37</sup>

During the course of the conferences Thorvald Solberg, the Register of Copyrights, prepared two draft revision bills which attempted to incorporate the conclusions and proposals of the conferees.<sup>38</sup> The basic copyright term was the life of the author plus fifty years,<sup>39</sup> but both drafts also required that the date of the author's death be recorded in the Copyright Office within certain rather short time limits.<sup>40</sup> The purpose of this requirement was to give the public definite notice of the date when the copyright would expire.<sup>41</sup> It is unclear what the consequences of failure to record the death date were supposed to be;<sup>42</sup> if they were to be expiration of the copyright, the recording requirement was certainly a disguised form of renewal.

A provision for renewal and reversion to the author also appeared in those sections of the Solberg drafts dealing with extension of subsisting copyrights to the full term. This is surprising in view of the otherwise concerted opposition to renewals, but the reason was stated plainly at the conferences; it was agreed that as a practical matter Congress would never extend the length of a copyright already in existence unless the benefits were given directly to the author.<sup>43</sup>

In the first Solberg draft<sup>44</sup> the extended term of the subsisting copyright was given "for the sole use of the author \* \* \*, if he be living." Assignees were specifically denied any rights in the extension, and there was to be no extension if the author was dead at the

<sup>37</sup> 2 *Stenographic Report* 73-74 (Nov. 1905).

<sup>38</sup> LIBRARY OF CONGRESS, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT, §§ 51-53, 86, 119 (Copyright Office Bull. No. 10, 1905); *id.* §§ 19, 66-67 (2d print, 1906).

<sup>39</sup> In addition to this basic term, the Solberg drafts also provided special terms for a variety of different works, including "composite or collective works," "works completed from the design of another," photographs, contributions to periodicals, commercial prints and labels, blank forms, derivative works, and periodicals.

<sup>40</sup> The provisions in both drafts were quite similar; that in the second draft read as follows:

SEC. 19. That in the case of all copyright works in which the term of protection extends beyond the date of the death of the author, there shall be filed in the Copyright Office for record, not later than thirty days after the issue of letters testamentary or letters of administration of his estate, or within ninety days after the day on which the author died, by the person claiming copyright either as ["heir"], "executor," "administrator," or "assignee" of the deceased author, the full name of the author, the true date of his death, and the titles of his works upon which copyright is claimed.

<sup>41</sup> 2 *Stenographic Report* 64-66 (Nov. 1905).

<sup>42</sup> See, *e.g.*, *id.* at 73-74.

<sup>43</sup> 3 *Stenographic Report* 479 (1906). The English Copyright Act of 1842, *supra* note 15, apparently reflected the same sort of thinking. It provided that the author could extend a subsisting copyright to the longer term, but if the copyright was owned by a publisher or other assignee, the copyright could be extended only if the author or his personal representative consented to extension and a "minute of such consent" was entered; the extended term was to be owned by the persons named in the "minute." See *Marzials v. Gibbons*, L.R. 9 Ch. 518 (1874).

<sup>44</sup> The provision read as follows:

53. (a) The copyright subsisting in any work at the time when this Act shall go into effect, by virtue of any copyright laws of the United States, shall be and is hereby extended to endure for the full terms of copyright provided by this Act, for the sole use of the author of said work, if he be living.

(b) In every case where an author has assigned his copyright, in whole or in part, before the time when this Act shall go into effect, such assignee shall be entitled to hold and possess said copyright only for the term agreed upon in the said assignment, and for such term only as the said assignee would have been entitled to hold and possess the same under the copyright laws in force on the day of the date of said assignment, and no longer.

(c) In every case where the right of any assignee in the copyright in any work shall terminate before the end of the period of copyright provided by this Act for such work, leaving a remainder of the term of copyright, such remainder of said term of copyright shall revert to and vest in the author of the work, if he be living.

(d) Nothing in this Act shall be held or construed to extend the term of copyright subsisting in any work at the time when this Act shall go into effect beyond the term of copyright protection secured by the copyright laws then in force, if the author is not living.

end of the subsisting term. Survival of the author as a condition of extension was felt too restrictive,<sup>45</sup> however, and in the second draft the extension was given to the author if living, or to his heirs if he were dead.<sup>46</sup>

The publishing interests objected to the extension provision as drafted, on the ground that it endangered legitimate investments; if the publisher could not obtain permission to continue publishing from the author or his heirs, his investment in his printing plates would be lost during the extended term.<sup>47</sup> The publishers recommended extending the term of subsisting copyrights only if the author had not sold his copyright outright, and then only if he or his widow or children were living.<sup>48</sup>

Near the end of the conferences a compromise was suggested; the right of extension would be confined to the author, his widow, and his children, and if the subsisting copyright had been assigned, the assignee would have the right to join in the application for renewal.<sup>49</sup> This proposal proved acceptable,<sup>50</sup> although it was pointed out that, under it, the renewal was no longer automatic, but had become conditional upon the filing of an application.<sup>51</sup>

#### D. CONGRESSIONAL ACTIVITIES, 1906-1909

Mr. Solberg made further revisions in his draft bill, and it was introduced in both houses on May 31, 1906.<sup>52</sup> Joint hearings were held in June and December, 1906,<sup>53</sup> and in his testimony the Librarian of Congress summarized the duration provisions in the bill as follows:<sup>54</sup>

\* \* \* The bill abolishes renewals and provides for three terms, according to the subject-matter. The shortest is twenty-eight years for labels and prints relating to articles of manufacture heretofore registered in the Patent Office, \* \* \* The second term, fifty years, is substantially identical with the present possible

<sup>45</sup> 2 *Stenographic Report* 368 (Nov. 1905).

<sup>46</sup> The provision read as follows:

SEC. 87. That the copyright subsisting in any work at the time when this Act shall go into effect shall be and is hereby extended to endure for the full terms of copyright provided by \* \* \* this Act, for the benefit of the author of said work, if he be living, or, if he be dead, for the benefit of his [heirs] executors, and administrators.

In every case where an author has assigned his copyright, in whole or in part, before this Act takes effect, such assignee shall be entitled to hold and possess said copyright only for the term agreed upon in the said assignment, and for such term only as the said assignee would have been entitled under the copyright laws in force on the day of the date of said assignment, and no longer, and where the right of an assignee in the copyright in any work shall terminate before the end of the period of copyright provided by this Act for such work, leaving a remainder of the term of copyright, such remainder of said term of copyright shall revert to and vest in the author of the work, if he be living, or, if he be dead, in his [heirs] executors, and administrators.

<sup>47</sup> 2 *Stenographic Report* 41-41a, 366-68 (Nov. 1905); 3 *Stenographic Report* 474-86 (1906).

<sup>48</sup> 3 *Stenographic Report* 476-77 (1906). The proposed revision read as follows:

The copyright subsisting in any work at the time when this act goes into effect may at the expiration of the renewal of the term provided for under the previous law (Revised Statutes, sec. 4954) be further renewed and extended by the author, inventor or designer if he be still living, or by his widow or children if he be dead, for a further period equal to that provided under the present act, i. e., for fifty years after the author's death, provided that said copyright has not been assigned previous to the passage and approval of this act.

<sup>49</sup> 3 *Stenographic Report* 481 (1906).

<sup>50</sup> *Id.* at 486.

<sup>51</sup> *Id.* at 481-82.

<sup>52</sup> S. 6330, H. R. 19853, 59th Cong., 1st Sess. (1906).

<sup>53</sup> *Hearings Before Committees on Patents on S. 6330 and H. R. 19853*, 59th Cong., 1st Sess. (June 1906); *Hearings Before Committees on Patents on S. 6330 and H. R. 19853*, 59th Cong., 1st Sess. (Dec. 1906).

<sup>54</sup> *Hearings* (June 1906), *supra* note 53, at 12; see *id.* at 9.

maximum of forty-two. It applies to some original and to all derivative works.<sup>56</sup> It would probably cover the majority of copyright entries during any particular period—the majority in number, I do not say in importance. The longer term—the life of the author and fifty years after his death—applies only to original works,<sup>57</sup> but applies to most of those.

The requirement for recording the author's death date had been dropped. However, the bill included the compromise renewal provision for extending subsisting copyrights which had been worked out at the earlier conferences,<sup>57</sup> and much of the discussions of copyright duration at the 1906 hearings<sup>58</sup> centered around this provision:

Sec. 19. That the copyright subsisting in any work at the time when this act goes into effect may, at the expiration of the renewal term provided for under existing law, be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him, for a further period such that the entire term shall be equal to that secured by this act: *Provided*, That application for such renewal and extension shall be made to the Copyright Office and duly registered therein within one year prior to the expiration of the existing term: *And provided further*, That should such subsisting copyright have been assigned, or a license granted therein for publication upon payment of royalty, the copyright shall be renewed and extended only in case the assignee or licensee shall join in the application for such renewal and extension.

Dissatisfaction with this provision continued to be expressed.<sup>59</sup> Some publishers felt that their investments would still be in danger, and argued that subsisting copyrights should not be extended at all.<sup>60</sup> George W. Ogilvie, a Chicago publisher who acknowledged that he was speaking against his own interests, argued that making the renewal conditional on the consent of a publisher gave the publisher a veto power which he could use to dictate his own terms and reduce the royalty he had formerly been paying.<sup>61</sup> Mr. Ogilvie suggested a provision requiring the assignee or licensee to continue paying the same royalty;<sup>62</sup> however, in cases where there had been an outright sale rather than a royalty agreement, he opposed any provision that would require joining the assignee in the renewal application.<sup>63</sup> He

<sup>56</sup> Section 18(b) of the bills listed these works as follows:

\* \* \* any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors; any abridgment, compilation, dramatization, or translation; any posthumous work; any arrangement or reproduction in some new form of a musical composition; any photograph; any reproduction of a work of art; any print or pictorial illustration; the copyrightable contents of any newspaper or other periodical; and the additions or annotations to works previously published.

<sup>57</sup> These "original works" were listed in section 18(c) as follows: "book, lecture, dramatic or musical composition, map, work of art, drawing or plastic work of a scientific or technical character, or other original work."

<sup>58</sup> Arthur Steuart, a Baltimore attorney representing the American Bar Association, described the evolution of the compromise as follows:

\* \* \* finally this clause was reached as a compromise of the interests involved, because it gave to each side the necessity of calling upon the other, both the author or the original proprietor and the subsequent licensee or assignee, as to what should be done in the case of an extension. It was the best compromise that we thought possible under the circumstances, because it left each of those interested a voice. They had to be consulted and had to be reconciled before the application could be made \* \* \*. *Hearings* (Dec. 1906), *supra* note 53, at 173.

<sup>59</sup> See, e.g., *Hearings* (June 1906), *supra* note 53, at 46-49, 54, 137, 185; *Hearings* (Dec. 1906), *supra* note 53, at 48, 95, 173, 402, 421.

<sup>60</sup> COPYRIGHT OFFICE, AMENDMENTS PROPOSED TO THE COPYRIGHT BILL (S. 6330, H.R. 19853) 80-83 (Pt. I, Nov. 1906); *id.* at 7 (Addenda, Dec. 4, 1906); *id.* at 54-55 (Pt. II, Dec. 1906).

<sup>61</sup> *Hearings* (June 1906), *supra* note 53, at 54, 137.

<sup>62</sup> *Hearings* (June 1906), *supra* note 53, at 46-49; *Hearings* (Dec. 1906), *supra* note 53, at 48.

<sup>63</sup> *Hearings* (June 1906), *supra* note 53, at 47.

<sup>64</sup> *Hearings* (Dec. 1906), *supra* note 53, at 48.



wished to insure that in all cases the benefits of the extended term would go to the author and his family.

Robert Underwood Johnson, representing the American [Authors'] Copyright League, proposed a further compromise: where there had been a royalty agreement, the copyright could be extended without joining the assignee or licensee, but the latter could continue publishing at the same royalty rate; however, where there had been an outright sale, the assignee or licensee would have to be joined in the renewal application.<sup>64</sup> This provision, which came to be known as the "Monroe Smith Amendment," was incorporated in several of the later bills.<sup>65</sup>

Before the 1906 hearings started it had been assumed that everyone favored abolishing renewals and substituting a long term based on the life of the author, with special terms based on publication for certain works. During the course of the hearings some new opinions were advanced. Objection was raised to having different terms for various works, on the ground that it would create difficult borderlines.<sup>66</sup> A good deal of opposition to the life-plus-fifty term was expressed, both because it was too long and because it was necessarily indeterminate.<sup>67</sup> Sentiment was also expressed in favor of renewals as a device for adjusting the term in accordance with the commercial value of the work, so that "undeserved or undesired extensions of term" would not be conferred upon those "hundreds of thousands of copyrights of no pecuniary value to the owners."<sup>68</sup>

These views found their way into the identical bills that were reported out of the committees of both houses early in 1907.<sup>69</sup> Special terms were provided for photographs and posthumous works,<sup>70</sup> but for all other works the copyright was to last for thirty years from the death of the author. However, the life-plus-thirty term was made to depend upon a renewal device; the copyright would expire twenty-eight years from publication unless the owner recorded a claim to the remainder of the term within the twenty-eighth year.<sup>71</sup> The requirement for renewal by the author, his widow or children, as a condition for extending subsisting copyrights, was also retained, but the provision authorizing an assignee to join in the renewal was dropped.

The committee reports accompanying these bills indicate clearly that the purpose of adding the renewal device was to allow the large bulk of copyrighted works to fall into the public domain at the end

<sup>64</sup> *Id.* at 95, 402.

<sup>65</sup> See notes 82-85, 95-96 *infra*, and text thereto.

<sup>66</sup> COPYRIGHT OFFICE, *op. cit.*, *supra* note 59, at 51 (Pt. II, Dec. 1906).

<sup>67</sup> *Id.* at 73-79 (Pt. I, Nov. 1906); *id.* at 49-53 (Pt. II, Dec. 1906).

<sup>68</sup> *Hearings* (June 1906), *supra* note 53, at 183.

<sup>69</sup> S. 8190, H.R. 25133, 59th Cong., 2d Sess. (1907).

<sup>70</sup> Section 17 provided a term of 28 years for photographs and 30 years for posthumous works, both to be computed from first publication.

<sup>71</sup> A proviso to § 17(c) read as follows:

\* \* \* *Provided*, That within the year next preceding the expiration of twenty-eight years from the first publication of such work the copyright proprietor shall record in the Copyright Office a notice that he desires the full term provided herein; and in default of such notice the copyright protection in such work shall determine at the expiration of twenty-eight years from first publication. \* \* \*

of a short definite term, while permitting a much longer term for works of lasting value.<sup>72</sup>

For almost a year after these bills were reported there was practically no legislative activity in the copyright field. In November, 1907, William A. Jenner, a New York attorney who claimed to be representing no special interest,<sup>73</sup> published a broadside entitled *The Publisher Against the People*, an attack upon the pending copyright bills, in which renewals were discussed at length.<sup>74</sup> Mr. Jenner argued that "one of the covert but great objects of the bill is to enable the publishers to escape from this second term";<sup>75</sup> he felt that the renewal term was of much value to the author and should be retained:

The second term of fourteen years to the author or to his widow or children is always a distinct and important advantage to him, and never a disadvantage, because if the author has made an improvident bargain with his publisher for the first term, its disadvantages may be redressed by the bargain for the second term with a surer knowledge of the selling value of the work. The proposed law altogether omits this salutary provision, and under it the publisher will acquire, and the author will forever part with, the entire interest in the work not only for the contingent term during life but also for the absolute term of thirty years from his death, unless the author reserves to himself the ownership of the copyright, which rarely happens.<sup>76</sup>

Mr. Jenner had no objection to a longer term where the work was worthy of it, but felt that this could best be accomplished by means of a second renewal, thus giving a third copyright term to the author and his family.<sup>77</sup>

In December, 1907, a newly-revised copyright bill was introduced in the House by Mr. Currier<sup>78</sup> and in the Senate by Mr. Smoot.<sup>79</sup> Special terms computed from publication were given to posthumous works and to "any periodical or other composite work," "any work copyrighted by a corporate body, or by an employer for whom such work is made for hire."<sup>80</sup> All other works were given a term of life-plus-thirty, subject to a double renewal provision; to obtain the full term it was necessary both to record a claim within the twenty-

<sup>72</sup> The following is an excerpt from the House report:

It is said that under existing law no extension of the term beyond the first period of twenty-eight years is asked for on 95 per cent of the copyrighted books. Your committee provide in this bill that unless within the year next preceding the expiration of twenty-eight years from first publication the copyright proprietor shall give notice that he desires the full term, the copyright shall cease at the end of twenty-eight years. It is believed that under this provision more than 90 percent of copyrighted books will fall into the public domain as early as they would under existing law. H. R. REP. NO. 7088, 59th Cong., 2d Sess. 14 (Pt. I, 1907).

The comments of the Senate committee were to the same effect:

The longer term proposed is \* \* \* but a possible maximum. It is coupled with the proviso that after a brief definite term of years (twenty-seven) the copyright proprietor shall record a positive notice that he desires still to keep alive the protection. In default of such notice the term will conclude absolutely at the end of twenty-eight years.

This amounts to an initial term of twenty-eight years (identical with the present initial term), with a privilege of renewal. It is probable that four-fifths of the copyrights would still conclude with the twenty-eighth year—conclude from their own indifference or inertia. S. REP. NO. 6187, 59th Cong., 2d Sess. 7 (Pt. I, 1907).

<sup>73</sup> *Hearings Before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess. 120 (1908).

<sup>74</sup> JENNER, THE PUBLISHER AGAINST THE PEOPLE 60-66 (1907).

<sup>75</sup> *Id.* at 60.

<sup>76</sup> *Id.* at 61.

<sup>77</sup> *Id.* at 65-66.

<sup>78</sup> H. R. 243, 60th Cong., 1st Sess. (1907).

<sup>79</sup> S. 2499, 60th Cong., 1st Sess. (1907).

<sup>80</sup> Section 25 gave 30 years to posthumous works and 42 years to the other works specified. In the House bill, which was introduced first, the employer clause read "by an employer by whom such work is made for hire," but the word "by" was changed to "for" in the Senate bill.

eightth year from publication and to record the date of the author's death in the Copyright Office.<sup>81</sup>

The provision covering subsisting copyrights in the Smoot-Currier bill was the same as that in the bills which had been reported early in 1907; the compromise provision requiring an assignee to join in the renewal was not included. This provision, which was henceforth called the "Monroe Smith Amendment,"<sup>82</sup> was restored to the Kittredge-Barchfeld bill introduced in the Senate on December 18, 1907<sup>83</sup> and in the House on January 6, 1908.<sup>84</sup> The amendment provided that an assignee or licensee of a subsisting copyright would be entitled to join in the renewal application if (1) there had been no royalty agreement, or (2) the author refused to continue the existing royalty agreement.<sup>85</sup> The Kittredge-Barchfeld bill also expanded the classes of persons who could claim the extended term: if there were no author, widow, widower, or children, the renewal could be claimed by the author's "heirs, executors, or administrators."

In late March of 1908 a three-day joint hearing was held on all the pending bills.<sup>86</sup> At the outset it became apparent that Senator Smoot and Representative Currier, chairmen of the Senate and House Committees on Patents respectively, were attracted by renewals as a device for allowing the author's interest to revert to him and his family.<sup>87</sup> Representative Currier in particular seemed to have become rather hostile to the idea of having a long term that might benefit publishers at the expense of authors; he spoke of the value of a renewal term to authors,<sup>88</sup> and the significance of the following passage can hardly be overestimated:

Representative CURRIER. Mr. Clemens told me that he sold the copyright for Innocents Abroad for a very small sum, and he got very little out of the Innocents Abroad until the twenty-eight-year period expired, and then his contract did not cover the renewal period, and in the fourteen years of the renewal period he was able to get out of it all the profits.<sup>89</sup>

At the 1908 hearings Mr. Ogilvie reiterated his opposition to allowing the publisher to join in the extension of subsisting copyrights, and appeared to take a position favoring reversion of copyright to the

<sup>81</sup> Section 25 of both bills contained the following two provisos:

*Provided*, That within the year next preceding the expiration of twenty-eight years from the first publication of such work the copyright proprietor shall record in the Copyright Office a notice that he desires the full term provided herein, and in default of such notice the copyright protection in such work shall determine at the expiration of twenty-eight years from first publication: *And provided further*, That where the term is to extend beyond the lifetime of the author it shall be the duty of his executors, administrators, or assigns to further record in the Copyright Office the date of his death.

<sup>82</sup> Monroe Smith was a member of the council of the American [Authors'] Copyright League and the drafter of the actual language of the amendment. *Hearings, supra* note 73, at 65.

<sup>83</sup> S. 2900, 60th Cong., 1st Sess. (1907).

<sup>84</sup> H.R. 11794, 60th Cong., 1st Sess. (1908).

<sup>85</sup> The amendment appeared in the second proviso of § 26:

\* \* \* *And provided further*, That if such subsisting copyright shall have been assigned or a license granted therein for publication, and if such assignment or license shall contain provision for payment of royalty, and if the renewed copyright for the extended term provided in this Act shall not be assigned nor license therein granted to such original assignee or licensee or his successor, said original assignee or licensee or his successor shall nevertheless be entitled to continue to publish the work on payment of the royalty stipulated in the original agreement; but if such original assignment or license contain no provision for the payment of royalty, the copyright shall be renewed and extended only in case the original assignee or licensee or his successor shall join in the application for such renewal and extension.

<sup>86</sup> *Hearings, supra* note 73.

<sup>87</sup> *Id.* at 17-20, 61-62.

<sup>88</sup> *Id.* at 17, 62.

<sup>89</sup> *Id.* at 20. This passage was quoted by Justice Frankfurter in his majority opinion in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 653 (1943).

author by means of a renewal device.<sup>90</sup> William A. Jenner also testified strongly in favor of renewals,<sup>91</sup> and at about the same time he brought out a new broadside, entitled *The Octopus: Reaching for Books*,<sup>92</sup> in which his views were even more forcefully expressed. He ridiculed the publishers' arguments that, unless they were given an interest in the renewal, they might lose their investment in their plates and stock on hand.<sup>93</sup> In *The Publisher Against the People*, he had maintained that, if the author had sold his copyright outright, he should be given a second chance to benefit from it, and if he had made a royalty agreement, he should be entitled to renegotiate for more favorable terms.<sup>94</sup>

In view of these expressions in favor of the renewal principle, it is puzzling that the author-publisher groups did not attempt to answer them by making a strong case for the abolition of renewals. The fact is that the only arguments they advanced on the question at the 1908 hearings were in favor of the "Monroe Smith Amendment,"<sup>95</sup> relating to the extension of subsisting copyrights, and even these arguments proved unpersuasive.<sup>96</sup> It is not altogether pointless to wonder what would have happened if some of the fundamental arguments against renewals had been effectively presented to Congress in 1908.

Seven more copyright bills were introduced in the House between May, 1908, and January, 1909.<sup>97</sup> With minor variations, the pattern for six<sup>98</sup> of these bills had already been set: special terms were provided for posthumous works,<sup>99</sup> periodicals and composite works,<sup>100</sup> works "copyrighted by a corporate body,"<sup>101</sup> and works made for hire;<sup>102</sup> for other works the term was the life of the author plus a period of years,<sup>103</sup> subject to renewal by the proprietor in the twenty-eighth year from publication, and with the requirement that the author's death date be recorded; an extension of subsisting copyright to the full term for the benefit of the author and his family<sup>104</sup> was provided, but with the qualification of the "Monroe Smith Amendment" which permitted assignees to join in the renewal in certain cases.

The seventh of these bills, which was introduced by Representative Currier on May 12, 1908,<sup>105</sup> broke away radically from this pattern and returned in part to the principle of the existing law. Copyright was to last for twenty-eight years from first publication, with a right of

<sup>90</sup> See *Hearings, supra* note 73, at 72-73.

<sup>91</sup> *Id.* at 127-28.

<sup>92</sup> JENNER, *THE OCTOPUS: REACHING FOR BOOKS* (1908).

<sup>93</sup> *Id.* at 44.

<sup>94</sup> JENNER, *THE PUBLISHER AGAINST THE PEOPLE* 61-62 (1907).

<sup>95</sup> *Hearings, supra* note 73, at 17-20, 66, 74-78, 88-89, 412.

<sup>96</sup> It was suggested at the time that omission of the "Monroe Smith Amendment" from the Act was inadvertent, *The Copyright Code: Its History and Features*, 76 *The Publishers' Weekly* 19, 20 (July 1909), but this is highly unlikely. In the face of all the discussion of the amendment, the omission of the amendment from the Currier bills of May 1908 (note 105, *infra*) and February 1909 (note 106, *infra*) can only have been deliberate, and this conclusion is borne out by the comments in the Committee reports, note 109, *infra*.

<sup>97</sup> H.R. 21592, H.R. 21984, H.R. 22071, H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 24782, 60th Cong., 2d Sess. (1908); H.R. 25162, H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>98</sup> All of the above (note 97 *supra*) except H.R. 22183, 60th Cong., 1st Sess. (1908).

<sup>99</sup> The terms were 30 years in three bills, 42 in one, and 50 in the other two.

<sup>100</sup> The terms were 42 years in three bills and 50 in the other three.

<sup>101</sup> The terms were 42 years in three bills and 50 in the other three. The parenthetical phrase "(otherwise than as assignee of the individual author or authors)" was included in the clause in H.R. 21592, and the words "or licensee" were added in H.R. 27310. See notes 205-09 *infra*, and text thereto.

<sup>102</sup> The terms were 42 years in three bills and 50 in the other three.

<sup>103</sup> The period after death was 80 years in one bill, 42 in two, and 50 in the other three.

<sup>104</sup> See notes 312-14, 336-39 *infra*, and text thereto.

<sup>105</sup> H.R. 22183, 60th Cong., 1st Sess. (1908).

renewal for another twenty-eight years on behalf of the "author, if still living, or the widow, widower, or children, if the author be not living, and if such author, widow, widower, or children be not living, then the author's heirs, or executors, or administrators \* \* \*, but if the work be a composite work upon which the copyright was originally secured by the proprietor thereof, then the proprietor of such copyright shall be entitled to the privilege of renewal and extension." Subsisting copyrights could be extended to the full term by the author, or his widow, children, or heirs, but the bill contained no "Monroe Smith Amendment" which would have allowed a publisher to share in the renewal.

The Smoot-Currier bill of February, 1909,<sup>106</sup> which became the Act of 1909,<sup>107</sup> represents a crude attempt to graft some of the provisions of the other bills onto the basic renewal provisions of the 1908 Currier bill. In particular, the four types of works for which special terms had been provided in the other bills—posthumous works, periodicals and other composite works, works copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author), and works made for hire—were picked up intact and forced into the renewal scheme as works for which a proprietor could claim renewal in his own right. It is regrettable that, after years of consideration and study, one of the most important provisions of the bill should have been pieced together hastily and enacted without any real analysis of the consequences.

The duration-renewal provisions of the Smoot-Currier bill were enacted without change on March 4, 1909.<sup>108</sup> The following quotations from the reports that accompanied the bill<sup>109</sup> indicate that there were two basic reasons why renewals were retained :

(1) *To benefit the author.*

\* \* \* It was urged before the committee 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.<sup>110</sup>

(2) *To regulate the term according to the commercial value of the work.*

\* \* \* A very small percentage of the copyrights are ever renewed. All use of them ceases in most cases long before the expiration of twenty-eight years. In the comparatively few cases where the work survives the original term the author ought to be given an adequate renewal term. \* \* \*<sup>111</sup>

#### E. SUMMARY

On its face the development of the 1909 duration-renewal provision appears to comprise an extraordinary *non sequitur*. Most of the bills and almost all of the discussion assumed a life-plus term and the aboli-

<sup>106</sup> S. 9440, H.R. 28192, 60th Cong., 2d Sess. (1909).

<sup>107</sup> Act of March 4, 1909, 35 Stat. 1075, 17 U.S.C. (1958).

<sup>108</sup> *Ibid.*

<sup>109</sup> H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. (1909).

<sup>110</sup> *Id.* at 14.

<sup>111</sup> *Ibid.*

tion of renewals, yet the law as enacted retained a publication-plus term with a rather elaborate reversionary renewal system. A careful analysis of the spotty, confusing, and extremely complex history of the provision shows pretty clearly why this happened, and the reasons are important today:

(1) The opponents of renewals agreed so thoroughly among themselves that they became complacent. They failed to make an effective case against renewals in the first instance, to answer the arguments presented on the other side, and to recognize the growing congressional sentiment in favor of renewals.

(2) Congressional hostility to a long, indeterminate term for all works was evident from the beginning. Provisions requiring registration of a renewal claim during the twenty-eighth year and recordation of the author's death date appeared in almost all the bills. These provisions were aimed at putting ephemeral works in the public domain after 28 years, and at making it easy for the public to determine when a copyright would expire.

(3) It was also obvious that some of those responsible for the legislation in Congress gradually became convinced that authors needed protection against publishers; renewals appeared to provide a convenient device for insuring that at least some of the benefits of the copyright went to the author. Nearly everyone agreed that the extension of subsisting copyrights should revert to the author and his family, and this provision furnished a springboard for extending the reversionary principle to all future copyrights.

### III. THE PRESENT LAW OF COPYRIGHT RENEWAL

#### A. STATUTORY LAW NOW IN EFFECT

The duration-renewal provisions of the Act of March 4, 1909,<sup>112</sup> which came into effect on July 1, 1909, were contained in two sections: § 23, which covered works copyrighted after the Act came into force,<sup>113</sup> and § 24, which covered works in which copyright was already sub-

<sup>112</sup> *Supra* note 107.

<sup>113</sup> The following is the text of § 23 as originally enacted:

SEC. 23. That the copyright secured by this Act shall endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: *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 of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years 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: *And provided further*, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopaedic or other composite work when such contribution has been separately registered, 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 for a further term of twenty-eight years 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: *And provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

sisting.<sup>114</sup> There were curious differences between these sections; in the case of future works, § 23 gave the renewal right to the proprietor in the case of posthumous works, periodicals and composite works, works copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author), and works made for hire, while for subsisting copyrights § 24 gave the proprietor the renewal only in the case of composite works. These differences may have been the result of a deliberate effort to have the extended terms of subsisting copyrights revert to the authors and their families in as many cases as possible, but it seems more likely that they simply resulted from careless drafting.<sup>115</sup>

Section 23 of the Act of 1909 became operative in July, 1936, and is now § 24, the basic duration-renewal provision of the copyright law as codified in 1947.<sup>116</sup> Section 24 of the Act of 1909 ceased to have any effect after July 1, 1937, and was dropped in the 1947 codification. In 1939 Congress enacted a bill transferring jurisdiction over commercial prints and labels from the Patent Office to the Copyright Office;<sup>117</sup> the bill provided that subsisting copyrights originally registered in the Patent Office could be renewed in the Copyright Office upon application by the proprietor, and this provision became section 25 of the Copyright Code.<sup>118</sup> In 1940 § 23 of the Act of 1909 (now § 24 of the Code) was amended to permit separate renewal of contributions to periodicals and other composite works, whether the contribution had originally been registered separately or not.<sup>119</sup> Aside from these changes, the renewal provisions are exactly the same as when they were enacted over fifty years ago.<sup>120</sup>

In structure, § 24 falls into four parts:

(1) The main body of the section provides that copyright shall endure for 28 years "from the date of first publication."

(2) The first proviso provides that, in the following cases, the copyright proprietor is entitled to a second term of 28 years if renewal registration is made within the 28th year of the first term:

(a) "Any posthumous work;"

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

<sup>114</sup> The following is the text of § 24:

SEC. 24. That the copyright subsisting in any work at the time when this Act goes into effect may, at the expiration of the term provided for under existing law, be renewed and extended by 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 by the author's executors, or in the absence of a will, his next of kin, for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period: *Provided, however,* That if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension granted under this section: *Provided,* That application for such renewal and extension shall be made to the copyright office and duly registered therein within one year prior to the expiration of the existing term.

<sup>115</sup> Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 477 (1943).

<sup>116</sup> Act of July 30, 1947, 61 Stat. 652, 17 U.S.C. (1958).

<sup>117</sup> Act of July 31, 1939, ch. 396, § 3, 53 Stat. 1142.

<sup>118</sup> 17 U.S.C. § 25 (1958).

<sup>119</sup> Act of March 15, 1940, ch. 57, 54 Stat. 51, 17 U.S.C. § 24 (1958).

<sup>120</sup> Changes affecting renewals have been made in other sections of the law. The renewal registration fee was raised from \$.50 to \$1.00 by the Act of May 23, 1928, ch. 704, § 1, 45 Stat. 714, and from \$1.00 to \$2.00 by the Act of April 27, 1948, 62 Stat. 202, 17 U.S.C. § 215 (1958). The President was given power to extent, by proclamation, the time limits for renewals and other registrations for the benefit of foreign authors affected by wartime disruption of communications. Act of Sept. 25, 1941, ch. 421, 55 Stat. 732, 17 U.S.C. § 9 (1958). [The Act of April 13, 1954, 68 Stat. 52, 17 U.S.C. § 216 (1958) provided that, when the last day for taking action in the Copyright Office falls on a Saturday, Sunday, or holiday, the necessary application or deposit may be made on the next business day.]

(c) "Any work copyrighted by a corporate body (otherwise than assignee or licensee of the individual author);"

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

(3) The second proviso provides that, in all other cases, the following are entitled to the renewal: "the author \* \* \* 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 \* \* \*."

(4) The last proviso provides that, unless renewal registration has been made, copyright terminates at the end of the first 28-year term.

#### B. THE NATURE AND THEORETICAL BASIS OF RENEWAL COPYRIGHT

The renewal copyright established in the Act of 1831 and elaborated in the Act of 1909 is a unique form of property whose nature and theoretical basis are still unclear. The courts and the commentators have repeatedly characterized a renewal as a "new estate" or a "new grant" rather than a mere continuation or extension.<sup>121</sup> Renewals are said to be separate from and independent of the original copyright,<sup>122</sup> to be "free and clear of any rights, interests, or licenses attached to the copyright for the initial term,"<sup>123</sup> and to have "absolutely all of the attributes of a new work copyrighted at the time the renewal is effected."<sup>124</sup> The right of renewal is considered a personal right given directly to certain named beneficiaries;<sup>125</sup> it "does not follow the author's estate but \* \* \* is derived directly from the statute."<sup>126</sup>

<sup>121</sup> *Ballentine v. De Sylva*, 226 F. 2d 623, 629 (9th Cir. 1955), *aff'd*, 351 U.S. 570 (1956); *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir. 1951), *cert. denied*, 342 U.S. 849 (1951); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); *Pierpont v. Fowle*, 19 Fed. Cas. 652 (No. 11152) (C.C.D. Mass. 1846); HOWELL, *THE COPYRIGHT LAW* 109 (3d ed. 1952); 2 SOCOLOW, *THE LAW OF RADIO BROADCASTING* § 677, at 1205-06 (1939); WELL, *AMERICAN COPYRIGHT LAW* § 949, at 363-64 (1917); *Caterini, Contributions to Periodicals*, in 10 *COPYRIGHT LAW SYMPOSIUM (ASCAP)* 321, 363 (1959); *Bricker, Renewal and Extension of Copyright*, 29 *SO. CAL. L. REV.* 23, 27-28 (1955).

<sup>122</sup> *Edward B. Marks Music Corp. v. Charles K. Harris Music Publishing Co.*, 255 F. 2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *Fitch v. Shubert*, 20 F. Supp. 314 (S.D.N.Y. 1937); *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E. 2d 283 (1955); BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* § 88, at 193 (1944); WARNER, *RADIO AND TELEVISION RIGHTS* § 81, at 245 (1953); *Caterini*, in *op. cit. supra* note 121, at 363; *Bricker, supra* note 121, at 27; *Comment*, 33 *N.Y.U.L. REV.* 1027, 1029 (1958); 22 *BROOKLYN L. REV.* 322, 324 (1956); 30 *SO. CAL. L. REV.* 532, 534 (1957); see *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

<sup>123</sup> *Fitch v. Shubert*, 20 F. Supp. 314 (S.D.N.Y. 1937); *accord*, *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F. 2d 569 (2d Cir. 1955), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); WARNER, *op. cit. supra* note 122, § 81, at 245; *Caterini*, in *op. cit. supra* note 121, at 363; *Bricker, supra* note 121, at 27-28; *Comment*, 33 *N.Y.U.L. REV.* 1027, 1029 (1958); 30 *SO. CAL. L. REV.* 532, 534 (1957); see *Miller Music Corp. v. Charles N. Daniels, Inc.*, *supra* note 122; WARNER, *op. cit. supra* note 122, § 83, at 255.

<sup>124</sup> 2 SOCOLOW, *op. cit. supra* note 121, at 1205; see *Harris v. Coca-Cola Co.*, 73 F. 2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); BALL, *op. cit. supra* note 122, § 88, at 192-93; *Bricker, supra* note 121, at 27.

<sup>125</sup> *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960); *Ballentine v. De Sylva*, 226 F. 2d 623, 625, 629 (9th Cir. 1955), *aff'd*, 351 U.S. 570 (1956); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); 28 *OPS. ATT'Y GEN.* 162 (1910); BALL, *op. cit. supra* note 122, § 88, at 193; 2 KENT, *COMMENTARIES ON AMERICAN LAW* 384 (2d ed. 1832); 2 SOCOLOW, *op. cit. supra* note 121, § 677, at 1205; *Comment*, 36 *U. DET. L.J.* 66, 68 (1958); see WELL, *op. cit. supra* note 121, § 956, at 367.

<sup>126</sup> *Danks v. Gordon*, 272 Fed. 821 (2d Cir. 1921); *accord*, *Miller Music Corp. v. Charles N. Daniels, Inc.*, *supra* note 125; *Ballentine v. De Sylva*, *supra* note 125, at 625; *White-Smith Music Pub. Co. v. Goff*, 180 Fed. 256 (C.C.D.R.I. 1910), *aff'd*, 187 Fed. 247 (1st Cir. 1911); BALL, *op. cit. supra* note 122, § 88, at 192; HOWELL, *op. cit. supra* note 121, at 109; WARNER, *op. cit. supra* note 122, § 81, at 246; *Comment*, 36 *U. DET. L.J.* 66, 67 (1958); *Comment*, 33 *N.Y.U.L. REV.* 1027, 1031 (1958); see *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *Stuff v. La Budde Feed & Grain Co.*, 42 F. Supp. 493 (E.D. Wis. 1941); *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D.N.Y. 1959); 28 *OPS. ATT'Y GEN.* 162 (1910); 17 *TEMP. L.Q.* 299, 301 (1943).



These generalizations, though mostly true, have suffered from too much uncritical repetition. To get at what renewals really are, one must look closely at what Congress wanted to do, what it said in the statute, and what the courts have said the statute means.

The legislative history shows that in retaining the reversionary aspect of renewals, Congress was trying to accomplish two things:

(1) If the author was still living, Congress wanted to give him an opportunity to benefit from the success of his work and to renegotiate disadvantageous bargains. It has often been said that the renewal provision was based on "the familiar imprudence of authors in commercial matters."<sup>127</sup> While superficially logical, there is nothing in the legislative history to support this supposition. There is more evidence of a Congressional recognition that author-publisher contracts must frequently be made at a time when the value of the work is unknown or conjectural and the author (regardless of his business ability) is necessarily in a poor bargaining position.<sup>128</sup>

(2) If the author were dead, Congress wanted to insure that his "dependent relatives"<sup>129</sup> would receive the benefits of the renewal, regardless of any agreements the author had entered into.

To attain these results Congress had to depart from ordinary concepts of property in two important respects:

(1) *Reversion*. The statute had to break the continuity of title at the end of the first term and provide for a reversion of ownership to the author, if living.

(2) *Statutory designation of beneficiaries*. To make sure that the renewal benefits went to "those naturally dependent upon the deceased author's bounty,"<sup>130</sup> something more than a reversion to the author's "executors, administrators, or heirs" had to be provided. If the renewal reverted to the author's estate, it was entirely possible that legatees and creditors might gain the benefits at the expense of the author's family and dependents. Apparently in a deliberate effort to avoid this result, Congress set up a schedule of successive classes of persons who were entitled to take the renewal as "a new personal grant of a right."<sup>131</sup>

These features made renewals so unusual that, immediately after the 1909 Act came into effect, there was uncertainty whether this could really be what Congress intended.<sup>132</sup> Within a few years, however, it had been firmly established<sup>133</sup> that a proprietor or assignee,

<sup>127</sup> Caterini, in *op. cit. supra* note 121, at 378; *accord*, Shapiro, Bernstein & Co. v. Bryan, 123 F. 2d 697 (2d Cir. 1941); BALL, *op. cit. supra* note 122, § 88, at 192; Bricker, *supra* note 121, at 27; 30 SO. CAL. L. REV. 532, 537 (1957); see SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 95 (2d ed. rev.).

<sup>128</sup> See H.R. REP. NO. 2222, 60th Cong., 2d Sess., 15 (1909); Comment, 33 N.Y.U.L. REV. 1027, 1029 n. 20 (1958); 6 U. DET. L.J. 79, 83-84 (1943); notes 87-89 *supra*, and text thereto.

<sup>129</sup> S. REP. NO. 6187, 59th Cong., 2d Sess. 8 (Pt. I, 1907).

<sup>130</sup> BALL, *op. cit. supra* note 122, § 88, at 193.

<sup>131</sup> Ballentine v. De Sylva, 226 F. 2d 623, 629 (9th Cir. 1955), *aff'd*, 351 U.S. 570 (1956); *accord*, Miller Music Corp. v. Charles N. Daniels, Inc., 362 U.S. 373 (1960).

<sup>132</sup> The lower court in White-Smith Music Pub. Co. v. Goff, 180 Fed. 256 (C.C.D.R.I. 1910), held that the proprietor-assignee had no right to claim renewal himself. However, the judge could not bring himself to believe that the two terms were discontinuous and that the proprietor's rights were cut off at the end of the first term; he suggested that if the copyright had been assigned, perhaps the work went into the public domain at the end of the first term. It also appears that the Copyright Office was subjected to considerable pressure in 1909 and 1910 to register renewal claims in the names of proprietor-assignees. See 28 OPS. ATTY GEN. 162 (1910).

<sup>133</sup> White-Smith Music Pub. Co. v. Goff, 187 Fed. 247 (2d Cir. 1911); Silverman v. Sunrise Pictures Corp., 273 Fed. 909 (2d Cir. 1921); Harris v. Coca-Cola Co., 78 F. 2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935); 28 OPS. ATTY GEN. 162 (1910).

as such, had no rights in a renewal copyright, that the right was a personal one, and that a renewal is not "really and truly an extension to the author, his assigns, executors, and administrators, but a new grant to the author or others enumerated."<sup>134</sup>

Acceptance of these basic principles still left open some important questions:

(1) *Is a future copyright assignable?* Assuming that assignment of the first term does not carry with it the renewal copyright, can the author or any other statutory beneficiary make a valid separate assignment of his potential renewal copyright before he has secured it? This turned out to be a very close question, which the Supreme Court finally settled in favor of alienability.<sup>135</sup>

(2) *Whom does the executor represent?* The executor is different from the author's widow, children, and next of kin, since he obviously cannot take the renewal for his own personal benefit. Does he take it as representative of (1) the author, (2) the corpus of the author's estate, or (3) the legatees? The cases have now established that the executor represents neither the author<sup>136</sup> nor the author's estate,<sup>137</sup> but that he takes the renewal as personal representative or trustee of the author's legatees; since the renewal does not become part of the author's estate, an assignment by the author of his renewal rights would be invalidated at the author's death, and the executor would take the renewal for the benefit of the author's legatees rather than his assignees.<sup>138</sup> The decisions, culminating in a recent 5-4 holding by the Supreme Court, thus indicate a most unusual role for the executor.<sup>139</sup>

(3) *Does a proprietor take a "new estate"?* With respect to the five types of works that a proprietor can renew in his own right—works made for hire, composite works, etc.—does the proprietor take a "new estate" free and clear of any pre-existing contractual obligations, including his own? Or is a renewal simply a continuation or extension of term in these cases? This basic question has never been litigated,<sup>139a</sup> and seems to have been overlooked by the commentators.

What, then, is a renewal copyright? In cases where a proprietor is entitled to claim, it is probably no more than a continuation or extension of term. Where the author, widow and children, executors, or next of kin are the statutory claimants, a vested renewal copyright is "a new estate, i.e., a new grant of copyright separate and independent from the first copyright."<sup>140</sup> In these cases a future renewal right has been called a "compulsory bequest,"<sup>141</sup> "analogous to life insur-

<sup>134</sup> *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 249 (1st Cir. 1911).

<sup>135</sup> *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

<sup>136</sup> *Fox Film Corp. v. Knowles*, 261 U.S. 326 (1923).

<sup>137</sup> *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188 (1957), *aff'd mem.*, 265 F. 2d 925 (1959), *aff'd*, 362 U.S. 373 (1960).

<sup>138</sup> *Ibid.*

<sup>139</sup> See notes 346-66 *infra*, and text thereto.

<sup>139a</sup> One of the questions involved in *Hampton v. Paramount Pictures Corp.*, 279 F. 2d 100 (9th Cir. 1960) was whether the owner of copyright in a motion picture, which it had renewed as "proprietor of copyright in a work made for hire," had abandoned its rights by its failure to contest defendant's exhibition of the film for many years before the renewal. The District Court indicated orally that the claim of abandonment necessarily failed because "the renewal of a copyright gives birth to a newborn child legally." The Ninth Circuit Court of Appeals affirmed the District Court without mentioning this specific point; it was one of the questions presented in a petition for certiorari denied by the Supreme Court, 364 U.S. 882 (1960).

<sup>140</sup> *Edward B. Marks Music Corp. v. Continental Record Co.*, 222 F. 2d 488, 490-91 (2d Cir.), *cert. denied*, 350 U.S. 861 (1955).

<sup>141</sup> *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956).

ance,"<sup>142</sup> "analogous to separate and concurrently existing contingent remainders which ripen into copyrights upon the satisfaction of certain conditions,"<sup>143</sup> "an expectancy [which] is like the interest of one who is entitled to a remainder after a term of years provided he outlives the term,"<sup>144</sup> and even "a phase of moral rights."<sup>145</sup> These labels indicate the general nature of renewals but they are not satisfactory as definitions. Beyond the fact that it is an alienable expectancy, a future renewal copyright is so unique that it defies definition except in terms of the statute that created it.

### C. THE RIGHT TO CLAIM AND OWN A RENEWAL COPYRIGHT

#### 1. Statutory claimants: proprietors

##### a. In general

The cases in which the statute entitles the copyright proprietor to claim renewal in his own right appear to fall into two categories:<sup>146</sup>

(1) Cases where the proprietor's right is determined by *the nature of the work*: posthumous works, periodicals and composite works, and commercial prints and labels.

(2) Cases where the proprietor's right is determined by *the nature of the original proprietor*: works copyrighted by a corporate body (otherwise than as assignee or licensee), and works copyrighted by an employer for hire.

The cases specified are the only ones in which a renewal claim can be asserted by a proprietor as such.<sup>147</sup> Although the proprietor claims are set forth in the first proviso of the renewal section, they are plainly exceptions to the author claims set forth in the second proviso.<sup>148</sup> It has been held, however, that just because the proprietor claims in the first proviso are so clearly exceptions, they will override second proviso claims in situations where the two provisos appear to overlap.<sup>149</sup>

Why was the proprietor given renewal rights in these particular cases? As we have seen, the answer does no credit to the drafters of the legislation. The duration-renewal provisions developed along two separate lines. On the one hand it was assumed that, in extending subsisting copyrights to a longer term, there would be a reversion to the author; the proprietors of encyclopedias, periodicals, and other composite works argued strenuously that in such cases they should be given the extension because of the problems of locating a multitude of authors at the time of renewal registration.<sup>150</sup> On the other hand, for future works it was assumed that there would be a life-plus term without renewal, and that there would be certain cases—posthumous

<sup>142</sup> Comment, 38 N.Y.U.L. REV. 1027, 1029 (1958); accord, Caterini, in *op. cit. supra* note 121 at 378.

<sup>143</sup> 30 SO. CAL. L. REV. 532, 535 n. 18 (1957).

<sup>144</sup> *Rose v. Bourne, Inc.*, 176 F. Supp. 605, 609 (S.D.N.Y. 1959), *aff'd*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960).

<sup>145</sup> SPRING, *op. cit. supra* note 127, at 95.

<sup>146</sup> WEIL, *op. cit. supra* note 121, § 952, at 364.

<sup>147</sup> *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D.N.Y. 1939); WEIL, *op. cit. supra* note 121, § 952, at 365.

<sup>148</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697 (2d Cir. 1941).

<sup>149</sup> *Ibid.* But cf. *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938).

<sup>150</sup> 1 *Stenographic Report* 109-10 (May-June 1905); *Hearings Before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess., 19-21, 75-77, 165 (1908). Most of the 1908-09 bills contained a provision meeting this argument. H.R. 21592, H.R. 21984, H.R. 22071, H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 25162, H.R. 27310, H.R. 28192, S. 9440, 60th Cong., 2d Sess. (1909).

works, periodicals and composite works, corporate works, and works made for hire—where it would be impossible or impracticable to base the term on an individual's life span.

When it was finally decided to establish a reversionary renewal for all works, the language that had been worked out for one purpose was grafted onto the renewal provision and made to serve an entirely different purpose. The drafter apparently lost sight of the "multiplicity of authors" argument;<sup>151</sup> instead, he must have reasoned that, if it was impracticable to use an author's life in computing the term in certain situations, it would likewise be impracticable to give authors and their heirs renewal in the same situations. The fallacy is obvious, and the result has been endless confusion.

The first proviso gives the right of renewal to "the proprietor of such copyright"—*i.e.*, "The copyright secured by this title." The "proprietor" in this context means the owner of the copyright at the time renewal registration is made, and not the first or original proprietor.<sup>152</sup> In other words, a "proprietor" claim follows the ownership of the copyright,<sup>153</sup> and is not a personal right like the claim of an author under the second proviso.<sup>154</sup>

#### *b. Posthumous works*

As we have seen, "posthumous works" appeared in the 1906-08 bills as an exception to the life-plus term, for the reason that in such cases it was thought inappropriate to base the term on the author's life. This exception was spliced onto the renewal provision as one of the works which the proprietor could renew in his own right, but without definition or regard for the consequences. As a result, both the meaning of the term "posthumous work" and its consequences in the renewal section are obscure.

The generally-accepted definition of "posthumous work" is "one which is published subsequent to the death of its author."<sup>155</sup> If this is what the phrase means in § 24, the author's widow and children, executors, or next of kin, as such, have no renewal rights whatever in works first published after the author's death. Thus, an assignment by the author of the rights in his unpublished works will cut off his family's renewal rights in any such works that are not published before he dies. This result was undoubtedly not intended,

<sup>151</sup> That the "multiplicity of authors" argument was uppermost in the minds of the Congressional Committee is clearly indicated by the language of the final committee report. See note 173 *infra*, and text thereto.

<sup>152</sup> *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D.N.Y. 1939) (on motion to dismiss): 36 F. Supp. 544 (S.D.N.Y. 1940), *aff'd*, 123 F. 2d 697 (2d Cir. 1941).

<sup>153</sup> HOWELL, *op. cit. supra* note 121, at 110.

<sup>154</sup> 2 SOCOLOW, *op. cit. supra* note 121, § 687, at 1219.

<sup>155</sup> Bricker, *supra* note 121, at 38. Leaving aside the rights of the author's family, discussed immediately below, this definition still leaves several questions unanswered in the context of the renewal provision:

(1) A work is publicly disseminated during the author's life (by public performance, broadcast, or recordings), but is not published in visual copies until after his death: Is this a "posthumous work"?

(2) A work is registered for copyright in unpublished form after the author's death but is never published: Is this a "posthumous work"?

(3) A work is registered for copyright in unpublished form during the author's life and is published after his death: Is this a "posthumous work"?

(4) The second proviso of section 24 apparently gives the right to claim renewal in a contribution to a periodical that has not been separately registered only to the author or his family: Who claims renewal in a contribution, not copyrighted separately, that was first published after its author's death?

(5) A work is by several authors, one of whom died before publication: Is this a "posthumous work"?

and has been strongly criticized,<sup>156</sup> but it is supported by the one judicial comment on the provision,<sup>157</sup> and probably represents a correct interpretation of the law.<sup>158</sup>

*c. Composite works*

Some of the most difficult problems in the renewal section arise from the provision dealing with composite works, which reads as follows:

\* \* \* in the case of \* \* \* any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, \* \* \* the proprietor of such copyright shall be entitled to a renewal and extension \* \* \*.

(1) *History of the provision*

Everyone apparently assumed that, under the law in effect before 1909, the publisher of an encyclopedia or similar collective work had to contact every author or heir in order to secure a complete renewal.<sup>159</sup> This was considered a great hardship because of the number of authors involved, and was advanced as one of the main arguments against the renewal device.<sup>160</sup> The same factor—multiplicity of authors—led to a recognition that the term of copyright in composite and collective works could not be based on the life of an author,<sup>161</sup> and almost all of the bills from the very beginning provided a special term for “any periodical or other composite work.”<sup>162</sup>

In the discussions of the extension of subsisting copyrights at the 1908 hearings, the publishers argued strenuously in favor of the “Monroe Smith Amendment” which would have allowed them to share the extended term with the author and his family.<sup>163</sup> It became increasingly apparent that the publishers’ main concern in this situation was with composite works—encyclopedias, law digests, dictionaries, and the like—in which very substantial sums had been invested.<sup>164</sup> The publishers were anxious to avoid the necessity of getting per-

<sup>156</sup> HOWELL, *op. cit. supra* note 121, at 111. Kupferman defines a “posthumous work” as “a work published after the author’s death by someone to whom has passed the right to reproduce it.” He argues that the word “posthumous” could not have been “designed to include the situation of a sale by a living author of his common law copyright,” since in that event “there would be no justification for permitting the proprietor to obtain the renewal.” He believes that the only logical justification for the “posthumous work” provision “is that the distributees of the author have already received the whole right in the work to dispose of” and therefore do not need the renewal reversion. Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 715 (1944). *But see* Bricker, *supra* note 121, at 39.

