86th Congress
2d Session

COMMITTEE PRINT

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

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

PURSUANT TO

S. Res. 240

STUDIES 29–31

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 Protection of Unpublished Works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

Printed for the use of the Committee on the Judiciary

UNITED STATES
GOVERNMENT PRINTING OFFICE
62348 WASHINGTON : 1961

COMMITTEE ON THE JUDICIARY

JAMES O. EASTLAND, Mississippi, *Chairman*

ESTES KEFAUVER, Tennessee
OLIN D. JOHNSTON, South Carolina
THOMAS C. HENNINGS, JR., Missouri [1]
JOHN L. McCLELLAN, Arkansas
JOSEPH C. O'MAHONEY, Wyoming
SAM J. ERVIN, JR., North Carolina
JOHN A. CARROLL, Colorado
THOMAS J. DODD, Connecticut
PHILIP A. HART, Michigan

ALEXANDER WILEY, Wisconsin
EVERETT McKINLEY DIRKSEN, Illinois
ROMAN L. HRUSKA, Nebraska
KENNETH B. KEATING, New York
NORRIS COTTON, New Hampshire

SUBCOMMITTEE ON PATENTS, TRADEMARKS, AND COPYRIGHTS

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

OLIN D. JOHNSTON, South Carolina
PHILIP A. HART, Michigan

ALEXANDER WILEY, Wisconsin

ROBERT L. WRIGHT, *Chief Counsel*
JOHN C. STEDMAN, *Associate Counsel*
STEPHEN G. HAASER, *Chief Clerk*

[1] The late Hon. Thomas C. Hennings, Jr., while a member of this committee, died on Sept. 18, 1960.

FOREWORD

This committee print is the tenth of a series of such prints of studies on Copyright Law Revision published by the Committee on the Judiary 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 Copyrights, Committee on the Judiciary, U.S. Senate.

COPYRIGHT OFFICE NOTE

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

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

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

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

ARTHUR FISHER,
Register of Copyrights,
Library of Congress.

L. QUINCY MUMFORD,
Librarian of Congress.

STUDIES IN EARLIER COMMITTEE PRINTS

First print:

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

Second print:

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

Third print:

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

Fourth print:

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

Fifth print:

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

Sixth print:

17. The Registration of Copyright.
18. Authority of the Register of Copyrights to Reject Applications for 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.

CONTENTS

STUDY NO. 29

PROTECTION OF UNPUBLISHED WORKS

By William S. Strauss

December 1957

CONTENTS

PROTECTION OF UNPUBLISHED WORKS

INTRODUCTORY NOTE

* * * before publication an author has, in the fruits of his intellectual labor, a property as whole and as inviolable as that which exists in material possessions; * * * he has supreme control over such productions, may exclude others from their enjoyment, may dispose of them as he pleases.[1]

These absolute rights in an unpublished work are recognized and protected in the United States by the common law, and continue perpetually as long as the work remains unpublished [2] unless, for certain classes of unpublished works, the owner voluntarily chooses to secure statutory copyright by registration in the Copyright Office.[3]

It is the accepted rule of law that the property right which the author has under the common law is terminated by publication of the work.[4] After publication, rights in intellectual works must be defended under the copyright statute.[5] However, the term "publication" is not defined in the statute,[6] except indirectly. Consequently it has no definite and fixed meaning. In fact, publication may reasonably be thought to mean one thing under the statute as related to published works and another under the common law as related to "unpublished" works.[7] For example, the recording of an "unpublished" work and sale of the records has been considered by some courts to constitute publication under the common law so as to terminate common law rights; but it is not thought to be such a publication as will afford the occasion to secure protection under the statute.[8]

This lack of clarity in such basic concepts leads to difficulties, as will be demonstrated later. The problem is further complicated by the fact that statutory protection is available under section 12 of the statute for certain classes of unpublished works by deposit and regis-

---

[1] DRONE, THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS 8 (1879).
[2] See *infra*, part II, 1.
[3] See *infra*, part II, 2.
[4] Donaldson v. Becket, 4 Burr. 2408 (1774). Globe Newspaper Co. v. Walker, 210 U.S. 356 (1908); Wheaton v. Peters, 33 U.S. 591 (1834); Brown v. Select Theatres, 56 F. Supp. 438 (D. Mass. 1944); Loew's v. Superior Court of Los Angeles County, 115 P. 2d 983 (Cal. Sup. Ct. 1941); Photo Drama v. Social Uplift Film Corp., 220 Fed. 448 (2d Cir. 1915); Universal Film Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914).
[5] Globe Newspaper Co. v. Walker *supra* note 4. Under 17 U.S.C. § 10, publication is the occasion for securing statutory copyright by inserting the copyright notice in the published copies of the work. Registration under sec. 12 is also considered to be an "abandonment" of common law rights. Universal Film Co. v. Copperman, *supra* note 4. But in Warner Bros. v. CBS, 102 F. Supp. 141 (S.D. Cal. 1951) the court held: "Neither the rationale of the rule nor the language nor the purpose of the statute requires that the author relinquish any common law right other than the perpetual right to restrict publication of the work."
[6] 17 U.S.C. § 26 defines "the date of publication" as being, "in the case of a work of which copies are reproduced for sale or distribution—the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor of the copyright or under his authority."
[7] Marx v. U.S., 96 F. 2d 204 (9th Cir. 1938).
[8] See *infra*, III, 2c.

tration while all other classes of works must rely on common law protection until their publication.[9]

In earlier days when the public dissemination of copyrightable works usually meant the reproduction and distribution of copies, it may have been logical and practical to define publication in those terms, to protect unpublished manuscripts against unauthorized publication under the established common law, and to limit the copyright statute to published works. Today, when copyrightable works are disseminated widely by public performance to audiences of millions over radio and television and by sound recordings and audiovisual films, the dichotomy of common law and statutory copyright based on the historic concept of publication may be thought to be outmoded.

What constitutes publication has become dubious in certain situations. What *should* constitute publication, in the light of the constitutional purpose to have works dedicated to the public after a limited time, is a difficult question and the answer may require new and expanding interpretations of the concept of publication as new techniques of dissemination develop; or the realization of the constitutional purpose may best be achieved by applying the principle of according statutory copyright for limited times to all copyrightable works, unpublished as well as published, possibly to the exclusion of perpetual common law rights for unpublished works.

I. History of Protection of Unpublished Works

1. Common Law Protection

The House of Lords held in 1666 [10] that a "copyright was a thing acknowledged at common law." But as the Statute of Anne [11] dealt only with copyright in books after publication without reference to common law rights, the question arose whether common law rights survived the act of publication. In *Millar* v. *Taylor* [12] three of the four judges held that the Statute of Anne did not provide for termination of common law rights after publication. This view was overruled by the House of Lords in *Donaldson* v. *Becket*.[13] The *Donaldson* case was followed, in the United States, in *Wheaton* v. *Peters*, and subsequent cases.[14] In the United States the rule is now well established that an author or his assignee may have perpetual common law rights in his work unless he publishes it, whereupon the common law rights are terminated.[15]

2. Protection of Unpublished Works in Early State Statutes

Some early State statutes referred to protection of unpublished manuscripts,[16] or books or pamphlets not yet published,[17] and provided for actions under the statutes for damages for unauthorized publica-

---

[9] See *infra*, part II, 2.
[10] Atkins v. Stationers Co., CARTER'S REPTS. 89 (1666).
[11] 8 Anne ch. 19 (1710).
[12] 4 Burr. 2303.
[13] *Supra* note 4.
[14] *Supra* note 4.
[15] In Great Britain common law rights in copyrightable works were abrogated by sec. 31, Copyright Act, 1911, 1 and 2 Geo. 5, c. 46.
[16] Connecticut (1783); New York (1786).
[17] Georgia (1786).

tion. But statutory copyright for a specified term extended only to published works.[18]

3. Protection of Unpublished Works in the Federal Statutes

Most of the Federal copyright acts before the Act of 1909 specifically provided that anyone who printed or published a manuscript without the author's or proprietor's consent, should be liable for damages.[19]

Section 2 of title 17, U.S.C. (sec. 2, Act of 1909) provides as follows:

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

In addition to this common law protection of unpublished works, section 12 of title 17, U.S.C. (sec. 11, Act of 1909) provides for voluntary registration as a means of securing copyright in certain classes of works of which copies are not reproduced for sale.

II. Protection of Unpublished Works in the Present Copyright Law

1. Preservation of Common Law Rights (Section 2) [20]

a. Extent and nature of the right.—Section 2 is an explicit savings clause for common law rights in unpublished works, which, although less succinctly stated, was contained in most previous copyright statutes.[21] Despite the Congressional statement that section 2 contains substantially the same provisions as did the previous law,[22] the present section goes beyond the earlier provisions. It expressly preserves not only the common law and equity rights of printing and publishing—as did the prior law—but also the right to "use" unpublished works which presumably includes the right to exhibit, represent, translate, dramatize, or otherwise use and control the work.[23] The Supreme Court of Illinois held in *Ferris* v. *Frohman* [24] as to the rights recognized by the common law:

> At common law the author of a literary composition has an absolute property right in his production, which he could not be deprived of so long as it remained unpublished, nor could he be compelled to publish it. This right of property exists at common law in all productions of literature, the drama, music, art, etc. * * *

This absolute property is protected like other personal property.[25] Like statutory copyright, the common law rights are separate from the ownership in the manuscript or other material object in which the literary or artistic work is embodied.[26] It should be noted that com-

---

[18] DRONE, *op. cit. supra* note 1, 124.

[19] Act of May 31, 1790, 1 Stat. 124 § 6; Act of Feb. 3, 1831, 4 Stat. 436 § 9; Act of July 8, 1870, 16 Stat. 198 § 102; REV. STAT. § 4967 (1875); Act of Mar. 31, 1891, 26 Stat. 1106 § 9.

[20] *Supra* I, 3. Hereinafter, unless otherwise indicated, "section" refers to sections of title 17, U.S.C. (Act of July 30, 1947, 61 Stat. 652) as amended.

[21] *Supra* note 19.

[22] Report No. 2222, accomp. H.R. 28192 [Act of 1909], 60th Cong., 2d Sess., on section 2.

[23] In Harper Bros. v. Donohue, 144 F. 491 (Cir. N.D. Ill. 1905), it was held that all these rights were included in the common law protection, although the statute did not so state.

[24] 238 Ill. 430, 87 N.E. 327 (1909), *aff'd* 223 U.S. 424 (1912).

[25] Commissioner of Internal Revenue v. Affiliated Enterprises, 123 F. 2d 665 (10th Cir. 1941), *cert. den.* 315 U.S. 812 (1942); Baker v. Libbie, 210 Mass. 599, 97 N.E. 109 (1912).

[26] Sec. 27. Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E. 2d 863 (1949); Pushman v. N.Y. Graphic Society, 25 N.Y.S. 32 (Sup. Ct.), *aff'd*, 262 App. Div. 729, 28 N.Y.S. 2d 711 (1st Dept. 1941), *aff'd* 287 N.Y. 302, 39 N.E. 2d 249 (1942).

mon law property rights may exist in forms of intellectual creations which are not copyrightable under the statute. In *White* v. *Kimmell* the court said: [27]

> The common law has long recognized a property right in the products of man's creative mind, regardless of the form in which they took expression.

Thus, common law protection (but not necessarily under a copyright theory) has been held to exist in recordings,[28] in a color chart,[29] and in slogans.[30]

Common law protection is not subject to the limitations imposed by the statute upon copyright. Thus, the compulsory license provision is not applicable to works protected by common law.[31] Common law rights confer unrestricted protection against any unauthorized use of the work.[32] "Subject to the provisions of law affecting all classes of property, an author may, without losing the protection of the common law, deal with his work in any manner he chooses * * *," [33] so long as the work remains unpublished.

b. Duration of common law protection.—Common law protection is perpetual [34] unless the work is published or unless statutory copyright in the work is secured by registration.[35]

c. Remedies.—In *Palmer* v. *DeWitt* [36] the New York Court of Appeals said:

> Whatever rights the plaintiff has * * * exist at common law, independent of any statute * * * the protection he seeks is property, and a right of property which is well established and recognized wherever the common law prevails, and not a franchise or privilege conferred by statute. The State Courts have jurisdiction, as in other actions affecting common law rights or property interests.

---

[27] 94 F. Supp. 502 (S.D. Cal. 1950), *rev'd on the facts*, 193 F. 2d 744 (9th Cir. 1952), *cert. den.* 343 U.S. 957 (1952).

[28] Granz v. Harris, 198 F. 2d 585 (2d Cir. 1952); Supreme Records v. Decca Records, 90 F. Supp. 904 (S.D. Cal. 1950); Capitol Records v. Mercury Records, 109 F. Supp. 330 (S.D.N.Y. 1952), *aff'd* 221 F. 2d 657 (2d Cir. 1955); RCA v. Whiteman, 114 F. 2d 86 (2d Cir.), *cert. den.* 311 U.S. 712 (1940); Waring v. WDAS Broadcasting Station, 327 Pa. 433, 194 Atl. 631 (Pa. Sup. Ct. 1937); Noble v. One Sixty Commonwealth Ave., 19 F. Supp. 671 (D. Mass. 1937), and others. Recordings will be discussed *infra* III, 2, c. Sometimes no sharp dividing line exists between common law literary rights and unfair competition. The discussion will not extend beyond common law literary rights in recordings of copyrightable works. A discussion of common law protection of intellectual creations which are not considered writings under Art. I, sec. 8 of the Constitution seems to be outside the scope of this paper.

[29] Ketcham v. N.Y. World's Fair 1939, 34 F. Supp. 657 (E.D.N.Y. 1940), *aff'd* 119 F. 2d 422 (2d Cir. 1941).

[30] Healey v. Macy & Co., 251 App. Div. 440, 297 N.Y.S. 165 (1st Dept., 1937); Liggett and Myers Tobacco Co., v. Meyer, 101 Ind. App. 420, 194 N.E. 206 (1935).

[31] Sec. 1(e): "* * * the provisions of this title, so far as they secure copyright controlling the parts of instruments, serving to reproduce mechanically the musical work, *shall include only compositions* published and *copyrighted* after July 1, 1909 * * *." [Italic supplied.]

[32] Even the "fair use" theory, applicable to works under statutory copyright, does not apply to works under common law protection. Stanley v. Columbia Broadcasting System, 35 Cal. 2d 653, 221 P. 2d 73 (Cal. Sup. Ct. 1950); Golding v. R.K.O., 35 Cal. 2d 690, 221 P. 2d 95 (Cal. Sup. Ct. 1950).

[33] WEIL, LAW OF COPYRIGHT 114 (1917).

[34] Grandma Moses Prop. v. This Week Magazine, 117 F. Supp. 348 (S.D.N.Y. 1953); National Comics Pubs. v. Fawcett Pubs. 191 F. 2d 594 (2d Cir. 1951); Swift v. Collegian Press, 131 F. 2d 900 (2d Cir. 1942); Bobbs-Merrill v. Straus, 147 Fed. 15 (2d Cir. 1906) *aff'd.* 210 U.S. 339 (1908); Universal Film Mfg. Co. v. Copperman, 212 Fed. 301 (S.D.N.Y. 1914), *aff'd* 218 Fed. 577 (2d Cir. 1914), *cert. den.* 235 U.S. 704 (1914).

[35] Secs. 10, 12, title 17, U.S.C.; Warner Bros. v. CBS, 102 F. Supp. 141 (S.D. Cal 1951); White v. Kimmell, 94 F. Supp. 502 (S.D. Cal. 1950); Benelli v. Hopkins, 95 N.Y.S. 2d 668, 197 Misc. 877 (Sup. Ct. 1950); Photodrama v. Social Uplift Film Corp., 220 Fed. 448 (2d Cir. 1915); West Pub. Co. v. Thompson Co., 169 Fed. 833 (C.C.E.D.N.Y. 1909), *modified on other grounds*, 176 Fed. 833 (2d Cir. 1910). Statutory copyright may be secured without publication of the work by registration under sec. 12. Brown v. Select Theatres, 56 F. Supp. 438 (D. Mass. 1944); Universal Film Co. v. Copperman, 218 Fed. 577 (2d Cir. 1914).

[36] 47 N.Y. 532 (1872).

And further:

> This property in a manuscript is not distinguishable from any other personal property. It is governed by the same rules of transfer and succession and is protected by the same process, and has the benefit of all the remedies accorded to other property so far as applicable * * *[37]

In *De Acosta* v. *Brown*,[38] an action for infringement of a non-copyrighted screen play, the court applied the same criteria for infringement of a common law right as for infringement of a copyrighted work. The district judge stated that, unless the State law under which the case was decided,[39] provides otherwise, he would follow the precedent cases decided under the copyright law, as to the remedies available. The Second Circuit Court affirmed, stating that, as far as tests for an award of profits and actual damages were concerned, there was no reason to distinguish between an action under the copyright law and one for infringement of common law rights. The court issued an injunction, ordered an accounting of profits, and awarded damages, relying on copyright cases as authority.

The copyright statute, however, provides for minimum and maximum amounts of damages in lieu of actual damages and profits.[40] These special statutory damages would presumably not be applicable to common law infringement.

