

COPYRIGHT LAW REVISION

STUDIES

PREPARED FOR THE

SUBCOMMITTEE ON
PATENTS, TRADEMARKS, AND COPYRIGHTS

OF THE

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7. Notice of Copyright



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FOREWORD

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

Provisions of the present copyright law are essentially the same as those of the statutes 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 re-examined 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 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 four studies, Nos. 7-10, dealing with copyright notice. Study No. 7, "Notice of Copyright," was prepared by Vincent A. Doyle of the Washington, D.C., bar (formerly Assistant Chief of the Examining Division of the Copyright Office) in collaboration with the following staff members of the Copyright Office: George D. Cary, General Counsel; Marjorie McCannon, Assistant Chief of the Reference Division; and Barbara A. Ringer, Assistant Chief of the Examining Division. Study No. 8, "Commercial Use of the Copyright Notice," was prepared by William M. Blaisdell, economist of the Copyright Office. Study No. 9, "Use of the Copyright Notice by Libraries," was prepared by Joseph W. Rogers, Chief of the Cataloging Division of the Copyright Office. Study No. 10, "False Use of Copyright Notice," was prepared by Caruthers Berger, Attorney Adviser of the Copyright Office.

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, U.S.C.) with a view to its general revision.

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

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

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

I. QUINCY MUMFORD,
Librarian of Congress.

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

STUDY NO. 7
NOTICE OF COPYRIGHT
BY VINCENT A. DOYLE, GEORGE D. CARY,
MARJORIE McCANNON, AND BARBARA A. RINGER
November 1957

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NOTICE OF COPYRIGHT

I. INTRODUCTION

Among the basic conditions for protection provided in the U.S. copyright law,¹ perhaps the most important is the requirement for a copyright notice. To secure and maintain copyright in the United States, the copies of a work published in this country must bear a notice in the form and position specified in the statute.² Publication of a work without the prescribed notice results in the permanent loss of copyright protection and places the work in the public domain.³

This concept of notice as a condition of copyright has been embodied in the U.S. law almost from the very beginning of Federal copyright legislation—since 1802, in fact.⁴ Of the countries which today are large producers of copyrighted material, the United States is practically alone in making notice a condition of copyright protection for all types of published works. In approaching a study of this matter, it must inevitably be asked whether the notice requirement is a useless vestige, or whether it has advantages which make its continuation in one form or another desirable.

It is the purpose of this paper to present an objective analysis of the notice provisions: their history, purpose, and interpretation; comparable provisions in foreign and international law; and the arguments advanced as to the relative advantages and disadvantages of notice requirements. Factual studies of the practical utility and operation of the notice provisions are planned for a later date. It is hoped that the present legal study, supplemented by such factual studies, will provide a basis for considering the problem of copyright notice in the forthcoming revision of the copyright law.

II. LEGISLATIVE HISTORY BEFORE 1909

A. LAWS OF THE STATES BEFORE 1790

Of the laws passed by the several States pursuant to the 1783 resolution of the Continental Congress,⁵ only that of Pennsylvania⁶ required that a notice be placed on the copies of copyrighted works. In addition to registration of the name of the proprietor and the title of the work, the Pennsylvania law required:

That no author or proprietor of any book or pamphlet shall be entitled to the benefit of this act unless he shall insert on the back of the title page a copy of the certificate of entry obtained of the prothonotary aforesaid, which the said prothonotary is hereby required to grant without any further reward.⁷

¹ 17 U.S.C. (1947).

² *Id.* §§ 10, 19, 20.

³ See Section III *infra*.

⁴ 2 STAT. 171 (1802).

⁵ 8 JOURNAL OF THE UNITED STATES IN CONGRESS ASSEMBLED 256 (1783), reprinted in COPYRIGHT LAWS OF THE UNITED STATES OF AMERICA 1783-1956, p. 1 (Copyright Office, 1956) (hereinafter cited as COPYRIGHT LAWS).

⁶ LAWS OF PENNSYLVANIA c. 125 (Bradford 1784), reprinted in COPYRIGHT LAWS, pp. 10-11.

⁷ *Id.* § VI.

In three of the States there was a requirement for what might be considered an embryonic copyright notice; Massachusetts,⁸ New Hampshire,⁹ and Rhode Island¹⁰ granted copyright protection for "all books, treatises, and other literary works, having the name of the author or authors thereof printed and published with the same * * *." These laws left no doubt that the presence of the author's name was a condition for securing copyright, because the penalties for infringement could be invoked only when the work infringed was "written by any subject of the United States of America, whose name, as author, shall have been thereto prefixed * * *." ¹¹

B. THE ORIGINAL FEDERAL COPYRIGHT ACT, 1790

Although the first Federal Copyright Act ¹² provided for registration as a condition of protection, it contained no requirement for a copyright notice to be impressed on the copies of copyrighted works. It did, however, require that the author or proprietor publish a copy of the record of registration in one or more U.S. newspapers for a period of 4 weeks, within 2 months of the date of registration.¹³

C. FEDERAL COPYRIGHT STATUTES, 1802-1905

The act of April 29, 1802,¹⁴ was the first Federal law to require a notice in copies of copyrighted works. In addition to the newspaper notice, the author or proprietor was required by section 1 of that act to insert a copy of the record "at full length in the title page or in the page immediately following the title" in the case of a book. For maps and charts, a notice in the following form was to be impressed on the face of the work:

Entered according to act of Congress, the ----- day of ----- 18--
(here insert the date when the same was deposited in the office) by A. B. of the
State of ----- (here insert the author's or proprietor's
name and the State in which he resides).

Section 2 of the act of 1802 extended the scope of copyright protection to include prints, with a proviso that the author or proprietor "cause the same entry to be truly engraved on such plate, with the name of the proprietor, and printed on every such print or prints as is herein before required to be made on maps or charts."

The act of February 3, 1831,¹⁵ a general revision statute, dropped the requirement for newspaper publication of a copy of the record of registration. The provisions dealing with the notice were coordinated and simplified to some extent:

SEC. 5. *And be it further enacted*, That no person shall be entitled to the benefit of this act, unless he shall give information of copyright being secured, by causing to be inserted, in the several copies of each and every edition published during the term secured on the title-page, or the page immediately following, if it be a book, or, if a map, chart, musical composition, print, cut, or engraving, by causing to be impressed on the face thereof, or if a volume of maps, charts, music, or engravings, upon the title or frontispiece thereof, the following words, viz:

⁸ MASS. ACTS & LAWS c. 26 (1782), reprinted in COPYRIGHT LAWS, pp. 4-5.

⁹ LAWS OF NEW HAMPSHIRE pp. 161-162 (Melcher 1789), reprinted in COPYRIGHT LAWS, p. 8.

¹⁰ RHODE ISLAND ACTS & RESOLVES pp. 6-7 (1783), reprinted in COPYRIGHT LAWS, p. 9.

¹¹ This quotation, and the one immediately preceding it, are taken from the Massachusetts statute; the equivalent provisions in the statutes of New Hampshire and Rhode Island are substantially the same.

¹² 1 STAT. 124 (1790).

¹³ *Id.* § 3.

¹⁴ 2 STAT. 171 (1802).

¹⁵ 4 STAT. 436 (1831).

"Entered according to the act of Congress, in the year ----, by A. B., in the clerk's office of the district court of -----," (as the case may be.)

The next general revision statute, the act of July 8, 1870,¹⁶ made certain technical amendments in the notice provisions, but did not change the basic requirement:

SEC. 97. *And be it further enacted*, That no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting in the several copies of every edition published, on the title page or the page immediately following, if it be a book; or if a map, chart, musical composition, print, cut, engraving, photograph, painting, drawing, chromo, statue, statuary, or model or design intended to be perfected and completed as a work of the fine arts, by inscribing upon some portion of the face or front thereof, or on the face of the substance on which the same shall be mounted, the following words, viz.: "Entered according to act of Congress, in the year ----, by A. B., in the office of the librarian of Congress, at Washington."

By the act of June 18, 1874,¹⁷ the author or proprietor was given the option of using as a notice "* * * the word 'Copyright,' together with the year the copyright was entered, and the name of the party by whom it was taken out; thus: 'Copyright, 18—, by A. B.'"¹⁸ This optional form of notice was to be used under the same conditions and in the same positions as required for the longer form.

Under the act of August 1, 1882,¹⁹ "manufacturers of designs for molded decorative articles, tiles, plaques, or articles of pottery or metal subject to copyright" were permitted to place the notice as follows:

* * * upon the back or bottom of such articles, or in such other place upon them as it has heretofore been usual for manufacturers of such articles to employ for the placing of manufacturers, merchants, and trade marks thereon.

The last change in the notice provisions prior to 1909 was incorporated in the act of March 3, 1905,²⁰ and applied only to books in foreign languages first published abroad. It provided that there should be inserted:

* * * in all copies of such book sold or distributed in the United States, on the title page or the page immediately following, a notice of the reservation of copyright in the name of the proprietor, together with the true date of first publication of such book, in the following words: "Published -----, nineteen hundred and ----- Privilege of copyright in the United States reserved under the Act approved -----, nineteen hundred and five, by -----" * * *

III. THE PRESENT LAW IN THE UNITED STATES

A. PROVISIONS OF THE PRESENT LAW

The notice requirements of the present law²¹ are essentially the same as those incorporated in the act of March 4, 1909.²² In general, each copy of a work "published or offered for sale in the United States by authority of the copyright proprietor" must bear a copyright notice in the prescribed form and position. Ordinarily the copyright notice consists of three elements:

1. The word "Copyright," the abbreviation "Copr.," or the symbol ©;

¹⁶ 16 STAT. 193, 214 (1870).

¹⁷ 18 STAT. 78 (1874).

¹⁸ *Id.* § 1.

¹⁹ 22 STAT. 181 (1882).

²⁰ 33 STAT. 1000 (1905).

²¹ 17 U.S.C. §§ 10, 19, 20 (1947).

²² 35 STAT. 1075 (1909).

2. The name of the copyright proprietor;
3. The year in which copyright was secured, in the case of printed literary, musical, or dramatic works.

The elements of the notice are to accompany each other (e.g., © John Doe 1957), and the notice is to appear in certain specified locations on the work. The required position for the notice varied with respect to different types of material:

1. *Books and other printed publications.*—The notice is to appear on the title page or the page immediately following. The “page immediately following” is the reverse side of the title page, where the title page is on the right side of the open book.

2. *Periodicals.*—There are three options with respect to the position of the notice:

- a. On the title page;
- b. On the first page of text; or
- c. Under the title heading (which is generally understood to be the masthead.)

3. *Musical compositions.*—Two alternatives as to position are offered:

- a. On the title page; or
- b. On the first page of music.

An optional form of notice is provided for six classes of works: maps; works of art; reproductions of works of art; drawings or plastic works of a scientific or technical character; photographs; and prints or pictorial illustrations, including commercial prints and labels. The year date need not be used, and the notice may consist of the symbol © with the initials, monogram, mark or symbol of the copyright owner, if the owner's name appears upon some accessible portion of the work.

While the statute requires that the notice appear upon “each copy” of a work published in the United States,²³ it also contains a provision preventing the invalidation of the copyright when the notice had been omitted “by accident or mistake * * * from a particular copy or copies.”²⁴ The omission of the notice under these circumstances does not affect the copyright owner's rights with respect to willful infringers, but limits his right of action against an innocent infringer who was misled by the omission; the innocent infringer is exempted from liability for damages, and is not subject to a permanent injunction unless reimbursed for his outlay.

In addition to the basic notice sections, the statute contains several provisions dealing directly with the copyright notice. Perhaps the most important of these provides that foreign works eligible for protection under the Universal Copyright Convention shall be exempted from several copyright formalities, including the domestic manufacturing requirements and the obligation to deposit copies, if the following condition is met:

* * * only if from the time of first publication all the copies of the work published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.²⁵

²³ 17 U.S.C. § 10 (1947). A special exception is made for “books seeking ad interim protection.”

²⁴ 17 U.S.C. § 21 (1947).

²⁵ *Id.* § 9(c), as amended by 68 STAT. 1030 (1954).

Other provisions of the statute with specific bearing on the copyright notice include: provisions concerning the notice in works covered by, or eligible for, ad interim copyright;²⁶ a provision that one notice in each volume or in each number of a newspaper or periodical shall suffice;²⁷ and a provision that the name of the assignee of a copyright may be substituted in the notice after the assignment has been recorded.²⁸

B. LEGISLATIVE HISTORY OF THE PRESENT PROVISIONS

In order to appreciate the importance of the change worked by the 1909 notice provisions it is necessary to realize that, before 1909, copyright was secured by the filing of a title in the Copyright Office, and the deposit of copies on or before the date of publication. The right to secure copyright was lost if for any reason these requirements were not met.

It was to mitigate the possibility of unintentional forfeiture that section 9 (now section 10) of the act of 1909 was drafted, permitting copyright to be secured by the very act of publishing a work with the copyright notice affixed to the copies. In the words of the final committee report accompanying the bill which was enacted in 1909:

Under the existing law the filing of title and deposit of copies on or before the date of first publication are conditions precedent, and any failure to comply with them works a forfeiture of the copyright. It is proposed under this bill to so change this as to have the copyright effective upon the publication with notice, and the other formalities become conditions subsequent.²⁹

The legislative history of the act of 1909 contains little of significance concerning the philosophy underlying the notice provisions. The basic elements of the present notice requirement were already present in H.R. 19853,³⁰ which was introduced by Representative Currier on May 31, 1906, and which was the first of the series of bills which led to the 1909 statute; the changes in the provisions which were finally enacted, and the relatively few comments on them during the hearings,³¹ dealt largely with matters of detail.

With respect to the copyright notice, all those who testified at the hearings apparently assumed that a notice should be required. The discussions during the hearings centered primarily around two relatively minor questions: whether copies should be required to bear the notice when published outside the United States, and whether the notice requirements should be further liberalized with regard to graphic and artistic works. In connection with both questions, there was also some discussion of the provision dealing with accidental omission of the notice, and the potential effect of this provision upon users and the public.

As originally drafted, the bill did not require that the copyright notice for any type of work contain a date. The reason the bill as

²⁶ *Id.* §§ 10, 16, 23.

²⁷ *Id.* § 20.

²⁸ *Id.* § 32.

²⁹ H. R. REP. NO. 2222, 60th Cong., 2d Sess. 10 (1909).

³⁰ H. R. 19853, 59th Cong., 1st Sess. (1906).

³¹ *Hearings before Committees on Patents on S. 6330 and H. R. 19853*, 59th Cong., 1st Sess. (June 1906); *Hearings before Committees on Patents on S. 6330 and H. R. 19853*, 59th Cong., 1st Sess. (Dec. 1906); *Hearings before Committees on Patents on Pending Bills*, 60th Cong., 1st Sess. (1908).

finally enacted required the date for literary, dramatic, and musical works is best summarized in the final committee report:

No date was required, not even the year in which the copyright was secured, in case of a book or anything else. Serious objections were made to the elimination of the date. It was said that the public would have no means of ascertaining whether the copyright had expired and that the public was entitled to that knowledge.

Your committee felt that in case of books or printed publications, including dramatic and musical works, the year in which the copyright began should be stated in the notice, and we have provided for the insertion of the date in the notice on all such works. Your committee did not feel that it was necessary to have the date printed on works of art, etc. Artists have always objected to the copyright notice which they were obliged to put on the pictures, because it was considered a disfigurement, and we have retained substantially the provision of the original bill regarding the notice in such cases.³²

The committee report also makes clear why the provision dealing with accidental omission of notice was added to the statute:

Section 20 makes a material change in existing law. Under existing law notice of copyright must be printed in every copy of every edition of a book. If any copy of any edition published by authority of the proprietor of the copyright by accident or mistake gets out without the copyright notice, the whole copyright is lost. More copyrights have been lost under this drastic provision of the law than in any other way. Your committee believe that an unintentional failure to comply with this requirement in the case of a single book ought not to have attached to it the penalty involved in the forfeiture of the copyright, * * *.³³

No changes of any real consequence were made as a result of the hearings preceding enactment of the statute,³⁴ but from a reading of the hearings there emerges a general impression that, in the minds of most of the persons interested in copyright legislation in 1909, notice was both necessary and desirable. Two examples of testimony by publishers will serve to point up this feeling. Charles Porterfield, representing a large law book publisher, had this to say concerning the notice requirement:

As far as the notice of copyright is concerned, it seems to be very important that every copyrighted thing should bear on its face some indication that it is protected, and for how long it is protected. The interests of the public certainly require that. It is impossible for everybody who wishes any information in that regard to come down here to Washington and overhaul the Copyright Office. The country is too large for that sort of thing. If each copyrighted thing has a notice on it which shows that it is copyrighted for a certain number of years, that is prima facie evidence that it has that protection. If anyone wishes to make further investigation, he then can consult the Copyright Office and see if it has in fact been entered.³⁵

Likewise, George W. Ogilvie, a Chicago publisher, made the following forceful statement:

I think every publisher in the United States who desires to be fair to his fellow publishers will agree with me that the only way that a man can tell whether a book is copyrighted or not is to have it contain a notice. If not, leave it out of all of them. Leave it out of every book published. Do not put any notice in at all, and make it [sic] go to the Copyright Office to get the information; but do not leave him "up in the air," as he will be left, some books with a notice and others without. How does he know? If a book is published under various titles and not filed in the Copyright Office, he cannot find out, and if he cannot find out and he takes extracts from the books that are not published it might bankrupt him. It will not bankrupt me, because I do not intend to publish any more books. [Laughter.]³⁶

³² H. R. REP. NO. 2222, 60th Cong., 2d Sess. 13 (1909).

³³ *Ibid.*

³⁴ See note 31, *supra*.

³⁵ *Hearings* (Dec. 1906), *supra* note 31, at 135.

³⁶ *Hearings* (1908), *supra* note 31, at 71.

Only two changes in the basic notice provisions have been made since 1909. The first, a technical amendment made at the time of the codification of the copyright law in 1947, simply involved a change in language.³⁷ The second, which was a part of the legislation enacted in 1954 to permit U.S. adherence to the Universal Copyright Convention, allows use of the symbol © instead of "Copyright" or "Copr." in the notice for all types of works;³⁸ before September 16, 1955, the effective date of the amendment, use of the symbol was permissible only for pictorial, graphic, and sculptural works.

C. JUDICIAL INTERPRETATION OF THE NOTICE PROVISIONS

1. *In general*

The courts have had many opportunities to interpret and apply the notice provisions of the copyright law. While it is difficult to generalize from a large body of decisions based on differing fact situations, it seems clear that, in their construction of the notice requirements, the courts have tended to adopt one or the other of two opposing philosophies.

The earlier of the two philosophies finds part of its origin in the 1834 Supreme Court decision in *Wheaton v. Peters*.³⁹ This case, upon which much of the American theory of copyright protection is based, dealt with the question of whether a valid copyright could be obtained if all of the statutory formalities had not been met. The court held, in effect, that copyright protection is dependent upon the act of Congress under which it originates, and that Congress may withhold protection or attach mandatory conditions upon which protection depends. This basic proposition was stated by the court as follows:

No one can deny that when the legislature are about to vest an exclusive right in an author or an inventor, they have the power to prescribe the conditions on which such right shall be enjoyed; and that no one can avail himself of such right who does not substantially comply with the requisitions of the law.⁴⁰

On the specific question of formalities, *Wheaton v. Peters* laid down this principle:

* * * this is not a technical grant of precedent and subsequent conditions. All the conditions are important, the law requires them to be performed, and, consequently, their performance is essential to a perfect title. On the performance of a part of them the right vests, and this was essential to its protection under the statute; but other acts are to be done, unless Congress have legislated in vain, to render the right perfect.⁴¹

The view that the notice requirements must be strictly observed has been followed in a number of cases⁴² and may still influence courts today. In recent years, however, the decisions appear to show an increasingly liberal attitude toward the copyright notice; there is a growing body of decisions based on the philosophy that substantial

³⁷ 61 STAT. 668 (1947).

³⁸ 68 STAT. 1030 (1954).

³⁹ 33 U.S. (8 Pet.) 591 (1834).

⁴⁰ *Id.* at 663-664.