<sup>157</sup> “\* \* \* ‘posthumous’ works [are] those on which the original copyright has been taken out by someone to whom the literary property passed before publication.” Shapiro, *Bernstein & Co. v. Bryan*, 123 F. 2d 697, 699 (2d Cir. 1941). *But see* BALL, *op. cit. supra* note 122, § 89, at 195.

<sup>158</sup> It should be noted that the apparent anomaly of denying the author’s family renewal rights in posthumous works becomes less disturbing the older the work involved is. There is little, if any, realistic justification for allowing a renewal reversion to the author’s wife, children, executors, or next of kin in the case of a work written—say—before 1850.

<sup>159</sup> *Hearings, supra* note 150, at 77; Elder, *Duration of Copyright*, 14 YALE L.J. 417 (1905); see AMERICAN PUBLISHERS’ COPYRIGHT LEAGUE, OPINIONS ON QUESTIONS OF COPYRIGHT 18 (1903).

<sup>160</sup> *Hearings, supra* note 150, at 18–19; 1 *Stenographic Report* 109–10, 160–61 (May–June 1905); Elder, *supra* note 159, at 418.

<sup>161</sup> *Hearings, supra* note 150, at 362.

<sup>162</sup> In the first Solberg draft bill of October, 1905 (LIBRARY OF CONGRESS, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT [Copyright Office Bull. No. 10, 1905]), the phrase read “a composite or collective work, such as an encyclopaedia, a ‘library,’ or ‘series,’ produced at the instance and expense of a publisher \* \* \*.” In the second Solberg draft, which was introduced in May, 1906 (S. 6330, H.R. 19353, 59th Cong., 1st Sess. [1906]), the phrase read simply “any composite or collective work.” Beginning in December, 1907 with H.R. 243 and S. 2499, 60th Cong., 1st Sess. (1907), the phrase was changed to “any periodical or other composite work,” and this language was used in all the 1908–1909 bills except H.R. 22183, 60th Cong., 1st Sess. (1908) and S. 9440, H.R. 28192, 60th Cong., 2d Sess. (1909).

<sup>163</sup> See notes 64–65, 82–85, 95–96 *supra*, and text thereto.

<sup>164</sup> *Hearings, supra* note 150, at 18–20, 76–78, 109.

mission from hundreds of authors and their families in order to bring out revisions and new versions of their collective works.<sup>165</sup>

While Representative Currier and others on the Congressional committees were not persuaded by the arguments in favor of the "Monroe Smith Amendment," they obviously became convinced of the need for an exception that would allow proprietors to extend the term of copyright in composite works in their own right.<sup>166</sup> There was one principal reason for this conviction; the impracticality of giving the renewal to authors and their families when the work was written by a large number of authors.

As a result of these developments, almost all of the bills introduced in 1908 contained a new provision in the section dealing with the extension of subsisting copyrights:

\* \* \* if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of the renewal and extension granted under this section: \* \* \*<sup>167</sup>

It should be noted that this provision was in addition to, and was completely separate from, the provision giving a special term to "any periodical or other composite work."

The 1908 Currier bill,<sup>168</sup> which broke away completely from the other pending bills, provided a renewal requirement both for future works and for subsisting copyrights. The two renewal provisions<sup>169</sup> were worded somewhat differently, but each provided a reversion to the author and his family with a single exception in favor of composite works. The language of the "composite works clause" in the two sections of the 1908 Currier bill was the same, and was slightly different from the equivalent language in the other bills:

\* \* \* if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then the proprietor of such copyright shall be entitled to the privilege of renewal and extension.

The Smoot-Currier bill of February, 1909,<sup>170</sup> which became the Act of 1909, was obviously based on the 1908 Currier bill, but contained some virtually inexplicable changes. The "composite works" provision in the basic renewal section<sup>171</sup> had become an amalgam of the language of the earlier bills giving a special term to "any periodical or other composite work," the language of the 1908 Currier bill, and new language:

\* \* \* in the case of \* \* \* any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, \* \* \* the proprietor of such copyright shall be entitled to a renewal and extension \* \* \*.

However, the equivalent provision in the section on subsisting copyrights<sup>172</sup> not only did not adopt this new language, but also reverted to the "composite works" language that had appeared in most of the 1908 bills *except* the Currier bill:

<sup>165</sup> *Hearings, supra* note 150, at 165.

<sup>166</sup> *Hearings, supra* note 150, at 19, 76.

<sup>167</sup> H.R. 21592, H.R. 21984, H.R. 22071, 60th Cong., 1st Sess. (1908); also two bills in 1909: H.R. 25162, H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>168</sup> H.R. 22183, 60th Cong., 1st Sess. (1908).

<sup>169</sup> The renewal provisions appeared in §§ 25 and 27.

<sup>170</sup> H.R. 28192, S. 9440, 60th Cong., 2d Sess. (1909).

<sup>171</sup> The basic renewal provision appeared in § 23.

<sup>172</sup> The provision on extension of subsisting copyrights appeared in § 24.

\* \* \* if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of the renewal and extension granted under this section.

There is no logical explanation for the striking and mysterious differences between the two sections; they can only be attributed to the drafter's carelessness and haste. Some indication of the real legislative intent can be found in the following excerpt from the final committee reports:

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 the 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.<sup>173</sup>

It is noteworthy that the first paragraph of the material quoted above is the only reference in the whole report to those cases in which the proprietor was given renewal in his own right. It seems that the committee's major concern in this situation—if not its only concern—was with cases where a number of authors contributed to a single work. It is almost as if the committees were unaware that the provisions concerning posthumous works, corporate works, and works made for hire had been added to the bills they were reporting.

(2) *Meaning of the phrase "periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof"*

(a) *"Periodical, cyclopedic, or other composite work"*

It is clear that Congress originally intended to give the right of renewal in the contents of a composite work to the proprietor, and to deny it to the various authors and their families, unless their contributions had been separately registered. The legislative history<sup>174</sup> shows that the determinative factors in a "composite work" were:

(1) A number of authors contributing copyrightable matter to a single work; and

(2) An employment or contractual arrangement entitling the proprietor to secure copyright in the various contributions.

Above all, it was the number of authors that was in the committee's mind. The whole purpose behind the exception, as originally conceived, was to give the proprietor the renewal in those relatively few cases where, as a practical matter, there were too many authors to join in the renewal claim. But the strength of this concept was dulled by the addition of "periodical" to the relevant phrase,<sup>175</sup> and was further

<sup>173</sup> H. R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 15 (1908).

<sup>174</sup> *Ibid.*; *Hearings, supra* note 150, at 18-19, 76-78, 109, 165.

<sup>175</sup> It is unclear whether a "periodical" was to be considered as a kind of "composite work" or as a different kind of work that was to be treated the same. Through careless drafting the phrase in the first proviso of § 23 (now § 24) reads "any periodical, cyclopedic, or other composite work," while that in the second proviso (dealing with the right of an author to renew individual contributions) reads "\* \* \* to a periodical or to a cyclopedic or other composite work." This question was quite important before 1937 because the old § 24 used only the phrase "a composite work" without mentioning periodicals; see notes 281-86 *infra*, and text thereto.

blunted by the drafter's failure to provide any definition of a "composite work" or to include any suggestion of the multiple-author criterion.

The result has been a distortion of the original concept of composite works. A series of renewal cases, which will be dealt with below in another context,<sup>176</sup> have considered the question of whether a work consisting of the contributions of two or three authors are "joint" works, so that the successor of one of the authors would have equal rights in the contributions of the other authors; one case involved text and illustrations,<sup>177</sup> and the others concerned words and music.<sup>178</sup> Most of the courts in these cases have insisted on considering the question in terms of a clear-cut dichotomy: is this a "joint" work or a "composite" work? In failing to see that there are works by more than one author which can be considered neither "joint" nor "composite," the courts have done considerable damage to the original concept of "composite works" in the renewal section, and in some cases have reached rather peculiar results.

In setting up "composite works" as the only alternative to "joint works," the courts seem to have disregarded the criterion of multiple authorship, and have substituted an entirely new criterion: the separability of the contributions.<sup>179</sup> The necessary implication of these decisions is that any work consisting of distinct and separable contributions which do not merge into a unitary whole is a "composite work," regardless of how many authors are involved. While it appears that Congress had no such criterion in mind,<sup>180</sup> the requirement that

<sup>176</sup> See notes 512-27 *infra*, and text thereto.

<sup>177</sup> *Harris v. Coca-Cola Co.*, 1 F. Supp. 713 (N.D. Ga. 1932), *bill dismissed on rehearing*, 22 U.S.P.Q. 72 (N.D. Ga.), *aff'd*, 73 F. 2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935).

<sup>178</sup> *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 268 (2d Cir. 1944); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd*, 221 F. 2d 569 (2d Cir.), *modified*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 67 U.S.P.Q. 12 (S.D.N.Y. 1945), *rev'd*, 161 F. 2d 408 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947).

<sup>179</sup> The only court which appears to have seen all the way through this problem was the Fifth Circuit Court of Appeals in *Harris v. Coca-Cola Co.*, 73 F. 2d 370 (5th Cir. 1934), which defined "composite works" as "those composed of the copyrightable work of several persons" and held that, whether or not a book of text and illustrations was a composite work, renewal by the widow of the author of the text did not extend to the illustrations. The attitude of all the other courts is exemplified by the following excerpt from the opinion in *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754, 758 (S.D.N.Y. 1953), speaking of the Circuit Court opinion in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944):

Judge Hand stressed the necessary purpose that each author should have in preparing his particular contribution to the joint work, explicitly ruling that if the first part of a work, to which two different persons devote their talents, is composed without any such common design, the combination of the two is a "composite work." But this is "not so, when both plan an undivided whole."

This decision was reversed, the Circuit Court holding that "since the intent was to merge the two contributions into a single work to be performed as a unit for the pleasure of the hearers we should consider the result 'joint' rather than 'composite.'" *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569, 570 (2d Cir. 1955).

<sup>180</sup> Aside from encyclopedias, most of the "composite works" mentioned during the hearings (e.g., dictionaries, directories, and legal digests) did not consist of separately identifiable contributions. See, e.g., *Hearings, supra* note 150, at 165. The following comment by William A. Livingstone, president of the Print Publishers Association of America, is persuasive on this point:

\* \* \* you should include also the term "composite," [when referring to works in which the proprietor may claim extension], because there are articles, such as maps, which may be the product of the work of several different persons and still might not be embraced in the term "encyclopedic." They would, however, be embraced under the term "composite." *Hearings, supra* note 150, at 109.



parts of a composite work must be "distinct or distinguishable" has been accepted by most commentators.<sup>181</sup>

This situation has been further complicated by the 1940 amendment which gave authors and their families the right to claim renewal in "a contribution by an individual author to a periodical or to a cyclopedic or other composite work," regardless of whether or not the contribution had been separately registered.<sup>182</sup> As things now stand, it seems that some standard requiring separability of contributions may have to be read into the phrase "composite work," but that this must be coupled with a requirement of multiple authorship. Perhaps Learned Hand came closest to a correct definition in a famous 1941 dictum:

\* \* \* The second [class] provides for "composite works," by which we understand those to which a number of authors have contributed distinguishable parts, which they have not however "separately registered," a situation at that time provided for by the second proviso though now changed—but which they have allowed a "proprietor" to include in one copyright. \* \* \*<sup>183</sup>

(b) "Upon which the copyright was originally secured by the proprietor thereof"

This ambiguous phrase, which is apparently intended to apply only to a "periodical, cyclopedic, or other composite work,"<sup>184</sup> has been the subject of a good deal of conjecture.<sup>185</sup> On the strength of the legislative history, it appears that the term "proprietor" in this phrase was used in balance and contrast with the term "individual author" in the clause of the second proviso covering "a contribution by an individual author to a periodical or to a cyclopaedic or other composite work [when such contribution has been separately registered]." In other words, under the 1909 Act the proprietor of copyright in a "composite work" (*i.e.*, a work of multiple authorship) had the right to renew everything in the work upon which he (or his predecessor) had had the original right to secure copyright, and the individual authors could renew their own contributions only if they had been separately copyrighted.<sup>186</sup> The effect of the 1940 amendment upon this situation will be discussed below.<sup>187</sup>

<sup>181</sup> BALL, *op. cit. supra* note 122, § 89, at 195; HOWELL, *op. cit. supra* note 121, at 111; Bricker, *supra* note 121, at 39; Kupferman, *supra* note 156, at 715; Wasserstrom, *The Copyrighting of Contributions to Composite Works*, 31 NOTRE DAME LAW. 381, 391-92 n. 57 (1956). Wasserstrom goes farthest in this direction, suggesting that the "distinctive characteristic" of a composite work is "that its parts are clearly discrete and readily capable of being used or are 'intended to be used separately and whose only unity is that they are bound together.'" Bricker suggests, on the basis of *Markham v. A. E. Borden Co.*, 206 F. 2d 199 (1st Cir. 1953), that a work by a single author may be considered "composite" if it consists of distinguishable parts. Howell, on the other hand, asserts that "a work made up of selections from the works of a single author would not be renewable as a composite work."

<sup>182</sup> Act of March 13, 1940, ch. 57, 54 Stat. 51, 17 U.S.C. § 24 (1958); see notes 283-91 *infra*, and text thereto.

<sup>183</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697, 699 (2d Cir. 1941).

<sup>184</sup> From the ambiguous wording and construction of the first proviso, it is possible to argue that the phrase "upon which the copyright was originally secured by the proprietor thereof" also qualifies "any posthumous work." However, the legislative history militates against this conclusion, since in the earlier bills leading up to the Act of 1909 the phrase was clearly used only in connection with "a composite work." *Cf. Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D.N.Y. 1939); WEIL, *AMERICAN COPYRIGHT LAW* § 952, at 364 (1917).

<sup>185</sup> BALL, *LAW OF COPYRIGHT AND LITERARY PROPERTY* § 89, at 196-97 (1944); 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* § 355, at 771-72 (1938); WEIL, *op. cit. supra* note 184, § 952, at 364. Weil comments:

\* \* \* Whether this means proprietor at the time of renewal, or not, or proprietor of the work and its contents, as distinguished from a mere publisher, or mere technical proprietor, of the copyright in such publication, as an entirety, is not entirely clear. It is deemed however, the words mean entire proprietor of the work and of its contents, at the time of original copyright. \* \* \*

<sup>186</sup> See *Shapiro, Bernstein & Co., v. Bryan*, 123 F. 2d 697, 699 (2d Cir. 1941) (dictum).

<sup>187</sup> See notes 292-302 *infra*, and text thereto.

In section 23 of the Act of 1909, which applied to works copyrighted under the new act, the relevant phrase read:

\* \* \* in the case of any \* \* \* periodical, cyclopaedic, or other composite work upon which the copyright was originally secured by the proprietor thereof \* \* \* *the proprietor of such copyright* shall be entitled \* \* \* [emphasis supplied]

In section 24, covering renewal of subsisting copyrights, it read:

\* \* \* if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then *such proprietor* shall be entitled \* \* \* [emphasis supplied]

On its face, the wording of section 24 indicated that, in the case of subsisting copyrights in composite works, the successor of the original proprietor had no renewal rights; either the original proprietor had to renew or the work would fall into the public domain.<sup>188</sup> This result was probably not intended,<sup>189</sup> and the Copyright Office was apparently liberal in registering renewal claims in the names of the successors of the original proprietor in this situation.<sup>190</sup> In any case, the language of section 23 (now § 24), as construed by the courts,<sup>191</sup> gives the renewal right directly to the owner at the time of renewal, and cuts off any rights of the original proprietor as such.

*d. Works copyrighted by a corporate body (otherwise than as assignee or licensee)*

Without doubt the most obscure provision in the renewal section is the so-called "corporate body" clause, which reads as follows:

\* \* \* in the case of \* \* \* any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) \* \* \* the proprietor of such copyright shall be entitled to a renewal and extension \* \* \*

Most commentators have tended to dismiss this clause as virtually meaningless<sup>192</sup> because of "the self-contained exception."<sup>193</sup> However, while it is true that the clause has little meaning in its present context, the legislative history makes its original purpose quite clear.

(1) *History of the provision*

At the copyright conferences held by the Librarian of Congress in 1905 and 1906, the question of works copyrighted by corporate bodies came up both in the discussions of who should be able to secure copyright and in the consideration of the terms of copyright for various works.<sup>194</sup> It was brought out that some foreign laws treated works published by corporate bodies in the same special category as pseudonymous, anonymous, posthumous, composite, and joint works, and that perhaps a special term of protection should be provided for them.<sup>195</sup> The Register of Copyrights, Mr. Solberg, apparently believed that this class of corporate works was largely synonymous with

<sup>188</sup> *Harris v. Coca-Cola Co.*, 73 F. 2d 370 (5th Cir. 1934) (dictum), *cert. denied*, 294 U.S. 709 (1935); HOWELL, *THE COPYRIGHT LAW* 114 (3d ed. 1952).

<sup>189</sup> See note 115 *supra*, and text thereto.

<sup>190</sup> 2 LADAS, *op. cit. supra* note 185, § 355, at 771-72, n. 353.

<sup>191</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697 (2d Cir. 1941).

<sup>192</sup> See BALL, *op. cit. supra* note 185, § 89, at 195-96; HOWELL, *supra* note 188, at 111-12; WARNER, *RADIO AND TELEVISION RIGHTS* § 82, at 252 (1953); Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 44 (1955). Howell comments that "[i]t is not clear why corporate bodies were singled out for this particular blessing, nor just what kinds of works it was intended to embrace."

<sup>193</sup> Kupferman, *supra* note 156, at 715.

<sup>194</sup> 1 *Stenographic Report* 67-68, 77-86, 160-61 (May-June 1905); 2 *Stenographic Report* 241-42 (Nov. 1905); 3 *Stenographic Report* 243-56, 518 (1906).

<sup>195</sup> 1 *Stenographic Report* 83-84, 160 (May-June 1905).

"composite works,"<sup>196</sup> but it was pointed out that "there are many cases where the work is by a single person, and still the proprietor wishes to take it out as a corporation."<sup>197</sup>

Mr. Solberg's first draft in October, 1905,<sup>198</sup> provided a special fifty-year term for "a composite or collective work, such as an encyclopaedia, a 'library,' or 'series' produced at the instance and expense of a publisher," but made no special mention of works copyrighted by corporate bodies. However, his second draft of March, 1906,<sup>199</sup> provided a special term of fifty years for several types of works, including "any book (not a blank book) by a corporate body"; this use of the word "by" was criticized during the conferences on the ground that corporations are incapable of writing books.<sup>200</sup>

In the Kittredge-Currier bill introduced in May, 1906,<sup>201</sup> a fifty-year term was provided for "any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors." This provision was omitted entirely from the bill as reported in January, 1907,<sup>202</sup> but was restored (in a slightly revised form) to the Smoot-Currier bill of December, 1907<sup>203</sup> and the Kittredge-Barchfeld bill of December, 1907 and January, 1908.<sup>204</sup>

It should be emphasized that these provisions, and the discussions that preceded them, were directed toward setting up a special term for corporate and other "impersonal" works that would be *shorter* than the basic life-plus term. At the same time, the scope of the phrase "works copyrighted by a corporate body" was far from clear. It was not intended to cover works by individual authors written at their own volition, but taken literally the language used would have included such works if originally copyrighted by a corporation.

This problem was eventually recognized by the American [Authors'] Copyright League, and at the December, 1906, hearings its secretary suggested an amendment which would add the parenthetical phrase "(otherwise than as assignee of the individual author or authors)" after the phrase "a work copyrighted by a corporate body."<sup>205</sup>

The meaning of this amendment, as shown in the legislative history, is unmistakable. The special shortened term for "works copyrighted by a corporate body" was thereby limited to "impersonal works" such as directories, dictionaries, corporate reports, and the like, and was apparently intended to overlap—at least to some extent—the larger categories of "composite works" and "works made for hire."<sup>206</sup> "Personal" works—works written by an individual author on his own volition—were entitled to the full life-plus term, whether originally

<sup>196</sup> See *id.* at 160-61.

<sup>197</sup> *Ibid.*

<sup>198</sup> LIBRARY OF CONGRESS, *supra* note 162.

<sup>199</sup> LIBRARY OF CONGRESS, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT (Copyright Office Bull. No. 10, 2d print, 1906).

<sup>200</sup> 3 *Stenographic Report* 518 (1906).

<sup>201</sup> S. 6330, H.R. 19853, 59th Cong., 1st Sess. (1906).

<sup>202</sup> S. 8190, H.R. 25133, 59th Cong., 2d Sess. (1907).

<sup>203</sup> S. 2499, H.R. 243, 60th Cong., 1st Sess. (1907).

<sup>204</sup> S. 2900, 60th Cong., 1st Sess. (1907); H.R. 11794, 60th Cong., 1st Sess. (1908).

<sup>205</sup> *Hearings Before Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 251, 402 (Dec. 1906); see COPYRIGHT OFFICE, AMENDMENTS PROPOSED TO THE COPYRIGHT BILL (S. 6330, H.R. 19853) 50-51 (Pt. II, Dec. 1906); *Hearings Before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess. 88 (1908).

<sup>206</sup> The Authors' League comments prepared by R. R. Bowker (*Hearings* [1908], *supra* note 205, at 79-100), state that the parenthetical phrase "(otherwise than as assignee of the individual author or authors)" is necessary to cover the case of a personal copyright taken out by an incorporated firm of publishers. *Hearings* (1908), *supra* note 205, at 88.

copyrighted by a corporation or not.<sup>207</sup> Special attention was drawn to periodicals copyrighted by a corporate body; under the amendment it was clear that individually-written contributions which were copyrighted by a publishing corporation as assignee or licensee of the contributing authors were to have the full life-plus term, and that only staff-written material was to be limited to the special "corporate body" term.<sup>208</sup>

The Authors' League amendment appeared in two of the bills introduced after the 1908 hearings;<sup>209</sup> four of the other bills continued to include a "corporate body" clause without the qualifying language.<sup>210</sup> The 1908 Currier bill,<sup>211</sup> which provided a renewal term for the benefit of the author and his family, contained an exception for composite works, but did not mention works copyrighted by a corporate body.

As we have already seen, the drafter of the final bill simply lifted the language from the provision specifying special terms for certain works, and used it to specify those classes which a proprietor could renew in his own right. The effect was to deprive the "corporate body" clause of whatever slight logic it might have had in the context in which it was written.

(2) *Meaning of the provision*

In 1938, shortly after the provision came into effect, the Register of Copyrights noted that the "corporate body" clause was giving rise to unwarranted and conflicting renewal claims;<sup>212</sup> in his opinion the only purpose of the clause was:

\* \* \* to cover works of an *impersonal* character, such as law digests, dictionaries, directories, etc., made by the staff or others whose individual work was merged in the whole and incapable of identification. \* \* \*

The Register felt that this clause was superfluous in view of the "work made for hire" provision, and he urged that it be eliminated. Nothing came of his suggestion, but for some time the Copyright Office has considered a "corporate body" claim appropriate only in a few rather special cases.<sup>213</sup>

While noting its obscurity, Judge Learned Hand attempted to give the clause some meaning in a 1941 dictum:

\* \* \* The third class is not entirely plain and it is not indeed necessary for us to define its scope. Coupled as it is with the fourth—which alone is here important—it may include "works" which are composed by persons who may be related to a corporation neither as employees "for hire," nor as assignors or licensors. (Members of a corporation producing a common "work" by mutual contributions, fused so as to be indistinguishable, may conceivably be one example.) \* \* \*

<sup>207</sup> See *Hearings* (1908), *supra* note 205, at 62.

<sup>208</sup> See *Hearings* (Dec. 1906), *supra* note 205, at 251; COPYRIGHT OFFICE, *op. cit. supra* note 205, at 51.

<sup>209</sup> H.R. 21592, 60th Cong., 1st Sess. (1908); H.R. 27310, 60th Cong., 2d Sess. (1909).  
<sup>210</sup> H.R. 21984, H.R. 22071, 60th Cong., 1st Sess. (1908); H.R. 24762, 60th Cong., 2d Sess. (1908); H.R. 25162, 60th Cong., 2d Sess. (1909).

<sup>211</sup> H.R. 22183, 60th Cong., 1st Sess. (1908).

<sup>212</sup> BOUVÉ, LETTER TO THE LIBRARIAN OF CONGRESS CONCERNING CERTAIN ASPECTS OF THE COPYRIGHT ACT OF MARCH 4, 1909, at 43-44 (1938).

<sup>213</sup> See Copyright Office, Form R (Mar. 1958); Copyright Office, Circular 15 (Feb. 1959).

<sup>214</sup> *Shapiro, Bernstein & Co. v. Bryan*, 128 F. 2d 697, 699 (2d Cir. 1941); *accord*, *Kupferman, supra* note 156, at 715-16. See also HOWELL, *op. cit. supra* note 188, at 111-12. Howell's remarks on this point appear to be garbled.

Aside from a few other possible examples of similarly unusual situations,<sup>215</sup> the "corporate body" clause appears to be a dead letter.

*e. Works copyrighted by an employer for hire*

Of the four types of works that a proprietor is entitled to renew in his own right the most important, both in the number of works involved and in their commercial value, is the class of "works made for hire."<sup>216</sup> The statutory provision reads as follows:

\* \* \* in the case of \* \* \* any work copyrighted \* \* \* by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension \* \* \*.

(1) *History of the provision*

Practically all of the meaningful legislative history of the "works made for hire" clause is found in the records of the revision conferences held by the Librarian of Congress in 1905 and 1906.<sup>217</sup> The 1905 conferences skirted around the rights and status of an employer-for-hire in the discussions of who should be entitled to secure copyright,<sup>218</sup> but the problem was not singled out for separate consideration. However, section 21 of the second draft bill prepared by the Register of Copyrights in March, 1906,<sup>219</sup> defined the term "author" as including, among a number of other things:

An employer, in the case of a work produced by an employee during the hours for which his salary is paid, subject to any agreement to the contrary.

The discussions during the third conference in 1906<sup>220</sup> make clear that this provision had been added at the behest of two groups of publishers: the publishers of encyclopedias, directories, and other composite works, and the publishers of prints and similar works of the graphic arts. Their purpose was to insure that they would be entitled to secure copyright in their staff-written material without having to get assignments from their employees.

The definitions of "author" in section 21 were criticized for being too elaborate and confusing, and it was urged that the statute merely give copyright to "authors \* \* \* , their executors, administrators, or assigns."<sup>221</sup> This suggestion was strongly opposed by the publishers of prints and composite works,<sup>222</sup> on the ground that, strictly speaking, they were neither "authors" nor "assigns." These publishers urged that copyright be given to "authors and proprietors," and their "executors, administrators, or assigns," the word "proprietors" here referring to publishers of composite works and employers for hire.

The print and composite work publishers also requested that specific language covering "employers for hire" be retained,<sup>223</sup> and further-

<sup>215</sup> Conceivable examples might be:

(1) A work written by members of a religious order or similar organization where the individual authors were not exactly employees for hire but at the same time had no personal property right in the work.

(2) A work written by an official or a major stockholder of a corporation, where the work was written directly for the corporation but not as an employees for hire.

(3) A motion picture produced under an unusual financing arrangement and copyrighted by a corporation that was not the employer for hire.

<sup>216</sup> Varmer, *Works Made for Hire and on Commission* [Study No. 13 in the present series of committee prints].

<sup>217</sup> See note 28 *supra*.

<sup>218</sup> 1 *Stenographic Report* 77-86 (May-June 1905).

<sup>219</sup> LIBRARY OF CONGRESS, *supra* note 199.

<sup>220</sup> 3 *Stenographic Report* 243-56, 518-19.

<sup>221</sup> *Id.* at 243-56.

<sup>222</sup> *Id.* at 250-51.

<sup>223</sup> *Id.* at 256.

more that employers be "provided specifically among those who are entitled to have the 50 year term as an original proprietor."<sup>224</sup> In this connection the representative of the print publishers criticized the phrase "produced by an employee during the hours for which his salary is paid" as being too limitative; "in many cases we have to have work done under conditions which do not make it possible to come within hours."<sup>225</sup> He suggested that the phrase "for salary" be substituted, but his suggestion was in turn criticized as too limitative since, for example, it would not necessarily cover the case of a painter engaged to paint a portrait.<sup>226</sup>

These discussions had direct results which appeared in the Kittredge-Currier bill introduced in May, 1906.<sup>227</sup> One result was a new definition of the word "author": "\* \* \* and the word 'author' shall include an employer in the case of works made for hire." This provision appeared in exactly the same form in all of the later bills, was enacted without change or discussion, and now appears in § 26 of the Code.

At the same time these discussions of employers-for-hire as "authors" resulted in an entirely new provision in the 1906 Kittredge-Currier bill<sup>228</sup> dealing with duration of copyright. A special term of fifty years was given to "any composite or collective work; any work copyrighted by a corporate body or by the employer of the author or authors." On the basis of the general discussions of term at the conferences and hearings,<sup>229</sup> it seems safe to conclude that there were two reasons why works copyrighted by employers were limited to the fifty-year term:

(1) Since an employer was to be considered the author, and since most employers are corporations or other legal entities, it would be impractical to base the term of copyright on the life of the "author" in such cases.

(2) Since the continuing benefits of the copyright would be going to the employer rather than the actual creator, a shorter term would be appropriate.

The provision limiting the term in works copyrighted by employers to a specific number of years was omitted from the Kittredge-Currier bill as reported in January, 1907,<sup>230</sup> but was reworded and restored to the Smoot-Currier bill in December, 1907;<sup>231</sup> this bill gave a special term of 42 years to "any work copyrighted \* \* \* by an employer for whom such work is made for hire." This language, which obviously came from the definition of "author" appearing elsewhere in the bill, was used in every later bill except one.<sup>232</sup>

When the drafter of the final Smoot-Currier bill in 1909 prepared the renewal section, he imported intact the language giving a special term to works copyrighted by employers for hire into the provision giving proprietors renewal in their own right. The committee re-

<sup>224</sup> *Id.* at 518.

<sup>225</sup> *Id.* at 519.

<sup>226</sup> *Ibid.*

<sup>227</sup> S. 6330, H.R. 19853, 59th Cong., 1st Sess. (1906).

<sup>228</sup> The definition of "author" appeared in § 63 of the bill, and the basic duration provision was § 18.

<sup>229</sup> See notes 31-32 *supra*, and text thereto.

<sup>230</sup> S. 8190, H.R. 25133, 59th Cong., 2d Sess. (1907).

<sup>231</sup> H.R. 243, S. 2499, 60th Cong., 1st Sess. (1907).

<sup>232</sup> It was omitted from the 1908 Currier bill, H.R. 22183, 60th Cong., 1st Sess. (1908), which substituted a renewal system for special terms.

ports on this final bill indicate a likelihood that the legislators regarded a "work made for hire" as a species of "composite or cyclopedic work," and did not realize the breadth of the exception they were creating.<sup>233</sup>

(2) *Meaning of the provision*

The situation that emerged under the Act of 1909 could not have been more confused; the courts were faced with the nearly impossible task of making sense out of three interrelated but uncoordinated provisions:

(1) Section 62 provided that "the word 'author' shall include an employer in the case of works made for hire."

(2) Section 24 provided that with the exception of composite works, subsisting copyrights could be renewed by the "author" and his family; there was no mention of works made for hire.

(3) Section 23, covering works copyrighted after 1909, gave the right to claim renewal in a "work copyrighted \* \* \* by an employer for whom such work is made for hire" to the copyright proprietor rather than the "author."

In *Tobani v. Carl Fischer, Inc.*,<sup>234</sup> involving renewals of copyrights secured before 1909, the court had to decide whether, under § 24, the right to claim renewal belonged to the employer for hire as "author," or to the individual employee and his family. In deciding that the employer for hire should have been the renewal claimant and that registrations in the names of the author and his children were void,<sup>235</sup> the court held that the definition of "author" as including an employer for hire must be read into § 24, the provision dealing with renewal of subsisting copyrights.<sup>236</sup> The decision did not consider what would happen under § 24 if the employer had assigned the copyright, if the individual employer were dead at the time of renewal, or if the employer were a corporation incapable of having a widow or children.<sup>237</sup>

The impact of the *Tobani* decision was shortly vitiated by a new case arising in the same circuit.<sup>238</sup> The copyrights involved in *Shapiro, Bernstein & Co. v. Bryan*<sup>239</sup> had been secured under the Act of 1909, so the provisions of § 23 rather than those of § 24 were controlling. One of the questions in the case was the validity of renewal

<sup>233</sup> See H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 15 (1909).

<sup>234</sup> 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938), *modifying* 36 U.S.P.Q. 97 (S.D.N.Y. 1937).

<sup>235</sup> The lower court, 36 U.S.P.Q. 97 (S.D.N.Y. 1937), held that the employer-proprietor was entitled to the renewals, and ordered that the renewal registrations made by the author (and later by his children) be transferred to it. However, the Circuit Court of Appeals held that, since renewal registrations had been made in the wrong name, no valid renewals had been secured and the works were in the public domain. Criticism has been directed at this aspect of the decision, among others, especially since the Copyright Office appears to have been unwilling to accept renewal claims by employers-for-hire as "authors" under section 24. HOWELL, *op. cit. supra* note 188, at 114-15; WARNER, *op. cit. supra* note 192, § 82, at 253-54. Compare *Tobani v. Carl Fischer, Inc.*, 36 U.S.P.Q. 97 (S.D.N.Y. 1937) with *United States Ozone Co. v. United States Ozone Co. of America*, 62 F. 2d 887 (7th Cir. 1932).

<sup>236</sup> 98 F. 2d 57 (2d Cir. 1938); *accord*, *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946).

<sup>237</sup> Several writers have commented on the "absurdities" created by the *Tobani* decision: Bricker, *supra* note 192, at 45; see WARNER, *op. cit. supra* note 192, § 82, at 253-54; 12 AIR L. REV. 399, 404-05 (1941).

<sup>238</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697 (2d Cir. 1941), *affirming* 36 F. Supp. 544 (S.D.N.Y. 1940). It should be noted that the *Bryan* opinion did not actually overrule the decision in the *Tobani* case, probably because technically the two cases involved different sections of the statute and were thus not on all fours. However, from the wording of his opinion, it is safe to assume that Judge Hand disapproved the *Tobani* decision.

<sup>239</sup> *Supra* note 238.

registrations in the name of the assignee of the original employer. The same court that decided *Tobani* held in *Bryan* that:

(1) The definition in § 62 of "author" as including an employer for hire does not apply to renewals under § 23 of works copyrighted after 1909; <sup>240</sup> in the second proviso the term "author" is used "in the colloquial sense," <sup>241</sup> and the "proprietor" claims specified in the first proviso override the "author" claims under the second proviso. <sup>242</sup>

(2) The "proprietors" entitled to renew under the first proviso of § 23 are the owners at the time of renewal and not necessarily the original proprietors. <sup>243</sup>

It therefore seems safe to conclude that, at least for works copyrighted after 1909, the present owner of copyright in a "work copyrighted \* \* \* by an employer for whom such work is made for hire" is the proper renewal claimant, and that neither the employee-author, nor his employer as such, is entitled to renew. <sup>244</sup>

In the *Bryan* case the philosophical justification <sup>245</sup> for the "work made for hire" exception seemed to trouble Judge Learned Hand; if Congress intended to give the benefit of a second chance to the author who had assigned away all his rights in the first term, why should not the same benefit have been given to employee-authors who are presumably even more in need of a second chance, never having had a first one? <sup>246</sup> Nevertheless, as Judge Hand says, "it is idle to try to speculate why Congress should have so provided"; <sup>247</sup> the truth is probably that they were thinking about the multiple-author situation and did not realize what they were doing. <sup>248</sup>

Read together, the *Tobani* and *Bryan* decisions appear to hold that under no circumstances is an individual employee-author entitled to any rights in either the original or the renewal term of copyright,

<sup>240</sup> In Judge Hand's opinion, the definition of "author" can have no significance in the first proviso of section 24 because the word does not appear there, and if "adds nothing" to the second proviso, since the possibility of an employer's widow, children, etc., claiming the renewal is "absurd." 123 F. 2d 697, 699 (2d Cir. 1941).

<sup>241</sup> *Id.* at 700.

<sup>242</sup> *Ibid.*

<sup>243</sup> Shapiro, Bernstein & Co. v. Bryan, 27 F. Supp. 11 (S.D.N.Y. 1939) (on motion to dismiss); 36 F. Supp. 544 (S.D.N.Y. 1940), *aff'd*, 123 F. 2d 697 (2d Cir. 1941).

<sup>244</sup> "The right of renewal in a work made for hire is not given to the author, nor to the employer as author, but to the proprietor." Shapiro, Bernstein & Co. v. Bryan, 36 F. Supp. 544, 545 (S.D.N.Y. 1940).

<sup>245</sup> Kupferman concludes that the philosophical justification for the "work made for hire" exception is that the employer can actually be considered a kind of author; "the motivating factor in producing the work was the employer who induced the creation." Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 716 (1944); accord, Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 45 (1955); see 2 SOCOLOW, *THE LAW OF RADIO BROADCASTING* § 687, at 1219 (1939); WITTENBERG, *THE LAW OF LITERARY PROPERTY* 99 (1957). The force of this reasoning is diminished by Judge Hand's holding in the *Bryan* case, 123 F. 2d 697 (2d Cir. 1941), that the employer need contribute nothing but money, and that the renewal right in such cases goes to the employer's successors and does not revert to the employer (or his family) as "author."

<sup>246</sup> "[I]t might have been reasonable \* \* \* to save out of the transfer by contract of employment cases where the employee was the real author, as here." 123 F. 2d 697, 700 (2d Cir. 1941).

<sup>247</sup> 123 F. 2d 697, 700 (2d Cir. 1941).

<sup>248</sup> See notes 173-233 *supra*, and text thereto.



and this conclusion is supported by other authority.<sup>249</sup> If this is true, the question in individual cases almost always resolves itself into one of fact or contract interpretation: was this work "made for hire" or not? The Copyright Office makes no effort to decide questions of this sort, and as a result registers a number of conflicting renewal claims asserted in the same works by "authors" and by "proprietors of copyright in a work made for hire."<sup>250</sup>

The large and complex problem of what constitutes a "work made for hire" is outside the scope of this study.<sup>251</sup> However, solely in the context of the renewal provision, it is possible to make a few general observations on the basis of the legislative history, decisions, and commentaries:

(1) A "work made for hire" is not one which the author created on his own volition and then sold to a proprietor.<sup>252</sup> There must have been some arrangement, going beyond an assignor-assignee relationship, before the work was undertaken.<sup>253</sup>

(2) A regular salary is usually indicative of employment for hire.<sup>254</sup> However, whether or not a work was "made for hire"<sup>255</sup> is not necessarily dependent upon whether it was prepared by an employee exclusively during regular working hours,<sup>256</sup> or for a fixed salary.<sup>257</sup>

<sup>249</sup> *United States Ozone Co. v. United States Ozone Co. of America*, 62 F. 2d 887 (7th Cir. 1932); *Fred Fisher Music Co. v. Leo Feist, Inc.*, 55 F. Supp. 359 (S.D.N.Y. 1944); *Vitaphone Corp. v. Hutchinson Amusement Co.*, 28 F. Supp. 526 (D. Mass. 1939); *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215 (C.C.M.D. Pa. 1911); WITTENBERG, *op. cit. supra* note 245, at 99; 2 SOCOLOW, *op. cit. supra* note 245, § 687, at 1220. Compare *Pierpont v. Fowle*, 19 Fed. Cas. 652 (No. 11152) (C.C.D. Mass. 1846). There are at least two situations in which the question of whether an employee for hire has any reversionary rights is still important:

(1) Technically, a proprietor is not entitled to renew a "work made for hire" unless it was also "copyrighted by an employer." What happens when the work was made for hire but the employer transfers all his rights before copyright is secured, and the work is actually copyrighted by an assignee rather than the employer? This situation is not uncommon in certain fields, especially motion pictures.

(2) It can be argued that, under the second proviso as amended in 1940, the only persons who can renew a contribution to a periodical not separately registered are the author and his family. Yet who renews a contribution not separately registered if it was made for hire?

It is conceivable that a court might allow an individual employee-author to renew in either or both of these situations. It appears more likely, however, that the court would look through the technical language and give the renewal to the proprietor.

<sup>250</sup> HOWELL, *THE COPYRIGHT LAW* 112 (3d ed. 1952); BOUVÉ, *op. cit. supra* note 212, at 39.

<sup>251</sup> For a separate consideration of this problem, see Varmer, *op. cit. supra* note 216.

<sup>252</sup> De Wolf, *Note on American Copyright Law*, in *COMPANION TO ENGLISH LITERATURE* 886L (app., 7th ed. 1939); Kupferman, *supra* note 245, at 716.

<sup>253</sup> "In every case, however, his work was pursuant to particular assignment and direction and it was in no sense original or spontaneous \* \* \*." *Tobani v. Carl Fischer, Inc.*, 36 U.S.P.Q. 97 (S.D.N.Y. 1937), *modified on other grounds*, 98 F. 2d 57 (2d Cir. 1938), *cert. denied*, 305 U.S. 650 (1938). In *Fred Fisher Music Co. v. Leo Feist, Inc.*, 55 F. Supp. 359 (S.D.N.Y. 1944), A agreed to write songs for B, and B promised to pay A a weekly salary; the court held that this constituted a relationship of employer and employee, and that B's assignment of the contract to C as part of its assets continued the employer-employee relationship because A acquiesced in and ratified the arrangement with C.

<sup>254</sup> See, e.g., *National Cloak & Suit Co. v. Kaufman*, 189 Fed. 215 (C.C.M.D. Pa. 1911); *Tobani v. Carl Fischer, Inc.*, *supra* note 253; BOUVÉ, *op. cit. supra* note 212, at 39; HOWELL, *op. cit. supra* note 250, at 112.

<sup>255</sup> In his comments on the renewal section in 1938 the Register of Copyrights, Colonel C. L. Bouvé, took the view that "this clause was intended to cover works produced by salaried employees in the course of their employment," and recommended that it be changed to read "or by an employer for whom such work was made by salaried employee or employees in the course of employment." BOUVÉ, *op. cit. supra* note 212, at 44.

<sup>256</sup> See *Tobani v. Carl Fischer, Inc.*, 36 U.S.P.Q. 97 (S.D.N.Y. 1937), *modified on other grounds*, 98 F. 2d 57 (2d Cir. 1938), *cert. denied*, 305 U.S. 650 (1938); HOWELL, *op. cit. supra* note 250, at 112; cf. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955).

<sup>257</sup> See *Tobani v. Carl Fischer, Inc.*, *supra* note 256; *Shapiro, Bernstein & Co. v. Bryan*, 27 F. Supp. 11 (S.D.N.Y. 1939) (on motion to dismiss); 36 F. Supp. 544 (S.D.N.Y. 1940), *aff'd*, 123 F. 2d 697 (2d Cir. 1941); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 67 U.S.P.Q. 12 (S.D.N.Y. 1945), *rev'd on other grounds*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947).

(3) The phrase "work made for hire" probably applies to some commissioned works,<sup>258</sup> although not to works prepared by independent contractors as "special job assignments"<sup>259</sup> or to works created by an employee entirely outside the scope of his employment.<sup>260</sup>

(4) The employer need not have contributed anything in the sense of "authorship" to a work made for hire; his only contribution need be the "hire" for which the employee-author worked.<sup>261</sup>

*f. Prints and labels registered in the Patent Office*

In 1940 a new class of works renewable by the proprietor was added to the copyright law.<sup>262</sup> Jurisdiction over "prints and labels published in connection with the sale or advertisement of articles of merchandise" was transferred from the Patent Office to the Register of Copyrights, and the Act contained the following renewal provision (now § 25 of the Copyright Code) :

Subsisting copyrights originally registered in the Patent Office prior to July 1, 1940, \* \* \* shall be subject to renewal in behalf of the proprietor upon application made to the Register of Copyrights within one year prior to the expiration of the original term of twenty-eight years.

The legislative history indicates that the only purpose of this Act was a simple change in place of administration, and that there was no intent to make any substantive changes in the law.<sup>263</sup> The earlier versions of the bill provided that subsisting copyrights "shall be subject to renewal by the Register of Copyrights at the expiration of their term in like manner, on the same terms, and upon payment of the same fee<sup>264</sup> as is provided in the case of renewal of other copyrights."<sup>265</sup> Nevertheless, the renewal section of the print and label bill as enacted makes copyrights registered in the Patent Office renewable by the proprietor in his own right, and gives the individual author and his family no right of renewal in such cases.

Of course most commercial prints and labels are made for hire, so the 1940 amendment probably did not destroy the rights of individual authors in a great many cases. However, it is interesting to note that section 25 will cease to be effective on July 1, 1968, and thereafter commercial prints and labels will be renewable on the same terms as all other copyrighted works.

<sup>258</sup> See *Tobani v. Carl Fischer, Inc.*, 36 U.S.P.Q. 97 (S.D.N.Y. 1937), *modified on other grounds*, 98 F. 2d 57 (2d Cir. 1938), *cert. denied*, 305 U.S. 650 (1938); *Varmer, op. cit. supra* note 216, at 130.

<sup>259</sup> See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 67 U.S.P.Q. 12 (S.D.N.Y. 1945), *rev'd on other grounds*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *De Wolf, in op. cit. supra* note 252, at 886L.

<sup>260</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd on other grounds*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955). *Contra, BOUVÉ, op. cit. supra* note 212, at 44.

<sup>261</sup> *Shapiro, Bernstein & Co. v. Bryan*, 123 F. 2d 697 (2d Cir. 1941).

<sup>262</sup> Act of July 31, 1939 (effective July 1, 1940), ch. 396, §§ 2-3, 53 Stat. 1142, 17 U.S.C. §§ 5-6 (1958).

<sup>263</sup> S. REP. NO. 1473, 74th Cong., 2d Sess. (1936); H.R. REP. NO. 70, S. REP. NO. 793, 76th Cong., 1st Sess. (1939); 80 CONG. REC. 1453 (1936); 84 CONG. REC. 9378 (1939).

<sup>264</sup> The fee for renewal of commercial prints and labels under the 1940 amendment was left unclear; the Attorney General held, 39 OPS. ATTY GEN. 459 (1940), that the same fee—\$6.00—should be charged for both original and renewal registrations, but this opinion was strongly criticized, *Carter, H.R. 1181*, 27 J. PAT. OFF. SOC'Y 194 (1945), and bills were introduced to reduce the fee to that charged for other renewals. H.R. 4641, 78th Cong., 2d Sess. (1944); H.R. 1181, 79th Cong., 1st Sess. (1945). Since the general fee increase in 1948 by the Act of April 27, 1948, 62 Stat. 202, 17 U.S.C. § 216 (1958), the Copyright Office has been charging the same \$2.00 fee for all renewals.

<sup>265</sup> S. 3121, 74th Cong., 1st Sess. (1935); S. 478, 75th Cong., 1st Sess. (1937); H.R. 8608, 75th Cong., 2d Sess. (1937).

## 2. Statutory claimants: authors and their families

### a. In general

The nub of the reversionary renewal system is found in the second proviso of § 24, which sets up a definite schedule of those entitled to claim renewal in all cases other than those enumerated in the first proviso:

- (1) "the author \* \* \*, if still living";
- (2) "the widow, widower, or children of the author, if the author be not living";
- (3) "if such author, widow, widower, or children be not living, then the author's executors";
- (4) "if such author, widow, widower, or children be not living, \* \* \* [and] in the absence of a will, his next of kin \* \* \*."

As shown above,<sup>266</sup> this provision derives from the Statute of Anne by way of the U.S. copyright statute of 1831. It was retained in an effort to benefit authors; as stated in the committee report:

\* \* \* 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.<sup>267</sup>

The committee report also indicates an intention to broaden the classes of those entitled to claim the renewal term:

[T]he bill \* \* \* makes some change in existing law as to those who may apply for the renewal. 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 executors, or, in the absence of a will, his next of kin. It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.<sup>268</sup>

### b. Contributions to periodicals and composite works

The second proviso of the renewal section begins with an omnibus statement of the works that an author and his family are entitled to renew:

*And provided further,* That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work, \* \* \*.

The phrase "any other copyrighted work" is intended to exclude those works specified in the first proviso which a proprietor is entitled to renew in his own right. The clause relating to contributions was originally intended to balance the clause in the first proviso giving the proprietor the right to renew "any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof." Unfortunately, the present language of the contributions clause is the result of an ill-considered amendment in 1940, which has thrown the renewal of contributions into complete confusion.

<sup>266</sup> See notes 2-14, *supra*, and text thereto.

<sup>267</sup> H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 14 (1909).

<sup>268</sup> *Id.* at 14-15.

*(1) History of the provision*

At the December, 1906, hearings, as noted above,<sup>269</sup> the Authors' League proposed an amendment to the "corporate body" clause that was intended to clarify the status of contributions to periodicals and other composite works;<sup>270</sup> such contributions were supposed to be entitled to the full life-plus term unless staff-written.<sup>271</sup> At the same time, the League proposed to add the following amendment to the basic duration provision:

\* \* \* except that the copyright as a whole of a composite work or periodical shall not preclude the right of an individual author of any separable copyrightable component part thereof to obtain separate copyright for his individual work for the term of life and fifty years.<sup>272</sup>

The thought behind this language was incorporated in a new provision which appeared in five of the 1907-1909 bills;<sup>273</sup> the duration section in these bills provided a basic life-plus term for most works, "including a contribution to a periodical when such contribution has been separately registered under the provisions of section twelve of this Act." In other words, a periodical and all its contents were to be given a straight publication-plus term, but if a contribution were registered separately, it would be entitled to the longer life-plus term.

The question of contributions came up at the 1908 hearings in an entirely different context—that of the "Monroe Smith Amendment" which would have allowed publishers to share the renewal and extension of subsisting copyrights with authors and their families.<sup>274</sup> As we have seen,<sup>275</sup> by emphasizing the practical difficulties of getting all contributors to join in a renewal application covering an encyclopedia or similar multi-author work, the publishers managed to convince the Congressional committees that the extension of such works should be given directly to the proprietor and should be denied to authors of individual contributions.<sup>276</sup> An exception to that effect appeared in most of the 1908-1909 bills;<sup>277</sup> for example:

\* \* \* or if the work be a composite work upon which copyright was originally secured by the proprietor thereof, then such proprietor shall be entitled to the privilege of renewal and extension.<sup>278</sup>

In combining language from these two different sources, the drafter of the final 1909 bills<sup>279</sup> for once reached a fairly consistent result. With respect to works copyrighted after 1909, the right to renew was given directly to the proprietor if the work were a "periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof." The author and his family had the right to renew "a contribution by an individual author to a periodical or to a cyclopedic or other composite work" only "when such contribution has been separately registered." It is clear from

<sup>269</sup> See notes 205-08 *supra*, and text thereto.

<sup>270</sup> *Hearings Before Committee on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 251 (Dec. 1906).

<sup>271</sup> See notes 207-08 *supra*, and text thereto.

<sup>272</sup> *Hearings, supra* note 270, at 402; COPYRIGHT OFFICE, AMENDMENTS PROPOSED TO THE COPYRIGHT BILL (S. 6330, H.R. 19853) 52 (Pt. II, Dec. 1906).

<sup>273</sup> S. 2900, 60th Cong., 1st Sess. (1907); H.R. 11794, H.R. 21592, 60th Cong., 1st Sess. (1908); H.R. 24782, 60th Cong., 2d Sess. (1908); H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>274</sup> See notes 64-65, 82-85, 95-96 *supra*, and text thereto.

<sup>275</sup> See notes 163-67 *supra*, and text thereto.

<sup>276</sup> See note 186 *supra*, and text thereto.

<sup>277</sup> H.R. 21592, H.R. 21984, H.R. 22071, H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 25162, H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>278</sup> The language of the 1908 Currier bill, H.R. 22183, 60th Cong., 1st Sess. (1908), was somewhat different; see notes 168-69 *supra*, and text thereto.

<sup>279</sup> H.R. 28192, S. 9440, 60th Cong., 2d Sess. (1909).

this language, and from the legislative history preceding it, that the rights of the proprietor and of the author and his family were intended to be mutually exclusive. The proprietor was given the renewal copyright in all contributions in which he had originally secured the copyright—that is, all contributions covered by his general notice, but excluding those contributions published with a separate notice and registered separately.<sup>279a</sup> This conclusion is borne out by the 1909 committee report, which contains the following comment:

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 the renewal. [Emphasis supplied.]<sup>280</sup>

It may not have been very sensible to deny an author and his family the right of renewal in contributions unless they were separately registered, but this is exactly what Congress intended to do. The reason, again, was the supposed difficulty in getting all the authors to join in the renewal application. However, the drafter evidently forgot to add an equivalent provision to § 24, covering subsisting copyrights; the language of that section, which governed renewals until 1936–1937, gave all renewals to authors and their families except for “a composite work upon which copyright was originally secured by the proprietor thereof.”

Despite the legislative history and the language of § 23, the Copyright Office regularly registered renewal claims covering subsisting copyrights in contributions in the names of authors and their families, whether the contributions had been separately registered or not—apparently on the theory that § 24 said nothing to prevent it.<sup>281</sup> This practice became so well established that, when § 23 came into force 27 years later, it was quite a shock to discover that the practice could no longer be followed.<sup>282</sup>

Apparently at the instance of Clement L. Bouvé, the Register of Copyrights, a series of bills aimed at deleting the phrase “when such contribution has been separately registered” were introduced in Congress in 1938 and 1939.<sup>283</sup> No hearings were held, and the Committee reports<sup>284</sup> consist largely of quotations from letters by Colonel Bouvé to the Committee. The first of these letters, dated May 12, 1938, read in part as follows:

Section 24 covered copyright secured under the prior law \* \* \*. Under this section renewal registration of individual contributions was regularly made in the name of the author or his widow, children, executor, or next of kin,

<sup>279a</sup> HOWELL, *op. cit. supra* note 250, at 113; WARNER, RADIO AND TELEVISION RIGHTS § 81, at 249 (1953); Caterini, *Contributions to Periodicals*, in 10 COPYRIGHT LAW SYMPOSIUM (ASCAP) 321, 367 (1959); De Wolf, in *op. cit. supra* note 252, at 886L; Bricker, *supra* note 245, at 42; see 2 SOLOW, *op. cit. supra* note 245, § 681, at 1211. *Contra*, Wasserstrom, *The Copyrighting of Contributions to Composite Works*, 31 NOTRE DAME LAW. 381, 412 (1956).

<sup>280</sup> H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 15 (1909).