2. Protection Under the Statute (Sec. 12)

a. Legislative history of section 12.—The first bills preceding the Copyright Act of 1909[41] did not by their terms grant copyright in unpublished works, but permitted their registration. Section 10 of S. 6330 provided, in the second paragraph:

> Registration may also be had of works of which copies are not reproduced for sale * * *

The reports of the Conference on Copyright[42] do not make it clear whether registration of such works was intended to accord statutory copyright, or whether such works were to have common law protection with the added benefits of proof of ownership, by virtue of registration, and statutory remedies.[43]

During the conference of November 1905, Mr. Howard stated, on behalf of the American Dramatists Club (one of the prospective beneficiaries of registration of unpublished works) concerning the purpose of such registration:[44]

> The fact is that a dramatist does not know what he wants to print until several weeks after the first production, and it is impossible, as in the case of a book, to get a copyright protection in time to be of use to him when he most needs

---

[37] Palmer v. DeWitt, was quoted with approval in Loew's v. Superior Ct., 115 P. 2d 983 (Cal. Sup. Ct. 1941).

[38] 50 F. Supp. 615 (S.D.N.Y. 1943), *aff'd* 146 F. 2d 408 (2d Cir. 1944), *cert. den.* 325 U.S. 862 (1945).

[39] Unless the Federal courts have jurisdiction because of diversity of citizenship, common law copyright is enforced in State courts. Wells v. Universal Pictures, 64 F. Supp. 852 (S.D.N.Y. 1945), 166 F. 2d 690 (2d Cir. 1948).

[40] § 101(b).

[41] Beginning with H.R. 19853 (59th Cong., 1st Sess., 1906), introduced by Congressman Currier, May 31, 1906; identical with S. 6330, introduced by Sen. Kitteridge, May 31, 1906.

[42] Held at the New York City Club May 31–June 2, 1905; Nov. 1–4, 1905; and March 13–16, 1906, at the Library of Congress, Washington, D.C.

[43] It has been said that the early drafts of 1905 and 1906 contemplated protection of unpublished work by a "reinforced common law copyright." WEIL, *op. cit. supra* note 33 at 290.

[44] Nov. 1905, at 494.

it * * * I ask, therefore, for the special privilege of depositing primarily a manuscript without printing, and having that manuscript identified as what we intended to copyright.

Statutory copyright for those unpublished works which were registered was clearly the intention of the Sulzer bills [45] which provided in section 12:

That copyright may also be had of the works * * * of which copies are not reproduced for sale, by deposit of one complete copy * * *

The import of such deposits for purposes of securing copyright was determined by the following phrase in section 12:

* * * which deposit and claim shall constitute publication for the purpose of securing copyright * * * [46]

Section 11 of the Washburn bill [47] had substantially the same provisions as section 11 of the Copyright Act of 1909. It began by stating "that copyright may also be had of the works of an author, of which copies are not reproduced for sale." [48] The provision that deposit of a copy constitutes publication for the purpose of securing copyright does not appear in the bills introduced subsequent to the Sulzer bill of January 5, 1909, or in the Act of 1909.

This omission caused for some time a great deal of uncertainty not only in regard to the question of whether the words "work not reproduced in copies for sale," mean "unpublished work" but also, if they mean "unpublished work",[49] what the term of copyright in such works is.

This question was not decided until the Ninth Circuit Court construed section 23 of the Act of 1909 in *Marx* v. *United States*.[50] This decision was followed in *Shilkret* v. *Musicraft Records*.[51] The courts have interpreted what they thought to be the Congressional intent, and it is now thought to be established that copyright under section 12 is granted to unpublished works for 28 years from the date of registration.

b. Unpublished works registrable.—Section 2 of the statute contemplates, without distinction as to class, the common law protection of all unpublished works. Section 12, on the other hand, enumerates the classes of works "of which copies are not reproduced for sale," [52] which may be copyrighted voluntarily by registration. Whether this enumeration is exclusive apparently has never been decided by any court, but the administrative practice of the Copyright Office [53] and

---

[45] H.R. 21984 and H.R. 25162, 60th Cong., 1st Sess., introduced on May 12, 1908 and January 5, 1909.

[46] However, H.R. 22183, 60th Cong., 1st Sess., introduced on May 12, 1908 by Mr. Currier, continued to use the term "registration." Same: H.R. 24782, 60th Cong., 2d Sess., introduced Dec. 19, 1908, by Mr. Barchfeld.

[47] H.R. 27310, 60th Cong., 2d Sess., introduced Jan. 28, 1909.

[48] Sec. 11, H.R. 28192, 60th Cong., 2d Sess., introduced Feb. 15, 1909, by Mr. Currier, and sec. 11 of S. 9440, 60th Cong., 2d Sess., introduced Feb. 22, 1909, by Senator Smoot are identical with H.R. 27310.

[49] See the discussion in WEIL, *op. cit. supra*, 289 *et seq.*, also Mr. Solberg's statement during the hearings on H.R. 15263 and H.R. 20596, 62d Cong., 2d Sess., Jan./Feb. 1912 (Townsend Amendment), at 112.

[50] 96 F. 2d 204 (9th Cir. 1938).

[51] 131 F. 2d 929 (2d Cir. 1942), *cert. den.* 319 U.S. 742 (1943).

[52] Whether this term means "unpublished" will be discussed *infra* III, 1, 2.

[53] In the "Letter to the Librarian of Congress Concerning Certain Aspects of the Copyright Act of March 4, 1909" (Government Printing Office, 1938) Col. Bouvé, then Register of Copyrights, said on p. 15: "The protection accorded under section 11 [12 Title 17, U.S.C.] was a departure from the normal process of securing copyright, and therefore must be deemed limited in its operation to the kinds of works named therein, under the rule *inclusio unius exclusio alterius.*"

the commentaries of text writers [54] have been consistent in so construing it.

As specified in section 12, therefore, statutory copyright is available, through voluntary registration, for unpublished works in the classes of lectures, etc., prepared for oral delivery; dramatic, musical, or dramatico-musical compositions; photographs; motion pictures; works of art; and plastic works or drawings. In general, these are the classes of works that are commonly disseminated by performance or exhibition as distinguished from dissemination by the reproduction and sale of copies. But statutory copyright is not available, since registration is not provided for under section 12, to unpublished works in the classes of books, periodicals, maps, reproductions of works of art, and prints. Works in these latter classes are protected only by the common law until they are published.

c. Term of copyright in unpublished registered works.—Neither section 10 nor section 12 states when the copyright term begins to run. In the case of published works, section 24 provides that "The copyright secured by this title shall endure for twenty-eight years from the date of first publication * * *," thus determining both the beginning and the end of the term of copyright. The sole indication in the statute that unpublished works are protected for a limited time only is contained in section 214 which provides, in part, in the last sentence:

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

In *Marx* v. *United States* [55] the court held:

> In view of the declared purpose to limit all copyrights to twenty-eight years, sec. [24] should be construed, in the case of works of which copies are not reproduced for sale, as having reference to the date of deposit * * *

thus, fixing both the beginning and the end of the term in the case of unpublished works.[56] This interpretation seems to be logical and in accord with the intent of Congress.[57] But the statute is faulty in failing to indicate explicitly the beginning and the end of the copyright term in works registered under section 12.

---

[54] HOWELL, THE COPYRIGHT LAW 102 (1952 ed.) states: "This act of grace [registration under sec. 12] was accorded these particular classes because they are primarily adapted for performance or exhibition . . . This section, therefore, being an exception to the general rule, must be deemed limited in its operation to the kinds of works specifically named therein." Other textwriters make statements to the same effect, citing no authority or citing the administrative rules of the Copyright Office. See: WEIL, *op. cit. supra* note 33, at 291; AMDUR, COPYRIGHT LAW AND PRACTICE 441 (1936); BALL, LAW OF COPYRIGHT 129 (1944); DE WOLF, AN OUTLINE OF COPYRIGHT LAW 34 (1925); SOCOLOW, 2 LAW OF RADIO-BROADCASTING 1078 (1939); WARNER RADIO AND TELEVISION RIGHTS 236 (1953). *Contra:* FROHLICH AND SCHWARTZ, LAW OF MOTION PICTURES 504 (1917).

[55] 96 F. 2d 204 (9th Cir. 1938).

[56] The decision in the Marx case was approved in Shilkret v. Musicraft Records, 131 F. 2d 929 (2d Cir. 1942), *reversing* 43 F. Supp. 184 (S.D.N.Y. 1941), *cert. den.* 319 U.S. 742 (1943).

[57] Marx v. U.S. *supra:* "It would appear that Congress intended that the time limit prescribed by sec. 23 [24] should have application to all copyrights secured by the act." Bouvé, "Letter to the Librarian" (*supra* note 53) at 14: "There is no specific provision in the Act as to the duration of copyright in an unpublished work, but section 23 [24] plainly shows the general intent of Congress to carry out the Constitutional direction by limiting the term to twenty-eight years in the case of any work published in the first instance, and there is nothing in the Act to indicate an intention to grant a different term to unpublished works * * *"—WEIL, *op. cit. supra* note 33, at 298, 303, maintains that deposit *is* publication, that section 12 refers to *published* works, and that, therefore, section 24 is directly applicable to works registered under sec. 12. As to the rights in unpublished works, the Court said in Shilkret v. Musicraft Records, 131 F. 2d 929 (2d Cir. 1942), *cert. den.* 319 U.S. 742 (1943): "By complying with section [12] an author gets the statutory rights specified in section 1 * * * ."

III. What Constitutes Publication

Publication has generally been thought to have a dual effect: it terminates common law protection, and it is the occasion for securing statutory copyright by placing a copyright notice on the published copies.

Before the decision in *Donaldson* v. *Becket*,[58] the exclusive and perpetual common law rights in a literary work presumably existed even after publication.[59] These rights are now considered lost upon publication, and the only protection thereafter is held to exist under the copyright statute.[60] The difficulty is to determine what constitutes publication, or conversely, what is an "unpublished work."

One noted text writer spoke of publication in its broad sense as follows:

> Properly speaking, a work is published when it is communicated to the general public. Literary, dramatic, and musical compositions may be published by being read, represented, or performed, or by the circulation of printed or manuscript copies. Paintings, works of sculpture, and similar productions, are published, when publicly exhibited. In short, to publish a thing is to make it public by any means or in any manner of which it is capable of being communicated to the public.[61]

In a logical and practical sense, communication to the public in any manner might be considered an abandonment of control over the property and hence a "dedication" of the work to the public.[62]

However, because the copyright law originally protected only books and other printed works, the concept of publication under the statute has generally been confined to the distribution of visual copies of the work, excluding other modes of dissemination such as public performance and the distribution of sound recordings. Traditionally the courts followed the same concept as to what constitutes such publication as will terminate common law rights; but, as will be discussed below, there has been a recent trend in court decisions toward the view that wide dissemination of a work, particularly through the distribution of sound recordings, is publication terminating common law rights, even though such dissemination cannot be the occasion for securing statutory copyright.

1. Statutory Definition of Publication

The only definition regarding "publication" in the copyright law is that of "the date of publication" in section 26. Weil states[63] that "this definition sufficiently describes the publication of books, prints, motion pictures, casts and all of those literary and artistic products which are reproduced in copies * * * It refers to the simpler forms of publication * * *"

During the Copyright Conference of June 1905, Mr. Bowker suggested the following definition of "publication":[64]

---

[58] House of Lords, 4 Burr. 2408 (1774).
[59] Thus Millar v. Taylor, 4 Burr. 2303.
[60] DRONE, *op. cit.* note 1, *supra* at 116.
[61] *Id.* at 115.
[62] Wheaton v. Peters, 8 Pet. 491 (1834). In Nat. Comics Pubs. v. Fawcett Pubs., 191 F. 2d 594 (2d Cir. 1951), *op. clarified* 198 F. 2d 927 (2d Cir. 1952), Judge Learned Hand said that publication without intent to abandon the right was not dedication but forfeiture.
[63] WEIL, *op. cit. supra* note 33 at 125, 126.
[64] Stenographic Report * * * Conference on Copyright, May–June 1905 (Copyright Office) at 165.

> * * * publication consists in the making and offering for public sale by the author or with his authority of printed copies or reproductions by any process of [a] literary or artistic work * * *

Mr. Bowker later proposed to redefine publication as "the making and offering for public sale by the author, or the copyright proprietor of copies or reproductions by any process, or in any form." [65]

Mr. Putnam, the Librarian of Congress, cautiously stated during the Congressional Hearings on the copyright bills: [66]

> * * * there is a definition of the date of publication where copies are reproduced for sale or distribution * * * It is limited to that because, after discussion, the conference did not seem to be able, * * * to suggest a definition for "publication" in the case of works of art, for instance, of which copies are not reproduced. It seemed to those who were advising us, a dangerous thing to attempt.

During the Congressional Hearings of December 1906 the question of defining publication was again raised in an interchange between Congressman Currier and Mr. Livingstone representing the Print Publishers' Association.[67] Mr. Currier asked for suggestions but Mr. Livingstone declared against any definition which would render a work of art published before the first authorized vending or public distribution. While there occurred several other discussions on the word "publication," [68] none of them led to a definition of the term.

2. Court Decisions Defining Publication

a. "Limited" publication.—Even in the case of the distribution of copies of a work the courts have made distinctions between "limited" and "general" publication, the former not constituting publication in the copyright sense.

In *Ladd* v. *Oxnard* [69] it was held that issuing copies of a book by making it available to subscribers with the restriction that it should not be passed on to anyone else, was a general publication despite the restriction. Said the court:

> * * * there was no limit placed * * * on the extent or number of persons to whom the book might be distributed under the conditions which they had provided.

In *Jeweler's Mercantile Agency* v. *Jeweler's Weekly Publishing Co.*[70] the New York Court of Appeals defined general publication as follows:

> * * * the present state of the law is that if a book be put within reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it * * *, it is published, and what is known as the common-law copyright, or right of first publication, is gone.

Both in the *Ladd* and the *Jeweler's Mercantile Agency* cases distribution of the copies was made to an unlimited number of persons. As Weil has pointed out,[71] only a private communication should be

---

[65] *Op. cit. supra* note 64 (March 1906) at 421.
[66] *Hearings on S. 6330 and H.R. 19853*, 59th Cong., 1st Sess. (June 1906) at 71.
[67] *Hearings*, Dec. 1906 at 101.
[68] *Ibid.*, June 1906 at 66, 67, 70, Dec. 1906 at 165.
[69] 75 Fed. 705 (D. Mass. 1896).
[70] 32 N.Y. Supp. 41 (1895), *rev'd* 155 N.Y. 241, 49 N.E. 872 (1898). For other cases see: WARNER, RADIO AND TELEVISION RIGHTS (1953) 866–868, notes; Schlattman, "The Doctrine of Limited Publication in the Law of Literary Property Compared with the Doctrine of Experimental Use in the Law of Patents," 5 COPYRIGHT LAW SYMPOSIUM (ASCAP) 37 (1954).
[71] WEIL, *op. cit. supra* note 33, 123, 124, citing Werckmeister v. American Lithographic Co., 134 Fed. 321 (2d Cir. 1904).

called a "limited" publication. But Weil also called a "limited" publication (in the usual sense) a "contradiction in terms, either meaning a private communication, which is no publication, or one where the rights of the immediate parties rest in contract, governed by principles other than that of the law of copyright." [72]

In *White* v. *Kimmell*,[73] which involved the making and distribution of less than one hundred manuscript copies, the court said:

> We adopt as a fair summary of the applicable principle [the] statement [of the lower court] that a limited publication which communicates the contents of a manuscript to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a "limited publication," which does not result in loss of the author's common law right to his manuscript * * *

b. Public performance as publication.—Public performance of a work, though the work is thereby disseminated to a wide and unlimited public, has generally been considered not to constitute publication of the performed work.

In *Ferris* v. *Frohman*,[74] which was decided under the Copyright Act of 1891, action was brought to restrain the production of an infringing play which had been largely copied from the original and had been copyrighted in the United States. The original play was registered for copyright in England, but not in the United States where it had been publicly performed. The Court held that there was no U.S. statute by virtue of which common-law right was lost through the performane of the unpublished play. The court stated the rule as follows:

> The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use.[75]

The result of this rule is that as long as a work is not issued to the public in copies, it may continue to enjoy perpetual protection under the common law, though disseminated in performances to the widest possible public.

The result of the *Ferris* rule has been questioned by several commentators. Thus, one writer has thought that it is "abhorrent to the central theme of Copyright to permit the dramatist or composer to exploit his work, and that in a way most appropriate to the medium without exacting the usual time limits on his monopoly." [76]

Under the Berne-Brussels Convention [77] and under the Universal Copyright Convention [78] public performance is not publication. But in most of the countries of the world, where the term of copyright is not measured from publication, the time limit on copyright applies to unpublished works (or at least to works publicly disseminated as by public performance) as well as to published works.[79]

---

[72] *Id.* at 153.
[73] 193 F. 2d 744, 746 (9th Cir.), *rehearing denied, cert. denied,* 343 U.S. 957 (1952), *reversing on the facts* 94 F. Supp. 502 (S.D. Cal. 1950). The lower court, 94 F. Supp. 502 (S.D. Cal. 1950) Discussed at great length the traditional difference between "general" and "limited" publication. *But cf.* American Visuals Corp. v. Holland, 239 F. 2d 740 (2d Cir. 1956); Continental Cas. Co. v. Beardsley, 113 U.S.P.Q. 181 (S.D.N.Y. 1957).
[74] 223 U.S. 424 (1912).
[75] *Id.* at p. 435.
[76] Kaplan, *Publication in Copyright Law,* 103 U. PA. L. REV. 469, 479 (1955).
[77] Art. 4 (4).
[78] Art. VI.
[79] See *infra,* IV, 4.