⁴¹ *Id.* at 665.

⁴² *Mifflin v. R. H. White Co.*, 190 U.S. 260 (1903); *Mifflin v. Dutton*, 190 U.S. 265 (1903); *Louis Dejonge & Co. v. Breuker & Kessler Co.*, 235 U.S. 33 (1914); *Public Ledger Co. v. Post Printing & Publishing Co.*, 294 Fed. 430 (8th Cir. 1923); *Advertisers Exchange, Inc. v. Anderson*, 144 F. 2d 907 (8th Cir. 1944); *Booth v. Haggard*, 184 F. 2d 470 (8th Cir. 1950); *Tompkins v. Rankin*, 24 Fed. Cas. 39, No. 14090 (C.C.D. Mass 1876); *Jackson v. Walkie*, 29 Fed. 15 (C.C.N.D. Ill. 1886); *Osgood v. A. S. Aloe Instrument Co.*, 83 Fed. 470 (C.C.E.D. Mo. 1897); *Record & Guide Co. v. Bromley*, 175 Fed. 156 (C.C.E.D. Pa. 1909); *Haas v. Leo Feist, Inc.*, 234 Fed. 105 (S.D.N.Y. 1916); *Smith v. Bartlett*, 18 F. Supp. 35 (D. Me. 1937); *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573 (S.D.N.Y. 1949); *Metro Associated Services, Inc. v. Webster City Graphic Inc.*, 117 F. Supp. 224 (N.D. Iowa 1953).

compliance with the statute is sufficient.⁴³ Some of the origins of this position may be found in the 1883 decision of the Supreme Court in *Burrow-Giles Lithographic Co. v. Sarony*,⁴⁴ where the Court stated:

* * * it is enough to say that the object of the statute is to give notice of the copyright to the public by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of exclusive right, and the date at which this right was obtained.⁴⁵

Since the cases on copyright notice necessarily turn on special facts and technical statutory provisions, the significance of individual decisions on this subject is relatively minor. Nevertheless, a summary review of the interpretation courts have given to the statutory notice provisions on various issues may not only help to reveal some of the strengths and weaknesses of the present law, but also to point the way to considered legislative solutions to some of the problems that now exist.

2. Defective notice: In general

(a) *Absence of notice.*—Regardless of a court's philosophical attitude toward the notice requirements, it would have no alternative but to hold a copyright invalid in an ordinary case of publication of a work in this country without notice.⁴⁶ For example, the Supreme Court held that Holmes' "Autocrat of the Breakfast Table" was in the public domain because its serial publication in an uncopyrighted periodical (i.e., bearing no notice) preceded its publication in book form.⁴⁷

(b) *Accidental omission of notice.*—The statute provides that accidental omission of the notice "from a particular copy or copies" does not invalidate the copyright, but merely prevents recovery of damages against an innocent infringer who was misled by the absence of the notice.⁴⁸ In general, the courts have held that the provision is not applicable where the required notice is omitted from all the copies,⁴⁹ or where the mistake is one of law.⁵⁰ It has been held to apply only where the notice was omitted "from one or perhaps a very few copies."⁵¹

In one of the few cases where the provision was held applicable,⁵² it appeared that defendant had innocently copied plaintiff's work

⁴³ Callaghan v. Myers, 128 U.S. 617 (1888); Bolles v. Outing Co., 77 Fed. 966 (2d Cir. 1897) *aff'd*, 175 U.S. 262 (1899); Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 73 F. 2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947); National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F. 2d 594 (2d Cir. 1951); Scribner v. Henry G. Allen Co., 49 Fed. 854 (C.C.S.D.N.Y. 1892). Werckmeister v. Springer Lithographing Co., 63 Fed. 808 (C.C.S.D.N.Y. 1894); Snow v. Mast, 65 Fed. 995 (C.C.S.D. Ohio 1895); Harper & Bros. v. M.A. Donohue & Co., 144 Fed. 491 (C.C.D.N.D. Ill. 1905); American Travel & Hotel Directory Co. v. Gehring Publishing Co., 4 F. 2d 415 (S.D.N.Y. 1925); Hale Nass Corp. v. Brechner 22 COPYRIGHT OFFICE BULLETIN 137 (S.D.N.Y. 1935); Gogniat v. Universal Pictures Corp., 35 U.S.P.Q. 117 (S.D.N.Y. 1937); Allen v. Walt Disney Productions, Ltd., 41 F. Supp. 134 (S.D.N.Y. 1941); Block v. Plaut, 87 F. Supp. 49 (N.D. Ill. 1949); Powell v. Stransky, 98 F. Supp. 434 (D.S.D. 1951); Harry Alter Co. v. Graves Refrigeration, Inc., 101 F. Supp. 703 (N.D. Ga. 1951); Ziegelheim v. Flohr, 119 F. Supp. 324 (E.D.N.Y. 1954).

⁴⁴ 111 U.S. 53 (1884).

⁴⁵ *Id.* at 55.

⁴⁶ Higgins v. Keuffel, 140 U.S. 428 (1891); Holmes v. Hurst, 174 U.S. 82 (1899); Pierce & Bushnell Manuf'g Co. v. Werckmeister, 72 Fed. 54 (1st Cir. 1896); Sieff v. Continental Auto Supply, Inc., 39 F. Supp. 683 (D. Minn. 1941); Superfine Products, Inc. v. Denny, 54 F. Supp. 148 (N.D. Ga. 1943). In Hoyt v. Daily Mirror, Inc., 31 F. Supp. 89 (S.D.N.Y. 1939), the court dismissed the complaint on the ground that the copies of a published photograph deposited in the Copyright Office lacked the copyright notice and the registration was therefore invalid. The opinion implies that the notice may also have been omitted from the copies which had been distributed, and that this factor may have influenced the decision.

⁴⁷ Holmes v. Hurst, 174 U.S. 82 (1899).

⁴⁸ 17 U.S.C. § 21 (1947).

⁴⁹ United Thrift Plan, Inc. v. National Thrift Plan, Inc., 34 F. 2d 300 (E.D.N.Y. 1929); Goes Lithographing Co. v. Apt Lithographic Co., 14 F. Supp. 620 (S.D.N.Y. 1936); J. A. Richards, Inc. v. New York Post, Inc., 23 F. Supp. 619 (S.D.N.Y. 1938); Deward & Rich, Inc. v. Bristol Savings & Loan Corp., 34 F. Supp. 345 (W.D. Va. 1940), *aff'd*, 120 F. 2d 537 (4th Cir. 1941).

⁵⁰ Wildman v. New York Times Co., 42 F. Supp. 412 (S.D.N.Y. 1941).

⁵¹ Krafft v. Cohen, 117 F. 2d 579, 581 (3d Cir. 1941).

⁵² Strauss v. Penn Printing & Publishing Co., 220 Fed. 997 (E.D. Pa. 1915); *accord*, Wilkes-Barre Record Co. v. Standard Advertising Co., 63 F. 2d 99 (3d Cir. 1933).

from a newspaper; a notice had appeared on the mat but, due to injury to the matrix, the symbol © had become unrecognizable. The court did not discuss the "particular copy or copies" provision; but it held that, since there was an omission of the prescribed notice, plaintiff was not entitled to recovery of damages. Nevertheless, the court awarded the plaintiff profits, on the theory that the provision specifically excluded the recovery of damages only.

Where the infringer had actual notice of the copyright, the fact that some or all of the particular copies to which he had access lacked the notice will not absolve him from liability.⁵³ And where the infringer, though wholly innocent, was misled by something other than the omission of the notice, he has been held fully liable.⁵⁴

(c) *Illegible notice.*—Where a notice is so small that it cannot be seen with the naked eye, or is so illegible that it fails to convey the claim to copyright, the courts have generally held the copyright invalid.⁵⁵ On the other hand, certain courts, in decisions involving microscopic or illegible notices, have considered the copyright valid, but denied damages because the defendant was an innocent infringer.⁵⁶ Still other courts have merely dismissed the action without discussion of the validity of the copyright.⁵⁷

The fact that the notice is small does not necessarily afford protection to a would-be infringer. If the notice can be discovered upon a careful inspection of the work, its relative inconspicuousness will not necessarily prevent recovery.⁵⁸

(d) *"Dispersed" notice.*—In prescribing the form of the copyright notice, the statute provides that the word or symbol of claim shall be "accompanied by" the name of the copyright owner and (where required) the year date of publication.⁵⁹ It is rather frequently found that, although a work contains each of the required elements of the notice, they do not all appear together. In such cases it may be difficult to determine whether the dispersed element (or elements) can be considered a part of the copyright notice.

In an early case involving this question⁶⁰ the year date did not accompany the other elements of the notice, but a date appeared at the bottom of the same page, where the date of publication customarily was located. The court strictly construed the notice provisions, and dismissed the action because of a defective notice.

A somewhat later case⁶¹ involved the notice for a periodical which lacked the date; immediately below the notice, separated by a line, appeared the volume and issue numbers and the issue date. The court held that the issue date could not be considered a part of the notice, and that the copyright was therefore invalid.

In recent years, in line with their increasingly liberal attitude toward the notice requirements, the courts appear to have become more generous in their consideration of dispersed notices. One

⁵³ *Gerlach-Barklow Co. v. Morris & Bendieu, Inc.*, 23 F. 2d 159 (2d Cir. 1927); *Schellberg v. Empringham*, 36 F. 2d 991 (S.D.N.Y. 1929).

⁵⁴ *Krafft v. Cohen*, 44 U.S.P.Q. 678 (E.D. Pa. 1940), *rev'd on other grounds*, 117 F.2d 579 (3d Cir. 1941).

⁵⁵ *Smith v. Bartlett*, 18 F. Supp. 35 (D. Me. 1937); *Deward & Rich, Inc. v. Bristol Savings & Loan Corp.*, 34 F. Supp. 345 (W.D. Va. 1940), *aff'd*, 120 F. 2d 537 (4th Cir. 1941); *Advertising Exchange, Inc. v. Witten Hardware Co.*, 50 F. Supp. 137 (W.D. Mo. 1942).

⁵⁶ *Alfred Decker Cohn Co. v. Etchison Hat Co.*, 225 Fed. 135 (E.D. Va. 1915); *Strauss v. Penn Printing & Publishing Co.*, 220 Fed. 977 (E.D. Pa. 1915).

⁵⁷ *Smith v. Wilkinson*, 19 F. Supp. 841 (D.N.H. 1937), *aff'd*, 97 F. 2d 506 (1st Cir. 1938).

⁵⁸ *Advertisers Exchange, Inc. v. Laufe*, 29 F. Supp. 1 (W.D. Pa. 1939).

⁵⁹ 17 U.S.C. § 19 (1947).

⁶⁰ *Tompkins v. Rankin*, 24 Fed. Cas. 39, No. 14090 (C.C.D. Mass. 1876).

⁶¹ *Record & Guide Co. v. Bromaly*, 175 Fed. 156 (C.C.E.D. Pa. 1909).

case ⁶² involved a card which contained the word "Copyright" at the top and the claimant's name at the bottom, several inches below. It was held that for practical purposes the name "accompanied" the claim, and that the defendant was not misled.

On the ground of substantial compliance the following notice was held adequate: ⁶³

Copyright 1948. The H. A. Co. Printed in U.S.A.

[In large letters] The Harry Alter Co., Inc.
[complete mailing address]

The court rested its decision on the ground that, in view of its size, the claimant's name was "difficult to be ignored by even a casual reader." ⁶⁴

In the light of these more recent decisions it appears that, as long as the required elements appear fairly close to each other on the work, the fact that they are not in the specified order, or are not in exact juxtaposition, will not invalidate the copyright. ⁶⁵

(e) *Foreign works*.—For a number of years, on the basis of decided cases, ⁶⁶ it had generally been considered that first publication of a work in a foreign country, without the notice of copyright required by U.S. law, would result in the loss of the right to secure copyright in this country. Much doubt was cast on this question in 1946, when the famous *Heim* case ⁶⁷ was decided by the court of appeals for the second circuit. The subject matter of that case was a musical composition first published in Hungary with an inadequate copyright notice. In what is probably a dictum, the majority of the court expressed the view that, as long as a work by a foreign author, first published abroad is not in the public domain of the country of first publication, the use of the statutory copyright notice is not a condition of a valid U.S. copyright. ⁶⁸ In a concurring opinion, ⁶⁹ Judge Clark took the view that, while copies of previously copyrighted works need not bear a notice when they are distributed outside the United States, it is still an essential condition of copyright that the first published copies bear the notice, regardless of where first publication takes place.

In the last analysis, the doctrine of the *Heim* case would mean that the bulk of works by foreign authors first published abroad are effectively protected under U.S. copyright law without the observance of any formalities. On the basis of this authority, the Copyright Office registers claims to copyright in foreign works first published abroad without the prescribed copyright notice,* taking the view that the decision has created sufficient doubt to permit registration. ⁷⁰

⁶² *Hale Nass Corporation v. Brechner*, 22 COPYRIGHT OFFICE BULLETIN 137 (S.D.N.Y. 1935)

⁶³ *Harry Alter Co. v. Graves Refrigeration, Inc.*, 101 F. Supp. 709 (N.D. Ga. 1951).

⁶⁴ *Id.* at 704.

⁶⁵ In *Ziegelheim v. Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954), the following notice was held valid:

Published and Printed by
"Ziegelheim", New York
Printed in U.S.A. Copyright 1943

⁶⁶ *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922) (by implication); *Universal Film Mfg. Co. v. Copperman*, 212 Fed. 301 (S.D.N.Y. 1914), *aff'd*, 218 Fed. 577 (2d Cir. 1914) *cert. denied*, 235 U.S. 704 (1914); *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S.D.N.Y. 1939). *Contra*, *Italian Book Co. v. Cardilli*, 273 Fed. 619 (S.D.N.Y. 1918).

⁶⁷ *Heim v. Universal Pictures*, 154 F. 2d 480 (2d Cir. 1946).

⁶⁸ *Id.* at 486.

⁶⁹ *Id.* at 486.

⁷⁰ See Kaminstein, "©: Key to Universal Copyright Protection," in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 23, 32 (1955).

*EDITOR'S NOTE: Since the time when this study was written, the Copyright Office practice in this regard has been changed. See Regulations of the Copyright Office, §202.2(a)(3), (in effect as of June 18, 1959), 24 Fed. Reg. 4955.

On the other hand, while the issue has not been litigated again in the intervening years, strong doubts as to the validity of the *Heim* case rationale have been expressed.⁷¹ Moreover, one of the key features of the Universal Copyright Convention and the amendment to the copyright law implementing the convention was the provision permitting the use of a special copyright notice in satisfaction of all copyright formalities.⁷² It is conceivable that a court today might regard the 1954 statutory amendment as having overruled the *Heim* doctrine.⁷³

(f) *Contributions to periodicals.*—The copyright law provides that “the copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each part were individually copyrighted under this title.”⁷⁴ This provision leaves open the question of who is the “proprietor” of an individual contribution to a copyrighted periodical when the right to secure copyright in the contribution has not been expressly transferred to the periodical publisher, and when the contribution did not bear its own copyright notice.

It appears to be generally agreed that, even where the individual author has not expressly assigned his rights to the publisher, a valid copyright may be secured in the contribution by virtue of the general copyright notice, in the name of the publisher, covering the periodical as a whole.⁷⁵ Where there is no agreement or trade practice to the contrary, the periodical publisher is usually regarded as securing legal title to copyright in the contribution as constructive trustee of the author;⁷⁶ it is a common practice in this situation for the periodical publisher to assign title to the copyright back to the author following publication.⁷⁷ Thus, while some periodical literature (notably advertising matter) probably must bear a separate copyright notice to be protected,^{77a} many contributions published without separate notice may be covered by the general notices in the periodicals containing them.

On the other hand, not all courts have agreed with this proposition,⁷⁸ and its application may depend upon the circumstances in a particular case. An author may still run some risk of having his copyright questioned, unless the work bears a separate copyright notice when published as a contribution to a periodical.

3. *Defective notice: Word or symbol of claim*

In a case⁷⁹ under the law in force before 1909, the notice in plaintiff's book read: “Entered according to act of Congress, in the year

⁷¹ *E.g.*, Katz, *Is Notice of Copyright Necessary in Works Published Abroad?—A Query and a Quandry*, 1953 WASH. U. L. Q. 55, 88 (1953).

⁷² See Section IV, C. *infra*.

⁷³ See Cary, *The United States and Universal Copyright: An Analysis of Public Law 743*, in UNIVERSAL COPYRIGHT CONVENTION ANALYZED 83, 91 (1955); Kaminstein, *op. cit. supra* note 70, at 32.

⁷⁴ 17 U.S.C. § 3 (1947).

⁷⁵ *Harper & Bros. v. M. A. Donohue & Co.*, 144 Fed. 491 (C.C.N.D. Ill. 1905); *Mail & Express Co. v. Life Pub. Co.*, 192 Fed. 899 (2d Cir. 1912); *Morse v. Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954). See Henn, “*Magazine Rights*”—*A Division of Indivisible Copyright*, in 40 CORNELL L. Q. 411, 452-454 (1955); Wasserstrom, *The Copyrighting of Contributions to Composite Works*, in 31 NOTRE DAME LAW. 381, 399-401 (1956).

⁷⁶ *Dam v. Kirke LaShelle Co.*, 175 Fed. 902 (2d Cir. 1910). *Brady v. Reliance Motion Picture Corp.*, 232 Fed. 259 (S.D.N.Y. 1916); *Schellberg v. Empringham*, 36 F. 2d 991 (S.D.N.Y. 1929); *Morse v. Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954).

⁷⁷ See *Morse v. Fields*, 127 F. Supp. 63 (S.D.N.Y. 1954); Wasserstrom, *Magazine, Newspaper and Syndication Problems*, in 1953 COPYRIGHT PROBLEMS ANALYZED 159, 168 (1953).

^{77a} *Official Aviation Guide Co. v. American Aviation Associates, Inc.*, 150 F. 2d 173 (7th Cir. 1945), *cert. denied*, 326 U.S. 776 (1945).

⁷⁸ See *Miffin v. R. H. White Co.*, 190 U.S. 260 (1903); *Miffin v. Dutton*, 190 U.S. 265 (1903); *Kaplan v. Fox Film Corp.*, 19 F. Supp. 780 (S.D.N.Y. 1937); *Official Aviation Guide Co. v. American Aviation Associates, Inc.*, 150 F. 2d 173 (7th Cir. 1945), *cert. denied*, 326 U.S. 176 (1945); *cf. Dam v. Kirke LaShelle Co.*, 175 Fed. 902 (2d Cir. 1910); *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949); *Leigh v. Barnhart*, 96 F. Supp. 194 (D.N.J. 1951).

⁷⁹ *Jackson v. Walkie*, 29 Fed. 15 (C.C.N.D. Ill. 1886).

1878, by H. A. Jackson." The words "in the office of the Librarian of Congress, at Washington", which the statute prescribed were to follow the word "Entered," were omitted. The court held this omission fatal to the copyright, and expressed its reasoning as follows:

If an author or proprietor of a book or literary work can change the formula prescribed by the statute for his notice of copyright to the public, by omitting the words left out of this notice, he may omit other words, or adopt an entirely different form, or may change the location of the notice. He may think that the title page, or the page immediately following, is not as good a place to print the notice as some other place in the book, and may therefore insist that he has a right to exercise his own judgment as to where he will print his notice, as well as the form in which it shall be printed. An author or proprietor of a work has no right to say in effect, that any part of the prescribed notice is immaterial, and may be omitted. He takes his copyright under the law, only by giving the notice, and the entire notice, which the statute provides; * * * ⁸⁰

In 1891 the Supreme Court had occasion to consider a case where the word "Copyright" had been omitted from the notice. It ordered the bill dismissed on the ground that compliance with all of the statutory notice provisions was essential to the maintenance of an infringement action.⁸¹

If a collection of pictorial or graphic material is published in book form with the full form of copyright notice, it has been held that separate reprints from the collection must retain the full "book" form of notice.⁸² Use of the abbreviated form of notice was held to invalidate copyright protection in the material reprinted.