<sup>281</sup> See S. REP. NO. 1808, 75th Cong., 3d Sess. (1938); Caterini, in *op. cit. supra* note 279a, at 368; Bricker, *supra* note 245, at 41.

<sup>282</sup> See S. REP. NO. 1808, 75th Cong., 3d Sess. (1938); BOUVÉ, LETTER TO THE LIBRARIAN OF CONGRESS CONCERNING CERTAIN ASPECTS OF THE COPYRIGHT ACT OF MARCH 4, 1909, at 43 (1938).

<sup>283</sup> S. 3969, H.R. 10503, 75th Cong., 3d Sess. (1938); S. 547, 76th Cong., 1st Sess. (1939).

<sup>284</sup> S. REP. NO. 1808, 75th Cong., 3d Sess. (1938); S. REP. NO. 465, 76th Cong., 1st Sess. (1939); H.R. REP. NO. 1612, 76th Cong., 3d Sess. (1940).

wholly irrespective of whether or not any separate registration had originally been made. No renewals were ever made during that period for individual contributions in behalf of *the publisher of the periodical, his right of renewal being deemed restricted by the terms of section 24 to the composite work considered as a unit.*

Section 23, which became operative on July 1, 1937, \* \* \* *for some undisclosed reason* restricts the author's renewal right to such contributions only as have been "separately registered." \* \* \* It appears that only a few publishers of magazines are renewing the early issues. Many of the publishers have long since gone out of business without leaving a successor, as a result of which the entire contents fall into the public domain, except in the rare instance where the contribution was separately registered by the author.

*The purpose of the bill S. 3969, as I understand it, seems to be to restore to the author the right he enjoyed prior to July 1, 1937, to renew directly in his own name any of his contributions whether separately registered or not.* Leading publishers of periodicals (such as Doubleday, Doran & Co., Inc.) seem willing to cooperate with the author in preserving the renewal right, and some of them were surprised to learn of this feature of section 23 when it came into operation on July 1, 1937.

*The effect of the bill, \* \* \* would, it is believed, be to prevent the subsequent accrual of a right of renewal in the owner of a copyright in a periodical in contributions thereto which had not been separately registered in the first place, \* \* \*.* In other words, the authors of such contributions would get the benefits which the bill is intended to bestow, \* \* \*.

From the administrative point of view, the proposed amendment of section 23 would facilitate registration of contributions. It would undoubtedly result in saving many copyrights which might otherwise fall into the public domain. [Emphasis supplied.]<sup>285</sup>

This passage shows that the 1940 amendment was based on a false assumption. Colonel Bouvé (and hence the Congressional committee) believed that, under the law in effect before 1937, the author had the exclusive right to renew his own contributions, and that the proprietor of the periodical or other composite work had renewal rights only in the work "considered as a unit"—that is, presumably, the elements of compilation and arrangement coupled with any staff-written material.<sup>286</sup> Section 23 was different "for some undisclosed reason." As a result of this basic misunderstanding, the expressed purpose of the amendment was to restore authors and proprietors to their supposed pre-1937 status—to give the right of renewal in contributions to authors and their families, and to deny it to proprietors. Ironically, this was the exact opposite of the original Congressional intention.

On the other hand, this passage, and the rest of the legislative history of the amendment,<sup>287</sup> reveal a more limited and immediate purpose: to keep contributions from falling into the public domain when there is no proprietor available to renew. In explaining the amendment on the floor of the Senate, Senator Lodge said:

Mr. President, under the present Copyright Act of 1909, if an author has allowed his publishers to attend to his copyright for him and then the publisher goes out of business, when the time comes to renew the copyright the author loses his possession of his own work. This bill is designed to take care of that situation, and to permit the separate, individual registration of copyrights by the author in the event the publisher or magazine owner or whoever may control the copyright has gone out of business. \* \* \*<sup>288</sup>

<sup>285</sup> S. REP. NO. 1808, 75th Cong., 8d Sess. (1938).

<sup>286</sup> Caterini, in *op. cit. supra* note 279a, at 371; see *id.* at 372-73, n. 190; Bricker, *supra* note 245, at 41.

<sup>287</sup> S. REP. NO. 465, 76th Cong., 1st Sess. (1939); H. R. REP. NO. 1612, 76th Cong., 8d Sess. (1940); 83 CONG. REC. 8297 (1938); BOUVÉ, *op. cit. supra* note 282, at 43.

<sup>288</sup> 83 CONG. REC. 8297 (1938).

Likewise, the committee reports immediately preceding passage of the amendment quoted from a letter from Colonel Bouvé dated May 20, 1939 containing the following passage:

The primary purpose of this proposed amendment is to make it possible for authors and those naturally dependent upon them to save valuable copyrights from falling into the public domain at the end of the first term of 28 years because the contribution to the periodical was not separately registered, although protected by the blanket copyright of the issue of the periodical in which it appeared. Many of such copyrights are falling into the public domain from day to day because the proprietor, i.e., the publishing company of the periodical, has gone out of existence, leaving no successor in interest or any legal representative entitled to renew the copyright. \* \* \* <sup>289</sup>

The amendment passed both Houses without debate,<sup>290</sup> and became law on March 15, 1940.<sup>291</sup>

(2) *Meaning of the present provision*

As Henn has said, "the method of amendment completely obfuscated the status of renewal rights in magazine material not prepared by the magazine publisher (including its employees)." <sup>292</sup> The courts have not yet had an opportunity to construe the clause, and it is impossible to predict exactly how they will divide the rights in contributions between proprietors and authors. In advancing a wide variety of theories, the commentators have gone off in many different directions.<sup>293</sup> The purpose of this paper precludes any thorough examination of the alternative possibilities that present themselves, but a few general observations can be made:

(1) Renewal registration by the proprietor will cover not only the "work as a whole"—that is, the elements of compilation, editing, and arrangement—but also any individual contributions that were written for hire by employees of the original proprietor.<sup>294</sup>

(2) With respect to any contributions that were published with a separate copyright notice and were registered separately, the author and his family have the exclusive renewal right.<sup>295</sup> Renewal by the proprietor of the periodical or composite work as a whole probably gives the proprietor no rights in such contributions—not even the right to include the contribution in future editions.<sup>296</sup>

(3) With respect to contributions which were neither made for hire nor copyrighted separately, several divergent possibilities have been suggested:

(a) *Author has sole right to renew:* Under this theory the proprietor has no rights whatever in the renewal of individual contributions. Unless renewal is made by the author or his family, the contribution falls into the public domain, even though the proprietor may

<sup>289</sup> S. REP. NO. 465, 76th Cong., 1st Sess. (1939); H.R. REP. NO. 1612, 76th Cong., 3d Sess. (1940).

<sup>290</sup> 84 CONG. REC. 7079 (1939); 86 CONG. REC. 2311 (1940).

<sup>291</sup> Act of March 15, 1940, 54 Stat. 51.

<sup>292</sup> Henn, "Magazine Rights"—A Division of Indivisible Copyright, 40 CORNELL L.Q. 411, 466 (1955).

<sup>293</sup> HOWELL, THE COPYRIGHT LAW 112-13 (3d ed. 1952); NICHOLSON, A MANUAL OF COPYRIGHT PRACTICE 162 (2d ed. 1956); WARNER, *op. cit. supra* note 279a, § 81, at 249; Caterini, in *op. cit. supra* note 279a, at 366-79; Bricker, *supra* note 245, at 42-44; Henn, *supra* note 292, at 466-68; Kupferman, *supra* note 245, at 716-17; Wasserstrom, *supra* note 279a, at 412. The analyses by Caterini and Bricker are particularly searching on this point.

<sup>294</sup> Caterini, in *op. cit. supra* note 279a, at 370-71; Henn, *supra* note 292, at 466.

<sup>295</sup> Caterini, in *op. cit. supra* note 279a, at 370-71; see Bricker, *supra* note 245, at 42-43; Henn, *supra* note 292, at 466; Kupferman, *supra* note 245, at 716.

<sup>296</sup> See Caterini, in *op. cit. supra* note 279a, at 370-71; Bricker, *supra* note 245, at 43.

have renewed the periodical or composite work in which the contribution was published.<sup>297</sup>

(b) *Renewal by proprietor for benefit of author*: Under this theory the author and his family have the sole beneficial interest in the renewal of an individual contribution, but renewal of the periodical or composite work by the proprietor will save the contribution from the public domain and create a trust for the benefit of the author.<sup>298</sup> The following qualifications should be noted, however:

(1) If the author or his family renew a contribution separately, the proprietor's renewal would not cover it.

(2) The proprietor's renewal copyright in a periodical or composite work may not cover any contributions that have been "assigned back" to the author or anyone else. Since he is not the "proprietor" of these contributions, his renewal may not cover them, and unless renewed separately they may fall into the public domain.<sup>299</sup>

(c) *Concurrent or joint renewal right*: Under some theories, the proprietor and the author both have beneficial interests in the renewal of individual contributions:

(1) It is conceivable that, by renewing his copyright in a periodical or composite work, the proprietor continues for another 28 years the rights he had in individual contributions, except for those contributions which the author or his family chooses to renew separately.<sup>300</sup>

(2) It has also been suggested that the rights of proprietors and authors are joint, and that renewal by one secures a beneficial co-ownership for the other.<sup>301</sup>

(d) *Renewal by author for benefit of proprietor*: Finally, it has been suggested that the only purpose of the 1940 amendment was to keep contributions out of the public domain when no proprietor could be found to apply for renewal. Under this theory, renewal of a contribution by an author or his family would create a trust for the benefit of the proprietor, and the author would be entitled to the full benefits only if there were no proprietor in existence.<sup>302</sup>

The last of these four theories can probably be dismissed as in conflict with Congress' apparent intention in 1940 to give the tangible benefits of the renewal to the author and his family. The first theory—giving the sole renewal right to the author—is probably close to what Colonel Bouvé had proposed to accomplish by the 1940 amendment, but two factors make its validity quite doubtful:

(1) In 1909 Congress actually intended to give the renewal rights in contributions to proprietors rather than to authors. Thus the 1940 amendment was based on a false assumption and its expressed purpose—of restoring to authors the rights they were supposed to have had before 1937—can be discounted.

(2) The real purpose of the 1940 amendment was to benefit authors by keeping their works out of the public domain. However, if every author of an individual contribution has to submit an application in order to renew his work, the effect is going to be the opposite, since

<sup>297</sup> Bricker, *supra* note 245, at 43-44; Wasserstrom, *supra* note 279a, at 412; see Caterini, in *op. cit. supra* note 279a, at 371-75.

<sup>298</sup> See Caterini, in *op. cit. supra* note 279a, at 374; Bricker, *supra* note 245, at 43.

<sup>299</sup> NICHOLSON, *op. cit. supra* note 293, at 163; see Caterini, in *op. cit. supra* note 279a, at 376-77.

<sup>300</sup> Henn, *supra* note 292, at 466.

<sup>301</sup> Caterini, in *op. cit. supra* note 279a, at 372, 373.

<sup>302</sup> Kupferman, *supra* note 245, at 716; see Henn, *supra* note 292, at 466-68.



a vast number of individual works would be thrown into the public domain despite renewal of the periodical or composite works in which they were published. This was the very point—the difficulty in getting all authors to join in renewal applications—that the publishers kept harping on in the 1906–1908 hearings, and that resulted in the “composite work” provision in the first place.

On the whole, it would seem that justice and the real legislative intent would best be served by the second theory, under which an author may renew separately if he wishes, but his beneficial rights are still preserved to him if the periodical or composite work is renewed by the proprietor. This alternative solution not only benefits the author, but also keeps the work out of the public domain if someone is interested enough to submit a renewal application covering either the contribution or the work in which it appeared.

*c. Widows, widowers, and children*

Widows and children were introduced into the renewal scheme for the first time in the Act of 1831,<sup>303</sup> which provided:

SEC. 2. *And be it further enacted*, That if, at the expiration of the aforesaid term of years, such author, \* \* \* be still living, \* \* \* or being dead, shall have left a widow, or child, or children, either or all then living, the same exclusive right shall be continued to such author, \* \* \* or, if dead, then to such widow and child, or children, for the further term of fourteen years: \* \* \*

In the revision of 1870<sup>304</sup> the language of this section was changed to read as follows:

SEC. 88. *And be it further enacted*, That the author, \* \* \* if he be still living, \* \* \* or his widow or children, if he be dead, shall have the same exclusive right continued for the further term of fourteen years, \* \* \*

The first of Mr. Solberg's draft bills,<sup>305</sup> prepared in conjunction with the 1905 revision conferences, provided that the extended term of subsisting copyrights should be “for the sole use of the author \* \* \* if he be living” and that, if the author were dead, the term would not be extended. This provision was criticized at the conferences as unduly restrictive, since it “cuts off all \* \* \* rights for the representative or heir of an author who has just died”;<sup>306</sup> as a result, Mr. Solberg's second draft<sup>307</sup> provided that the extended term should be given to “the author \* \* \*, if he be living, or, if he be dead, for the benefit of his [heirs] executors, and administrators.”

At the 1906 conferences<sup>308</sup> the publishers objected to this provision on several grounds, including the difficulty of locating and negotiating with large and indeterminate groups of heirs. They declared that the purpose of the extension provision was:

\* \* \* to secure to a distinguished group of American authors \* \* \* some advantage during the remaining years of their lives where their works have expired or are about to expire under the present term, and also to give them opportunity of accumulating for their children or leaving to their family something in the shape of property that this provision was framed. \* \* \*<sup>309</sup>

<sup>303</sup> Act of 1831, ch. 16, 4 Stat. 436.

<sup>304</sup> Act of July 8, 1870, ch. 230, 16 Stat. 198, 212.

<sup>305</sup> LIBRARY OF CONGRESS, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT (Copyright Office Bull. No. 10, 1905).

<sup>306</sup> 2 *Stenographic Report* 268 (Nov. 1905).

<sup>307</sup> LIBRARY OF CONGRESS, *op. cit. supra* note 305 (2d print. 1906).

<sup>308</sup> 3 *Stenographic Report* 474–86 (1906).

<sup>309</sup> *Id.* at 474.

To accomplish this aim, the publishers proposed an amendment which would secure:

\* \* \* this right of extension \* \* \* for the author himself if he be still living, or for his widow or child if he be dead; that is to say, not for the heirs in the widest sense of the term, but for the same beneficiaries which now have under the existing law the right to secure an extension of copyright for a period of 14 years at the end of the 28-year term. \* \* \*<sup>310</sup>

The wording of the amendment proposed by the publishers read, in part:

The copyright subsisting \* \* \* may \* \* \* be further renewed and extended by the author. \* \* \* if he be still living, or by his widow or children if he be dead, \* \* \*.<sup>311</sup>

The Kittredge-Currier bill, introduced in May, 1906,<sup>312</sup> contained language which would have given the extended term to widows and children if the author were dead, but which set widows and children apart as separate, successive classes of beneficiaries:

Sec. 19. That the copyright subsisting \* \* \* may \* \* \* be further renewed and extended by the author, if he be still living, or if he be dead, leaving a widow, by his widow, or in her default or if no widow survive him, by his children, if any survive him, \* \* \*.

With the addition of a clause giving widowers equal rights with widows,<sup>313</sup> this language remained the same in the section of all the 1907-1908 bills dealing with extension of subsisting copyrights.<sup>314</sup> However, in the basic duration section of the 1908 Currier bill,<sup>315</sup> the right of renewal was given to:

\* \* \* the author, if still living, or the widow, widower, or children, if the author be not living, and if such author, widow, widower, or children be not living, then the author's heirs, or executors, or administrators \* \* \*.

In the final Smoot-Currier bill,<sup>316</sup> which was enacted in March, 1909<sup>317</sup> the basic right of renewal, and also the right to extend subsisting copyrights, were given to:

\* \* \* 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 \* \* \*.

The important and controversial question of whether under this language an author's widow and children take successively or as a class was not settled until 1956. In *De Sylva v. Ballentine*<sup>318</sup> the Supreme Court held unanimously that " \* \* \* on the death of the author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share the renewal term of the copy-

<sup>310</sup> *Id.* at 476.

<sup>311</sup> *Id.* at 477.

<sup>312</sup> S. 6330, H.R. 19853, 59th Cong., 1st Sess. (1906).

<sup>313</sup> For the background of this amendment, see *Hearings Before the Committees on Patents on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. 173-74 (Dec. 1906); COPY-RIGHT OFFICE, *op. cit. supra* note 272, at 7 (addenda, Dec. 4, 1906).

<sup>314</sup> S. 8190, H.R. 25133, 59th Cong., 2d Sess. (1907); H.R. 243, S. 2499, 60th Cong., 1st Sess. (1907); H.R. 11794, H.R. 21592, H.R. 21984, H.R. 22071, H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 24782, 60th Cong., 2d Sess. (1908); also two bills in 1909: H.R. 25162, H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>315</sup> H.R. 22183, 60th Cong., 1st Sess. (1908).

<sup>316</sup> H.R. 28192, S. 9440, 60th Cong., 2d Sess. (1909).

<sup>317</sup> Act of March 4, 1909, 35 Stat. 1075, 17 U.S.C. (1958).

<sup>318</sup> 351 U.S. 570 (1956); see also *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960); *Fisher v. Edwin H. Morris & Co.*, 113 U.S.P.Q. 251 (S.D.N.Y. 1957).

right.”<sup>319</sup> The Court noted that “the statute does not specifically provide for an allocation, as between the widow or widower and children, of their respective interests,”<sup>320</sup> but deliberately refrained from deciding “the question of what are the respective rights of the widow and child in the copyright renewals.”<sup>321</sup> As most of the many commentators<sup>322</sup> on this case have emphasized, this difficult problem is urgently in need of a judicial or legislative answer. It will be discussed in more detail below.<sup>323</sup>

The *De Sylva* case also involved the question of whether the author's illegitimate son could be considered a “child” within the meaning of the renewal section. On this point the Supreme Court held, two justices dissenting,<sup>324</sup> that State law is controlling, that under the applicable State statute an illegitimate child is considered an heir of his father, and that hence the illegitimate son is entitled to share the renewals with the author's widow. In the course of its opinion, the Court said:

\* \* \* To decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those relationships. The word “children,” although it to some extent describes a purely physical relationship, also describes a legal status not unlike the others. To determine whether a child has been legally adopted, for example, requires a reference to state law. \* \* \*<sup>325</sup>

In other words, the *De Sylva* case appears to hold that, in determining the meaning of the terms “widow,” “widower,” and “children,” it is necessary in each case to look to the applicable State law. The potential consequences and problems arising from this decision will be discussed in a later section.<sup>326</sup> However, it should be noted here that this aspect of the 1956 *De Sylva* case casts considerable doubt upon the 1953 decision in *Edward B. Marks Music Corp. v. Borst Music Pub. Co.*<sup>327</sup> In that case a Federal district court held, as a matter of Federal law, that the author's widow at the time of his death remained his “widow” for renewal purposes despite her remarriage.<sup>328</sup> Under *De*

<sup>319</sup> 351 U.S. 570, 580 (1956). The decision of the Ninth Circuit Court of Appeals on this point was stated as follows:

We conclude that the word “or” between the words “widower,” “children,” must be construed as expressing the alternative and means that either one or the other may act for the family which consists of the widow (or widower) and all of the children. 226 F. 2d 623, 628 (9th Cir. 1955).

<sup>320</sup> 351 U.S. 570, 579 n. 5 (1956).

<sup>321</sup> *Id.* at 582.

<sup>322</sup> Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 28-29 (1955); Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1025, 1032 n. 23 (1956); Hollander & Diamond, *The Right of Renewal—Confusion's Masterpiece*, 64 COM. L.J. 96, 97 (1959); Note, 30 SO. CAL. L. REV. 532, 535 (1957); Note, 10 W. RES. L. REV. 263, 273 (1959); 69 HARV. L. REV. 1129, 1132 (1956); 31 N.Y.U.L. REV. 1319, 1323 (1956).

<sup>323</sup> See notes 499-502 *infra*, and text thereto.

<sup>324</sup> Justice Douglas' concurring opinion, in which Justice Black joined, expressed disagreement on this point, and asserted that “the statutory policy of protecting dependents would be better served by uniformity rather than by the diversity which would flow from incorporating into the Act the law of forty-eight states.” He felt the Court should “hold that illegitimate children were ‘children’ within the meaning of § 24 of the Copyright Act whether or not state law would allow them those dependency benefits.” 351 U.S. 570, 583-84 (1956); accord, Miller, *Problems in the Transfer of Interests in a Copyright*, in 10 COPYRIGHT LAW SYMPOSIUM (ASCAP) 131, 148-51 (1959).

<sup>325</sup> 351 U.S. 570, 580 (1956).

<sup>326</sup> See notes 568-72 *infra*, and text thereto.

<sup>327</sup> 110 F. Supp. 913 (D.N.J. 1953); see Bricker, *supra* note 322, at 28; Hollander & Diamond, *supra* note 322, at 97.

<sup>328</sup> In reaching its decision the court appeared to rely on two factors: (1) the lack of any statutory language restricting the renewal right to widows who have not remarried, and (2) judicial authority in analogous fields “to the effect that a woman who remarries retains her status as widow of her first husband.” 110 F. Supp. 913, 918 (D.N.J. 1953); see Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 717 (1944).

*Sylva*, the status of a remarried "widow" would now probably have to be decided by reference to the appropriate state law of domestic relations, property, or both. Likewise, in addition to the problems of illegitimacy and remarriage, state law would presumably be determinative of the many other questions involved in deciding whether someone is a "widow" or a "child"—the validity of a marriage, divorce, or adoption, the status of stepchildren, foster children, posthumous children, etc.<sup>329</sup>

*d. Executors and next of kin*

(1) *History of the provision*

As we have seen, in Mr. Solberg's first draft bill of October, 1905,<sup>330</sup> the extension of a subsisting copyright was given only to the author. This provision was broadened in his second draft<sup>331</sup> to include the author's "[heirs] executors or administrators" if the author were dead. The publishers recommended substituting the author's widow and children for his heirs, executors, or administrators, on the ground that they would be easier to find and deal with than heirs;<sup>332</sup> this was done in the Kittredge-Currier bill introduced in May, 1906.<sup>333</sup> However, the Senate Committee reporting the bill recommended including a third class consisting of heirs, executors, or administrators, to avoid the expiration of the copyright if the author were dead and had no surviving widow or children:

The bill follows the act of 1831<sup>334</sup> in permitting to existing copyrights the benefit of the possible extension; as introduced, however, it limited the privilege to cases where the author or his widow or children are still living, whereas the act of 1831 extended it also to his heirs, executors, or administrators (not, it will be observed, to his assigns). The committee believe that the limitation would discriminate unfairly against dependent relatives of the author and recommend an amendment which will include them to the same extent as by the act of 1831.<sup>335</sup>

This recommendation was not acted upon in the Currier-Smoot bill of December, 1907,<sup>336</sup> but was adopted as an amendment to the Kittredge-Barchfeld bill of December, 1907 and January, 1908:

\* \* \* and if such author, widow, widower, or children shall not be living at the passage of this Act, then his or her<sup>337</sup> heirs, executors, or administrators shall be entitled to the privilege of renewal and extension granted under this section: \* \* \*<sup>338</sup>

<sup>329</sup> For discussions of some of these questions, see Kupferman, *supra* note 328, at 717-18; HOWELL, *op. cit. supra* note 293, at 118; WARNER, *op. cit. supra* note 279a, § 83, at 281.

<sup>330</sup> LIBRARY OF CONGRESS, *op. cit. supra* note 305.

<sup>331</sup> LIBRARY OF CONGRESS, MEMORANDUM DRAFT OF A BILL TO AMEND AND CONSOLIDATE THE ACTS RESPECTING COPYRIGHT (Copyright Office Bull. No. 10, 2d print, 1906).

<sup>332</sup> See note 308 *supra*, and text thereto.

<sup>333</sup> S. 6330, H.R. 10853, 59th Cong., 1st Sess. (1906).

<sup>334</sup> The provision extending the term of subsisting copyrights appeared in section 16 of the Act of 1831 (ch. XVI, 4 Stat. 439), the relevant portions of which read as follows:

\* \* \* whenever a copyright has been heretofore obtained \* \* \* if [the] \* \* \* author \* \* \* be living at the passage of this act, then such author \* \* \* shall continue to have the same exclusive right \* \* \* for such additional period of time as will, together with the time which shall have elapsed from the first entry of such copyright, make up the term of twenty-eight years, with the same right to his widow, child, or children, to renew the copyright, at the expiration thereof, as is above provided in relation to copyrights originally secured under this act. And if such author \* \* \* shall not be living at the passage of this act, then, his \* \* \* heirs, executors and administrators, shall be entitled to the like exclusive enjoyment of said copyright, \* \* \* for the period of twenty-eight years from the first entry of said copyright, with the like privilege of renewal to the widow, child, or children, \* \* \* as is provided in relation to copyrights originally secured under this act: \* \* \*

<sup>335</sup> S. REP. NO. 6187, 59th Cong., 2d Sess. 8 (1907).

<sup>336</sup> H.R. 243, S. 2499, 60th Cong., 1st Sess. (1907).

<sup>337</sup> "His or her" in this context apparently referred only to "author," and not to "widow, widower, or children."

<sup>338</sup> S. 2900, 60th Cong., 1st Sess. (1907); H.R. 11794, 60th Cong., 1st Sess. (1908).

This amendment appeared in the extension section of all the other pre-1909 bills,<sup>339</sup> including the 1908 Currier bill;<sup>340</sup> with slightly different wording it also appeared in the basic duration section of the 1908 Currier bill.

During the hearings there was never any direct proposal to provide explicitly for the author's next of kin. However, the following significant colloquy between Thomas Nelson Page<sup>341</sup> and members of the committee, which occurred rather late in the 1908 hearings,<sup>342</sup> indicates the trend of thinking that resulted in the final language dealing with both executors and next of kin:

Mr. PAGE. \* \* \* I observe \* \* \* a provision that copyright might be extended, renewed, under proper conditions by the widow or children of an author. It might be that a man might have sisters or some other female relatives dependent upon him whom he has supported all his life, and they might lose all the profits of his work. Yet they might be members of his family quite as much as if they were his children. \* \* \*

Representative LAW. How would you suggest that that be arranged?

Mr. PAGE. He might leave it by will, I should think.

Senator BRANDEGEE. To his legal representative?

Mr. PAGE. Yes.

Representative CURRIER. A Member of Congress spoke to me about the case of Frank Stockton. Some of his books copyrighted for twenty-eight years are just about running out. He had a brother whom he provided for in his lifetime, but that brother can not get any benefit of the copyright.

Mr. PAGE. It seems to me it ought to be extended to him. I have in mind the case of Mrs. Ritchie, Thackeray's daughter. After her father's death, she, owing to some complications which rendered her uncertain as to what her rights might be, sold the complete copyright in all his works for £5,000, as I understand, and I suppose that fifty times that sum would have been a reasonable value for it. \* \* \*

The Smoot-Currier bill of February, 1909,<sup>343</sup> which became the Act of 1909, gave the right to renewal to:

\* \* \* 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 \* \* \*.

The committee reports on this bill, after repeating this language, state:

\* \* \* It was not the intention to permit the administrator to apply for the renewal, but to permit the author who had no wife or children to bequeath by will the right to apply for the renewal.<sup>344</sup>

This language, interpreted in the light of the discussion at the 1908 hearings quoted above, leads to some fairly definite conclusions as to what Congress intended:

(1) If the deceased author had no surviving widow and children, Congress wanted the renewal to go to close relations or others who might have been dependent on the author for support or assistance, whether the author left a will or not.

<sup>339</sup> H.R. 21592, H.R. 21984, H.R. 22071, H.R. 22183, 60th Cong., 1st Sess. (1908); H.R. 24782, 60th Cong., 2d Sess. (1908); also two bills in 1909: H.R. 25182, H.R. 27310, 60th Cong., 2d Sess. (1909).

<sup>340</sup> H.R. 22183, 60th Cong., 1st Sess. (1908).

<sup>341</sup> Page was a well-known man of letters who said he was representing "obscure authors." *Hearings Before the Committees on Patents on Pending Bills*, 60th Cong., 1st Sess. 139 (1908).

<sup>342</sup> *Id.* at 140.

<sup>343</sup> H.R. 28192, S. 9440, 60th Cong., 2d Sess. (1909).

<sup>344</sup> H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 15 (1909).

(2) If the author did not leave a will, Congress had the alternative of giving the right to the author's administrators or directly to his next of kin. In making a point of unequivocally excluding administrators, the committees expressed an intention to keep the renewal out of the author's estate, and to give it direct to the next of kin, free of claims from either the author's creditors or his assignees.

(3) If the author left a will, Congress wanted to allow him to choose those he himself wished to have the benefit of the renewal. The denomination of executors was not intended to make the renewal a part of the author's estate. Instead, Congress probably felt that, as a practical matter, it would be better for the executors rather than the legatees to take the renewal in the first instance, so that the rights of the various legatees could be sorted out in probate proceedings under the guidance of the executor.<sup>345</sup>

(2) *The role of the executor*

The role thus apparently intended for the executor under the renewal section—that of taking the renewal as a personal right but of holding it as representative or trustee of the legatees chosen by the author in his will—is quite different from the part the law usually requires an executor to play. This factor, coupled with the lack of clear language expressing the legislative intent, has caused the courts no end of trouble.

In the 1921 cases of *Silverman v. Sunrise Pictures Corp.*<sup>346</sup> and *Fox Film Corp v. Knowles*,<sup>347</sup> the Federal courts in New York reasoned that: (1) a renewal is a new estate that is not capable of existing until the last year of the first term; (2) if the author died before the renewal year, the renewal could never be a part of his estate; (3) the author's executors can have no right to deal with anything that is outside the testator's estate; therefore (4) executors can claim renewal only when the author died testate but widowless and childless during the last year of the renewal term.

This all-too-plausible line of reasoning, which has been called "a wonderful example of conceptual thinking,"<sup>348</sup> was rejected when the *Fox* case reached the Supreme Court.<sup>349</sup> In an opinion by Justice Holmes the Court held that an executor stands on the same footing as the widow or next of kin, and takes what and when they would have taken had they been the proper claimants. In the course of the opinion, Justice Holmes said:

\* \* \* the words specially applicable seem to us plainly to import that, if there is no widow or child, the executor may exercise the power that the testator might have exercised if he had been alive. The executor represents the person of the testator \* \* \*, and it is no novelty for him to be given rights that the testator could not have exercised while he lived. \* \* \*<sup>350</sup>

<sup>345</sup> "[T]he deliberate exclusion of the administrator from the list of parties who are capable of renewing indicates that the executor was not to take the right as a mere personal representative of the author, but rather that he was designated as the appropriate person to carry out the testamentary directions of the author as to the disposition of the renewal term." Comment, 33 N.Y.U.L. REV. 1027, 1031 (1958). Brown suggests that the executor was included "as the one who would best know the nature and extent of his testator's property and could be relied on to make the application at the proper time for the benefit of all those beneficially entitled." Brown, *Renewal Rights in Copyright*, 28 CORNELL L.Q. 460, 476 (1943).

<sup>346</sup> 273 Fed. 909 (2d Cir. 1921).

<sup>347</sup> 274 Fed. 731 (E.D.N.Y. 1921), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd*, 261 U.S. 326 (1923); 275 Fed. 582 (S.D.N.Y. 1921), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd*, 261 U.S. 326 (1923).

<sup>348</sup> Cohen, *Justice Holmes and Copyright Law*, 32 SO. CAL. L. REV. 263, 278 (1959).

<sup>349</sup> 261 U.S. 326 (1923).

<sup>350</sup> *Id.* at 330.

Thus, if there is no widow or child and the deceased author left a will, the executor is clearly the proper renewal claimant, but for whom does he take? For himself personally? For the next of kin? For an assignee to whom the author may have transferred his renewal expectancy during his life? Or for the author's legatees directly, without regard to any claims of assignees or creditors of the author? No one has ever seriously argued that an executor's right of renewal accrues to him for his personal benefit,<sup>351</sup> and a recent case held that the executor does not take the renewal for the benefit of the next of kin, as such.<sup>352</sup> The real issue, which has just been settled by the Supreme Court in a split decision,<sup>353</sup> is whether the executor assumes the obligations his testator would have had if still living when the renewal vests, or whether he takes the renewal free of any pre-existing obligations, for the direct benefit of those named as beneficiaries in the author's will.

If taken literally, the statements in the excerpt from the *Fox* opinion quoted above<sup>354</sup>—that the executor represents the person of the testator and can exercise the same rights as those the testator could have exercised had he lived—might lead to the conclusion that the executor has the same obligations toward assignees and creditors as the author would have had. This conclusion overlooks two factors, however:

(1) The statements were made solely in the context of a decision that an executor takes a personal right, and is thus on a parity with the other claimants named in the second proviso, including the author; and

(2) The *Fox* case was decided long before the *Witmark* case<sup>355</sup> established that the renewal expectancy is assignable, and the remarks were probably based on the opposite assumption.

In the recent *Moonlight and Roses* case (*Miller Music Corp. v. Charles N. Daniels, Inc.*)<sup>356</sup> the Federal district court for the Southern District of New York decided that the executor of the author, who died without widow or children, took the renewal for the benefit of his residuary legatees, even though the author had made an explicit assignment of the renewal expectancy in the song to a publisher before he died. Judge Bryan held that the executor's right to renew is "not a derivative right arising under general testamentary law,"<sup>357</sup> but rather "a right arising from the statute itself which has created the right on its own express and limited terms";<sup>358</sup> thus:

\* \* \* I conclude that the executor has the same rights under the statute as the widow and children or next of kin. His right to renew is completely independent of what the author's rights were at the time of his decease. The fact

<sup>351</sup> See Chaffee, *Reflections on the Law of Copyright: [Pt.] I*, 45 COLUM. L. REV. 503, 528 (1945); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 265 F. 2d 925 (2d Cir. 1959) (dissent).

<sup>352</sup> "If the purpose of § 24 was to permit an author to name an executor to exercise the right of renewal and not to grant the right to bequeath the usufruct of the renewed copyright to such beneficiaries as he might designate, then there was no reason for the interposition of the executor." *Gibran v. Alfred A. Knopf, Inc.*, 153 F. Supp. 854, 860 (S.D.N.Y. 1957), *aff'd on other grounds sub nom. Gibran v. National Committee of Gibran*, 255 F. 2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958).

<sup>353</sup> *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960).

<sup>354</sup> See note 350 *supra*.

<sup>355</sup> *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643 (1943).

<sup>356</sup> 158 F. Supp. 188 (S.D.N.Y. 1957), *aff'd mem.*, 265 F. 2d 925 (2d Cir. 1959), *aff'd*, 362 U.S. 373 (1960).

<sup>357</sup> 158 F. Supp. 188, 192 (S.D.N.Y. 1957).

<sup>358</sup> *Ibid.*

that the author had assigned his inchoate rights to the plaintiff would not have barred his widow, or children, if any, from exercising the statutory renewal rights. \* \* \* <sup>350</sup>

This conclusion is supported by the commentators that have considered the question,<sup>360</sup> and is in line with the legislative intent.<sup>361</sup> The decision was affirmed *per curiam* by the Court of Appeals,<sup>362</sup> but with a forceful dissent by Judge Washington who pointed to the apparent anomaly of allowing an author to repudiate his contractual obligations in his will; the executor represents the testator, and "in equity and fairness, the executor should be made to take all steps necessary to see that his testator's contract is carried out."<sup>363</sup>

The Supreme Court has now settled this question in a 5-4 decision affirming the lower courts in the *Moonlight and Roses* case, and holding that, with respect to the deceased author's assignees, the renewal rights of an executor are just as independent as those of the author's widow, children, or next of kin.<sup>364</sup> Justice Douglas' opinion for the majority did not deal directly with the question of who is actually benefitted when an executor renews, but the decision necessarily implies that the executor represents the authors' legatees. This conclusion is borne out by language in Justice Harlan's dissent, to the effect that an executor "takes nothing beneficially, but only as a fiduciary for those benefitted by the will." It thus seems safe to conclude that the executor represents neither himself, the next of kin, the author, nor the author's estate, but takes the renewal for the sole and direct benefit of the author's legatees; that the author's assignees and creditors<sup>365</sup> have no claims on the renewal in this situation, and also that the renewal cannot be taxed as part of the author's estate.<sup>366</sup>

<sup>350</sup> *Id.* at 194.

<sup>360</sup> Bricker, *supra* note 322, at 29-30; Kupferman, *supra* note 328, at 718; Comment, 33 N.Y.U.L. REV. 1027, 1031 (1958).

<sup>361</sup> See notes 330-45 *supra*, and text thereto.

<sup>362</sup> 265 F. 2d 925 (2d Cir. 1959).

<sup>363</sup> *Id.* at 926. Judge Washington also felt it was anomalous that, "because an executor cannot take office until the author dies, he is the only interested person who cannot join in a prior assignment of renewal rights." *Ibid.* However, several commentators have suggested the possibility that an author could bind himself by contract to bequeath the renewal to his assignee and that, if he failed to do so, the assignee might have a right of action for damages against the estate. See Bricker, *supra* note 322, at 30; Kupferman, *supra* note 328, at 726-27; Comment, 33 N.Y.U.L. REV. 1027, 1032 (1958). In contrast to Judge Washington's point, the author of the latter comment also notes that "[i]f the executor's interest were subject to the author's assignments, the legatees would be in an inferior position to the next of kin, who take independently of the author's assignments." *Ibid.* Justice Harlan's dissent in the Supreme Court, 362 U.S. 373, 378 (1960), appeared to assume that, under the majority opinion, state law will henceforth determine whether a contract to bequeath a renewal is recognized and given effect; he felt that the "resulting uncertainties" will be "unjust and unsettling." Justice Harlan also refused to accept the premise, on which the majority to some extent relied, that the next of kin take independent of the author's assignments. He felt petitioner's concession on this point was "demonstrably unnecessary" and that, although the rights of widow and children are unaffected by the author's contracts, Congress did not intend to protect either executors or next of kin "from loss of rights arising out of the author's acts." *Id.* at 382.

<sup>364</sup> *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960). The majority opinion, by Justice Douglas, assumed that the author's prior assignment would not have affected the rights of his widow or children (if he had had any), or of his next of kin (if he had not left a will). The court concluded that the executor's rights were equally independent ("under this Act the executor's right to renewal is independent of the author's rights at the time of his death"), and that to hold otherwise would be to "re-design § 24" and to ignore its "consistent policy to treat renewal rights as expectancies until the renewal period arrives." The grounds for the dissent are discussed in note 363 *supra*.

<sup>365</sup> Creditors and assignees would seem to be in the same position for this purpose. For discussions of the rights of creditors, see Bricker, *supra* note 322, at 30; Chafee, *supra* note 351, at 528; Kupferman, *supra* note 328, at 719; Comment, 36 U. DET. L.J. 66, 71-72 (1958).

<sup>366</sup> Comment, *supra* note 365, at 71-72.



(3) *The "absence of a will"*

Under the statutory language the next of kin take the renewal only "in the absence of a will"; but whether a will is present or absent in a particular case is a complicated problem that is still far from settled. The statute makes no provision whatever to cover the fairly common situations in which the author left a will and (1) failed to name executors; (2) the named executor refused to serve, failed to qualify, or died before taking office; or (3) after serving the executor died or was discharged. In all these situations the author left a will but there is no executor to claim.

In the 1923 case of *Silverman v. Sunrise Pictures Corp.*<sup>367</sup> the Court of Appeals for the Second Circuit held that, where the author's executor had been discharged before the renewal year, renewal registrations in the names of the author's next of kin were valid. The court's theory was that, although the rights of the next of kin arise only "in the absence of a will," " \* \* \* there is here a complete absence of any will affecting this renewal copyright."<sup>368</sup> In passing the court appeared to reiterate a dictum from the same court's opinion in an earlier phase of the case,<sup>369</sup> suggesting that administrators *de bonis non cum testamento annexo* cannot claim renewal because they are administrators rather than executors, and are thus excluded from the statute.<sup>370</sup>

However, in 1957 the district court for the Southern District of New York in *Gibran v. Alfred A. Knopf, Inc.*<sup>371</sup> dismissed the *Silverman* opinion as "purely dictum"<sup>372</sup> and decided that, where the author's will named no executor, an administrator *cum testamento annexo* took a valid renewal in preference to the author's next of kin. Judge Weinfeld held that the difference between an executor and an administrator c.t.a. is "largely one in name only";<sup>373</sup> that the administrator c.t.a. "stands in the shoes of an executor and as such is entitled to exercise the right of renewal of the copyright";<sup>374</sup> and that to hold otherwise would defeat the purpose of the statute; he added the following comments:

\* \* \* if an executor named by an author had in fact qualified and thereafter resigned or died while in office, and no substitute executor had been provided for under the will, or if the named executor declined to serve, then under the construction urged by the plaintiff, the author's purpose to bequeath the renewal rights to his copyright would be defeated, as well as the congressional purpose to permit him, when he died leaving no widow or children, to make a bequest of the renewal copyright. \* \* \*<sup>375</sup>

On appeal, the Second Circuit Court of Appeals in the *Gibran* case,<sup>376</sup> in an opinion by Judge Learned Hand, refused to go quite this far. It held "that § 24 gives the power to the administrator c.t.a., at least in cases where the author has made a will but has not appointed any executor." [Emphasis supplied]<sup>377</sup>

<sup>367</sup> 290 Fed. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923).

<sup>368</sup> *Id.* at 805.

<sup>369</sup> 273 Fed. 909, 912 (2d Cir. 1921).

<sup>370</sup> See 290 Fed. 804, 805 (2d Cir.) (dictum), *cert. denied*, 262 U.S. 758 (1923); *Danks v. Gordon*, 272 Fed. 821, 825 (2d Cir. 1921) (dictum).

<sup>371</sup> 153 F. Supp. 854 (S.D.N.Y. 1957), *aff'd sub nom. Gibran v. National Committee of Gibran*, 255 F. 2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958).

<sup>372</sup> 153 F. Supp. 854, 859 (S.D.N.Y. 1957).

<sup>373</sup> *Id.* at 858.

<sup>374</sup> *Id.* at 857.

<sup>375</sup> *Id.* at 858.

<sup>376</sup> 255 F. 2d 121 (2d Cir. 1958), 28 FORDHAM L. REV. 159 (1959).

<sup>377</sup> *Id.* at 123.

\* \* \* Were this not true, there would be no one, as the section reads, who could exercise the power at all; there would be no executor and yet there would not be the "absence of a will," which is an express condition on the privilege of the next of kin. \* \* \*<sup>378</sup>

At the same time Judge Hand appeared to uphold the decision in the *Silverman* case permitting the next of kin to renew when the executor had been discharged and no administrator d.b.n.c.t.a. had been appointed at the time of renewal registration.<sup>379</sup>

Thus the *Gibran* case seems to leave this problem almost as confused and uncertain as it was before. About the only conclusions one can draw are these:

(1) If the author left a will which named no executors, an administrator c.t.a. is the correct claimant, and the next of kin probably have no renewal rights.

(2) If the named executor declines or is unable to serve, the question is still open. However, the reasoning in the *Gibran* case supports the claim of an administrator c.t.a. in this situation.

(3) If an executor has died or been discharged after serving, the answer may turn on whether the estate is considered completely settled, and whether an administrator d.b.n.c.t.a. has been appointed:

(a) If the estate is not yet completely settled, and an administrator d.b.n.c.t.a. is functioning, the logic of the *Gibran* case would seem to make him the proper claimant.

(b) If the estate is completely settled and no administrator d.b.n.c.t.a. has been appointed, the theory of the *Silverman* case that there is an "absence of a will" supports the claim of the next of kin.

(c) If the estate is completely settled but an administrator d.b.n.c.t.a. is appointed just to file the renewal claim, it is hard to predict how a court would decide.

(4) The courts seem to agree that the renewal should not be held to lapse in this situation—the claim either of the administrator c.t.a. or d.b.n.c.t.a. or of the next of kin will be upheld. Thus, until the matter is clarified further, it is probably wisest to file two renewal applications in every such case.

There is another aspect of the problem of what constitutes "the absence of a will" that deserves attention. If the author's will, though valid and effective, failed to contain either a specific or a residuary bequest capable of transferring the renewal copyright, the renewal will presumably pass by default, as if by intestacy. It has been suggested that in this situation there exists "the absence of a will" which entitles the next of kin to claim in their own right rather than through the

<sup>378</sup> *Ibid.*

<sup>379</sup> One commentator suggests that the *Silverman* and *Gibran* decisions may really be inconsistent since "[t]he former relies on the assumption that where the estate covered by a testamentary disposition has been distributed and the executor discharged prior to the copyright renewal period, the right of copyright renewal passes by intestacy although the author may have expressed a clear testamentary intent that it be bequeathed to named legatees." 28 FORDHAM L. REV. 159, 161 n. 16 (1959).

executor.<sup>360</sup> Reliance on this theory seems unnecessarily risky,<sup>361</sup> and in this situation, again, concurrent renewal applications by the executor and next of kin might be the wisest course.

(4) *Rights of legatees and next of kin*

It is clear that the administrators of an intestate author have no right of renewal whatever<sup>362</sup> and that, when "the absence of a will" has been established, the next of kin are entitled to renew in their own names and on their own behalf.<sup>363</sup> It has been suggested that, on the same theory, the author's legatees should be entitled to claim renewal in their own right, especially where the executor refuses or fails to act.<sup>364</sup> However, the legislative history and wording of the statute weigh heavily against this theory; it seems clear that, in order for the legatees to benefit from the renewal, a claim must be registered in the name of the author's executor.<sup>365</sup>

There is language in one of the lower court decisions in the *Fox* case<sup>366</sup> to the effect that, once the copyright has been renewed in the name of the executor, the legatees take title to it automatically:

\* \* \* the person then entitled to receive the estate or that part of it which includes the renewed copyright will receive the benefit at the hands of the executor. *No formal transfer by the executor is necessary*, as evidently the executor can hold this property right only subject to accounting for and turning over the estate. [Emphasis supplied.]<sup>367</sup>

While this may be true of the equitable title, it is unlikely that the legatees can receive legal title to the renewal in the absence of a decree of distribution or a specific assignment from the executor.

It appears that State law controls when a person becomes an executor and when he ceases to be one, and who are the author's next of kin

<sup>360</sup> See Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 30 (1955); Brown, *supra* note 345, at 475; Comment, 33 N.Y.U.L. REV. 1027 n. 5 (1958). Kupferman appears to favor executors as the proper claimants in this situation but suggests, on the basis of the *Silverman* decision, that a court might uphold renewal registration by either the executor or the next of kin "on the ground that it is senseless to divide the legal and equitable ownership unnecessarily." Kupferman, *supra* note 328, at 727.

<sup>361</sup> See, e.g., *Fox Film Corp. v. Knowles*, 274 Fed. 731, 732 (E.D.N.Y. 1921), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd*, 261 U.S. 326 (1923) ("An allegation that action was had by an executor plainly imports a will, thus excluding next of kin under the statute."); *Yardley v. Houghton Mifflin Co.*, 25 F. Supp. 361 (S.D.N.Y. 1938) (renewal by next of kin void when executor still functioning, even though she was also legatee); *Gibran v. Alfred A. Knopf, Inc.*, 153 F. Supp. 854 (S.D.N.Y. 1957), *aff'd on other grounds sub nom. Gibran v. National Committee of Gibran*, 255 F. 2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958) (executor held not to take for benefit of next of kin as such).

<sup>362</sup> *Danks v. Gordon*, 272 Fed. 821 (2d Cir. 1921); *Harris v. Coca-Cola Co.*, 73 F. 2d 370, 371 (5th Cir. 1934) (dictum) ("an administrator may represent no relative and no wish of the author"); *cert. denied*, 294 U.S. 709 (1935); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 911 (2d Cir. 1921) (dictum); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 253 (1st Cir. 1911) (dictum); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 158 F. Supp. 188, 193 (S.D.N.Y. 1957) (dictum), *aff'd mem.*, 265 F. 2d 925 (2d Cir. 1959), 362 U.S. 373 (1960).

<sup>363</sup> *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923); see *Ballentine v. De Sylva*, 226 F. 2d 623, 625 (9th Cir. 1955) (dictum), *aff'd on other grounds*, 351 U.S. 570 (1956).

<sup>364</sup> Brown, *supra* note 345, at 476, 481; see *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923).

<sup>365</sup> Bricker concludes that a legatee as such has no right to claim renewal, but that there is nothing to prevent him from submitting a renewal application in the name of the executor. Bricker, *supra* note 380, at 29-30.

<sup>366</sup> *Fox Film Corp. v. Knowles*, 274 Fed. 731 (E.D.N.Y. 1921), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd*, 261 U.S. 326 (1923).

<sup>367</sup> *Id.* at 733.

in a particular case.<sup>388</sup> As one court put it, this is a matter "capable of greatly complicating questions arising under national statutes."<sup>389</sup>

### 3. Assignments and licenses of a renewal copyright

#### a. The assignability of the renewal term

##### (1) The *Witmark* decision and its background

The English cases<sup>390</sup> arising under the Statute of Anne<sup>391</sup> held that the author's renewal expectancy was assignable and that, if the author survived the first term, his assignee was entitled to the renewal if a clear intention to convey it to him was manifested in the contract or could be inferred from the circumstances. The nineteenth century American cases on the subject,<sup>392</sup> though inconclusive, suggested the same result, and this conclusion was supported by most of the contemporary legal commentators.<sup>393</sup> Justice Frankfurter, after an exhaustive review and analysis of the historical background of the problem, concluded in the *Witmark* case that "neither expressly nor impliedly did the act of 1831 impose any restraints upon the right of the author himself to assign his contingent interest in the renewal,"<sup>394</sup> and there is little or no basis for contesting that opinion.<sup>395</sup>

The legislative history of the Act of 1909 contains no conclusive answer to this problem. The petitioners in the *Witmark* case based their defense upon the clear policy expressed in the final 1909 com-

<sup>388</sup> *De Sylva v. Ballentine*, 351 U.S. 570 (1956); *Gibran v. Alfred A. Knopf, Inc.*, 153 F. Supp. 854 (S.D.N.Y. 1957) (by implication), *aff'd sub nom. Gibran v. National Committee of Gibran*, 255 F. 2d 121 (2d Cir.), *cert. denied*, 358 U.S. 828 (1958); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); see *Miller Music Corp v. Charles N. Daniels, Inc.*, 362 U.S. 373, 378 (1960) (dissent). A recent commentator notes that in the *Gibran* case the lower court "construed 'executor' to include an administrator c.t.a. apparently as a question of Federal statutory interpretation and construed the testator's will under New York law." Miller, in *op. cit. supra* note 324, at 149 n. 78.

<sup>389</sup> *Silverman v. Sunrise Pictures Corp.*, *supra* note 388, at 913.  
<sup>390</sup> *Rundell v. Murray*, Jac. 315, 37 Eng. Rep. 868 (Ch. 1821); *Carnan v. Bowles*, 2 Bro. C.C. 80, 29 Eng. Rep. 45 (Ch. 1786). In the *Rundell* case the court stated that "an author will not be taken to have assigned his contingent right in case of his surviving the fourteen years, unless the assignment is so expressed as to purport to pass it. \* \* \*

37 Eng. Rep. at 870.  
<sup>391</sup> 8 Anne, c. 19 (1710); see notes 2-4 *supra*, and text thereto.  
<sup>392</sup> *Paige v. Banks*, 18 Fed. Cas. 1001 (No. 10671) (C.C.S.D.N.Y. 1870), *aff'd*, 80 U.S. (13 Wall.) 608 (1871); *Cowen v. Banks*, 6 Fed. Cas. 669 (No. 3295) (C.C.D.N.Y. 1862); *Pierpont v. Fowle*, 19 Fed. Cas. 652 (No. 11152) (C.C.D. Mass. 1846). The *Cowen* and *Paige* cases involved extensions of copyrights subsisting before 1831, and it is unclear whether the decisions were based on the statute of 1790 (under which assignees were explicitly given renewal rights) or the statute of 1831 (which did not mention assignees in connection with the renewal). The *Paige* case has been much discussed; see, e.g., *M. Witmark & Sons v. Fred Fisher Music Co.*, 38 F. Supp. 72 (S.D.N.Y. 1941), *aff'd*, 125 F. 2d 949 (2d Cir. 1942), *aff'd*, 318 U.S. 643 (1943); *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); 28 OPS. ATTY GEN. 162 (1910); *Kupferman*, *supra* note 328, at 721-22; 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 772 n. 354 (1938). The *Pierpont* case held that under the particular circumstances the renewal term had not been validly assigned, but indicated that an assignment of the expectancy would be enforceable if there were a clear intent to convey coupled with "clear and adequate consideration." *Pierpont v. Fowle*, *supra* at 659. The assignee could not take the renewal "unless he has paid for it, clearly contracted for it, and in equity, rather than by any technical law, is to be protected in it." *Id.* at 660.

<sup>393</sup> See authorities cited in *Fred Fisher Music Co. v. M. Witmark & Sons*, 318 U.S. 643, 651 (1943). Drone took the view that, before publication, an outright transfer by the author deprived him and his heirs of any future interest whatever in the work; Drone felt, however, that after statutory copyright had been secured the author and his family were entitled to claim the renewal, but could bind themselves by contract to assign it after it had been secured. DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 326-27 (1879). *But see* WELL, AMERICAN COPYRIGHT LAW § 956, at 366-68 (1917).

<sup>394</sup> 318 U.S. at 651. In the Second Circuit *Witmark* opinion the court noted that the Act of 1831 had dropped any reference to "assigns" as renewal beneficiaries, and commented:

\* \* \* All that this says \* \* \* is that assignment of copyright is not assignment of renewal; that renewal is an expectancy, not a present right. It does not express a public policy against disposal of the possibility of renewal. We cannot find a policy of "void and of no effect" in this change. \* \* \* 125 F. 2d at 951.