One writer [80] has thought that the *Ferris* case, decided under the Copyright Act of 1891 which made no provision for securing statutory copyright in works that were publicly performed, should not be followed under the 1909 Act which permits, though it does not require, the securing of statutory copyright in certain unpublished works by registration.[81] He apparently argues that since statutory copyright is now available, for works that are publicly performed, the statutory mode of protection should be deemed to supersede the common-law right when public performance takes place.[82]

The courts have consistently followed the rule in the *Ferris* case in holding that public performance is not publication.

In *McCarthy and Fischer* v. *White* [83] the court said:

> It is * * * well settled that the public performance of a dramatic or musical composition is not an abandonment to the public. [citing *Ferris* v. *Frohman*]. Only a publication of the manuscript will amount to an abandonment * * *

Thus, in the *McCarthy* case, "publication" was defined in the strict sense of publication in the form of copies.

In *Nutt* v. *National Institute* [84] the court repeated the statement in the *McCarthy* case, just quoted. Here the court considered public delivery a limited publication, holding:

> Common law rights are not lost by a limited publication as distinguished from the general publication. By * * * section [2] there is reserved to authors all common law rights * * * prior to [the] enactment [of the Act of 1909] and the decisions of the courts relating to common law rights prior to the passage of the Act of 1909 have not changed the rule. (*Ferris* v. *Frohman* [cit. om.]; *Photo-Drama Motion Picture Co.* v. *Social Uplift Film Corp.* [cit. om.]).

In *Uproar Co.* v. *National Broadcasting Co.*[85] it was held that the "rendering of the performance before the microphone cannot be held an abandonment of ownership * * * by the proprietors or a dedication * * * to the public * * *" [86]

As to whether the public exhibition of motion pictures constitutes publication, it was held in *Patterson* v. *Century Productions* [87] that gratuitious exhibition of a motion picture to select groups did not amount to publication, especially where the prints could not be used except in a specified, strictly limited and non-commercial way. In *De Mille Co.* v. *Casey* [88] the court equated public exhibition of a motion picture with public performance, saying that "performance * * * has never been held to be publication."

The only case which may be interpreted as regarding a performance from filmed copies as publication, seems to be *Blanc* v. *Lantz*,[89] where the court said:

> * * * distribution and exhibition of these films in commercial theatres throughout the world constitutes so general a publication * * * as to result in the loss of the common law copyright.[90]

---

[80] Selvin, *Should Performance Dedicate*, 42 CAL. L. REV. 40 (1954).
[81] Sec. 11 of the 1909 Act, now Sec. 12 of Title 17, U.S.C.
[82] Selvin, *op. cit. supra* note 80, at 45. Kaplan, *op. cit. supra* note 76, at 479, disagrees since statutory copyright for such works is merely optional and no penalty is attached to the failure to exercise that option.
[83] 259 Fed. 364 (S.D.N.Y. 1919).
[84] 31 F. 2d 236 (2d Cir. 1929). Criticized by Selvin, *loc. cit. supra* note 80, at 45, 46.
[85] 8 F. Supp. 358 (Mass. 1934), *aff'd* 81 F. 2d 373 (1st Cir. 1936).
[86] Citing Ferris v. Frohman; Nutt v. National Institute; McCarthy and Fischer v. White, *supra*.
[87] 93 F. 2d 489 (2d Cir. 1937), *cert. denied* 303 U.S. 655 (1938).
[88] 121 Misc. 78, 201 N.Y.S. 20 (Sup. Ct. 1923).
[89] 83 U.S.P.Q. 137 (Cal. Sup. Ct. 1949).
[90] The court construed § 983 of the Cal. Civ. Code which refers to the case where "the owner of a product of the mind intentionally makes it public."

But even this decision relied primarily on distribution of *copies* in the form of motion pictures:

> by * * * electing to exploit it commercially * * * by reproducing his work in a tangible form permitting general circulation, by way of copies * * * plaintiff has lost his right to the exclusive property * * *

Summarizing the holdings of the courts, it seems to be the accepted practice [91] to consider public performance of a work either as "limited" publication, or as no publication. Thus, even where a work is performed for an audience of millions, as in broadcasts, the work remains unpublished and the common law rights in it remain intact.

c. Sale of records as publication.—Another question is whether the making and sale of sound recordings is a publication of the recorded work. In the last several years this question has much exercised the courts and the copyright bar.

In the celebrated case of *White-Smith* v. *Apollo*,[92] it was held by the Supreme Court that piano music rolls were not copies of the musical work. The Court said that a copy was "a written or printed record—in intelligible notation" in a "form which others can see and read." This holding has been used ever since to refuse accepting records as copies and their sale as publication of the musical or literary work recorded.

In *Yacoubian* v. *Carroll* [93] the court held, in a very brief opinion, that the sale of phonograph records of a composition registered under section 12 did not affect the copyright in the unpublished work. The court apparently considered that the making and sale of records did not constitute a publication of the work.

This traditional view was subjected to attack by Judge Igoe's opinion in *Shapiro, Bernstein* v. *Miracle Record Co.*[94] In that case the musical work was not protected by statutory copyright at the time records of it were made and sold. In a *dictum* (the plaintiff was defeated on the ground that his work was not copyrightable because it was not an original composition) Judge Igoe said:

> It seems to me that production and sale of a phonograph record is fully as much of a publication as production and sale of sheet music.

and that the sale of records would therefore have terminated any common law rights.

On motion for a new trial, the plaintiff argued that records are not copies of the recorded musical work, that the sale of records therefore does not constitute publication of the work and hence does not destroy common law rights. Judge Igoe reinforced his previous statement as follows:

> It seems to me that publication is a practical question * * * When phonograph records * * * are available for purchase in every city, town and hamlet, certainly the dissemination of the composition to the public is complete * * * The Copyright Code grants a monopoly only under limited conditions. If plaintiff's argument is to succeed here, then a perpetual monopoly is granted without the necessity of compliance with the Copyright Act.

If phonograph records were deemed "copies" of the recorded musical work, the decision would be in accord with the well-established principle that general unrestricted distribution of copies is publica-

---

[91] Except possibly Blanc v. Lantz, 83 U.S.P.Q. 137 (Cal. Sup. Ct. 1949).
[92] 209 U.S. 1 (1908).
[93] 74 U.S.P.Q. 257 (S.D. Cal. 1947).
[94] 91 F. Supp. 473 (N.D. Ill. 1950).

tion. But the court said it was immaterial whether records were "copies" within the purview of the statute, and held the sale of records to be publication under the common law. However, in a further *dictum* Judge Igoe said that if the musical work had been copyrighted (as by registration of the unpublished work), the sale of records would not have affected the statutory copyright.

Judge Igoe's *dicta* in the *Shapiro, Bernstein* case [95] were repeated by Judge Liebell in *Mills Music* v. *Cromwell Music*.[96] The court there said:

> The manufacture and sale of phonograph records in this country by a person or corporation duly authorized * * * would have constituted a publication, capable of destroying [the] common law copyright. If [the owner] had obtained a statutory copyright prior to the manufacture and sale of the phonograph records, the sale of the records would have no effect on [the] rights, which would then be based on the copyright statute.

If these *dicta* of Judges Igoe and Leibell represent a correct application of the common law so that the sale of records constitutes publication, but if, at the same time, records are not "copies" under the statute, the result would seem to be that the sale of records of an unregistered work is sufficient to terminate common law rights without being sufficient to secure statutory copyright by publication with the copyright notice. If, on the other hand, the courts were to hold that records are "copies" of the recorded work under the present statute, statutory copyright could be secured upon the sale of records by placing an appropriate copyright notice on the records. But the sale of records *without* the notice would not only fail to secure copyright; it would divest a statutory copyright previously secured by registration of the unpublished work or by publication of sheet music with the notice. And on the assumption heretofore made that records are not "copies" of the work, innumerable records have been sold without a copyright notice.

The views expressed by Judges Igoe and Leibell may have been induced by an understandable aversion to permitting common law rights to continue perpetually after the work has been widely distributed to the public in the form of records, while, in accordance with the constitutional provision, protection under the copyright statute is limited in duration. This consideration was stated by Judge Learned Hand in his dissenting opinion in the more recent case of *Capitol Records* v. *Mercury Records Corp.*[97]

In the *Capitol Records* case, all three judges agreed that a virtuoso's recorded performance could be made copyrightable under the Federal Constitution, but that Congress had not done so in the Copyright Act. The majority held that under the common law of New York, the sale of records of the virtuoso's performance did not constitute publication of the performance and hence was not a dedication of the virtuoso's common law right to copy and sell the record.[98]

---

[95] 91 F. Supp. 473 (N.D. Ill. 1950).
[96] 126 F. Supp. 54 (S.D.N.Y. 1954). *Accord:* Biltmore v. Kittinger, (unreported), civil action No. 13937-WB., S.D. Cal. (Jan. 1954), *modified* 238 F. 2d 373 (9th Cir. 1956) *cert. den.* 352 U.S. 954 (1956).
[97] 221 F. 2d 657 (2d Cir. 1955), *affirming* 109 F. Supp. 330 (S.D.N.Y. 1952).
[98] The majority opinion said that RCA Mfg. Co. v. Whiteman, 114 F. 2d 86 (2d Cir. 1940), which had held that the sale of records was a publication which terminated common law rights in the recorded performance, was no longer the law of New York. The majority relied on the later case of Metropolitan Opera Assn. v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S. 2d 483 (1950), *aff'd* 279 App. Div. 632, 107 N.Y.S. 2d 795 (1951).

While the *Capitol Records* case dealt with a recording of a virtuoso's performance which is not copyrightable under the statute, Judge Hand's dissenting opinion is particularly noteworthy as setting forth the dilemma inherent in the question of whether the sale of records constitutes publication of the recorded work under the present law. As to whether publication was a matter of State law he said:

> * * * [the States] could grant to an author a perpetual monopoly, although he exploited the "work" with all the freedom he would have enjoyed, had it been copyrighted. I cannot believe that the failure of Congress to include within the Act all that the [constitutional] clause covers, should give the states so wide a power. To do so would pro tanto defeat the overriding purpose of the clause, which was to grant only for "limited times" the untrammeled exploitation of an author's "writings."

Judge Hand then observed that the case presented a dilemma: if the sale of records was publication, the common law protection was terminated and no statutory protection was available; but he disliked the premise that, if the sale of records was not publication, the common law rights would be perpetual and would not be subject to other limitations imposed upon copyrighted works by the Copyright Act. He concluded:

> I recognize that under the view I take the plaintiff can have only a very limited use of its records if it hopes to keep its monopoly. That is indeed a harsh limitation, since it cannot copyright them; but I am not satisfied that the result is unjust, when the alternative is a monopoly unlimited both in time and use.

In 1909, publication of musical compositions took place by printing them in sheet form; but today many musical works, particularly in the popular field, are first produced on records, and some are never printed in sheet form. If the sale of records is not considered publication, the owner of the common law right can exploit his work fully, except by printing copies, and continue to assert his exclusive rights perpetually. On the other hand, if the sale of records of an unpublished work were publication under the common law, no records could be sold without loss of the common law rights, and statutory copyright could not now be secured except by registration beforehand. The confusion is further compounded by the possibility that whether the sale of records is common law publication may vary from one jurisdiction to another. And as the sale of records has not generally been considered publication under the statute, the author or his successor must register his unpublished work before selling records or run the risk of losing all rights when the records are sold.

In summary, the historical dichotomy of common law protection prior to publication and statutory protection after publication has, under modern conditions, created uncertainties and questionable results: (1) there are some areas of uncertainty as to what constitutes publication; (2) in some instances publication under the common law is not the same as publication under the statute, though the same act of "publication" that terminates common law protection was historically supposed to afford the opportunity to secure statutory protection; (3) while the policy of the Constitution is to provide copyright protection "for limited times," a work not published in copies may be protected perpetually under the common law, even though it is widely disseminated to the public by other means.

It seems evident that our present copyright law regarding the concept of publication and the protection of unpublished works should be subjected to a reexamination. It will be shown briefly how other countries have solved the problem of protecting "unpublished" works and what previous legislative attempts to solve it have been made in this country.

IV. Protection of Unpublished Works in International Conventions and Foreign Laws

1. Under the Universal Copyright Convention

Since the United States has ratified the Universal Copyright Convention [99] (referred to below as the UCC), any revision of the copyright law respecting unpublished works must take into account the obligations incumbent on the United States to protect foreign unpublished works in accordance with the provisions of the UCC.[100]

The UCC provides that unpublished foreign works entitled to protection under the Convention are to be given protection without formalities.[101] The term of protection for works registered prior to publication may be computed from the date of registration [102] and must not be less than 25 years from that date;[103] otherwise, it might be argued that the term for unpublished works not so registered must be not less than the life of the author and 25 years after his death.[104]

The distinction between published and unpublished works is significant under the UCC for the following purposes:

(1) Works first published in any Convention country are to be protected in other Convention countries.[105]

(2) Formalities may be required by a Convention country for works first published in its own territory.[106]

(3) The period of protection may be computed from the date of first publication or from the date of registration prior to publication.[107]

(4) A notice may be required, in lieu of other formalities, on all published copies of a work.[108]

---

[99] With effect as of September 16, 1955.

[100] Article II, paragraph 2 of the Universal Copyright Convention provides as follows: "2. Unpublished works of nationals of each Contracting State shall enjoy the same protection as that other State accords to unpublished works of its own nationals."

[101] Article III, paragraph 4 of the UCC, provides: "4. In each Contracting State there shall be legal means of protecting without formalities, the unpublished works of nationals of other Contracting States." The U.S. copyright statute now provides statutory protection for unpublished works of certain classes upon registration. Since the UCC requires that foreign unpublished works be afforded protection without formalities, the U.S. could not require registration of such works. Their protection without formalities is now afforded in the U.S. under the common law.

[102] The term for unpublished works registered under sec. 12 of the U.S. statute, 17 U.S.C., is computed from the date of registration. See Shilkret v. Musicraft Records, Inc., 131 F. 2d 929 (2d Cir. 1942); Marx v. United States, 96 F. 2d 204 (9th Cir. 1938).

[103] UCC, Art. IV, 2, third paragraph. The period in the U.S. is now 28 years with the privilege of renewal for another 28 years.

[104] UCC, Art. IV, 2, first paragraph. Registration of unpublished works under section 12 of the present U.S. statute is voluntary. For unpublished works not registered, the U.S. now provides protection with no time limit under the common law. Since the formality of registration could not be made a requirement, *quaere* whether the U.S. statute, if it were to impose a limited term on all unpublished works, would be obliged to provide, for foreign unpublished works entitled to protection under the UCC, a term of not less than the life of the author and 25 years after his death, unless such works were voluntarily registered.

[105] See UCC, Art. II, 1; Art. III, 2. Works of a national of any Convention country are to be protected in other Convention countries whether published or unpublished: UCC, Art. II, 1 and 2.

[106] UCC, Art. III, 2.

[107] UCC, Art. IV, 2, second and third paragraphs.

[108] UCC, Art. III, 1.

(5) No formalities may be required for unpublished works.[109]

Publication, for the purposes of the UCC, is defined as meaning "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." [110]

It seems clear that in providing protection for foreign works under the UCC, public performance and the sale of sound recordings could not be deemed publication. Thus, in revising the U.S. copyright law, the works of nationals of other Convention countries which are publicly performed or issued in the form of sound recordings (and not distributed in visual copies) must be given the protection required by the Convention for unpublished works, i.e., without requiring a notice or other formalities, and (unless voluntarily registered) perhaps for a term of not less than the life of the author and 25 years after his death.

2. Under the Berne Convention

The Berne Convention [111] protects, in all member countries other than the country of origin, works first published in a member country and unpublished works by nationals of member countries of the Convention.[112] This protection is granted without formalities [113] and subsists, normally, for the life of the author and fifty years after his death.[114]

While the distinction between published and unpublished works is not of importance in regard to formalities and the normal term of protection, it is significant in several respects:

(1) Works first published in a country of the Union are protected in all other Union countries whether the author is a national of a Union country [115] or of a non-Union country.[116]

(2) The term of fifty years after the death of the author [117] is subject to several exceptions; among them is the provision that anonymous and pseudonymous works are protected for fifty years from the date of their publication.[118]

"Published" works are defined [119] as works copies of which have been issued and made available in sufficient quantities to the public, whatever may be the means of manufacture of the copies. Performance, exhibition and presentation of a literary or artistic work, and construction of an architectural work are not considered publication.[120] The Berne Convention is silent on the question of whether sale of

---

[109] UCC, Art. III, 4.
[110] UCC, Art. VI.
[111] As revised at Brussels in 1948.
[112] Art. 4(1): "Authors who are nationals of any of the countries of the Union, shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."
[113] Art. 4 (2): "The enjoyment and the exercise of these rights shall not be subject to any formality; * * *"
[114] Art. 7(1).
[115] Art. 4(1).
[116] Art. 6(1).
[117] Art. 7(1).
[118] Art. 7(4).
[119] Art. 4(4).
[120] *Ibid.*

records is publication.[121] The laws of the member countries vary in this respect.[122]

3. Under the Pan American Conventions

a. The Buenos Aires Convention of 1910.[123]—The Buenos Aires Convention contains no specific reference to protection of unpublished works. Even Article 3rd, which provides, somewhat ambiguously, that the "acknowledgement of a copyright obtained in one State in conformity with its laws, shall produce its effect of full right, in all other States" seems to refer only to published works, because, in order to be protected "there shall appear in the work a statement that indicates the reservation of the property right." This requirement of a copyright notice seems hardly applicable to unpublished works.