4. Defective notice: Name of copyright proprietor

(a) *In general.*—The law requires that the notice include the "name of the copyright proprietor";⁸³ a notice which contains no identification of the copyright proprietor would be considered defective.⁸⁴ The courts have generally not been strict in requiring a full statement of the name, if there is sufficient identification for practical purposes.⁸⁵ Thus, the Supreme Court has held the last name of the claimant, preceded by a single initial, to be a substantial compliance with the statute,⁸⁶ and the surname alone has been held sufficient.⁸⁷ Omission of the designation "Inc." from the name of a corporate claimant was held of no significance since it "in no way disguised the identity of the party who had registered the copyright."⁸⁸

On the other hand, use of the proprietor's initials or trade symbol rather than his name (*e.g.*, "D S" rather than "Doll & Smith") has been held insufficient to meet the statutory requirements.⁸⁹ In those classes of artistic and graphic works where the statute specifically permits use of the proprietor's initials, monogram, mark, or

⁸⁰ *Id.* at 16.

⁸¹ *Higgins v. Keuffel*, 140 U.S. 428 (1891).

⁸² *Advertisers Exchange, Inc. v. Anderson*, 144 F. 2d 907 (8th Cir. 1944); *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S.D.N.Y. 1939).

⁸³ 17 U.S.C. § 19 (1947).

⁸⁴ *Osgood v. A. S. Aloe Instrument Co.*, 83 Fed. 470 (C.C.E.D. Mo. 1897); *W.S. Bessett, Inc. v. Albert J. Germain Co.*, 18 F. Supp. 249 (D. Mass. 1937); *Buck v. Liederkrantz*, 34 F. Supp. 1006 (E.D. Pa. 1937).

⁸⁵ *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884). *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935); *Allen v. Walt Disney Productions, Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941).

⁸⁶ *Burrow-Giles Lithographic Co. v. Sarony*, *supra* note 85.

⁸⁷ *Bolles v. Outing Co.*, 77 Fed. 966 (2d Cir. 1897), *aff'd*, 175 U.S. 262 (1899); *Ziegelheim v. Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954).

⁸⁸ *Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F. 2d 276, 277 (2d Cir. 1934), *cert. denied*, 294 U.S. 717 (1935).

⁸⁹ *Smith v. Wilkinson*, 19 F. Supp. 841 (D.N.H. 1937), *aff'd*, 97 F. 2d 506 (1st Cir. 1938); *Smith v. Bartlett*, 18 F. Supp. 35 (D. Me. 1937).

symbol in the notice, it is still essential that the name of the proprietor appear elsewhere on the copies.⁹⁰

(b) *Notice in the wrong name.*—Under certain circumstances, even if the name in the notice is not that of the true copyright proprietor the courts have held the copyright valid on the theory of a “constructive trust”;⁹¹ the legal title to the copyright is regarded as having been secured by the person named in the notice, and is held in trust for the true proprietor, who owns the equitable title. Two copyright cases, both dealing with notices in the name of a corporation, illustrate the opposite poles of judicial thinking on this point.

In a case⁹² involving serial installments to be published in a newspaper, the author had agreed that the individual publisher could secure copyright in his name. The installments as published bore no separate notices, but the issues containing them were copyrighted in the name of the newspaper corporation. Although the publisher owned all but five shares of the corporate stock, the court held the notice defective on the ground that a corporation has a separate legal existence apart from that of its stockholders.

A more recent case⁹³ demonstrates the willingness of some courts to look beyond the strict formalities and to recognize the realities behind the corporate fiction. Here the corporate copyright proprietor had set up a dummy corporation for promotional purposes. Although the agreement between the two corporations did not authorize the dummy to secure copyrights, the court held that the copyrights secured by notice in the name of the latter were not invalid. The court acknowledged that if the dummy corporation had an independent will and was owned by shareholders who had interests separate from the proprietary corporation, the situation would have been different. But, the court reasoned:

Since, however, the interests of the two corporations were precisely the same, we think that a notice was sufficient which used the dummy's name as “proprietor.” Anyone who should act in reliance upon the proprietorship of Superman, Inc. [the dummy], would not find himself in any different position because it turned out that that corporation was only a dummy; certainly “Detective” [the proprietor] could not for that reason have escaped any liability. We are unwilling to allow a barefaced infringer to invoke an innocent deviation from the letter that could not in the slightest degree have prejudiced him or the public.⁹⁴

(c) *Assignee's name in notice.*—The copyright law provides that, when an assignment of copyright in a work has been recorded in the Copyright Office, the assignee may substitute his name for that of the assignor in the notice of copyright.⁹⁵ In *Group Publishers, Inc. v. Winchell*,⁹⁶ the court held that substitution of the assignee's name before recordation of the assignment invalidated the copyright. This case, the only one directly construing this particular provision of the law, has a number of disturbing implications. For example, a work first published in a periodical with a notice in the name of the periodical publisher would presumably be thrown into the public

⁹⁰ *E. I. Horsman & Aetna Doll Co. v. Kaufman*, 286 Fed. 372 (2d Cir. 1922); *Goes Lithographing Co. v. Apt Lithographic Co.*, 14 F. Supp. 620 (S.D.N.Y. 1936); *Metro Associated Services Inc. v. Webster City Graphic, Inc.*, 117 F. Supp. 224 (N.D. Iowa 1953); *Gray Envelope Manufacturing Co.*, 39 U.S.P.Q. 323 (Comm'r Patents 1938). But see *Block v. Plaut*, 87 F. Supp. 49 (N.D. Ill. 1949).

⁹¹ *Bisel v. Ladner*, 1 F. 2d 436 (3d Cir. 1924); *Cohan v. Richmond*, 19 F. Supp. 771 (S.D.N.Y. 1937); *Henry Holt and Co. v. Liggett and Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938).

⁹² *Public Ledger Co. v. Post Printing & Publishing Co.*, 294 Fed. 430 (8th Cir. 1923).

⁹³ *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 191 F. 2d 594 (2d Cir. 1951).

⁹⁴ *Id.* at 602.

⁹⁵ 17 U.S.C. § 32 (1947).

⁹⁶ *Group Publishers, Inc. v. Winchell*, 86 F. Supp. 573 (S.D.N.Y. 1949).

domain by publication of the same work in book form with a notice in another name, unless an assignment was recorded before publication of the book edition.⁹⁷

(d) *Joint owners.*—The fact that the copyright notice is in the name of one individual does not necessarily mean that the named person is the sole owner of copyright in the work; there may be others who have an interest in the copyright. The courts have held that where several parties are entitled to secure copyright in a work, and the name of only one of them appears in the copyright notice, that person is the legal owner of the copyright, but holds in trust for the other joint owners.⁹⁸

(e) *Use of fictitious or trade names.*—At common law, individuals are permitted to “carry on business under any name and style which they may choose to adopt.”⁹⁹ Likewise, “if persons trade or carry on business under a name, style, or firm, whatever may be done by them under that name is as valid as if real names had been used.”¹⁰⁰

Thus, at common law, a copyright notice utilizing the trade name of a business would be considered valid. This principle was recognized in the early case of *Scribner v. Henry G. Allen Co.*:¹⁰¹ the court noted that some States regulated the use of fictitious names, but considered this irrelevant since “an omission to file a certificate would have no effect upon the title of property which he [plaintiff] has bought in the name of the firm.”¹⁰² On the other hand, where a State had penal laws actually forbidding the use of trade or fictitious names unless they were registered, a notice which included an unregistered trade name was held invalid.¹⁰³

If the State statutes relating to registration of trade or fictitious names have been satisfied, the courts have not generally permitted infringers to take advantage of technical deviations in the notice. In one case,¹⁰⁴ two individuals doing business as “The United Music Co.” registered the name under the New York State statute. Following publication and copyright registration one of the individuals disassociated himself from the company, and in an infringement suit the defendant argued that a new certificate should have been filed under State law. The court rejected this contention on the ground that it “* * * would be a very technical construction of a penal statute and would produce an inequitable result.”¹⁰⁵ In another case¹⁰⁶ a trade name was registered as “T. W. Allen Company,” while the copyright notice used the name “The Thornton W. Allen Company.” The court considered the difference “at most a slight variance and is not material.”¹⁰⁷ It added:

The name on the copyright notice gives sufficient notice to the public of the name of the owner of the composition upon which copyright is claimed, and the date when this right was obtained. That is all that the statute requires * * *.¹⁰⁸

⁹⁷ *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374, 378 (S.D.N.Y. 1952) (dictum).

⁹⁸ *Maurel v. Smith*, 271 Fed. 211 (2d Cir. 1921); *Fed. Browne Music Co. v. Fowler*, 290 Fed. 751 (2d Cir. 1923); *Quinn-Brown Pub. Corp. v. Chilton Co.*, 15 F. Supp. 213 (S.D.N.Y. 1936).

⁹⁹ *Maughan v. Sharpe*, 17 Common Bench N.S. 443, 462 (Exch. 1864).

¹⁰⁰ 1 LINDLEY, PARTNERSHIP 208 (4th ed., Ewell 1881).

¹⁰¹ 49 Fed. 854 (C.C.S.D.N.Y. 1892); accord, *Werckmeister v. Springer Lithographing Co.*, 63 Fed. 808 (C.C.S.D.N.Y. 1894).

¹⁰² *Scribner v. Henry G. Allen Co.*, *supra* note 101 at 855.

¹⁰³ *Haas v. Leo Feist, Inc.*, 234 Fed. 105 (S.D.N.Y. 1916).

¹⁰⁴ *Gogniat v. Universal Pictures Corp.*, 35 U.S.P.Q. 117 (S.D.N.Y. 1937).

¹⁰⁵ *Id.* at 125.

¹⁰⁶ *Allen v. Walt Disney Productions, Ltd.*, 41 F. Supp. 134 (S.D.N.Y. 1941).

¹⁰⁷ *Id.* at 135.

¹⁰⁸ *Ibid.*

5. *Defective notice: Date of copyright*

(a) *In general.*—The omission of a year date from the notice in a “printed literary, musical, or dramatic work”¹⁰⁹ will invalidate the copyright.¹¹⁰ For other types of works use of the date is optional, and omission of the date will not affect the validity of the copyright.¹¹¹

A year date in which the first two digits are omitted (e.g., “Copyright ’94. By B. L. Snow”) has been held sufficient to identify the year involved.¹¹² As one court has pointed out, there can be little question as to which century is meant.¹¹³

Although it is far more common to print the date in Arabic numerals, use of Roman numerals in the notice is unobjectionable.¹¹⁴ As one court put it:

Roman numerals are a part of the language of this country. They are constantly in use upon monumental architecture of all sorts and for serial purposes upon books, and they are a part of the language as taught in the public schools, and understood by all but the most illiterate. Nor can one seriously contend that the notice required by the statute could be fulfilled only by Arabic numerals. If the letters were written out in words, it would certainly be a compliance. I regard the writing of it here in Roman numerals as more nearly a literal compliance with the statute than to write out the year in words.¹¹⁵

(b) *Postdated notice.*—If the date in a notice is that of a year later than the actual year of publication, there are strong indications that a court would hold the notice invalid;¹¹⁶ it would probably be regarded as an attempt to claim a period of protection longer than that allowed by law. The question was directly litigated in a case that arose over a hundred years ago; the court held that publication of a work in 1846 with an 1847 notice invalidated the copyright.¹¹⁷ This decision has generally been accepted as representing the law on the point,¹¹⁸ although there may be situations, especially where publication occurred very near the end of the year, in which the equities might lead a court to uphold the validity of a notice with the date of the next year.¹¹⁹

(c) *Antedated notice.*—An antedated notice (one that contains a date earlier than that of actual publication) has been held valid, since the mistake is in favor of the public;¹²⁰ the loss, if any, is upon the

¹⁰⁹ 17 U.S.C. § 19 (1947).

¹¹⁰ *Wildman v. New York Times Co.*, 42 F. Supp. 412 (S.D.N.Y. 1941).

¹¹¹ *Flaischer Studios, Inc. v. Ralph A. Freundlich, Inc.*, 73 F.2d 276 (2d Cir. 1934); *cert. denied*, 294 U.S. 717 (1935).

¹¹² *Snow v. Mast*, 65 Fed. 995 (C.C.S.D. Ohio 1895).

¹¹³ *Bolles v. Outing Co.*, 77 Fed. 966, 969 (2d Cir. 1897), *aff'd* 175 U.S. 262 (1899).

¹¹⁴ *Stern v. Jerome H. Remick & Co.*, 175 Fed. 282 (C.C.S.D.N.Y. 1910). In several cases the validity of a copyright has been upheld without reference to the fact that the notice was dated in Roman numerals. See, e.g., *Ted Browne Music Co. v. Fowler*, 290 Fed. 751 (2d Cir. 1923); *M. Witmark & Sons v. Pastime Amusement Co.*, 293 Fed. 470 (E.D.S.C. 1924), *aff'd*, 2 F.2d 1020 (4th Cir. 1924); *Buck v. Russo*, 25 F. Supp. 317 (D. Mass. 1938); *Shapiro, Bernstein & Co. v. Jerry Vogel Co.*, 161 F.2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947).

¹¹⁵ *Stern v. Jerome H. Remick & Co.*, *supra* note 114, at 283.

¹¹⁶ See, e.g., *Baker v. Taylor*, 2 Fed. Cas. 478, No. 782 (C.C.S.D.N.Y. 1848); *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922); *Heim v. Universal Pictures Co.*, 154 F.2d 480 (2d Cir. 1946). *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S.D.N.Y. 1939); *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949).

¹¹⁷ *Baker v. Taylor*, *supra* note 116.

¹¹⁸ See, e.g., *West Publishing Co. v. Edward Thompson Co.*, 169 Fed. 833, 879 (C.C.E.D.N.Y. 1909); *Shapiro, Bernstein & Co. v. Jerry Vogel Co.*, 161 F.2d 406 (2d Cir. 1946) *cert. denied*, 331 U.S. 820 (1947); *Basevi v. Edward O'Toole Co.*, 26 F. Supp. 41 (S.D. N.Y. 1939); *Harris v. Miller*, 50 U.S.P.Q. 306 (S.D.N.Y. 1941); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 93 F. Supp. 349 (S.D.N.Y. 1950), *rev'd on other grounds*, 191 F.2d 594 (2d Cir. 1951); *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374 (S.D. N.Y. 1952); 37 C.F.R. § 202.1(b)(8) (1956). But see *Schumacher v. Wogram*, 35 Fed. 210 (C.C.S.D.N.Y. 1888).

¹¹⁹ In two recent cases, defendants claimed that the plaintiff's copyrights were invalid because the applications for copyright registration stated dates of publication a few months later than the actual dates on which the works were published. The courts in both cases declined to accept this defense, on the ground that there had been no fraud or serious prejudice to the public. Although no question as to the validity of the notice was involved in these cases, they may reflect the more liberal attitude of the courts in this area. *Advisers, Inc. v. Wiesen-Hart, Inc.*, 238 F.2d 706 (6th Cir. 1956), *cert. denied*, 353 U.S. 949 (1957); *Ziegelheim v. Flohr*, 119 F. Supp. 324 (E.D.N.Y. 1954).

¹²⁰ *Callaghan v. Myers*, 128 U.S. 617 (1888); *American Code Co. v. Bensinger*, 282 Fed. 829 (2d Cir. 1922); *Southern Music Pub. Co. v. Bibb-Lang, Inc.*, 10 F. Supp. 972 (S.D.N.Y. 1935); *Leigh v. Gerber*, 86 F. Supp. 320 (S.D.N.Y. 1949).

copyright owner, whose term of protection is computed from the earlier date. In one case the defendant argued that an antedated notice should be held invalid since it would permit the proprietor to sue under the statute for alleged infringement before the copyright actually came into existence. The court, in rejecting this argument, pointed out that the use of an antedated notice would not make statutory protection retroactive, but would merely shorten the term.¹²¹

(d) *New editions.*—Whenever a copyrighted work is reprinted without change, a notice containing the original date when copyright was secured should be affixed to it; use of a later date would result in a postdated notice which would invalidate the copyright.¹²² If an existing work is revised and republished with “new matter,” it becomes a “new work” and as such is entitled to separate protection.¹²³ There are decisions holding that the only date required in the notice for a “new work” is the year of publication of that work.¹²⁴ However, it is not clear whether these decisions would apply if the “new matter” were incidental to, or clearly separable from, the earlier material.

An interesting question of statutory interpretation arises with respect to the date to appear in the notice on the published version of a work that has earlier been copyrighted by registration in unpublished form. The statute requires the notice to include the year in which “copyright was secured by publication.”¹²⁵ When copyright is secured by registration rather than by publication, should the notice contain the year in which copyright was secured, or the later year in which the work was published for the first time? This is a problem of great importance, especially to music publishers; it is often solved when the published version contains a new arrangement or other copyrightable new matter, thus permitting use of the later date. When the published version is the same as the unpublished version, however, the weight of opinion appears to support the view that the year copyright was secured by registration should be used in the notice.¹²⁶

One court’s interpretation of the value of the notice is found in a case dealing with these questions.¹²⁷ A composition registered in unpublished form in 1911 was published with new lyrics in 1912, and with a notice reading:

Copyright MCMXI by Ernie Burnett
Copyright transferred MCMXII to Theron
C. Bennett, Denver, Colo.

¹²¹ *Basevi v. Edward O’Toole Co.*, 26 F. Supp. 41 (S.D.N.Y. 1939).

¹²² *Lawrence v. Dana*, 15 Fed. Cas. 26, 52 No. 8136 (C.C.D. Mass. 1869); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 93 F. Supp. 349 (S.D.N.Y. 1950), *rev’d on other grounds*, 191 F. 2d 594 (2d Cir. 1951).

¹²³ 17 U.S.C. § 7 (1947).

¹²⁴ *Lawrence v. Dana*, 15 Fed. Cas. 26, 52 No. 8136 (C.C.D. Mass. 1869); *Harris v. Miller*, 60 U.S.P.Q. 306 (S.D.N.Y. 1941); *National Comics Publications, Inc. v. Fawcett Publications, Inc.*, 93 F. Supp. 349 (S.D.N.Y. 1950), *rev’d on other grounds*, 191 F. 2d 594 (2d Cir. 1951). In *Wrench v. Universal Pictures Co.*, 104 F. Supp. 374 (S.D.N.Y. 1952), the court upheld the validity of copyright in the contents of a book published with a 1948 notice, although substantial portions of the work had been copyrighted upon publication in periodicals in 1944 and 1945. The opinion states:

Since the only copyright date necessary to protect the property is 1948, the insertion of “1945” in the copyright notice in the book was superfluous * * *. Although the listing of prior copyrights is a practice of publishers “there is nothing in any act of Congress to show that each successive edition must specify the date of the original copyright.” [citation omitted]

¹²⁵ 17 U.S.C. § 19 (1947).

¹²⁶ See DE WOLF, *AN OUTLINE OF COPYRIGHT LAW* 57 (1925); HOWELL, *THE COPYRIGHT LAW* 105, 107 (3d ed. 1952); 2 LADAS, *THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY* 763 (1938); NICHOLSON, *A MANUAL OF AMERICAN COPYRIGHT PRACTICE* 129, 175 (2d ed. 1956); SHAFER, *MUSICAL COPYRIGHT* 94 (2d ed. 1939); Tannenbaum, *Practical Problems in Copyright*, in *SEVEN COPYRIGHT PROBLEMS ANALYZED* 7, 11 (1952); WARNER, *RADIO AND TELEVISION RIGHTS* § 72 (1953); WEIL, *AMERICAN COPYRIGHT LAW* 296, 306 (1917). This view has also been adopted by the Copyright Office in its regulations; 37 C.F.R. § 202.2(b)(6) (1956).

¹²⁷ *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F. 2d 406 (2d Cir. 1946), *cert. denied*, 331 U.S. 820 (1947).