<sup>395</sup> For discussions of the 19th century historical background of the *Witmark* case, see Brown, *supra* note 345, at 462-65; *Kupferman, Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 721-23 (1944).

mittee reports—to protect the author against unprofitable bargains by returning the second term to him:

\* \* \* 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.<sup>396</sup>

On the other hand, there were definite indications in the 1906 and 1908 hearings that at least some of those concerned with the bills believed the renewal term could be assigned.<sup>397</sup> The Supreme Court majority, speaking through Justice Frankfurter, felt that the only purpose of the renewal was to enable “the author to sell his ‘copyright’ without losing his renewal interest”; “if the author’s copyright extended over a single, longer term, his sale of the ‘copyright’ would terminate his entire interest.”<sup>398</sup> The Court pointed to the legislators’ expressed intention to frame the statute on this point “as is the existing law,” and noted that under “existing law” renewals could be assigned. It concluded that:

The report cannot be tortured, by reading it without regard to the circumstances in which it was written, into an expression of a legislative purpose to nullify agreements by authors to assign their renewal interests. If Congress, speaking through its responsible members, had any intention of altering what theretofore had not been questioned, namely, that there were no statutory restraints upon the assignment by authors of their renewal rights, it is almost certain that such purpose would have been manifested. The legislative materials reveal no such intention.<sup>399</sup>

Thus at the core of the *Witmark* decision was Congress’ failure to make itself clear one way or the other on this crucial point.

Shortly after the Act of 1909 came into force the Register of Copyrights asked the Attorney General whether he should make renewal registration in the names of purported assignees. The resulting opinion<sup>400</sup> held that the Register “should be governed by the language of the statute and grant a renewal to no one other than the person or persons mentioned therein”; the statute did not “authorize the extension to be made in the name of the assignee.”<sup>401</sup> At the same time, the opinion said plainly that an assignment of the renewal would be valid:

\* \* \* But who may possess the legal or equitable right in the copyright after renewal is another question and one which is to be determined by the terms of such contract as the author or other person or persons entitled to the renewal may have entered into before or after the renewal is had. \* \* \* [N]o doubt \* \* \* [the expectancy] may be the subject of a valid contract before renewal, which would carry the equitable, if not the legal, title thereto when renewed. \* \* \*<sup>402</sup>

In 1911 the Court of Appeals for the First Circuit reached a similar result in *White-Smith Music Pub. Co. v. Goff*:<sup>403</sup>

<sup>396</sup> H.R. REP. NO. 2222, S. REP. NO. 1108, 60th Cong., 2d Sess. 14 (1909); see Kupferman, *supra* note 395, at 723.

<sup>397</sup> See 2 *Stenographic Report* 64-65 (Nov. 1905); *Hearings Before Committees on Patents on S. 6330 and H.R. 19853*, at 48-49, 185 (June 1906); *Hearings Before the Committee on Patents on Pending Bills 17-20*, 66, 77, 128 (1908).

<sup>398</sup> 318 U.S. at 653-54.

<sup>399</sup> *Id.* at 655-56.

<sup>400</sup> 28 OPS. ATTY GEN. 162 (1910).

<sup>401</sup> *Id.* at 170.

<sup>402</sup> *Ibid.*

<sup>403</sup> 187 Fed. 247 (1st Cir. 1911); see *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D.N.Y. 1942) (on motion for summary judgment); 49 F. Supp. 135 (S.D.N.Y. 1943). The *Tobani* case contains language indicating that the author “may divest himself of the right thus reserved for him by parting absolutely with his entire interest in a work,” *Tobani v. Carl Fischer, Inc.*, *supra* at 60, but this must be read in light of the court’s holding that the author was an employee for hire. See Kupferman, *supra* note 395, at 722-23.

\* \* \* It is therefore, at least clear that, by the express terms of the statutes, whether the one existing when this copyright was taken out or the one existing when the extension was applied for, no one except the author or the members of his family or his executors could ordinarily apply for the extension; and this independently of any question for whose benefit the author or the other applicant might hold the copyright when acquired.<sup>404</sup>

Most of the pre-*Witmark* commentators also agreed that, while an assignee has no right to claim renewal in his own name, an assignment by the author of his future renewal rights would probably be binding upon him if he survived.<sup>405</sup> The outcome in the *Witmark* case was thus foreshadowed by a quantity of respectable authority, and should not have been as electrifying as the flurry of law review notes might suggest.<sup>406</sup>

The 1941 district court decision in *Witmark*<sup>407</sup> held that where the author was living, he was bound by a contract in which he had "specifically agreed to assign his personal right to the renewal copyright,"<sup>408</sup> and the underlying policy of the statute did not prevent such an assignment. This holding was affirmed in 1942 by the Court of Appeals in a split decision.<sup>409</sup> The majority, on the basis of statutory history, the opinions of commentators, and the policy favoring free assignability, held that "only an author can renew, but that he can make binding agreements to renew for someone's benefit."<sup>410</sup> Judge Frank, in a strong dissent, argued on grounds of legislative history and the clear policy in favor of protecting authors against inequitable contracts, that the assignment should not be enforced.<sup>411</sup>

In addition, the district court indicated that an ordinary copyright assignment which contained no mention of the renewal would not convey renewal rights.<sup>412</sup> The district court opinion,<sup>413</sup> and both opinions in the Court of Appeals,<sup>414</sup> agreed that in any case the valid-

<sup>404</sup> 187 Fed. at 249. Apparently the author in the *Goff* case had sold his manuscript outright, and the lower court, while deciding that the assignee was not entitled to the renewal under the statute, implied strongly that the author was not entitled to it either. 180 Fed. 256. The appellate decision established that, at least in the absence of an agreement covering the renewal, the author is entitled to the benefit of the second term.

<sup>405</sup> BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW 117-18 (1912); DE WOLF, AN OUTLINE OF COPYRIGHT LAW 66-67 (1925); 2 LADAS, *op. cit. supra* note 392, at 773; WEIL, *op. cit. supra* note 393, § 956, at 366-68; see Note, 10 AIR LAW REV. 198, at 205-06 (1939). *Contra*, Bergstrom, *The Businessman Deals with Copyright*, in 3 COPYRIGHT LAW SYMPOSIUM (ASCAP) 249, 275-77 (1940).

<sup>406</sup> Fleisher & Cohen, *Validity of Assignment of the Copyright Renewal Term*, 1 AUTHORS' LEAGUE BULL. 15 (1943); 9 U. CHI. L. REV. 737 (1942); 6 U. DET. L.J. 79 (1943); 55 HARV. L. REV. 139 (1941); 18 IND. L.J. 318 (1943); 42 MICH. L. REV. 190 (1943); 16 SO. CAL. L. REV. 353 (1943); 15 SO. CAL. L. REV. 108 (1941); 17 TEMP. L.Q. 299 (1943).

<sup>407</sup> 38 F. Supp. 72 (S.D.N.Y. 1941).

<sup>408</sup> *Id.* at 74. The court decided that:

\* \* \* the main intent of Congress was to give a separate right to authors to the fruits of their labors in the renewal copyright. This prevented proprietors and assignees of the original copyright from securing a renewal, but Congress did not, nor does it appear that the statute, prevents the author from specifically and separately agreeing to assign, and assigning, his own renewal rights when, and if, these renewal rights accrue. *Id.* at 75.

<sup>409</sup> 125 F. 2d 949 (2d Cir. 1942).

<sup>410</sup> *Id.* at 952.

<sup>411</sup> *Id.* at 954.

<sup>412</sup> "There is no doubt but that an ordinary assignment of the original copyright \* \* \*, without specifically providing for the renewal of the copyright by the assignee in the author's name, would not give to plaintiff the right to apply for the renewal copyright, in its own name or in the name of the author." 38 F. Supp. at 74.

<sup>413</sup> "Nor, if Graf had died, could his purported assignment of the renewal copyright be binding on his widow, executor, etc." *Ibid.*

<sup>414</sup> The majority opinion stated: "\* \* \* An assignment of this expectancy \* \* \* must rest also on survival. It is also apparent that the assignment here would not have cut off the rights of renewal extended to the widow, children, executors, or next of kin, in the event of Graf's death prior to the renewal period." 125 F. 2d at 950. The dissent stated: "\* \* \* One who purchases it [the expectancy] under a contract made prior to the renewal date acquires nothing, even the majority concedes, if the author is not alive on that date; \* \* \*." *Id.* at 957.

ity of the assignment depended on the survival of the assignor; the author could not cut off the independent renewal rights of his widow and children, etc. The majority in the Court of Appeals also pointed out that its holding was limited to statutory interpretation, and did not foreclose the defendants from attacking the validity of the assignment on other grounds.<sup>415</sup>

In 1943 the Supreme Court<sup>416</sup> split 5-3 on the issue, the majority holding that "the author, during his lifetime, could make a binding assignment of the expectancy in his future rights of renewal."<sup>417</sup> The minority agreed with Judge Frank's dissent in the court below, as demonstrating "a congressional purpose to reserve the renewal privilege for the personal benefit of authors and their families."<sup>418</sup>

Justice Frankfurter's opinion for the majority is a model of thoroughgoing judicial scholarship, directed at the single question of statutory interpretation. Its decision was based primarily on legislative history and on the policy favoring freedom of alienability:

\* \* \* If an author cannot make an effective assignment of his renewal, it may be worthless to him when he is most in need. Nobody would pay an author for something he cannot sell. \* \* \* While authors may have habits making for intermittent want, they may have no less a spirit of independence which would resent treatment of them as wards under guardianship of the law.<sup>419</sup>

The opinion refrained from making any intimation as to whether "a particular assignment should be denied enforcement by the courts because it was made under oppressive circumstances."

\* \* \* It is one thing to hold that the courts should not make themselves instruments of injustice by lending their aid to the enforcement of an agreement where the author was under such coercion of circumstances that enforcement would be unconscionable. \* \* \* It is quite another matter to hold, as we are asked in this case, that regardless of the circumstances surrounding a particular assignment, no agreements by authors to assign their renewal interests are binding.<sup>420</sup>

## (2) Requirements of a valid renewal assignment

### (a) Intention to convey

Whether or not the instrument of assignment contains any specific reference to the renewal copyright, the controlling factor is the intention of the parties.<sup>421</sup> However, in cases where the renewal is not covered by the language of the assignment,<sup>422</sup> the courts have been reluctant to uphold the transfer in the absence of clear and convincing

<sup>415</sup> *Id.* at 954.

<sup>416</sup> 318 U.S. 643 (1943).

<sup>417</sup> *De Sylva v. Ballentine*, 351 U.S. 570, 574 (1956).

<sup>418</sup> 318 U.S. at 659-60.

<sup>419</sup> 318 U.S. at 657.

<sup>420</sup> *Id.* at 656-57.

<sup>421</sup> *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958); *Rossiter v. Vogel*, 134 F. 2d 908 (2d Cir. 1943); *Venus Music Corp. v. Mills Music, Inc.*, 156 F. Supp. 753 (S.D.N.Y. 1957), *aff'd*, 261 F. 2d 577 (2d Cir. 1958); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953) (by implication), *rev'd on other grounds*, 221 F. 2d 569 (2d Cir. 1955), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Bricker*, *supra* note 380, at 31; *Kupferman*, *supra* note 395, at 729; Note, 10 W. RES. L. REV. 263, 271 (1959).

<sup>422</sup> The lower court in the *Twelfth Street Rag* case held that a provision reading "this contract carries with it all extensions of copyrights that may be secured on these compositions" was sufficient to transfer the renewal expectancy. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, *supra* note 421, at 760.

extrinsic evidence of an intention to convey.<sup>423</sup> It has been said that "the circumstances justifying the transfer of the right of renewal must be stronger than those justifying the transfer of the copyright, since the right of renewal is separate from the original copyright,"<sup>424</sup> "that a general transfer by an author of the original copyright without mention of renewal rights conveys no interest in the renewal rights without proof of a contrary intention,"<sup>425</sup> and that where "the extrinsic evidence concerning intent is ambiguous," the conveyance will not be upheld.<sup>426</sup> On the other hand, a recent case held that under the particular circumstances a general assignment which did not mention renewal constituted a valid conveyance of the renewal expectancy;<sup>427</sup> intent is a question of fact and "a trial court may \* \* \* infer from the surrounding circumstances an intention to convey renewal rights by general words of assignment."<sup>428</sup>

(b) *Formal requirements*

It now appears settled that an assignment of the renewal expectancy constitutes an "assignment of copyright"<sup>429</sup> within the meaning of the transfer and recording sections of the statute.<sup>430</sup> This means that the instrument must be "in writing signed by the proprietor of the copyright," and also that it must be recorded within three months of its execution to prevail "against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment has been duly recorded." The recording requirement has been an important issue in several renewal cases,<sup>431</sup> but each time the decision has gone against the "subsequent purchaser" because his later assignment was not supported by "valuable consideration."<sup>432</sup>

<sup>423</sup> See, e.g., *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958); *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951); *Rossiter v. Vogel*, 134 F. 2d 908 (2d Cir. 1943); *Edward B. Marks Music Corp. v. Borst Music Pub. Co.*, 110 F. Supp. 913 (D.N.J. 1953); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943); *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E. 2d 283 (1955); Miller, *Problems in the Transfer of Interests in a Copyright*, in 10 COPYRIGHT LAW SYMPOSIUM (ASCAP) 131, 148 (1959); Bricker, *supra* note 380, at 81-82; Note, 10 W. RES. L. REV. 263, 271 (1959).

<sup>424</sup> *Rossiter v. Vogel*, *supra* note 423, at 911.

<sup>425</sup> *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518, 521 (2d Cir. 1958).

<sup>426</sup> *Ibid.*

<sup>427</sup> *Venus Music Corp. v. Mills Music, Inc.*, 156 F. Supp. 753 (S.D.N.Y. 1957), *aff'd*, 261 F. 2d 577 (2d Cir. 1958).

<sup>428</sup> *Id.* at 579.

<sup>429</sup> *Edward B. Marks Music Corp. v. Charles K. Harris Music Pub. Co.*, 255 F. 2d 518 (2d Cir.), *cert. denied*, 358 U.S. 831 (1958); *Rose v. Bourne, Inc.*, 178 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960); *Venus Music Corp. v. Mills Music, Inc.*, 156 F. Supp. 753 (S.D.N.Y. 1957), *aff'd*, 261 F. 2d 577 (2d Cir. 1958); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); Miller, in *op. cit. supra* note 423, at 151; Bricker, *supra* note 380, at 35; Note, *supra* note 421, at 271; see Henn, "Magazine Rights"—A Division of Indivisible Copyright, 40 CORNELL L.Q. 411, 467 (1955). In *Rossiter v. Vogel*, 134 F. 2d 908, 911 (2d Cir. 1943), the court said:

The requirement that "every" assignment shall be recorded leaves no room for doubt that an assignment of an expectancy is as recordable as any other assignment and that unrecorded it cannot prevail against the subsequent recorded assignment of a bona fide purchaser for a valuable consideration.

<sup>430</sup> 17 U.S.C. §§ 28-32 (1958).

<sup>431</sup> *Rossiter v. Vogel*, 46 F. Supp. 749 (S.D.N.Y. 1942), *rev'd on other grounds*, 134 F. 2d 908 (2d Cir. 1943); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Venus Music Corp. v. Mills Music, Inc.*, 156 F. Supp. 753 (S.D.N.Y. 1957), *aff'd*, 261 F. 2d 577 (2d Cir. 1958); see Colby, *Duration of Copyright in the United States—Status of Assignments of Copyright Renewals—the Billy Rose Case*, 7 BULL. CR. SOC. 203 (1960).

<sup>432</sup> In *Rossiter v. Vogel*, *supra* note 431, a promise to share royalties was held insufficient. In *Von Tilzer v. Jerry Vogel Music Co.*, *supra* note 431, a future promise to pay was held insufficient. In *Venus Music Corp. v. Mills Music, Inc.*, *supra* note 431, a stated consideration of \$1.00 was held insufficient, whether paid or not. Bricker suggests, however, that the situation might be different if the subsequent purchaser had performed, made partial payments, or changed his position. Bricker, *supra* note 380, at 35; see Colby, *supra* note 431, at 205.



(c) *Legal validity and equitable enforceability*

The *Witmark* case contained clear indications that a particular assignment of the renewal expectancy could be denied enforcement because it was made under "oppressive circumstances,"<sup>433</sup> and this assumption was confirmed shortly in the 1943 decision of the Second Circuit in *Rossiter v. Vogel*.<sup>434</sup> In reversing summary judgment<sup>435</sup> the Court held that proof of fraud would render the assignment totally void, and added:

Moreover, we think that the evidence of inadequate consideration, especially when taken in connection with the allegations of deceit, presents a triable issue at least as to the enforceability of plaintiff's assignment. Equity is loath to grant specific performance of a contract founded upon a grossly inadequate consideration, particularly when there are other circumstances indicating unfairness. \* \* \*

The Court later held the contract unenforceable on equitable grounds;<sup>437</sup> the stated consideration of \$1.00 was "inadequate and inequitable," especially since it had not been paid.<sup>438</sup> In a later case the assignee was denied summary judgment on the ground that allegations of absence of consideration, inadequacy of consideration, and "unconscionable advantage \* \* \* taken at the time of publication" created triable issues.<sup>439</sup>

On the other hand, where the terms of the assignment are clear and provide for definite royalty payments for certain uses, the courts<sup>440</sup> have been unwilling to deny it enforcement "in the absence of fraud, misrepresentation, or gross overreaching";<sup>441</sup> "it is not for the Court to decide whether the terms \* \* \* are fair or unfair,"<sup>442</sup> and unless actually deceived the assignor is bound by his agreement whether he understood it or not.<sup>443</sup> In the celebrated case of *Rose v. Bourne, Inc.*,<sup>444</sup> the district court held that changes in the music business since the time the assignment was made did not make the consideration inadequate; "inadequacy of consideration resulting from a subsequent event does not render a transaction voidable, if the consideration was adequate, though conjectural, at the time of the transfer."<sup>445</sup>

<sup>433</sup> 318 U.S. at 656; see also the Circuit Court's decision in the *Witmark* case, 125 F. 2d at 954.

<sup>434</sup> 134 F. 2d 908 (2d Cir. 1943). For discussions of this problem see Colby, *supra* note 431; Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, at 34-35 (1955).

<sup>435</sup> *Rossiter v. Vogel*, 46 F. Supp. 749 (S.D.N.Y. 1942).

<sup>436</sup> 134 F. 2d at 912.

<sup>437</sup> *Rossiter v. Vogel*, 148 F. 2d 292 (2d Cir. 1945); see Colby, *supra* note 431, at 206-208; Kupferman, *supra* note 395, at 730 n. 103.

<sup>438</sup> 148 F. 2d at 293.

<sup>439</sup> *Carmichael v. Mills Music, Inc.*, 121 F. Supp. 43, 46 (S.D.N.Y. 1954).

<sup>440</sup> *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960); *Fisher v. Edwin H. Morris & Co.*, 113 U.S.P.Q. 251 (S.D.N.Y. 1957).

<sup>441</sup> *Fisher v. Edwin H. Morris & Co.*, *supra* note 440, at 252.

<sup>442</sup> *Id.* at 251.

<sup>443</sup> In *Fisher v. Edwin H. Morris & Co.*, 113 U.S.P.Q. 251, 252 (S.D.N.Y. 1957), the court viewed the case as involving "a situation of a woman who, relying upon the advice of her husband, signed an agreement in writing which affected legal rights and who thereafter wishes to disassociate herself from that agreement \* \* \*." The court concluded that she "knew she had signed the agreement, that she is intelligent enough if she had read the agreement to know what it meant," and that although she "may consider that she made a poor bargain, it does not appear \* \* \* that there was any overreaching \* \* \*."

<sup>444</sup> 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960).

<sup>445</sup> *Id.* at 611.

(d) *Necessity for power of attorney*

There was some language in the district court opinion in the *Witmark* case<sup>446</sup> suggesting that, in order for the assignment of the renewal expectancy to be fully valid, it must contain specific language authorizing the assignee to secure renewal in the assignor's name.<sup>447</sup> However, the *Rossiter* case<sup>448</sup> held that, as far as validity of the assignment is concerned, the specific granting of a power of attorney is "an unnecessary precaution";<sup>449</sup> the power of attorney to enforce its terms "will be implied from the mere fact of an assignment."<sup>450</sup>

b. *Effect of assignments and licenses of a renewal copyright*(1) *Rights of statutory renewal beneficiaries*

It is now well-established that, even though the author can assign away his own renewal expectancy, he cannot cut off, defeat, or diminish the independent statutory renewal rights of his widow and children or next of kin.<sup>451</sup> And, as we have seen, the Supreme Court has now settled that executors take the renewal for the direct benefit of the author's legatees, without regard to any assignment of renewal rights the author may have made before he died.<sup>452</sup> At one time there was some feeling that, if the author parted absolutely with all of his rights in a work, both he and his family would be estopped from claiming rights under the renewal term,<sup>453</sup> but this theory is now completely discredited.<sup>454</sup> It is clear that the rights of the author's assignees are dependent on his survival and fail if he dies before the renewal year.

At the same time it is settled that the widow, children, and next of kin<sup>455</sup> can also assign their own rights in the renewal expectancy, no

<sup>446</sup> 38 F. Supp. at 72.

<sup>447</sup> See note 412 *supra*.

<sup>448</sup> 134 F. 2d 908 (2d Cir. 1943).

<sup>449</sup> *Id.* at 911. See notes 463-67 *infra*, and text thereto.

<sup>450</sup> 134 F. 2d at 911.

<sup>451</sup> *Carmichael v. Mills Music, Inc.*, 121 F. Supp. 43 (S.D.N.Y. 1954); *Selwynn & Co. v. Veller*, 43 F. Supp. 491 (S.D.N.Y. 1942); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D.N.Y. 1942) ("The Bird on Nellie's Hat"); *Tobani v. Carl Fischer, Inc.*, 263 App. Div. 503, 33 N.Y.S. 2d 294, *aff'd*, 289 N.Y. 727, 46 N.E. 2d 347 (1942); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373, 377-78 (1960) (dictum); *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F. 2d 949, 950 (2d Cir. 1942) (dictum), *aff'd on other grounds*, 318 U.S. 643 (1943); *Rose v. Bourne, Inc.*, 176 F. Supp. 605, 609 (S.D.N.Y. 1959) (dictum), *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960); *Fox Film Corp. v. Knowles*, 274 Fed. 731, 732 (E.D.N.Y. 1921) (dictum), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd on other grounds*, 261 U.S. 326 (1923); see *Fitch v. Shubert*, 20 F. Supp. 314, 315 (S.D.N.Y. 1937) (by implication); *DE WOLF*, *op. cit. supra* note 405, at 66-67; 2 *LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 773 (1938); 2 *KENT, COMMENTARIES ON AMERICAN LAW* 384 (2d ed. 1832); *WARNER, RADIO AND TELEVISION RIGHTS* § 83, at 258 (1953); *WEIL, AMERICAN COPYRIGHT LAW* § 956, at 366 (1917); *Bricker, Renewal and Extension of Copyright*, 29 *SO. CAL. L. REV.* 23, 33 (1955); *Brown, Renewal Rights in Copyright*, 28 *CORNELL L.Q.* 460, 472 (1943); *Fleisher & Cohen, supra* note 406, at 17; *Kupferman, Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 *COLUM. L. REV.* 712, at 721, 726 (1944); 6 *U. DET. L.J.* 79, 80 (1943). Justice Harlan, speaking for the Supreme Court in *De Sylva v. Ballentine*, 351 U.S. 570, 582 (1956), said that: "Since the author cannot assign his family's renewal rights, § 24 takes the form of a compulsory bequest of the copyright to the designated persons."

<sup>452</sup> See notes 354-66 *supra*, and text thereto.

<sup>453</sup> *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57, 60 (2d Cir.) (dictum), *cert. denied*, 305 U.S. 650 (1938); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859, 865 (S.D.N.Y. 1942) (dictum); *White-Smith Music Pub. Co. v. Goff*, 180 Fed. 256, 259 (C.C.D.R.I. 1910) (dictum), *aff'd on other grounds*, 187 Fed. 247 (1st Cir. 1911); *BOWKER, op. cit. supra* note 405, at 118; *DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 326-27 (1879).

<sup>454</sup> See *WEIL, op. cit. supra* note 451, § 956, at 366-68; *Bricker, supra* note 451, at 32; *Brown, supra* note 451, at 465 n.32.

<sup>455</sup> The same is probably true with respect to the author's legatees; see notes 354-66 *supra*, and text thereto.

matter how contingent or fragmentary.<sup>456</sup> They can join the author in his assignment or execute an independent transfer, although in either case a separate consideration for each assignor would probably be needed for validity.<sup>457</sup>

(2) *Rights of assignees and licensees under a binding transfer*

The renewal assignee stands in the shoes of his assignor, and takes the renewal only if the assignor is the beneficiary entitled under the statute. It has been said that the rights of licensees are the same as assignees in this situation.<sup>458</sup> While this important point has not been fully litigated or much discussed,<sup>459</sup> it seems logical to treat assignments and licenses alike. Thus if a license (whether exclusive or non-exclusive) can be said to cover the renewal term explicitly or by implication, the licensee may continue to exercise his rights under the license—but only if his licensor is the true owner of the renewal when it vests. If the licensor's rights are cut off at the end of the first term, the licensee's rights are also terminated.

It is still not clear what an assignee must do to vest full legal, as well as equitable, title in himself once renewal has been secured.<sup>460</sup> Actions for specific performance<sup>461</sup> and declaratory judgment<sup>462</sup> have been sustained in this situation,<sup>463</sup> but the assignee is certainly not obliged to bring suit under ordinary circumstances. There is authority indicating that all he need do is file a renewal application in the name of his assignor,<sup>464</sup> under a power of attorney which can be implied from the mere fact of assignment.<sup>465</sup> On the other hand it is common practice for an assignee to take two additional steps: (1) he executes, as attorney-in-fact, an assignment of the renewal to himself, and (2) he records this assignment in the Copyright Office.<sup>466</sup> These precautions seem well-advised in view of the recording requirements<sup>467</sup> and

<sup>456</sup> *Fisher v. Edwin H. Morris & Co.*, 113 U.S.P.Q. 251 (S.D.N.Y. 1957); see *Selwynn & Co. v. Veller*, 43 F. Supp. 491 (S.D.N.Y. 1942); *Miller Music Corp. v. Charles N. Daniels, Inc.*, 265 F. 2d 925 (2d Cir. 1959) (dissent); *Venus Music Corp. v. Mills Music, Inc.*, 261 F. 2d 577, 579 n. 2 (2d Cir. 1958) (by implication); *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F. 2d 949, 953 (2d Cir. 1942) (dictum), *aff'd on other grounds*, 318 U.S. 643 (1943).

<sup>457</sup> SPRING, RISKS AND RIGHTS IN PUBLISHING, TELEVISION, RADIO, MOTION PICTURES, ADVERTISING, AND THE THEATER 95 (2d ed. rev.); see *Fisher v. Edwin H. Morris & Co.*, *supra* note 456.

<sup>458</sup> *Kupferman*, *supra* note 451, at 725, states:

It is now quite clear that the renewal expectancy can be assigned in advance, and a fortiori a license under the renewal can be granted in advance. This presents a stronger case, because the copyright remains in the licensor; hence many of the policy reasons against an assignment of the renewal right in advance are inapplicable.

<sup>459</sup> See *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490 (S.D.N.Y. 1942), *aff'd*, 140 F. 2d 266 (2d Cir. 1944); *Fitch v. Shubert*, 20 F. Supp. 314 (S.D.N.Y. 1937); *Sayers v. Spaeth*, 20 COPYRIGHT OFFICE BULL. 625 (S.D.N.Y. 1932); *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E. 2d 283 (1955); *WARNER*, *op. cit. supra* note 451, § 83, at 255-57.

<sup>460</sup> *Bricker*, *supra* note 451, at 33-34; *Kupferman*, *supra* note 451, at 729-31; *Comment*, 36 U. DET. L.J. 66, 73 (1958).

<sup>461</sup> *G. Schirmer, Inc. v. Robbins Music Corp.*, 176 Misc. 578, 28 N.Y.S. 2d 699 (Sup. Ct. 1941) *aff'd mem.*, 267 App. Div. 751, 45 N.Y.S. 2d 924 (1943).

<sup>462</sup> *Carmichael v. Mills Music, Inc.*, 121 F. Supp. 43 (S.D.N.Y. 1954).

<sup>463</sup> The possibility of an action to impose a trust has also been suggested. *Bricker*, *supra* note 451, at 34; see *M. Witmark & Sons v. Fred Fisher Music Co.*, 38 F. Supp. 72, 75 (S.D.N.Y. 1941) (dictum), *aff'd on other grounds*, 125 F. 2d 949 (2d Cir. 1942), *aff'd on other grounds*, 318 U.S. 643 (1943).

<sup>464</sup> *Rossiter v. Vogel*, 134 F. 2d 908 (2d Cir. 1943); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd* 279 F. 2d 79 (2d Cir.) *cert. den.*, 364 U.S. 880 (1960); see *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490 (S.D.N.Y. 1942).

<sup>465</sup> *Rossiter v. Vogel*, *supra* note 464; *Rose v. Bourne, Inc.*, *supra* note 464.

<sup>466</sup> *Bricker*, *supra* note 451, at 34.

<sup>467</sup> 17 U.S.C. § 30 (1958).

the provision prohibiting substitution of an assignee's name in the notice before recordation.<sup>468</sup>

(3) *Rights of assignees and licensees when a transfer terminates or fails*

It is easy enough to say that, if an assignment does not cover the renewal term or if the assignor does not survive, the assignee no longer has any rights in the work. Likewise, if a license does not cover the renewal term, or if the licensor is not the true owner of the renewal when it is secured, it can readily be said that all rights of the licensee terminate at the end of the first term. To use the hackneyed phrase, the new owner takes the renewal "free and clear of all rights, interests, and licenses."<sup>469</sup> But these general propositions, while true in themselves, mask several difficult problems.

(a) *Duties of a licensee*

In *April Productions, Inc. v. G. Schirmer, Inc.*,<sup>470</sup> the licensee-publisher negotiated a new license with the owner of the renewal copyright and was thus entitled to continue publishing the work after the end of the first term. However, its contract with the owner of the first term had been unlimited in time, and the question was whether the licensee had to pay royalties both to the renewal owner and also to the owner of the first term (who had no rights in the renewal). The New York Court of Appeals<sup>471</sup> held that, while not mentioned by name, the copyright in the work was the real subject matter of the license, and that "in the absence of express language," the agreement could not "be construed to require payment of royalties after the expiration of the underlying copyrights";<sup>472</sup> the licensee's obligation to pay royalties under the \* \* \* agreement was measured by the duration of the rights thereby conferred.<sup>473</sup> In other words, it would seem that not only a copyright licensee's rights, but also his obligations, are cut off if ownership of the copyright changes at the time of renewal.<sup>474</sup>

(b) *Disposal of copies, etc.*

Assuming that an assignee or licensee must stop producing copies, articles, records, films, or other physical embodiments of the work when his contractual rights end, what can he do with stock on hand? This is a close question which has never reached the courts and on which opinions differ.<sup>475</sup> It seems most probable that continued sale

<sup>468</sup> 17 U.S.C. § 32 (1958).

<sup>469</sup> See note 123, *supra*.

<sup>470</sup> 122 N.Y.S. 2d 888 (1953), *aff'd*, 284 App. Div. 639, 131 N.Y.S. 2d 341 (1954), *rev'd*, 308 N.Y. 366, 126 N.E. 2d 283 (1955).

<sup>471</sup> In the lower court Justice Valente held that, since the contract was unlimited in time and made no mention of copyright, the change in ownership upon renewal did not alter the licensee's obligation. The Appellate Division affirmed, 8-2, and the Court of Appeals reversed, 2-1.

<sup>472</sup> 308 N.Y. at 375, 126 N.E. 2d at 289.

<sup>473</sup> 308 N.Y. at 377, 126 N.E. 2d at 290.

<sup>474</sup> See *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945). But see *Rose v. Bourne, Inc.*, 176 F. Supp. 606, 612 (S.D.N.Y. 1950) (dictum) *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960); *Tobani v. Carl Fischer, Inc.*, 263 App. Div. 503, 83 N.Y.S. 2d 294, *aff'd*, 289 N.Y. 727, 46 N.E. 2d 347 (1942).

<sup>475</sup> Weil and Ladas both indicate that any copies still on hand can be freely disposed of since they were "lawfully obtained" under section 41 of the 1909 Act (17 U.S.C. § 27 [1958]). WEIL, *op. cit. supra* note 451, § 963, at 371-72, §§ 1501-06, at 541-42; 2 LADAS, *op. cit. supra* note 451, at 774. Bricker, however, suggests the contrary. Bricker, *supra* note 451, at 82-83.

of copies would constitute a technical infringement,<sup>476</sup> but that individual cases would be decided on the basis of equitable considerations.<sup>477</sup>

(c) *Use of new versions created under terminated assignment or license*

A problem that has thoroughly confused the courts in recent years arises when a new version has been made and copyrighted under an assignment or license that is no longer binding during the renewal term. Common examples are motion pictures, dramatizations, musical arrangements, and translations. The owner of copyright in the new version has independent rights in his "new work,"<sup>478</sup> but can he use or exploit the work at all without getting a license from the owner of renewal rights in the original work on which it is based?

A leading expert on the renewal section has said:

\* \* \* If a motion picture company buys from an author all rights in a novel, it may validly copyright the motion picture photoplay in its own name and renew that copyright at the appropriate time. But if the author dies prior to the time for renewal of the basic work, the widow may renew this copyright and thus deprive the company of any right to continue to release the photoplay during the renewal term of the basic work. This does not mean, however, that another company to whom the widow transfers motion picture rights may infringe upon the first company's renewal copyright.<sup>479</sup>

In *Fitch v. Shubert*<sup>480</sup> the court held that the owner of copyright in an operetta could not continue to produce performances of the work without a license from the owner of renewal in the original play on which the operetta was based. Similarly, in *G. Ricordi & Co. v. Paramount Pictures, Inc.*,<sup>481</sup> plaintiff was owner of copyright in an opera ("Madama Butterfly") which was based both on a novel and a play (which in turn was based on the novel). The novel had been renewed but the play had not. The court held that:

\* \* \* plaintiff has acquired no rights under Long's renewal of the copyright on his novel and the plaintiff's renewal copyright of the opera gives it rights only in the new matter which it added to the novel and the play. It follows that the plaintiff is not entitled to make general use of the novel for a motion picture version of Long's copyrighted story; it must be restricted to what was copyrightable as new matter in its operatic version.<sup>482</sup>

The court also held that, since the copyrightable new matter in the play was in the public domain, plaintiff could claim no rights in it, but that it was free for anyone to use. The holding was limited to motion picture rights, but the court's reasoning applies equally to public performances, sound recordings, or any other method of exploitation controlled by the copyright law. It would seem, on the basis of judi-

<sup>476</sup> Bricker points out that section 27 was intended to cover the resale of previously published copies, and may have no application where there has been no previous sale. *Id.* at 33. It is also significant that the "Monroe Smith Amendment," which was intended to cover this very problem, was not incorporated in the 1909 Act; see notes 64-65, 82-85 *supra*, and text thereto.

<sup>477</sup> See WEIL, *op. cit. supra* note 451, § 963, at 372. One commentator suggests that the "original term publisher \* \* \* would probably not be permitted to dispose of an abnormal amount of copies deliberately printed for the purpose of sale during the renewal term." Zissu, *Works—Subject of Copyright—Rights in Statutory Copyrights* 5 (Practising Law Institute, mimeo outline, 1949).

<sup>478</sup> 17 U.S.C. § 7 (1958); see *Glaser v. St. Elmo Co.*, 175 Fed. 276 (C.C.S.D.N.Y. 1909).

<sup>479</sup> Bricker, *supra* note 451, at 43; accord, *Colby, supra* note 431, at 204.

<sup>480</sup> 20 F. Supp. 314 (S.D.N.Y. 1937).

<sup>481</sup> 92 F. Supp. 537 (S.D.N.Y. 1950), *modified*, 189 F. 2d 460 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951).

<sup>482</sup> 189 F. 2d at 471.

cial authority,<sup>483</sup> legislative history,<sup>484</sup> and the opinions of the commentators,<sup>485</sup> that someone cannot avoid his obligations to the owner of a renewal copyright merely because he created and copyrighted a "new version" under a license or assignment which terminated at the end of the first term.

Unfortunately, in two fairly recent cases between the same parties, the Court of Appeals for the Second Circuit has reached results opposed to this principle. In both the *Melancholy Baby*<sup>486</sup> and *Twelfth Street Rag*<sup>487</sup> cases the court held that, despite the lack of any collaboration, the product of adding new words to old music constituted "joint authorship" rather than a "composite work"; therefore the owner of copyright in this "joint work" was entitled to continue using the music without any license from the owner of copyright in the music. The fallacy in this reasoning will be discussed below,<sup>488</sup> but the following language in the *Twelfth Street Rag* opinion should be noted:

\* \* \* Since [the] intent was to merge the two contributions into a single work to be performed as a unit for the pleasure of the hearers we should consider the result "joint" rather than "composite." The result reached in the district court would leave one of the authors of the "new work" with but a barren right in the words of a worthless poem, never intended to be used alone. Such a result is not to be favored.<sup>489</sup>

This comment could be made about almost any "new version"; it not only disregards the principle established by the *Fitch* and *Ricordi* decisions, but it also appears to reflect a basic misconception of the nature of a renewal copyright.

#### 4. Problems of co-ownership and co-authorship under a renewal copyright

The general problem of joint ownership of copyrights is the subject of another study in this series,<sup>490</sup> and cannot be dealt with here in detail. However, since some of the most important and difficult questions now at issue under the renewal provision involve co-ownership and co-authorship, this paper would not be complete without a summary of the problem.

##### a. Tenancy in common

It is well established that, when the author is dead and there is more than one person in the class of beneficiaries entitled to renew under the statute, the beneficiaries receive the renewal as tenants in

<sup>483</sup> See *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 92 F. Supp. 537 (S.D.N.Y. 1950), modified, 189 F. 2d 469 (2d Cir.), cert. denied, 342 U.S. 849 (1951); *Fitch v. Schubert*, 20 F. Supp. 314 (S.D.N.Y. 1937); *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 370, 126 N.E. 2d 283, 286 (1955) (by implication).

<sup>484</sup> There are indications in the 1906-08 hearings that those responsible for the bills felt that copyright in a "new version" would secure protection for nothing but the "new matter." See, e.g., *Hearings Before the Committees on Patents on S. 6330 and H.R. 19853*, at 309, 364-65 (Dec. 1906).

<sup>485</sup> See Zissu, *supra* note 477, at 5; Caterini, *Contributions to Periodicals*, in 10 COPY-RIGHT LAW SYMPOSIUM (ASCAP) 321, 363 (1959); Bricker, *supra* note 451, at 43; Note, 10 W. RES. L. REV. 263, 266 (1959).

<sup>486</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820 (1947).

<sup>487</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), modified, 223 F. 2d 252 (2d Cir. 1955).

<sup>488</sup> See notes 520-39 *infra*, and text thereto.

<sup>489</sup> 221 F. 2d at 570.

<sup>490</sup> Cary, *Joint Ownership of Copyrights* [Study No. 12 in the present series of committee prints].

common.<sup>491</sup> They own an undivided and indivisible interest in the work as a whole; their interest and relationship was described generally in one case as follows:

\* \* \* the possession of one tenant in common is the possession of all \* \* \*; so, too, the entry of one is the entry of all; seisin of one is for the use of all, any act of one is presumed to be for the common benefit; in short the relation between such owners is ordinarily or presumably that of trust \* \* \*.<sup>492</sup>

It is now equally settled that, in the case of works of "joint authorship," the rights of the various co-authors (or their statutory beneficiaries) are also those of tenants in common, and this is true both for the original<sup>493</sup> and the renewal terms<sup>494</sup> of copyright.

By calling co-ownership of renewal a tenancy in common the courts have been able to avoid holding that, in order to secure a valid renewal, all those entitled to claim would have to join in the application.<sup>495</sup> Since the act of one is equivalent to the act of all, registration by one valid claimant keeps the entire work out of the public domain<sup>496</sup> and secures the benefits of the renewal for all those who would have been

<sup>491</sup> *De Sylva v. Ballentine*, 351 U.S. 570, 580 (1956), *affirming* 226 F. 2d 623 (9th Cir. 1955); *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *Bricker*, *supra* note 451, at 30-31; *Kupferman*, *supra* note 451, at 718; *Kupferman*, *Copyright—Co-owners*, 19 ST. JOHN'S L. REV. 95, 98 (1945); *Taubman*, *Joint Authorship and Co-ownership in American Copyright Law*, 31 N.Y.U.L. REV. 1246, 1258 (1956).

<sup>492</sup> *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 914 (2d Cir. 1921). *But see* *Jerry Vogel Music Co. v. Miller Music, Inc.*, 272 App. Div. 571, 573, 74 N.Y.S. 2d 425, 426 (1947) ("We may call them tenants in common, but there is nothing magical in that description, and the incidents of their relationship do not necessarily follow from that description.")

<sup>493</sup> *Maurel v. Smith*, 220 Fed. 195 (S.D.N.Y. 1915), *aff'd*, 271 Fed. 211 (2d Cir. 1921); *Kapplow v. Abelard Schuman, Ltd.*, 193 N.Y.S. 2d 931 (Sup. Ct. 1959).

<sup>494</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955) ("Twelfth Street Rag"); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406, 411 (2d Cir. 1946) (on clarification of opinion), *cert. denied*, 331 U.S. 820, *on remand*, 73 F. Supp. 165 (S.D.N.Y. 1947) ("Melancholy Baby"); *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 270 (2d Cir. 1944), *affirming* 49 F. Supp. 135 (S.D.N.Y. 1943) ("I Wonder Who's Kissing Her Now"); 140 F. 2d 268 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("The Bird on Nellie's Hat"); 140 F. 2d 266 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("December and May"); 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment) ("I Wonder Who's Kissing Her Now") ("The Bird on Nellie's Hat") ("December and May"); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>495</sup> The following comments by the court in *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909, 914 (2d Cir. 1921) are illustrative:

\* \* \* only by treating the act of a fraction of the next of kin as a class act can injustice be prevented. Next of kin are often numerous, as here; widely separated geographically, as here; some may be in parts unknown; yet defendant's argument, pressed to its logical result, means that, if one owner of a microscopic fraction of right cannot be found or can be bought, so that he cannot or will not sign the renewal application, the rest of the family are helpless. The same result would flow from the malicious or purchased act of one child in a numerous family. Assuredly the Legislature never intended such injustice.

*But see* *Bricker*, *supra* note 451, at 31.

<sup>496</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955) ("Twelfth Street Rag"); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406, 411 (2d Cir. 1946) (on clarification of opinion), *cert. denied*, 331 U.S. 820, *on remand*, 73 F. Supp. 165 (S.D.N.Y. 1947) ("Melancholy Baby"); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 270 (2d Cir. 1944), *affirming* 49 F. Supp. 135 (S.D.N.Y. 1943) ("I Wonder Who's Kissing Her Now"); 140 F. 2d 268 (2d Cir. 1944), *modified on other grounds* 47 F. Supp. 490 (S.D.N.Y. 1942) ("The Bird on Nellie's Hat"); 140 F. 2d 266 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("December and May"); 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment) ("I Wonder Who's Kissing Her Now") ("The Bird on Nellie's Hat") ("December and May"); *Silverman v. Sunrise Pictures Corp.*, *supra* note 495; *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), *cert. denied*, 262 U.S. 758 (1923).

entitled to claim.<sup>497</sup> It is also clear that under a renewal there is no principle of survivorship; if one co-owner dies, his undivided portion of the renewal goes to his heirs (as under tenancy in common) and not to the other owners (as under joint tenancy).<sup>498</sup>

### b. Proportion of ownership

In the *De Sylva*<sup>499</sup> case the Supreme Court left open the question of whether the author's widow and children take the renewal *per capita*, or whether the widow takes half and the children divide the other half.<sup>500</sup> In view of the Court's holding that the meaning of the word "child" was to be determined by the State law of descent and distribution,<sup>501</sup> it is possible to infer that the proportion of ownership between the widow and children might be settled on the same basis. If this is true, then State law would probably also settle whether the author's next of kin take *per stirpes* or *per capita*. In any case, it seems clear that the total share of a particular author's statutory beneficiaries cannot be greater than the share of the renewal the author would have taken had he lived.<sup>502</sup>

As between co-authors, the respective shares of the renewal to which each would be entitled is hard to assess.<sup>503</sup> It has been suggested that courts are reluctant to evaluate the contributions of the authors on any qualitative basis, and might be expected to make "a rough estimate of the quantity of the final product attributable to each."<sup>504</sup> The farther the courts get away from real collaboration as the standard of joint authorship, the worse this problem is likely to become.

### c. Joint authorship

At first glance it would seem that the question of what constitutes joint authorship<sup>505</sup> is outside the scope of this paper, since it involves the situation existing when a work was originally written.<sup>506</sup> In truth, however, most of the American cases on this subject have

<sup>497</sup> *Ballentine v. De Sylva*, 226 F. 2d 623, 634 (9th Cir. 1955), *aff'd*, 351 U.S. 570, 580 (1956); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, *supra* note 496 ("Twelfth Street Rag"); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, *supra* note 496 ("Melancholy Baby"); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, *supra* note 496; *Tobani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1938); *Silverman v. Sunrise Pictures Corp.*, *supra* note 496; *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945); *Jerry Vogel Music Co. v. Edward B. Marks Music Corp.*, 56 F. Supp. 779 (S.D.N.Y. 1944); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>498</sup> *Edward B. Marks Music Corp. v. Wonnell*, *supra* note 497; *Rosengart, Principles of Co-authorship in American, Comparative, and International Copyright Law*, 25 SO. CAL. L. REV. 247, 252-53 (1952); *Taubman, supra* note 491, at 1258; *Note*, 72 HARV. L. REV. 1550, 1554 (1959).

<sup>499</sup> *De Sylva v. Ballentine*, 351 U.S. 570 (1956); see *Fisher v. Edwin H. Morris & Co.*, 113 U.S.P.Q. 251 (S.D.N.Y. 1957).

<sup>500</sup> *De Sylva v. Ballentine*, *supra* note 499, at 579 n. 5, 580.  
<sup>501</sup> See notes 324-29 *supra*, and notes 568-72 *infra*, and text thereto.  
<sup>502</sup> See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Edward B. Marks Music Co. v. Wonnell*, 61 F. Supp. 772 (S.D.N.Y. 1945).

<sup>503</sup> See *ibid*; *Kapplow v. Abelard Schuman, Ltd.*, 193 N.Y.S. 2d 931 (Sup. Ct. 1959).

<sup>504</sup> *Note*, 72 HARV. L. REV. 1550, 1564 (1959).  
<sup>505</sup> For discussions of this question see *Cary, supra* note 490, at 89-92; *Bricker, Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 36-37 (1955); *Rosengart, supra* note 498, at 247-52; *Taubman, supra* note 491, at 1247-51; *Note*, 72 HARV. L. REV. 1550, 1551-53 (1959).

<sup>506</sup> Whether someone was actually a co-author may be a question of factual proof in a renewal case, and the outcome may be affected by allegations of estoppel or laches. *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945); *Forster Music Publishers, Inc. v. Jerry Vogel Music Co.*, 62 U.S.P.Q. 142 (S.D.N.Y. 1944), *aff'd*, 147 F. 2d 614 (2d Cir.), *cert. denied*, 325 U.S. 880 (1945); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946).



involved ownership of renewal copyrights, and the questionable results in some of these cases have been directly attributable to that fact.

To review the case law development in this field briefly:

(1) The fountainhead English case of *Levy v. Rutley* (1871)<sup>507</sup> established that the basic requirement of joint authorship was "common design"—a preconceived intention to cooperate in creating a single work. In addition, the decision suggested that this "common design" required the authors to know each other and to work toward the same end—a unitary work—at about the same time.

(2) In *Maurel v. Smith* (1915)<sup>508</sup> Judge Learned Hand broadened the *Levy* concept somewhat by holding that as long as the "collaborators knowingly engage in the production of a piece which is to be presented originally as a whole only," they are joint authors even though they do not know who their collaborators are or may be. The Second Circuit Court of Appeals affirmed (1921),<sup>509</sup> holding that "a confusion of literary labor contributed by independent efforts"<sup>510</sup> constituted a joint work since there was "joint cooperation in carrying out the effort to complete the opera."<sup>511</sup>

(3) In *Harris v. Coca-Cola Co.* (1934)<sup>512</sup> the Fifth Circuit Court of Appeals held that Joel Chandler Harris could not be considered a joint author of the illustrations in an edition of *Uncle Remus* published fifteen years after first publication of the book, and that renewal of the illustrated edition by Harris's widow was therefore invalid. The court stated that renewal by one author or his relatives "does not extend to another's work, although associated in the same book,"<sup>513</sup> and refused to decide whether the illustrated edition was a "composite work" or not.

(4) In a series of renewal cases between 1942 and 1944, *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*,<sup>514</sup> the Federal courts in the Second Circuit established a new and broader concept of joint authorship. While still clinging to the necessity of collaboration, the courts held that this did not require "physical propinquity" or consultation,<sup>515</sup> and that it is quite possible for joint authors to work at entirely different times.<sup>516</sup> Under these cases the important point was that the authors knew when they were writing their parts (words and music of songs) that they were to be combined with other parts and presented to the public as a unit; " \* \* \* it makes no difference whether the authors work in concert, or even whether they know each other; it is enough that they mean their contributions to be complementary in the sense that they are to be embodied in a single work to be performed as such."<sup>517</sup> The courts pointed out the injustice that would ensue during the renewal term if a renewing author were able

<sup>507</sup> L.R. 6 C.P. 523 (1871).

<sup>508</sup> 220 Fed. 195 (S.D.N.Y. 1915), *aff'd*, 271 Fed. 211 (2d Cir. 1921).

<sup>509</sup> 271 Fed. 211 (2d Cir. 1921).

<sup>510</sup> *Id.* at 214.

<sup>511</sup> *Id.* at 215. *But see* *Klein v. Beach*, 232 Fed. 240 (S.D.N.Y. 1916).

<sup>512</sup> 73 F. 2d 370 (5th Cir. 1934), *cert. denied*, 294 U.S. 709 (1935).

<sup>513</sup> *Id.* at 371.

<sup>514</sup> 140 F. 2d 270 (2d Cir. 1944), *affirming* 49 F. Supp. 135 (S.D.N.Y. 1943) ("I Wonder Who's Kissing Her Now"); 140 F. 2d 268 (2d Cir. 1944), *modifying* 47 F. Supp. 490 (S.D.N.Y. 1942) ("The Bird on Nelly's Hat"); 140 F. 2d 266 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("December and May"); 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment) ("I Wonder Who's Kissing Her Now") ("The Bird on Nelly's Hat") ("December and May").

<sup>515</sup> 42 F. Supp. at 864.

<sup>516</sup> 47 F. Supp. 490 (S.D.N.Y. 1942).

<sup>517</sup> 140 F. 2d at 267.

to exclude a co-author who had not renewed; <sup>518</sup> in one of the Circuit Court opinions Judge Learned Hand said:

\* \* \* To allow the author to prevent the composer, or the composer to prevent the author, from exploiting [the work as a whole] \* \* \*, would be to allow him to deprive his fellow of the most valuable part of his contribution; to take away the kernel, and leave him only the husk. It is quite beside the point that, if the first part is composed without any common design, its author retains power to forbid publication of the joint work. Whatever popularity the second author's contribution may have added to the first's, which will survive their divorce, he must be content to release to the first author; whatever popularity his own contribution has gained from the association, he must be content to lose. Not so, when both plan an undivided whole; in that case unless they stipulate otherwise in advance, their separate interests will be as inextricably involved, as are the threads out of which they have woven the seamless fabric of the work.<sup>519</sup>

Judge Hand noted that, although the parts were separable and capable of being used separately, this was not their purpose. He distinguished a work of joint authorship from what he called a "composite work"—a work in which each part is separate and the only unity is the fact that the parts are bound together.

(5) In the *Melancholy Baby* case (1945-1947)<sup>520</sup> the original authors of the words and music of a song had copyrighted their work in unpublished form. Later the author of the music consented to have new words written by a third person, and it was this new version that was published. The lower court held that this was not a joint work because "contributing old material in unchanged form cannot be collaboration in the creation of new matter; no labor is involved."<sup>521</sup> However, the Court of Appeals reversed, holding that the author of the music and the author of the new words were co-authors and collaborators:

\* \* \* The words and music of a song constitute a "musical composition" in which the two contributions merge into a single work to be performed as a unit for the pleasure of the hearers; they are not a "composite" work, like the articles in an encyclopedia, but are as little separable for purposes of the copyright as are the individual musical notes which constitute the melody. \* \* \*<sup>522</sup>

In determining joint authorship the court appeared to pay little attention to the author's intention, and to look only at the nature of the end product and the relationship between its parts. There were strong intimations in the case that the authors of the music and of the new words might be considered "joint authors" of, and thus have renewal rights in, later "new versions" where neither had anything to do with the new matter.<sup>523</sup>

(6) The *Twelfth Street Rag* case (1953-1955)<sup>524</sup> followed much the same course as *Melancholy Baby*, but went one step further. Here the author had written, copyrighted, and published his music as an "instrumental," without words. He later assigned his copyright and rights in the initial term to a publisher, who had words written without the composer's knowledge or consent. The lower court held that the resulting "song" was a "composite work" rather than a "joint

<sup>518</sup> 42 F. Supp. 859 (S.D.N.Y. 1942); 47 F. Supp. 490 (S.D.N.Y. 1942); 140 F. 2d 266 (2d Cir. 1944).

<sup>519</sup> 140 F. 2d at 267.

<sup>520</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 67 U.S.P.Q. 12 (S.D.N.Y. 1945), *rev'd*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947), *on remand*, 73 F. Supp. 165 (S.D.N.Y. 1947).

<sup>521</sup> 67 U.S.P.Q. at 14.

<sup>522</sup> 161 F. 2d at 409.

<sup>523</sup> See *id.* at 411 (on clarification of opinion), *on remand*, 73 F. Supp. 165 (S.D.N.Y. 1947).