"Publication" determines the country of origin of a work. The country of origin is deemed the country of first publication in America, and if a work has simultaneously appeared in several signatory countries, the country with the shortest term of protection is considered the country of origin.[124]

b. The Washington Convention of 1946.[125]—This Convention protects unpublished works,[126] and does not permit the requirement of formalities for the protection of works originating in other contracting countries.[127] However, in order to facilitate the utilization of literary, scientific, and artistic works, the use of a copyright notice is "encouraged" and a form for that notice is suggested.[128] The duration of copyright is governed by the law of the contracting State in which copyright was originally obtained but it is limited by the term of copyright in the country in which protection is claimed.[129]

The Washington Convention makes no special distinctions between published and unpublished works and contains no definition of "publication". The significance and definition of publication are apparently left to the law of each contracting State.

4. In the Laws of Foreign Countries

The copyright statutes of foreign countries generally provide for protection of all unpublished as well as published works. The dual system in the U.S. of common law protection for works while they

---

[121] This question was considered at the Brussels Conference of 1948. The report of the Revision Conference held at Brussels contains the following on page 177 (transl. from the French, W.S.): "The *Spanish delegation* pointed out that the concept of publication ('edition') had greatly developed because of technical progress, particularly in regard to musical works * * * Forty years ago there was only one method of fixing sounds, that is by written notation which could be read directly by a few specialists. Today, sounds can be fixed on records. Therefore, records must be considered publication ('edition') under the Convention. The *British delegation* held, on the other hand, that the right of performance and the right to copy are distinct rights, and that a performance of a work is not a copy in the Anglo-Saxon Law. A film or a record is the fixation of a performance of a work but not a copy of the work."

[122] See *infra* Great Britain, France.

[123] The United States has ratified the Buenos Aires Convention.

[124] Art. 7.

[125] The United States has not ratified the Washington Convention.

[126] Art. IV, 1: "Each of the Contracting States agrees to recognize and protect within its territory the rights of authors in unpublished works. The present Convention shall not be construed to annul or limit the rights of an author in his unpublished work, nor his right to prevent its reproduction, publication, or use without his consent, nor his right to obtain damages therefor."

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

[128] Art. X.

[129] Art. VIII.

remain unpublished, and statutory protection after they are published, has no counterpart in any other country. Even in Great Britain, where this dual system originated, and in the other countries of the British Commonwealth, common law protection for unpublished works has been abolished, and protection of unpublished as well as published works is governed by the copyright statute.

Broadly speaking, the foreign laws treat published and unpublished works alike in many respects, but they have found it necessary to differentiate between the two for some purposes.

Among the countries where registration is required, some require registration for published works only, with registration being voluntary for unpublished works.[130] In other countries, registration is required for both unpublished and published works alike.[131]

In countries having a notice requirement (whether for all classes of works, for certain kinds of works, or for the reservation of certain rights), this requirement is generally confined to published copies of the works.[132]

Where no formalities such as registration and notice are required—as is generally true (with certain exceptions) in the countries of the Berne Union—there is, of course, no occasion to differentiate between unpublished and published works in regard to such requirements.

In many countries where registration is not required, the deposit of copies for the enrichment of national libraries is required (though not as a condition of copyright protection). The deposit requirement is generally limited to published copies.

Where the duration of copyright is based on the life of the author, as it is in most foreign countries,[133] that term—for works by identified natural persons—is usually applied to published and unpublished works alike. But it is not feasible to base the duration of copyright on the life of the author in the case of anonymous or pseudonymous works, or works by juridical entities.[134] For such works foreign laws usually provide for a term of copyright computed from the date of first publication [135] or, in a few instances, from the date of first public dissemination,[136] and no specific provision is made for the duration of copyright in such works that are not published or not publicly disseminated.

Some foreign countries also provide a special term based on the date of publication or public dissemination for works that are not published or not disseminated until after the death of the author.[137]

---

[130] E.g., in Argentina, Law of 1933, Arts. 57–68; the Philippines, Law of 1924, secs. 11, 12; Spain, Law of 1879, Arts. 33–45; Brazil, Law of 1916, as amended, Art. 673.

[131] E.g., in Chile, Law of 1925, as amended, Arts. 1, 9, 14–18; Colombia, Law of 1946, Arts. 73–89.

[132] E.g., in Argentina, Law of 1933, Art. 63; the Philippines, Law of 1924, sec. 16; Denmark (for photographs), Law of 1911, § 1; Dominican Republic (for the reservation of translation rights), Law of 1947, Art. 18.

[133] Twenty-seven countries have adopted the term of Art. 7 of the Berne-Brussels Convention, i.e., life of the author and 50 years thereafter; 3 countries have life plus 80 years; 1 country has life plus 60 years; 1 country has life plus 40 years; 12 countries have life plus 30 years; 2 countries have life plus 25 years; 4 countries have life plus 20 years.

[134] Many countries purport to recognize only natural persons as authors; but if no such persons are named as the authors, the work is treated as anonymous in which case the publisher or disseminator (which may be a corporate organization) is regarded as the copyright owner.

[135] E.g., United Kingdom Copyright Act, 1956, Sec. 49(2); French Law of 1957, Art. 22; Argentine Law of 1933, Art. 8.

[136] E.g., German Law of 1901, § 31; Italian Law of 1941, Art. 27; Mexican Law of 1956, Art. 20.

[137] Other countries apply the regular term of a period of years after the author's death, without regard to the date of posthumous publication or dissemination.

In France,[138] and Mexico,[139] for example, the term for posthumous works is a period of years after publication. In Japan, the term for works first published or publicly performed after the death of the author is 30 years from such publication or public performance; [140] and in Italy, works disseminated for the first time within 20 years after the author's death are protected for 50 years after such dissemination.[141] In Germany, where the basic term of protection for both unpublished and published works runs for 50 years after the death of the author, a work first published more than 40 years after the author's death is protected for 10 years from publication.[142] Under the new law of the United Kingdom, if a work has not been disseminated (by publication, public performance, offering for sale of records, or broadcasting) before the death of the author, copyright continues to subsist until 50 years after such dissemination; [143] presumably copyright in works not disseminated continues indefinitely.[144]

Moreover, the date of publication or public dissemination is used in some countries as the basis for computing the term of copyright for certain classes of works, notably photographs,[145] motion pictures,[146] and sound recordings.[147]

In many countries a distinction is also made between published and unpublished works in regard to the protection of foreign works. Under the Berne Convention the protection of published works depends upon publication in a member country, while the protection of unpublished works depends upon the fact that the author is a national of a Berne country. In countries adhering to the Universal Copyright Convention, the fact of publication in a member country is similarly one criterion for protection; and both published and unpublished works are entitled to protection if the author is a national of another member country, regardless of the place of first publication.

V. Legisative Proposals Regarding Protection of Unpublished Works

Between 1924 and 1940 a number of bills for the general revision of the copyright law were introduced in Congress but none of them was enacted into law.[148] All these bills contained some provision for the protection of unpublished works; some of them preserved the

---

[138] French Law of 1957, Art. 23.
[139] Mexican Law of 1956, Art. 20.
[140] Japanese Law of 1899, as amended, Art. 4.
[141] Italian Law of 1941, Art. 31.
[142] German Law of 1901, as amended, § 29.
[143] U.K. Copyright Act 1956, Sec. 2.
[144] As is true today in the U.S. where unpublished works (unless voluntarily registered) enjoy unlimited protection under the common law. But if such works were protected in the U.S. under the statute, the Constitution would require that the term be limited.
[145] E.g., date of publication in the German Law of 1907, as amended, § 26; Japanese Law of 1899, as amended, Art. 23; Argentine Law of 1933, Art. 34. Date of dissemination in the Netherlands Law of 1912, as amended, Art. 40. In Japan the term for unpublished photographs runs from creation. In Canada, REV. STAT., 1952, Ch. 55, Sec. 9, the term for all photographs runs from creation.
[146] E.g., date of publication in the U.K. Copyright Act, 1956, Sec. 13(3); Argentine Law of 1933, Art. 34. Date of dissemination in the Netherlands Law of 1912, as amended, Art. 40; Italian Law of 1941, Art. 32; Austrian Law of 1936, § 62. In Italy and Austria, if the film is not disseminated the term runs from its creation.
[147] In the U.K. the term of protection for sound recordings runs from the date of publication: U.K. Copyright Act, 1956, Sec. 12(3). In Canada, REV. STAT. 1952, Ch. 55, Sec. 10, and in Italy, Law of 1941, Art. 75, the term runs from the date of making the recording.
[148] One type of bill passed the House in 1931 and an entirely different kind of bill passed the Senate in 1935. See *infra V:* 3, 7a.

dual system of common law protection and statutory copyright, others abolished common law rights in favor of statutory copyright. On several of these bills extensive hearings were held but the record is singularly devoid of any discussion of the merits of the varying proposals for protecting unpublished works.[149] Following is a brief summary of the provisions dealing with unpublished works in those bills which proposed new or different principles as compared with the law now in force or with the bills preceding them.

1. H.R. 9137 by Mr. Dallinger[150]

The Dallinger bill, which represented the first attempt at general revision of the Copyright Act of 1909, applied both to published and unpublished works.[151] The bill was designed to enable the United States to adhere to the Berne Convention as revised in Berlin in 1908, and its basic principle—of copyright from creation without compliance with formalities—was a complete departure from the traditional concept of American copyright law.

The bill provided that no person should be entitled to copyright or any similar right in any work subject to copyright except under the provisions of the bill, thus abrogating common law literary property rights; but the right to bring an action under the common law for a breach of trust or unfair competition was expressly preserved.[152]

Copyright was to vest in the author immediately upon creation of a work and, subject to any contracts, he was to be the first copyright owner.[153] No registration was necessary for the author to obtain copyright or to maintain his rights as the first owner of the copyright.[154] The author, publisher, proprietor, or any other person interested in a copyright as legal successor of the author of a published or unpublished work could obtain registration of a claim to copyright, or to any of the rights comprised therein.[155] Innocence in infringement limited the remedy to an injunction preventing future infringement,[156] but the failure to register a work or to affix a notice of copyright did not, *per se*, create a presumption or constitute evidence of innocence.[157] On the other hand, if a registration of copyright or of any instrument affecting copyright was made prior to the infringement, this limitation on remedies did not apply.[158]

The term of copyright for both published and unpublished works was fixed at the life of the author and a period of fifty years after

---

[149] During the hearings held in 1932 on the Sirovich bills (*infra* 5, 6), a constitutional question was raised as to the power of Congress to abolish common law rights in unpublished works and substitute statutory copyright as their sole protection. The discussion on this point will be reviewed in a later section of this paper dealing with that constitutional question.

[150] 68th Cong., 1st Sess., introd. on May 9, 1924.

[151] Sec. 2. "Publication" was defined as issue of copies to the public (not including public performance). Sec. 3.

[152] Sec. 2.

[153] Sec. 45(a).

[154] Sec. 45(a). Nor was a copyright notice required, but a notice could be placed voluntarily on copies published, offered for sale, or exhibited. Sec. 20. Sec. 13 expressly exempted foreign authors, entitled to U.S. copyright, from compulsory compliance with any formalities.

[155] Sec. 14. Assignments and licenses not registered were not valid against subsequent assignees and licensees; and an assignee or licensee could not maintain an action unless the instrument had first been registered. Sec. 47.

[156] Sec. 26(a).

[157] Sec. 26(a), second proviso.

[158] Sec. 26(a), first proviso.

his death, except that where the author was a corporation or partnership, the term was fifty years from production of the work.[159]

2. H.R. 11258 by Mr. Perkins[160]

This bill provided for copyright in all the writings of authors from the time of the making of their works, whether published or unpublished,[161] without accomplishment of any conditions or formalities.[162] However, for the purposes of preserving evidence and facilitating transfers of copyright and rights thereunder, authors or their executors, administrators or assigns could obtain registration for a work.[163]

The bill also preserved common law rights in unpublished works by a provision almost identical with section 2 of the present law.[164] Thus, both common law and statutory protection were provided for unpublished works; and the bill did not state when an unpublished work was under common law protection or when it enjoyed statutory copyright. Voluntary registration[165] and action in a Federal district court for infringement[166] were provided for, but whether such registration or action would have constituted an election of statutory copyright was not specified.[167]

The general term of copyright was fixed at the life of the author and fifty years thereafter[168] with certain exceptions.[169] As just pointed out, the provision for continuing common law protection for unpublished works makes it questionable whether, even after expiration of the copyright term, an action for infringement of common law rights in an unpublished work could not have been brought in a State court.

---

[159] Sec. 22. Under Sec. 24, anonymous and pseudonymous works were to be protected for the same term as works published under the author's true name. It is difficult to visualize how the date of death of an anonymous author could be used as reference for the establishment of the terms. Posthumous works were to be protected for 50 years after the death of the anthor, so that any work not published during the term of protection was treated as an unpublished work, apparently without the possibility of additional protection if later published.

[160] 68th Cong., 2d Sess., introd. January 2, 1925.

[161] Secs. 1, 9.

[162] Sec. 1. Deposit of copies of published works was required for use of the Library of Congress. Deposit was not a condtion for securing copyright, but failure to deposit after demand subjected the copyright owner to a fine. Secs. 49–51.

[163] Sec. 1, proviso; sec. 45. Assignments and licenses could be recorded, and recording was required before an assignee could maintain an action for infringement: sec. 17. Assignments and licenses not recorded were void as against a subsequent purchaser in good faith who recorded his assignment: sec. 18.

[164] Sec. 38. Mr. Weil, speaking for the Motion Picture Producers and Exhibitors of America and the National Publishers Association, objected to section 38 because it made it possible to get simultaneous relief in the Federal and the State courts. Hearings on H.R. 11258 at 448.

[165] Sec. 45.

[166] Secs. 28, 29, 32.

[167] In the Thomas bill of 1940 (see *infra* 8, at p. 24) certain acts were specified as constituting an election of statutory copyright.

[168] Sec. 20.

[169] A term of fifty years from first publication was provided for any posthumous work, any work made for hire, any composite or cyclopaedic work, or any compilation, abridgment, adaptation, or arrangement (sec. 21); for the general copyright secured by the publisher of a newspaper or other periodical (sec. 22); and for motion pictures and sound recordings (sec. 23). No special term was provided for unpublished works in these categories. Query as to what the term would have been for an unpublished work if made for hire or if it were an abridgment, adaptation, arrangement, or a motion picture. Perhaps such unpublished works would have been protected under the common law.

3. H.R. 12549 by Mr. Vestal [170]

Under this bill, which passed the House of Representatives,[171] copyright was granted to authors from and after creation in all their writings, published or unpublished, and without compliance with any conditions or formalities.[172] Common law rights were not expressly abolished, but section 2 of the bill extended copyright "to all published and unpublished works * * * not in the public domain on the date when this Act takes effect," and there was no provision preserving common law rights.[173]

Registration was not required, but could be obtained, if desired, by the author or the owner of the copyright or any interest therein.[174] The liability of innocent infringers was limited to a reasonable license fee of from $50 to $2,500; but this limitation did not apply if registration of copyright or recordation of an instrument affecting any right therein was made prior to the infringement.[175]

The term of copyright was fixed at the life of the author and fifty years thereafter, except that where the author was not an individual, the term was fifty years from the date of completion of the creation of the work.[176]

4. S. 3985 by Senator Dill [177]

Copyright was granted by this bill to any author or other person entitled thereto in all his writings, published or unpublished "upon compliance with the provisions of this Act." [178] Protection under the bill could be claimed "by affixing a legible notice to the work or works." [179] Such notice had to be affixed to "all copies of the work published or otherwise distributed," [180] and was to be affixed to the copy of an unpublished work deposited for registration.[181] No right of action for infringement was to exist "for any period previous to the date of affixing notice." [182]

Registration could be made for any published or unpublished work.[183] In any action for infringement, if the plaintiff failed to prove that, at the time of the infringement, either the work had been registered or the notice had been affixed, his remedy was limited to an injunction or to a reasonable license fee of from $25 to $2,500.[184] The bill made no mention of common law protection for unpublished works, and it is not clear from the bill whether unpublished works not

---

[170] 71st Cong., 2d Sess., introd. May 22, 1930.
[171] On January 13, 1931. 71st Cong., 3d Sess. This bill was substantially similar to others previously introduced by Mr. Vestal; the first one was H.R. 10434, 69th Cong., 1st Sess., introd. May 17, 1926.
[172] Secs. 1, 2. Deposit of copies of published works for the use of the Library of Congress was required to be made by the publisher. Failure to deposit after demand did not affect the copyright but subjected the publisher to a fine. Secs. 39–41.
[173] Section 2 would seem to have the effect of substituting statutory copyright for common law rights.
[174] Sec. 34. Notice likewise was not required but could be placed voluntarily on copies of the work; sec. 32. Assignments and licenses could be recorded, and if unrecorded were not valid against any previously recorded assignment or license taken in good faith: sec. 10. Registrations and recordations were constructive notice to all persons: sec. 43.
[175] Sec. 14(a). The limitation was also not applicable if the work infringed had been published with a copyright notice.
[176] Sec. 12. Copyright in posthumous works also expired 50 years from the death of the author (sec. 13). There was no provision for the term in anonymous works, published or unpublished.
[177] 72d Cong., 1st Sess., introd. March 2 (calendar day March 8), 1932.
[178] Sec. 1.
[179] Sec. 6.
[180] Sec. 6.
[181] Sec. 11.
[182] Sec. 18.
[183] Secs. 10, 11.
[184] Sec. 20, final proviso.

registered were left to common law protection or were to have protection with limited remedies under the bill.