The court acknowledged that there had not been literal compliance with the statutory requirements since, strictly speaking, there was no notice covering the 1912 version. It held the notice valid, however, stating:

Nevertheless it is apparent that he intended to copyright the 1912 version, for that was the song he was publishing. * * * The published notice was sufficient to inform a prospective copyist that Bennett was trying to get copyright protection for the published song to which he attached it. Had such a copyist looked up Burnett's copyright, he would have found that it protected an "unpublished song" with different words, but that ought not to have satisfied him that Norton's words were in the public domain; on the contrary, he would then have the more reason to believe that Bennett was trying to protect the song as published, and he should be chargeable with knowledge of such facts as reasonable inquiry would have disclosed. Such an inquiry addressed to Bennett would have disclosed that he was the proprietor of both Norton's words and Burnett's music and intended to obtain protection for the song as published.¹²⁸

6. Defective notice: Position

(a) *Title page.*—For a book or other printed publication, the copyright law requires that the notice be placed on the "title page or the page immediately following."¹²⁹ Most of the decisions concerning the position of the notice involve the question of what is a title page. In several cases where the notice was applied to the last page of a publication, the courts have consistently held the notice invalid.¹³⁰

A more difficult problem has been to determine whether a given page was a "title page" within the meaning of the law. An early case¹³¹ involved a periodical¹³² of 106 pages with a notice on page 51. The title of the work appeared at the top of every page, but page 19, the first page containing ordinary reading matter, also bore the title of the publication, the volume and issue number, and the month and year of issue. The court held this to be the "title page" and dismissed the action because the notice was not correctly placed.

As indicated by this decision, the title page does not necessarily have to be the first page. On the basis of this concept, the courts have upheld title pages which were removed from the front of the publication, if they were preceded by advertising matter.¹³³ But not all notices may be safely removed from the front of the publication. If, for example, a loose-leaf catalog held together by a paper backing sheet contains, on the backing sheet, all the information as to its contents, manufacturer, manufacturer's address, and telephone number, it has been held improper to place a notice on the fifth sheet of the catalog itself.¹³⁴

Determination of what is the title page is frequently a question of fact. In one case¹³⁵ the paper cover of a book bore one title and another title appeared on page 3. The only notice on the work appeared on page 3, but in his complaint the plaintiff identified the work under the title appearing on the cover. The trial court dismissed the action on the ground of misplaced notice, despite plaintiff's attempts to show that page 3 was actually the title page; the court of appeals

¹²⁸ *Id.* at 409.

¹²⁹ 17 U.S.C. § 20 (1947).

¹³⁰ *United Thrift Plan, Inc. v. National Thrift Plan, Inc.*, 34 F. 2d 300 (E.D.N.Y. 1929); *W. S. Bessett Inc. v. Albert S. Germain Co.*, 18 F. Supp. 249 (D. Mass. 1937); *J. A. Richards, Inc. v. N.Y. Post, Inc.*, 23 F. Supp. 619 (S.D.N.Y. 1938).

¹³¹ *Freeman v. The Trade Register, Inc.*, 173 Fed. 419 (C.C.W.D. Wash. 1909).

¹³² The law then in effect treated periodicals as "books" for purposes of specifying the position of the notice; see note 16 *supra*, and text thereto.

¹³³ *American Travel and Hotel Directory Co. v. Gehring Publishing Co.*, 4 F. 2d 415 (S.D.N.Y. 1925).

¹³⁴ *Siewek Tool Co. v. Morton*, 128 F. Supp. 71 (E.D. Mich. 1954).

¹³⁵ *Booth v. Haggard*, 184 F. 2d 470 (8th Cir. 1950).

upheld the decision as supported by substantial evidence and in accord with the averments of the complaint. The reverse of this situation arose in a later case,¹³⁶ in which the court found that the cover page was not the title page, stating:

* * * it cannot be regarded as a page in any sense, any more than the buckram covering or binding of a law book can be so regarded. It is not part of the published matter and has no connection with it other than that of a cover to protect the printed matter of the text.¹³⁷

If a copyright notice appears on the outside cover of a periodical, one court has questioned whether it can be said to apply to the contents of the periodical.¹³⁸ But in a later case in the same district,¹³⁹ the court held that, where a cover contained copyrightable material and indicated the particular feature emphasized in that issue, the cover could be regarded as a "copyrightable component" part of the magazine. Although both the cover and the magazine bore notice in that case, it would appear that, where there is some relation between the cover and the contents of a magazine, the cover would be regarded as a "title page" and a notice on the cover would extend to the entire magazine.

(b) *Detachable tags, etc.*—In recent years, questions have arisen with increasing frequency concerning the validity of a notice for an article, affixed to a temporary tag, label, or container which is intended to be removed and discarded when the article is put in use. This problem arose in a recently litigated case¹⁴⁰ and, while the issue was not determinative, the opinion strongly indicates that such a notice is invalid. The court had this to say:

The printed notice of copyright on the two tags attached to the Trifari pins did not meet the statutory requirement that the notice be "on some accessible portion of such copies or of the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted." 17 U.S.C. § 19. Thus they could serve plaintiff only by showing that defendants had actual notice of the copyright of an improperly marked article. Defendants' officers state that no notice was on the pin that they copied and it is not unlikely that during handling in a retail store, before the sale, these small tags might have been removed.¹⁴¹

(c) *Repetitive designs.*—Another notice problem is presented by copyrightable designs which are repeated on a continuous sheet or roll of paper, fabric, and the like. In its 1914 decision in *Louis DeJonge & Co. v. Breuker & Kessler Co.*,¹⁴² the Supreme Court held that copyright in a painting which had been reproduced on wrapping paper was lost when twelve repetitions of the painting appeared on a sheet containing a single notice. This concept was upheld in recent years where a copyrighted representation of a chrysanthemum was applied repetitively to dress goods.¹⁴³

The problem of repetitive designs becomes still more difficult for certain types of works; even if the notice for a wallpaper design, for example, is affixed to the selvage often enough to satisfy the courts, there is a question as to the effect on copyright protection when the paper is applied to a wall and the selvage is covered permanently.

¹³⁶ Powell v. Stransky, 98 F. Supp. 434 (D.S.D. 1951).

¹³⁷ *Id.* at 435.

¹³⁸ Fawcett Publications, Inc. v. Elliot Publishing Co., 54 U.S.P.Q. 367 (S.D.N.Y. 1942).

¹³⁹ Conde Nast Publications, Inc. v. Vogue School of Fashion Modeling, Inc., 105 F. Supp. 325 (S.D.N.Y. 1952).

¹⁴⁰ Trifari, Krussman & Fishel, Inc. v. B. Steinberg-Kaslo Co., 144 F. Supp. 577 (S.D.N.Y. 1956).

¹⁴¹ *Id.* at 582.

¹⁴² 235 U.S. 33 (1914).

¹⁴³ Verney Corp. v. Rose Fabric Converters Corp., 87 F. Supp. 802 (S.D.N.Y. 1949).

No cases shed sufficient light on the problem of repetitive notices to determine how often the notice must be applied, or what happens when the notice is obliterated in actual use. If the doctrine of the *DeJonge* case is carried to its logical conclusion, it would appear difficult to protect repetitive designs without seriously detracting from the esthetic appearance of the product.

IV. THE COPYRIGHT NOTICE IN INTERNATIONAL TREATIES AND CONVENTIONS

A. WESTERN HEMISPHERE COPYRIGHT CONVENTIONS

In the Western Hemisphere today the two principal multilateral copyright conventions in effect are those signed in Buenos Aires in 1910 and in Washington in 1946;¹⁴⁴ the United States is a member of the Buenos Aires Convention. The Washington Convention, as between adherents, supersedes the version signed at Buenos Aires, and to this extent is in effect a revision of the earlier treaty.

The Buenos Aires Convention, in article 3, provides:

The acknowledgement of a copyright obtained in one state, in conformity with its laws, shall produce its effects of full right, in all the other states, without the necessity of complying with any other formality, provided always there shall appear in the work a statement that indicates the reservation of the property right.

The sole condition for obtaining protection in another state which is a party to this convention is the inclusion of some sort of a reservation of rights, and in practice this reservation appears usually to take the form of either "Derechos reservados," "All rights reserved," or "All rights reserved under Pan American Copyright Convention." While the question has not been litigated, it also seems probable that any of the forms of copyright notice specified by the United States law should constitute a "reservation of the property right" which would be upheld in the other member countries.

The Washington Convention of 1946 contains, in Article X, the following provision concerning notice:

In order to facilitate the utilization of literary, scientific, and artistic works, the Contracting States agree to encourage the use on such works of the expression "Copyright" or its abbreviation "Copr." or the letter "C" enclosed with a circle, followed by the year in which the protection begins, the name and address of the copyright owner, and the place of origin of the work. This information should appear on the reverse of the title page in the case of a written work, or in some accessible place according to the nature of the work, such as the margin, on the back, permanent base, pedestal, or the material on which the work is mounted. However, a notice of copyright in this or any other form shall not be interpreted as a condition of protection of the work under the provisions of the present Convention.

The wording of this article was proposed by the United States Delegation in place of the proviso of article 3 of the Buenos Aires Convention, because that delegation believed "that notice is a useful informational

¹⁴⁴ The Mexico City Convention of 1902 and the Havana Convention of 1928 have for all practical purposes been superseded. El Salvador is the only country party to the 1902 convention that has not ratified a later treaty, and Panama is in the same position as regards the 1928 Convention.

The following countries are adherents to the Buenos Aires Convention of 1910: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Nicaragua, Panama, Paraguay, Peru, United States of America, and Uruguay.

The following countries are adherents to the Washington Convention of 1946: Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, and Paraguay.

device."¹⁴⁵ In the words of the report of the U.S. delegate to this convention:

* * * the Conference was actively interest in including the suggestion for the use of an informative notice. It believed that customary use of notice as prescribed would be helpful to those wishing to utilize American literary, scientific, and artistic works for commercial purposes.¹⁴⁶

For a number of reasons in large part unrelated to the notice provision, the United States has not ratified the Washington Convention.

B. INTERNATIONAL COPYRIGHT "BERNE" CONVENTIONS

The original Berne Convention of 1886 implicitly recognized the right of contracting states to require notice as a condition of copyright; Article II laid down the principle of national treatment, and provided:

The enjoyment of these rights shall be subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and must not exceed in the other countries the term of protection granted in the said country of origin.

This provision was not affected by the Paris revision of 1896, but the revisions made by the Berlin Convention of 1908 brought about a fundamental change. The second paragraph of article 4 provided as follows:

The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work.

This provision has been incorporated without appreciable change in the latest revisions of the "Berne" Convention—the Rome Convention of 1928 and the Brussels Convention of 1948.¹⁴⁷

The original 1886 convention contained two provisions specifically requiring a "notice" (that is, a statement of reservation) as a condition of certain rights. First, article VII permitted free reproduction of "articles from newspapers or periodicals * * * unless the authors or publishers have expressly forbidden it," and provided that "[f] or periodicals it shall be sufficient if the prohibition is indicated in general terms at the beginning of each number of the periodical." The principle of this provision has been incorporated in all later revisions of the convention, although in somewhat different and more limited form. The Paris revision of 1896¹⁴⁸ excluded from the provision's effect "[s]erial stories, including tales;" for other types of articles unauthorized use could be prevented only if "the authors or editors shall have expressly declared in the newspaper or periodical itself in which they shall have been published that reproduction is forbidden. The provision was simplified in the Berlin revision of 1908.¹⁴⁹ and appears as article 9 in the Rome Convention of 1928 and the Brussels Convention of 1948; in the latest revision it reads as follows:

2. Articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved; * * *

¹⁴⁵ *Report of U.S. Delegate to Inter-American Conference of Experts on Copyright, Washington, D.C., June 1-22, 1946.* p. 21.

¹⁴⁶ *Ibid.*

¹⁴⁷ The provision appears in art. 4(2) of both treaties.

¹⁴⁸ Art. I(4).

¹⁴⁹ Art. 9.

The other specific "notice" provision of the 1886 convention ¹⁵⁰ referred to the right of musical performance, and read as follows:

The stipulations of article II [the right of national treatment] shall apply equally to the public performance of unpublished musical works, or of published works in which the author has expressly declared on the title page or commencement of the work that he forbids the public performance thereof.

The Berlin Convention of 1908 ¹⁵¹ specifically abrogated this requirement, and instituted a provision which has appeared in all of the later revisions:

3. In order to enjoy the protection of this article [the right of public performance], authors shall not be bound, when publishing their works, to forbid the public presentation or performance thereof.^{151a}

The various "Berne" Conventions also contains a few provisions which would permit contracting states to require a notice for certain purposes. For example, the latest revision (the Brussels Convention of 1948), in addition to permitting the requirement of a notice for articles of current interest,¹⁵² provides that it shall be a matter for domestic legislation to determine the conditions under which works of applied art may be protected,¹⁵³ and the conditions under which lectures and similar works may be reproduced by the press.¹⁵⁴

C. THE UNIVERSAL COPYRIGHT CONVENTION

It is generally recognized that the Universal Copyright Convention, signed at Geneva in 1952, represents an effort to reconcile the fundamental differences between those countries which base copyright protection on the performance of certain formalities, and those which do not.¹⁵⁵ The foundation stone on which the convention is built is that provision of article III which reads as follows:

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

¹⁵⁰ Art. IX, par. 3.

¹⁵¹ Art. 11, par. 3.

^{151a} Art. 11, par. 3 of the Brussels Convention of 1948.

¹⁵² See note 149 *supra*, and text thereto.

¹⁵³ Art. 2(5).

¹⁵⁴ Art. 2 *bis*.

¹⁵⁵ See Kaminstein, *op. cit. supra* note 70.

It is worth noting that the compromise embodied in this provision involves the use of a prescribed form of notice as a substitute for other types of formalities.^{155a}

V. THE COPYRIGHT NOTICE IN THE LAWS OF FOREIGN COUNTRIES

A. GENERAL NOTICE PROVISIONS

1. Notice as a condition of copyright

As will be seen below,¹⁵⁶ many countries require a notice with respect to particular classes or uses of copyrighted works. In addition there are five countries, other than the United States, which appear to require some sort of notice as a fundamental condition of copyright protection. The statute of the Philippines,¹⁵⁷ which is patterned after that of the United States, requires both publication with notice and registration as conditions of copyright in published works, and contains a comparatively simple notice provision:

SEC. 16. The notice of copyright required by section eleven of this Act shall consist of the word "Copyright" accompanied by the name of the copyright proprietor and the year in which the copyright was registered.

This requirement is elaborated considerably in the Rules of Practice Relating to the Registration of Copyright Claims:¹⁵⁸ for example, the rules require that the notice contain the "true, legal name of the living person, firm, or corporation owning the copyright"¹⁵⁹ and forbid the use of pseudonyms in the notice.¹⁶⁰

The statute of Nicaragua¹⁶¹ requires "[a]ll authors, translators and publishers" to insert a notice consisting of "their name, the date of publication, and such legal conditions and notices as they may deem suitable" in specified locations on "books or musical compositions, * * * engravings, and * * * other artistic works."¹⁶² Failure to employ the prescribed notice apparently results in the loss of copyright protection.¹⁶³

^{155a} The second session of the Intergovernmental Copyright Committee (a committee of representatives of twelve Contracting States, established under Article XI of the Universal Copyright Convention) was held at Washington, D. C., October 7-11, 1957. This session took two actions of considerable interest with respect to the problem of copyright notice. In "Advisory Statement No. 1" the Committee expressed the view that the following positions of the copyright notice would generally satisfy the provisions of Article III, paragraph 1 of the convention:

- in the case of books or pamphlets, on the title page or the page immediately following, or at the end of the book or pamphlet.
- in the case of a single sheet, on either of the sides.
- in the case of printed music, on the title page or first page of music, or at the end of the printed music.
- in the case of newspapers, magazines or other periodicals, under the main title or the "masthead".
- in the case of maps, prints, or photographs, on their face side, either on the actual map or picture (but somewhere near the title or the margin) or on the margin,
- in the case of independent parts of a whole (if a separate copyright is claimed in the independent parts), under the title of the independent part,
- in the case of motion pictures, on the frames which carry its title (whether appearing at the beginning or the end) or credits * * *

In the same statement the Committee also expressed the view that " * * * if the three elements of the notice * * * appear in close juxtaposition to each other and in letters and numbers large enough to appear legible to an ordinary reader, * * * then the notice would appear to meet the requirements of the convention as to the manner of placement.

The Committee, in its Resolution No. 9(II), also expressed the hope that:

- * * * in the case of newspapers and other periodicals, Contracting States will, while permitting the use of separate copyright notices in the case of individual contributions, nevertheless treat a single copyright notice, containing the name of the newspaper or periodical proprietor, as serving to protect all that matter which, under the domestic law where protection is claimed, is capable of enjoying copyright protection.

The official text of the advisory statement and resolution quoted above are contained in Records of the Second Session of the Intergovernmental Copyright Committee (IGC/II/25, 1957) at 19 and 22.

¹⁵⁶ See Section V.B. *infra*.

¹⁵⁷ Act of March 6, 1924.

¹⁵⁸ Administrative Order of Sept. 18-22, 1947, §§ 35-36.

¹⁵⁹ *Id.*, § 36.

¹⁶⁰ *Ibid.*

¹⁶¹ Decree of Feb. 1, 1904.

¹⁶² *Id.* art. 844.

¹⁶³ *Id.* art. 845.

Argentina, Paraguay, and Chile make notice a mandatory condition of registration, and registration in turn is required as a condition of protection. The statute of Argentina¹⁶⁴ provides:

No work shall be registered if it does not bear an imprint. An imprint shall consist of the indication of the date, place, edition, and the name of the publisher.

The statute of Paraguay¹⁶⁵ is similar to that of Argentina on this point. The Chilean copyright law¹⁶⁶ appears to contain a double notice requirement. Copyright is acquired by registration,¹⁶⁷ and registration for published works can apparently be made only in the name of the person appearing as author in the copies.¹⁶⁸ The statute also requires, as a condition of protection, that copies of registered works bear the registration number;¹⁶⁹ provision is made for assigning registration numbers in advance.¹⁷⁰

2. Notice mandatory but not a condition of copyright

The new Mexican copyright statute,¹⁷¹ which came into effect in January 1957, embodies an interesting approach to the notice problem. Article 23 provides as follows:

Published works protected by this law shall bear the expression "derechos reservados" (rights reserved), or its abbreviation "D.R.," followed by the symbol © and the full name and address of the copyright owner and an indication of the year of first publication. These particulars shall be placed in such manner and location that they shall be readily visible and give clear notice of claim of copyright. *However, the indication of the reservation of copyright in this or any other form shall not be an essential condition for the protection of the work, but shall render any publisher who omits them liable to the sanctions prescribed by this law.* [Emphasis supplied.]

The "sanctions" mentioned in this provision consist of a fine of from 500 to 10,000 pesos, which may be imposed administratively by the Secretariat of Education.¹⁷² The same fine may also be imposed for failure to observe five other "notice" provisions,¹⁷³ which require that the following information shall be indicated "in a clearly visible form and position on all works":

(1) Publishers must indicate the name and address of the producer of the edition, together with the date and serial number of the edition.

(2) Printers must indicate the name and address of the printer, the number of copies printed, and the date of completion of printing.

(3) Spanish translations must bear the title of the work in the original language, below the Spanish title.

(4) Publishers must indicate the name of the author unless the work is anonymous or pseudonymous; in the latter case the pseudonym must be given. In the case of new versions, the name of the author of the new matter must be included. A name may be suppressed with the consent of the author, but the substitution of another name is absolutely prohibited.

¹⁶⁴ Law No. 11,723 of Sept. 28, 1933, art. 63.

¹⁶⁵ Law No. 94 of July 5-10, 1951, arts. 55, 56, 58.

¹⁶⁶ Decree—Law No. 345 of March 17, 1925, as amended.

¹⁶⁷ *Id.* art. 1.

¹⁶⁸ Regulation No. 1063 regarding the Copyright Register (March 19, 1925), art. 12(1)

¹⁶⁹ Decree—Law No. 345 of March 17, 1925, as amended, art. 15.

¹⁷⁰ Regulation No. 1063 regarding the Copyright Register (March 19, 1925), art. 2(4)

¹⁷¹ Law of Dec. 31, 1956.

¹⁷² *Id.* art. 138.

¹⁷³ *Id.* arts. 54-58.

(5) Publishers of "works that have been abridged, adapted, or modified in any other manner" must "mention this fact and the purpose thereof."