<sup>524</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd*, 221 F. 2d 569 (2d Cir.), *modified*, 223 F. 2d 252 (2d Cir. 1955).

work," and that intent of the author to create a joint work is essential. The Court of Appeals reversed on the ground that the determinative factor is not always the intent of the author; if "the original author had assigned all his rights that he could assign," the test of joint authorship is "the consent, by the one who holds the copyright on the product of the first author, at the time of the collaboration, to the collaboration of the second author."<sup>525</sup> [Emphasis supplied.] Since the assignee's intent was "to merge the two contributions into a single work to be performed as a unit for the pleasure of hearers," the work was "joint" rather than "composite";<sup>526</sup> otherwise the result "would leave one of the authors of the 'new work' with but a barren right in the words of a worthless poem, never intended to be used alone."<sup>527</sup>

Beginning with the *Marks v. Vogel* cases, the broadening concept of joint authorship appears to have been the direct result of the renewal system—of the courts' reluctance to split ownership or hold that part of a work is in the public domain during the renewal term.<sup>528</sup> Aside from questions of principle, the result in the *Marks* case seems logically defensible, and even the decision (though not the reasoning) in the *Melancholy Baby* case can be justified on its facts.<sup>529</sup> However, the decision in the *Twelfth Street Rag* case appears to be in conflict with other renewal cases and with the copyright statute itself.<sup>530</sup>

Under the *Twelfth Street Rag* doctrine, any new version created with the consent of the owner of copyright in the basic work would constitute a work of joint authorship in the absence of a specific agreement to the contrary.<sup>531</sup> This means that someone who creates and copyrights a "new version," under an assignment or license valid for the first term only, could continue to exploit the entire work during the renewal period without permission from the owner of renewal in the basic work—despite the fact that all his contractual rights have ended. He can not only keep on doing what his contract permitted him to do during the first term, but as tenant in common he can unilaterally use the entire work in any way or license it for any purpose, subject only to an accounting for profits.<sup>532</sup> This result is directly contrary to the *Fitch* and *Ricordi* decisions,<sup>533</sup> and flies in the face of the concept of renewals as a new estate, free of pre-existing assignments and licenses.<sup>534</sup>

Furthermore, *Twelfth Street Rag* would mean that the original author automatically becomes a "joint author" of every authorized new version based on his work, even though created without his knowledge or consent. The original author and his family or next of kin could

<sup>525</sup> 221 F. 2d at 570.

<sup>526</sup> *Ibid.*

<sup>527</sup> *Ibid.*

<sup>528</sup> Kupperman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 732-33 (1944).

<sup>529</sup> It might be possible to establish co-authorship on the basis of the original author's knowledge and consent, coupled with the fact that the "new version" actually constituted the first publication of the work. See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 115 F. Supp. 754 (S.D.N.Y. 1953), *rev'd* 221 F. 2d 569 (2d Cir.), *modified*, 223 F. 2d 252 (2d Cir. 1955).

<sup>530</sup> See notes 473-89 *supra*, and text thereto.

<sup>531</sup> See *Szekely v. Eagle Lion Films, Inc.*, 140 F. Supp. 843 (S.D.N.Y. 1956), *aff'd*, 242 F. 2d 264 (2d Cir.), *cert. denied*, 354 U.S. 922 (1957).

<sup>532</sup> See notes 547-80 *supra*, and text thereto.

<sup>533</sup> See notes 480-83 *supra*, and text thereto.

<sup>534</sup> See notes 123, 469 *supra*, and text thereto. In *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490, 491 (S.D.N.Y. 1942), Judge Lovett remarked that:

\* \* \* Joel Chandler Harris did not originally write his Uncle Remus tales with any intention of having them illustrated when they were collected and put in book form \* \* \* nor did Shakespeare write his *Midsummer Night's Dream*, nor David the 23d Psalm, intending they should be set to music and produced as musical positions under copyrights. \* \* \*

continue to claim renewal rights in (and royalties from) new versions with which he had nothing to do, long after his own work had gone into the public domain.<sup>535</sup> This conflicts with the principle that copyright in a new version covers only the new matter in that version,<sup>536</sup> and with the statutory provision that protection for a "new version" shall not enlarge protection for the original work on which the "new work" was based.<sup>537</sup>

Needless to say, the present situation is decidedly unsatisfactory. Any effort to resolve the problem, whether by court decision or legislative enactment, should take the following points into consideration:

(1) It is a mistake to say, as some courts have, that if a work is not "composite" it is necessarily "joint."<sup>538</sup> Actually there are at least four types of works that combine the contributions of more than one author:

(a) *Joint works*: works written in direct or indirect collaboration in the first instance. Here renewal by one author could renew the whole work.

(b) *Composite works*: works which incorporate separable or inseparable contributions by a number of authors, and which also involve over-all elements of compilation, editing and arrangement. Here renewal by an individual author covers only his own contribution, but the proprietor can renew the work as a whole.

(c) *Collective works*: works lacking over-all elements of compilation or editing, but containing separate contributions by two or more authors which were written without collaboration. (Examples: a novel by A published with a preface by B, a foreword by C, and illustrations by D; three gospel songs by different authors, published together with a single title page.) The decisions imply that these are "composite works," but they lack both the multiplicity of authorship and the over-all editing and compilation that would justify renewal of the entire work by the proprietor. In these cases renewal by an individual author might be limited to his own contribution alone; but, since the proprietor cannot renew, it is arguable that renewal by one author would create a constructive trust on behalf of the separate rights of the other authors.<sup>539</sup>

(d) *New versions*: works consisting of previously published or copyrighted material which has been abridged, arranged, compiled, or otherwise revised, or which has been combined with new matter. Here it would seem that only the authors of the new matter can renew.

(2) In the case of new versions, a renewal copyright can cover only the new matter, and can give no rights whatever in the older material employed in the "new work." Thus, the authorship on which renewal ownership is based in such cases is solely the authorship of the new matter; the author of the original work, as such, should be given no renewal rights in the new version. There may be many cases where the original author actually collaborates in revising or enlarging his

<sup>535</sup> See *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820 (1947); *Cary, op. cit. supra* note 490, at 91-92.

<sup>536</sup> *Adventures in Good Eating, Inc. v. Best Places to Eat, Inc.*, 131 F. 2d 809 (7th Cir. 1942); *Markham v. A. E. Borden Co.*, 108 F. Supp. 695 (D. Mass. 1952), *rev'd on other grounds*, 206 F. 2d 199 (1st Cir. 1953).

<sup>537</sup> 17 U.S.C. § 7 (1958).

<sup>538</sup> See notes 176-81 *supra*, and text thereto.

<sup>539</sup> *Harris v. Coca-Cola Co.*, 73 F. 2d 370 (5th Cir. 1934) appears to hold otherwise, but probably can be distinguished because the work was actually a "new version."

own work, and may thus claim renewal in the new version as a co-author. But where the original author had no part in writing the new version, he should not be entitled to renewal rights in it.

*d. The results of a constructive trust*

The cases have established that, when one valid claimant renews, he holds the benefits of the renewal for himself and as constructive trustee for all others who could have claimed.<sup>540</sup> The claimant of record holds legal title to the renewal, but the exact nature of the rights of unregistered claimants is unclear.<sup>541</sup> Although the rights of an unregistered claimant are usually called equitable rather than legal,<sup>542</sup> this has not appeared to restrict his freedom to deal with the property as a full co-tenant.

It has been suggested that, under usual trust principles, only the constructive trustees should be entitled to deal with the work as only they hold legal title;<sup>543</sup> since the rights of unregistered claimants are equitable only, it is argued that their sole right would be to an accounting for profits from the holders of record. However, the trend of the cases is very much the other way. The unregistered beneficiary under a constructive trust in this situation has been held entitled as a co-tenant to assign his share,<sup>544</sup> to exploit the work himself,<sup>545</sup> and to license it as well.<sup>546</sup> While it is probably advantageous

<sup>540</sup> *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 268 (2d Cir. 1944); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944); *Silverman v. Sunrise Pictures Corp.*, 290 Fed. 804 (2d Cir.), *cert. denied*, 282 U.S. 758 (1923); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Edward B. Marks Music Corp. v. Wonnell*, 61 F. Supp. 722 (S.D.N.Y. 1945); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 49 F. Supp. 135 (S.D.N.Y. 1943), *aff'd*, 140 F. 2d 270 (2d Cir. 1944); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D.N.Y. 1942); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 59 N.Y.S. 2d 728 (1945), *rev'd on other grounds*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>541</sup> This question was raised and deliberately left open in *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 268 (2d Cir. 1944). The court suggested that, where the name of the co-author appeared on the face of the renewal application (though not as a co-claimant), the legal title might also inure to him. However, for the sake of argument, the court assumed that the co-author's interest was equitable.

<sup>542</sup> See, e.g., *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947).

<sup>543</sup> *Nimmer, Copyright 1956: Recent Trends in the Law of Artistic Property*, 4 U.C.L.A.L. REV. 323, 334-36 (1957); 31 N.Y.U.L. REV. 1319, 1322-23 (1956); see *Ballentine v. De Sylva*, 226 F. 2d 623, 634 (9th Cir. 1955) (dissent). But see *Jerry Vogel Music Co. v. Miller Music, Inc.*, 59 N.Y.S. 2d 728 (1945), *rev'd*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>544</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 270 (2d Cir. 1944), *affirming* 49 F. Supp. 135 (S.D.N.Y. 1943) ("I Wonder Who's Kissing Her Now"); 140 F. 2d 268 (2d Cir. 1944), *modifying on other grounds* 47 F. Supp. 490 (S.D.N.Y. 1942) ("The Bird on Nellie's Hat"); 140 F. 2d 266 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("December and May"); 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment) ("I Wonder Who's Kissing Her Now") ("The Bird on Nellie's Hat") ("December and May"); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Jerry Vogel Music Co. v. Miller Music, Inc.*, *supra* note 543.

<sup>545</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment); 47 F. Supp. 490 (S.D.N.Y. 1942), *aff'd*, 140 F. 2d 266 (2d Cir. 1944) ("December and May"); 49 F. Supp. 135 (S.D.N.Y. 1943), *aff'd*, 140 F. 2d 270 (2d Cir. 1944) ("I Wonder Who's Kissing Her Now").

<sup>546</sup> *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490 (S.D.N.Y. 1942), *aff'd*, 140 F. 2d 266 (2d Cir. 1944); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 59 N.Y.S. 2d 728 (1945), *rev'd on other grounds*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

for a renewal claimant to register his own claim, it appears that as long as one co-tenant's claim is validly registered, the substantive rights of all co-tenants are very much the same.

*e. Rights of co-owners under a renewal copyright*

In 1874 the Supreme Judicial Court of Maine held in *Carter v. Bailey*<sup>547</sup> that each co-owner of a copyright can use and exploit the entire work without the consent of the other tenants in common, and without accounting to them for any profits he receives. For many years this was considered the American rule<sup>548</sup> with respect to both initial and renewal copyrights, as it is with patents.<sup>549</sup> However, the no-accounting rule of the *Carter* case now appears to have been completely overruled; and, although the right of co-owners to deal freely and unilaterally with the entire work is well-established, this rule has been sharply criticized in recent years.

At the present time it appears settled that:

(1) When one co-owner assigns his share of a renewal copyright, his assignee steps into his shoes and assumes all of his assignor's rights and obligations as co-tenant in common.<sup>550</sup> His rights are necessarily non-exclusive, since they are subject to the rights of the other tenants in common.<sup>551</sup>

(2) A co-owner may freely use or exploit the work himself, without permission from any other co-owner.<sup>552</sup>

(3) A co-owner may also license others to use or exploit the work, without the consent of the other owners.<sup>553</sup> The other co-owners have no recourse against the licensee; <sup>554</sup> their only rights, if any are against the licensing co-owner.

<sup>547</sup> 64 Me. 458 (1874).

<sup>548</sup> See, e.g., *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921). The English rule is different; under *Powell v. Head*, 12 Ch. D. 686 (1879), exploitation of a work requires the consent of all co-owners, and thus no accounting is necessary.

<sup>549</sup> Taubman, *Joint Authorship and Co-Ownership in American Copyright Law*, 81 N.Y.U.L. REV. 1246, 1253 (1956).

<sup>550</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 270 (2d Cir. 1944), *affirming* 49 F. Supp. 135 (S.D.N.Y. 1943) ("I Wonder Who's Kissing Her Now"); 140 F. 2d 268 (2d Cir. 1944), *modifying on other grounds* 47 F. Supp. 490 (S.D.N.Y. 1942) ("The Bird on Nellie's Hat"); 140 F. 2d 266 (2d Cir. 1944), *affirming* 47 F. Supp. 490 (S.D.N.Y. 1942) ("December and May"); 42 F. Supp. 859 (S.D.N.Y. 1942) (on motions for summary judgment) ("I Wonder Who's Kissing Her Now") ("The Bird on Nellie's Hat") ("December and May"); *Jerry Vogel Music Co. v. Edward B. Marks Music Corp.*, 56 F. Supp. 779 (S.D.N.Y. 1944); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 59 N.Y.S. 2d 728 (1945), *rev'd on other grounds*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>551</sup> One commentator has pointed out that a person's rights and liabilities in the co-ownership situation may differ substantially, depending upon whether he is considered an assignee or a licensee; he concludes that "one who assumes the substantial ownership of the property created by the act should also assume the obligation of accounting to other owners and the power of demanding a share of the profits \* \* \*." Note, 72 HARV. L. REV. 1550, 1563 (1959).

<sup>552</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 266 (2d Cir. 1944).

<sup>553</sup> See *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 47 F. Supp. 490 (S.D.N.Y. 1942), *aff'd*, 140 F. 2d 266 (2d Cir. 1944); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 59 N.Y.S. 2d 728 (1945), *rev'd on other grounds*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>554</sup> Note, 72 HARV. L. REV. 1550, 1563 (1959).

(4) Under no circumstances may one co-tenant sue another co-tenant as an infringer.<sup>555</sup> The only right of tenants in common among themselves is for an accounting for profits.<sup>556</sup> The no-accounting rule of *Carter v. Bailey* has been discarded on various theories: that cotenancy creates an equitable relationship of mutual trusts which requires an accounting to regulate;<sup>557</sup> that unilateral dealing amounts to potential exclusion or destruction which calls for an accounting;<sup>558</sup> or simply that accounting is needed to "promote sound and orderly marketing of a work and a fair division of profits on the basis of mutual interest."<sup>559</sup>

(5) It has been suggested that, even though a co-owner must account for his use of the entire work, he should not be obliged to account for profits from the separate exploitation of those portions written solely by him (or his predecessor).<sup>560</sup>

This freedom of tenants in common to dispose of their rights and to exploit the entire work, subject only to an accounting for profits, has resulted in many "split renewals"—that is, renewal copyrights owned and exploited independently by two or more publishers. This loss of exclusivity has been criticized as reducing the value of a copyright<sup>561</sup> and various alternatives have been suggested,<sup>562</sup> but one commentator felt it "inescapable \* \* \* that some diffusion of copyright ownership is a necessary concomitant of our present scheme of renewal succession."<sup>563</sup>

## 5. Problems of jurisdiction and applicable law

### a. State or Federal jurisdiction

An important question, on which the law is still quite unsettled, is whether the State or Federal courts have jurisdiction in a case involving the validity or construction of an assignment of renewal rights. It

<sup>555</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *Edward B. Marks Music Corp. v. Jerry Vogel Music Co.*, 140 F. 2d 270 (2d Cir. 1944); 140 F. 2d 268 (2d Cir. 1944); 140 F. 2d 266 (2d Cir. 1944). However, where the purported assignee cannot prove the validity of his assignment or the title of his assignor, he will be held liable as an infringer. *Forster Music Publishers, Inc. v. Jerry Vogel Music Co.*, 62 U.S.P.Q. 142 (S.D.N.Y. 1944), *aff'd*, 147 F. 2d 614 (2d Cir.), *cert. denied*, 325 U.S. 880 (1945); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946).

<sup>556</sup> It has been suggested that, where one co-owner has acted negligently or wilfully—where there has been "unreasonable depletion of value of the copyright to an extent greater than the value of the profits received"—the other co-owners might recover more than a mere share of profits. Note, 72 HARV. L. REV. 1550, 1565 (1959).

<sup>557</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Maurel v. Smith*, 220 Fed. 195 (S.D.N.Y. 1915), *aff'd*, 271 Fed. 211 (2d Cir. 1921).

<sup>558</sup> *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 73 F. Supp. 165 (S.D.N.Y. 1947); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 272 App. Div. 571, 74 N.Y.S. 2d 425 (1947), *aff'd mem.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949).

<sup>559</sup> *Jerry Vogel Music Co. v. Miller Music, Inc.*, *supra* note 558, at 575, 74 N.Y.S. 2d at 428.

<sup>560</sup> Note, 72 HARV. L. REV. 1550, 1562 (1959). In *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 221 F. 2d 569 (2d Cir.), *modified on other grounds*, 223 F. 2d 252 (2d Cir. 1955), the Court of Appeals first gave an accounting only to defendant (the assignee of the author of the new words) who had been held a tenant in common with the assignee of the author of the music. On rehearing the court modified its opinion to allow reciprocal accounting, excluding the profits from plaintiff's exploitation of the music alone.

<sup>561</sup> Cary, *supra* note 490 at 108-09; 2 SOCOLOW, THE LAW OF RADIO BROADCASTING § 679, at 1208-10 (1939); Miller, *Problems in the Transfer of Interests in a Copyright*, in 10 COPYRIGHT LAW SYMPOSIUM (ASCAP) 174-75 (1959); Schaeffer & Schaeffer, *Infringement of Musical Copyright*, 4 JOHN MARSHALL L.Q. 511, 533-34 (1939); Taubman, *supra* note 549, at 1258, 1260-61.

<sup>562</sup> Cary, *op. cit. supra* note 490, at 111; Taubman, *supra* note 549, at 1260-61.

<sup>563</sup> Note, 30 SO. CAL. L. REV. 532, 537 (1957).

seems that, where the suit involves a construction of the renewal section of the copyright law, or where the validity of the renewal copyright is in question, the Federal courts have exclusive jurisdiction.<sup>564</sup> Where the only question involves the validity or enforceability of a contract or assignment dealing with renewal rights, State court jurisdiction has been upheld;<sup>565</sup> but there is authority indicating that, where the plaintiff in this situation pleads infringement of copyright rather than breach or invalidity of contract, a Federal court action may be upheld—at least in the Second Circuit.<sup>566</sup>

*b. Applicable law for construction of statutory language*

An even more serious problem is the law to be applied in construing the language of the renewal section. As we have seen<sup>567</sup> the Supreme Court in the *De Sylva* case<sup>568</sup> held, two justices dissenting, that the meaning of the word "children" was to be determined by reference to the applicable State law governing the descent of property. Justice Harlan's opinion also stated that "to decide who is the widow or widower of a deceased author, or who are his executors or next of kin, requires a reference to the law of the State which created those legal relationships."<sup>569</sup> At least with respect to the scope of the various classes of second proviso beneficiaries, this decision appears to establish that State law is controlling.<sup>570</sup> Whether this would also be true with respect to the division of the renewal among the various members of a class,<sup>571</sup> or with respect to first proviso beneficiaries, remains to be seen.

This aspect of the *De Sylva* decision has been criticized because of the problems it raises—the necessity for deciding conflicts of law questions and the resulting lack of definiteness and uniformity in the meaning of the terms used in the statute.<sup>572</sup> However, it is hard to imagine how a court would decide, for example, who are the author's next of kin, without reference to State law. The difficulty, of course, arises from using indefinite terms in the statute without defining them or indicating how they are to be defined.

<sup>564</sup> *Danks v. Gordon*, 272 Fed. 821 (2d Cir. 1921). 28 U.S.C. § 1338(a) (1958) provides:

(a) The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent and copyright cases.

<sup>565</sup> See *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 126 N.E. 2d 283 (1955); *Jerry Vogel Music Co. v. Miller Music, Inc.*, 299 N.Y. 782, 87 N.E. 2d 681 (1949); *Tobani v. Carl Fischer, Inc.*, 263 App. Div. 503, 33 N.Y.S. 2d 294, *aff'd mem.*, 289 N.Y. 727, 46 N.E. 2d 347 (1942); *G. Schirmer, Inc. v. Robbins Music Corp.*, 170 Misc. 578, 28 N.Y.S. 2d 699 (Sup. Ct. 1941), *aff'd mem.*, 267 App. Div. 751, 45 N.Y.S. 2d 924 (1943). In *Danks v. Gordon*, 272 Fed. 821, 827 (2d Cir. 1921), the court said:

If the suit is one brought to enforce a right based upon a contract which relates to a copyrighted production, the suit is one which arises out of the contract and is not one arising under the copyright statute, and the federal courts are without jurisdiction.

<sup>566</sup> *Venus Music Corp. v. Mills Music, Inc.*, 156 F. Supp. 753 (S.D.N.Y. 1957), *aff'd on other grounds*, 261 F. 2d 577 (2d Cir. 1958). Judge Murphy in the district court expressed some doubt as to his jurisdiction but assumed, on the basis of Second Circuit authority, that "the characterization of the cause of action is still the choice of the plaintiff, and that this court has jurisdiction." *Id.* at 753; *cf. Cohan v. Richmond*, 86 F. 2d 680 (2d Cir. 1936).

<sup>567</sup> See notes 324-25 *supra*, and text thereto.

<sup>568</sup> 351 U.S. 570, 580-81 (1956).

<sup>569</sup> *Id.* at 581.

<sup>570</sup> See notes 324-29, 388-89 *supra*, and text thereto.

<sup>571</sup> See notes 499-504 *supra*, and text thereto.

<sup>572</sup> See Note, 30 CO. CAL. L. REV. 532-33 (1957); Miller, in *op. cit. supra* note 561, at 148-51.



*c. Extent of rights in subsisting copyrights renewed under new law*

The procedure for renewal, and those entitled to claim, are governed exclusively by the law in effect when renewal is made.<sup>573</sup> At the same time, it is clear that validity of a renewal copyright depends upon the validity of copyright during the first term;<sup>574</sup> if copyright has been lost or has never been secured, no valid renewal can be obtained. Thus, the provisions of an earlier statute may frequently determine the effectiveness of a renewal registration.<sup>575</sup>

It is still unclear whether the substantive rights of a renewal owner are governed by the law in effect when copyright was first secured or that in effect when renewal was made. Can renewal enlarge or diminish the rights previously held by a copyright owner? In *Edward B. Marks Music Corp. v. Continental Record Co.*<sup>576</sup> the Second Circuit Court of Appeals held that the renewal of a musical work copyrighted before 1909 did not confer any rights against mechanical reproduction on the copyright owner; the holding was based on the wording of 17 U.S.C. § 1(e), but the court also relied on the renewal section, saying:

\* \* \* Section 24 does not state that a renewal operates as the grant of a new monopoly having a larger field than the original copyright. It states simply that "subsisting" copyrights may "be renewed and extended" and that in certain instances such renewal and extension may be had "for a further period such that the entire term shall be equal to that secured by this Act, including the renewal period." Section 24 requires that application for renewal or extension is to be made "one year prior to the expiration of the existing term." Such language militates against the interpretation of Section 1(e) for which the plaintiff contends.<sup>577</sup>

On the other hand, the 1944 decision in *Jerome v. Twentieth Century-Fox Film Corp.*<sup>578</sup> held that the 1909 Act governs the measure of damages for infringements occurring after its passage, and that "the 1909 Act also as plainly covers a 1943 infringement of a 1923 renewal copyright, especially since a renewal copyright is a new estate."<sup>579</sup> The 1946 decision in the same case<sup>580</sup> appeared to hold that a work copyrighted in 1896 was entitled to motion picture rights by virtue of its renewal in 1923. A recent case specifically left open the question of whether renewal of a work copyrighted before the Act of 1909 came into force carried with it broader rights than those available under the pre-existing law.<sup>581</sup>

<sup>573</sup> *Stephens v. Howells Sales Co.*, 16 F. 2d 805 (S.D.N.Y. 1926); *cf. Ewing v. Standard Oil Co.*, 42 App. D.C. 321 (1914); *Ex parte Avenarius Brothers*, 32 U.S.P.Q. 125 (1937); *Schwartz v. General Electric Co.*, 91 U.S.P.Q. 254 (1951).

<sup>574</sup> See *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834); *West Publishing Co. v. Edward Thompson Co.*, 176 Fed. 833 (2d Cir. 1910).

<sup>575</sup> For example, an English-language book first published abroad and registered for ad interim copyright, but never manufactured in the United States, would not be eligible for renewal registration, even though if published today it would be exempted from the ad interim and manufacturing requirements. 37 C.F.R. § 202.4(b)(3) (1980).

<sup>576</sup> 222 F. 2d 488 (2d Cir.), *cert. denied*, 350 U.S. 861 (1955).

<sup>577</sup> *Id.* at 491.

<sup>578</sup> 53 F. Supp. 13 (S.D.N.Y. 1944).

<sup>579</sup> *Id.* at 15.

<sup>580</sup> 67 F. Supp. 736 (S.D.N.Y. 1946), *aff'd per curiam*, 165 F. 2d 734 (2d Cir. 1948).

<sup>581</sup> *Beban v. Decca Records, Inc.*, 169 F. Supp. 829 (S.D. Cal. 1959).

## D. PROCEDURE AND CONSEQUENCES OF RENEWAL REGISTRATION

1. *Statutory provisions*

The renewal section begins with a statement of the duration of the first term of copyright:

The copyright secured by this title shall endure for twenty-eight years from the date of first publication, \* \* \*

After reciting those who may apply for renewal, both provisos of the renewal section state that the appropriate claimants:

\* \* \* shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered there-in within one year prior to the expiration of the original term of copyright:  
\* \* \*

The section then ends with a final proviso:

*Anr provided further*, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication.

2. *Time limits and procedure for renewal registration*

The Copyright Office regulations provide:

Claims to renewal copyright must be registered within the last (28th) year of the original copyright term. The original term for a published work is computed from the date of first publication; the term for a work originally registered in unpublished form is computed from the date of registration in the Copyright Office. Unless the required application and fee are received in the Copyright Office during the prescribed period before the first term of copyright expires, copyright protection is lost permanently and the work enters the public domain. The Copyright Office has no discretion to extend the renewal time limits.<sup>582</sup>

Through an oversight the statute failed to state the duration of copyrights secured by registration in unpublished form, but it is now well-established that copyright in such works dates from registration in the Copyright Office.<sup>583</sup> The decisions also indicate that, when the copyright notice on a published work contains a date earlier than the year when copyright was actually secured, the first term, and hence the renewal time limits, are computed from the last day of the year in the notice.<sup>584</sup> The original and renewal terms are necessarily continuous; the renewal begins at the end of the first term,<sup>585</sup> but if a valid renewal application has not been made at that time, the work enters the public domain.<sup>586</sup>

<sup>582</sup> 37 C.F.R. § 202.17(a) (1960).

<sup>583</sup> *Shilkret v. Muslcraft Records, Inc.*, 131 F. 2d 929 (2d Cir. 1942), *cert. denied*, 319 U.S. 742 (1943); *Marx v. United States*, 96 F. 2d 204 (9th Cir. 1938); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960); *Loew's, Inc. v. Superior Court of Los Angeles County*, 18 Cal. 2d 419, 115 P. 2d 983 (1941); *Gorham, Deposit as Publication Under Section 12 of the Copyright Code*, 8 N.Y.U. INTRA L. REV. 202 (1953).

<sup>584</sup> *Callaghan v. Myers*, 128 U.S. 617, 657 (1888); *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922); *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949); *Southern Music Pub. Co. v. Biibo-Lang, Inc.*, 10 F. Supp. 972 (S.D.N.Y. 1935); *Henn, "Magazine Rights"—A Division of Indivisible Copyright*, 40 CORNELL L.Q. 411, 450 n.154 (1955).

<sup>585</sup> *G. Schirmer, Inc. v. Robbins Music Corp.*, 176 Misc. 578, 28 N.Y.S. 2d 699 (Sup. Ct. 1941), *aff'd mem.*, 267 App. Div. 751, 45 N.Y.S. 2d 924 (1943).

<sup>586</sup> *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921). Under 17 U.S.C. § 9(b) (1958), the President is empowered to issue proclamations extending the time limits for foreign works which became eligible for renewal at times when communications were disrupted. Under 17 U.S.C. § 216 (1958), when the last day of the renewal year falls on Saturday, Sunday, or a holiday, an application received on the next business day is acceptable.

The language of the statute appears to require not only that the application be made to the Copyright Office, but also that the application be "duly registered therein," within the specified time limits. However, the Copyright Office has regarded the phrase "duly registered" as "synonymous with the filing by the applicant of his application for renewal within the renewal period."<sup>587</sup> Deposit in the mail is not sufficient,<sup>588</sup> but once the applicant has gotten a fee and facts sufficient to constitute a valid claim to the Copyright Office before the deadline,<sup>589</sup> "he has done all that can be required of him to secure registration of his claim, and \* \* \* 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."<sup>590</sup> One early decision also indicated that, where a formally correct renewal application had been submitted within the time limits, refusal of registration by the Copyright Office would not prevent the claimant from bringing suit without a certificate,<sup>591</sup> but a recent case involving original rather than renewal registration appears to contradict this doctrine.<sup>592</sup>

Shortly after the 1909 Act came into force the Register of Copyrights asked the Attorney General for an opinion as to his authority to refuse renewal registration in the names of assignees and others not specifically listed as beneficiaries in the statute. The Attorney General held that the Register "should be governed by the language of the statute and grant a renewal to no one other than the person or persons mentioned therein";<sup>593</sup> since assignees were not mentioned, their applications should be disallowed. The Copyright Office reaffirmed this position after the *Witmark* decision,<sup>594</sup> and it has been generally accepted by the courts<sup>595</sup> and the commentators.<sup>596</sup>

In the process of registering a renewal claim the Copyright Office does not re-examine the validity of the original claim, nor does it attempt to decide questions of fact or law concerning authorship or ownership.<sup>597</sup> As long as original registration for a work has been made, the Copyright Office accepts it at face value.<sup>598</sup> Examination of a renewal application involves whether the claim has been filed

<sup>587</sup> BOUVÉ, LETTER TO THE LIBRARIAN OF CONGRESS CONCERNING CERTAIN ASPECTS OF THE COPYRIGHT ACT OF MARCH 4, 1909, at 41 (1938).

<sup>588</sup> 2 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 773 (1938); Kupferman, *Renewal of Copyright—Section 23 of the Copyright Act of 1909*, 44 COLUM. L. REV. 712, 733 (1944).

<sup>589</sup> See DE WOLF, AN OUTLINE OF COPYRIGHT LAW 67 (1925); HOWELL, THE COPYRIGHT LAW 111 (3d ed. 1952).

<sup>590</sup> BOUVÉ, *op. cit. supra* note 587, at 40.

<sup>591</sup> *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); HOWELL, *op. cit. supra* note 589, at 113; Bricker, *Renewal and Extension of Copyright*, 29 SO. CAL. L. REV. 23, 26 (1955); Henn, *supra* note 584, at 465 n. 228 (1955).

<sup>592</sup> *Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Co.*, 260 F. 2d 637 (2d Cir. 1958).

<sup>593</sup> 28 OPS. ATTY GEN. 162 (1910).

<sup>594</sup> De Wolf, *The Witmark Copyright Case*, 143 PUBLISHERS' WEEKLY 1955 (1943).  
<sup>595</sup> See, e.g., *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960). *But see* *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247, 249 (1st Cir. 1911) (dictum).

<sup>596</sup> HOWELL, *op. cit. supra* note 589, at 116; Bricker, *supra* note 591, at 33-34; Fleisher & Cohen, *Validity of Assignment of the Copyright Renewal Term*, 1 AUTHORS' LEAGUE BULL. 15 (1943).

<sup>597</sup> BOUVÉ, *op. cit. supra* note 587, at 40-41; 2 LADAS, *op. cit. supra* note 588, at 773; Henn, *supra* note 584, at 465 n. 228.

<sup>598</sup> Under ordinary circumstances an original registration is essential to form the basis of a renewal registration. Henn, *op. cit. supra* note 584, at 458, although it may be made as late as the last year of the first term. *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); *cf. Washingtonian Pub. Co. v. Pearson*, 306 U.S. 30 (1939). For a discussion of the future renewal problems which will be presented by U.C.C. works for which no original registration can be required, see Appendix B, notes B7, B8, and text thereto.

within the statutory time limits, whether it is consistent with the facts shown in the records of original registration, and whether it falls within one of the statutory classes of beneficiaries.

It is inevitable that, in a substantial number of cases, two or more renewal applications covering the same original registration will be submitted during the renewal year. The Copyright Office tries to avoid making a registration that merely duplicates an earlier one, but where the claims are asserted in different names and are consistent with each other, separate registrations are made without question. Even where the claims are in obvious conflict the Copyright Office will register separate claims,<sup>599</sup> although its practice here is to point out the conflict to the later applicant and request confirmation of his claim, before proceeding with registration.

The administrative practice of registering more than one renewal claim for a single work has been the object of a good deal of criticism,<sup>600</sup> and it is true that it results in some confusion and uncertainty. Perhaps it might be possible to work out a better solution to the problem than that of issuing separate and apparently unrelated certificates to the various claimants. Nevertheless, it would seem highly undesirable to require the Copyright Office to make judicial determinations of substantive renewal rights, and short of this the registration of cumulative and conflicting claims appears inescapable.<sup>601</sup>

The cases have established that an effective assignment of the renewal carries with it an implied power of attorney to apply for the renewal in the author's name,<sup>602</sup> and the same might conceivably be said for a licensee or someone else with a valid equitable interest in the renewal. However, suppose someone with no legal or equitable rights under the renewal submits an application in the correct claimant's name, but without first obtaining his permission; will this be a valid renewal if the claimant later ratifies his self-appointed agent's action? There is a difference of opinion on this question,<sup>603</sup> but at best the practice—which is apparently not uncommon—seems risky. Certainly whenever possible an explicit power of attorney should be obtained before a renewal application is submitted.

### 3. Consequences of failure to make a valid renewal

It appears to be settled law that renewal registration in the name of someone not entitled to claim under the statute is void, and that failure of the correct claimant to register within the renewal year puts the work in the public domain.<sup>604</sup> Although the possibility of a trust *ex malificio* in this situation has been suggested,<sup>605</sup> the cases are all the other way. Accurate identification of the correct statutory beneficiary on the renewal application is therefore essential, and in cases

<sup>599</sup> BOUVÉ, *op. cit. supra* note 587, at 38-40.

<sup>600</sup> See, e.g., BOUVÉ, *op. cit. supra* note 587, at 39-40; 2 SOLOW, *op. cit. supra* note 561, § 679, at 1207-09; Redleaf, *Co-ownership of Copyright*, 119 N.Y.L.J. 760 (1948).

<sup>601</sup> See BOUVÉ, *op. cit. supra* note 587, at 40; Note, 10 AIR L. REV. 198, 205 (1939).

<sup>602</sup> See notes 464-65 *supra*, and text thereto.

<sup>603</sup> Compare 2 SOLOW, *op. cit. supra* note 561, § 679, at 1207 and Kupferman, *supra* note 588, at 714 with DE WOLF, *op. cit. supra* note 589, at 67; Bricker, *supra* note 591, at 30 and Henn, *supra* note 584, at 465 n. 228.

<sup>604</sup> *Tohani v. Carl Fischer, Inc.*, 98 F. 2d 57 (2d Cir.), *cert. denied*, 305 U.S. 650 (1933); *Forster Music Publishers, Inc. v. Jerry Vogel Music Co.*, 147 F. 2d 614 (2d Cir.), *cert. denied*, 325 U.S. 880 (1945); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Yardley v. Houghton Mifflin Co.*, 25 F. Supp. 361 (S.D.N.Y. 1938); *April Productions, Inc. v. G. Schirmer, Inc.*, 308 N.Y. 366, 377, 126 N.E. 2d 283, 290 (1955) (dictum).

<sup>605</sup> WARNER, RADIO AND TELEVISION RIGHTS § 82, at 254 (1953).

of doubt it is necessary to file separate claims in order to cover the possibilities.

Suppose a valid renewal is secured for a work, but no one bothers to renew a later "new version" in which a substantial part of the work had been published; what goes into the public domain when the first term of copyright in the "new version" expires? The court in the *Ricordi*<sup>606</sup> case considered this important question and came up with a logical answer:

(1) When copyright in a new version expires, all that goes into the public domain is the new matter. If renewal has been made for the original work on which the new version was based, it is still fully protected. A license from the owner of copyright in the original version is necessary to use the new version as a whole, but if the new matter can be separated it can be used without permission.

(2) Conversely, if copyright in the original work has expired but renewal is secured for the new version, anyone may use the original work without permission, but use of any new matter in the new version would be infringement unless consent of the renewal owner had been secured.

Although the *Ricordi* case probably still represents the law on the point, the decisions in the *Melancholy Baby* and *Twelfth Street Rag* cases have thrown a certain amount of doubt and confusion into this area.<sup>607</sup>

#### 4. Problems of vesting

It is clear that a renewal cannot vest<sup>608</sup> until after the twenty-seventh year of the first term, but at what point does vesting actually take place—on the first day of the twenty-eighth year, when renewal registration could be made by someone?<sup>609</sup> on the day a valid renewal application is actually filed?<sup>610</sup> or on the first day of the twenty-ninth year, when the renewal term begins?<sup>611</sup> Since any number of changes—deaths, births, marriages, divorces, assignments, etc.—can take place in a one year period, the time of vesting can assume great importance in particular cases.

The present statute is silent as to vesting, and the question has never been directly presented to the courts. While the matter is not completely free from doubt, the following conclusions appear to be in line with recent expressions of opinion on the subject:

(1) Before the twenty-eighth year, any person's interest in a renewal is wholly contingent and incapable of being presently vested.<sup>612</sup>

<sup>606</sup> *G. Ricordi & Co. v. Paramount Pictures, Inc.*, 189 F. 2d 469 (2d Cir.), *cert. denied*, 342 U.S. 849 (1951).

<sup>607</sup> See notes 486-80, 520-39 *supra*, and text thereto.

<sup>608</sup> "Vest. To accrue to; to be fixed; to take effect; to give a fixed and indefeasible right." BLACK, LAW DICTIONARY 1811 (3d ed. 1933).

<sup>609</sup> See *Miller Music Corp. v. Charles N. Daniels, Inc.*, 362 U.S. 373 (1960); *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946); *Henn*, *supra* note 584, at 467.

<sup>610</sup> See *Rositer v. Vogel*, 134 F. 2d 908 (2d Cir. 1943); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.) *cert. den.*, 364 U.S. 880 (1960); *Tobani v. Carl Fischer, Inc.*, 263 App. Div. 503, 504, 33 N.Y.S. 2d 294, 296 (dictum), *aff'd on other grounds*, 289 N.Y. 727, 46 N.E. 2d 347 (1942); 2 LADAS, *op. cit. supra* note 588, at 773-74; *Brown, Renewal Rights in Copyright*, 28 CORNELL L. Q. 460, 473, 481 (1943); *Kupferman*, *supra* note 588, at 733-34.

<sup>611</sup> See DE WOLF, *op. cit. supra* note 589, at 67-68; WARNER, *op. cit. supra* note 605, § 64, at 263.

<sup>612</sup> *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd*, 279 F. 2d 79 (2d Cir.), *cert. den.*, 364 U.S. 880 (1960).

(2) During the twenty-eighth year, before a claim has been registered, the interest of the persons entitled to claim (or of their assignees) is still contingent or inchoate, but is now capable of being presently vested.<sup>613</sup> However, should the person entitled to claim die before his application is submitted, the rights of his heirs, legatees, or assignees are cut off, and the members of the next statutory class become entitled to claim.<sup>614</sup>

(3) As soon as a valid renewal claim is registered, the renewal is "vested in interest"—that is, there is a "present fixed right of future enjoyment."<sup>615</sup>

(a) At this point the rights of the group entitled to claim are determined and indefeasible, and the contingent rights of the other statutory classes are cut off and destroyed.<sup>616</sup> The death, during the renewal year, of the registered claimant or of any other entitled to claim, will not affect the validity of the renewal, the rights of the other members of the class, the rights of assignees, or the rights of his own heirs or legatees.<sup>617</sup>

(b) Renewal by one of a group entitled to claim probably vests legal title in the registered claimant and equitable title in the other possible claimants.<sup>618</sup> Later renewal registrations in the names of the other claimants may convert their equitable rights into legal title, but it cannot change the persons entitled to ownership, since these were fixed when the first claim was registered.<sup>619</sup>

(4) At the beginning of the renewal term itself, the renewal copyright becomes "vested in possession"—that is, a right of present enjoyment comes into existence.<sup>620</sup>

##### 5. Notice of renewal copyright

A question of considerable practical importance, on which the statute is completely silent and the authorities provide no definite answer, is the form of notice required for copies published after the renewal term begins. Does the notice on copies already printed have to be changed? On new copies, will the old notice be sufficient? Will a new notice, giving only the date of renewal and the name of the renewal owner, be sufficient alone? What is the date of renewal—the date of registration or the date the renewal term begins? Who is the renewal owner—the registered claimant or his assignee?<sup>621</sup>

<sup>613</sup> See *Silverman v. Sunrise Pictures Corp.*, 273 Fed. 909 (2d Cir. 1921); *White-Smith Music Pub. Co. v. Goff*, 187 Fed. 247 (1st Cir. 1911); *Von Tilzer v. Jerry Vogel Music Co.*, 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom. Gumm v. Jerry Vogel Music Co.*, 158 F. 2d 516 (2d Cir. 1946).

<sup>614</sup> 2 LADAS, *op. cit. supra* note 588, at 773-74; 2 SOCOLOW, *THE LAW OF RADIO BROADCASTING* § 686, at 1218; Brown, *supra* note 610, at 473, 481; Note, 10 AIR L. REV. 198, 204 (1939).

<sup>615</sup> BLACK, *op. cit. supra* note 608, at 1811.

<sup>616</sup> See *Rossiter v. Vogel*, 134 F. 2d 908 (2d Cir. 1943); *Rose v. Bourne, Inc.*, 176 F. Supp. 605 (S.D.N.Y. 1959), *aff'd on other grounds*, 279 F. 2d 79 (2d Cir.) *cert. den.*, 364 U.S. 880 (1960); HOWELL, *op. cit. supra* note 589, at 116; Bricker, *supra* note 591, at 26; Comment, 36 U. DET. L.J. 66, at 68 n. 15 (1958).

<sup>617</sup> Bricker, *supra* note 591, at 26; Zissu, *Works-Subject of Copyright-Rights in Statutory Copyrights* 5 (Practising Law Institute, mimeo outline, 1949); Comment, *supra* note 616, at 68 n. 15.

<sup>618</sup> See notes 540-46 *supra*, and text thereto.

<sup>619</sup> See 2 SOCOLOW, *op. cit. supra* note 614, § 679, at 1207-09.

<sup>620</sup> BLACK, *op. cit. supra* note 608, at 1811.

<sup>621</sup> The statute, 17 U.S.C. § 32 (1958), permits substitution of an assignee's name in the notice only after the assignment has been recorded. See NICHOLSON, *A MANUAL OF COPYRIGHT PRACTICE* 162 (2d ed. 1956).

It has been suggested that, although probably sufficient,<sup>622</sup> retention of the original notice might be misleading to the public.<sup>623</sup> On the other hand, though at least one court has upheld a notice limited to the facts of renewal,<sup>624</sup> there is little justification in the statute for such a result.<sup>625</sup> Because of this uncertainty the commentators have almost all recommended use of two notices or a combined notice setting forth both the facts of original publication and renewal.<sup>626</sup>

#### IV. REVIEW OF BASIC PROBLEMS

##### A. IN GENERAL

Renewals have become so complicated and controversial that it is hard to take a fresh look at the problem.<sup>627</sup> Nevertheless, it appears that this is what those responsible for the forthcoming general copyright law revision will have to do, if they are to avoid the outcome of previous revision efforts. They should try to see through the complexity of the present provision, to put aside their own preconceptions, and to determine objectively whether renewals have any features worth saving. In doing this, they should recognize that the main aspects of the renewal device—division of copyright duration into two terms, and reversion of ownership—are two different things that should be considered separately.

##### B. RENEWALS AS AN ASPECT OF DURATION

At present about 15% of subsisting copyrights are being renewed; in fiscal 1959, for example, roughly 21,500 copyrights were renewed, as against 124,500 that went into the public domain at the end of their first 28-year term.

Inevitably, a person's reactions to these figures will be colored by his own philosophy of copyright. There are many who believe that the longer a copyright lasts the better; and that it does no harm if the bulk of copyrighted works are protected longer than necessary, provided those works with continuing commercial value are given adequate protection. Others argue that a work can continue to have scholarly, historical, or other value after its commercial value is gone;

<sup>622</sup> See 2 LADAS, *op. cit. supra* note 588, at 774; Henn, *supra* note 584, at 459.

<sup>623</sup> BOUVÉ, *op. cit. supra* note 587, at 41-42; WEIL, *AMERICAN COPYRIGHT LAW* § 957, at 368-69 (1917); Bricker, *supra* note 591, at 26-27; Kupferman, *supra* note 588, at 734.

<sup>624</sup> Fox Film Corp. v. Knowles, 274 Fed. 731 (E.D.N.Y. 1921), *aff'd mem.*, 279 Fed. 1018 (2d Cir. 1922), *rev'd on other grounds*, 261 U.S. 326 (1923); see Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 42 F. Supp. 859 (S.D.N.Y. 1942). *But see* Von Tilzer v. Jerry Vogel Music Co., 53 F. Supp. 191 (S.D.N.Y. 1943), *aff'd sub nom.* Gumm v. Jerry Vogel Music Co., 158 F. 2d 516 (2d Cir. 1946).

<sup>625</sup> See BOWKER, *COPYRIGHT ITS HISTORY AND ITS LAW* 118 (1912); Bricker, *supra* note 591, at 26-27; Kupferman, *supra* note 588, at 734.

<sup>626</sup> BOUVÉ, *op. cit. supra* note 587, at 42; BOWKER, *op. cit. supra* note 625, at 118; HOWELL, *op. cit. supra* note 589, at 119; 2 LADAS, *op. cit. supra* note 588, at 774; NICHOLSON, *op. cit. supra* note 621, at 162; SHAFER, *MUSICAL COPYRIGHT* 171 (2d ed. 1939); WARNER, *op. cit. supra* note 605, § 83, at 261; WEIL, *op. cit. supra* note 623, § 957, at 369; Bricker, *supra* note 591, at 27; Henn, *supra* note 584, at 459; Kupferman, *supra* note 588, at 734.

<sup>627</sup> For discussions of some of the philosophical bases of and arguments for and against renewal of copyright, see EVANS, *COPYRIGHT AND THE PUBLIC INTEREST* 16-20 (1949); Bricker, *supra* note 591, at 45-46; Chafee, *Reflections on the Law of Copyright: [Pt.] II*, 45 *COLUM. L. REV.* 719, 721-25, 732-33 (1945); Finkelstein, *The Copyright Law—A Reappraisal*, 104 *U. PA. L. REV.* 1025, 1042-54 (1956); Hollander & Diamond, *The Right of Renewal—Confusion's Masterpiece*, 64 *COM. L.J.* 96, 98 (1959); Kupferman, *supra* note 588, at 735; Young, *The Copyright Term*, 7 *COPYRIGHT LAW SYMPOSIUM* (ASCAP) 139, 153-54, 162, 168-71 (1956); Comment, 36 *U. DET. L.J.* 66, 74-77 (1958).

they assert that it hampers free cultural and intellectual interchange to have great numbers of ephemeral and non-commercial works tied up for long periods of time, when no one is interested in asserting rights in them.

It is worth noting that a number of foreign copyright laws have provisions limiting the duration of copyright or of certain rights, unless the work continues to be used or made available to the public. Most patent and trademark laws have renewal provisions aimed at the same objective. The American renewal system also accomplishes this result, and avoids the need for providing special terms for particular types of works (photographs, motion pictures, etc.).

Renewal registration can be a burden, and failure to observe the time limits can have drastic and unfortunate results. However, most of the troublesome problems connected with renewal registration arise from uncertainty as to the right to claim and own a renewal copyright, and renewal could become a routine formality if the reversion were removed. Even the problems of failure to meet the time limits might be ameliorated by provisions for a longer period, or for grace periods and reinstatement as in foreign patent and trademark laws.

As a registration formality, the usefulness of renewal in leading to the true owner of the second term is sharply limited by two possibilities: that the renewal term may have been assigned, or that there may be others in the same class of renewal claimants. On the other hand, there are cases in which renewal registration offers a helpful starting point in searching copyright title, and improvements in the whole scheme of registration and recordation might increase the number of these cases.

#### C. RENEWAL AS A REVERSION OR RESERVATION OF AUTHOR'S RIGHTS

Probably the main purpose of the present renewal provision was to protect the author against disadvantageous bargains—to give him a second chance to realize financial benefits from his creation. This underlying purpose has been called paternalistic and in conflict with principles of freedom of contract. On the other hand, an analysis of the copyright laws of the world reveals a tendency to treat copyright as something different from ordinary goods and chattels, and to establish restrictions on alienability and control over contract relations for the benefit of the author and his family. There is an apparent conviction that copyright involves an element of personal creativity entitling an author to special consideration in his contractual dealings, together with a recognition that when most copyright bargains are made there is no way to judge the ultimate value or life of the work.

If one assumes that there is merit in the idea of legal provisions preserving some continuing interest in the author, it is still necessary to ask whether the American renewal system is successful in accomplishing this result. On balance, it seems that the probable answer to this question would be a qualified "no."

(1) The all-or-nothing approach of the reversion can sometimes have drastic effects upon the interests of publishers and other users. This danger, coupled with uncertainty as to ownership of the renewal and inability to insure exclusivity, may reduce the value of a renewal or actually prevent the use of a work.



(2) "Split renewals," in which co-owners of a renewal assign their rights to different users, create accounting problems and may dissipate the value of a copyright.

(3) The complexity and uncertainty of the present law, deriving partly from the nature of the reversion and partly from poor legislative drafting, stands in the way of its successful operation. The task of revising the present provision to make it clear and consistent would be enormously difficult, and the prospect of simply repealing the reversionary renewal is a tempting one.

Notwithstanding these serious detriments, some individual authors and their families appear to have benefitted directly from the renewal provisions. Moreover, although there are various reasons why authors are in a better general bargaining position today than they were fifty years ago, renewals have apparently played a part in this change. In at least one case, the renewal provision was a pivotal factor in the formation and development of a major authors' protective society and its uniform contract.<sup>628</sup>

All things considered, it appears that although the American renewal system conveys some benefits to authors and their families, it has been a remarkably inefficient and burdensome method of accomplishing this result. At the same time, it is important to realize that the reversionary renewal is the only provision in the U.S. copyright law that attempts to preserve the author's interests or to give him an advantage in his contract relations. If the renewal provision were repealed and nothing were substituted in its place, the United States would be moving in a direction opposite to that of most other countries.

There are many alternatives to a reversionary renewal system, and at least one of them has been seriously considered in past revision efforts. For example, the "Shotwell Committee" bill incorporated a 25-year limit on the duration of assignments and licenses, with a reversion to the author or certain of his heirs, but with a right to continue publishing under a royalty agreement. When seen in perspective this device appears closely similar to the existing renewal system, and would share many of the same advantages and disadvantages. Other provisions found in foreign laws and intended to give the author a continuing interest in his work include:

(1) Requirement that a contract specify the exact nature of each right transferred, with special requirements concerning transfers of an entire copyright;

(2) Prohibition against assignments and exclusive licenses for a lump sum, except under specified conditions;

(3) Requirement that contract must specify certain things (*e.g.*, duration of each right transferred, period within which work must be exploited, remuneration, etc.), with presumptions to control in case certain provisions are omitted;

(4) Reversion to the author if the transferee fails to exploit or continue exploitation within a reasonable time;

(5) Establishment of conditions limiting right of transferee to retransfer copyright or rights under the copyright without the author's permission;

<sup>628</sup> See Klein, *Protective Societies for Authors and Creators*, in 1953 COPYRIGHT PROBLEMS ANALYZED 13, 32-41 (1953).

(6) Establishment of controls over distribution of royalties collected by performing rights societies and other authors' protective associations.

#### D. CONCLUSION

The present problems of renewal revolve around the reversion to the author and his family. There is no reason why renewals could not be kept as a device for adjusting the term, while dropping the reversion altogether. For example, the copyright could still be divided into terms, with provision for extension by anyone with a legal or equitable interest in a copyright; the action of one person should be sufficient to extend the term for the benefit of everyone who has any interest in the copyright, without any change in (or loss of) ownership. At the same time, this system would still permit the large majority of works to enter the public domain twice as soon as they would under a straight term. Some features of the reversion could, if desired, be preserved by separate provisions dealing with assignments and contract relations.

As shown in the history of past revision efforts, the question of what to do with subsisting copyrights is an important and difficult problem that should not be dismissed lightly. With respect to copyrights in their first term, there are strong policy arguments against cutting off the future interests of prospective renewal claimants and their assignees. And, should the duration of copyright be extended beyond 56 years, preponderant sentiment in the past has favored having the extension revert to the author or his family; but in this situation the rights of transferees has always been a question. These problems promise to be among the most troublesome the legislative drafter's will have to face.

#### V. SUMMARY OF ISSUES

(1) Should all of the essential elements of copyright renewal (division of duration into terms, registration as a requirement of the longer term, and reversion of ownership) be retained?

(2) If so, what major improvements or changes should be made in the present renewal provisions:

(a) With respect to the time limits and formalities of renewal registration?

(b) With respect to those entitled to claim renewal?

(c) With respect to other problems (assignability, rights of co-owners, time of vesting, etc.) not now specified in the statute?

(3) If the present reversionary renewal system is not retained, should there be any provisions permitting works without continuing commercial value to enter the public domain sooner than other works:

(a) By means of a non-reversionary renewal system?

(b) By other means?

(4) If the present reversionary renewal system is not retained, should there be any provisions for a reversion or reservation of authors' rights:

(a) By means of limitations on assignments?

(b) By other means?

(5) What provision should be made for subsisting copyrights:

(a) If in their first term?

(b) If the duration of copyright is extended beyond 56 years?