The term of protection was fixed at fifty-six years from the date of completion of the work, "which date together with date of affixing notice shall be declared under oath by the applicant for registration of claim of copyright * * *." [185]

5. H.R. 10364 by Mr. Sirovich [186]

This bill provided for copyright to authors of all published and unpublished literary, artistic or scientific writtings.[187] The rights granted under the bill were "in lieu of and in substitution for any common law right of copyright." [188]

The copyright was to begin upon creation of the work and to continue until the expiration of fifty-six years from the date of first public presentation of the work.[189] No term was specified for works not publicly presented.[190]

Copyrights, assignments and licenses could voluntarily be registered or recorded,[191] and a notice of copyright could be affixed to all printed copies of published works.[192] However, failure to register or record such rights,[193] or omission of the copyright notice,[194] limited the remedies of the owner of the right, in actions against innocent infringers, to an injunction or to a reasonable license fee of from $25 to $2,500.

6. H.R. 11948 by Mr. Sirovich [195]

The bill was substantially similar to H.R. 10364, except that, as to the copyright term, in the case of a work not publicly presented, the copyright was to terminate three years after the death of the author; [196] where a corporation was deemed the author, copyright was to terminate three years from creation of the work unless publicly presented prior to the expiration of such period.[197] For the purpose of fixing the copyright term, registration was deemed a public presentation.[198]

7. S. 3047 (Duffy Bill), H.R. 11420 (Sirovich Bill) and H.R. 10632 (Daly Bill) [199]

a. The Duffy bill.—The Duffy bill (which was passed by the Senate on July 31, 1935) protected unpublished works of all classes if voluntarily registered.[200] Section 2 of the Act of 1909, preserving

---

[185] Sec. 18.
[186] 72d Cong., 1st Sess., introd. March 10, 1932.
[187] Sec. 1.
[188] Sec. 37.
[189] Sec. 6.
[190] Mr. Burkan, representing ASCAP, was of the opinion that this made the bill unconstitutional, as there was a possibility that public presentation would never take place; the term of copyright, which was to begin with such public presentation, would be unlimited if it did not take place, and Congress had no right to confer statutory rights for an unlimited time. *Hearings, Committee on Patents,* 72d Cong., 1st Sess., March 21, 24, and 25, 1932, at 162 to 164, 183.
[191] Secs. 15, 16, 18.
[192] Sec. 17.
[193] Sec. 7.
[194] Sec. 8.
[195] 72d Cong., 1st Sess., introd. May 7, 1932.
[196] Sec. 7. This provision probably was intended to overcome the constitutional objections to sec. 6 of H.R. 10364, *supra.* See footnote 190.
[197] Secs. 7, 16.
[198] Sec. 7. Registration and notice were dealt with as in H.R. 10364 *supra.*
[199] S. 3047, 74th Cong., 1st Sess. (1935) introd. by Senator Duffy. H.R. 11420, 74th Cong., 2d Sess. (1936), introd. by Mr. Sirovich. H.R. 10632, 74th Cong., 2d Sess. (1936) introd. by Mr. Daly.
[200] Sec. 9. Published works had to bear a notice (sec. 7), but foreign works entitled to protection under the Berne Convention were to be protected without formalities (sec. 6).

common law rights in unpublished works not registered, was left intact. Thus, unpublished works were to be protected in substantially the same manner as under the Act of 1909 and the present law, except that the privilege of securing statutory copyright by registration was extended to all classes of unpublished works.

The term of copyright was fixed at 56 years from the date of first publication; or, in the case of unpublished works, from the date of creation of the work as shown in the records of the Copyright Office and as indicated by the copyright notice affixed if and when the work was published or, in the absence of such notice and record as otherwise provided.[201]

b. The Sirovich bill.—In the respects with which we are here concerned, this bill was substantially the same as the Act of 1909. Copyright was secured by publication with notice.[202] Copyright was made available for certain (but not all) classes of unpublished works by voluntary registration.[203] Unpublished works not registered were left to common law protection.[204] The term of copyright was fixed at 56 years from the date of publication or of registration of the work whichever was earlier.[205]

c. The Daly bill.—The Daly bill was substantially similar to the Duffy bill in the respects here pertinent, except that the privilege of securing statutory copyright for unpublished works by voluntary registration was limited to specified classes of works[206] as in the Act of 1909 and the present law.

8. S. 3043 by Senator Thomas[207]

In 1938, the Committee for the Study of Copyright of the National Committee of the United States on International Intellectual Cooperation (the "Shotwell committee") began studies on a general revision of the copyright law which finally resulted in the bill introduced by Senator Thomas.

This bill (sometimes referred to as the "Shotwell bill") provided for copyright in published and unpublished works from and after the creation of the work and without compliance with any conditions or formalities.[208] However, the failure to deposit copies of a published work or to deposit "a copy or manuscript of a completed unpublished work" made statutory damages unavailable.[209]

The term of copyright normally ran for the life of the author and 50 years thereafter,[210] with the following exceptions: when the author of a work was not a natural person, copyright subsisted for 50 years from the date of creation of the work;[211] copyright in an anonymous work was to expire 50 years from the date of first publication unless within such period the true name of the author, his address, and the

---

[201] Sec. 15.
[202] Sec. 9.
[203] Sec. 11.
[204] Sec. 2.
[205] Sec. 22.
[206] Sec. 11. The Daly bill also provided copyright protection for performers of copyrighted works.
[207] 76th Cong., 3d Sess., introd. on January 8, 1940.
[208] Sec. 2. Voluntary registration was provided for published and unpublished works: sec. 17(b). Grants of copyright or of any right therein could be recorded; recordation was constructive notice to all persons; a grant recorded in good faith by a grantee without notice would prevail over a period unrecorded grant: sec. 16.
[209] Sec. 14.
[210] Sec. 6.
[211] Sec. 6(b).

title of the work were recorded in the Copyright Office and a copy of the work was deposited.[212]

Section 45 of the bill repeated Section 2 of the Act of 1909, thereby preserving common law protection of unpublished works; but because the Thomas bill granted copyright on creation, a proviso was added that the owner could elect either common law protection or statutory copyright. Any of the following acts constituted election of statutory copyright: publication of the work, deposit of a copy of the work in the Copyright Office, filing of an application to register the work, recordation in the Copyright Office of any grant or other written instrument in respect to the work, the commencement of any action or proceeding in any court based on any claim to statutory copyright, the assertion in writing of any claim to statutory copyright or of any right to remedies or proceedings for infringement of any such right.[213]

VI. Analysis of the Problem

INTRODUCTORY NOTE

Before the twentieth century, the dichotomy of common law rights for unpublished works and statutory protection for published works created few problems comparable to those of today: the general method of commercial exploitation then was through the publication of printed copies, and the performance of unpublished works could usually be controlled through possession of the manuscripts. Even during the discussions and hearings preceding the Act of 1909 there was no thought that phonograph records, for example, would outstrip printed copies as a medium of communicating and disseminating musical works to the public.[214] Sound motion pictures and broadcasting as a means of public communication were unknown. Also unknown were the modern devices for capturing and reproducing visual and acoustic performances.

The reason that in 1909 unpublished lectures, musical and dramatic compositions, works of art, and photographs (followed in 1912 by motion pictures) were brought under the statute, was the fact that these classes of copyrightable works were often publicly performed or exhibited without, or before, being published in the form of copies. Mr. Bowker, who had a large share in the drafting of the 1909 Act, described the situation as follows:[215]

> The dramatic author and the musical performer receive recompense for their creative labor not so much from publication of their works in the printed form of a book as through their performance or representation, * * * as the artist receives remuneration not only for the reproduction and sale of copies, but also from the exhibition as well as sale of his original work.

The drafters of the 1909 Act therefore thought of an unpublished work in terms of a work capable of and "intended for oral delivery before it is printed in a book or periodical[216] and proposed that such a work "might be registered and protected for oral delivery before

---

[212] Sec. 6(c).
[213] Sec. 45.
[214] The range of record repertoires was largely limited to operatic selections, renderings of brass bands, little salon and popular pieces. Recording was done by the acoustic method (amplification and electrical recording appeared in 1919) and the phonograph was almost exclusively used in the home. GELATT, THE FABULOUS PHONOGRAPH (1955) at 174, 308.
[215] BOWKER, COPYRIGHT, ITS HISTORY AND ITS LAW (1912) at 162.
[216] *Id.* at 59.

publication." [217] This innovation was further motivated by the knowledge that "the courts seemed disposed to protect a lecturer on the common law ground that the lecture read is not published by reading, and can be controlled as manuscript." [218] Even then, lectures, performances and exhibitions were presented to a limited audience, and the works involved could be controlled through possession of the manuscript, which was essential to the reproduction or performance of the work.

The developments since 1909 in the field of visual and acoustic mass communication, such as motion pictures, sound recordings, radio and television broadcasts, have made unpublished works accessible to audiences of millions. At the same time the development of devices for the quick and easy recording of sounds and images; by which works performed can be captured and readily reproduced without the manuscript or other copy, have destroyed the possibility of controlling the use of unpublished works through possession of the manuscript.

In the light of these developments, several features of the present law concerning works which, though not "published," are widely disseminated, may be thought to have become outmoded. For one, unless the owner of the common law rights chooses to register the work, he may disseminate the work publicly in every conceivable way except by publishing copies, and his rights continue perpetually in spite of the constitutional policy of copyright for a limited time. This fact may have been the impelling motivation for the recent pronouncements by some courts that the sale of phonograph records is such a publication of the work recorded as to terminate common law rights.[219] The question whether the commercial sale of records is publication of the recorded work has become a source of great confusion. Thus, works reproduced only on records and widely disseminated in that form may or may not lose their perpetual common law protection and, unless registered prior to their being recorded, may not qualify for statutory protection.

On the other hand, works broadcast over radio and television to audiences of many millions throughout the country are considered unpublished, both under the common law and under the statute, because in both instances the courts still operate on the theory that performance does not constitute publication. The result is that these works enjoy perpetual common law protection unless voluntarily registered for copyright or published in copies.

It may also be anomalous that statutory copyright is not available for some classes of works—notably non-dramatic literary works other than those intended for oral delivery—until they are published in visual copies.

In the present situation there are also other areas of confusion as to what constitutes publication: in order to accord statutory copyright, the issue of a few copies with the notice of copyright has been held, in some instances, to constitute publication; conversely, in order to preserve common law rights, in other cases, the distribution of a considerable number of copies without the copyright notice has been

---

[217] *Id.* at 90.
[218] *Ibid.*
[219] See *supra* III, 2. *Cf.* the dissenting opinion of Judge Learned Hand in Capitol Records v. Mercury Records, 221 F. 2d 657 (2d Cir. 1955).

considered "limited" publication and, consequently, not a forfeiture of the common law rights.

For the purpose of considering the possible revision of the present system of protecting unpublished works, the following three proposals will be discussed:

(1) To continue the system of alternative protection under the common law or by voluntary registration under the statute, but with the privilege of registration being extended to all classes of unpublished works.

(2) To extend the concept of publication to include all methods of public dissemination, by protecting under the statute all works made available to the public in any manner, and to limit common law protection to works which have not been made available to the public.

(3) To eliminate protection under the common law and to provide only for statutory protection for all unpublished as well as published works from creation.

1. Alternative Protection of All Unpublished Works Under Common Law or by Voluntary Registration

If the statute were to be extended to permit copyright in all unpublished works, the simplest method would be to provide for voluntary registration of all classes of unpublished works, preserving common law rights in those not registered. This could be done by simply broadening section 12 of the present law to permit registration of all classes of works.

As noted, the main reason for making certain classes copyrightable in unpublished form in 1909 was that these were the kinds of works commonly performed or exhibited before, or instead of, being published in the form of copies. Today, any class of works may be exhibited or performed without or before being published in printed form: e.g., poems are recited over the radio and prints or maps are shown on television. As to non-dramatic literary works—probably the most important category of works for which statutory copyright is not now available before publication—the amendment of section 1(c) in 1952, granting performing rights in them, expressly recognizes that they are capable of being performed or exhibited like dramatic, musical or artistic works which are now registrable in unpublished form. Moreover, a non-dramatic script may be made into a motion picture or used for a television broadcast, with the script itself never being published. The reasoning which in 1909 called for statutory protection of certain "performable" classes of works in unpublished form may well apply today to all classes of works.

The Copyright Office receives many applications and inquiries indicating a desire to obtain registration for unpublished manuscripts of non-dramatic literary works or other works that are not now registrable in unpublished form. Authors or distributors may desire to secure the statutory protection and record evidence afforded by registration before or during their negotiations for publication or other use of a work. Authors have sought various means of providing evidence regarding the existence and content of their unpublished works not registrable in the Copyright Office, for example, by mailing their manuscripts in sealed envelopes to themselves, or by depositing copies and having the date and other information recorded in the files of an authors' organization.

The system of maintaining common law protection, but permitting statutory copyright for all classes of unpublished works as a voluntary alternative, was proposed in the Duffy bill of 1935.[220] The Sirovich bill of 1936 [221] retained substantially the provisions of the present law on this point, but extended the privilege of securing statutory protection by voluntary registration to works prepared for broadcasting or recording; but it did not include other classes of unpublished works that are not now included under section 12. Under the Thomas bill of 1940 [222] the owner could elect either common law protection or statutory copyright in an unpublished work of any class, registration being one means of electing statutory copyright.[223]

The continuation of the present alternative system, but extending the privilege of securing statutory protection, by voluntary registration, to include all classes of unpublished works, would have the merit of avoiding a radical change in our way of protecting unpublished works. At the same time, it would end the discrimination against those classes of unpublished works not now enumerated in section 12, so that authors or owners of all classes of unpublished works would be entitled to secure statutory copyright voluntarily. However, the presently existing uncertainties in regard to what constitutes publication, and particularly in regard to the sale of records as publication, would remain, unless resolved in some other context. Most important, unpublished works not voluntarily registered, though widely disseminated by performance or exhibition, would continue to have perpetual protection under the common law.

2. Statutory Protection After Public Dissemination; Common Law Protection Until That Time

a. General considerations.—The phrase "public dissemination" is used here in the sense of communicating a work to the public visually or accoustically by any method and in any form, whether permanently fixed or not. Under the proposal now considered, such public dissemination would terminate common law protection and bring the work under the statute (though the term would not necessarily be computed from the date of such dissemination). As long as a work had not been publicly disclosed in any way, protection would be afforded under the common law.[224]

The Sirovich bills of 1932 [225] used "public presentation" as the date from which the copyright term was counted, but proposed to abolish common law rights before such presentation of any work [226] and to substitute statutory copyright from the date of creation.[227]

The present proposal might be viewed as a logical extension, in the light of modern conditions, of the traditional concept of providing Federal statutory copyright for "published" works only. However, the word "published" would be interpreted in its widest sense, i.e., as

---

[220] S. 3047, 74th Cong., 1st Sess. See *supra* V, 7.
[221] H. R. 11420, 74th Cong., 2d Sess. See *supra* V, 7.
[222] S. 3043, 76th Cong., 3d Sess. (commonly known as the Shotwell bill).
[223] As to what other acts constituted election of statutory copyright under this bill see *supra* V, at pp. 19–25.
[224] This might be combined with a system of voluntary registration prior to dissemination.
[225] See *supra* V : 5, 6.
[226] Sec. 37 of H.R. 10364 ; Sec. 38, H.R. 11948.
[227] Sec. 6, H.R. 10364 ; Sec. 7, H.R. 11948. H.R. 10364 had no alternative term, which made the term presumably perpetual if there was no public presentation. Probably, this would have been in conflict with the constitutional provision of "limited times". Sec. 7 of H.R. 11948 closed this gap by providing for a term of three years after the death of the author if the work was not publicly presented.

comprising any method by which a work may be communicated to the public, including reproduction and distribution of visual or acoustic copies, live or recorded or broadcast public performance, or public exhibition. Perpetual common law rights would then exist only in works such as private letters and manuscripts which have not been disclosed to the public in any manner. Works which are now considered "unpublished", when publicly disseminated, would be protected only under the statute for a limited time, without the alternative of perpetual common law protection.

In connection with this proposal, consideration must be given to the questions that would arise as to the duration of the copyright term and the applicability of any requirements of notice, deposit and registration, with respect to works publicly disseminated other than by the publication of visual copies.

b. Term of copyright for disseminated works.—The term of copyright for works disseminated otherwise than by the issuance of copies might conceivably be based on the date of dissemination, or the date of registration (if registration of such works were required; or if not required, where registration is made voluntarily, but a different base would then be needed for such works not registered), or on the life of the author. To some extent, the choice of a term for such works might depend upon the term chosen for works published by the issuance of copies.[228]

Some observations should be made here regarding the term for unpublished foreign works entitled to protection under the Universal Copyright Convention.