The copyright laws of three countries (Republic of China, Liberia, and El Salvador) appear to require a notice for published works, but do not make clear what consequences follow from failure to use a notice. The Chinese copyright statute ¹⁷⁴ provides that no action against an infringer may be instituted until registration has been made, and the regulations issued under the statute in 1944 ¹⁷⁵ provide for a notice to appear on registered works, as follows:

SECTION 6. Any literary or artistic work which has been registered shall bear the inscription "Registered by the Ministry of Interior on ----- (day) ----- (month) ----- (year)" and the certificate number, on the last page of the said work.

The Liberian statute ¹⁷⁶ likewise requires registration as a condition of copyright protection, and provides simply:

The works thus copyrighted and certified shall have a notice to this effect affixed.¹⁷⁷

The statute of El Salvador ¹⁷⁸ seems to require that the copyright owner's name appear on the title page, but it is not clear whether failure to use the name would forfeit protection; the provision reads as follows:

ARTICLE 9. In order to enjoy the rights granted by the preceding articles, no Government certificate of any kind shall be necessary; it shall be sufficient to indicate the owner on the title page, after a copy has been deposited with the Ministry of Fomento.

In Honduras literary and artistic works are protected under the patent law,¹⁷⁹ and are evidently subject to the following provision:

ARTICLE 27. No civil or criminal action shall lie if objects of legitimate origin do not bear an indication that they are the subject of a patent, and of its number, provided such marking is possible.

Whether this provision is meant merely to protect innocent infringers who have been misled by the absence of notice, or whether the absence of notice would be an absolute defense in an infringement suit, is open to question.

The statutes of Ecuador and Norway contain similar provisions to the effect that, when a work has been reproduced with the authorization of the copyright owner, this fact must be expressly indicated on the copies. The provision in the law of Ecuador ¹⁸⁰ is limited to literary works. The Norwegian statute ¹⁸¹ requires the number of the impression, the name of the printer, the place and year of printing; and, for graphic and musical works, each copy must be numbered consecutively.

¹⁷⁴ Law of April 27, 1944, art. 19.

¹⁷⁵ Regulation concerning the Enforcement of Copyright Law, Sept. 5, 1944.

¹⁷⁶ Act of Dec. 22, 1911.

¹⁷⁷ *Id.* § 6.

¹⁷⁸ Law of June 2, and 8, 1900.*

¹⁷⁹ Law of April 1, 1919, as amended.

¹⁸⁰ Law of Aug. 3-8, 1887, art. 6.

¹⁸¹ Law of June 6, 1930, § 25.

B. SPECIAL NOTICE PROVISIONS

1. *Articles in periodicals*

A large number of copyright statutes contain one or more provisions requiring a notice or reservation of rights with respect to particular classes or uses of works. Easily the most common of these special "notice" provisions describes the circumstances under which articles in periodicals may be reproduced without the authority of the author or publisher; the treaty counterpart of this provision appeared in the original Berne Convention of 1886 and, with amendments, has been included in all of its revisions.¹⁸² It has been adopted, with various modifications, in the statutes of at least 39 countries.¹⁸³ A typical provision is that of Sweden:¹⁸⁴

SECTION 14. Articles in newspapers and periodicals on current economic, political, or religious topics may be reprinted in other newspapers or periodicals, unless the reproduction thereof is expressly reserved.

When such reprint is made, the title of the newspaper or periodical from which the article is taken must be clearly indicated.

As a rule, the effect of this "notice requirement" is limited to "topical articles"¹⁸⁵ or "articles on current economic, political, or religious topics."¹⁸⁶ Some of the provisions specifically exclude from their scope "literary and scientific articles,"¹⁸⁷ "tales, stories, or novels in serial form,"¹⁸⁸ and the like. On the other hand, several of the provisions refer generally to "articles,"¹⁸⁹ "any work,"¹⁹⁰ "material,"¹⁹¹ "productions,"¹⁹² and "writings,"¹⁹³ thus implying that these "notice" requirements might extend to works of any character.

The large majority of the provisions deal specifically with works published in "periodicals,"¹⁹⁴ "newspapers and periodicals,"¹⁹⁵ "periodicals or reviews,"¹⁹⁶ "newspapers and magazines,"¹⁹⁷ and the like. At least four of the provisions are confined to material published in newspapers alone.¹⁹⁸ A few of the statutes are silent as to the place of publication of the material in question,¹⁹⁹ suggesting that contributions to books or pamphlets might also be affected by the requirement.

In the absence of an express reservation, most of the provisions permit free reproduction only by "newspapers or periodicals,"²⁰⁰ "other periodicals of the same nature,"²⁰¹ "the press,"²⁰² etc. A few of the

¹⁸² See Section IV. B. *supra*.

¹⁸³ Belgium, Chile, China, Colombia, Costa Rica, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, Finland, German Federal Republic, Greece, Guatemala, Holy See, Hungary, Iceland, India, Indonesia, Italy, Japan, Lebanon, Liechtenstein, Luxemburg, Mexico, Monaco, Netherlands, Norway, Panama, Paraguay, Philippines, Portugal, Spain, Sweden, Switzerland, Syria, Thailand, Turkey, Venezuela.

¹⁸⁴ Law No. 381 of May 30, 1919, as amended.

¹⁸⁵ See, *e.g.*, Law of Dec. 7, 1922, as amended, art. 25(b)(2) (Switzerland).

¹⁸⁶ See, *e.g.*, Law No. 149 of April 26, 1933, § 15 (Denmark).

¹⁸⁷ See, *e.g.*, Law of Dec. 29, 1921, § 9(2) (Hungary).

¹⁸⁸ See, *e.g.*, Decree of Jan. 17, 1924, as amended, art. 141 (Lebanon).

¹⁸⁹ Act of March 22, 1886, as amended, art. 14 (Belgium).

¹⁹⁰ Law of Aug. 3-8, 1887, art. 28 (Ecuador).

¹⁹¹ Act of June 29, 1920, as amended, art. 13 (Greece).

¹⁹² Law No. 1 approving the Administrative Code, Aug. 22, 1916, art. 1939 (Panama).

¹⁹³ Law of Jan. 10, 1879, art. 31 (Spain).

¹⁹⁴ See, *e.g.*, Law of Dec. 22, 1953, § 17(1)(f) (Czechoslovakia).

¹⁹⁵ See, *e.g.*, Law of June 6, 1930, § 9(4) (Norway).

¹⁹⁶ See, *e.g.*, Law of March 17, 1947, art. 13 (Dominican Republic).

¹⁹⁷ See, *e.g.*, Law of Dec. 29, 1956, art. 7 (Mexico).

¹⁹⁸ Act of March 22, 1886, as amended, art. 14 (Belgium); Law of Dec. 29, 1921, § 9(2) (Hungary); Law of Oct. 26, 1923, art. 25 (Liechtenstein); Law No. 1 approving the Administrative Code, Aug. 22, 1916, art. 1939 (Panama).

¹⁹⁹ See, *e.g.*, Law No. 149 of April 26, 1933, § 15 (Denmark); Act of Nov. 24, 1948, as amended, art. 15 (Monaco).

²⁰⁰ See, *e.g.*, Law No. 354 of June 24, 1954, art. 14 (Egypt).

²⁰¹ Decree-Law No. 40 of June 27, 1896, as amended, art. 16 (Costa Rica).

²⁰² See, *e.g.*, Decree-Law No. 1037 of Feb. 8-11, 1954, art. 16 (Guatemala).

statutes also include "broadcast,"²⁰³ "oral bulletins,"²⁰⁴ and diffusion "by the radio or by any other means."²⁰⁵ At least six of the provisions contain no limitations as to the user;²⁰⁶ this presumably means that, unless a notice is used, anyone is free to reproduce the work.

Most of the statutes speak of the right of users, in the absence of an express reservation, to "reproduce"²⁰⁷ or "reprint"²⁰⁸ the work, but are silent as to what form this "reproduction" might take. A few statutes refer to reproduction "in the original language or in translation,"²⁰⁹ and one provision specifically permits an article to be "reproduced, adapted, or translated" freely unless a notice has been used.²¹⁰

In describing the form of the notice, most of the provisions use general language such as "express reservation,"²¹¹ "special or general reservation,"²¹² or "expressly forbidden";²¹³ only one indicates a specific form of notice.²¹⁴ A few statutes prescribe that the notice appear "at the time of publication"²¹⁵ or "in the newspaper or [periodical] collection itself,"²¹⁶ but this requirement seems implicit in all of the provisions from the nature of the subject matter with which they deal. Three of the provisions require that the reservation appear in a particular location on the work ("at the end of the * * * periodicals,"²¹⁷ "preceding or following the said article or work,"²¹⁸ and "immediately following the title, or at the end of the article"),²¹⁹ while three others suggest that a general reservation at the beginning of each issue of a periodical constitutes sufficient notice.²²⁰ Two statutes provide that, if the works in question are "expressly designated as original articles or special communications," no express prohibition is necessary,²²¹ and another statute provides that "the signature of the author shall be equivalent to a reservation."²²²

2. Photographs

The copyright laws of 10 countries (Argentina,²²³ Bulgaria,²²⁴ Denmark,²²⁵ Greece,²²⁶ Italy,²²⁷ the Holy See,²²⁸ Norway,²²⁹ Poland,²³⁰

²⁰³ Act (Law No. 633) of April 22, 1941, as amended, art. 65 (Italy).

²⁰⁴ Law No. 94 of July 5-10, 1951, art. 12 (Paraguay).

²⁰⁵ Law of Dec. 10, 1951, art. 36 (Turkey).

²⁰⁶ Law of April 27, 1944, art. 18 (China); Law No. 86 of Dec. 26, 1946, art. 21 (Colombia); Law No. 1381 of March 17, 1947, art. 13 (Dominican Republic); Decree of Jan. 17, 1924, as amended, art. 141 (Lebanon); Act of March 6, 1924, § 5 (Philippines); Act of June 16, 1931, § 7 (Thailand).

²⁰⁷ See, e.g., Law of June 28-July 13, 1928, art. 81 (Venezuela).

²⁰⁸ See, e.g., Law of April 27, 1944, art. 18 (China).

²⁰⁹ See, e.g., Law No. 174 of June 3, 1927, as amended, § 17 (3) (Finland).

²¹⁰ Decree of Jan. 17, 1924, as amended, art. 141 (Lebanon).

²¹¹ See, e.g., Decree-Law No. 345 of March 17, 1925, as amended, art. 6 (Chile).

²¹² See, e.g., Decree-Law No. 1037 of Feb. 8-11, 1954, art. 16 (Guatemala).

²¹³ See, e.g., Law of Oct. 26, 1928, art. 25 (Liechtenstein).

²¹⁴ Art. 7 of the Italian Copyright Regulations (Decree No. 1369 approving the Regulations, May 18, 1942) requires that the declaration of reservation "* * * shall be made by placing at the beginning or at the end of the article the words 'riproduzione riservata' or their abbreviation or other like expression."

²¹⁵ Law of Dec. 29, 1956, art. 7 (Mexico).

²¹⁶ Law of May 10, 1898, art. 14 (Luxemburg).

²¹⁷ Decree-Law No. 40 of June 27, 1896, as amended, art. 16 (Costa Rica).

²¹⁸ Law No. 1381 of March 17, 1947, art. 13 (Dominican Republic).

²¹⁹ Law of Jan. 10, 1879, art. 31 (Spain).

²²⁰ Royal Decree approving basic law, Sept. 23, 1912, art. 15 (Netherlands); Law of May 10, 1898, art. 14 (Luxemburg); Act of June 16, 1931, § 7 (Thailand).

²²¹ Law of Oct. 26, 1928, art. 25 (Liechtenstein); Law of Dec. 7, 1922, as amended, art. 25(b)(2) (Switzerland).

²²² Law No. 94 of July 5-10, 1951, art. 12 (Paraguay).

²²³ Law No. 11,723 of Sept. 28, 1933, art. 34.

²²⁴ Law of Nov. 16, 1951, § 19.

²²⁵ Law No. 131 of May 13, 1911, § 1.

²²⁶ Act (Law No. 2387) of June 29, 1920, as amended, art. 14.

²²⁷ Act (Law No. 633) of April 22, 1941, as amended, arts. 90-92; Regulations (Decree No. 1369 approving the Regulations, May 18, 1942), arts. 9-10.

²²⁸ Act of June 7, 1929.

²²⁹ Law of May 11, 1909, § 2.

²³⁰ Law No. 234 of July 10, 1952, art. 2.

the U.S.S.R.,²³¹ and Venezuela²³²) contain provisions requiring a notice for published photographs. Most of these provisions make notice an essential condition of copyright protection; but in Italy (and the Holy See) a failure to use the notice would not prevent recovery for infringement if bad faith could be proved.²³³

The form of the notice prescribed for photographs varies widely from statute to statute. Most of the provisions require the name of the photographer or publisher and the year of publication,²³⁴ and some also prescribe specific words of reservation.²³⁵ The Polish statute²³⁶ requires, as an essential condition of copyright, that all negatives, copies, and prints of the photograph bear an "express reservation of copyright"; it also provides that, unless the year of production is indicated, the copyright owner would be deprived of rights against an infringer who did not know the copyright was still in effect.

3. *Speeches*

The British Copyright Act of 1911 provided, with respect to the right of the press to reproduce public speeches, that the following would not constitute an infringement of copyright:

(v) The publication in a newspaper of a report of a lecture delivered in public, unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions [concerning fair dealing] in paragraph (i) as to newspaper summaries.²³⁷

This provision was adopted, and is still in effect, in Australia,²³⁸ Ceylon,²³⁹ Israel,²⁴⁰ Pakistan,²⁴¹ the Union of Burma,²⁴² and the Union of South Africa.²⁴³ It has also been incorporated, without change, in the copyright statutes of Canada,²⁴⁴ Ireland,²⁴⁵ and New Zealand.²⁴⁶ The provision is no longer in effect in the United Kingdom, since the British Copyright Act of 1956²⁴⁷ (effective on June 1, 1957) does not contain its counterpart.

Outside the British Commonwealth, two Latin American countries (Chile²⁴⁸ and Colombia²⁴⁹) have adopted similar provisions concerning the reproduction of speeches made at public meetings.

4. *Sound recordings*

As a condition of copyright protection in sound recordings, the laws of several countries²⁵⁰ require the use of some sort of notice. The

²³¹ Joint Resolution of May 16, 1928, § 12.

²³² Law of June 28—July 13, 1928, art. 163.

²³³ See notes 227, 228 *supra*.

²³⁴ See, *e.g.*, the provisions of Bulgaria (note 224 *supra*) and Greece (note 226 *supra*).

²³⁵ See, *e.g.*, the provisions of Denmark (note 225 *supra*) and Norway (note 229 *supra*).

²³⁶ See note 230 *supra*.

²³⁷ Copyright Act, 1911, 1 & 2 GEO. 5, c. 46, § 2(1)(v).

²³⁸ Act of Nov. 20, 1912, as amended, § 8.

²³⁹ Ceylon Independence Act, 1947, 11 GEO. 6, c. 7, § 4.

²⁴⁰ Extension to Palestine Order, March 21, 1924, as modified.

²⁴¹ Act of Feb. 24, 1914, as amended.

²⁴² Union of Burma (Adaptation of Laws) Order, Jan. 4, 1948.

²⁴³ Act of April 7, 1916, as amended.

²⁴⁴ CAN. REV. STAT. c. 55, § 17(2)(e) (1952).

²⁴⁵ Act of May 20, 1927, as amended, § 155 (1)(v).

²⁴⁶ Act of Nov. 22, 1913, as amended, § 5 (1)(e).

²⁴⁷ Copyright Act, 1956, 4 & 5 ELIZ. 2, c. 74.

²⁴⁸ Decree-Law No. 345 of March 17, 1925, art. 6.

²⁴⁹ Law No. 86 of Dec. 26, 1946, art. 20.

²⁵⁰ Italy, Holy See, Mexico, Poland, Spain, United Kingdom.

most elaborate provision on the point appears in the Italian statute (which is also effective in the Holy See ²⁵¹) and reads as follows:

Copies of a phonograph record or of any like contrivance for reproducing sounds or voices in which an intellectual work has been recorded shall not be commercially distributed unless they bear, in an indelible manner, the following indications:

- (1) the title of the work reproduced;
- (2) the name of the author;
- (3) the name of the performing artist. Orchestral or choral groups shall be indicated by their customary name;
- (4) the date of production.²⁵²

In addition, article 8 of the Italian Copyright Regulations ²⁵³ requires the deposit of copyrighted recordings, and provides that "copies of the aforesaid records or contrivances shall bear, at least in abbreviated form, an indication that the deposit has been effected."

The copyright law of Poland ²⁵⁴ provides that, unless the records bear the year of recording, there shall be no recovery against persons who were unaware that copyright was still in effect. The Spanish decree requires the phonographic works to bear "the number of the original plate or matrix," as "a distinctive sign."²⁵⁵ The new Mexican copyright statute provides that record manufacturers must make clear, on the record labels, that the authority to make recordings does not carry with it the right to use or exploit them in public.²⁵⁶

Probably the most significant provisions on this point are found in the new British Copyright Act of 1956 ²⁵⁷ which requires, as a condition of the right to sue for infringement, that all records (or their containers) issued in the United Kingdom bear "a label or other mark indicating the year in which the recording was first published."²⁵⁸ The effect of this provision does not extend to cases where the copyright owner had not authorized public issuance, or where he had attempted to have the records correctly marked. In addition, the statute provides an incentive for marking all copies of recordings with the name of the maker, together with the year and country of first publication; such a notice would constitute prima facie evidence in an infringement action.²⁵⁹

5. *Motion pictures*

A Spanish statute ²⁶⁰ requires registration as a condition of copyright in cinematographic works and provides that, when a copyrighted film is exploited, a notice consisting of the word "Registrada" and the registration number must appear on the film itself and on all advertising posters and programs connected with the film. Apparently a notice is also required by the law of Greece ²⁶¹ as a condition of copyright in motion pictures, but the form of the notice is somewhat unclear. The notice evidently should consist of the date of publication together with a name and address, but whether the name and address should be that of the copyright owner, the film producer, the cinematographer, or someone else, is open to question.

²⁵¹ Act of June 7, 1929.

²⁵² Act (Law No. 633) of April 22, 1941, as amended, art. 62; see also art. 76.

²⁵³ Decree No. 1369 approving the Regulations, May 18, 1942.

²⁵⁴ Law No. 234 of July 10, 1952, art. 2.

²⁵⁵ Decree of July 10, 1942, art. 3.

²⁵⁶ Law of Dec. 31, 1956, art. 66.

²⁵⁷ Copyright Act, 1956, 4 & 5 ELIZ. 2, c. 74.

²⁵⁸ *Id.* § 12 (6).

²⁵⁹ *Id.* § 20 (7).

²⁶⁰ Decree-Law of July 26, 1929, as amended, art. 231.

²⁶¹ Act (Law No. 2387) of June 20, 1920, as amended, art. 14.

The law of Paraguay ²⁶² requires that, when shown in public, a film must indicate the names of the producer, authors, composers, director, and principal performers; this is essentially a "moral right" provision but also serves as a notice requirement. The Italian statute ²⁶³ contains some very complicated provisions which, in general, appear to allow a longer term of protection for certain documentary films if they are registered and bear a notice reading (in Italian) "Reproduction reserved for 40 years."

6. *Architectural and similar works*

The copyright laws of both Finland ²⁶⁴ and the U.S.S.R. ²⁶⁵ contain provisions permitting the erection of buildings and other structures from published drawings or designs, without the permission of the author or architect, unless the publication carried an express reservation. The Finnish provision also extends to reproductions of works of applied art.