# APPENDIXES

## APPENDIX A

### LEGISLATIVE PROPOSALS SINCE 1909 AFFECTING RENEWALS

#### A. DEVELOPMENTS, 1909-1923

In the 1912 hearings<sup>41</sup> on bills to bring motion pictures under the copyright law<sup>42</sup> the Register of Copyrights, Mr. Solberg, noted that the 1909 Act had failed to specify the duration of copyright in unpublished works.<sup>43</sup> He urged the committee to correct this omission, but without extending the term of works registered between 1909 and 1912. The following comment on this point by Representative Currier, former chairman of the House Committee responsible for the Act of 1909, casts light upon the Congressional attitude toward renewals at the time:

"Mr. CURRIER. I got a good deal of insight into this question. I had a three years' fight with the publishers, who tried to get everything in sight; and they had not the slightest regard for the 90,000,000 of people. They had not any conception that they had any interest in a copyright, and they wanted a term of copyright for 50 years in a single term. They did not want this renewal term in the law at all, and they ought not to have their original term extended one minute."<sup>44</sup>

Before 1924 the only other development worth noting was a series of bills, introduced in 1922 and 1923, aimed at permitting U.S. adherence to the Berne Copyright Union.<sup>45</sup> While not altogether clear, these bills would apparently have retained the renewal requirements for both U.S. and foreign works.

#### B. THE DALLINGER BILL, 1924

The first post-1909 general revision bill, which was also aimed at Berne adherence, was the Dallinger bill introduced on March 24, 1924<sup>46</sup> and again, with revisions, on May 9, 1924.<sup>47</sup> Basically, the bill provided for a straight life-plus term, but with a reversion to the author's family:

*Basic term:* life-plus-fifty.

*Special terms:* 50 years from "production" where author was a corporation or partnership.

*Reversion:* for all but "collective" works, no assignment, license, or other grant would be valid after 25 years from the author's death;<sup>48</sup> at that point the copyright would revert to the author's widow or widower, if surviving, or if not, to his heirs at law.

<sup>41</sup> *Hearings on Townsend Copyright Amendment Before the House Committee on Patents*, 62d Cong., 2d Sess. 112-115 (1912).

<sup>42</sup> H.R. 15263, 62d Cong., 2d Sess. (1911); H.R. 20596, 62d Cong., 2d Sess. (1912).

<sup>43</sup> Mr. Solberg felt that this "was simply an inadvertence," but feared that "a defendant may plead that under this provision he should have an undetermined term of copyright." Representative Currier, who had been chiefly responsible for the Act of 1909, agreed that "we certainly intended to make every copyright term 28 years." *Hearings*, *supra* note A1, at 112-13.

<sup>44</sup> *Id.* at 115.

<sup>45</sup> H.R. 11476, 67th Cong., 2d Sess. (1922); S. 4101, 67th Cong., 4th Sess. (1922); H.R. 13676, H.R. 14035, 67th Cong., 4th Sess. (1923); S. 74, H.R. 573, H.R. 2663, H.R. 8177, 68th Cong., 1st Sess. (1923). Similar bills were introduced in later Congresses: H.R. 9586, 70th Cong., 1st Sess. (1928); H.R. 15086, 70th Cong., 2d Sess. (1928); H.R. 6988, 71st Cong., 2d Sess. (1929); H.R. 5853, S. 1928, 73d Cong., 1st Sess. (1933).

<sup>46</sup> H.R. 8177, 68th Cong., 1st Sess. (1924).

<sup>47</sup> H.R. 9137, 68th Cong., 1st Sess. (1924).

<sup>48</sup> The first Dallinger bill contained a clause permitting the assignee or grantee to dispose of copies still on hand after the reversion, but this clause was omitted from the revised bill.

*Subsisting copyrights:* would be extended to the full term without any renewal formality, but the extended term would vest exclusively in the author's widow, widower, or heirs at law; assignees or licensees would have no rights in the extension.

During the brief hearings on the Dallinger bill there was only passing reference to the duration provisions,<sup>A9</sup> but a mimeographed statement prepared by those interests responsible for the bill<sup>A10</sup> indicated that one purpose was to retain the reversion as "a heritage of [the author's] family" but to do away with the renewal formality which "has been a source of difficulty and injustice."<sup>A11</sup>

#### C. THE PERKINS BILL, 1925

The next general revision bill<sup>A12</sup> dropped the reversionary feature of the Dallinger bill:

*Basic term:* life-plus-fifty.

*Special terms:* 50 years from publication for a variety of works.<sup>A13</sup>

*Reversion:* none (except that, in the absence of a specific agreement to the contrary, the copyright in a contribution to a periodical would automatically revert to the author after publication).

*Subsisting copyrights:* would be extended to the full term without any renewal formality, but the extended term would revert to roughly the same beneficiaries as those provided in the present renewal section.<sup>A14</sup>

There was little meaningful discussion of duration or renewals at the 1925 hearings on the Perkins bill.<sup>A15</sup> However, the representative of the Victor Talking Machine Company expressed opposition to the bill on the ground that, by abolishing renewals, the author and his family would be unjustly deprived of a second chance to benefit from a work.<sup>A16</sup> It was suggested that making copyrights divisible would not solve this problem, since authors frequently sold their entire copyright outright.<sup>A17</sup>

#### D. THE VESTAL BILLS, 1926-1931

In 1926 the general revision movement entered one of its most active phases with the introduction of H.R. 10434, Representative Vestal's first revision bill:<sup>A18</sup>

*Basic term:* life-plus-fifty.

*Special terms:* 50 years from "completion of creation of the work" where the author was not an individual.

*Reversion:* none.

*Subsisting copyrights:* would be extended to the full term without any renewal formality, but the extended term would revert to roughly the same beneficiaries as those provided in the present renewal section.<sup>A19</sup>

<sup>A9</sup> *Hearings on H.R. 6250 and H.R. 9137 Before the House Committee on Patents*, 68th Cong., 1st Sess. 329 (1924).

<sup>A10</sup> Principal sponsorship for the Dallinger bill apparently came from motion picture, printing, and periodical publishing interests. See *Hearings*, *supra* note A9, at 298-301. The mimeographed statement, entitled "Brief Review of the Proposed Changes in the Copyright Law Contained in the Dallinger Bill," was evidently sent to the House Committee by the chairman of a joint committee representing these interests, and is in the Copyright Office Library.

<sup>A11</sup> The discussion of duration appears on page 20 of the statement.

<sup>A12</sup> H.R. 11258, S. 4355, 68th Cong., 2d Sess. (1925); H.R. 5841, 69th Cong., 1st Sess. (1925).

<sup>A13</sup> Posthumous works, works made for hire, composite or cyclopaedic works, compilations, abridgments, adaptations, arrangements, motion pictures, sound recordings, and periodicals.

<sup>A14</sup> If the author left a will and there were no surviving widow, widower, or children, the extension was given either to the author's executors or to "a duly appointed administrator with the will annexed." In cases where the proprietor could claim renewal under the present law (posthumous works, composite works, etc.) the subsisting copyright was merely continued until fifty years from first publication.

<sup>A15</sup> *Hearings on H.R. 11258 Before the House Committee on Patents*, 68th Cong., 2d Sess. 105-07, 110-11, 318-23, 390, 424-25, 434-35, 442-43, 482-83 (1925).

<sup>A16</sup> *Id.* at 318-23.

<sup>A17</sup> *Id.* at 320-23.

<sup>A18</sup> H.R. 10434, 69th Cong., 1st Sess. (1926).

<sup>A19</sup> If the author left a will and there were no surviving widow, widower, or children, the extension was to vest "in the author's executors or testamentary trustees \* \* \* or in a duly appointed administrator with the will annexed if there be no such executors or trustees, and in the absence of a will, in his administrator: \* \* \*." In cases where the proprietor could claim renewal under the present law (posthumous works, composite works, etc.), the subsisting copyright was merely continued until fifty-six years from first publication.

However, this long and involved section also contained two provisos similar to the old "Monroe Smith Amendment."<sup>420</sup> If the author had parted with any of his rights under a royalty agreement, the agreement would continue in force during the extended term; but, if he had made an outright assignment for a lump sum, apparently the author and the copyright proprietor were to renegotiate and divide the extension between them.<sup>421</sup>

At the April, 1926, hearings on H.R. 10434, the representatives of the authors and publishers favored a single long term based on the life of the author.<sup>422</sup> Renewals were criticized as depriving the publisher of a legitimate investment,<sup>423</sup> and as making it difficult for the author to sell his contingent interest.<sup>424</sup> On the other hand, there was some sentiment expressed in favor of the reversionary aspect of renewals,<sup>425</sup> and in favor of a definite term rather than one based on the life of the author.<sup>426</sup> There was also considerable discussion, pro and con, of the provision allowing the author and publisher to share the extension of subsisting copyrights.<sup>427</sup>

The Vestal bill was reintroduced in the 70th<sup>428</sup> and 71st<sup>429</sup> Congresses, and further hearings were held in April and May, 1930.<sup>430</sup> There was little discussion of duration,<sup>430a</sup> though at one point the renewal device was criticized as troublesome and unfair to publishers.<sup>431</sup> The main topic of interest at these hearings was divisibility of copyright, which at its heart was directly linked with the reversionary aspect of renewals; there was apparently a widespread belief that, if the author retained any rights he did not specifically sell, there would be no need for a reversion to give him and his family a continuing benefit.<sup>432</sup>

Theatrical producers, in particular, objected to the divisibility section of the 1926-1929 Vestal bill on the ground that, if an author were able to sell dramatic and motion picture rights separately, the legitimate theater would be adversely affected.<sup>433</sup> At the end of the 1930 hearings it became apparent that a new compromise had been reached; in place of the provision in the divisibility section specifying that the author retained any rights he did not sell, the committee proposed to substitute a reversion to "his legal personal representatives" after 28 years following the author's death:<sup>434</sup>

"*Provided*, That no assignment by the author, where the author is an individual, of the copyright in any work and no grant by him of any interest therein (otherwise than by will), after the passage of this act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-eight years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that period shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest, shall be null and void."

With this addition, and with some revisions in the section dealing with the extension of subsisting copyrights, the Vestal bill was introduced on May 22, 1930 as H.R. 12549,<sup>435</sup> and was reported from committee on May 28, 1930 with the following comment:

"The present term of copyright under the act of 1909 is 28 years, with an additional term of 28 years for renewal. Under H.R. 12549 the term is extended to the life of the author and a period of 50 years after his death. This is the general period provided for by the International Copyright Union, and it has the

<sup>420</sup> See notes 64-65, 82-85, 95-96 *supra*, and text thereto.

<sup>421</sup> The division of benefits was apparently to be left to the courts where the parties could not agree, and was supposed to depend on the amount the publisher had invested and the value of his return. See *Hearings on H.R. 10434 Before the House Committee on Patents*, 69th Cong., 1st Sess. 299 (1926).

<sup>422</sup> *Id.* at 49-50, 64-65, 76.

<sup>423</sup> *Id.* at 64-65, 76.

<sup>424</sup> *Id.* at 64.

<sup>425</sup> *Id.* at 145-46, 213.

<sup>426</sup> *Id.* at 180-82, 252-53.

<sup>427</sup> *Id.* at 24, 118-19, 123, 140, 146, 230-31, 298-99.

<sup>428</sup> H.R. 8912, 70th Cong., 1st Sess. (1928).

<sup>429</sup> H.R. 6990, 71st Cong., 2d Sess. (1929).

<sup>430</sup> *Hearings on H.R. 6990 Before the House Committee on Patents*, 71st Cong., 2d Sess. (1930).

<sup>430a</sup> See *id.* at 45, 48, 109, 110, 139, 184.

<sup>431</sup> *Id.* at 45.

<sup>432</sup> See, e.g., *id.* at 36, 48.

<sup>433</sup> See, e.g., *id.* at 267-74.

<sup>434</sup> *Id.* at 274.

<sup>435</sup> H.R. 12549, 71st Cong., 2d Sess. (1930).

advantage of giving the young author ample time in which to reap the benefit of his genius. No objection has been raised to the extension by any of the industries, and, to parallel the renewal or reversionary interest provided for in the act of 1909, the present bill includes a provision by which the absolute reversion of the work to the author's representatives takes place regardless of his assignments, after the expiration of 28 years beyond his life."<sup>A36</sup>

During the 1930-1931 House debates on the Vestal bill the duration sections were discussed at considerable length.<sup>A37</sup> One of the arguments advanced by the opponents was that under existing law an author and his family benefitted for 28 years, but under the bill the publisher would have the whole copyright for a much longer term.<sup>A38</sup> The proponents replied that authors and their heirs would derive substantial benefits from the extension of duration,<sup>A39</sup> that an author should be able to perceive at the outset if his work is of lasting value and make an advantageous contract based on the longer term,<sup>A40</sup> and that it is unfair to throw a work into the public domain if the author forgets to renew.<sup>A41</sup>

On June 28, 1930, Representative Vestal offered a committee amendment limiting the right of the author's "legal personal representatives" to dispose of the copyright that would revert to them 28 years after the author's death:

"After the death of the author the entire reversionary interest in the copyright or any right or rights comprised therein may be assigned, mortgaged, licensed, or otherwise disposed of by his legal personal representative or such other persons (if any) in whom the same shall vest under his will, except that no assignment or other disposition of any right or rights for the reversionary term or any part thereof shall be made unless the assignee or licensee of record thereof (if any) for the immediately preceding term shall have first been given a reasonable opportunity to acquire the same at a price and upon terms at least equal to those upon which such right or rights are offered or granted to others, and any assignment or other disposition or agreement as to the disposition of any such right or rights in violation of this restriction shall be null and void and may be set aside at the instance of such prior assignee or licensee."<sup>A42</sup>

It is interesting that this amendment was rejected,<sup>A43</sup> apparently on the strength of arguments that publishing houses should not be benefitted at the expense of the author's heirs.<sup>A44</sup> On the other hand, a later amendment that would have returned to the duration-renewal provisions of the present law was decisively defeated,<sup>A45</sup> and the bill was passed by a large majority in the House on January 13, 1931.<sup>A46</sup>

The Vestal bill, as passed by the House, was introduced in the Senate on January 21, 1931,<sup>A47</sup> and hearings were held on January 28 and 29.<sup>A48</sup> At the hearings there were passing references to renewals as a source of present difficulty,<sup>A49</sup> but there was a striking amount of concerted opposition to the life-plus-fifty term on various grounds, principally that it would be too long, that it would be indefinite and would protect different works for different periods, and that it would be very difficult or impossible to determine authorship and dates of death in many cases.<sup>A50</sup> Several witnesses strongly recommended a straight term of years beginning and ending on a definite date.<sup>A51</sup>

The bill was reported favorably by the Senate Committee on February 17, 1931,<sup>A52</sup> but with some radical amendments. Notably, the term for all works was now a straight "seventy years from the date of copyright," and the reversion to

<sup>A36</sup> H.R. REP. NO. 1689, 71st Cong., 2d Sess. 10 (Pt. I, 1930). Later reports containing the same passage were H.R. REP. NO. 1898 and H.R. REP. NO. 2016, 71st Cong., 2d Sess. (1930).

<sup>A37</sup> 72 CONG. REC. 10593-94, 11997-98, 12007, 12016-18 (1930); 74 CONG. REC. 2014-22 (1930).

<sup>A38</sup> 72 CONG. REC. 12016-18 (1930); 74 CONG. REC. 2018 (1930).

<sup>A39</sup> 72 CONG. REC. 11998, 12007, 12016-18 (1930); 74 CONG. REC. 2015, 2019 (1930).

<sup>A40</sup> 74 CONG. REC. 2017 (1930) (remarks of Representative Beedy).

<sup>A41</sup> 74 CONG. REC. 2017 (1930) (remarks of Representative Bloom).

<sup>A42</sup> 72 CONG. REC. 12016 (1930).

<sup>A43</sup> *Id.* at 12017.

<sup>A44</sup> *Id.* at 12016-17.

<sup>A45</sup> 74 CONG. REC. 2014-19 (1930).

<sup>A46</sup> *Id.* at 2081.

<sup>A47</sup> H.R. 12549, 71st Cong., 3d Sess. (1931).

<sup>A48</sup> *Hearings on H.R. 12549 Before the Senate Committee on Patents, 71st Cong., 3d Sess.* (1931).

<sup>A49</sup> *Id.* at 133, 264.

<sup>A50</sup> *Id.* at 23-24, 26-28, 56-57, 88-89, 133, 145, 146-47, 261-62, 264. For arguments favoring life-plus-fifty, see *id.* at 193-94, 307-08.

<sup>A51</sup> *Id.* at 88-89, 133, 261-62, 264.

<sup>A52</sup> S. REP. NO. 1732, 71st Cong., 3d Sess. (1931).

the author's personal representatives 28 years after his death had been dropped entirely.<sup>A53</sup> The report indicates that the main reason behind the 70 year term was to make the length of copyright protection uniform for the works of all authors;<sup>A54</sup> the reason for dropping the reversion was not stated but, since it had been based on the death of the author, it may have been felt incompatible with a straight term. The Senate bill was debated briefly,<sup>A55</sup> but was never reached for a vote, and died with the end of the 71st Congress. In the 72d Congress both the House and Senate versions of the Vestal bill were introduced with some relatively minor revisions,<sup>A56</sup> but no further action was taken in either chamber.

#### E. THE DILL BILL, 1932-1933

On March 2, 1932 Senator Dill introduced a new general revision bill<sup>A57</sup> in which the duration provisions were somewhat simplified:

*Basic term:* 56 years "from the date of completion of the work."

*Special terms:* none.

*Reversion:* none.

*Subsisting copyrights:* would be automatically "continued" until 56 years from the date of copyright. If there had been a binding assignment of the renewal, the "continuation" would vest in the owner of the copyright, subject to the conditions of the assignment; but, in the absence of such an assignment, the continuation would vest in (1) "the author, his executor, testamentary trustees, or administrator" at the end of 28 years, or (2) if renewal registration had been made, in the owners of renewal under pre-existing law.

This bill was reintroduced in the 73d Congress,<sup>A58</sup> but no action was even taken on it.

#### F. THE SIROVICH BILLS, 1932

Throughout the late winter and spring of 1932 Representative Sirovich, the new chairman of the House Committee on Patents, held extensive hearings on general revision of copyright.<sup>A59</sup> The first phase of the hearings took place between February 1 and March 14. Although the life-plus-fifty term still had supporters,<sup>A60</sup> it was obvious from the start that Representative Sirovich and other members of both Houses had become convinced of the impracticality of basing the term on the author's life.<sup>A61</sup> A straight term of 60 years from publication or public performance was considered at first;<sup>A62</sup> but this was reduced to 56 years at Mr. Solberg's suggestion, in order to avoid the complications inherent in extending the term for subsisting copyrights.<sup>A63</sup> Renewals were criticized by several speakers as a burden and a source of difficulty, and because of the danger of loss of protection through forgetting the time limits.<sup>A64</sup>

The key to general revision, as Representative Sirovich saw it, was divisibility of copyright.<sup>A65</sup> He proposed to make the author the first copyright owner in every case, and to permit him not only to assign away his entire right, but also to divide his copyright into as many rights as he wished and to sell or license each right separately. This, he felt, would mean that each right (*e.g.*, serial publication,

<sup>A53</sup> Another change was the addition, to the section governing extension of subsisting copyrights, of a clause deeming assignments and licenses on a royalty basis personal contracts. This was supposed to protect the author's rights in the event of breach or bankruptcy. *Id.* at 31.

<sup>A54</sup> *Id.* at 28.

<sup>A55</sup> 74 CONG. REC. 6244-51 (1931).

<sup>A56</sup> H.R. 139, S. 176, 72d Cong., 1st Sess. (1931). The House version retained both the life-plus-fifty term and the reversion to the author's personal representatives. The Senate version reduced the straight term to 60 years and, in the section on extension of subsisting copyrights, dropped the whole proviso governing rights under an outright lump sum purchase and substituted a proviso disclaiming interference with any vested right.

<sup>A57</sup> S. 3985, 72d Cong., 1st Sess. (1932).

<sup>A58</sup> S. 342, 73d Cong., 1st Sess. (1933).

<sup>A59</sup> *Hearings on General Revision of the Copyright Law Before the House Committee on Patents*, 72d Cong., 1st Sess. (1932); *Hearings on H.R. 10976 Before the House Committee on Patents*, 72d Cong., 1st Sess. (1932); *Hearings on H.R. 11948 before the House Committee on Patents*, 72d Cong., 1st Sess. (1932).

<sup>A60</sup> *Hearings on General Revision*, *supra* note A59, at 7, 28, 105-06, 137, 326. As at previous hearings, there was also opposition to a life-plus term. *Id.* at 85, 119, 562.

<sup>A61</sup> *Id.* at 77, 101, 106, 118.

<sup>A62</sup> *Id.* at 77, 80-81, 100-01, 105-06.

<sup>A63</sup> *Id.* at 118-19, 326-27.

<sup>A64</sup> *Id.* at 7, 100-01, 105-06, 118, 327.

<sup>A65</sup> See, *e.g.*, *id.* at 100-01, 106, 324, 330-33, 360, 416.

book publication, motion picture, dramatic, radio, television, etc.) would be bargained for separately, and that authors would retain all rights they did not sell.

This conception of divisibility as a kind of universal panacea permeated the 1932 hearings and, as in the 1930 hearings<sup>A60</sup> was closely related to the reversionary aspect of renewals. Mr. Sirovich and others apparently felt that, as long as the author retained some or most of his bundle of rights, he would always have a reversionary interest or a "second chance" which would make renewals unnecessary.<sup>A67</sup> At least at the beginning, the Committee either did not realize or did not seem concerned about the practical possibility that the author would be induced to make an outright assignment of his copyright, leaving himself with no continuing interest whatever.

On February 29, 1932, Mr. Solberg, who had retired as Register of Copyrights but was still an active supporter of Berne adherence, made a lengthy statement to the Committee concerning the term of copyright.<sup>A68</sup> Although stressing the advantages of the "Union term" (life-plus-fifty) he pointed out that acceptance of this term was not necessary for the United States to join the Berne Union, and he indicated that he was not opposed to a straight term of 56 years. However, Mr. Solberg was seriously concerned about the effect of automatically extending the term of all subsisting copyrights to the full 56 year term, without the necessity of making renewal registration for those works in their first 28 years. He pointed out that automatic extension would double the term for nearly four million works, and that "this seems of doubtful value or necessity."<sup>A69</sup> He noted that only about five percent of copyrights were being renewed at that time and that, if renewal registration were required for subsisting copyrights, only 200,000 rather than four million copyrights would be extended. He therefore proposed that, with some minor revisions, the renewal provision be retained for subsisting copyrights still in their first term.<sup>A70</sup>

Mr. Sirovich was astounded to learn that only five percent of copyrights were then being renewed, and his immediate reaction to Mr. Solberg's proposal concerning subsisting copyrights appeared favorable.<sup>A71</sup> However, he still advocated a straight term of 56 years for future works<sup>A72</sup> because of his conviction that, under a divisible copyright, the author would retain rights which might become valuable at a later time:

"The CHAIRMAN. Who knows what the perfection of television might mean? Some of the old rights that are now in the sphere of television might be reserved. Some years ago, nobody dreamt what motion pictures would become. Then, you men [the magazine publishers] had full right to everything, but to-day every author will speak for his dramatic, radio, moving-picture, and television rights, and who knows what this era will bring forth that will give the author more opportunities than in the domain of serial rights and first publication which is so rich to-day for the magazines.

"The renewal period is given only to those authors who avail themselves of the right of renewal. If we make the terms of the copyright 56 years, we may be giving them some real property right that may mean something to them and to their descendants."<sup>A73</sup>

On March 10, 1932, after the hearings had been going on for almost six weeks, Representative Sirovich introduced the first<sup>A74</sup> of the six bills he presented in the 72d Congress; its term provisions, and those of the second Sirovich bill of March 22,<sup>A75</sup> were not fundamentally different from those of the Dill bill<sup>A76</sup> and of the Senate version of the Vestal bill:<sup>A77</sup>

*Basic term:* copyright from creation, to expire 56 years from "the date of first public presentation."

<sup>A60</sup> See note A32 *supra*, and text thereto.

<sup>A67</sup> See, e.g., *Hearings on General Revision*, *supra* note A59, at 100-01, 330-33, 360; *Hearings on H.R. 10976*, *supra* note A59, at 187-88; *Hearings on H.R. 11948*, *supra* note A59, at 122-23.

<sup>A68</sup> *Hearings on General Revision*, *supra* note A59, at 321-33.

<sup>A69</sup> *Id.* at 327.

<sup>A70</sup> *Id.* at 327-30.

<sup>A71</sup> *Id.* at 330-33.

<sup>A72</sup> *Id.* at 330-32, 360.

<sup>A73</sup> *Id.* at 360.

<sup>A74</sup> H.R. 10364, 72d Cong., 1st Sess. (1932).

<sup>A75</sup> H.R. 10740, 72d Cong., 1st Sess. (1932).

<sup>A76</sup> See note A57 *supra*, and text thereto.

<sup>A77</sup> See notes A52-56 *supra*, and text thereto.



*Special terms:* none.

*Reversion:* none.

*Subsisting copyrights:* would be extended to 56 years from first public presentation without the need of renewal registration. If a binding agreement had been made to renew the copyright for the benefit of the proprietor of the first term, the agreement could be continued on the same royalty basis or upon payment of the same lump sum at the end of the first 28 years. "If there was no agreement for renewal, the copyright shall become the property of the author at the end of the twenty-eight year period."

During the second phase of the 1932 hearings, which took place between March 21 and March 25,<sup>A78</sup> criticism of basing the term on the "date of first public presentation" was advanced on the ground that it was too indefinite and difficult to ascertain.<sup>A79</sup> In an effort to meet these objections<sup>A80</sup> Representative Sirovich revised the term provisions in his third bill of March 30:<sup>A81</sup> copyright was still to terminate 56 years after first public presentation, but if the work had not been publicly presented the copyright would end three years after the author's death, or three years after creation if the author was a corporation. The committee report on this bill contains the following comments:

"In place of the awkward method of providing two terms of 28 years each, the bill substitutes one term of 56 years, which begins to run on the first publication or other public presentation of the work. The disadvantage of two terms of copyright has been that in many cases an author loses his copyright by failing to renew and too many controversies have arisen over the rights of purchasers and the rights of authors on the expiration of the first term. The author here is given a complete term of 56 years and his copyright for that term is a property right which can be easily dealt with, and under this provision no misunderstandings can arise. On the death of the author his copyright continues in favor of his personal representatives until the end of the term, unless he has already assigned his copyright, in which case the same holds true of the copyright owner."<sup>A82</sup>

On March 25, 1932, Nathan Burkan, Counsel for ASCAP, testified forcefully in favor of the reversionary feature of renewals;<sup>A83</sup> he said: "I may be in conflict with my own people on this, but I have strong views on the subject, influenced by what Mark Twain told the Patents Committee in 1909."<sup>A84</sup> He argued that, as in the House version of the Vestal bill, the rights of an assignee or licensee should revert "to the author or his dependents \* \* \* at the expiration of a period of 28 years."<sup>A85</sup> Representative Sirovich asserted that such a provision would be unnecessary in view of the divisibility provisions of his bill,<sup>A86</sup> but Mr. Burkan stressed that, "as a rule," the author is required to sign "a document by which he divests himself of all his rights in his work for all time for a mere pittance."<sup>A87</sup>

The term provisions of the fourth Sirovich bill of May 7, 1932,<sup>A88</sup> were substantially the same as those of its immediate predecessor. However, at the final Sirovich hearing on May 12<sup>A89</sup> Mr. Burkan again strongly recommended a reversion to the author and his family after 28 years;<sup>A90</sup> he submitted a brief and a draft amendment for the purpose.<sup>A91</sup> Mr. Sirovich still seemed to feel that divisibility would solve the problem, but Mr. Burkan was most emphatic in his disagreement. He argued that a technical provision allowing the author to divide up his rights and sell them separately would not keep him from being forced to make an outright sale of his entire right for a small sum.<sup>A92</sup>

<sup>A78</sup> *Hearings on H.R. 10976, supra* note A59.

<sup>A79</sup> *Id.* at 167-68.

<sup>A80</sup> *Id.* at 169-70. Although the title page of the March 21-25 hearings indicate that they were held on H.R. 10976, the fact is that the bill bearing that number was not introduced until March 30, after that phase of the hearings was concluded.

<sup>A81</sup> H.R. 10976, 72d Cong., 1st Sess. (1932).

<sup>A82</sup> H.R. REP. NO. 1008, 72d Cong., 1st Sess. 4 (1932); see also *id.* at 2.

<sup>A83</sup> *Hearings on H.R. 10976, supra* note A59, at 187-88.

<sup>A84</sup> *Id.* at 187.

<sup>A85</sup> *Ibid.*

<sup>A86</sup> *Id.* at 187-88.

<sup>A87</sup> *Id.* at 188.

<sup>A88</sup> H.R. 11948, 72d Cong., 1st Sess. (1932).

<sup>A89</sup> *Hearings on H.R. 11948, supra* note A59.

<sup>A90</sup> *Id.* at 121-23.

<sup>A91</sup> *Id.* at 127-28, 155-56.

<sup>A92</sup> *Id.* at 122-23.

As a direct result of these arguments a new proviso was added to the fifth<sup>A93</sup> and sixth<sup>A94</sup> Sirovich bills. It was restricted in terms to "musical and dramatico-musical compositions," and it provided that all assignments and grants would cease to be valid after the first 28 years of the copyright:

"\* \* \* the reversionary interest in the copyright in such [musical and dramatico-musical] compositions expectant at the termination of that [28 year] period shall, notwithstanding any agreement to the contrary, revert to the author if he be living, and if not living, such reversionary interest shall be disposed of either as directed by the will of the author or according to the applicable laws governing the intestate disposition of personal property upon the death of such author."

The fifth Sirovich bill was reported<sup>A95</sup> and debated briefly in the House,<sup>A96</sup> but no further action was taken in the 72d Congress.

#### G. DEVELOPMENTS, 1933-1936: THE DUFFY, DALY, AND SIROVICH BILLS

Two new bills aimed at doing the minimum necessary to permit Berne adherence were introduced in 1933,<sup>A97</sup> and on February 19, 1934, President Roosevelt forwarded the Convention itself to the Senate for possible ratification.<sup>A98</sup> As an outgrowth of hearings in the spring of 1934,<sup>A99</sup> an Interdepartmental Committee was organized;<sup>A100</sup> it prepared a new general revision bill, introduced by Senator Duffy on March 13, 1935.<sup>A101</sup> About a month later the presidential recommendation concerning the Berne Convention was reported favorably by the Senate Foreign Relations Committee;<sup>A102</sup> the Convention was actually ratified by the Senate on April 19, 1935,<sup>A103</sup> but this action was withdrawn immediately and the Convention was returned to Committee to await action on the Duffy bill.<sup>A104</sup>

The term provisions of the first Duffy bill (S. 2465) were not unlike those of earlier measures, but lacked the reversionary feature previously urged by Mr. Burkan:<sup>A105</sup>

*Basic term:* 56 years from publication or, if unpublished, from creation.

*Special terms:* none.

*Reversion:* none.

*Subsisting copyrights:* would be automatically extended to 56 years from the date of original copyright. The remainder of the section was unclear, but apparently provided that, at the end of 28 years, copyright would revert to those who would have been entitled to the renewal under pre-existing law.<sup>A106</sup>

<sup>A93</sup> H.R. 12094, 72d Cong., 1st Sess. (1932).

<sup>A94</sup> H.R. 12425, 72d Cong., 1st Sess. (1932).

<sup>A95</sup> H.R. REP. NO. 1361, 72d Cong., 1st Sess. (1932).

<sup>A96</sup> 75 CONG. REC. 11059-72 (1932).

<sup>A97</sup> H.R. 5853, S. 1928, 73d Cong., 1st Sess. (1933).

<sup>A98</sup> EXEC. E., 73d Cong., 2d Sess. (1934).

<sup>A99</sup> *Hearings on S. 1928 Before the Senate Committee on Foreign Relations*, 73d Cong., 2d Sess. (1934).

<sup>A100</sup> The Interdepartmental Committee held conferences and issued a report, which was printed as an exhibit to the Committee report on the Convention, EXEC. REP. NO. 4, 74th Cong., 1st Sess. 9-18 (1935). The report referred very briefly to renewals, noting that a single term is "calculated to be of benefit to authors," and that "experience in the past has shown that authors frequently forget to renew their copyright and afterwards discover that they could have profited by the protection of the second term of 28 years." *Id.* at 16.

<sup>A101</sup> S. 2465, 74th Cong., 1st Sess. (1935).

<sup>A102</sup> EXEC. REP. NO. 4, 74th Cong., 1st Sess. (1935).

<sup>A103</sup> 79 CONG. REC. 6032 (1935).

<sup>A104</sup> *Id.* at 6099.

<sup>A105</sup> A letter dated March 20, 1935 from the Chairman of the Interdepartmental Committee to Louis D. Frohlich, printed in the record of the 1936 hearings, indicates that the Committee was not opposed to providing a reversion in a future, more comprehensive bill:

It appeared highly desirable to the committee to remove the formality of renewal registration. It may be added that practically everyone who has given attention to the matter during the discussions before committees of Congress for some years past has approved the idea of a single term of copyright in place of the two terms, original and renewal, existing under present law. The right of renewal frequently is not exercised, with resulting loss of copyright in valuable works, and it is believed the single term is an improvement from practically every point of view. Your proposal for a reversion of the latter part of the copyright term to the author or his family interested the committee. As you say, the British law gives this right, which accrues 25 years after the death of the author. It may be possible at a future time to consider further the value of this proposal, but the purpose of the present draft hardly seems to justify introducing it. *Hearings on Revision of Copyright Laws Before the House Committee on Patents*, 74th Cong., 2d Sess. 342, 343 (1936).

<sup>A106</sup> The letter to Mr. Frohlich, *supra* note A105, indicated that the purpose of this section was "to give the second 28 years of copyright in all cases to the same persons who would receive it under existing law, subject, however to any agreement made for the disposal of the renewal term which would be enforceable under the present statute. \* \* \*"

*Ibid.*

On May 8, 1935, Senator McAdoo, Chairman of the Senate Committee on Patents, held an "informal conference" on the Duffy bill.<sup>A107</sup> At this hearing Mr. Burkan once again strongly urged that the bill be changed to provide a reversion to the author and his family.<sup>A108</sup> However, he also made clear that he did not favor the renewal device ("I find a great many heirs forget to renew and therefore they lose their rights"),<sup>A109</sup> and that he preferred the English system of an automatic reversion after a fixed term.

A few days later the Duffy bill as amended by the committee was introduced as S. 3047,<sup>A110</sup> and reported.<sup>A111</sup> Mr. Burkan's suggestion for a reversion had not been adopted, but the section on extension of subsisting copyrights had been clarified; if, on the date the act took effect, the copyright was still in its first 28-year term, copyright for the period beyond 28 years would vest in those entitled to claim renewal under pre-existing law, subject to any agreement covering the renewal term.

In the course of the Senate debates on S. 3047 during the summer of 1935, Senator Duffy commented twice<sup>A112</sup> that the renewal device had been dropped in favor of a single term at the request of the authors, because "many times it is found that the authors have been negligent, that they have slept on their rights, so to speak, and neglected to make proper application."<sup>A113</sup> The Duffy bill passed the Senate on August 7, 1935,<sup>A114</sup> with an amendment giving a special copyright term of twenty years from publication for "artistic models or designs intended to be applied to or embodied in manufactured products." The bill, as amended, was introduced in the House on August 8.<sup>A115</sup>

Shortly after Congress reconvened in 1936 two new revision bills were introduced in the House: the Daly bill (H.R. 10632) on January 27,<sup>A116</sup> and the Sirovich bill (H.R. 11420) on February 24.<sup>A117</sup> Both of these bills adopted a reversionary feature such as that advocated by Nathan Burkan. The following were the basic term provisions of the Daly bill:

- Basic term:* 56 years from publication or, if unpublished, from creation.
- Special terms:* 20 years from publication for "artistic models or designs intended to be applied to or embodied in manufactured products."
- Reversion:* all assignments and grants would terminate at the end of 28 years, and all rights would revert to the author, his widow and children, executors, or next of kin, as under pre-existing law; any agreement covering the reversionary period would be null and void.
- Subsisting copyrights:* would be automatically extended to 56 years from the date of original copyright. If, on the date the act took effect, the copyright was still in its first 28-year term, copyright for the period beyond 28 years would vest in those entitled to claim renewal under pre-existing law, subject to any agreement covering the renewal term.

The term provisions of the new Sirovich bill were essentially the same as those of the Daly bill, although the bill offered no protection for designs and the provision governing the extension of subsisting copyrights was somewhat vaguer.

In February, March, and April, 1936, the House Committee on Patents under the chairmanship of Representative Sirovich, conducted extensive hearings<sup>A118</sup> on the three pending bills: Duffy, Daly, and Sirovich. The first speaker was Gene Buck, President of ASCAP; at the very outset of his remarks he expressed his opposition to a straight 56-year term and urged the Committee to consider a reversion to the author or his family after 28 years.<sup>A119</sup>

"In saying that, I am talking just 100 percent for the creators, because, if you gentlemen know anything about men who live by writing books and songs and plays, there have been times in the history of the world where occasions have arisen and where smart and clever men, with money, would take this creator fellow and buy him outright, or his work.

<sup>A107</sup> A transcript of the proceedings is printed in *Hearings, supra* note A105, at 1402-19.

<sup>A108</sup> *Id.* at 1410-11, 1414; see *id.* at 1417.

<sup>A109</sup> *Id.* at 1411.

<sup>A110</sup> S. 3047, 74th Cong., 1st Sess. (1935).

<sup>A111</sup> S. REP. NO. 896, 74th Cong., 1st Sess. (1935).

<sup>A112</sup> 79 CONG. REC. 12252, 12262-63 (1935).

<sup>A113</sup> *Id.* at 12252.

<sup>A114</sup> *Id.* at 12615.

<sup>A115</sup> *Id.* at 12904.

<sup>A116</sup> H.R. 10632, 74th Cong., 2d Sess. (1936).

<sup>A117</sup> H.R. 11420, 74th Cong., 2d Sess. (1936). This replaced H.R. 11374, introduced on February 21, which was withdrawn because of errors.

<sup>A118</sup> *Hearings, supra* note A105.

<sup>A119</sup> *Id.* at 4-5.

"\* \* \* I want a law to have it prescribed that the author, the creator, is the man who shall have the renewal, for this very distinct reason: This creative gift sometimes does not last long. I have known of men who have written great songs, one that the whole world sang, and never wrote another. These men have wives, they have children, and I want to see to it, with all the force that I possess, that we can enlighten men who address themselves to this highly important question, that if that man has passed on, then that his widow and children shall have the right to renew at the end of 28 years."<sup>A120</sup>

These views were reiterated and underlined by Nathan Burkan and others in testimony and written statements filed with the committee.<sup>A121</sup> In reply to these comments Senator Duffy asserted that the renewal had been dropped "at the request of the authors, especially the Authors' League," and that "I, personally, do not care whether it remains in the bill or not."<sup>A122</sup> Representative Sirovich also seemed impressed by the arguments in favor of a reversion.<sup>A123</sup>

On the other hand, several witnesses attacked renewals in general and the reversion in particular. Sydney Kaye, representing broadcasters, pointed out that the limitation on assignments and grants:

"\* \* \* may be just as awkward for an author who wants to sell something as it is for the person who wants to buy it, and may be very awkward for a man who makes a play out of a book and then finds that he cannot use it after 28 years; or for a college that adopts a song as its college song, and gets all the rights it can have granted, and at the end of the 28 years finds that it cannot perform it."<sup>A124</sup>

A local broadcaster favored a straight term over the renewal system "which has resulted in unnecessary loss of copyright protection and confusion as to ownership of the copyrights."<sup>A125</sup> A music publisher strongly criticized renewals as "unpleasant and out-of-date" and as providing "a hardship for its technical requirements are often unworkable and in consequence valuable copyrights have thus been thrown into the public domain."<sup>A126</sup> He felt that the proposed reversion "would obviously create an impossible situation, repugnant to all composers and authors,"<sup>A127</sup> and another music publisher agreed that such a restriction on assignments would not only unfairly damage publishers but would also reduce the amount an author could get for his rights.<sup>A128</sup>

Edwin P. Kilroe, representing a motion picture company, felt the most important thing was that "the provisions of the act relating to the term are clear and concise and definite as to the persons who may own the renewed term of copyright so that these rights may be dealt with now."<sup>A129</sup> Another witness urged that too long a term not be given to copyrighted designs; he felt that for such works a term of two years, possibly with a longer renewal term, would be ample.<sup>A130</sup>

#### H. THE "SHOTWELL COMMITTEE" BILL AND OTHER DEVELOPMENTS, 1937-PRESENT

In January 1937, shortly after the opening of the 75th Congress, Senator Duffy introduced a new general revision bill<sup>A131</sup> in which the term provisions were merely a slightly revised version of the duration-renewal section of the 1909 Act:

*Basic term:* 28 years from publication (or, if unpublished, from creation), with the possibility of renewal for a second 28 years.<sup>A132</sup>

*Special terms:* none.

*Reversion:* second term would revert to exactly the same classes of persons as those named in the 1909 Act.<sup>A133</sup>

*Subsisting copyrights:* no special provision was necessary, since the existing law was unchanged.

<sup>A120</sup> *Ibid.*

<sup>A121</sup> *Id.* at 1089, 1106, 1386.

<sup>A122</sup> *Id.* at 226-227.

<sup>A123</sup> *Id.* at 463.

<sup>A124</sup> *Id.* at 403; see also *id.* at 463, 477.

<sup>A125</sup> *Id.* at 594.

<sup>A126</sup> *Id.* at 556.

<sup>A127</sup> *Id.* at 560.

<sup>A128</sup> *Id.* at 1435.

<sup>A129</sup> *Id.* at 1009; see also *id.* at 1180-81, 1185.

<sup>A130</sup> *Id.* at 924; see also *id.* at 928.

<sup>A131</sup> S. 7, 75th Cong., 1st Sess. (1937).

<sup>A132</sup> For works registered in unpublished form under the Act of 1909, copyright was to begin on the "date of deposit."

<sup>A133</sup> As in the later 1940 amendment (54 Stat. 51 [1940], 17 U.S.C. § 24 [1958]), the author would have been permitted to renew a contribution to a periodical or other composite work, whether or not the contribution had been separately registered.

Counterparts of the new Duffy bill were also introduced in the House,<sup>A134</sup> and a little later the Daly bill was reintroduced in both House and Senate.<sup>A135</sup> The Daly bill was also introduced four times in the 76th Congress,<sup>A136</sup> and was introduced as late as 1941 in the 77th Congress,<sup>A137</sup> but no further action on any of these measures was ever taken. The same was true of efforts to secure ratification of the Berne Convention, which also persisted until 1941.<sup>A133</sup>

The last important<sup>A138</sup> legislative developments in this field were the activities of the so-called "Shotwell Committee," culminating in the introduction of the Thomas bill<sup>A140</sup> on January 8, 1940, more than twenty years ago. This Committee, which was formed under the auspices of an American organization related to the League of Nations, had as its purpose the drafting of an entirely new general revision bill that would allow the United States to join the Berne Union.<sup>A141</sup> It was composed of representatives of a number of groups affected by the copyright law, and held a series of meetings in 1938 and 1939.<sup>A142</sup>

At the conferences the Authors' League advocated a life-plus-fifty term, with no assignment or grant to be valid for more than 25 years. ASCAP proposed a renewal system like that in the Act of 1909 and in the last Duffy bill;<sup>A143</sup> copyright was to revert to the author and his family at the end of the first 28-year term.<sup>A144</sup> However, as an alternative, ASCAP was also agreeable to a life-plus or straight term, as long as the bill provided that all rights would revert to the author or his family at stated periods. The book publishers and motion picture interests both favored a straight and definite term, without reversion.

The draft duration provisions that emerged as the conferences progressed were based on the Authors' League proposals for a life-plus-fifty term with a 25-year limit on assignments and licenses; most of the discussions centered around the provisions governing reversion and the extension of subsisting copyrights. The music publishers and radio broadcasters expressed opposition to the reversionary provision as an unwarranted restriction on freedom of contract which would be of no ultimate benefit to authors; the motion picture interests were opposed to the reversion on principle, but were willing to accept it as long as royalty agreements were permitted to continue in force. The extension of subsisting copyrights was opposed by the broadcasters as unnecessary and impracticable, and the provision underwent a number of changes in content and wording during the conferences.

The final "Shotwell Committee" bill was introduced by Senator Thomas on January 8, 1940:<sup>A145</sup>

*Basic term:* life-plus-fifty.

*Special terms:* 50 years from creation "when the author \* \* \* is not a natural person"; 50 years from publication for pseudonymous and anonymous works unless the true name of the author were recorded.

<sup>A134</sup> H.R. 2695, H.R. 3004, 75th Cong., 1st Sess. (1937).

<sup>A135</sup> H.R. 5275, S. 2240, 75th Cong., 1st Sess. (1937).

<sup>A136</sup> H.R. 926, H.R. 4871, H.R. 6160, 76th Cong., 1st Sess. (1939); H.R. 9703, 76th Cong., 3d Sess. (1940).

<sup>A137</sup> H.R. 3997, 77th Cong., 1st Sess. (1941).

<sup>A138</sup> See EXEC. REP. NO. 1, 75th Cong., 2d Sess. (1937); EXEC. REP. NO. 2, 76th Cong., 1st Sess. (1939); EXEC. REP. NO. 1, 77th Cong., 1st Sess. (1941).

<sup>A139</sup> Since the war the only legislative developments affecting renewals are: a bill, H.R. 2584, 83d Cong., 1st Sess. (1953) that would have permitted a child to renew only in the absence of a surviving spouse; a resolution, H.R.J. Res. 176, 83d Cong., 1st Sess. (1953) that would have amended the Constitution to make copyrights and patents perpetual; and a bill and report, H.R. 10263, H.R. REP. NO. 2417, 84th Cong., 2d Sess. (1954), that would have raised the renewal fee to \$4.00.

<sup>A140</sup> S. 3043, 76th Cong., 3d Sess. (1940).

<sup>A141</sup> Goldman, *A History of U.S.A. Copyright Law Revision From 1901 to 1954* at 10 [Study No. 1 in the present series of committee prints].

<sup>A142</sup> The records of the conferences have not been published, but have been collected and are available in the Copyright Office.

<sup>A143</sup> S. 7, 75th Cong., 1st Sess. (1937).

<sup>A144</sup> ASCAP also recommended that the following proviso be added to the renewal section:

*Provided further,* That not more than one renewal of copyright in a single copyrighted work shall be registered, and that the registration of such renewal by any person shall inure to the benefit of any and all parties entitled thereto regardless of the right or interest of person by whom or in whose name such renewal shall have been registered. The reason for this provision was the present situation, under which "there are any number of renewals and it is impossible to determine from the record the person who may be entitled to such renewal."

<sup>A145</sup> S. 3043, 76th Cong., 3d Sess. (1940).

*Reversion*: no grant by an author who was a natural person would be valid for more than 25 years. At the end of 25 years the rights would revert to the author or his widow or widower, children, or parents; but, to the extent that the grant carried the right to publish in exchange for royalties, the grantee might continue publishing under the terms of the grant.

*Subsisting copyrights*: would be automatically extended to the life-plus-fifty term, but after 28 years from the date of copyright (or from the effective date of renewal, if the copyright had been renewed), all rights would revert to those "entitled to ownership of the renewal" under the Act of 1909.

Despite all the careful preparatory work, no further action on the "Shotwell Committee" bill was ever taken.

#### I. SUMMARY

Since the last efforts at general revision came to an end more than twenty years ago, any general conclusions to be drawn from the history of these efforts may not be altogether valid today. However, the following points should be noted:

(1) There never was any penetrating analysis of the nature of renewals and the basic arguments for and against them. The policy considerations that had prompted Congress to retain and elaborate upon the renewal device were not really brought out, and the only arguments usually advanced against renewals were that they were a bother and that "many" copyrights were lost because the authors forgot to renew. As a result, some legislators seemed indifferent as to whether renewals were retained or abolished.

(2) For some time there seemed to be a general feeling that divisibility would provide the author with as much of a "second chance" as he would get under a system of renewals or limitations on assignments. However, it was pointed out that this purpose could easily be thwarted as long as outright assignments of all the author's rights were permissible, and the belief in divisibility as a substitute for a reversion apparently did not persist after 1932.

(3) As the general revision movement progressed, the author groups became more and more determined to retain a reversion, preferably through a limitation on assignments and licenses to a specific term of years. On the whole, the user groups appeared willing to accept this principle if royalty agreements could be kept in force after the reversion and if certain other exceptions were provided.

(4) The transitory provision dealing with the extension of subsisting copyrights turned out to be one of the most troublesome and difficult problems facing the revision drafters, and no completely satisfactory solution was ever found. Everyone appeared to agree that, at least nominally, the extension had to be given to the author or his family, but there was considerable pressure to allow previous grantees to share in the extension. There was also some feeling that, rather than face all these problems, it would be better not to extend subsisting copyrights at all.

#### APPENDIX B

##### ANALOGIES TO RENEWAL OF COPYRIGHT UNDER OTHER LEGAL SYSTEMS

###### A. RENEWALS AND ANALOGOUS PROVISIONS UNDER INTERNATIONAL CONVENTIONS

###### 1. *International Copyright ("Berne") Conventions*

Under the original Berne Convention of 1886 a Union country was free to establish any term of protection it chose, subject to the principle of "national treatment"<sup>B1</sup> as qualified by the principle of "comparison of terms."<sup>B2</sup> The Berlin revision of 1908 established a basic "Convention term" of life-plus-fifty for all works except photographs and posthumous, anonymous, and pseudonymous works—the terms for which were left to domestic law. However, the life-plus-fifty term in the Berlin Convention was in no sense a binding requirement; as long as this term had not been uniformly adopted in all countries of the Union,

<sup>B1</sup> In broad terms, the principle of "national treatment" is that a member State will give works originating in other member States the same protection it gives its own works.

<sup>B2</sup> The principle of "comparison of terms" permits or requires a member State to give protection to works originating in other member States for a term no longer than the term of protection given in the country of origin.

any member country remained free to establish its own term. This provision remained unchanged in the Rome revision of 1928. Technically, therefore, the United States could have entered the Berne Union by ratifying any of the Conventions up to 1948 without changing the duration-renewal provisions of its domestic law.

The Brussels revision of 1948 made the life-plus-fifty term a basic required minimum for all member countries, with specific minimum terms of fifty years from publication for anonymous and pseudonymous works; domestic law was permitted to govern the terms for works of cinematography, photography, and applied art. This fundamental change would prevent the United States, among other countries, from ratifying the Brussels Convention without substantial revisions in its copyright law.

As will be pointed out below,<sup>83</sup> it is not altogether clear whether provisions establishing a compulsory license or otherwise limiting exclusive rights during a specified period at the end of the life-plus-fifty term would be in violation of the Brussels Convention. Aside from the matter of term, there is nothing in any of the Berne Conventions that would prevent a country from limiting the alienability of a copyright, or from providing for a reversion to the author or his heirs at a specific time or upon the occurrence of a specified condition. The Brussels revision also contained a nonmandatory "droit de suite" provision which, as will be pointed out below,<sup>84</sup> has some marked similarities to a renewal system.

## 2. Pan-American copyright conventions

None of the various Western Hemisphere Copyright Conventions would preclude a country from adopting any term it chose, subject to national treatment and comparison of terms. For example, Article 6 of the Buenos Aires Copyright Convention of 1910, of which the United States is a member, provides:

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

The Washington Convention of 1946, which the United States signed but did not ratify, contains, in addition to this provision, a sentence which was obviously intended to cover the U.S. renewal situation:

"In case the law of any Contracting State grants two successive periods of protection, the duration of the protection with respect to that State shall include, for the purposes of the present Convention, the aggregate of both periods."

## 3. The Universal Copyright Convention

As befits its position as a bridge between the copyright systems of the United States and the Berne Union countries, the Universal Copyright Convention signed at Geneva in 1952 contains some rather elaborate provisions which are deliberately designed to accommodate the U.S. renewal system.<sup>85</sup> Article IV of the Convention first establishes that duration shall be governed by national treatment, and then provides:

"The term of protection for works protected under this Convention shall not be less than the life of the author and 25 years after his death.

"However, any Contracting State which, on the effective date of this Convention in that State, has limited this term for certain classes of works to a period computed from the first publication of the work, shall be entitled to maintain these exceptions and to extend them to other classes of works. For all these classes the term of protection shall not be less than 25 years from the date of first publication.

"Any Contracting State which, upon the effective date of this Convention in that State, does not compute the term of protection upon the basis of the life of the author, shall be entitled to compute the term of protection from the date

<sup>83</sup> See notes B158-64 *infra*, and text thereto.

<sup>84</sup> See notes B148-50 *infra*, and text thereto.

<sup>85</sup> For general discussions of these provisions, see Cary, *The United States and Universal Copyright: An Analysis of Public Law 743*, in *UNIVERSAL COPYRIGHT CONVENTION ANALYZED 83* (Kupferman & Poner, eds. 1955); Kaminstein, ©: *Key to Universal Copyright Protection*, *id.* at 23; Kaye, *Duration of Copyright Protection and Publication Under the Convention: Articles IV and VI*, *id.* at 39; Kaminstein, *Copyright Formalities—Article III*, 2 *BULL. CR. SOC.* 89 (1955); Kaye, *Duration of Copyright and the Concept of "Dedication"—Articles IV and VI*, *id.* at 93; Sargoy, *The Entry Into Effect in 1955 of the Universal Copyright Convention: A National Report for the U.S.A.*, 5 *BULL. CR. SOC.* 177 (1958).

of the first publication of the work or from its registration prior to publication, as the case may be, provided the term of protection shall not be less than 25 years from the date of first publication or from its registration prior to publication, as the case may be.

"If the legislation of a Contracting State grants two or more successive terms of protection, the duration of the first term shall not be less than one of the minimum periods specified above."

Minimum terms of ten years are provided for photographic works and "works of applied art in so far as they are protected as artistic works." Comparison of terms is permitted, though not required, and the problems presented by a renewal system are also dealt with in this context:

"No Contracting State shall be obliged to grant protection to a work for a period longer than that fixed for the class of works to which the work in question belongs, in the case of unpublished works by the law of the Contracting State of which the author is a national, and in the case of published works by the law of the Contracting State in which the work has been first published.

"For the purposes of the application of the preceding provision, if the law of any Contracting State grants two or more successive terms of protection, the period of protection of that State shall be considered to be the aggregate of those terms. However, if a specified work is not protected by such State during the second or any subsequent term for any reason, the other Contracting States shall not be obliged to protect it during the second or any subsequent term."