Paragraph three of Article IV, 2 of the UCC permits computation of the period of protection from the date of the first "publication" of the work, or from its registration prior to publication, or upon the basis of the life of the author. "Publication" is defined in Article VI of the UCC as "the reproduction in tangible form and the general distribution to the public of copies of a work from which it can be read or otherwise visually perceived." This definition is obviously much narrower than "public dissemination": it does not cover the distribution of sound recordings or the presentation to the public by broadcast or any other public performance. As the copyright term under the UCC must be for a minimum of 25 years from either publication as defined above, or from registration prior to publication, or from the death of the author, the date of first public dissemination is not acceptable as the starting point of a fixed term of years for copyright in any foreign work entitled to protection under the UCC.

Similarly, the term for such foreign works could not be computed from registration (except when voluntarily registered) since Art. III, 4, of the UCC requires that unpublished works be given protection without formalities, and hence registration could not be required.

No conflict with the UCC would exist if the copyright in foreign works disseminated otherwise than by "publication" were to subsist until the end of 25 or more years after the death of the author.[229] It

[228] The relative merits of basing the term on each of the alternative starting points were discussed in the study on *"Duration of Copyright"* by James J. Guinan [Study No. 30 in the present committee print].

[229] Should a work later be "published" in the sense of Art. VI, UCC, a new term could begin to run from such publication for a fixed number of years. This would be permissible under the UCC and would be in consonance with the present U.S. system in regard to works not registered in unpublished form.

may be argued that in the interests of uniformity and simplicity the same term should be provided for domestic works so disseminated.

A term for a number of years after the death of the author, however, would still leave an unsolved problem. Under section 26 of the present U.S. copyright law an employer is considered the author of a work made for hire. Such an employer frequently is a corporation.[230] Moreover, a work may be disseminated with the author not being identified. Corporate and anonymous authorship creates no problem as to term where, as in the present law, the term runs for a fixed number of years from registration or publication, respectively; but if the life of the author were the factor determining the duration of copyright, special provisions would have to be made as to the term of protection for unpublished works created in the employment of corporations or disseminated anonymously, for which a "date of death" cannot be determined.

The laws of foreign countries on this question have been discussed above. To summarize: Since most foreign countries do not recognize corporate authorship, their laws do not generally deal with the question of copyright in unpublished corporate works. There are a few exceptions to the rule as, for instance, in regard to photographs, designs or motion pictures, for which several countries provide a term based on the date of creation, or, in a few instances, on the date of dissemination. In dealing with collective, anonymous, and pseudonymous works, foreign laws usually provide for a term running from publication, or, in a few countries, from dissemination, but make no specific provision for unpublished or undisseminated works in these categories. Some foreign laws provide generally for initial copyright ownership in (if not authorship of) legal entities; and here again, the usual copyright term for such works, as for anonymous and pseudonymous works, runs from publication or, in a few countries, from dissemination, with no provision being made for a term for unpublished or undisseminated corporate works.

For corporate and anonymous works which are publicly disseminated but not published in the form of visual copies, none of the copyright terms provided for in the UCC in regard to unpublished works could be applied: the date of registration cannot be used (except where registration is made voluntarily) since the UCC does not permit a requirement of registration for unpublished works; and the date of the author's death cannot be applied to a corporate entity or to an anonymous work. Since the UCC contains no provision for such works, it may be argued that for corporate and anonymous works not published in visual copies, a term based on the date of public dissemination would be permissible under the UCC.[231]

The UCC, of course, has no application to works of domestic authors. It is therefore possible to provide for a term, for domestic works which are not "published", on any of the bases mentioned above.

---

[230] A sample analysis made by the Copyright Office for the six months period from January to June 1955 showed a total of 108,467 registrations of which 61.2 percent were for works by individual authors and 38.8 percent for works by corporate or group authors. See Appendix A to the study on *"Duration of Copyright"* by James J. Guinan [Study No. 30 in the present committee print].

[231] The Main Commission at the General Conference of 1952, where the UCC was adopted, decided that it was not necessary to include a provision on corporate, anonymous, or pseudonymous works. Report of the Rapporteur General on Art. II, Records of the Intergovernmental Copyright Conference, Geneva 1952, pp. 76, 77. Such works would be treated according to the provisions of the national laws.

However, to have one term for domestic works and a different term for foreign works might be the source of some confusion as it would become necessary to ascertain, for any particular work, whether it is domestic or foreign, in order to determine the duration of copyright.

c. Formalities.—If a system of formalities such as notice, deposit and registration were to be maintained for works published in visual copies, the question would arise whether these formalities should be extended to works publicly disseminated by means of public performance or by the distribution of acoustic records.

As a practical matter, it would seem to be unrealistic to require a notice—which would usually have to be given orally—at every public performance of a work. Moreover, the reasons for requiring a notice on published copies, which stem from the fact that copies can readily be reproduced or used, have little or no application to public performances.

The case of acoustic records of works may be quite different. Such records are readily capable of reproduction and use in much the same way as visual copies. The reasons advanced for a notice requirement—for example, to apprise persons having copies of the copyright claim and its initial ownership—would seem to apply to records as well as to visual copies. There appears to be some warrant, therefore, for the view that if a notice is to be required for visual copies publicly distributed, that requirement should be extended to acoustic records so distributed.

However, a notice could not be required on acoustic records of foreign works entitled to protection under the UCC. As previously pointed out, the distribution of records is not "publication" under Art. VI of the UCC, so that works distributed only in the form of records are "unpublished" works under the UCC for which, under Art. III, 4, protection must be afforded without formalities. It is only for "published" (visual) copies of a work that the UCC (Art. III, 1) permits a notice requirement for copyright protection.

Whether a deposit and registration system applicable to works published in visual copies could or should be extended to works disseminated by public performance or by the distribution of acoustic records, would seem to depend upon the nature of the system. Registration as a wholly voluntary matter could be made applicable to all works however disseminated, or even if not disseminated. Registration as a condition for protection could not be required for foreign works entitled to protection under the UCC. Perhaps registration as a condition for extraordinary remedies, such as statutory damages, would be consistent with the UCC, as long as the failure to register did not affect the existence of the copyright and the availability of other remedies.

d. Protection before public dissemination.—The proposal now being considered—to bring works under the statute upon their public dissemination in any manner—would continue the system of common law protection for works not so disseminated. Thus, manuscripts and private letters would have protection under the common law against their unauthorized disclosure to the public, for an unlimited time unless and until an authorized disclosure is made.

The historical theory of copyright law in the U.S. has been to protect private manuscripts against public disclosure, under the common law, for as long as the author or his successors choose to withhold the work from the public. When the publication of visual copies was virtually the only means of making works accessible to the public, only works so published were withdrawn from protection under the common law. Under present day conditions, the same theory might be thought to require that works made accessible to the public by other methods of dissemination—the distribution of acoustic records or public performance—be withdrawn from common law protection and be given statutory protection for a limited period of time; but works not disclosed to the public in any manner could still be left to common law protection in line with the historical theory.

More positively, it can be argued that in the interests of respecting privacy, undisclosed manuscripts and letters should be considered as common law property without time limit unless and until the author or his successors choose to disclose them to the public.

This, in essence, is the result reached in the United Kingdom [232] and in Canada,[233] where the copyright statutes provide that copyright in works not disseminated in any manner during the life of the author continues until 50 years after they are disseminated.

This matter will be considered further in the discussion below of the alternative of having the copyright statute provide for a limited term of protection for all unpublished works.

Another matter that deserves consideration, if undisseminated works are left to common law protection, is that of providing for voluntary registration, thereby securing statutory copyright, for undisseminated works. Such registration, which either the author or other owner of the work or a prospective user may desire for his greater protection, could be equated with dissemination, or a statutory term could begin from registration.

3. Statutory Protection Only for All Works

a. General considerations.—We turn now to the third proposal for dealing with unpublished works: to discontinue common law protection entirely and extend the statute to cover all works from their creation. This proposal—which is found in several of the previous general revision bills [234] differs from the second proposal discussed above in that even works not publicly disseminated in any manner would be entitled only to statutory protection. Under the proposal now considered, undisclosed works such as manuscripts and letters would also be given a statutory copyright term after which they would go into the public domain.

As previously pointed out, it may be argued that the privacy of authors should be respected by protecting their undisseminated writings against unauthorized disclosure for an unlimited time [235] unless and until they or their heirs or assigns choose to make the disclosure.

---

[232] U. K. Copyright Act, 1956, sec. 2.

[233] Revised Statutes of Canada, 1952, Ch. 55, sec. 6.

[234] See *supra* V, at pp. 19–25: Dallinger bill, H.R. 9137; 68th Cong. 1st Sess. (1924); Perkins bill, H.R. 11258, 68th Cong., 1st Sess. (1925); Vestal bill, H.R. 10434, 69th Cong., 1st Sess. (1926); Herbert bill, S. 176, 72d Cong., 1st Sess. (1931); Sirovich bills, H.R. 10364 and H.R. 11948, 72d Cong., 1st Sess. (1932).

[235] This, of course, would mean leaving the protection of such works to the common law. Protection under the Federal statute would necessarily be for a limited time.

Thus, the author and his heirs may wish to withhold from the public his less successful works which, in their opinion, might detract from his reputation; or they may wish to keep from the public writings which contain the author's personal observations regarding contemporary persons or events. On the other hand, it can be argued that after a considerable period of time after the death of the author and his contemporaries, the sensitivity of their remote heirs is no longer entitled to the same consideration,[236] while the accessible "private" writings of the author may be of great interest to scholars, historians, and the public in general. The author or his heirs, or others in possession of his "private" writings, may of course destroy any writings which they believe should never be disclosed; but if these writings remain in existence, there may be a public interest in eventually allowing anyone in possession of an old manuscript to make it available for research or publication without the risk of infringement claims by remote and unknown heirs.

b. Duration.—Assuming that such undisseminated works should eventually go into the public domain, the period of protection against unauthorized disclosure should probably be long enough to avoid any substantial invasion of the privacy of the author and his contemporaries, and of their families for at least the next generation. The term of protection might be for a substantial number of years after the author's death.[237]

A different term would have to be provided, of course, for undisseminated works of corporate or anonymous authorship. For such works the term of years might run from the date of creation.

If, during the term provided for undisseminated works, such a work were registered or published or otherwise publicly disseminated, the consideration of privacy and secrecy would drop out; and if a different term were provided for works registered, published, or otherwise disseminated, that term might then be made applicable.

c. Formalities.—Even if a notice requirement were retained for distributed copies of a work, there would seem to be no purpose in requiring a notice on the manuscript of an undisclosed work. Similarly, any requirement of deposit and registration could not appropriately be applied to works which the author or owner wishes to withhold from public disclosure. However, the author or other owner may wish to register a work not yet disclosed when he contemplates its publication or other dissemination; and for this purpose, voluntary registration might be provided for.

d. Pre-existing unpublished works.—The proposal to have all unpublished works protected under the Federal statute only, with common law protection being eliminated, might raise a constitutional

---

[236] In exceptional cases there is always the possibility of an action for criminal libel of a deceased person if the defamation of the dead person is rightly so much resented by surviving relatives that it tends to disturb the peace. State v. Haffer, 94 Wash. 136, 162 Pac. 45 (1917).

[237] For foreign works entitled to protection under the Universal Copyright Convention, a term of at least 25 years after the author's death would fulfill the requirements of the Convention.

question as to pre-existing unpublished works in which common law rights already subsist.[238]

It seems clear enough that a new copyright statute could be made applicable to any works created in the future, without regard to their publication or other dissemination. The power of Congress to legislate on copyright is expressly conferred by the Constitution, and this power is limited in two respects only: copyright is confined to the "writings" of "authors," and it can only be granted "for limited times". There is nothing that limits Federal copyright legislation to published writings. Nor is any obstacle apparent to the denial of common law protection for future works, since no common law rights can be said to exist in works not yet created.

Likewise, with respect to pre-existing works in which common law rights subsist, it seems clear that Congress could make the statute applicable, and terminate the common law rights, whenever, in the future, the owner voluntarily registers, publishes, or otherwise publicly disseminates the work.

The question remaining is whether, in regard to pre-existing works, Congress could make the statute applicable, and terminate the subsisting common law rights, if the work were never registered, published, or publicly disseminated in any manner.

This question could be avoided if, for pre-existing works in which common law rights subsist, the common law rights were continued in perpetuity unless and until the owner chose statutory protection by doing some specified act such as registration, public dissemination, or asserting a claim under the statute.[239] However, if it is thought desirable to abolish common law protection and have the statute govern with respect to all future works, the same considerations would seem

---

[238] The constitutional question was raised by Mr. Burkan, general attorney for ASCAP, during the hearings on two of the Sirovich bills, H.R. 10740 and H.R. 10976, 72d Cong., 1st Sess., March, 1932. H.R. 10740 contained the following provision (sec. 37): "The rights granted to authors under this Act shall be in lieu of and in substitution for any common law right of copyright * * *" Mr. Burkan said (*Hearings* on H.R. 10976, *supra* at 163) that the Government could not "divest the author of his common law right * * * because that is depriving him of his property without due process of law." The Bar Association of the City of New York apparently disagreed (*Hearings* on H.R. 10976, *supra* at 168): "Some of our Committee [on Copyrights, N. Y. City Bar Association] felt that it was a nice question, whether the common law of an author * * * could be taken away by an Act of Congress because, among other things, the doctrine that there is no such thing as common law of the United States, is well established. The better view seemed to be that the Congress, under the constitutional grant of power, having chosen * * * to make the copyright of an author come into existence with the creation of his work, there is no room left for the common law property right of an author in his writings. It all comes under the protection of the statute." In a later Sirovich bill, H.R. 11948, the following saving clause was added (sec. 38): "Where an author has a common law right on the effective date of this Act, such author shall be protected under and pursuant to the provision of this Act until the expiration of fifty-six years from the effective date of this Act." An objection was again raised by the representative of ASCAP to the constitutionality of this provision (*Hearings* on H.R. 11948, May, 1932).

[239] This course was followed for all unpublished works, whether pre-existing or created in the future, by the Thomas (Shotwell) bill. See *supra* V. Section 45 of that bill read as follows: "Nothing in this Act shall be construed to annul or limit the right of the author or other owner of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without the consent of such author or other owner, and to obtain damages therefor: *Provided, however,* That when the author or other owner shall have elected to have copyright under this Act, the provisions of this Act shall be exclusive, and in lieu of and in substitution for any rights and remedies at law or in equity under any other applicable or available common or statutory law of any appropriate jurisdiction, as to published and unpublished works. Notwithstanding any other provisions of this Act, such election shall be deemed to have been exercised by and shall be binding only upon, an author or other owner who has made or authorized any of the following: A publication thereof; a deposit of a copy or copies of the work in the Copyright Office as provided herein; the filing of any application to register the work in the Copyright Office as provided herein; a recordation in the Copyright Office of any grant or other written instrument in respect thereof as provided herein; the commencement

to indicate the desirability of substituting statutory for common law protection of all pre-existing works. Moreover, if all future works were to be governed by the statute, the continuation of common law protection for pre-existing works could be a source of considerable confusion: whether a particular work would be subject to common law or statutory protection (with their differences regarding jurisdiction of the courts, term of protection, etc.) would depend upon whether the work had been created before or after the effective date of the new statute, a fact which might be difficult to determine, especially after the lapse of some years.

If, then, pre-existing works in which common law rights subsist were to be brought under the statute, with the common law rights being abrogated, the question would have to be considered whether the substitution of statutory copyright for common law rights would constitute the taking of property without due process of law. This question is two-pronged: it goes, first, to the extent of the rights involved and, second, to their duration.

As to the extent of the rights, it can be argued that statutory copyright would afford substantially the same rights as common law protection. Thus, existing common law rights would be confirmed as statutory rights. Likewise, the statutory remedies would seem to be no less favorable to the owner than those available under the common law.[240] As to the rights and remedies afforded to the owner, therefore, no constitutional barrier is seen to substituting statutory protection for existing common law protection.

As to duration, the question may be asked whether the substitution of statutory copyright for a limited term in place of the perpetual duration of common law rights would deprive the owner of property without due process of law. One possible line of reasoning on this question is suggested by the holding that during the lifetime of a person his heirs, legatees, or devisees have no vested interest in his property.[241] Perhaps, on that premise, it would suffice for constitutional purposes to have the statute assure protection for at least the lifetime of the person or persons who owned the common law property at the effective date of the new statute.[242]

---

of any action or proceeding in any court based upon any claim to copyright under this Act, or of any right to remedies or proceedings for infringement of any such right or rights."

In a memorandum of Nov. 16, 1938, to the Shotwell Committee, Mr. Sargoy stated that Congress could abrogate common law rights, but that none of the groups submitting proposals for a bill had advocated doing so. The notes to Section 1 of the Shotwell Committee's draft bill of April 15, 1939, state: "The second paragraph [of Sec. 1] is identical to Sec. 2 of the Copyright Act of 1909. Although the proposed bill grants statutory copyright both in published and unpublished works, it appears questionable whether Federal legislation may abolish common law copyright in unpublished works which is secured under the law of the various states."

The "collected comments" of Nov. 1939 contain an exposé by the Song Writers on Section 45 of the bill (preserving common law rights) in which the difference of opinion as to the constitutionality of abrogating common law rights is again mentioned but where it is suggested that common law rights should be abrogated and any question of constitutionality be left to the courts.

[240] If no right of action has accrued, existing remedies may be abolished, as long as an adequate remedy for existing rights is provided, even though the new remedy may be less favorable. I COOLEY, CONSTITUTIONAL LIMITATIONS (1927) at 591, 2 *id.* at 754 and cases cited. However, a right of action which has actually accrued under the common law, may not be denied. United States v. Standard Oil of California, 21 F. Supp. 645, *aff'd*, 107 F. 2d 402 (1940), *cert. denied* 309 U S. 654 (1940).