The Italian statute (also effective in the Holy See) ²⁶⁶ embodies a similar principle. The author of "engineering projects and other analogous works which constitute original solutions to technical problems" are entitled to equitable remuneration from any person who "realizes the technical project concerned," but only if the inserts "upon the plan or drawing a declaration of reservation of the right." ²⁶⁷

The Portuguese copyright statute apparently requires, as a condition of copyright in architectural works, that the completed structure bear the name of the architect "in a visible place." ²⁶⁸

7. *Public documents*

Statutes effective in four countries (Chile, the Netherlands, Indonesia, and Uruguay) contain provisions making protection or use of various types of public documents conditional upon the presence of a notice. In Chile, periodicals are free to reproduce laws, decrees, regulations, orders, and public records or reports, unless copyright has been expressly reserved. ²⁶⁹ The statute of Uruguay provides that, in order to obtain copyright in "writings, drawings, and engravings which appear in national publications," the work must be signed with the name or pseudonym of the author, and must bear a conspicuous notice consisting of the words "Derechos reservados." ²⁷⁰

The statute of the Netherlands (also effective in Indonesia) ²⁷¹ specifically denies copyright to laws, decrees, ordinances, and judicial or administrative decisions, and provides as follows:

No copyright shall subsist in other publications of the public authorities, unless it is reserved either in general by law, decree, or ordinance, or in a particular case by a notice in the work itself or by a statement made at the time the work is made public. ²⁷²

²⁶² Law No. 94 of July 5-10, 1951, art. 27.

²⁶³ Act (Law No. 633) of April 22, 1941, as amended, arts. 91, 92; Regulations, art. 10 (Decree No. 1369 approving the Regulations, May 18, 1942).

²⁶⁴ Law No. 174 of June 3, 1927, as amended, § 17(8).

²⁶⁵ Joint Resolution of May 16, 1928, § 9(n).

²⁶⁶ Act of June 7, 1929.

²⁶⁷ Act (Law No. 633) of Apr. 22, 1941, as amended, art. 99.

²⁶⁸ Decree No. 13725 of May 27, 1927, art. 8 § 2.

²⁶⁹ Decree-Law No. 345 of Mar. 17, 1925, as amended, art. 6.

²⁷⁰ Law of Dec. 15 and 17, 1937, as amended, art. 22.

²⁷¹ Decree No. 58 of Dec. 13, 1912.

²⁷² Royal Decree approving basic Law, Sept. 23, 1912, art. 11.

8. *Translation rights*

Two Western Hemisphere nations have important statutory provisions making the right of translation dependent upon the use of a notice. The pertinent section of the statute of the Dominican Republic states plainly that "the author of a work shall only have the exclusive right of translation into any other language when he so states expressly in all published copies."²⁷³ The Nicaraguan provision reads as follows:

ARTICLE 751. An author shall be entitled to reserve to himself the right to publish translations of his works, but in such cases he shall indicate whether the reservation is limited to any given language or extends to all languages.²⁷⁴

9. *Performing rights*

It has already been pointed out that the original Berne Convention of 1886 contained a provision requiring that the copies of a musical composition bear an express reservation in order for the author to enjoy the exclusive right of public performance.²⁷⁵ This requirement was abrogated in 1908, but there are remnants of it in a few national laws.

The requirement is still given full effect in the statute of Thailand; the pertinent section reads as follows:

The authors of unpublished musical works shall be protected against the unauthorized public representation of their works. If the works have been published the authors shall be protected against unauthorized public representation of the works, provided that the authors have expressly declared on the title page or commencement of the works that such performance is forbidden.²⁷⁶

The laws of Hungary²⁷⁷ and the German Federal Republic²⁷⁸ both retain provisions concerning the "performing rights notice" to appear in works copyrighted before those laws came into effect—in 1921 and 1910, respectively. It also seems likely that, with respect to their treatment of certain foreign works under the "Berne" Conventions, there are still countries which may apply the "notice" requirement in this situation.

10. *Miscellaneous notice provisions*

There are several other "notice" provisions which, although worthy of mention, defy systematic grouping. While Iran does not have a copyright statute, a circular of the Ministry of National Education provides that an edited compilation of previously uncollected works may be copyrighted if, at the end of the volume, a notice reading "Publication rights reserved" appears.²⁷⁹ In Yugoslavia, the reproduction of works of art in newspapers and journals is not an infringement of copyright unless expressly forbidden by the artist.²⁸⁰

The Turkish statute permits any published work to be "lent for a fee" without the author's consent, "unless expressly forbidden in a statement appearing on the copies."²⁸¹ The Russian copyright law provides that any kind of work may be publicly exhibited without the author's consent, except those works whose public exhibition has been forbidden.²⁸²

²⁷³ Law No. 1381 of Mar. 17, 1947, art. 18.

²⁷⁴ Decree promulgating the Civil Code, Feb. 1, 1904.

²⁷⁵ See Section V. B. *supra*.

²⁷⁶ Act of June 16, 1931, § 8.

²⁷⁷ Law of Dec. 29, 1921, § 85.

²⁷⁸ Act of June 19, 1901, as amended, § 61.

²⁷⁹ The circular is dated March 30 or 31, 1936.

²⁸⁰ Decree enacting the Law, May 25, 1946, § 16(9).

²⁸¹ Law of Dec. 10, 1951, art. 38.

²⁸² Joint Resolution of May 16, 1928, § 9(m).

In Mexico²⁸³ and Rumania²⁸⁴ the right to restrain certain educational uses of copyrighted works depends upon an express reservation of the right. And the statutes of Denmark²⁸⁵ and the U.S.S.R.²⁸⁶ permit the use of poems as the texts of musical compositions unless this right has been expressly reserved.

Penalties for the false or fraudulent use of a copyright notice are provided in the laws of several countries. Among these is the statute of Peru,²⁸⁷ which contains no other notice provision; this seems an implicit recognition that persons may voluntarily use a notice, though no incentives are provided.

C. PROVISIONS RELATED TO NOTICE

1. *Anonymous and pseudonymous works: Presumptions as to authorship, ownership, and term*

Most of the copyright laws of the world contain provisions concerning anonymous and pseudonymous works; these generally deal with presumptions as to authorship and copyright ownership, and the duration of copyright protection. Fairly typical of these provisions, which find their prototypes in the "Berne" Conventions, are the following excerpts from the Copyright Statute of Switzerland:²⁸⁸

ARTICLE 8. IV. PRESUMPTION OF AUTHORSHIP

Anonymous and pseudonymous works. In the absence of proof to the contrary, the following persons shall be deemed to be the author of a work:

(1) the physical person whose true name is indicated upon copies of the work in the manner generally used to designate the author; in the case of works of art and photography, the application of a distinctive sign of the author shall be regarded as equivalent to his name;

* * * * *

In the case of a published work of which the author is not indicated in accordance with the provisions of clauses (1) and (2) above, the person who has caused the work to appear, or if such person is not designated, the publisher, shall be responsible for the safeguarding of the copyright; the person who caused the work to appear, or the publisher, shall, in the absence of proof to the contrary, be deemed to be the successor in title of the author.

ARTICLE 37

2. *Anonymous or pseudonymous works even if they are posthumous works.*

(1) The protection of an anonymous or pseudonymous work shall terminate 50 years from the time when it was first made public.

(2) If the pseudonym leaves no doubt as to the identity of the author, or if the author disclosed his identity during the period indicated in the preceding paragraph, the term of protection shall be [the life of the author plus fifty years].

These provisions rest upon the principle that, in order to base ownership and term of copyright upon the individual author, notice of his name must be given to the public. Essentially the same principle underlies notice provisions, such as those of the United States, requiring the name of the copyright owner and the copyright date. Thus, the many sections dealing with anonymous and pseudonymous works may, in this sense, be regarded as "notice provisions."

Any detailed analysis of the provisions relating to anonymous and pseudonymous works is outside the scope of this paper, but a few such

²⁸³ Law of Dec. 29, 1956, art. 59.

²⁸⁴ Decree of June 18, 1956, art. 14(c).

²⁸⁵ Law No. 149 of April 26, 1933, § 14(d).

²⁸⁶ Joint Resolution of May 16, 1928, § 9(h).

²⁸⁷ Supreme Resolution of Feb. 5, 1915, art. 8.

²⁸⁸ Law of Dec. 7, 1922, as amended.

provisions are worthy of special mention. For example, the Danish statute provides that the copyright for works of joint authorship shall terminate 50 years "from the last day of the year of death of the last surviving author," but adds that:

If the work has been published, only those authors who are named in the published work or in connection with its public performance shall be taken into account with respect to this provision.²⁸⁹

Likewise, under certain circumstances, the Nicaraguan statute²⁹⁰ bases the term of copyright upon information appearing in the work:

Article 764. The period which, in certain cases, is indicated for the duration of copyright shall be calculated from the date of the work; if this date is not indicated on the work, then from January 1 of the year following the publication of the work, or of the last volume, loose sheets or part which completes it.

In addition to establishing presumptions based on the name of the author given in a work, the statutes of Germany²⁹¹ and Venezuela²⁹² (which are very similar on this point) prescribe specific locations on the work where the name is to appear. Under the German law, the name should be indicated "on the title page, in the dedication, preface, or at the end"; and for contributions, it is sufficient if the name appears "at the head or the end of the contribution."

The most interesting provision of this type is found in the statute of Mexico.²⁹³ and reads as follows:

Article 14. In the absence of proof to the contrary, the person whose name, or known or registered pseudonym, is indicated as the author of a protected work shall be presumed to be the author. The competent Courts shall, in consequence, allow such persons to take legal action for infringement of their rights.

In the case of anonymous or pseudonymous works whose authors have not disclosed their identity, the action may be brought by the publishers of the works, but this right shall cease as soon as the author or the copyright owner becomes a party to the proceedings. In cases where the publisher acts, he shall be deemed to act as owner of the copyright and with the responsibilities of an agent.

The use of an anonymous work shall be free as long as its author does not make himself known. The author shall have a period of thirty years, reckoned from the first publication of the work in which to do so. In all cases, after the lapse of this period, the work shall pass into the public domain.

The third paragraph of this article appears to provide, not only that the term of copyright for anonymous works shall be limited to 30 years from publication unless the author's name is divulged, but also that the work shall be completely free for use until disclosure is made. This seems inconsistent with the second paragraph, which purports to allow the publisher of an anonymous work to act on behalf of the author; but, taken at face value, this provision would make use of the author's name on the work, or disclosure of his identity, an essential condition of copyright protection.

2. "Moral right" provisions

A number of statutes dealing with the so-called moral right of the author require, under various circumstances, that the author's name be affixed to all copies of his works. While the intention behind these provisions is not that of notifying the public concerning ownership and duration, to some extent they have that practical effect.

²⁸⁹ Law No. 149 of April 26, 1933, § 21.

²⁹⁰ Decree promulgating the Civil Code, Feb. 1, 1904.

²⁹¹ Act of June 19, 1901, as amended, § 7.

²⁹² Law of June 28-July 13, 1928, art. 9.

²⁹³ Law of Dec. 31, 1956.

VI. PROPOSALS SINCE 1909 FOR REVISION OF THE NOTICE REQUIREMENTS

A. THE DALLINGER BILL, 1924

One of the earliest of the general revision bills designed to permit the United States to become a member of the Berne Copyright Union was H.R. 9137,²⁹⁴ which was introduced by Representative Dallinger on May 9, 1924. The bill provided that no notice was to be required as a condition of copyright, but permitted the use of a notice consisting of the word "Copyright" or the abbreviation "Copr.", accompanied by the name of the copyright proprietor.²⁹⁵ The places for affixing the notice, if one was used, were also prescribed; these were essentially the same as the positions required by the present law, except that the notice for a contribution to a periodical was to be placed "at the foot of the first page of text or under the title or caption."²⁹⁶

Among the proponents of the Dallinger bill's provisions on copyright without mandatory notice requirements was Louis E. Swarts of the Motion Picture Producers and Distributors of America.²⁹⁷ He criticized the provisions of the present law, arguing that the loss of many copyrights through failure to meet technical notice requirements was an injustice.

B. THE PERKINS BILL, 1925

H.R. 11258,²⁹⁸ which was introduced by Representative Perkins on January 2, 1925, was an important early general revision bill drafted by Thorvald Solberg, the Register of Copyrights.²⁹⁹ Section 1 provided:

That copyright is secured by this Act for all the writings of authors from the time of the making of their works, whether published or unpublished, for the term of copyright protection hereinafter provided. Such copyright shall vest in the author of any such work immediately upon the making of the work and shall not depend upon the accomplishment of any conditions or formalities whatever: * * * [there followed a provision for optional registration for purposes of preserving evidence].

Section 44 provided:

No notice of copyright shall be required on any work subject to copyright under this Act and the omission of such notice from any work shall not be taken as evidence that no copyright is claimed therein; but if desired a notice of the reservation of the copyright or of any right included in the copyright in any work may be placed on any or all copies of such work by the owner of the copyright or the assignee or licensee of any special right pertaining to the copyright in the work; * * * [there followed a penalty provision for fraudulent notice].

In order to facilitate identification of the copyright owner, the bill provided that the person named as author on the work was presumed to be the author, hence the copyright owner,³⁰⁰ and that assignments were to be recorded in order to be valid against subsequent purchasers;³⁰¹ no action for infringement could be brought by an assignee until the instrument under which he claimed had been recorded.³⁰²

²⁹⁴ H.R. 9137, 68th Cong., 1st Sess. (1924).

²⁹⁵ *Id.*, § 20.

²⁹⁶ *Id.*, § 21.

²⁹⁷ *Hearings Before the House Committee on Patents on H.R. 6250 and H.R. 9137*, 68th Cong., 1st Sess. 313-322 (1924).

²⁹⁸ H.R. 11258, 68th Cong., 2d Sess. (1925).

²⁹⁹ *Hearings Before the House Committee on Patents on H.R. 11258*, 68th Cong., 2d Sess. 12 (1925).

³⁰⁰ H.R. 11258, 68th Cong., 2d Sess. § 35 (1925).

³⁰¹ *Id.*, § 18.

³⁰² *Id.*, § 34.

Representatives of various author groups, including the Artists' Guild,³⁰³ the Authors' League of America,³⁰⁴ and ASCAP,³⁰⁵ testified strongly in favor of the bill. They argued that authors should be entitled to copyright protection without the added burden of technical formalities which, as artists rather than businessmen, they are not really equipped to handle. In their opinion the copyright notice was not a real advantage to legitimate users and the public, since it could not be relied upon for determining the facts of copyright protection, but simply provided a trap for the unwary. One of the opponents of the bill, representing the Motion Picture Owners of America,³⁰⁶ argued that since copyright is a statutory privilege rather than a natural right, to grant it automatically and indiscriminately would be inconsistent with the public interest. In particular, he maintained that copyright without mandatory formalities would interfere with the progress of the motion picture industry.

C. THE VESTAL BILLS, 1926-31

The four general revision bills introduced by Representative Vestal from 1926 to 1930³⁰⁷ contained substantially the same provisions concerning the copyright notice. The last of the four, which was introduced as H.R. 12549³⁰⁸ on May 22, 1930, came closest to enactment; it passed the House of Representatives on January 13, 1931,³⁰⁹ but, although it was reported out of the Senate committee,³¹⁰ it was not reached for a vote in the Senate.

Section 1 of H.R. 12549 provided that copyright be granted to authors "without compliance with any conditions or formalities whatever, from and after the creation of their work." Section 34 freed all copyrighted works, including those copyrighted under previous statutes, from the requirement of a notice, but provided for a voluntary notice which could be placed in certain positions on the work:

No notice of copyright shall be required on any work copyrighted under this Act, nor after this Act goes into effect, as to works copyrighted under previous Acts. The omission of such notice from any work shall not be taken as evidence that no copyright is claimed therein nor affect the validity of the copyright therein. Nevertheless, a legible notice of copyright or a notice with reference to any right included in the copyright in any work may be placed on copies of the work by the owner of the copyright or an assignee or licensee. Such notice shall, if applied in the case of a book or other printed publication, be placed upon its title page or the page immediately following, or upon any of the first ten, or the last ten pages of text; or in the case of a contribution to a periodical, such notice shall be either placed as aforesaid or under the title or at the foot of the first page of said contribution; * * * [followed by a penalty provision for fraudulent notice].

Section 35 would have validated copyrights lost under earlier laws because of defective notices:

In the event that prior to the passage of this Act notices of copyright were placed upon any works which were defective in form or did not contain the name of the person or persons actually entitled to copyright or contained an incorrect name or

³⁰³ *Hearings, supra* note 299, at 63-69.

³⁰⁴ *Id.* at 383-388, 504-510.

³⁰⁵ *Id.* at 145-192, 512-523.

³⁰⁶ *Id.* at 95-116.

³⁰⁷ H. R. 10434, 69th Cong., 1st Sess. (1926); H. R. 8912, 70th Cong., 1st Sess. (1928); H. R. 6990, 71st Cong., 2d Sess. (1929); H. R. 12549, 71st Cong., 2d Sess. (1930).

³⁰⁸ H. R. 12549, 71st Cong., 2d Sess. (1930).

³⁰⁹ 74 CONG. REC. 2080-2081 (1931).

³¹⁰ S. REP. NO. 1732, 71st Cong., 3d Sess. (1931).

date or in which the date was lacking * * * such notices * * * are hereby legalized, confirmed, made valid and effectual as fully as if none of the various errors, omissions, matters, and conditions hereinabove enumerated had occurred or existed: * * * [followed by a proviso saving the rights of those who had incurred expenditures in uses of works which, but for this section, would have been lawful].

The Vestal bill encouraged voluntary use of a notice by limiting a copyright owner's remedy to "the fair and reasonable value of a license," when the defendant could prove that his infringement was innocent and that, at the time of the infringement, no copyright notice had been affixed to the work or no copyright claim had been registered.³¹¹ Registration of a claim, though not required, would have constituted constructive notice of the copyright.³¹²

At the various hearings on the Vestal bills³¹³ the interested groups alined themselves much as they had with respect to earlier proposals to eliminate or liberalize copyright formalities. Proponents of the bills stressed the view that copyright is a natural right of the author which should not be conditioned on burdensome formalities.³¹⁴ They argued that it was unjust to deprive an author of his hard-earned property through failure to observe technicalities which serve little practical purpose.³¹⁵ It was suggested that in reality forfeiture of copyright results in more profits for the publisher at the expense of the author, rather than a saving to the public.³¹⁶

Opponents of the Vestal bill argued that automatic protection for everything written would hamper free communication and scholarship, and would "legalize blackmail."³¹⁷ They pointed to what they considered the practical advantages of notice in informing the public concerning the copyright claim, and argued that the notice requirements are not burdensome to those who take reasonable care to preserve their rights.³¹⁸

Thorvald Solberg, the Register of Copyrights, opposed the Vestal bill on the ground that it did not go far enough. He attacked the provision exempting innocent infringers from liability if, when infringed, the work bore no notice and no claim had been registered; he argued that this was simply another burdensome formality in a different guise.³¹⁹

D. OTHER DEVELOPMENTS, 1928-32

While the Vestal bills for general revision of the law were being considered, other attempts were being made to modify the copyright law only to the extent necessary to permit the United States to become a member of the Berne Union. Typical of the bills introduced for this purpose was H.R. 15086, which was submitted by Representative Vestal to the 2d session of the 70th Congress on December 10, 1928.

³¹¹ H.R. 12549, 71st Cong., 2d Sess. § 15(d) (1930).

³¹² *Id.* § 36.

³¹³ *Hearings Before the House Committee on Patents on H.R. 10434*, 69th Cong., 1st Sess. (1926); *Hearings Before the House Committee on Patents on H.R. 16808*, 69th Cong., 2d Sess. (1927); *Hearings Before the House Committee on Patents on H.R. 8912*, 70th Cong., 1st Sess. (1928); *Hearings Before the House Committee on Patents on H.R. 8913*, 70th Cong., 1st Sess. (1928); *Hearings Before the House Committee on Patents on H.R. 6990*, 71st Cong., 2d Sess. (1930); *Hearings Before the Senate Committee on Patents on H.R. 12549*, 71st Cong., 2d Sess. (1931).

³¹⁴ *Hearings Before the House Committee on Patents on H.R. 10434*, 69th Cong., 1st Sess. 35 (1926).

³¹⁵ *Id.* at 65.

³¹⁶ *Hearings Before the House Committee on Patents on H.R. 6990*, 71st Cong., 2d Sess. 35 (1930).

³¹⁷ *Hearings*, *supra* note 314, at 173.

³¹⁸ *Hearings*, *supra* note 316, at 57.

³¹⁹ *Hearings*, *supra* note 314, at 237.