Article III, paragraph 1 exempts works protected under the U.C.C. from any formalities as long as the special Convention notice is used. However, with respect to the renewal term, paragraph 5 specifically permits the imposition of any formalities a country wishes:<sup>86</sup>

"If a Contracting State grants protection for more than one term of copyright and the first term is for a period longer than one of the minimum periods prescribed in Article IV, such State shall not be required to comply with the provisions of paragraph 1 of this Article III in respect of the second or any subsequent term of copyright."

The United States is a party to the Universal Copyright Convention, which came into force on September 16, 1955. A foreign work published with a Convention notice and copyrighted in the United States by virtue of the U.C.C. is protected for the first 28-year term without registration or any other formalities. If the present law is still in effect at the end of the first term, the renewal provisions will control; the right to claim renewal will ordinarily revert to the author and his family as in the case of domestic works, and renewal registration will have to be made in the correct name in order to extend the term.<sup>87</sup> A question still undecided is what the Copyright Office will require for renewal registration in case no original registration has previously been made.<sup>88</sup> Theoretically originally registration, with the deposit of a copy, could be demanded as a condition of renewal, but this would hardly be in keeping with the spirit of the Convention. On the other hand, if the renewal system is still in force in 1982, the Copyright Office will have to devise some practical method for determining whether there is any basis for renewal registration in such cases.

Even though some of these provisions of the Universal Copyright Convention are based on the presence of renewals in the U.S. copyright law, there is certainly nothing in the U.C.C. that would require the United States to retain renewals in a future statutory revision. Under the U.C.C. the drafters of a new U.S. statute will be largely free to retain, revise, or reject the duration-renewal provisions of the present law, as they see fit.

#### B. PROVISIONS ANALOGOUS TO RENEWALS IN THE COPYRIGHT LAWS OF OTHER COUNTRIES

##### 1. In general

The U.S. system of copyright renewal—combining the three elements of division into terms, registration as a requirement of the second term, and reversion of ownership—is quite unique in the world. Not even the Philippines renewal (which is based on ours) can be considered comparable, since it does not include

<sup>86</sup> See Kaminstein, *Key to Universal Copyright Protection*, *supra* note B5, at 35; Kaminstein, *Copyright Formalities—Article III*, *supra* note B5, at 92.

<sup>87</sup> See *ibid.*; Cary, in *op. cit. supra* note B5, at 100-03; Sargoy, *supra* note B5, at 200-01.

<sup>88</sup> See Cary, in *op. cit. supra* note B5, at 100-03; Kaminstein, *Key to Universal Copyright Protection*, *supra* note B5, at 35; Kaminstein, *Copyright Formalities—Article III*, *supra* note B5, at 92.



the reversionary element. However, it would be a great mistake to assume that the aims and purposes of the American renewal system are ignored or neglected in foreign copyright laws.

On the contrary, provisions aimed at adjusting the length of the copyright term in a variety of situations are increasingly common in the copyright statutes of other countries. Even more striking are the provisions intended to help preserve and maintain the author's personal and economic rights as against transferees and users, or to give him and his family a "second chance" to benefit from his work. These provisions are extremely common and growing more so; both the scope of these provisions, and the particularity with which they are set out, also appear to be increasing. It is probably no exaggeration to call the growth in provisions regulating an author's contract relations the most important recent development in world copyright law.

This huge subject deserves a more searching analysis than can be given it here. However, it is important to realize that at present the reversionary renewal is the only comparable provision in the U.S. copyright law. If the American renewal system should be abolished or substantially altered, it would seem appropriate to consider some of the alternative methods other countries have adopted to adjust the duration of copyright protection and to regulate the author's contract relations for his benefit. The general summary that follows may furnish a starting point in this direction.

## 2. Adjustment of copyright duration

### a. Division into terms

Except for the lack of a reversion, the duration-renewal provisions of the Philippines law<sup>89</sup> are very similar to those of the United States: a first term of thirty years from registration, with a second term of thirty years if the "proprietor \* \* \* or his assigns or heirs" make renewal registration within the last year of the first term.<sup>90</sup> In Honduras a work of authorship is granted a "patent" for a term of ten, fifteen, or twenty years, "according to the importance of the invention and the wishes of the applicant";<sup>91</sup> the "patent" is subject to annual renewal upon advance payment of a specified fee.<sup>92</sup> Besides the United States, these are the only two countries that can be said to divide copyright duration into terms.

### b. Lapse for failure to register

In Spain<sup>93</sup> and four Latin American countries (Costa Rica,<sup>94</sup> Cuba,<sup>95</sup> the Dominican Republic,<sup>96</sup> and Panama<sup>97</sup>) a kind of renewal device is tied to the registration system. The copyright proprietor is given one year in which to register his work. If registration is not made within this period, the work enters the public domain for a period of ten years,<sup>98</sup> at the end of which the author or his successor is given another one-year period<sup>99</sup> in which to make registration. If registration is not made within this second period, the work passes "definitely and absolutely into the public domain."

### c. Adjustment of term in relation to author's heirs

The laws of several countries<sup>100</sup> undertake to protect the author for his lifetime but provide that, upon his death, the continuation of copyright protection or the length of term depend upon the existence of heirs. If the author left no heirs,

<sup>89</sup> Act of Mar. 6, 1924, § 18; Administrative Order of Sept. 18 and 22, 1947, § 49. The English text of these and all laws, decrees, orders, regulations, etc., cited in this Appendix, together with complete references to source, place of publication, amendments, etc., appear in UNESCO, COPYRIGHT LAWS AND TREATIES OF THE WORLD (CLTW supp-1959).

<sup>90</sup> The terms for works published in parts at intervals are forty years from registration of the first part, with a renewal of 40 years.

<sup>91</sup> Law of Apr. 1, 1919, as amended up to Dec. 14, 1939, art. 4.

<sup>92</sup> *Id.*, arts. 8-9.

<sup>93</sup> Law of Jan. 10, 1879, arts. 36, 38-39.

<sup>94</sup> Decree-Law of June 27, 1896, as amended up to May 25, 1948, arts. 54, 63.

<sup>95</sup> The Spanish copyright law (note B13, *supra*) is in effect in Cuba.

<sup>96</sup> Law of March 17, 1947, art. 16.

<sup>97</sup> Administrative Code, approved by Law of Aug. 22, 1916, arts. 1906-07, 1915.

<sup>98</sup> In the Dominican Republic this period is five years.

<sup>99</sup> In the Dominican Republic this period is two years.

<sup>100</sup> Albania: Decree of Sept. 24, 1947, as amended up to 1951, §§ 9, 11; Bulgaria: Law of Nov. 16, 1951, as amended up to July 4, 1956, § 18; Czechoslovakia: Law of Dec. 22, 1953, § 65; Dominican Republic: Law of Mar. 17, 1947, art. 31; El Salvador: Law of June 2 & 8, 1900, art. 2; Greece: Act of June 29, 1920, as amended up to Oct. 7, 1943, art. 5; Haiti: Law of Oct. 8, 1885, arts. 5-6; Hashemite Kingdom of Jordan: Ottoman Law of May 8, 1912, arts. 6, 17; Rumania: Decree of June 18, 1956, as amended up to July 24, 1957, arts. 6, 8.

the copyright either expires altogether or continues for a shortened term. The evident theory behind these provisions is that the purpose of copyright—to benefit the author and his family—ceases to exist when those persons are dead.

In three Iron Curtain countries—Albania, Bulgaria, and Rumania—the recently-enacted copyright statutes go even further in the same direction. These laws, the details of which differ, make the duration of copyright protection dependent upon the lifetime or age of certain specified heirs; for example, the Albanian provision reads as follows:

“Upon the death of the author, the copyright shall devolve upon his wife until her death or remarriage, and upon their children until they attain 25 years of age or, if they are unable to earn their subsistence, for such time as this inability continues.

“When a copyright has not devolved upon the wife and children, pursuant to the above provisions, it shall devolve upon the parents for as long as they live or upon the grandchildren (*nipërit*) until they attain 25 years of age, provided they were supported by the author, or by the grandfather or grandmother until the death of such authors or grandparents.”

Surprisingly enough, the Haitian copyright law of 1885 contains a similar provision.

#### d. *Adjustment of term to encourage availability*

The copyright laws of a number of countries contain provisions aimed, at least partly, at balancing the author-publisher's desire for a long term against the public's desire to have the work generally available at the earliest possible time. The American renewal system seeks to accomplish this by requiring a second registration; those relatively few works of continuing commercial value are provided a full term, but the bulk of copyrighted works are allowed to become freely available to the public twice as soon. While the foreign laws approach the problem from several different angles, their basic purpose is much the same.

##### (1) *Right of translation*

In countries where much copyrighted material is published and performed in translation, limitations upon the term of protection for the exclusive right of translation are common. In Greece<sup>B21</sup> the right of translation falls into the public domain after ten years, and the same is true in Nicaragua<sup>B22</sup> for works by non-resident authors. In Iceland,<sup>B23</sup> Japan,<sup>B24</sup> Korea,<sup>B25</sup> Luxemburg,<sup>B26</sup> and Turkey,<sup>B27</sup> the translation right terminates within ten years unless an authorized translation is published domestically within that time; in Egypt<sup>B28</sup> the period is five years, and in Thailand<sup>B29</sup> the ten-year restriction applies only to foreign works. In Yugoslavia,<sup>B30</sup> failure to publish a translation within ten years results in loss of the right to control translation, but the copyright owner remains entitled to indemnification. The recent Mexican statute,<sup>B31</sup> following a pattern established in the Universal Copyright Convention,<sup>B32</sup> permits the granting of a compulsory license to publish Spanish translations under certain conditions, if the copyright owner has failed to do so for seven years.

##### (2) *Compulsory licenses after fixed periods*

The British Copyright Act of 1911<sup>B33</sup> contained two compulsory licensing provisions which were intended to insure that, after the author's death, his works would not be published at too high a price or withheld from the public altogether:

(a) Following a period of 25 years after the author's death, his works could be reproduced for sale without permission, if a notice of intention to reproduce were given in writing, and if royalties of 10% of the sale price were paid under conditions prescribed by the Board of Trade.

<sup>B21</sup> Act of June 29, 1920, as amended up to Oct. 7, 1943, art. 6.

<sup>B22</sup> Civil Code, promulgated by Decree of Feb. 1, 1904, arts. 751, 753.

<sup>B23</sup> Law of Oct. 20, 1905, as amended up to May 23, 1947, § 4.

<sup>B24</sup> Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 7.

<sup>B25</sup> Law approved by Proclamation of Jan. 28, 1957, art. 34.

<sup>B26</sup> Law of May 10, 1898, art. 12.

<sup>B27</sup> Law of Dec. 10, 1951, art. 28.

<sup>B28</sup> United Arab Republic (Egypt): Law of June 24, 1954, art. 8.

<sup>B29</sup> Act of June 16, 1931, § 29.

<sup>B30</sup> Law enacted by Decree of July 10, 1957, art. 52.

<sup>B31</sup> Law of Dec. 29, 1956, arts. 30-31.

<sup>B32</sup> For a discussion of the translation provisions of the U.C.C., see Finkelstein, *Right of Translation: Article V of the Universal Copyright Convention*, in *UNIVERSAL COPYRIGHT CONVENTION ANALYZED* 51 (Kupferman and Fouer, eds. 1955).

<sup>B33</sup> 1 & 2 Geo. 5, c. 46, §§ 3, 4.

(b) At any time after the death of the author of a literary, dramatic, or musical work that had been published or publicly performed, complaint could be made to the Judicial Committee of the Privy Council that the copyright owner had refused to republish or allow republication or performance of the work, and the owner could be ordered to grant a license under terms prescribed by the Judicial Committee.

The 1911 Act has been superseded in the United Kingdom,<sup>B34</sup> but is still in force in Australia,<sup>B35</sup> Canada,<sup>B36</sup> Ceylon,<sup>B37</sup> Federation of Rhodesia and Nyasaland, Israel,<sup>B38</sup> New Zealand,<sup>B39</sup> Pakistan,<sup>B40</sup> the Union of Burma, and the Union of South Africa.<sup>B41</sup> Roughly similar compulsory licensing provisions are also in effect in Greece<sup>B42</sup> and the Hashemite Kingdom of Jordan.<sup>B43</sup>

(3) *Loss of copyright for failure to make available*

Under certain conditions the laws of Spain and three Latin American countries provide for the complete loss of copyright protection for failure to publish or perform a work within a specified period. In Spain<sup>B44</sup> and Cuba,<sup>B45</sup> a literary work that is out of print and has not been republished within a twenty-year period falls into the public domain after denunciation and a one-year opportunity for the owner to reprint. In Costa Rica<sup>B46</sup> a scientific, literary, or artistic work falls into the public domain if not reprinted within 25 years, and copyright in a dramatic or musical work is lost if the work is not published within thirty years. In Uruguay<sup>B47</sup> a work falls into the public domain if not published, performed, or exhibited within ten years after the death of the author, and a Greek legislative decree<sup>B48</sup> contains similar provisions.

e. *Limited terms for specific categories of works*

Aside from the nearly-universal provisions dealing with anonymous, pseudonymous, joint, and posthumous works (which are the necessary result of a term based on the life of the author), many copyright laws contain provisions limiting the term for specified kinds or categories of works. The following table represents a rough count of the number of national laws containing specific limitations:

Category	Number of statutes
Photographs	40
Government publications	25
Works of legal entities, corporate bodies, associations, etc	24
Cinematographic works	21
Sound recordings	20
Composite, collective, periodical works, etc	13
Designs and graphic works	8
Letters, memoirs, and old manuscripts	6
Theatrical sketches, dances, and pantomimes	3
Translations	2
Works of international organizations	2
Reprint editions	2
Television and radio broadcasts	1

<sup>B34</sup> The 1911 Act was repealed by 4 & 5 Eliz. 2, c. 4; see notes B151-73 *infra*, and text thereto.

<sup>B35</sup> Act of Nov. 20, 1912, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B36</sup> CAN. REV. STAT. c. 55, §§ 7, 13 (1952).

<sup>B37</sup> Ceylon Independence Act, 1947 (11 Geo. 6, c. 7) § 4, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B38</sup> Order of Mar. 21, 1924 (maintained in force in Israel and modified up to 1953), incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B39</sup> Act of Nov. 22, 1913, as amended up to Oct. 6, 1924, §§ 6-7.

<sup>B40</sup> Act of Feb. 24, 1914, as amended up to 1951, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B41</sup> Act of Apr. 7, 1916, as amended up to Apr. 28, 1951, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B42</sup> Legislative Decree of Nov. 23, 1942, arts. 2-3.

<sup>B43</sup> Ottoman Law of May 8, 1912, art. 19.

<sup>B44</sup> Law of Jan. 10, 1879, art. 44.

<sup>B45</sup> The Spanish copyright law is in force in Cuba.

<sup>B46</sup> Decree-Law of June 27, 1896, as amended up to May 25, 1948, arts. 64-65.

<sup>B47</sup> Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, art. 14.

<sup>B48</sup> Legislative Decree of Nov. 23, 1942, art. 1.

Many, if not most, of these limitations are based on a belief that the particular kind of work should be freely available to the public within a shorter period than that provided for other works. It is worth noting that the U.S. copyright law contains no special terms; <sup>B40</sup> reliance is placed entirely on the renewal device to throw ephemeral works into the public domain within a reasonable time.

### 3. Reversion or reservation of author's rights

In addition to provisions aimed at adjusting the copyright term in relation to the value and availability of a work, there are among the copyright laws of the world a great many provisions aimed specifically at protecting the author and his family in his business dealings and contract relations. These provisions take a variety of forms, but in general their purpose is the same as that behind the American reversionary renewal: to protect the author and his dependents against transfers which are disadvantageous to him when made, or which become disadvantageous with the passage of time.

#### a. Outright reversion to heirs at a specific time

The British Copyright Act of 1911 <sup>B50</sup> contained a provision making all transfers invalid beyond the end of 25 years from the author's death, with an inalienable reversion to the author's "legal personal representatives as part of his estate." This provision was dropped in the United Kingdom when the new copyright law became effective in 1956, <sup>B51</sup> but it is still in force in ten countries: Australia, <sup>B52</sup> Canada, <sup>B53</sup> Ceylon, <sup>B54</sup> Federation of Rhodesia and Nyasaland, Ireland, <sup>B55</sup> Israel, <sup>B56</sup> New Zealand, <sup>B57</sup> Pakistan, <sup>B58</sup> Union of Burma, and Union of South Africa. <sup>B59</sup>

In Spain, <sup>B60</sup> Cuba, <sup>B61</sup> and Colombia, <sup>B62</sup> if the author leaves "compulsory heirs" (i.e., heirs who inherit as of right and who cannot be disinherited without legitimate cause), all rights of transferees end 25 years after the author's death, and the copyright passes to the "compulsory heirs" for the remaining 55 years. <sup>B63</sup> The Panamanian law <sup>B64</sup> is much the same, although the "compulsory heirs" are specified as the author's parents and children. In France, <sup>B65</sup> where certain rights are inalienable or may revert upon specified conditions, the copyright law provides for a compulsory bequest to the surviving spouse; if the author also leaves "forced heirs" (héritiers à réserve), the spouse must share the copyright with them.

The copyright laws of both El Salvador <sup>B66</sup> and Haiti <sup>B67</sup> apparently provide a reversion at the author's death. In El Salvador the copyright goes to the author's heirs for 25 years if they exercise their rights within one year. In Haiti the copyright goes first to the widow for life and then to the children for twenty years; or, in the absence of children, to the "other heirs or proprietors" for ten years. Under the unusual law of Costa Rica <sup>B68</sup> a transferred copyright belongs to the assignee for his lifetime and to the assignee's successors for twenty years, whereupon it reverts to the author or his heirs and legatees for another thirty years.

<sup>B40</sup> The five-year ad interim copyright might be considered a special exception to this rule, although it is addressed to a different purpose.

<sup>B50</sup> 1 & 2 Geo. 5, c. 46, § 5(b).

<sup>B51</sup> The 1911 Act was repealed by 4 & 5 Eliz. 2, c. 4; see notes B151-73 *infra*, and text thereto.

<sup>B52</sup> Act of Nov. 20, 1912, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B53</sup> CAN. REV. STAT. c. 55, § 12 (5) (1952).

<sup>B54</sup> Ceylon Independence Act, 1947 (11 Geo. 6, c. 7) § 4, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B55</sup> Act of May 20, 1927, as amended up to July 23, 1958, § 158(b)(2).

<sup>B56</sup> Order of Mar. 21, 1924 (maintained in force in Israel and modified up to 1953), incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B57</sup> Act of Nov. 22, 1913, as amended up to Oct. 6, 1924, § 8 (2).

<sup>B58</sup> Act of Feb. 24, 1914, as amended up to 1951, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B59</sup> Act of Apr. 7, 1916, as amended up to Apr. 28, 1951, incorporating the United Kingdom Copyright Act of 1911 (1 & 2 Geo. 5, c. 46).

<sup>B60</sup> Law of Jan. 10, 1879, art. 6.

<sup>B61</sup> The Spanish copyright law is in force in Cuba.

<sup>B62</sup> Law of Dec. 26, 1946, art. 91.

<sup>B63</sup> Article 41 of the Spanish Copyright Regulations (enacted by Royal Decree of Sept. 3, 1880, as amended up to 1919) requires compulsory heirs to prove and register their claims.

<sup>B64</sup> Administrative Code, approved by Law of Aug. 22, 1916, § 1903.

<sup>B65</sup> Law of Mar. 11, 1957, art. 24.

<sup>B66</sup> Law of June 2 and 8, 1900, art. 2.

<sup>B67</sup> Law of Oct. 8, 1885, art. 6.

<sup>B68</sup> Decree-Law of June 27, 1896, as amended up to May 25, 1948, art. 4.

In three East European countries—Albania,<sup>B60</sup> Bulgaria,<sup>B70</sup> and Rumania<sup>B71</sup>—the copyright as such is inalienable, and upon the author's death it passes to certain "lawful" heirs. The duration of the rights enjoyed by these heirs is made to depend upon their relationship to the author and the degree of their dependency upon him.

b. *Limitations on alienability and regulation of contract relations for author's benefit*

(1) *General restrictions on alienability*

There are at present three countries—Austria,<sup>B72</sup> Bulgaria,<sup>B73</sup> and Rumania<sup>B74</sup>—in which it is impossible for an author to assign away his entire copyright during his lifetime. Copyright in those countries is inalienable, and although the author may grant an exclusive right to use his work in a particular way, he always retains any rights he has not specifically transferred. This theory of the inalienability of copyright has also been adopted in the recent German draft statutes,<sup>B75</sup> and may mark a new trend in the basic philosophy of the copyright law.

In addition to inalienability, the Bulgarian statute<sup>B76</sup> limits the duration of all transfers to five years, and in Rumania<sup>B77</sup> a particular right may be assigned "only for a limited time." Albania<sup>B78</sup> permits assignments of all or part of a copyright, but only for a period of ten years or less. Several countries limit the duration of contracts for particular uses; for example, contracts for performance in France<sup>B79</sup> and for cinematographic adaptation in Czechoslovakia<sup>B80</sup> are limited to five years, and publishing contracts are limited to twenty years in Italy<sup>B81</sup> and four years in Hungary.<sup>B82</sup> In Russia<sup>B83</sup> publishing contracts can last no longer than four years, and a maximum duration of three years is provided for performing contracts. Provisions allowing rights in contributions to periodicals to revert to the author after a short period also appear in several statutes.<sup>B84</sup>

Another general method of protecting the author against unwittingly assigning away more than he bargained for is to require that the contract specify the exact nature of the right transferred. Provisions of this type are quite common,<sup>B85</sup> and a good example is found in the recent French law:<sup>B86</sup>

<sup>B60</sup> Decree of Sept. 24, 1947, as amended up to 1951, § 9.

<sup>B70</sup> Law of Nov. 16, 1951, as amended up to July 4, 1956, art. 18.

<sup>B71</sup> Decree of June 18, 1956, as amended up to July 24, 1957, arts. 3(6), 6.

<sup>B72</sup> Act of Apr. 9, 1936, as amended up to July 8, 1953, §§ 23-24.

<sup>B73</sup> Law of Nov. 16, 1951, as amended up to July 4, 1956, § 20.

<sup>B74</sup> Decree of June 18, 1956, as amended up to July 24, 1957, art. 3.

<sup>B75</sup> See Strauss, *Summary of the German Draft Law on Copyright and the Report*

*of the Drafting Commission* 3-4, 12-13 (Copyright Society of U.S.A., Translation Service 1955, No. 2a); 26 REVUE INTERNATIONALE DU DROIT D'AUTEUR 121 (1960). The report accompanying the 1954 draft explained that moral rights are inalienable under the present law, and that the "rights of use" in a work are so closely connected with the author's moral rights that "a separate treatment of these rights does not seem possible." Thus, an author would be prohibited from alienating his copyright in whole or in part, and the most he could do would be to grant an exclusive license covering a particular right to use; "[a]ssignment of the right would forever deprive the author of such assigned part of the copyright, which would be in contradiction to the nature of copyright." Strauss, *op. cit. supra* at 3. The 1959 draft also adopts this principle, and goes even further; an author would be permitted to participate in the revenue received by a licensee whenever it is obviously out of proportion to the fee paid to the author, in consideration of all the circumstances.

<sup>B76</sup> Note B73, *supra*.

<sup>B77</sup> Note B74, *supra*.

<sup>B78</sup> Decree of Sept. 24, 1947, as amended up to 1951, § 7.

<sup>B79</sup> Law of Mar. 11, 1957, art. 44.

<sup>B80</sup> Law of Dec. 22, 1953, § 47(1).

<sup>B81</sup> Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 122.

<sup>B82</sup> Decree of Apr. 21, 1951, § 3.

<sup>B83</sup> U.S.S.R.: Joint Resolution of May 16, 1928, § 17; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 18-19, 32-33; Ukrainian S.S.R.: Joint Resolution of Feb. 6, 1929, §§ 17, 21.

<sup>B84</sup> See, e.g., Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, § 36; Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, art. 859; German Federal Republic: Act of June 19, 1901, as amended up to Dec. 13, 1934, § 42; Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(3); Korea: Law of Jan. 28, 1957, art. 54; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, art. 382; Venezuela: Law of June 28-July 13, 1928, art. 81.

<sup>B85</sup> See, e.g., Albania: Decree of Sept. 24, 1947, as amended up to 1951, § 7; Bulgaria: Law of Nov. 16, 1951, as amended up to July 4, 1956; Czechoslovakia: Law of Dec. 22, 1953, § 28(1); Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 17a; Turkey: Law of Dec. 10, 1951, art. 52; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 18, 32; United Arab Republic (Egypt): Law of June 24, 1954, art. 37.

<sup>B86</sup> Law of Mar. 11, 1957, art. 31.

"The transfer of authors' rights shall be subject to the condition that each of the rights transferred shall be specifically mentioned in the act of transfer, and that the field of exploitation of the rights transferred shall be delimited as to extent and purpose, as to place, and as to duration."

In a sense, a system of this kind approaches inalienability of copyright. The author would probably retain some kind of interest in even the most comprehensive transfer, if nothing more than rights in uses resulting from future technological developments.

(2) *Reversion for failure to exploit the work*

The laws of some thirty countries contain provisions which, under various circumstances, permit an author to reclaim his exclusive rights if his transferee fails or ceases to exploit the work. The theory behind these provisions is that authors mainly benefit from continued exploitation; if the transferee suppresses or abandons a work, the exclusive rights should revert to the author so that he can make a new bargain. This system of reversion for failure to exploit does not, of course, go as far as the American renewal system, which provides an automatic reversion whether the transferee is still exploiting the work or not. Up to a point, however, the purposes and results of the two systems are much the same.

(a) *Reversion for failure to begin exploitation within specified time limits*

The most common reversion provision of this type permits rescission of the author's contract after a certain period, if the transferee has failed to start publishing, performing, or otherwise using the work during that time. In several countries the relevant period must be set out in the agreement,<sup>B87</sup> and most of these laws also provide that the contractual period cannot be longer than a certain maximum.<sup>B88</sup> Other statutes establish a statutory minimum period within which the work must be exploited, either in all cases<sup>B89</sup> or in those cases in which the contract itself does not stipulate a time limit.<sup>B90</sup> In still other countries these provisions are combined in various ways; <sup>B91</sup> for example, the Danish statute <sup>B92</sup> provides:

"In the absence of an agreement to the contrary in the publishing contract, the publisher shall be required to publish the work within one year of receiving the complete manuscript.

"If the work has not been published within 4 years of delivery of the complete manuscript, the author \* \* \* shall be entitled to demand that publication take place within one year of the presentation of such demand regardless of stipulations on this matter in the publishing contract.

"If publication has not taken place before the expiration of the said period, the right of the publisher to publish the work shall terminate; this, however, shall not involve the forfeiture of royalties already paid or due."

The various statutes differ as to what the author must do to reclaim his rights. In some countries the reversion is apparently automatic,<sup>B93</sup> in others the author

<sup>B87</sup> Czechoslovakia: Law of Dec. 22, 1953, §§ 28(1), 37; France: Law of Mar. 11, 1957, art. 63; statutes cited in note B88, *infra*; see Yugoslavia: Law enacted by Decree of July 10, 1957, art. 17.

<sup>B88</sup> Czechoslovakia: Law of Dec. 22, 1953, §§ 28(1), 43(1); France: Law of Mar. 11, 1957, art. 44; Poland: Law of July 10, 1952, arts. 35, 36, 38, 46; U.S.S.R.: Joint Resolution of May 16, 1928, § 17; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 18, 22-23, 32, 34, 40; Ukrainian S.S.R.: Joint Resolution of Feb. 6, 1929, §§ 17, 19, 22-23; Byelorussian Republic: Resolution of Jan. 14, 1929, § 6; see Uruguay: Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, art. 32.

<sup>B89</sup> Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 46; Colombia: Law of Dec. 26, 1946, art. 55; Czechoslovakia: Law of Dec. 22, 1953, §§ 48, 51, 54; Dominican Republic: Law of Mar. 17, 1947, art. 8; Iceland: Law of Oct. 20, 1905, as amended up to June 5, 1947, § 10; Norway: Law of June 6, 1930, art. 28; Paraguay: Law of July 5-10, 1951, art. 35; Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 17.

<sup>B90</sup> Bulgaria: Code of Contracts and Obligations promulgated by Edict of Nov. 14, 1950, §§ 274, 277; Greece: Act of June 29, 1920, as amended up to Dec. 7, 1944, art. 12; Hungary: Decree of Apr. 21, 1951, § 9; Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(5); Korea: Law approved by Proclamation of Jan. 28, 1957, arts. 51, 61; Mexico: Law of Dec. 29, 1956, arts. 46-47, 64; Portugal: Decree of May 27, 1927, arts. 45, 76; see Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, art. 1360; Peru: Civil Code adopted by Law of May 29-June 2, 1936, art. 1680.

<sup>B91</sup> Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, arts. 127-28, 139; Nicaragua: Civil Code promulgated by Decree of Feb. 1, 1904, arts. 774-77.

<sup>B92</sup> Law of Apr. 26, 1933, § 9.

<sup>B93</sup> See, e.g., Dominican Republic: Law of Mar. 17, 1947, art. 8; France: Law of Mar. 11, 1957, art. 44; Greece: Act of June 29, 1920, as amended up to Dec. 7, 1944, art. 12; Hungary: Decree of Apr. 21, 1951, § 9.

must file a notice,<sup>B94</sup> petition the court,<sup>B95</sup> or give the transferee another opportunity to exploit the work within a certain period.<sup>B96</sup> In addition to a reversion, or as an alternative, some statutes entitle the author to specific performance or damage,<sup>B97</sup> and many specify that the author is under no obligation to repay any remuneration he has already received.<sup>B98</sup>

(b) *Reversion for failure to continue exploitation*

Also extremely common are provisions requiring the transferee to keep works in print, to publish new editions, or to perform the work with reasonable continuity, on pain of having his exclusive rights revert to the author.<sup>B99</sup> Some statutes simply provide that a contract ends automatically whenever the agreed editions are out of print "irrespective of the stipulated term."<sup>B100</sup> Others provide for the fixing of time limits for republication or performance,<sup>B101</sup> or actually specify time limits within which the transferee must republish or perform in order to retain his rights.<sup>B102</sup> A few laws also provide criteria for determining when a work has gone out of print.<sup>B103</sup>

(c) *Reversion for bankruptcy or dissolution*

The statutes of several countries contain provisions which, under a variety of circumstances, permit reversion to the author when the transferee becomes bankrupt or ceases to exist.<sup>B104</sup>

(3) *Restrictions and presumptions concerning contractual provisions, rights and obligations*

Anyone making a general survey of the current copyright laws of the world cannot fail to be impressed by the prevalence of provisions dealing with the actual content and meaning of authors' contracts. Provisions of this type now exist in the laws of at least 28 countries, and usually these provisions are both extensive and detailed. Most appear in the basic copyright statute<sup>B105</sup> or regulations,<sup>B106</sup> some in the nation's organic law on contracts,<sup>B107</sup> and a few in special laws or decrees.<sup>B108</sup> Quite a number of the statutes contain general provisions dealing

<sup>B94</sup> See, e.g., Mexico: Law of Dec. 29, 1956, arts. 46-47, 64.

<sup>B95</sup> See, e.g., Peru: Civil Code adopted by Law of May 29-June 2, 1936, art. 1680.

<sup>B96</sup> See, e.g., Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, art. 1360; Denmark: Law of Apr. 26, 1933, § 9; France: Law of Mar. 11, 1957, art. 63; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, § 23; Uruguay: Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, art. 32.

<sup>B97</sup> See, e.g., Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 46; Dominican Republic: Law of Mar. 17, 1947, art. 8; Mexico: Law of Dec. 29, 1956, art. 46; Portugal: Decree of May 27, 1927, art. 76.

<sup>B98</sup> See, e.g., Czechoslovakia: Law of Dec. 22, 1953, §§ 48, 51, 54; Denmark: Law of Apr. 26, 1933, § 9; Dominican Republic: Law of Mar. 17, 1947, art. 8; Mexico: Law of Dec. 29, 1956, art. 46; Nicaragua: Civil Code promulgated by Decree of Feb. 1, 1904, art. 777; Poland: Law of July 10, 1952, art. 38; Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 17.

<sup>B99</sup> Iceland: Law of Oct. 20, 1905, as amended up to June 5, 1947, § 9; Norway: Law of June 6, 1930, § 27; Ukrainian S.S.R.: Joint Resolution of Feb. 6, 1929, § 20; statutes cited in notes B100-02 *infra*.

<sup>B100</sup> Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 44; Colombia: Law of Dec. 26, 1946, art. 62; Mexico: Law of Dec. 29, 1956, art. 52.

<sup>B101</sup> Czechoslovakia: Law of Dec. 22, 1953, § 40; France: Law of Mar. 11, 1957, art. 63; Germany: Act of June 19, 1901, as amended up to Dec. 13, 1934, § 29; Korea: Law of Jan. 28, 1957, arts. 55, 61; Peru: Civil Code adopted by Law of May 29-June 2, 1936, art. 1673; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, art. 383; Venezuela: Law of June 28-July 13, 1928, art. 99.

<sup>B102</sup> Denmark: Law of Apr. 26, 1933, §§ 9-10; Dominican Republic: Law of May 17, 1947, art. 8; France: Law of Mar. 11, 1957, art. 44; Iceland: Law of Oct. 20, 1905, as amended up to June 5, 1947, § 10; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 124; Norway: Law of June 6, 1930, art. 28; Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 18; Uruguay: Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, art. 32.

<sup>B103</sup> France: Law of Mar. 11, 1957, art. 63; Mexico: Law of Dec. 29, 1956, art. 52.

<sup>B104</sup> Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, § 32; Czechoslovakia: Law of Dec. 22, 1953, § 27; Italy: Law of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 135; Portugal: Decree of May 27, 1927, art. 64; Switzerland: Code of Obligations promulgated by Law of Mar. 30, 1911, art. 392; Venezuela: Law of June 28-July 13, 1928, art. 113.

<sup>B105</sup> This is the case in Argentina, Austria, Brazil, Colombia, Czechoslovakia, Denmark, France, Iceland, Italy, Japan, Korea, Mexico, Nicaragua, Norway, Paraguay, Poland, Portugal, Rumania, Sweden, Turkey, U.S.S.R., and Venezuela.

<sup>B106</sup> This is the case in Spain.

<sup>B107</sup> This is the case in Bulgaria, Peru, and Switzerland.

<sup>B108</sup> This is the case in Germany and Hungary.

with all types of contracts, but the most common provisions are directed specifically at transfers of publishing and performance rights; some also deal with contracts covering publication in periodicals and use in broadcasting, motion pictures, and sound recordings.

As the following summary will show, these provisions bear little or no surface resemblance to the American renewal system. To a great extent, however, their underlying purposes are identical: to protect the author against disadvantageous, unprofitable, or unfair transfers, and to put him in a position to receive an adequate and continuing return from his creation.

(a) *General restrictions on contents of contracts*

As might be expected, the most rigid control over an author's contract relations is found in the statutes of the Iron Curtain countries.<sup>B109</sup> The details of these laws differ, but in general they require that every contract contain certain specified provisions. In most of these countries a government bureau provides model contracts, and no contractual provision can deviate from these models unless it is more generous to the author than they are. In certain cases the government can take over a copyright for its own purposes, but the author is still entitled to full remuneration.

Requirements that contracts specify certain definite things are by no means confined to Iron Curtain statutes. Among the most common requirements of this type are the following:

(1) The contract must state its duration, the period within which the work must be published or performed, or both;<sup>B110</sup>

(2) The contract must specify the number of editions, copies, performances, etc., permissible under it;<sup>B111</sup>

(3) The contract must specify the remuneration due the author.<sup>B112</sup>

In some cases a contract is apparently considered invalid unless it contains the required provisions; for example, the Egyptian statute provides:

"In order to be valid, the act of assignment must be in writing; it must expressly specify, distinctly and in detail, each of the rights assigned, precisely defining its scope, purpose, duration and place of exploitation."<sup>B113</sup>

Usually, however, the law establishes a definite presumption—concerning the time period, the number of editions or copies, or even the amount of remuneration—which controls in the absence of a specific provision; the Italian law provides, for example:

"The number of editions and the number of copies of each edition shall be specified in the contract. However, alternatives may be provided for, either in respect of the number of editions and copies, or in respect of the remuneration based thereon.

"In the absence of such indications, it shall be understood that the contract has for its object a single edition of not more than 2,000 copies."<sup>B114</sup>

In addition, some of the statutes place a ceiling on the time periods or numbers of editions or copies which a contract can validly specify,<sup>B115</sup> or a floor on the amount of the author's royalty.<sup>B116</sup>

Besides provisions which a contract must contain, a number of statutes specify certain provisions which are considered invalid if included in an agreement. The most common examples are provisions dealing with "personal rights" (such

<sup>B109</sup> Bulgaria: Code of Contracts and Obligations promulgated by Edict of Nov. 14, 1950, § 271; Czechoslovakia: Law of Dec. 22, 1953, §§ 28, 31-32; Hungary: Decree of Apr. 21, 1951, §§ 3, 11-12; Poland: Law of July 10, 1952, arts. 33, 41; Rumania: Decree of June 18, 1956, as amended up to July 24, 1957, arts. 3, 19, 23-26; U.S.S.R.: Joint Resolution of May 16, 1928, § 17; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 18-22, 26-27, 32-34; Ukrainian S.S.R.: Joint Resolution of Feb. 6, 1926, §§ 17-19, 29; Yugoslavia: Law enacted by Decree of July 10, 1957, art. 81.

<sup>B110</sup> See, e.g., Colombia: Law of Dec. 26, 1946, arts. 59-60; France: Law of March 11, 1957, arts. 31, 44.

<sup>B111</sup> See, e.g., Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 40; Colombia: Law of Dec. 26, 1946, art. 59; France: Law of Mar. 11, 1957, art. 51; Norway: Law of June 6, 1930, § 25; Portugal: Decree of May 27, 1927, art. 44; Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 17; Venezuela: Law of June 28-July 13, 1928, arts. 89-90.

<sup>B112</sup> See, e.g., Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 40; France: Law of Mar. 11, 1957, arts. 35-36, 52; Paraguay: Law of July 5-10, 1951, art. 34.

<sup>B113</sup> Law of June 24, 1954, art. 37.

<sup>B114</sup> Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 122.

<sup>B115</sup> See, e.g., Bulgaria: Code of Contracts and Obligations promulgated by Edict of Nov. 14, 1950, § 271; France: Law of Mar. 11, 1957, art. 44; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 122; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 19, 21-22, 33-34.

<sup>B116</sup> See note B121 *infra*.



as the various so-called "moral rights" and the "droit de suite"), which some laws make inalienable and unwaivable.<sup>3117</sup> Several statutes also contain provisions restricting the scope or duration of assignments of future works;<sup>3118</sup> and in two countries a transfer cannot validly include rights which may arise under future copyright laws, and which are greater in scope or duration than those arising under existing law.<sup>3119</sup>

(b) *Provisions controlling or affecting author's compensation*

Direct or indirect government regulation and control of the amount of remuneration an author receives appears to be a trend in recent copyright legislation. The provisions of a number of statutes establishing and regulating performing rights societies and other authors' protective associations<sup>3120</sup> tend in this direction, since the government is given effective control over the collection and distribution of royalties. Even more striking are the elaborate schedules of mandatory royalty rates for particular uses, which have been adopted by governments on both sides of the Iron Curtain.<sup>3121</sup> Another significant development is represented by the "cultural funds"—government funds similar to the trust funds of American unions—which are created as an adjunct to the royalties paid to authors, and which are used to support indigent creators and to promote cultural projects.<sup>3122</sup> The "lending library" funds in the Scandinavian countries,<sup>3123</sup> under which authors have an unwaivable right to remuneration from the secondary uses of their books, also appear to fall into this pattern.

A number of other statutes, while stopping short of actually prescribing royalty rates, either require that the author's remuneration be stated in the contract,<sup>3124</sup> or provide that a requirement of consideration will be presumed in the absence of clear language to the contrary.<sup>3125</sup> An interesting and possibly portentous provision was introduced in the Italian statute in 1941<sup>3126</sup> and adopted with elaborations in the new French law of 1957,<sup>3127</sup> it requires, as a general rule, that any total or partial transfer must be on a royalty basis, giving the author "a proportionate participation in the receipts resulting from sale or exploitation of the work." However, a variety of exceptions, permitting lump sum assignments in particular situations, are also provided, and the practical effect of the provision is still an open question.

(c) *Rules of contract interpretation*

The statutes of a number of countries also contain a variety of provisions establishing presumptions and rules of contract interpretation for the author's

<sup>3117</sup> See notes B144-50 *infra*, and text thereto.

<sup>3118</sup> See, e.g., Austria: Act of Apr. 9, 1938, as amended up to July 8, 1953, § 31; France: Law of Mar. 11, 1957, arts. 33-34; Hungary: Law of Dec. 29, 1921, § 3; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 120; Mexico: Law of Dec. 29, 1956, art. 42; Turkey: Law of Dec. 10, 1951, art. 48; U.A.R. (Egypt): Law of June 24, 1954, art. 40; Venezuela: Law of June 28-July 18, 1928, arts. 63-64.

<sup>3119</sup> Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 119; Turkey: Law of Dec. 10, 1951, art. 51.

<sup>3120</sup> See, e.g., Chile: Decree of Sept. 28, 1953; Czechoslovakia: Law of Dec. 22, 1953, §§ 71-72; India: Act of June 4, 1957, §§ 83-85; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, arts. 180-84; Japan: Law of Apr. 5, 1939, as amended up to June 6, 1952; Mexico: Law of Dec. 29, 1956, arts. 80-110; Switzerland: Federal Law of Sept. 25, 1940; Yugoslavia: Law enacted by Decree of July 10, 1957, arts. 69-74.

<sup>3121</sup> See, e.g., Chile: Law of Jan. 10, 1935, Decree of May 16, 1951; Czechoslovakia: Decree of Apr. 25, 1956, as amended up to Oct. 31, 1956; Hungary: Decrees of Jan. 31 and June 14, 1958; Mexico: Rate Schedules of July 29, 1957; Rumania: Order of Oct. 5, 1950; Spain: Regulations enacted by Royal Decree of Sept. 3, 1950, as amended up to Oct. 7, 1919, arts. 96-103; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 20, 88, Resolutions of July 12, 1944 and July 15, 1947.

<sup>3122</sup> Chile: Decree of Nov. 19, 1942; Czechoslovakia: Law of Dec. 22, 1953, §§ 73-80; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 180; Norway: Law of Dec. 14, 1956.

<sup>3123</sup> Denmark: Law of May 27, 1950; Norway: Law of Dec. 12, 1947; Sweden: Royal Decree of June 17, 1955, as amended up to Nov. 8, 1957. Proposals for funds of this type were also incorporated in the new German draft law and are being presently considered in Great Britain.

<sup>3124</sup> See note B112 *supra*.

<sup>3125</sup> See, e.g., Colombia: Law of Dec. 26, 1946, art. 58; Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 22; Paraguay: Law of July 5-10, 1951, art. 34; Portugal: Decree of May 27, 1927, art. 41; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, art. 888; Venezuela: Law of June 28-July 18, 1928, art. 102.

<sup>3126</sup> Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 130.

<sup>3127</sup> Law of Mar. 11, 1957, arts. 35-36, 52.

benefit.<sup>B120</sup> The general thought behind these provisions is that assignments and transfers in the copyright field should be interpreted restrictively, and that, in the absence of an express agreement to the contrary, the transfer of one right gives the transferee nothing beyond what is necessary for the exercise of that right. Although the various provisions differ widely, that of Italy can be considered fairly typical:

"In the absence of an express stipulation, alienation shall not extend to the rights of utilization in later elaborations and transformations to which the work may lend itself, including adaptations to cinematography, broadcasting, and recording upon mechanical contrivances.

"In the absence of an agreement to the contrary, the alienation of one or more of the rights of utilization shall not imply the transfer of other rights which are not necessarily dependent upon the right transferred, even if, according to the provisions of Part I, they are included in the same category of exclusive rights."<sup>B120</sup>

(d) *Right of author to rescind or withdraw from contract*

Many countries also permit the author to extricate himself from an unsatisfactory contractual relationship under certain circumstances. As we have seen,<sup>B120</sup> provisions entitling the author to rescind a contract if the transferee fails to exploit the work within certain contractual or statutory time limits are quite common. Other grounds for rescission are, for example: (1) "where the right to use is not exploited in accordance with the purpose for which it is granted";<sup>B121</sup> (2) "if the work is published or performed in a manner prejudicial to the value of the work";<sup>B122</sup> or (3) "when circumstances arise that could not have been foreseen at the time of the contract."<sup>B123</sup> In a few countries an author is given the opportunity (sometimes for a limited time) to cancel a contract and withdraw a work for any reason, subject to indemnification of his transferee;<sup>B124</sup> some statutes treat the right to withdraw as a sort of "moral right" and restrict the author's freedom to waive it in advance.<sup>B125</sup>

(e) *Restrictions on retransfer*

One of the most common statutory provisions dealing with the author's contractual relationships involves a transferee's right to assign or license his rights to a third person. For the most part these provisions permit retransfer only with the express consent of the author or his heirs,<sup>B126</sup> although in a few cases such retransfers are prohibited outright<sup>B127</sup> or require government approval.<sup>B128</sup> Under some provisions a retransfer may be grounds for rescission of the contract.<sup>B129</sup>

<sup>B120</sup> See, e.g., Austria: Act of Apr. 9, 1936, as amended up to Sept. 8, 1953, §§ 33, 36; Chile: Decree-Law of Mar. 17, 1925, as amended up to Dec. 28, 1949, art. 9; Denmark: Law of Apr. 26, 1933, § 9; France: Law of Mar. 11, 1957, arts. 30, 45; Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 2; Lebanon: Decree of Jan. 17, 1924, as amended up to Jan. 31, 1946, art. 146; Liechtenstein: Law of Oct. 26, 1928, art. 9; Mexico: Law of Dec. 29, 1956, arts. 24, 65-66; Norway: Law of June 6, 1930, § 13; Sweden: Law of May 30, 1919, as amended up to June 24, 1955, art. 9; U.A.R. (Egypt): Law of June 24, 1954, art. 37.

<sup>B121</sup> Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 119.

<sup>B122</sup> See notes B87-104 *supra*, and text thereto.

<sup>B123</sup> Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, § 29.

<sup>B124</sup> Czechoslovakia: Law of Dec. 22, 1953, § 44.

<sup>B125</sup> Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 35.

<sup>B126</sup> See, e.g., Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(8); Portugal: Decree of May 27, 1927, art. 34; Spain: Regulations enacted by Royal Decree of Sept. 3, 1880, as amended up to Oct. 7, 1919, art. 93; Venezuela: Law of June 23-July 13, 1928, art. 72.

<sup>B127</sup> See, e.g., Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, § 29; France: Law of Mar. 11, 1957, art. 32; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 142; U.A.R. (Egypt): Law of June 24, 1954, art. 42; Uruguay: Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, art. 13.

<sup>B128</sup> See, e.g., Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, §§ 27-28; Colombia: Law of Dec. 26, 1946, art. 56; Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 28; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, arts. 132, 136; Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(9); Portugal: Decree of May 27, 1927, art. 46; Turkey: Law of Dec. 10, 1951, art. 49; R.S.F.S.R.: Joint Resolution of Oct. 8, 1928, §§ 24, 44.

<sup>B129</sup> See, e.g., Denmark: Law of Apr. 26, 1933, § 10; Sweden: Law of May 30, 1919, as amended up to Apr. 24, 1931, § 18; Venezuela: Law of June 28-July 13, 1928, art. 137.

<sup>B130</sup> See, e.g., Hungary: Decree of Apr. 21, 1951, § 10; Rumania: Decree of June 18, 1956, as amended up to July 24, 1957, art. 28.

<sup>B131</sup> See, e.g., France: Law of Mar. 11, 1957, art. 62; Rumania: Decree of June 18, 1956, as amended up to July 24, 1957, art. 28.

(f) *Special obligations of transferee to author*

Statutory provisions establishing additional duties owed by the transferee to the author as part of their contractual relationship are also numerous. Those most frequently encountered involve: (1) the duty of the transferee to maintain accounts and to allow inspection of his books;<sup>B140</sup> (2) the right of the author to object to the selling price if it affects the work's dissemination;<sup>B141</sup> (3) the disposition of unsold copies when a contract ends;<sup>B142</sup> and (4) the duty of the transferee to notify the author of new editions in advance and to permit him to make revisions.<sup>B143</sup>

c. *Special rights reserved to the author*

In addition to rights of economic exploitation, a number of laws accord to the author certain "personal" or "moral" rights; these remain with him even when he has alienated his entire copyright, and under some statutes cannot be transferred or even waived.<sup>B144</sup> These "moral rights" include the right of the author to claim authorship, to divulge his work when and how he chooses, to have his name appear as author, to oppose distortions, mutilations, or other modifications that would injure his honor or reputation, and to require faithful adherence to the text of his work. The right of the author to withdraw his work from the public is sometimes considered a "moral right";<sup>B145</sup> the same can be said for the numerous provisions prohibiting the transferee from making any unauthorized alterations and reserving to the author the right to alter, correct, recast, or translate his work regardless of any transfers.<sup>B146</sup> Similarly, provisions permitting the author to publish a work in a collected edition despite an earlier transfer for separate publication (and vice versa)<sup>B147</sup> appear to fall into this category.

It is a truism that the moral right of the author is not recognized under American copyright law, but to a limited extent the renewal system accomplishes the same result. If all contractual obligations are cut off at the end of 28 years, the author or his family regain full control not only of the right of economic exploitation, but also of all the personal rights in the work that could be called "moral." Assuming that he has not parted with his rights in the renewal term,

<sup>B140</sup> See, e.g., Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, art. 1354; France: Law of Mar. 11, 1957, arts. 39, 46, 59, 60; Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 24; Mexico: Law of June 6, 1930, art. 67; Peru: Civil Code adopted by Law of May 29-June 2, 1936, art. 1675; Portugal: Decree of May 27, 1927, art. 52; Venezuela: Law of June 28-July 13, 1928, art. 103.

<sup>B141</sup> See, e.g., Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, art. 1358; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 131; Peru: Civil Code adopted by Law of May 29-June 2, 1936, art. 1678; Portugal: Decree of May 27, 1927, art. 48; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, art. 384.

<sup>B142</sup> See, e.g., Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, art. 43; France: Law of Mar. 11, 1957, art. 56; Germany: Act of June 19, 1901, as amended up to May 22, 1910, § 29; Italy: Act of Apr. 22, 1941, as amended up to Aug. 23, 1946, art. 133; Mexico: Law of Dec. 29, 1956, art. 51; Venezuela: Law of June 28-July 13, 1928, art. 105.

<sup>B143</sup> See, e.g., Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(7); Korea: Law approved by Proclamation of Jan. 28, 1957, art. 52; Mexico: Law of Dec. 29, 1956, art. 44; Poland: Law of July 10, 1952, art. 39; Portugal: Decree of May 27, 1927, art. 57; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, art. 385.

<sup>B144</sup> For a general discussion of the author's moral right, see Strauss, *The Moral Right of the Author*. [Study No. 4 in the present series of committee prints.]

<sup>B145</sup> See notes B-130-35 *supra*, and text thereto.

<sup>B146</sup> See, e.g., Argentina: Law of Sept. 28, 1933, as amended up to Oct. 2, 1957, arts. 38-39, 51; Brazil: Civil Code promulgated by Law of Jan. 1, 1916, as amended up to Jan. 15, 1919, arts. 659, 1350; Finland: Law of June 3, 1927, as amended up to Mar. 28, 1941, § 22; France: Law of Mar. 11, 1957, art. 56; Germany: Act of June 19, 1901, as amended up to May 22, 1910, §§ 12-13, 20; Hungary: Law of Dec. 29, 1921, § 3; Iceland: Law of Oct. 20, 1905, as amended up to June 5, 1947, § 9; Korea: Law approved by Proclamation of Jan. 28, 1957, arts. 16, 17, 42; Mexico: Law of Dec. 29, 1956, arts. 24, 40-41; Netherlands: Law of Sept. 23, 1912, art. 25; Nicaragua: Civil Code promulgated by Decree of Feb. 1, 1904, arts. 742, 763; Paraguay: Law of July 5-10, 1951, art. 33; Poland: Law of July 10, 1952, arts. 31, 42; Portugal: Decree of May 27, 1927, arts. 56, 62, 75; Spain: Regulations enacted by Royal Decree of Sept. 3, 1880, as amended up to Oct. 7, 1919, art. 66; Switzerland: Code of Obligations promulgated by Federal Law of Mar. 30, 1911, arts. 385, 387; Turkey: Law of Dec. 10, 1951, art. 55; Venezuela: Law of June 28-July 13, 1928, arts. 67-68, 93-94, 125.

<sup>B147</sup> See, e.g., Austria: Act of Apr. 9, 1936, as amended up to July 8, 1953, § 34; Czechoslovakia: Law of Dec. 22, 1953, § 38; France: Law of Mar. 11, 1957, art. 36; Japan: Law of Mar. 4, 1899, as amended up to May 15, 1958, art. 28(3); Norway: Law of June 6, 1930, § 27; Poland: Law of July 10, 1952, art. 45; Venezuela: Law of June 28-July 13, 1928, arts. 66, 86, 88.

at the beginning of the 29th year the author's "moral rights" are restored to him to deal with as he wishes.

An even closer analogy to renewal is found in the "droit de suite" system in effect in France<sup>3148</sup> and several other countries.<sup>3149</sup> Here, in general, the author of an original work of art or similar creation is entitled to participate in the proceeds of every public resale of the original, if there has been any substantial increase in price. This seems a perfect example of the "second chance" theory in operation, and a recent commentator has pointed out the similarity to renewals.<sup>3150</sup>

#### C. BRITISH COMMONWEALTH DEVELOPMENTS

Some interesting and significant legislative developments have taken place in three British Commonwealth countries in recent years, and these appear to have direct bearing on the American renewal system.

##### 1. *British Copyright Act, 1911*

As noted above,<sup>3151</sup> the British Act of 1911 (which is still widely in effect in countries now or formerly part of the British Commonwealth) contained three provisions roughly analogous to renewals in the United States:

a. For the last 25 years of a copyright (beginning 25 years after the author's death) his works could be published under an automatic compulsory license, upon payment of a 10% royalty.

b. During the same 25-year period the copyright reverted to the author's estate.

c. If republication or performance were refused at any time after the author's death, upon complaint the Privy Council could grant a compulsory license.