[241] See Grant v. Jefferson, 247 U.S. 288 (1918).

[242] It should be noted that the owner at that time would not necessarily be the author who may already be deceased or who may have assigned his rights; also, that there may be any number of owners such as the several heirs of a deceased author.

Another possible approach would be to assure statutory protection of pre-existing unpublished works for a reasonably long period of time from the enactment of the statute. Thus, one of the Sirovich bills of 1932 [243] specified a term of fifty-six years from the effective date of the statute. Such an approach would seem to be based on the premise that the due process requirements of the Fifth Amendment are satisfied as long as the reduction in duration is reasonably necessary to achieve the Congressional purpose.[244] If Congress deems it advisable to apply the statute to pre-existing works, it must, by mandate of the Constitution, limit the term of protection for such works. And if the term were long enough to afford the owner a fair opportunity to reap the benefits of his rights, the effect of the time limitation would not seem to be unreasonably severe.[245]

The first approach mentioned above—statutory protection of pre-existing works for a term based on the life of the owner or owners at the time of enactment of the statute—would involve serious practical difficulties. After the lapse of some years it might be extremely difficult to determine who the owner or owners had been (and there might have been a number of them) at a particular date in the past, and then to ascertain if and when they died. Moreover, such a term could not be applied to corporate owners; nor would it be in accord with the requirement of the Universal Copyright Convention under which the life of the author, rather than of the owner, is the basis for computing the term.

The second approach mentioned above—statutory protection for a term of years running from enactment of the statute—would make it easy to compute the term. This term could be applied to all works including those of corporate authorship or ownership. In order to conform with the Universal Copyright Convention, it could be provided that the term would run for a period of years after the death of the author (who may or may not be living when the statute is enacted) or for the period of years after enactment of the statute, whichever is longer.

e. Exclusive Federal jurisdiction.—It should be observed that the proposal to have all copyrightable works governed by the statute from their creation would mean that all litigation involving claims of infringing use of copyrightable works would be within the exclusive jurisdiction of the Federal courts, even though the works were private papers such as manuscripts, diaries, letters, photographs, etc., which had never been disclosed to the public. State courts would be ousted of their present jurisdiction over actions for infringing uses of unpublished works now protected by the common law (though related actions involving matters of general law such as breach of contracts, breach of trust, transfers of physical property, devolution of title, etc., might still be governed by State law and triable in the State courts).

---

[243] H.R. 11948, 72d Cong., 1st Sess.

[244] *Cf.* Guaranty Trust Co. v. Henwood, 307 U.S. 247 (1939); Howell Electric Motors Co. v. United States, 172 F. 2d 953 (6th Cir. 1949).

[245] Similar considerations would seem to underlie the traditional view that statutes of limitation may be reduced, even with respect to pre-existing causes of action, as long as a reasonable time for enforcing the right is preserved. See Terry v. Anderson, 95 U.S. 628 (1877).

There may be some question whether the control and use of private papers, before they are publicly disseminated, are not so much a local matter that they should be left to State regulation and trial in the State courts. It might be arguable that the control and use of writings do not become matters of national concern until they are disclosed to the public in some manner. On the other hand, it could be contended that exclusive Federal regulation is preferable, not only to assure greater uniformity, but also on the premise that even with respect to undisclosed works there is a national concern in any work which may be disseminated to the public.

VII. Summary of Major Issues

Which of the following alternatives should be adopted for the protection of unpublished works (i.e., works of which copies are not distributed to the public)?

Alternative A.—Continue the system of the present law, whereby statutory copyright may be obtained for unpublished works by voluntary registration; with all unpublished works not registered being left to protection under the common law.

If this alternative is adopted:

(1) Should voluntary registration be limited to certain classes of unpublished works, and if so, should the specification of these classes in section 12 of the present law be retained or modified; or should voluntary registration be made available for all classes of unpublished works?

(2) What should be the copyright term for unpublished works which are registered?

Alternative B.—Make the statute applicable to all works when publicly disseminated in any manner; with works not publicly disseminated being left to protection under the common law.

If this alternative is adopted:

(1) What should be the copyright term for works publicly disseminated? Should different terms be provided for works published in copies and those otherwise disseminated?

(2) Should provision be made for obtaining statutory copyright in works not publicly disseminated, by their voluntary registration? If so, what should be the copyright term for such works that are registered?

Alternative C.—Make the statute applicable to all works from their creation, without regard to publication or public dissemination; with common law protection being eliminated.

If this alternative is adopted:

(1) What should be the copyright term? Should different terms be provided for works published in copies (or works publicly disseminated in any manner) and those not published (or publicly disseminated)?

(2) Should pre-existing unpublished works in which common law rights subsist be brought under the statute? If so, what copyright term should be provided for such works if they are never published, publicly disseminated, or registered?

62348—61——4

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

CONTENTS

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

By John Schulman

DECEMBER 10, 1957.

I have read the study on the "Protection of Unpublished Works."

It is my belief that there should be a single copyright system under which both published and unpublished works would be protected. Accordingly, I am in favor of a Federal statute which would embrace that principle.

To this extent I subscribe to Alternative C. However, the phrasing of the alternative is much too limited and the subsidiary questions represent only a few of the many factors to be taken into account.

My preference for a single statutory system of copyright which would absorb (rather than eliminate) common law doctrine is predicated upon the general pattern which I have indicated in comments upon other studies. Obviously, if our statutory system is to continue being a straitjacket, rather than a law which assured adequate protection for authors and artists, I would prefer to retain the dual systems of statutory and common law protection. The common law doctrines are in my opinion better adapted to present day conditions and practices than is our outmoded statutory system.

JOHN SCHULMAN.

By Walter J. Derenberg

DECEMBER 11, 1957.

I have finished reading the very excellent study by William Strauss on "Protection of Unpublished Works," upon which you have invited my opinion.

I have always felt quite strongly that common law copyright protection should be abolished in the United States as it was in England and that we should have a much simplified system which would do away with the complications of our present law and, particularly, Section 12 thereof.

I would therefore favor Alternative C, under which the federal statute would be applicable to all works from their creation, without regard to publication or public dissemination. Having in mind the ultimate possibility of assimilating the Berne Convention and the Universal Copyright Convention and for other reasons well summarized in Mr. Finkelstein's recent article, "The Copyright Law—A Reappraisal" (104 U. of Pa. L. Rev. 1025 (June 1956)). I would also favor the idea that such uniform federal statutory protection should be for the life of the author and 50 years thereafter.

I am also of opinion that preexisting unpublished works should be brought under the statute and that perhaps the best way to do this would be to adopt the approach first suggested in one of the Sirovich Bills to which Mr. Strauss's study refers in footnote 243.

While I realize that some problems may arise with regard to unpublished letters, photographs and other private material, I have always felt that there is, on the other hand, a real public interest which should permit the use of this type of material after an initial fairly long period of protection, at least in instances in which the use thereof may be of literary or historical interest.

As you will recall, this point of view was also suggested in the interesting study published a few years ago by Dr. Ralph Shaw, entitled "Literary Property in the United States."

I am a firm advocate of one uniform federal system of copyright law, which, in my opinion, would also further promote better international copyright relations between the United States and other nations, without, at the same time, raising serious constitutional questions.

WALTER J. DERENBERG.

By Walter J. Derenberg

MARCH 19, 1958.

I have reviewed the excellent study by William Strauss on "Protection of Unpublished Works." With regard to the existing Section 12 of the Act of 1909, which provides for statutory protection for certain types of unpublished works, I have always considered this section an anomaly for a number of reasons. In the first place, I have never been able to see any reason why the protection of Section 12 should not equally be available to books and other literary material which, under the present wording, are outside the scope of the sanction. Furthermore, it has always seemed rather curious to me that it should be necessary, under the existing law, to go through all the registration formalities again once the hitherto unpublished work will have been generally distributed. In view of the fact that an additional fee has to be paid at that time and all other registration formality requirements have to be met again, one may well ask the question whether the subsequent registration should not create an independent term of copyright so that the 28-year period would run from the date of general publication, rather than from the date of the deposit with the Copyright Office.

But I would go much further. There is no other country in the world that provides for three different types of copyright as does our present system, i.e., statutory copyright for published works, statutory copyright for certain unpublished works, and common law copyright. In trying to explain our law to members of the Bar in foreign countries which have one uniform system, I have found it difficult to explain the intricacies of our own copyright system.

I would favor not only the legislative repeal of Section 12 but also elimination of common law copyright, so as to make the entire problem of the protection of literary and artistic works a matter of uniform federal legislation. In other words, I would cast my vote as in favor of Alternative C, as stated on page 37 of the Strauss study. I find myself in complete agreement with that part of the Report of Committee No. 15 on the Revision of the Copyright Law as presented to the Annual Meeting of the American Bar Association at New York City in 1957, which recommends a single exclusive system of federal statutory protection (see page 61 of 1957 Committee Reports, Section of Patent, Trademark, and Copyright Law, American Bar Association). As pointed out in this report, the elimination of a multistate plus federal system of protection would also result in removing certain ambiguities in the administration of the Universal Copyright Convention. Moreover, just as we have finally succeeded in getting legislation passed providing for a uniform federal statute of limitations with regard to infringement suits based on the Copyright Act, we should strive toward similar uniformity when dealing with copyright protection of unpublished works, even if by doing so we might have to interfere to some extent with existing jurisdiction of various state courts for such matters.

I have always believed that the present system under which perpetual common law copyright is assured to manuscripts, letters and other unpublished literary material results in hampering the use of much historically and scientifically valuable material which should not be withheld from the public solely because it may not be possible to find the heirs of a long-deceased author or because they might unreasonably refuse to grant permission to use such material. With regard to the duration of statutory copyright in unpublished material, it would be my opinion that a term of protection of at least twenty-five years after the author's death and not exceeding seventy-five years would be sufficient for the purpose of avoiding any unwarranted invasion of the privacy rights of the author or his family and would, at the same time, serve the public interest in making public important material of this type.

I would also favor the suggestion made at page 33 of Mr. Strauss's study that in case of public dissemination of hitherto undisseminated material, a different term of protection dating from such dissemination should be provided. I would see no constitutional issue in making the proposed new statute applicable to preexisting works in which common law copyright may exist at the time of the enactment of the statute, as long as a reasonably long statutory term is substituted for the preexisting unlimited common law protection.

WALTER J. DERENBERG.

By Edward A. Sargoy

MARCH 21, 1958.

(Re: Copyright Revision Panel Studies, "Protection of Unpublished Works," by William Strauss)

I have read with great interest the above paper by Bill Strauss. It is a fine study which has cut to the core of the fundamental difficulty of the dichotomous system of protecting intellectual and artistic works in the United States. This is the juridical regime by which statutory protection, exclusively in the federal courts, and strictly limited as to copyrightability, infringability, and duration, is accorded on the one hand, only to visual forms of "writings" after a first investive publication with copyright notice (or a registration prior to publication as to some classes). On the other hand, there is left to the vagaries of judicial interpretations of the unwritten common law, as well as to potential statutes, of the forty-eight States, prior to the moment of first divestive publication, a protection unlimited as to the form of expression of the work, the extent and nature of its exclusive right of use, and as to duration. Add to this concoction, the unknown ingredient of what is investive or divestive publication, as Bill Strauss has so well brought out. In such regard he is in company with such as Kaplan, Nimmer, and others, in their comments on publication, particularly as affected by the doctrines expounded in the *Waring, Whiteman, Miracle Records, Tzena Tzena, Capital Records, Metropolitan Opera* and *Ettore* cases (Kaplan: 69 Harv. L. Rev. 409; 103 U. Pa. L. Rev. 469; Nimmer, 56 Colum. L. Rev. 185).

Bill Strauss has also done a fine job in exploring the history of our common law protection both in the courts, as well as in the various legislative attempts over the years to bring unpublished works into our statutory system, and to point up the problem of the unpublished work in the UCC and in its comparative treatment under other Conventions, as well as in the individual laws of other countries.

What I thought exceptionally well done was his perspicacious analysis at the conclusion of the paper, of the various problems, practical, constitutional and otherwise, which would be encountered in taking different paths of approach toward a solution.

I think this study, as complemented by the problems discussed in the studies on duration, notice of copyright, and divisibility, and what I anticipate may be discussed in Kaplan's prospective work on registration, is an apt illustration of the necessary philosophical integration of all of these concepts in considering any new system, as indicated in the 1957 Report of my A.B.A. Committee on Program for General Revision of the Copyright Law.

Getting more directly to the various paths to a new system surveyed by Bill Strauss in his concluding analysis, my general feeling is as follows:

I am strongly opposed to the system mentioned in the first alternative, one in effect which would preserve our present dual system of federal law for published or voluntarily registered works, and the juridical systems of the forty-eight States for unpublished, unregistered works, even though we were to make the statute available for voluntary registrations of all classes of unpublished works. Apart from the continued lack of uniformity which this means in protecting a work of such incorporeal nature that it can be present simultaneously in tens of thousands of different places throughout the county, for infringing uses, I have a strong aversion, influenced to some extent by Judge Hand's dissent in the *Capital Records* case, to the indefinite period of protection which common law will accord in this electronic age to works fully and commercially exploited in their distribution to millions of people, but in forms not deemed capable of divestive publication. I have no objection to an extremely long term, but I do object to the distinction that enables perpetual commercial exploitation, outside the statute, while other forms of work coming within the copyright statute must have a limited term.

The second alternative pointed out by Bill Strauss does therefore appeal to me, in the sense that from the moment an attempt is made to disseminate the work to the public, in any medium, there should be the single standard of exclusive right and uniform type of enforcement through the United States, as provided by the copyright statute. This would leave out of the domain of the statute the many private works, in the form of letters, manuscripts, drawings, painting, photographs, doodles, etc. which it is still desired to be kept for strictly

private purposes. Probably there is no thought in terms of protection for any of these, except to preserve their privacy. But if some thief were to break into a home and steal such a work, and then attempt to utilize any such material, the common law could throw its customary cloak of personal property protection about such works in State courts. I think cases of this kind would be comparatively rare and inconsequential. At the same time, if statutory copyright protection was desired or contemplated for some time in the future, I would permit voluntary registration.

Under such a system, statutory protection would be accorded to a work from and after its first public presentation, or registration, and I have been amenable to the thought that it might expire fifty years from the last day of the calendar year, either in which the author died if an individual, or in which the registration or public presentation first took place in the case of authors for hire, anonymous or pseudonymous authors. While registration, or the use of a copyright notice, would not be mandatory, the statute might possibly afford incentives to such use, by making different remedies available, depending upon whether the registration, or use of the notice, took place prior to the alleged infringement.

I would have no objection to the third alternative outlined by Bill Strauss, namely, bringing everything, including private works never publicly presented or disseminated, into the statutory system. This certainly would be ideal from the point of view of uniformity not only in the United States, but with the systems of other countries. Under the UCC, the obligation to protect published works as well as works in their unpublished stage, without formalities, would be simpler, if jurisdiction were exclusively in the federal courts. If it were not desired to clutter the federal courts with suits which might involve theft of private letters, manuscripts, etc., concurrent jurisdiction could be considered for State courts where the work was not publicly presented, or registered, but the copyright statute would be controlling as to exclusive rights, term, etc. I am not too disturbed about the fact that private letters, documents, manuscripts, pictures, etc., may fall into the public domain fifty years after an author has died. I think there may be a genuine public interest by and after that time in what an author had written in an earlier era which had been withheld from public dissemination. As Bill Strauss pointed out, if public disclosure would be damaging to the interests of his family, fifty or more years after his death, there generally might be a good opportunity to destroy any such materials prior to that time, although it is possible the work may not have been in the possession of the family.

The constitutional question posed by whether it would be a deprivation of vested property rights to bring into the limited copyright statute unpublished works in existence on the day the statute took effect, is an intriguing one. I would like to think more about it. The statute would be substituting rights not only more limited as to term, but undoubtedly as to scope and extent of use, as compared with the previously existing common law right. Bill Strauss has offered a number of ingenious suggestions for meeting this situation. He has indicated the possibility that as to scope of the right, the change to the statute might afford substantially equivalent rights. As to term, he correctly indicates that if the author has protection for life, his potential heirs have no vested rights of which they can be deprived. If on the day such a statute took effect, the presumably perpetual common law rights were in an owner not the author, there would be a more difficult problem of how to give such an owner a substantial term equivalent, although there are possible ways of handling this as Strauss points out.

In this regard, I should like to toss into the pot for consideration, the view that if property rights are within the purview of the exercise of a constitutional power of Congress, the beneficiaries thereof have no vested right in preventing abolition or changes by Congress, even if effective to alter existing rights.