This bill provided for the elimination of formalities with respect to works of foreign authors in the following fashion:

SEC. 2. * * * foreign authors who first publish their works in any country which is a member of the Copyright Union, as well as all authors who are within the jurisdiction of one of the countries of the said union, shall enjoy for their works, whether unpublished or published for the first time in one of the countries of the said union, such rights as the laws of the United States now accord or shall hereafter accord to citizens of the United States, as well as the rights specially accorded by the said convention: * * *

SEC. 3. The enjoyment and the exercise by such authors of the rights and remedies accorded by the copyright laws of the United States and the said convention shall not be subject to the performance of any formalities other than such as are authorized by the said convention, and such authors shall not be required to comply with the provisions of the copyright laws of the United States as to publication with notice of copyright, * * *

This and similar measures, which would have had no effect upon the notice requirements for domestic works, were never reported from committee.

On March 2, 1932, Senator Dill introduced S. 3985,³²⁰ a new general revision bill. Although this bill was never reported, its notice provisions had some interesting features. The section titled "How To Secure Copyright—Notice" read:

SEC. 6. Any author or other person entitled to copyright under this Act and desiring to protect the same by law shall make claim of copyright by affixing a legible notice to the work or works in which copyright is claimed. Notice shall consist of the word "copyright" or "copr" or the letter C inclosed in a circle thus C or words expressly forbidding the exercise of any rights included under the term "copyright" as defined in this Act, year when copyright begins and the name of the copyright owner. The notice shall be affixed to all copies of the work published or otherwise distributed in the United States or its dependencies.

In the case of a book or other printed publication, the notice shall be placed on the title page or one of the ten pages immediately following. In the case of a newspaper or periodical, if notice of copyright is placed in the column containing the editorial and publishing statement it shall be deemed sufficient to protect all matter printed in the issue of that date, and in case of individual contributions to a newspaper or periodical, said notice will protect such special contributions, but additional notice may be affixed under the title of the contribution, at the foot of any page, or at the beginning or end of the contribution.

In the case of a work or works or copies of works on which it is not practicable to affix the name of the copyright owner, the notice may consist of the letter C or the letter C inclosed in a circle thus © accompanied by the initials, monogram, mark, or symbol of the copyright owner: *Provided*, That on some accessible portion of such work or copies or on the margin, back, permanent base, or pedestal, or of the substance on which such copies shall be mounted, his name shall appear.

* * * * *

Section 20(e) of the Dill bill provided that the plaintiff would be entitled to no remedy other than an injunction if he failed to prove either that the work had been registered or that the copyright notice had been affixed at the time of infringement. And not even an injunction could be had if defendant had incurred any substantial expenditures; in such case the plaintiff would be entitled to no more than the reasonable value of a license in an amount between \$25 and \$2,500.

E. THE SIROVICH BILLS, 1932

During the first half of 1932 Representative Sirovich, the new chairman of the House Committee on Patents, introduced six general

³²⁰ S. 3985, 72d Cong., 1st Sess. (1932).

revision bills³²¹ on which a series of hearings were held;³²² two of the bills were reported,³²³ but no final action on any of them was taken. The first of the Sirovich bills, H.R. 10364, contained the following notice provisions:

EFFECT OF FAILURE TO AFFIX NOTICE OF COPYRIGHT

SEC. 8. Copyright granted by this Act shall not in any manner be impaired by the failure, after the effective date of this Act, to affix notice of copyright to a printed work: *Provided*, That in an action for infringement (1) brought by the owner of the copyright, or an assignee or licensee, who has consented to the publication of the work without copyright notice as provided in section 17, or (2) brought against an infringer who has been misled by the omission of copyright notice by accident or mistake from a particular printed copy or copies, no remedy under this Act except an injunction against future infringement shall be available where it appears to the court that the infringer acted without intent to infringe; except that where such infringer has incurred substantial expenditure or liability in connection with the exploitation, production, or performance of any such copyright work, such infringer shall be liable only for a reasonable license fee not in excess of \$2,500 nor less than \$25 and no injunction shall issue.

* * * * *

NOTICE OF COPYRIGHT

SECTION 17. To constitute valid notice as referred to in section 8 there must be affixed to all printed copies of published copyright work, a legible statement indicating that copyright is claimed. The notice may consist of the word "copyright" or "copr." or the letter © [sic] inclosed in a circle or the phrase "all rights reserved." In the case of books, pamphlets, and similar printed publications, such notice may be placed upon the title page. In the case of a newspaper, magazine, or similar periodical publication such notice may be placed in the column containing the editorial and publishing statement, in which event such notice shall be deemed sufficient to constitute due notice of copyright in behalf of each individual contributor entitled to copyright in any of the individual contributions in the issue of that date. In the case of anonymous and pseudonymous works the copyright notice inserted by the publisher shall be deemed sufficient to protect the author or other owner of the copyright. However, any form of notice is sufficient which is affixed to some readily accessible part of the copy and which reasonably informs anyone in possession of any such copy that copyright is claimed in the work.

The notice provisions in the later Sirovich bills were essentially the same as those of H.R. 10364. In section 8 of H.R. 10740, the maximum limit of the "compulsory license" fee for innocent infringers was raised to \$5,000, and in section 17, the third sentence was revised to read as follows:

In the case of books, pamphlets, and similar printed publications, such notice should be placed upon the title-page or the page immediately following and should include, in addition to the word "copyright," the year date of first publication and the name of the copyright owner.

The other bills also changed the form of the permissive notice to include the year date of publication and the name of the copyright proprietor. All of the Sirovich bills contained provisions for voluntary registration like those concerning notice, with similar protection for the infringer who had been misled by failure to register.³²⁴

³²¹ H.R. 10364, 72d Cong., 1st Sess. (1932); H.R. 10740, 72d Cong., 1st Sess. (1932); H.R. 10976, 72d Cong., 1st Sess. (1932); H.R. 11948, 72d Cong., 1st Sess. (1932); H.R. 12094, 72d Cong., 1st Sess. (1932); H.R. 12425, 72d Cong., 1st Sess. (1932).

³²² *Hearings Before the House Committee on Patents on H.R. 10364*, 72d Cong., 1st Sess. (1932); *Hearings Before the House Committee on Patents on H.R. 10740*, 72d Cong., 1st Sess. (1932); *Hearings Before the House Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. (1932); *Hearings Before the House Committee on Patents on H.R. 11948*, 72d Cong., 1st Sess. (1932); *Hearings Before the House Committee on Patents on H.R. 12094*, 72d Cong., 1st Sess. (1932).

³²³ H.R. REP. NO. 1008, 72d Cong., 1st Sess. (1932); H.R. REP. NO. 1361, 72d Cong., 1st Sess. (1932).

³²⁴ The provisions appeared in section 18 of H.R. 10364 and H.R. 10740, and in section 19 of H.R. 10976, H.R. 11948, H.R. 12094, and H.R. 12425.

At the hearings these provisions were severely criticized by Nathan Burkan of ASCAP who said:

* * * [These sections] which restrict, limit, and qualify remedies to the extent that in effect a compulsory license system is created, deprive authors of their exclusive rights to their writings, within the meaning of the Constitution, and, therefore, the bill to that extent is unconstitutional * * *. This bill whittles away the author's rights to such an extent that it can not be said to confer upon him the exclusive right to his writings as provided in the Constitution * * *.³²⁵

F. THE DUFFY BILL AND OTHER DEVELOPMENTS, 1933-36

Senator Dill reintroduced his general revision bill in the 73d Congress on March 13, 1933 (S. 342), but no further action was taken on it. On May 31, 1933, a short bill, H.R. 5853, was introduced by Representative Luce to permit the United States to become a member of the Berne Union by exempting works of foreign authors from compulsory formalities; the bill was also introduced in the Senate by Senator Cutting as S. 1928 on June 10, 1933.

On February 16, 1934, Secretary of State Cordell Hull recommended to President Roosevelt that the United States adhere to the Berne Convention. The President sent this recommendation to the Senate for advice and consent, and not long thereafter hearings were held on S. 1928³²⁶ by the Senate Foreign Relations Committee. Opposition developed to the adherence of the United States to the Berne Convention, and near the close of the hearings, it was suggested that the Secretary of State confer with the various conflicting interests and report later to the Senate Committee.³²⁷ As a result, the Interdepartmental Committee on Copyright, headed by Dr. Wallace McClure of the State Department, was organized. Representatives by the Copyright Office and the Department of Commerce were included on this committee, which formulated a bill, S. 2465,³²⁸ later introduced in the Senate on March 13, 1935, by Senator Duffy. A second draft of this bill was introduced by Senator Duffy on May 13, 1935.³²⁹ This bill was favorably reported by the committee³³⁰ and passed the Senate on August 7, 1935.³³¹

As passed by the Senate, the Duffy bill contained provisions requiring a notice and specifying its form and location.³³² However, the bill also provided that:

* * * the omission by accident or mistake of the prescribed notice, or any error as to the name of the copyright owner or the date of copyright or the position of the notice, shall not invalidate the copyright or deprive the author or other owner thereof of any of his rights under this act, or, except as otherwise provided in this act, as amended, prevent recovery for infringement against any person who, after actual notice of the copyright, begins an undertaking to infringe it, but shall prevent the recovery of damages against an innocent infringer who has been misled by the omission of or error in the notice * * *. [Emphasis supplied.]³³³

In addition, it was provided that no permanent injunction was to be granted unless the copyright owner "shall reimburse to the innocent infringer his reasonable outlay innocently incurred, or such proportion thereof, as the court, in its discretion, shall direct."³³⁴

³²⁵ *Hearings Before the House Committee on Patents on H.R. 10976*, 72d Cong., 1st Sess. 88 (1932).

³²⁶ *Hearings Before the Senate Committee on Foreign Relations on S. 1928*, 73d Cong., 2d Sess. (1934).

³²⁷ *Id.* at 90.

³²⁸ S. 2465, 74th Cong., 1st Sess. (1935).

³²⁹ S. 3047, 74th Cong., 1st Sess. (1935).

³³⁰ S. REP. NO. 896, 74th Cong., 1st Sess. (1935).

³³¹ 79 CONG. REC. 12611-12615 (1935).

³³² S. 3047, 74th Cong., 1st Sess. §§ 7, 12 (1935).

³³³ *Id.* § 13.

³³⁴ *Ibid.*

Following passage by the Senate of the Duffy bill, two bills were introduced in the House: one by Congressman Daly, on January 27, 1936 (H.R. 10632)³³⁵ and one by Congressman Sirovich, on February 24, 1936 (H.R. 11420).³³⁶ Both of these bills contained notice provisions substantially similar to that in the Duffy bill. No hearings were held on the second Duffy bill in the Senate, so we have no indication but the committee report as to the reaction to the notice provision. The committee report says:

The present program affords automatic copyright to American authors w[h]ere they need it most, namely, in other countries, and it withholds automatic copyright from American authors in respect to the United States, where the consuming industry and the consuming public seem, at least for the present, to have a better case in favor of registration and notice than the authors have for exemption from these formalities.³³⁷

In presenting the case for the fulfillment of formalities by domestic authors, the report states:

Native authors, being able readily to comply with the necessary formalities, have no pressing need of copyright without formality, or, as it is often called, automatic copyright. Since native authors constitute the source of the vast bulk of copyrightable works which are of interest to consumers in the United States, the question of consumers' rights and interests necessarily plays a very considerable part in determining the just course with reference to this subject. In the United States the authors naturally would like to have automatic copyright, but the consumers are very insistent that the registration, the consequent record, and notice of copyright affixed to the copyrighted article, are to them valuable safeguards against both the innocent use of works in which copyright exists, and in taking advantage of the nonexistence of copyright to make use of uncopyrighted works or works in which the copyright has expired.³³⁸

In the hearings before the House Patents Committee held during February, March, and April, 1936, the Duffy, Daly, and Sirovich bills were the subject of consideration.³³⁹ In discussing the desirability of the notice requirement, Louis G. Caldwell, representing the National Association of Broadcasters, after commenting upon the multiplicity of performing licenses required by the broadcasters, stated:

In view of what I said, I do not think I need to argue what we have argued so much at length at other hearings, as to the importance to us of copyright formalities, the copyright notice, to some extent the registration and the need for a definite term of copyright. Those are matters which enable you to tell whether music is or is not in the public domain. And, if not in the public domain, they help the broadcaster to know to what house or licensing agency or owner he should go to get the right to perform.³⁴⁰

Mr. Caldwell, in his prepared statement, put the matter more succinctly when he stated:

It is extremely important that the broadcaster, and, in fact, every user of music, be able so far as humanly possible—

1. To ascertain whether a particular musical composition is copyrighted or is in the public domain, and
2. If it is copyrighted, to ascertain who controls the performing rights.³⁴¹

Congressman Karl Stefan, who had been a radio announcer and commentator for some 13 years before coming to Congress, filed a statement on behalf of his constituents who owned small radio stations to the effect that the Duffy bill—

³³⁵ H.R. 10632, 74th Cong., 2d Sess. (1936).

³³⁶ H.R. 11420, 74th Cong., 2d Sess. (1936).

³³⁷ S. REP. NO. 896, 74th Cong., 1st Sess. 3 (1935).

³³⁸ *Ibid.*

³³⁹ *Hearings Before the House Committee on Patents*, 74th Cong., 2d Sess. (1936).

³⁴⁰ *Id.* at 437.

³⁴¹ *Id.* at 469.

* * * adequately preserves the copyright formalities which help the user to know what music is in the public domain, where it is copyrighted, and who controls the copyright.³⁴²

A statement of the effect of the notice provision, from the standpoint of a businessman, appears in the testimony of Marvin Pierce, chairman of the Copyright Committee of the National Publishers' Association, a large organization of magazine publishers. He outlined the interest of his association in the following words:

* * * our interest in copyright legislation is primarily that of the buyer who is interested in seeing that the title to the property he is acquiring is clear, and that the penalties of unknowingly using material bought from someone who is not entitled to sell are not unreasonably severe. This interest is no mean or casual affair. Our best estimate of the amount of money spent annually in the 10 largest magazines for editorial and illustrative material, subject to copyright, is \$6,000,000. The commitments to readers and to advertisers in these same publications are many times greater. Since copyright law not only affects the title to the material purchased and used, but also jeopardizes the fulfillment of our commitments to readers and to advertisers, we would be derelict if we did not closely scan the provisions of any proposed changes to our statutes.³⁴³

In explaining the opposition of his association to the Berne Convention, Mr. Pierce stated:

Our opposition is based primarily upon the business difficulties arising from the establishment of copyright upon creation, generally called automatic copyright, without the requirement of any formality or of registration, and the extension of this nebulous right in this country to the nationals of most of the countries of the world. The impossibility of checking the authenticity of submitted manuscripts and illustrations must be obvious.

The result can only be that purchasers of copyrightable material will be forced for their own protection to deal as much as possible with established sources. Such a result is damaging to both magazines and authors, since it is to the marked advantage of publishers to secure new writers and illustrators, and no deterrent to the acceptance of their work should be placed in the way of new and unknown writers.³⁴⁴

From the above-quoted statements, it may be concluded that those who spoke at the 1936 hearings with regard to the notice provisions seemed generally in favor of requiring notice as an aid to the user.

G. THE SHOTWELL COMMITTEE BILL AND OTHER DEVELOPMENTS, 1937-41

Various revisions of the Daly bill, which substantially incorporated the notice provisions of the Duffy bill, were introduced in both houses of Congress between 1937 and 1941;³⁴⁵ although they attracted some attention, no action was taken on any of them. The most significant development during this period actually took place outside of Congress. A Committee for the Study of Copyright, headed by Professor James T. Shotwell of Columbia University, was organized within the framework of the National Committee of the United States of America on International Intellectual Cooperation, a group related to the League of Nations' Committee on Intellectual Cooperation; its purpose was essentially to draft a new general revision bill permitting the United States to join the Berne Union.³⁴⁶

³⁴² *Id.* at 594.

³⁴³ *Id.* at 723.

³⁴⁴ *Id.* at 723-724.

³⁴⁵ H. R. 5275, 75th Cong., 1st Sess. (1937); S. 2240, 75th Cong., 1st Sess. (1937); H. R. 926, 76th Cong., 1st Sess. (1939); H. R. 4871, 76th Cong., 1st Sess. (1939); H. R. 6160, 76th Cong., 1st Sess. (1939); H. R. 9703, 76th Cong., 3d Sess. (1940); H. R. 3997, 77th Cong., 1st Sess. (1941).

³⁴⁶ GOLDMAN, A HISTORY OF U.S.A. COPYRIGHT LAW REVISION 1901-1954, at 10-11 [Study No. 1 in the present series of committee prints].

The Shotwell Committee, which was composed of representatives of most of the major groups interested in copyright, held a number of meetings during 1938 and 1939.³⁴⁷ The fullest discussion of the notice requirements occurred during one of the early sessions, at which representatives of the authors' groups urged the unfairness of a situation in which an author's rights can be irretrievably lost because of a technical error on the part of a publisher over which the author himself has no control. The motion picture representatives, on the other hand, maintained that the notice is of great value to users; and they argued for a stricter system of recording transfers of rights under a copyright. On the notice question, the position of the motion picture interests was summarized as follows:

When a man has common law rights, it is true he doesn't need any notice or registration of any sort, and can hold someone for infringement, but we must not forget he has only his common law rights so long as he withholds the work from publication, and then he has them perpetually, but once (excluding the fact that a performance is not publication) he puts it in print, he has no common law rights any longer, and people interested want to know whether or not the work is in the public domain. A proposal to permit publication without losing what would have been previously the common law rights, by not putting any notice on it, will make it extremely difficult to tell when works fall into the public domain.

At one point in the discussion it was suggested for the authors that, since users almost invariably conduct their own investigations rather than relying solely on the notice for information concerning the copyright, the notice actually serves no real purpose. A representative of the broadcasters replied:

That isn't invariably true. The convenience of notice to us is that it gives us the starting point * * *. It is a great convenience for us to have that starting point. I am not saying that the author should lose all of his writings if the publisher omits doing it. I say it is good for us to have it and we would like to have it encouraged if not made compulsory, by making it attractive to do it.

The "Shotwell Committee" bill was introduced by Senator Thomas as S. 3043³⁴⁸ on January 8, 1940. It provided that copyright was to be extended "without compliance with any conditions or formalities,"³⁴⁹ and it would have restored (without prejudice to users who had already begun an undertaking) the copyright in works which had previously been published with defective notices.³⁵⁰ The bill contained indirect recognition that notices of copyright could be used voluntarily,³⁵¹ but included no indication as to the preferred form and position of the permissive notice, and offered no incentives for the use of such a notice.³⁵² Section 17(3) provided:

The failure to register any claim to copyright, or to record a grant, or to publish any work with notice of copyright, shall not affect the validity of any copyright or right therein, nor impair the rights of the author or other owner thereof, except as in this act otherwise expressly provided.

There were no hearings or further action on the "Shotwell Committee" bill. Nevertheless, it is of some historical importance, not only because of the thoroughness with which it was prepared, but also because it represents the last full-scale effort at reconsideration of the U.S. copyright notice requirements.

³⁴⁷ The records of the conferences have not been published, but have been collected and are available in the Copyright Office.

³⁴⁸ S. 3043, 76th Cong., 3d Sess. (1940).

³⁴⁹ *Id.* § 2.

³⁵⁰ *Id.* § 46(b).

³⁵¹ *Id.* § 17(3).

³⁵² Section 14 of the bill provided that, unless copies of a work were deposited in the Copyright Office within a specified period, the copyright proprietor would be denied the right to obtain statutory damages.

H. DEVELOPMENTS, 1942—PRESENT

Identical bills aimed at liberalizing the present statutory notice requirements have been introduced in the last three Congresses by Representative Keating.³⁵³ The first was submitted on July 29, 1953, and the latest, H.R. 287, was introduced in the 85th Congress on January 3, 1957, and is still pending. No action on any of these measures has been taken.