##### 2. *The Brussels Convention, 1948*

In the preparatory discussions preceding the Brussels Convention of 1948, there was a view that at least the first of these provisions was in conflict with the Berne Union term, and that it stood in the way of adoption of a uniform minimum term of life-plus-fifty.<sup>3152</sup> Apparently the British representatives, both before and during the Brussels Conference, indicated definitely that this provision would be dropped from their law; on the strength of these declarations the Conference made life-plus-fifty a compulsory minimum and dropped a proposed exception that would have expressly permitted retention of the 25-year compulsory license.<sup>3153</sup>

##### 3. *The Gregory Report, 1952*

The 1952 Report of the Gregory Committee,<sup>3154</sup> which recommended sweeping revisions of the United Kingdom copyright law, considered the two compulsory licensing provisions, and concluded that their effectiveness at making works widely and cheaply available was slight.<sup>3155</sup> The Committee reported its conclusion as follows:

"In the light of these considerations we have come to the conclusion that neither the proviso to Section 3 nor Section 4 of the Copyright Act, 1911, is decisive to secure the publication of books in cheap editions which would not otherwise be available to the public at, or at about, the same prices. \* \* \* In our view, the advantages of continued adherence to the [Berne] Union and to the latest Convention are overwhelming, and greatly outweigh any possible disadvantages which might flow from the repeal of the provisions of the existing law to which we have referred. We recommend in this regard that the law

<sup>3148</sup> Law of Mar. 11, 1957, art. 42.

<sup>3149</sup> Belgium: Law of June 25, 1921; Czechoslovakia: Law of Dec. 22, 1953, § 98; Italy: Act of Apr. 22, 1941, as amended up to Aug. 28, 1946, arts. 144-55; Turkey: Law of Dec. 10, 1951, art. 45; Uruguay: Law of Dec. 15 and 17, 1937, as amended up to Feb. 25, 1938, § 9. The new German draft law also incorporates a "droit de suite" provision.

<sup>3150</sup> Hauser, *The French Droit de Suite*, 6 BULL. CR. SOC. 94, 112-18 (1959).

<sup>3151</sup> See notes B33, B50 *supra*, and text thereto.

<sup>3152</sup> BRUSSELS CONFERENCE: PROPOSED REVISIONS WITH COMMENTARY THEREON 48-49 (Berne Bureau Prelim. Docs., Pt. 1, 2d ed. rev., Jan. 1947).

<sup>3153</sup> RAPPORT GENERAL SUR LES TRAVAUX DE LA CONFERENCE DIPLOMATIQUE POUR LA REVISION DE LA CONVENTION DE BERNE 14 (1948); *Les Propositions, Contre-Propositions et Observations présentées par différentes Administrations, pour être soumises à la Conférence de Bruxelles*, 49 LE DROIT D'AUTEUR 85 (1938).

<sup>3154</sup> BOARD OF TRADE, REPORT OF THE COPYRIGHT COMMITTEE (1952).

<sup>3155</sup> *Id.* at 8-9.

be brought into line with the Brussels Convention. The omission of the proviso to Section 3 of the Act would appear to involve the omission also of the proviso to Section 5(2), which would seem to have been inserted so as to give the royalty under Section 3 to the personal representatives of the author."<sup>B156</sup>

A *propos* of the last sentence of this quotation, it is interesting that little or no consideration was given to the proviso allowing copyrights to revert to the author's estate during their last 25 years; the Committee appeared to assume that if the 25-year compulsory license were dropped, the 25-year reversion necessarily went with it. In his 1948 edition of *Copinger on the Law of Copyright*,<sup>B157</sup> Skone James argued that the intended benefits of the reversionary provision were "quite illusory" for two reasons: (1) since the copyright reverts to the author's estate it is likely to be sold for debts, and (2) since the rights during the last 25 years are necessarily non-exclusive because of the compulsory license, they are not calculated to bring very much in any case.

#### 4. Parliamentary debates and the U.K. Copyright Act, 1956

The British revision bill was debated in the House of Lords late in 1955, and at the outset of his presentation the Lord Chancellor emphasized that the Brussels Convention "demands the granting of an unqualified period of protection for the life of the author and fifty years thereafter," that the two compulsory licensing provisions are in conflict with this requirement, and that they therefore "have to go."<sup>B158</sup> This declaration was echoed by the President of the Board of Trade at the start of the debates in Commons in June, 1956.<sup>B159</sup> It soon became apparent, however, that there was considerable real opposition in Commons to dropping the 25-year compulsory license, on the ground that unless it were retained books would become more expensive and less freely available.<sup>B160</sup> The issue was debated at length.<sup>B161</sup> The proponents of the bill declined to argue the merits of the question and, in fact, appeared to agree that the compulsory publishing license probably had some value.<sup>B162</sup> They based their position solely on the ground that, if these compulsory licensing provisions were retained, "it would be impossible to adhere to the new form of the Berne Convention."<sup>B163</sup> They made this point so forcefully that their view finally prevailed, but the following remarks epitomize the prevailing attitude:

"Generally speaking, I think that those two qualifications have to be given up. We are sorry about the first one in particular, for reasons given very clearly by hon. Members on both sides. It has been of advantage to the public that after 25 years a work that was wanted by the public could be obtained in a cheap edition. This we are now to lose, and it is a very great pity. None the less the advantages we get are such that I think we must accept the limitations with good grace."<sup>B164</sup>

As finally enacted the Copyright Act of 1956 omitted all three of the provisions which were analogous to the American renewal. The reason was not their lack of merit, but the assumption that for the United Kingdom to adhere to Brussels they would have to be sacrificed. Whether or not this assumption was well-founded seems debatable, since a compulsory publishing license during the last 25 years would not appear to cut down the basic duration of a copyright any more than a compulsory recording license during the whole term. It is also curious that the reversion to the author's estate, which could not be considered in conflict with Brussels, was also dropped without any real consideration.

#### 5. The Canadian Copyright Report, 1957

The 1957 Ilsley Report on Copyright of the Canadian Royal Commission<sup>B165</sup> broke sharply with the British views on copyright term as shown in the Gregory Report and the 1956 Act. The Canadian Report recommended a basic term of 56 years from first publication or public dissemination, or the life of the author,

<sup>B156</sup> *Id.*, at 9.

<sup>B157</sup> COPINGER & SKONE JAMES, *THE LAW OF COPYRIGHT* 113-14 (8th ed. 1948).

<sup>B158</sup> 194 H.L. DEB. 502 (1955).

<sup>B159</sup> 558 H.C. DEB. 718 (1956).

<sup>B160</sup> 553 H.C. DEB. 739-42 (1956).

<sup>B161</sup> 553 H.C. DEB. 767, 776, 785, 792-93, 801-03 (1956); H.C. DEB., Standing Committee B on Copyright Bill 3-14 (1st Sitting 1956); see *Copyright, the Full 50 Years, 1956 THE BOOKSELLER* 1538.

<sup>B162</sup> 553 H.C. DEB. 785, 793 (1956); H.C. DEB., Standing Committee B on Copyright Bill 6-9 (1st Sitting 1956).

<sup>B163</sup> 553 H.C. DEB. 740 (1956).

<sup>B164</sup> 553 H.C. DEB. 785 (1956).

<sup>B165</sup> ROYAL COMMISSION ON PATENTS, COPYRIGHT, TRADE MARKS AND INDUSTRIAL DESIGNS, *REPORT ON COPYRIGHT* (1957).

whichever is longer; in particular, it urged retention of the 25-year compulsory licensing provision whether the proposed term based on publication were accepted or not.<sup>B166</sup> The Commission apparently assumed, as had the British legislators before it, that the Brussels Convention would require repeal of the two compulsory licensing provisions related to term, and on this ground, among others, it recommended against adherence to the Brussels Convention.<sup>B167</sup> The provision allowing a reversion to the author's estate was not mentioned in the report.

#### 6. *The New Zealand Copyright Report, 1959*

The 1959 Dalglish Report of the New Zealand Copyright Committee<sup>B168</sup> followed the lead of its Canadian counterpart in departing from the British Act of 1956. It adopted the Canadian proposal for a basic term of publication-plus-56 years, or the life of the author, whichever is longer (with a special provision covering works that are publicly performed, broadcast, or sold on records before being published).<sup>B169</sup> In stating its conclusion the Committee said:

"\* \* \* We consider that there is a very good argument in favour of making the term of copyright run from the time of publication, in that all works would then have the same period during which to earn the author his reward, and in our recommendations we have endeavoured to achieve this result as far as possible. We also think that a good deal can be said for the United States' approach to the question. There the term is 28 years with the right for the author or his successors (but not his assigns) to renew for a further period of 28 years. \* \* \* But Article 7 *bis* (3) of the Rome Revision specifically requires that in the case of works of joint authors copyright protection must not expire before the death of the author who dies last, and New Zealand is bound by that Revision. It would be inequitable for copyright in the works of a single author to expire before copyright in earlier works where he is a joint author and we therefore consider that New Zealand must provide that copyright shall not expire in respect of any published works before the death of the author. \* \* \*"<sup>B170</sup>

On the other hand, the New Zealand Committee did not agree with the Canadian Report's view that the compulsory license provisions should be retained; the New Zealand report states:

"The Department of Justice drew our attention to criticism in England of the omission from the 1956 United Kingdom Act of the provisions corresponding to the proviso of section 6 and the whole of section 7. We agree, however, with the view of the Gregory Committee that there would be nothing gained from the point of view of encouraging publication of literary works by the retention of either of these provisions. As to the question of permission to perform dramatic works and musical works which is dealt with in section 7, we think that the provisions which we later recommend in connection with the copyright Tribunal should be adequate to deal with any problems which might arise in connection with the refusal to make musical or dramatic works available for public performance except on payment of exorbitant fees. We therefore do not consider that these two provisions should be retained, and we recommend that they be omitted from any new legislation."<sup>B171</sup>

Unlike the two earlier reports, the New Zealand Report deals with the reversion to the author's estate at some length. The Committee felt that repeal of this provision (which now appears in § 8(2) of the New Zealand Copyright Act of 1913) would be a "retrograde step" from the "point of view of the reward to authors."<sup>B172</sup>

"\* \* \* This appears to have been inserted in the 1911 United Kingdom Act to ensure that an author's family received a substantial portion of the benefit of a work which achieved general public recognition some years after the death of the author. It appears to us that the repeal of that proviso would not do any good for the author's family but rather the opposite and that it would be the pub-

<sup>B166</sup> *Id.* at 19-23.

<sup>B167</sup> *Id.* at 14, 15-16, 23.

<sup>B168</sup> REPORT OF THE [NEW ZEALAND] COPYRIGHT COMMITTEE (1959).

<sup>B169</sup> *Id.* at 15-16, 19-35, 144-45. Unlike the Canadian Commission, the New Zealand Copyright Committee did not feel that the U.C.C. definition of publication would permit establishment of a term of years based on public performance, broadcasting, or sale of records. It therefore recommended that "if before a work is published it has been publicly performed or broadcast or records of the work have been offered for sale, copyright shall continue until the expiration of 56 years from the first of those acts or until the expiration of 25 years from the date of publication, or until the death of the author, whichever period is longest." *Id.* at 28.

<sup>B170</sup> *Id.* at 25.

<sup>B171</sup> *Id.* at 34-35.

<sup>B172</sup> *Id.* at 24-25.

lishers or other assignees of the copyright who would receive the benefit. It is to be noted that the United States provision that the second term of 28 years of copyright protection can be obtained only by the author or his successors, and not by his assigns, appears to be directed to achieving a similar result to that sought to be achieved in the proviso \* \* \*."

The Committee concluded that dropping of the reversion was not a necessary corollary to repeal of the compulsory licensing provisions, and stated its recommendation as follows:

"\* \* \* We have carefully considered whether it is desirable, along the lines of the proviso to section 8(2), to prohibit any assignment of copyright for the whole of the term of copyright, and we have had regard to the fact that in the United States only the author or his successor may renew copyright for the second term of 28 years. We consider that the retention of the proviso to section 8(2) may well be of value to the successors of a deceased author, particularly in cases where after the author's death his works become popular. We have no evidence of this but we feel that the proviso can do no harm and may possibly do good. Retention of the reference to a period of 25 years from the death of the author will not conflict with the Rome Revision or the Universal Copyright Convention. We think therefore that a similar provision to that contained in the proviso to section 8(2) should be enacted in any new legislation and we recommend accordingly."<sup>B173</sup>

#### D. RENEWAL PROVISIONS IN PATENT, DESIGN, AND TRADEMARK LAWS

##### 1. In general

It is an interesting thing that, in the industrial property laws of the world,<sup>B174</sup> division of protection into terms and renewal registration devices are the rule rather than the exception. The principal purposes of these renewal provisions appear to be:

- a. To bring in revenue and make the government registry office self-sustaining;
- b. To reduce the term of patents, designs, and trademarks that have not continued to be commercially valuable, and to make them available to the public for use as soon as possible; and
- c. To encourage continued exploitation, and "to make the record as nearly as possible one of actual rights."<sup>B175</sup>

The second and third of these purposes, if not the first, have considerable relevance to the copyright situation.

##### 2. Patent laws

Today most patents throughout the world are granted for a single definite term (usually between fifteen and twenty years), although there are still some countries in which the term is discretionary with the government, or in which the applicant is offered two or more terms from which to choose. There are also a substantial number of countries in which the term can be extended upon the filing of an application within certain time limits; sometimes the extension is granted automatically, but usually the patentee must show special circumstances justifying a longer term.<sup>B176</sup>

In the patent field the most important form of renewal device is the so-called "renewal fee" or "tax." A recent study by P. J. Federico<sup>B177</sup> indicates that the patent laws of at least sixty countries provide for renewal fees, and that the United States and Canada are the only major countries which do not employ the device. The following summary is based primarily on Mr. Federico's analysis:

- a. Typically, renewal fees are annual fees which are charged after a patent is issued, and which must be paid in order to keep the patent from lapsing. In Great Britain and several other countries the renewal fees are payable after four years and annually thereafter; some countries provide longer intervals for payments.

<sup>B173</sup> *Id.* at 35.

<sup>B174</sup> The summary and analysis in this section are based to a large extent upon the outlines of the industrial property laws of the world contained in CARLBERG, *GUIDE TO PATENTS, TRADEMARKS AND DESIGNS* (2d ed. 1958).

<sup>B175</sup> *Ewing v. Standard Oil Co.*, 42 App. D.C. 321, 324 (1914).

<sup>B176</sup> In Great Britain and other countries, for example, the patentee may be granted an extension of five (or, in exceptional cases, ten) years, if he shows that he has been inadequately remunerated, or if he has suffered war loss or damage.

<sup>B177</sup> Federico, *Renewal Fees and Other Patent Fees in Foreign Countries* (Study No. 17 of Subcomm. on Patents, Trademarks and Copyrights of Senate Comm. on the Judiciary, Comm. Print 1958).

b. Renewal fees are generally graduated, increasing as the patent grows older. Some countries permit payment in advance, and allow discounts if this option is chosen.

c. If the renewal fee is not paid the patent lapses, but most countries provide periods of grace (usually with a fine or higher fee). Some also permit reinstatement after lapse, but normally this is possible only for a limited period, and requires proof that failure to pay was unintentional or unavoidable; the intervening rights of third parties are also protected in this situation.

d. The Federico study indicates that the renewal fee device is remarkably effective in terminating patents as soon as they lose their commercial value; as a rule, it would appear that considerably less than 10% of foreign patents continue to be renewed throughout the full term available to them.

Before 1861 the American patent law contained a provision permitting the original patentee to renew the 14 year patent for another seven years under certain conditions, including payment of a rather high fee.<sup>3170</sup> Apparently this provision was considered burdensome,<sup>3171</sup> and in the Act of March 2, 1861,<sup>3180</sup> the present straight term of 17 years was substituted.

### 3. Design laws

Of the countries that have laws specifically protecting industrial and commercial designs, the majority divide the duration of protection into two or more terms. Some, like the United States,<sup>3181</sup> give the applicant a choice among terms of different lengths (with fees varied according to the length chosen). Most, however, provide for one or more extensions of term by means of renewal registration.<sup>3182</sup>

### 4. Trademark laws

Practically all the trademark laws of the world provide for renewal registration at definite intervals, as a condition for keeping the trademark registration in effect. Since the basis of trademark protection is user, the renewal device is needed to show that after a certain period the trademark is still in use and has not been abandoned. As stated in one American case, the renewal "is a correction of the record to the date of renewal by the registrant or owner of the mark asserting his continued use of it, and therefore title in it."<sup>3183</sup>

A typical trademark law provides an initial period of protection (usually between seven and twenty years), which is renewable indefinitely for the same period.<sup>3184</sup> Most statutes require that renewal registration be made before expiration of the preceding term, and many of these specify definite renewal time limits, including a period of grace after expiration. Once a trademark registration has expired without renewal, the applicant is not precluded from seeking an entirely new registration; but instead of merely extending protection, in this situation he must establish his rights anew.

## APPENDIX C

### A STATISTICAL SURVEY OF RENEWAL REGISTRATIONS

The statistical material on the pages that follow was prepared to provide some information about how renewal registration operates in practice. The following comments are intended to summarize and supplement this material.

1. Table 1 shows that, as far as renewals are concerned, music is by far the most important class of copyrightable works. Nearly half of all renewal registrations cover musical compositions, and more than  $\frac{1}{3}$  of the musical compositions registered in 1931-1932 were renewed. In contrast, only 7% of books and 11% of periodicals are being renewed.

<sup>3170</sup> *Id.* at 33; see *Siemens' Administrator v. Sellers*, 123 U.S. 276 (1887); *Wilson v. Rousseau*, 45 U.S. (4 How.) 646 (1846).

<sup>3171</sup> 69 C.J.S. § 187 (1961).

<sup>3180</sup> Ch. 88, 12 Stat. 246.

<sup>3181</sup> 35 U.S.C. § 178 (1952). The applicant for an American design patent is required to choose a term of 3½, 7, or 14 years, the fees for which are \$10, \$15, and \$30, respectively; he may change his choice of term while his application is pending, but once the patent issues the term may not be extended.

<sup>3182</sup> In Great Britain and a number of other countries the initial term is five years, with two renewal terms of five years each.

<sup>3183</sup> *Ewing v. Standard Oil Co.*, 42 App. D.C. 821, 824 (1914).

<sup>3184</sup> In some countries the duration of the renewal is different from that of the initial term. In Great Britain, for example, a trademark registration lasts for 7 years, but may be renewed indefinitely for periods of 14 years each.



2. Table 2, and the graph accompanying it, illustrate the dramatic rise in the total percentage of copyrights renewed. In 1910 renewal was made for about 3½% of the works copyrighted in 1883; this percentage had doubled by 1940 and has now redoubled. Last year the total of copyrighted works renewed was nearly 15%.

3. Table 3, based on a survey of some 10,000 renewal applications entered during a recent six month period, indicates that about ⅘ of all renewal claims are asserted in the name of the author or his statutory beneficiaries, and the other ⅓ by proprietors. Author claims constituted 40% of all claims submitted, and 60% of claims asserted on behalf of the author or his family. Proprietors of works made for hire claimed in 22% of all cases, and accounted for 66% of the proprietor claims.

4. The following facts, derived from our six month survey, are also worth noting:

a. Number of claims given on one application:

one.....	9,543	(88%)	
two.....	829		}1,255 with 2 or more (12%)
three.....	371		
four.....	49		
five.....	1		
seven.....	5		
	10,798		

b. About 10% (1,124) of the renewal applications covered derivative works (in these cases the renewal claim was based on "new matter").

c. During the six month period 102 claims were rejected as too late; of course this figure does not reflect cases where the claimant realized it was too late, and did not bother to submit an application.

d. During the six month period conflicting claims were registered in 85 cases.

5. Table 4, based on a survey of 2,000 applications, indicates that more than ¼ of all renewal applications are filed within the first month of the renewal year, ½ during the first three months, and about ⅓ during the last month.

6. A question that has arisen at past revision hearings involves the impact of automatic extension of subsisting copyrights if the requirement of renewal were dropped. Suppose, for example, that a new law had gone into effect on January 1, 1960, that automatically extended the duration of all copyrights then in their first term. In that event a total of 4,982,597 (roughly five million) copyrights would be given a longer term, as contrasted with approximately 15% of that number, or 750,000, if renewal registration were still required for subsisting copyrights.

TABLE 1.—Renewals by class of original registrations

Class	Original (1931-32)	Renewal (1958-59)	Percent
A.....	57,065	*3,942	7
B.....	39,177	4,335	11
C.....	521	2	0.4
D.....	8,286	692	11
E.....	29,264	10,272	35
F.....	1,774	844	48
G.....	2,590	107	4
H.....		**1	
I.....	1,697	6	0.4
J.....	2,570	27	1
K.....	3,354	141	4
L.....	800	594	74
M.....	739	478	65
Prints and labels (Patent Office).....	1,975	92	5
Totals.....	147,822	21,533	15

\*Includes contributions to periodicals.  
 \*\*Original registration made in 1958.

TABLE 2.—Renewals (1910–1959) for works copyrighted (1883–1932)

Original registrations*		Renewal registrations**		% renewed
Year	Number	Year	Number	
1883	25,006	1910	894	3.57
1884	27,216	1911	819	3.00
1885	28,355	1912	1,183	4.10
1886	31,260	1913	949	3.03
1887	35,092	1914	1,065	3.03
1888	38,583	1915	1,213	3.14
1889	40,978	1916	1,522	3.71
1890	42,789	1917	1,845	4.31
1891	49,062	1918	1,710	3.48
1892	56,000	1919	1,760	3.14
1893	58,962	1920	2,007	3.40
1894	62,786	1921	2,084	3.81
1895	66,003	1922	2,583	3.91
1896	73,339	1923	2,628	3.58
1897	75,000	1924	3,433	4.57
1898	75,545	1925	3,309	4.38
1899	80,968	1926	4,029	4.97
1900	94,798	1927	4,686	4.94
1901	92,351	1928	5,447	5.89
1902	92,978	1929	4,948	5.32
1903	97,979	1930	5,937	6.05
1904	103,130	1931	5,998	5.81
1905	113,374	1932	5,888	5.19
1906	117,704	1933	6,411	5.44
1907	123,829	1934	6,989	5.64
1908	119,742	1935	6,661	5.56
1909	120,131	1936	8,180	6.80
1910	108,067	1937	8,589	7.94
1911	114,270	1938	9,940	8.69
1912	119,582	1939	10,177	8.51
1913	118,480	1940	10,207	8.61
1914	121,923	1941	10,342	8.48
1915	113,867	1942	11,488	10.08
1916	114,339	1943	9,650	8.43
1917	109,446	1944	10,247	9.36
1918	104,871	1945	11,367	10.83
1919	111,097	1946	12,516	11.26
1920	124,450	1947	13,201	10.60
1921	133,074	1948	15,816	11.88
1922	135,907	1949	13,675	10.06
1923	146,257	1950	14,531	9.93
1924	159,261	1951	16,372	10.27
1925	162,539	1952	16,690	10.26
1926	173,606	1953	17,101	9.85
1927	179,314	1954	18,508	10.32
1928	188,467	1955	19,519	10.35
1929	157,011	1956	20,926	13.32
1930	166,855	1957	21,473	12.86
1931	158,644	1958	22,593	14.24
1932	145,847	1959	21,441	14.70

\*1883-1900—includes renewal registrations since separate count was not kept.  
 \*\*Renewals 1910-1923—14 yr. extensions are not included.

APPENDIX C - GRAPH TO ACCOMPANY TABLE 2

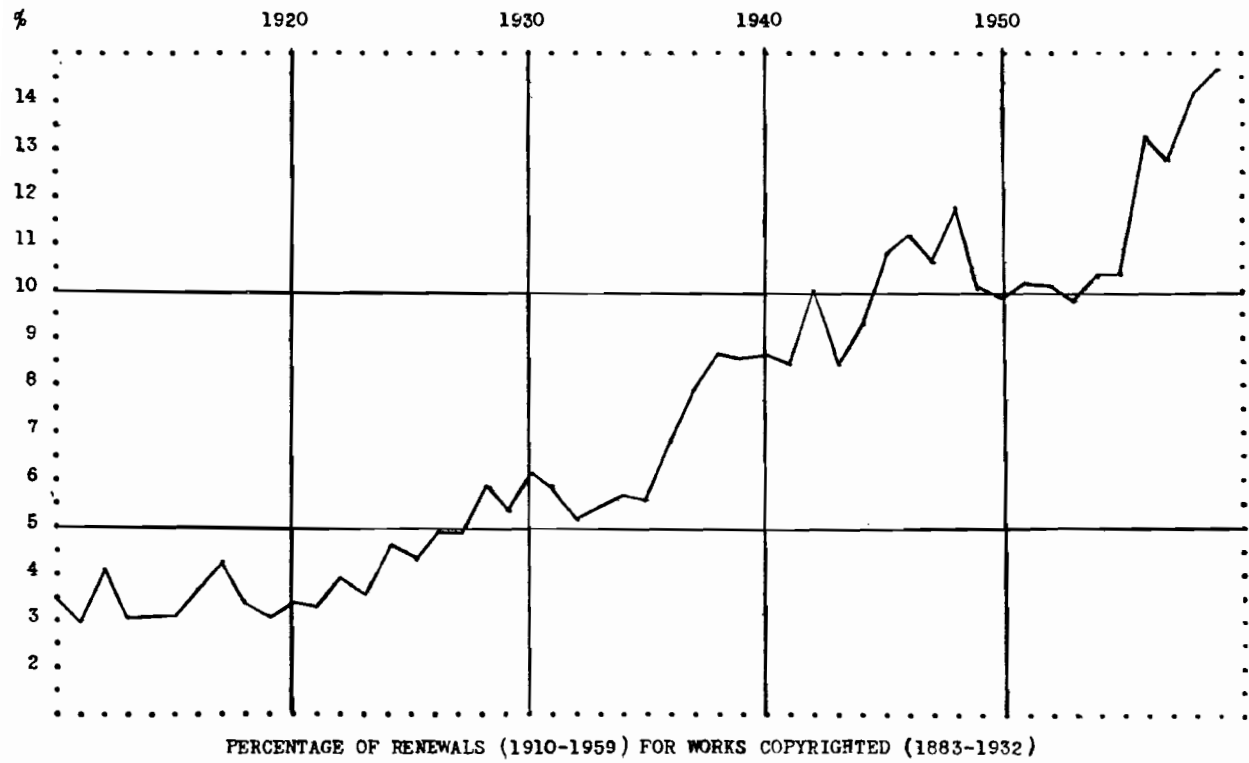


TABLE 3.—*Categories of renewal claimants*

[Based on a survey of all renewal claims registered during a recent six-month period, Jan. 1–June 30, 1959, covering Registration Nos. R-227802–238599]

1. Total claims by category of claimant:		
Authors	5,002	(40%)
Proprietors: works made for hire	2,817	(22%)
Widows, widowers, and/or children	2,615	(21%)
Proprietors: composite works	1,338	(11%)
Executors	335	(3%)
Next of kin	314	(3%)
Proprietors: posthumous works	46	(—%)
Proprietors: prints & labels	41	(—%)
Proprietors: corporate	32	(—%)
<b>TOTAL CLAIMS</b>	<b>12,540</b>	
2. Claims by authors and their statutory beneficiaries:		
Authors	5,002	(60%)
Widows, widowers, and/or children	2,615	(32%)
Executors	335	(4%)
Next of kin	314	(4%)
<b>TOTAL</b>	<b>8,266</b>	
3. Claims by proprietors:		
Works made for hire	2,817	(66%)
Composite works	1,338	(31%)
Posthumous works	46	(1%)
Prints & labels	41	(1%)
Corporate	32	(1%)
<b>TOTAL</b>	<b>4,274</b>	

TABLE 4.—*Date on which renewal applications are filed*

[Based on a survey of the first 2,000 applications passed in fiscal 1959, covering Registrations Nos. R-227802–229801]

Application received on—			
1st day	131	} 567 (28%) (1st month)	} 1,038 (52%) (1st three months)
1st week (except 1st day)	213		
1st month (except 1st week)	223		
2nd month	247		
3rd month	224		
4th month	98		
5th month	58		
6th month	110		
7th month	109		
8th month	113		
9th month	78		
10th month	65		
11th month	98		
12th month (except last week)	200		
last week (except last day)	28	} 233 (12%) (last month)	
last day	3		
Sec. 216	2		
<b>TOTAL</b>	<b>2,000</b>		

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COMMENTS AND VIEWS SUBMITTED TO THE  
COPYRIGHT OFFICE  
ON  
RENEWAL OF COPYRIGHT

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT  
OFFICE ON REVISION OF COPYRIGHT

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*By Horace S. Manges*

JUNE 21, 1960.

I have read with interest the illuminating treatise on Renewal of Copyright by Miss Barbara A. Ringer.

After giving due consideration to the many facets of this question, I favor a single copyright term of 56 years from publication date in order to avoid the many complex problems which have arisen under the provisions for renewal in those situations where the author dies before the twenty-eighth year of the original term.

As to subsisting copyrights, I would favor making the provision for 56 years retroactive so that each subsisting copyright would continue for a period of 56 years from the date of its publication as stated on the application for copyright registration.

HORACE S. MANGES.

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*By Horace S. Manges*

JULY 13, 1960.

In addition to the objection of the confusing complications resulting from having to determine who is entitled to a copyright renewal under the present statute, I regard any form of renewal as an undesirable burden and a requirement which results in a deprivation of rights of the non-watchful author.

As to subsisting copyrights, it was my intention to convey the view that they should remain valid for 56 years from date of publication as if the 56 year term had been in existence at the time of such first publication.

HORACE S. MANGES.

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*By Melville B. Nimmer*

JUNE 22, 1960.

I have read with a great deal of interest Barbara Ringer's excellent study on "Renewal of Copyright". I have the following comments in connection with the issues raised by the study:

1. I believe strongly that the concepts of division of duration and registration as a requirement of a longer term should be discarded from any new copyright act. On the other hand, I think the concept of reversion of ownership should be retained and made more meaningful than it is under existing case law.

2. (a) It seems to me there should be a single undivided term of copyright protection (e. g., the life of the author plus fifteen years). However, the duration of any assignment or license by an author should be limited by statute. Thus, an author should not have the power to assign or license any rights in his work for a term longer than, say, twenty-eight years, with respect to a book, measured from the time of the execution of the assignment. Furthermore, any agreement to execute a new assignment at a later time should be expressly made invalid by statute. The permissible period of an assignment may vary according to the type of work involved. Thus, if there is an assignment (or what some courts more technically regard as a license) of motion picture rights, the term of the assignment might be for a period of ten years (a not uncommon period for distribution agreements). An assignment of television rights or of magazine publication rights might be for a lesser period and an assignment of book publication rights might be for a greater period. In no event should any formalities be required in order to effectuate the reversion of rights to the author upon the expiration of the assignment.

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(b) The reversion of rights under the plan suggested above should be to the author or his next of kin. To permit a reversion to the author's assignees would be to defeat the purpose of a reservation. Similarly, a reversion to the author's legatees might likewise defeat the purpose of the reservation since a purchaser of rights might, as a part of the original consideration, obtain the right to be named a legatee under the author's will.

(c) As indicated above, the reversion of rights should not be assignable, since otherwise the underlying purpose of such reversion would be defeated. Under the plan suggested here no problem would be raised with respect to the time of vesting.

3. I think it wrong to attempt to determine by statute which works have continuing commercial value and which do not and to vary the period of protection accordingly. If a work in fact has lost its commercial value then presumably the price for its use during its remaining period of protection will be affected accordingly. On the other hand, an arbitrary distinction of this nature might not be in accord with actual commercial values.

4. A system of limitations on assignments as indicated above seems to me to be the best approach to this problem.

5. With respect to subsisting copyrights, obviously the limitation on assignments suggested above could not affect existing agreements. However, such limitation could be applicable with respect to subsisting copyrights which are not the subject of subsisting assignments.

MELVILLE B. NIMMER.

*By John R. Peterson*

JUNE 22, 1960.

COMMENTS ON COPYRIGHT OFFICE STUDY ENTITLED "RENEWAL OF COPYRIGHT"

The original purpose of this series of studies by the Copyright Office was the re-examination of the copyright law looking to its general revision. In the course of this effort there has been produced the most encyclopedic work on copyright to date that is available anywhere and certain fairly clear indications of the direction which revision should take. This study most ably carries forward the high standards and tradition which have been established in this series.

The analysis of the United States system of copyright renewals into its three aspects of duration, formalities, and ownership is helpful not only in perceiving some of the reasons for the troubles which have been encountered but most of all in reaching toward a decision as to whether the renewal system should be preserved or should be abolished in favor of a single term, either for a considerable period of years or for the life of the author plus some specified number of years thereafter.

It is interesting to note that the third aspect, that of ownership, which has given the most trouble, was originally the very reason for a renewal system. The legislative history which has been so carefully and completely assembled in this study makes it clear that it was the desire of Congress to provide a reversion of copyright to the author and his dependents for the renewal period in order to preserve him from bad bargains and unduly delayed success.

If the renewal system is to be retained it is certain that the interests of the authors can be much better protected than by the present arrangement. Appendix B, on pages 208-210, summarizes provisions in the laws of other countries intended to protect the author and his dependents against transfers which are disadvantageous or which become so in the course of later events. With the benefit of experience in other countries and with the ingenuity for which such groups have become noted, we can well expect authors' associations to conceive and present specific proposals for legal provisions which would encourage authorship and safeguard its rewards more effectively than do renewal reversions. It would seem well for such proposals to take shape at an early date so that they could be discussed with the Copyright Office, tested in the forum of the bar associations, and perhaps embodied in the draft statute which everyone anticipates will emanate from the Copyright Office.

There seems general agreement that the present maximum term of 56 years for copyright protection in the United States is due for further lengthening. Ever since the first copyright law, the Statute of Anne of 1710 passed primarily for the protection of printers, copyright protection has been in multiples of



terms of seven years, historically the period that it took to train a printer's apprentice. The first term was 14 years plus a second term for a like period if the author were still living. By successive steps these terms have been extended to the present arrangement of an original term of 28 years plus a renewal for the same time. It has now come to be the author rather than the printer who is the primary source of public solicitude, and the life span of authors as well as of most other classes has been significantly increasing. It is of course completely inconsistent with the general concepts of property in the free world that one's assets be summarily confiscated without fault of his, yet this can and does happen under the present provisions of the copyright law when copyrights expire during an author's later years just when he may be most in need of royalties.

There are several basic methods of providing for a sufficient term of copyright for the protection of authors:

1. A single term of protection, perhaps for about 85 years, starting to run from date of publication. Studies have indicated that this is about the average duration of the copyright term in other countries having the usual provision of protection for the life of the author plus 50 years. Many works which had lost their commercial value would nevertheless be kept out of the public domain for this full period.

2. A relatively short initial period of copyright plus a single renewal for an extended period. This would have the advantage of passing more works into the public domain at an earlier date where renewal is unimportant to the author, but is necessarily limited, at least at this time, by the provisions of the Universal Copyright Convention which require that the initial period of protection be for a minimum of 25 years. It would seem that this provision of the UCC could well be changed to include a requirement only that total available protection, whether by renewal or otherwise, should be for a minimum of 25 years. Many modern writings, particularly in technological fields, have a limited commercial life of only eight to twelve years, but research in these fields would be considerably facilitated if these works were freely accessible in the public domain after that period.

3. The United States could conceivably abandon its traditional position and join the other countries in a term of life of the author plus 50 years or so after his death. This would have the advantage of consistency with other countries, but particularly with the widespread destruction of life and public records in the recent war and with the fast growing internationalization of all of the media of communication, there is always the problem of ascertaining if and when the author died, particularly if it isn't even clear in which country he may have lived. The term for a definite period starting with publication is much more easily ascertained since a glance at the work itself will usually give full information, and the records on renewals are easily checked. Certainty and facility of ascertainment in questions of copyright are of prime importance to users of such materials, and in this respect the United States system revised and modernized would seem to be definitely in advance of the concept of a term dependent upon an uncertain and sometimes unascertainable event such as the passing of the author.

4. Addition of a second term of 28 years, making a total of 84 years protection, about the average duration of copyright in other countries. Such virtues as our present renewal system has demonstrated would be preserved, and its obvious defects could be easily remedied as discussed below.

The conclusions presented by this study on page 190 are sound and well considered. In any rearrangement of our renewal system it would certainly seem advisable to drop the reversion provision which has caused so much trouble and replace this with some more certain and equitable device for the protection of authors and their families. The elimination of some of the technicalities and formalities on renewal would avoid many of the hardships and inequities which have resulted. It would seem particularly advisable as this study indicates, to permit extension by anyone with a legal or equitable interest in a copyright, such extension to operate for the benefit of all concerned. The courts can and should determine ownership in disputed questions.

One possibility which might well bear consideration under alternative 4 would be to allow the first renewal term to serve as a grace period within which the author could at any time reinstate his copyright. If he had failed in his effort to renew it, had simply neglected the renewal, or had just not been

in a position financially to take care of the renewals on possibly a number of his creative efforts, his belated recognition by the public should serve to enrich him and not merely to haunt him for his failure to have effectively renewed.

Tardy renewals would of course have to take into account the rights of intervening users of the material after the expiration of the original copyright period. Such rights can be recognized and respected, however, on an equitable basis, perhaps being classified as compulsory licenses to such users with royalties being adjusted on a statutory or other equitable basis. Thus an author would reap a normal profit on a postponed success, and a publisher of such a work would know in advance what his maximum royalty would be.

Historically, subsisting copyrights have uniformly been given the benefit of the extended period in revisions of the copyright law, and every consideration would seem to indicate similar treatment at this time. The best manner of handling a change in the reversion provision, however, with its consequent effect upon prospective renewal claimants and their assignees will be an interesting although not insuperable problem for the legislative drafters.

JOHN R. PETERSON.

*By Samuel W. Tannenbaum*

JUNE 28, 1960.

At the outset, I want to express my personal appreciation for Barbara Ringer's scholarly and comprehensive work, *RENEWAL OF COPYRIGHT*. Its extensive scope and excellent documentations are an invaluable aid.

My views expressed with respect to James J. Guinan's fine study, *DURATION OF COPYRIGHT* are applicable in many respects to the study *RENEWAL OF COPYRIGHT*.

In my opinion, the present system of a single term of 28 years plus a renewal of an additional 28 year term is obsolete.

Especially archaic is the much litigated provision with respect to the proper parties and the succession of renewal. Authors should no longer be regarded as wards of Congress.

In this day of the author's awareness of the commercial value of his work, there is no further need to protect him against himself. The various protective societies have established forms of contracts and restrictions which safeguard the interests of the author and his family.

I am in favor of a single term, modeled after the provisions of the Universal Copyright Convention, with certain limitations necessary for the protection of the author and his family, in the light of our American intellectual, cultural and economic mores.

A single term would avoid the troublesome and recurring problems arising under Section 24 of the Copyright Act which I discussed in my comments to *STUDY NO. 30, DURATION OF COPYRIGHT* on pages 99-100.

The enactment of a single term would also avoid the perplexing situations only partially settled in *Ballantyne v. De Sylva*, relating to the proper parties to renew, although the Court left undecided the proportionate interest of the owners of the renewal.

Under a single term, an author by will could bequeath to those who are the principal objects of his bounty and other legatees his copyright or certain rights thereunder for the entire or partial term of 50 years (if that period is finally adopted). He could also divide all or such parts thereof among as many legatees as he may desire.

In the event of intestacy, those entitled to take under the laws of the state of his residence at the time of his death, would receive their distributive shares in the copyright, according to such state law.

A great volume of litigation would be avoided, typical of which are *Ballentine v. De Sylva*, 351 U.S. 570 (1956), *Witmark & Sons v. Fisher*, 318 U.S. 643 (1943), *Fox Film Co. v. Knowles*, 261 U.S. 326 (1923); *Silverman v. Sunrise Pictures Corp.*, 290 F. 804 (CCA 2, 1923, cert. den. 262 U.S. 759, 1923) and the recent cases of *Gibran v. Knopf*, 255 F. 2d 121 (CCA 2, 1958), *Miller v. Daniels*, 4 L. Ed. (2d) 804 (April 18, 1960), and *Rose v. Bourne*, 176 F. Supp. 605 (S.D.N.Y. 1960) affd. CCA (2) May 31, 1960, Docket 26015 (not yet officially reported).

## COMMENCEMENT OF COMPUTATION OF TERM

a. *Works not published in the lifetime of the author:*

The term should be 50 years after the first publication, public dissemination, or public presentation. This is the uniform term in most of the foreign countries and international conventions.

b. *Works published during the lifetime of the author:*

The term should be life of author plus 50 years with a different term for certain works such as maps, prints and labels and other industrial or commercial works.

c. *Corporate, anonymous, pseudonymous and composite works:*

The term should be 50 years from creation, public presentation or registration and deposit.

d. *Joint authorship:*

It would be advisable to fix the term, during the life of the last surviving co-author plus 50 years.

To afford a source of information for computing the commencement of the term, especially in the case of contributions to periodicals, books, pamphlets and music, there should be a requirement of the deposit in the Copyright Office of the title of the work, author, media, date and place of publication.

In the case of unpublished dramatic and unpublished musical works, unpublished scenarios and scripts, similar information should be filed in the Copyright Office, such as date and place of first presentation, name and address of producer.

Although there are available recognized publications furnishing information pertaining to authorship, date and place of publication of books, stories, plays and other published material, it would be of great help to require filing in the Copyright Office of such information, particularly relating to works not so indexed.

SAMUEL W. TANNENBAUM.

*By Harry R. Olsson, Jr.*

JULY 1, 1960.

This study is as thorough as any other in the project. Miss Ringer is to be congratulated on her work.

As to the issues raised by it, I believe:

1. The system of copyright renewal in all its essential elements should be retained. This feature of our system is part of the compromise between the needs of creators and the needs of the public and has served a useful function. The defects of its operation in the past should be cured rather than the system itself abolished.

2a. The time limits and formalities of renewal registration should be retained. What is needed is a greater awareness on the part of authors and copyright people of the importance of establishing in their own procedures a tickler system for renewing during the twenty-eighth year. Probably many copyrights expire today not because of a lack of interest in the work but because of a lack of knowledge that the time has come to take the necessary simple step to renew. Perhaps the Copyright Office should supply along with registration certificates a prominent word of advice to the claimant to set up a tickler system for the benefit of himself and any other possible recipient of the renewal privilege.

2b. The widow of the author should occupy a class precedent to and separate from that of the children. As to the class of children, the act should clarify what is meant by the term so that reference to state law need not be made to ascertain the identity of members of the class.

2c. The existing case law which has grown up in the absence of statutory guidance with regard to such matters as assignability of the renewal, rights of co-owners and time of vesting appear to me to be adequate.

3. A single term of fifty-six years is far too long and a term of life plus fifty would be far too long for the literary and artistic trash for which copyright is now so often claimed. I think a main beneficial result of the present renewal system is the tendency it has to throw so much of this matter into the public domain after twenty-eight years. If we were to abolish the renewal requirement and substitute a term of the length that would be likely in such a

case or by a term of life plus the number of years likely in such a case, I believe I should then support a system giving different terms of protection to different works. I am not unmindful of the difficulties which would be present in such a system and that is one reason I am so anxious that the renewal system be retained in the new law.

HARRY R. OLSSON, Jr.

*By Ralph S. Brown, Jr.*

JULY 6, 1960.

I am glad that you extended the time for comments on Miss Ringer's study of "Renewal of Copyright," if only because it permits me to express my admiration for this useful and scholarly study.

I have only one comment to make about the substance of the work: Do the recent Second Circuit cases on joint works really impair the rationale of the Ricordi case (pp. 169-170, 174-175)? It is true that there is some broad, if not loose, language in the joint work cases; but I suggest that they can be easily confined to their subject matter of words-and-music, and that the Ricordi decision is undisturbed in its application to new matter in new versions.

On the policy issues raised by this study, Miss Ringer's original explanation of the curiosities in the present statutory language at least suggests a hope that it would be possible to devise a rational system, subject to the hazards of the legislative process. However, almost all the other data point toward a negative verdict on the reversionary renewal.

The suggestion of a renewal without any reversionary features has some appeal to one who, like myself, is concerned to see work pass into the public domain, for the convenience of scholars and others, when there is no value in keeping the copyright. However, I am inclined to adhere to the views I expressed in my comments of May 9, 1957, attached to Mr. Guinan's study on "Duration of Copyright". There I expressed a preference for a single term of life plus 25 or 30 years for natural persons, and a single term of perhaps 50 years for corporate and similar works.

RALPH S. BROWN, Jr.

*By John Schulman*

JULY 12, 1960.

The study on the "Renewal of Copyright" made by Barbara Ringer is excellent. As she points out so well, the doctrine of a renewal term of copyright, with a reversion of the new grant to the author and his family, is deeply ingrained in our own legislative policy.

Nor can anyone dispute Miss Ringer's observation (p. 211) concerning copyright systems in more than 28 other countries, to wit:

"Anyone making a general survey of the current copyright laws of the world cannot fail to be impressed by the prevalence of provisions dealing with the actual content and meaning of authors' contracts. Provisions of this type now exist in the laws of at least 28 countries, and usually these provisions are both extensive and detailed. Most appear in the basic copyright statute, or regulations, some in the nation's organic law on contracts, and a few in special laws or decrees. Quite a number of the statutes contain general provisions dealing with all types of contracts, but the most common provisions are directed specifically at transfers of publishing and performance rights; some also deal with contracts covering publication in periodicals and use in broadcasting, motion pictures, and sound recordings.

"As the following summary will show, these provisions bear little or on surface resemblance to the American renewal system. To a great extent, however, their underlying purposes are identical: to protect the author against disadvantageous, unprofitable, or unfair transfers, and to put him in a position to receive an adequate and continuing return from his creation."

Her analysis supports the view that any change in our copyright law which would eliminate the renewal pattern should carry with it corresponding changes in the overall structure of a new copyright statute.

Our original copyright statute, enacted in 1790, was the second copyright law of national scope to recognize the inherent right of an author to own and control his intellectual product by making copyright protection available to all authors on equal terms. It followed in point of time the Statute of Anne (1710) and

preceded the French Decree of 1793. All of these measures and those which followed them, departed from the earlier concept that the grant of an exclusive right to print and publish constituted a special privilege, dependent upon royal favor, and integrated with a system of censorship and control of printing.

The enactment of these copyright laws in the 18th Century, was the logical outgrowth of the liberal philosophy of the 17th Century with its emphasis upon individual liberty and freedom of expression. The renewal term conditioned upon the survival of the author created by the Statute of Anne was designed in the author's interest. A similar philosophy was embodied in the constitutional provision empowering Congress to enact laws securing to "authors" the exclusive right in their writings.

In line with this tradition, Congress has, as Miss Ringer shows, continued the renewal pattern and has rejected proposals that copyright should endure for a single continuous term.

The pattern of a dual term is presently unique to the United States. However, as the study shows, other countries have adopted other methods of accomplishing a similar purpose. Their statutes provide, among other elements, for a divisible copyright effective upon creation of a work, and impose limitations upon contractual relationships. The purpose of these provisions is to enable an author to derive the fullest benefit from the exploitation of his property.

It is my view that unless the present structure of the Copyright Law is changed, the renewal pattern providing for a reversion to the author and his family should be retained, and improved. The terms should be lengthened. The revised statute should clarify the rights of the author and his family in the renewal copyright, and safeguards should be provided against inequitable or improvident contracts for anticipatory assignments of renewals.

It should be recognized that the true value of works such as musical compositions, books and plays cannot, by their very nature, be determined in advance of publication or other presentation to the public. This is not mere theory. It is common practice, not only in the United States but throughout the world, for authors to place their works with publishers and producers on a royalty basis. If the song, book or play is properly exploited and meets with public favor, the author participates in its success. If, on the other hand, the property is not exploited or is not accepted by the public, the author is the loser. Accordingly, an author's only safeguard lies in his opportunity of obtaining fair and equitable terms under which he is assured of proper exploitation of his work, and of full participation in its earnings.

The author today, particularly the young author, often lacks the bargaining power to secure a contract which is fully adequate. Under the best of circumstances, it is not possible to foresee all of the developments and changes in the areas in which the works will be utilized and exploited and to provide for every possible contingency.

In addition, the present structure of our copyright act, based upon the concept of an indivisible copyright and its emphasis upon formalities, lends itself to an undue concentration of copyrightable properties, to a lack of adequate exploitation of author's works and to a denial of adequate returns to most authors from their creative efforts.

By continuing the pattern of a dual term of copyright in an improved form, this lack of equity and undue concentration can to some extent be remedied.

If we are to retain our present dual term of copyright, its present period is much too short. History discloses that as human life expectancy has increased, the terms of copyright have been extended. We are now faced with the unfortunate condition that many copyrighted works are falling into the public domain during the lifetime of their authors. Accordingly, the terms should be lengthened to be consistent with present day life expectancy.

So much for a discussion of the nature of the renewal term to be enacted if the renewal term were to be retained.

It is my opinion that, in principle, the adoption of a term of copyright extending for a period beyond the death of the author would be preferable to a term expressed in a number of years from the date of publication or registration. For the most part, the culturally developed countries of the world have chosen a basic period of copyright extending during the life of the author and 50 years thereafter. In respect of works published anonymously or under pseudonyms, where the true identity of the author is not revealed, and in respect of works produced by corporate bodies, these countries have fixed the term of copyright at 50 years from the date of publication. In most of these countries terms of copyright differ for different kinds of works.

The concept of a term of copyright extending for a period of years beyond the death of the author is basically sound. Under that pattern, substantially all of the works of an author fall into the public domain at one and the same time and become available for reproduction in compilations or other composite forms at that time. The system is more efficient and more equitable to authors and users than our present system. Presently it is essential to check the status of each work individually. Compilations or sets of an author's work cannot be produced until copyright on the last of them expires; unpublished works not registered for copyright are entitled to perpetual common law protection; works of an author which are still under copyright, compete with those of the same author which have fallen into the public domain.

However, if a single term of copyright extending for a period beyond the author's death were to be chosen for a new statute, it should be accompanied by a number of protective changes in the structure of our law.

(1) Both published and unpublished works should be embraced within the Federal system of copyright.

(2) Copyright should stem from creation without formalities.

(3) The copyright should be divisible so that an author may grant to a publisher the right to print and issue copies, to a producer the right to adapt a work for a play, to a motion picture company the right to produce a motion picture, and the right to a television producer to produce a television program, etc. These rights should be separate and fully enforceable so that they might be bargained for separately. The purchaser should, as a matter of law, be entitled only to those rights which are expressly bargained for and granted; all rights not expressly granted should be deemed reserved to the author. It should be necessary for these assignments to be in writing and to have been recorded in the Copyright Office.

(4) Although I do not believe that the statute should attempt to write contractual provisions into the law, I favor following the principle of establishing presumptions, as is done in the Uniform Sales Acts and of the Negotiable Instruments Laws. The copyright statute should set forth presumptions and consequences which flow from contracts and licenses wherein the intentions of the parties are not clearly expressed.

(5) The doctrine by which an employer becomes the "author" of a work is not only artificial but erroneous. Adequate provision can be made for shop rights or other employer privileges analogous to those recognized by our patent system.

(6) Finally, the extension of the term of copyright to a period beyond the death of the author would require some provision for the disposition of the extended period. I suggest that the extended term should revert to the original author or his family.

In the alternative, the statute might provide that a person to whom rights in the extended term had been granted under a written contract could continue to exercise such rights if (a) the contract provided for the author's participation on an equitable basis in all of the earnings of the work, (b) if the contract had been fully performed, and (c) if the contract had been recorded in the Copyright Office within 90 days after its execution.

JOHN SCHULMAN.

*By Robert Gibbon*

(The Curtis Publishing Company)

JULY 20, 1960.

Problems relating to copyright renewal are the major source of this Company's interest in the proposed revision of the copyright law. While we have seen no injustice attributable to the confusion that surrounds this aspect of the law, it is our conviction that the doubt and uncertainty which now exist are an unnecessary burden on publishers, authors, agents and their lawyers.

Because of the importance of this problem, we have confined our comments, where possible, to issues relating to contributions to periodicals and composite works.

We concur with the prevailing thought that there are distinct advantages to statutory periods of copyright and renewal. These provide, among other benefits, an indication to the public of duration of copyright. The provision for registration as a requirement for the renewal term, if intelligently stated, pro-

vides a possibility for early entry of much copyrighted material into public domain without jeopardizing the rights of parties who desire the longer period of exclusivity.

Reversion of ownership of rights, to protect an author from the effects of a hasty or inequitable bargain, is clearly anachronistic. No matter how precisely this can be shown to have been the intent behind much of the existing law, it clearly is not a part of the present day concepts. Possibly the author once did need protection from someone who might wrest from him the fruits of his creativity. However, the development of communication media, authors' agents and the current insatiable needs of publishers and producers make such protective efforts unnecessary and, indeed, cumbersome.

An author should have as much right as anyone else to alienate interests in his product, for whatever period they are within his control. Once he has transferred an interest, the transferee is entitled to protection under the law.

With respect to composite works, why shouldn't the proprietor have a right of renewal? To become a proprietor he has had to acquire all interests in the materials; but in all likelihood, at the time of renewal, his interests are quite limited. He has probably assigned some of the rights back to the author. Possibly he has disposed of some interests for the mutual benefit of the author and himself. By having held, at the time of original copyright, all interests in the material, he is the logical party to apply for renewal. His renewal should accrue to the benefit of all of the holders of interests in the copyrighted material, whatever those interests are and whoever the holders might be.

A renewal by the proprietor of material in a periodical or composite work, who obtained the original copyright, would serve to protect the interests of all of the holders of rights in any of the copyrighted material. However, there is no need to make this right of renewal exclusive in the proprietor. If he has ceased to exist or shows no interest in obtaining renewals, and this will not occur too frequently, the various holders of rights under the copyright should also have a right of renewal. Each such renewal would protect the rights of the person making the renewal and all rights that emanated from him or are derived from him. Without reversion of ownership to complicate the situation, such a plan creates no complexity or confusion. Each holder of a right or an interest knows that, to protect it for the renewal period, he must either apply for renewal himself or assure himself that one of his predecessors in interest has applied for renewal.

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