In *Seese* v. *Bethlehem Steel Co.* (D. Md., 1947), 74 F. Supp. 412, the contention was made that the subsequent enactment of the portal-to-portal wage law by Congress, so as to amend substantive rights previously created under the Fair Labor Standards Act, was a deprivation of vested rights in existing contracts without due process, to the extent that it was retrospective. When the original act was passed, Judge Chesnut points out, at p. 418, it then undoubtedly affected existing purely private contracts of employment. Whether Congress acted in respect of the future, or to affect past relationships in both cases, Congress was prescribing the economic policy to be pursued with respect to interstate commerce and to meet conditions it deemed controlling in such regard as a matter of sovereign governmental policy. He says that since the original act necessarily

affected then existing purely private contracts of employment, he does not see how a modification cannot do the same thing. He says that Congress could have repealed the Fair Labor Standards Act *in toto*, and such repeal could have provided that it applied to all existing claims or cases under the act repealed, without any savings clause. At p. 419, he further says:

"This seems to be a clear recognition of the reserved power of Congress to modify or withdraw rights based purely on prior statutes subject only, of course, to constitutional limitations. The only such limitation relied on in this case by the plaintiffs is based on their contention that they acquired a vested property right by reason of the Fair Labor Sandards Act. But this latter Act was enacted by Congress in the exercise of its sovereign delegated power to regulate interstate commerce. And the Portal-to-Portal Act in amending the substantive right created is of the same constitutional nature exercised in the judgment of Congress as the proper policy for the Nation in matters affecting the employer-employee relationship in interstate commerce; and is kindred to the exercise of the police power by the States which, of course, may and often does affect previously existing personal rights. [Citing cases.]

* * * * * * *

"I therefore conclude that the rights now asserted by the plaintiffs under the Fair Labor Standards Act were not vested rights protected by the 5th Amendment because only of statutory origin which could be and have been constitutionally taken away by the Portal-to-Portal Act."

In affirming the above decision, Chief Judge Parker, speaking for the Fourth Circuit Court of Appeals (168 F. 2d 58) at 62 said:

"The Portal-to-Portal Act of May 14, 1947, like the Fair Labor Standards Act which it modified and amended, was an exercise by Congress of the power to regulate interstate and foreign commerce; and it is well settled that the exercise of such power is not invalidated even by the fact that its effect is to destroy rights under valid existing contracts. Such was the holding in *Addyston Pipe & Steel Co.* v. *United States*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136, where the court pointed out that private contracts as well as state legislation must yield in such case to the superior power of Congress. [Citing cases.]

* * * * * * *

In *North American Co.* v. *Securities & Exchange Commission*, 327 U.S. 686, * * * the court said:

"This broad commerce clause does not operate so as to render the nation powerless to defend itself against economic forces that Congress decrees inimical or destructive of the national economy. Rather it is an affirmative power commensurate with the national needs. It is unrestricted by contrary state laws or private contracts. * * *"

Judge Parker does point out (at p. 64) that the constitutional power of Congress, under the commerce clause, to divest or curtail vested rights must not be exercised arbitrarily or unreasonably.

Is it possible that this doctrine might be applicable to the constitutional question posed in Bill Strauss' discussion? I appreciate the fact that in the above cited case Congress had taken affirmative action to affect existing contract rights by the original Fair Labor Standards Act, under its power in interstate commerce. If Congress did likewise, in a new copyright law, to make the statute exclusive, it would also affect existing rights. In Title 17, the action by Congress, in the exercise of its constitutional power over copyright, was negative rather than positive in its effect, but nevertheless certain action was taken by Congress in Sec. 2. Under the Act of 1831, Congress did expressly provide for protection against unauthorized printing or publishing of any manuscript of an author or proprietor who was a citizen or resident of the United States, without his consent, by a special action on the case founded upon the statute, in any court having cognizance; and gave equitable jurisdiction to United States courts to grant injunctions in such regard (Sec. 9). This covered unpublished manuscripts, without the statutory formality of the deposit, prior to publication, of the title of the work, as was required in the case of remedies against infringement provided under Secs. 6 and 7 for copyrighted works. In the Revised Statutes (1870), like protection against unauthorized printing or publishing of any manuscript was given by Sec. 102, to be recovered by action on the case in any court of competent jurisdiction, without any such specified formality, as the recording of the title of the work required for infringement of copyrighted works as provided in Secs. 99–101. In our present Act of 1909, Congress in Sec. 2,

chose to depart from the above policy. It excluded Title 17 from the remedies at common law or equity which would protect unpublished, unregistered works. Whether such be federal common law, or State common law, I leave to the majority and dissenting judges in the *Capitol Records* case.

If Congress, in the exercise of its constitutional power over interstate commerce, can, as a matter of sovereign governmental policy, enact laws which necessarily affect then existing purely private contracts, or even state legislation, and can then amend its legislation so as to abolish or modify its previous enactment, expressly providing that it applies to all existing claims or rights, so as again to affect existing rights, and perhaps later restore the original legislation, again with an effect on existing rights, might not it be said that Congress, in exercising sovereign governmental policy over copyright, under its constitutional power, can give and take away, in whole or in part, regardless of then existing rights? Judge Chesnut felt the exercise of such commerce power was akin to the exercise of the police power, which may and often does affect previously existing personal rights. It would not seem that the substitution of a long statutory term, and sufficiently broad statutory exclusive rights was capricious, arbitrary, or unreasonable.

I do not know if this is so or not. I have not had time for further exploration, and the question is fascinating. In the meantime, I would reserve my views as to what, if anything, should be done as to bringing pre-existing common law works into an all-statutory federal system.

EDWARD A. SARGOY.

By Harry G. Henn

MARCH 22, 1958.

I am submitting my comments and views on the study on the "Protection of Unpublished Works," prepared by William Strauss of the Copyright Office staff.

I have read the study with considerable interest, but find it difficult to make the requested election among the three main alternatives, along with answering the subsidiary questions relating to each, on page 37 of the study.

As I view the problem, the choice of alternatives is dependent upon evaluation of the differences between common law copyright and statutory copyright. While the principal characteristics of common law copyright are familiar, as are the principal characteristics of present statutory copyright, we are not, at this stage of the revision program, in a position to predict the attributes of statutory copyright in the revised copyright statute.

Any choice of the alternatives, therefore, must be tentative, and based on the present differences between common law copyright and statutory copyright. Although the study does state most of the major differences between common law copyright and statutory copyright (pages 3–7), I personally would have preferred a more exhaustive comparison. In this connection, the study perhaps should have pointed out that all authors are eligible for common law protection, but not to secure statutory copyright; that such statutory sanctions as importation restrictions, criminal infringement, and attorney's fees, the statutory three-year statute of limitations, and the statutory requirements of assignments do not apply to common law copyright.

On the basis of the present differences between common law copyright and statutory copyright, I prefer Alternative A (page 37) to Alternatives B and C (page 37). If this alternative were adopted, voluntary registration might well be made available for all classes of unpublished works. In such cases, the copyright term should begin upon the making of such registration and should continue for the same term as is prescribed by the statute for published works. If the term for published works is computed from the date of publication, the term for unpublished works should be computed from the date of registration, as is now the case.

Alternative A is preferable, in my opinion, because (1) it is more consistent with our present dual copyright system and therefore would presumably be more acceptable to persons familiar with the present system, and (2) it would provide excellent practical experience for testing the value of further innovation along the lines suggested by Alternative B and Alternative C.

HARRY G. HENN.

By Joseph S. Dubin

APRIL 1, 1958.

(Re: "Protection of Unpublished Works")

In connection with the study covering the above matter, you will recall that I have always been of the opinion that the Federal system should cover all works, and the so-called common law protection should be eliminated. This would do away with the conflict in decisions rendered in the various state jurisdictions, and would eventually result in a uniform series of rulings.

The term should be for a period after the death of the author, and should not be restricted to the antiquated definition of publication. In other words, as long as the work is made available to the public, whether in copies or otherwise, that should be the test of publication. If, of course, the work is not made available to the public, then the period should run from the time the work is so made available.

JOSEPH S. DUBIN.

By Irwin Karp

APRIL 4, 1958.

(Re: "Protection of Unpublished Works")

There is no reason, either in history or considerations of policy, to bemoan the fact that an unpublished novel, a personal letter, or an unperformed play, may be protected by common law for periods exceeding the term of statutory copyright.

Congress in 1909 was aware that dramatic and other works were widely disseminated to the public through performance rather than publication. Although in some fields "performance" more recently replaced "publication" as the principal means of "dissemination," this represents merely a shift of emphasis. Dissemination by records today simply replaces the widespread dissemination by other non-published media (minstrel shows, vaudeville, etc.) in 1909. In the theatre, there has been no change. Plays were disseminated by performance in 1909—Congress was aware of it; they are disseminated by performance today.

From a practical point of view, there is no substantial reason to fear that an author may retain his property rights in a publicly performed play for more than the limited statutory term; most plays (and other works) are registered prior to performance and are published during or after performance; publication of copies is essential for the licensing of stock and amateur uses.

I believe that the nub of the problem lies in the distinction between "disseminated" and "undisseminated" works, rather than between "published" and "unpublished" works. It would be consistent with the purpose of the Copyright Act, and with prevailing common law of property rights, to clarify and broaden the statutory definition of publication to include all means by which a work is "published" in the dictionary sense of the word, i.e., made public or disseminated.

The problem of "unpublished" works could be solved by (i) extending the privilege of registration—prior to dissemination—to all works; (ii) providing that publication shall mean any means by which the work is made public or disseminated; (iii) restricting the notice requirement to those forms of work in which notice is now mandatory (not to include records); and lastly (iv) retaining the provision that common law rights in undisclosed works are preserved.

It seems to me that the common law property rights in undisclosed works should be preserved. This right is in accordance with a fundamental concept of the democratic form of government; the right of privacy (even though it is not specifically granted in the Constitution). To me, it is also an inevitable concomitant of the right of free speech—that right should include not only the privilege of speaking but of withholding speech.

If an author does not choose to publish something he has conceived and written, that is his own business and nobody else's. The theoretical loss of valuable works to the community is a risk that must be taken to preserve freedom of thought, speech and privacy—at best it is only a theoretical risk. For every author who may exercise the right of withholding his work, there are a hundred who are only too anxious to disclose the fruits of their minds to the public at the earliest possible opportunity. There is little danger that much will be lost to posterity by permitting those who do not choose to disclose to exercise that privilege.

Mr. Strauss has pretty much indicated the fallacy underlying the argument for limited protection of "unpublished" (or, more accurately, undisclosed) letters, private papers and other works. As he points out, those who possess the undisclosed manuscript, either authors or heirs, have a legal right to destroy them or to keep them under lock and key, so that destruction of the common law right by statute will not enhance the chances of publication, and may ever induce those desirous of preserving the privacy of works to destroy the manuscripts.

IRWIN KARP.

By Herman Finkelstein

MAY 22, 1958.

* * * * * * *

I have not been sending comments in on some of the individual studies because I think they are all interrelated and it is impossible to comment on one without commenting on all of the others. That is certainly true of "Protection of Unpublished Works." My attitude on that will depend on what is done with other provisions.

The subjects which I consider most important have already been commented on by me in "The Copyright Law—A Reappraisal" (104 U. Pa. L. Rev. 1025–1063 (1956)). You will find the subject mentioned under the heading "Should Federal Law Supersede Common Law Rights in Unpublished Works?" at page 1061 of that article.

* * * * * * *

JUNE 2, 1958.

* * * * * * *

I intended to convey in my letter of May 22 the thought that for the most part it is impossible to comment on one of the studies without pointing out its relation to other parts of the copyright law that need revision.

My own views on necessary changes in the copyright law are expressed in the University of Pennsylvania Law Review article. If those changes are made in the federal statute, I would be in favor of having a single copyright system for both published and unpublished works. If, however, the revision of the copyright law should not offer sufficient incentives for the publication of works, then I believe that the existing system, which permits each state to protect unpublished works, should continue.

HERMAN FINKELSTEIN.

By Melville B. Nimmer

JULY 8, 1958.

I have read with much interest the study by William Strauss, entitled "Protection of Unpublished Works." With respect to the three alternatives suggested by Mr. Strauss at page 37 of his study, I would prefer Alternative C, with certain qualifying conditions. That is, I think it desirable that all works be protected from their creation under a single Federal statute. The greater uniformity and predictability, which a single Federal system would achieve, are certainly objectives which should be sought. However, I would favor this alternative only if certain other important substantive changes are also embodied in a new Copyright Act. Thus, protection for an unpublished work must be automatic from its creation, without any requirement of registration or deposit as a condition precedent to copyright.

Unless such formalities were abolished, a single Federal system of protection would become a trap whereby unwary creators would frequently discharge their works into the public domain. Furthermore, in order to warrant the abolition of perpetual protection for unpublished works under the common law, the period of statutory protection would be substantially increased. In this connection, I would favor the widely recognized measure of the life of the author, plus fifty years. I do not think a distinction should be made as to term between unpublished (or undisseminated) works and published (or disseminated) works. Such a distinction, if based upon "publication," would only perpetuate the existing legal difficulties in delineating this esoteric term.

If, in the alternative, the distinction were based upon "dissemination" this would in turn lead to similar fine spun distinctions in defining this term. More-

over, to favor undisseminated works by granting such a longer term would encourage the withholding of such works from public consumption.

With respect to the constitutional problem of applying a new Federal statute to pre-existing unpublished works, I can only add that such a problem would probably not arise in California. It should be noted that the so-called common law copyright in California is actually a creature of statute, i.e., Section 980 of the California Civil Code. Therefore, applying generally the reasoning of *Seese* v. *Bethlehem Steel Company* (74 F. Supp. 412 (D. Md. 1947)), as cited and discussed in Edward Sargoy's comments, it may well be argued that modification of such statutory rights does not constitute a deprivation of property in the constitutional sense.

If the substantive changes discussed above, with reference to abolition of formalities and extension of the copyright term, are not embodied in a new Copyright Act, then, in such event, I would favor Alternative A, i.e., a continuation of the present law whereby statutory copyright may be obtained for unpublished works by voluntary registration, but with all unpublished works not registered being left to protection under the common law. In such circumstances voluntary registration should be made available for all classes of unpublished works. This has the merit of permitting the creator to elect between the respective benefits and detriments of common law and statutory copyright. I would not, in any event, favor Alternative B, since if formalities were abolished and term of copyright increased, I think Alternative C would be preferable. If, on the other hand, formalities are not abolished and term of copyright not extended, then I think it wrong to require the creator of a work which is disseminated, but not published, to be subjected to the existing formalities and limited copyright term.

MELVILLE B. NIMMER.

By Ellen Jane Lorenz

(Church and Sunday School Publishers Association)

MAY 15, 1959.

Your office was kind enough to express an interest in the opinions evolved through a discussion on copyright problems at the annual convention of the Church and Sunday School Publishers Association. After a review of your 1958–59 studies, the [following] questionnaire was sent to each of our member companies, with the resulting vote recorded. * * *

COPYRIGHT QUESTIONNAIRE

[Six members of the Association responded. The number voting in favor of each proposition is shown.]

* * * * * * *

"Protection of Unpublished Works": Which alternative do you favor:

1. As now: optional registration, with unregistered works under protection of common law? (3)
2. New statute to protect all works (published or unpublished) when publicly disseminated; with nondisseminated works under protection of common law? (2)
3. New statute to protect all works from time of their creation; no common law rights? (1)

* * * * * * *

Voting companies: Southern Baptist Publication; Rodeheaver-Hall-Mack; Hope Publishing; John T. Benson; Lorenz Publishing; Nazarene Publishing.

ELLEN JANE LORENZ.

By William P. Fidler

(American Association of University Professors)

OCTOBER 30, 1959.

As copies of the various studies on the general revision of the copyright law have been received, I have sought the advice of competent scholars concerning the relationship of the academic profession to the issues raised by these studies. At this time I am presenting some of the points of view expressed by professors who are competent to judge the technicalities of copyrights.

* * * * * * *

As to protection of unpublished works, the present law is reasonably satisfactory so far as we know; but a statute that would spell it out more clearly than at present, supplanting the common law while embodying its substance, seems to us to be desirable.

* * * * * * *

WILLIAM P. FIDLER.

By Judge Learned Hand

APRIL 23, 1959.

[The answers below were given by Judge Learned Hand in response to the following three questions presented to him by the Copyright Office.]

1. Q. Should the public dissemination of a work be equated with publication so that common law literary property would then cease and copyright protection for a limited time thereafter would be afforded by the federal statute?

A. I answer yes. In the case of music, pictures, drama, or lectures, I mean by "public dissemination," to an unselected public at large, either with or without payment. I should of course include any form of mechanical broadcasting, as by radio or television or the like, if there turns out to be any.

2. Q. Should works not publicly disseminated in any manner (e.g., private manuscripts, diaries, letters, family photographs, etc.) be left to protection under the common law; or, alternatively, should they be brought under the federal statute upon creation (common law protection and state court jurisdiction thus being abolished altogether).

A. On the whole I am disposed to leave to the state courts the protection of "undisseminated works." That seems to me a fair compromise between conflicting interests provided that some period be fixed after which they come into the public demesne. An author should be privileged to keep his compositions rigidly within his own power until the "common-law literary property" expires; and I am for reserving all regulatory power to the states, so far as no national interest is involved. Of course, I know that it begs the question to say that no national interest is involved while the author lives; but I would choose to leave this much to the state courts.

3. Q. If works not publicly disseminated are left to protection under the common law, should the federal statute impose a time limit on such protection? If no time limit is so imposed, should the owner of the physical manuscript be presumed to have the right, upon the author's death (or after a certain number of years therefrom), to make public dissemination of the work in the absence of any specific reservation to the contrary?

A. I would impose a time limit, say for 100 years after the work is created or for 50 years after the author's death. As an alternative in case no absolute time limit is imposed, I would transfer the "literary property" to the owner of the physical manuscript at the end of say 50 years after the author's death.

LEARNED HAND.