The Keating bill, which would supersede sections 19 and 20 of the present copyright statute, attempts to meet most of the major difficulties encountered under the existing requirements, and to reduce the technical aspects of notice to a minimum. As an additional alternative to "Copyright," "Copr.," or "©" the statement of claim could read "All Rights Reserved." Adopting the Universal Copyright Convention formula, the notice would be adequate if "placed in such manner and location as to give reasonable notice of claim of copyright." Various specific locations which would meet this general requirement are suggested, including the front cover of a work, or the 10 pages preceding or following the title page or first page of text. If the author is also the proprietor, a statement of his name on the title page or front cover would be sufficient as a statement of the copyright owner, even if unconnected with the statement of claim; this same general principle would apply to the date. Special provision is also made for the notice to appear on repetitive designs.

VII. REVIEW OF BASIC PROBLEMS

A. THE ISSUES RAISED BY COPYRIGHT NOTICE

The opponents of notice as a fundamental condition of copyright have attacked the general principle on four major grounds:

1. *Notice is anomalous.*—Everyone is entitled to the fruits of his labor; the notice requirement, which forces an author to make an affirmative claim or forfeit copyright protection, is in basic conflict with this principle.

2. *Notice is anachronistic.*—Most of the other countries of the world have no general notice formalities, and in clinging to the requirement the United States is hopelessly behind the times.

3. *Notice is useless.*—Since anyone wishing to determine the ownership or expiration date of a copyright must necessarily go beyond the notice, it is in reality a meaningless technicality.

4. *Notice is unjust and oppressive.*—Many copyrights are lost because of technical defects in the notice over which the author had no control; an author is not a businessman and is not equipped to deal with complex formalities.

The leading arguments in support of a notice requirement may be summarized as follows:

1. *Notice is socially desirable.*—No one is interested in copyrighting the large majority of published works but, without formalities, they would be pointlessly kept in the private domain for many years; this would inevitably hamper scholarship and free cultural interchange.

2. *Notice fits the U.S. situation.*—Far from being an outmoded concept, notice is increasingly needed to meet the demands for copy-

³⁵³ H.R. 6808, 83d Cong., 1st Sess. (1953); H.R. 782, 84th Cong., 1st Sess. (1955); H.R. 287, 85th Cong., 1st Sess. (1957).

right information created by technological developments and the growing number of "secondary users."

3. *Notice accords with the U.S. theory of copyright.*—Copyright in the United States is a limited grant of a monopoly to provide an incentive to creation, rather than a natural right of the author. It is thus appropriate to require the author to fulfill certain conditions which are of benefit to the public.

4. *Notice is effective in practice.*—Notice fulfills a vital function in informing the public that a claim exists, and in providing users with at least a starting point for determining ownership and duration. The burden of affixing a notice is generally very slight.

These opposing arguments can be elaborated almost endlessly, and much support can be found for both points of view. It is not the purpose of this paper to reach conclusions, but simply to frame the basic issues presented by notice in the general revision of the copyright law. In essence, the arguments for and against a notice requirement may be said to revolve around two opposing aims:

On the one hand, to assure to all authors the benefit of copyright protection for all of their works.

On the other, to facilitate the dissemination of works, by allowing free use of works in which no claim to copyright is asserted, and by giving prospective users a readily available starting point for determining the ownership and duration of copyright when a claim is asserted.

B. ABOLISHMENT OF THE NOTICE

Complete elimination of the notice requirements has been urged by the author-publisher groups, as simplifying the securing of copyright. If notice were eliminated, there would also be no necessity for dealing with the complicated details of the notice requirements in various kinds of works. On the other hand, it has been urged that a provision bringing all published works into the private domain would hamper the dissemination and scholarly use of copyright material.

C. INCENTIVES FOR VOLUNTARY USE OF NOTICE

One of the principal arguments advanced by the opponents of compulsory notice is the injustice of having copyright forfeited irrevocably for failure to observe the technical requirements of notice. On the other side, one of the principal arguments of those favoring notice is the importance of protecting innocent users, who had relied on the absence of notice, against liability for infringement. As noted above,³⁵⁴ some of the earlier revision bills have attempted to reconcile these opposing views by a system under which notice is a condition of certain remedies but not of the right itself. These bills would have permitted copyright to subsist without a notice, but would have limited the remedies against an infringer who relied on the absence of notice, either to an injunction against future infringement, or to a reasonable license fee.³⁵⁵

³⁵⁴ See Section VI, *supra*.

³⁵⁵ For a recent exposition of a solution along these lines for "formalities", see Finkelstein, *The Copyright Law—A Reappraisal*, 104 U. of Pa. L. Rev. 1025, 1054 (1956).

D. THE SPECIFIC NOTICE REQUIREMENTS

There has been general agreement that the notice provisions of the present law leave much to be desired. Some of the requirements are ambiguous, others are incomplete, and still others are ill adapted to present-day media of expression. By requiring the notice to meet very limited and specific conditions as to form and position, the present statute has appeared to many as unduly restrictive and as resulting in a number of cases of technically faulty notices.

Some of the objections to the present notice requirement might no doubt be minimized by a more liberal and flexible specification of the form and position of the notice. As to position, for example, consideration might be given to a provision along the lines of the Universal Copyright Convention, which provides that the notice be "placed in such manner and location as to give reasonable notice of claim of copyright." And as to form, it might be provided that an error in the name or the year date would not invalidate the notice, and could be cured by the recording of corrective data in the Copyright Office.

If some form of notice is to be retained, consideration must also be given to the clarification of other details, including the notice on collections of copyrighted works, the requirement of a notice on works published abroad, the year date or dates in a revised edition, and the notice on a sheet reproducing a work repetitively. These questions, while of great practical importance, are subsidiary to the basic issues raised by the copyright notice. Analysis of detailed alternatives on these points is not within the scope of the present paper.

VIII. SUMMARY OF ISSUES

1. Should the copyright notice be retained as a mandatory condition of copyright protection?
2. If not, should incentives be offered for the voluntary use of notice, by limiting the remedies available against an innocent infringer, i.e., one who relies on the absence of notice?
3. If notice is made a condition for the availability of certain remedies, what should be the limitations on the remedies available against an innocent infringer?
 - (a) Should the innocent infringer be subject to an injunction? If so, should he be permitted to complete the undertaking innocently begun, unless the copyright owner reimburses him for his outlay?
 - (b) Should the innocent infringer be liable for a reasonable license fee for the infringing use?
 - (c) Should any other remedies be available against an innocent infringer?
 - (d) Should actual notice given to the infringer have the effect of removing his defense of innocence for undertakings begun thereafter?
4. If provision is made for either a mandatory or voluntary use of a notice:
 - (a) What, in general, should be the form of the notice?
 - (b) What provision should be made for the position of the notice?
 - (c) Should the notice requirement be applied to works published abroad?

COMMENTS AND VIEWS SUBMITTED TO THE
COPYRIGHT OFFICE
ON
NOTICE OF COPYRIGHT

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COMMENTS AND VIEWS SUBMITTED TO THE COPYRIGHT OFFICE ON NOTICE OF COPYRIGHT

By John Schulman

NOVEMBER 29, 1957.

The above study is extremely interesting and very well done.

It is impossible to answer all the questions on page 48 categorically because they contain inferences and implications which would make any such absolute answer impossible.

However, subject to the caveat stated, my general views are as follows:

1. No copyright notice or other formality should be imposed as a condition of copyright protection.

2. I should have no objection to a permissive use of the notice and to incentives for the election to use it.

This question illustrates the difficulty of providing a categorical answer. To my mind, a person who "relies" on the absence of notice is not necessarily an innocent infringer. He may know of the proprietor's rights but "rely" upon his ability to defeat them. If at all, relief should be given to the person who is "misled" by the failure to affix a notice. Moreover, there may be sanctions other than "limiting" the remedies.

3. The answer to this question depends upon a number of considerations. They include the definition of "innocent infringer," the treatment of minimum damage, requirements of registrations of transfers, etc. Generally speaking, my answer to this question would follow the line of the answer to question 2.

4. The answer to this question is reflected by my answer to question 1. A provision for a "permissive" notice would have to be flexible. Any wording or position which would reasonably give notice of the copyright should be sufficient. Any attempt to go beyond this kind of flexible provision must of necessity give rise to unnecessary disputes concerning the adequacy of the notice.

Sincerely,

JOHN SCHULMAN.

By George E. Frost

DECEMBER 15, 1957.

I have reviewed with great interest the piece by Messrs. Doyle and others on copyright notice. As usual I found it well done and most instructive.

My comments should be prefaced by noting that in connection with the industrial designs bill some of us * * * have had lengthy and rather detailed discussions respecting the whole subject of notice. This bill is now before the Congress on the basis of inviting comments, I think H.R. 8867. * * * Two aspects of this bill are in my judgment worthy of particular comment. First, it is designed to overcome problems such as that of repetitive designs, lack of room for notice, and the like that arise under traditional copyright. Second, the arrangement of the bill and the language used is carefully worked out to avoid some of the perplexities that have come up in connection with the copyright law.

To answer your specific questions at page 48 of the piece (subject, of course, to my being convinced otherwise based on considerations not known to me) it is my feeling that notice should be a condition to copyright protection. However, statutory provisions should be arranged to bring the required notice into line with practicalities, and I would seriously consider the possibility of some overall saving provision to the effect that if others are apprized of the copyright status of the work, including the date of copyright, failure to meet formal requirements is immaterial.

As to question 4a, notice should be the same for all classes of works and should include the date of copyright (date of publication) and the name of the proprietor.

Consideration should be given to the use of identification numbers as to the proprietors, registered on a list maintained by the Copyright Office.

As to question 4b, my feeling is that the statute should give specific locations for notice (e.g. title page) so that notices so located will be considered adequate without question. In addition, notice placed elsewhere and reasonably positioned to come to the attention of those who might otherwise copy would be by statute declared sufficient.

As to question 4c I think the statute ought to be in essentially the same language as the U.C.C.—that is providing for the “c” in a circle, name of the proprietor, and “year of first publication placed in such manner and location as to give reasonable notice of claim of copyright.”

Sincerely yours,

GEORGE FROST.

By Samuel Tannenbaum

MARCH 6, 1958.

The Misses Marjorie G. McCannon and Barbara A. Ringer and Messrs. Vincent A. Doyle and George D. Cary merit the praise of the copyright bar and the creators and users of copyrighted material for their scholarly research and comprehensive study, “Notice of Copyright.”

The study presents, in a logical and orderly manner, the historical background of the copyright notice in our copyright law, with a detailed discussion of the legislative enactments.

Of special interest is the recital of the past proposed legislative attempts to amend the notice provisions, pointing up the elements which defeated the passage of the proposed statutes.

The study will afford authoritative source material so essential for an intelligent program for the consideration and recommendations, with respect to the continuance of the present form of notice, proposed variations or its elimination.

While it is encouraging to note the tendency of the courts to liberalize the harsh statutory provisions with respect to the form of notice and its position, legislation should be effected to minimize the possibility of valuable works falling into the public domain.

There should be no objection to setting forth in *haec verba*, the specific form of copyright notice, identical to that prescribed in article III, sub. 1 of the Universal Copyright Convention, to wit: “© 1958 by John Jones.”

With respect to the position of the notice, the same language used in the above subd. 1, of the Universal Copyright Convention, should be a satisfactory amendment to the U.S. copyright law, to wit, that a notice be inserted “in such manner and location as to give reasonable notice of claim of copyright”.

Aside from the advantages relating to the substantive copyright law, from the practical view point the advisability of continuing the use of the notice of copyright in one form or another, is evident by reason of the following:

1. In most cases, the statutory notice affords notice to the public as to whether or not the author has elected to claim the benefits of statutory copyright protection.

2. It facilitates the determination as to whether the copyright of the work has been renewed or not. It would also indicate whether the copyright had expired, if more than 56 years had elapsed.

3. It would expedite the time consumed in the search required for determining the existence, validity and ownership of the copyright, rights thereunder, and uses of the work involved.

Very truly yours,

SAMUEL W. TANNENBAUM.

By Edward Sargoy

MARCH 14, 1958.

I have read with interest the above very fine and thorough study on Notice of Copyright. Its review of the legislative attempts to resolve the problem of notice by eliminating it entirely (except for voluntary use without incentives), as in the Thomas bill, or by preserving it as a condition on the remedy but not upon the copyright, as in the Sirovich bills, or by keeping the principle intact with some clarifying amendments, as in the Keating bill, puts the problem into focus, inso-

far as attempts have been made to deal with it in the past. The comparative study of what other countries have done with respect to various aspects of notice was most interesting.

As to the questions posed by the study, my views have been as indicated in the report I wrote for the A.B.A. Committee on Program for Revision of the Copyright Law, setting up certain concepts for further study purposes, presented at the New York annual meeting in 1957. There I indicated that the concept of the copyright notice might well be eliminated.

My views are not frozen and if there are persuasive arguments to the contrary, I am open to suggestion. I do not think, however, that copyright notice should any longer be retained in any general revision as a mandatory condition of copyright protection.

I do not think that I would have any objection to the voluntary use of notice, and the providing of certain incentives in such regard, but I would like to see just what is proposed, and how an "innocent" infringer is to be defined, before limiting any remedies.

If provision were made for use of a voluntary notice, I think that the UCC requirements as to the form of the notice and as to its placement on the work would be very appropriate. The hemispheres have contracted greatly as far as communication of works of intellectual and artistic creation is concerned, and our United States works certainly circulate throughout the free world. Congress having expressly provided in Public Law 743 to amend title 17, so that the UCC claimant can only secure protection in the United States if he publishes *outside* the United States with the UCC form of copyright notice (unless he registers his unpublished work in the Copyright Office), it would seem consistent to require the U.S.A. copyright notice, if any effect were to be given thereto, to be on copies published outside as well as in the United States.

Sincerely,

EDWARD A. SARGOY.

By *Ralph S. Brown, Jr.*

MARCH 19, 1958.

The careful marshaling in the Copyright Office study of the arguments for and against any requirement of notice as a condition for protection leaves me with a conviction that mandatory notice should be retained for *published works*. Even if we are out of step with most of the rest of the world, the notice requirement does not preclude international cooperation, as exemplified by the UCC. The historic conception of copyright in this country as a legal monopoly seems to require that some assertion should be made by those who wish to have the advantage of the monopoly. Notice seems best adapted for this purpose, since it is easy for the author to accomplish, and directly warns the would-be copier that a claim of copyright is made with respect to the work.

With respect to an *infringer* who is misled by the accidental omission of a notice from some copies, or by its unauthorized omission by a licensee or another infringer, there seems to be considerable merit in giving him immunity from all remedies except an injunction. In this connection, he should have some protection for an undertaking innocently begun. The language of section 8 of the proposed Designs of Useful Articles bill seems well adapted for this purpose.

Many of the objections to notice would be lessened if the technicalities could be diminished. It seems clear that the present statute and the older cases have been quite unnecessarily rigorous. So long as the essentials of a claim of copyright, by any appropriate word or symbol, the date, and some identification of the author are included, there should be no insistence on an exact formula. As for the position of a notice, the provision of the UCC—"placed in such manner and location as to give reasonable notice"—should be a sufficient statutory guide. I suppose some explicit statutory provision for curing postdated notices would be necessary to overcome the decisions that invalidate copyrights the date of which is later than the actual date of publication.

I should have thought that a requirement of notice on the foreign editions of works first published abroad was burdensome (considering its inconsistency with foreign practice), and that the absence of such notice should not preclude the obtaining of an American copyright. In other words, I am (though on very imperfect information) in sympathy with the majority position in *Heim v. Harris*. However, since the UCC apparently looks in a different direction it seems appropriate for our domestic law to accent its requirement of notice on works published abroad.

RALPH S. BROWN, JR.

By Walter J. Derenberg

MARCH 21, 1958.

This is in further reply to your letter of March 6, inviting my comments on the study of "Notice of Copyright." Since this admirable study gives the complete historical and legislative background of the present notice provisions and also offers an enlightening survey of the respective provisions in the laws of foreign countries, it will not be necessary here to do more than briefly indicate my personal views with regard to the issues summarized at page 48 of the study.

It has always been my belief that the present notice provisions of the Act of 1909 are an anachronism and have resulted in innumerable instances in the loss of copyright on highly technical grounds. The enumeration beginning at page 12 of the study and continuing through page 23 is convincing and eloquent proof of the many unnecessary pitfalls which confront authors of literary or artistic works in the United States in this respect. Even though our courts have in recent years taken a somewhat more liberal view with regard to the notice requirements, as evidenced, for instance, in the "Superman" case (*National Comics v. Fawcett*, 191 F. 2d 594 (2d Cir. 1951)), it still remains true that defects in the position, the wording, the location, the date, etc., in the notice frequently lead to a forfeiture of copyright in this country.

This, in my opinion, has always been a most undesirable situation but has become almost intolerable since ratification by the United States of the Universal Copyright Convention. While the new Convention notice, © may now be used by U.S. authors and authors of works first published here on any type of work, as provided by Public Law 743, it still remains true that with regard to all other notice requirements concerning such works the notice provisions of the Act of 1909 continue to apply. In other words, a U.S. author may still not put the © at any place where it can be "reasonably seen" as provided in article III.1 of the Universal Convention, but must continue to comply with the rigid requirements of sections 18 and 19 of the Act of 1909.

This result followed from our policy in seeking enactment of Public Law 743 not to go beyond the minimum changes which were required in our domestic law for the purpose of enabling the United States to ratify the Convention.

In my opinion, any complete revision of the Copyright Act of 1909 should certainly eliminate all existing notice requirements for works first published here which would go beyond the requirements of article III.1 of the Universal Convention. In other words, if any notice requirements at all were retained, it should suffice for any kind of copyrighted work if the symbol © accompanied by the name of the copyright proprietor and the year of first publication were placed "in such manner and location as to give reasonable notice of claim of copyright." I, however, would readily endorse any legislative proposal which would not even go as far as the Universal Convention but which would approach the philosophy underlying the Berne Convention and the laws of the vast majority of foreign countries, to the effect that no copyright notice whatever should be required as a condition to the securing of copyright protection. In other words, I would favor a provision such as was included in the Shotwell bill of 1940, S. 3043, which provided that copyright was to be extended "without compliance with any conditions or formalities." I would, on the other hand, seek to encourage the voluntary use of a copyright notice—but not under the technical requirements of the existing law but under the "reasonable" location provisions of the Universal Convention, by offering certain remedial incentives to those who advise the public of their claim to copyright. This could perhaps best be done by inserting a provision analogous to section 29 of the Federal Trademark Act of 1946. Under that section, the registration notice—either "Reg. U.S. Pat. Off." or "®"—is not mandatory but, in the absence of such notice a registrant in an infringement suit may not recover profits or damages unless he can prove that the defendant had actual notice of the registration. In short, I would answer the first question on page 48 of the study in the negative, and would not make notice a mandatory condition of copyright protection.

I would answer question 2 affirmatively, by providing an incentive for voluntary use of the type of notice provided for in the Universal Convention.

In answer to question 3, the solution I would suggest would be possible loss of the copyright owner's right to damages and profits in the absence of proof of actual notice in infringement suits.

In answer to question 4, it would be my recommendation that the requirements for voluntary notice for domestic purposes should coincide with those of article III of the Universal Copyright Convention and that a notice which would meet the requirements of that article should be satisfactory both for works of

American authors and other works first published in a foreign country, regardless of whether such foreign country may have ratified the UCC or not.

Sincerely yours,

WALTER J. DERENBERG.

By *Harry G. Henn*

MARCH 24, 1958.

So far as the study is concerned, the value of the present mandatory copyright notice requirements, from the point of view of users, would have been subject to more accurate appraisal if the study, in one place, had listed the various situations when the complete absence of a copyright notice on copies distributed to the public fails to indicate lack of copyright in the work, e.g.: (1) infringing copies; (2) copies from which a licensee has improperly omitted notice; (3) copies from which notice has been omitted by accident or by mistake; (4) copies published or republished abroad; (5) copies published by the United States government; and (6) copies of works originating in a country adhering to the Pan American Copyright Convention of 1910. The study might also have explored more fully the inadequacies of the present notice requirements in the case of periodicals, new versions, and the like, where the general copyright notice fails to distinguish the material therein which is being copyrighted under such notice from the material in which copyright is already subsisting and from material in the public domain.

With respect to the summary of issues in the study (p. 48), my tentative views are as follows:

(1) Copyright notice should be abolished as a mandatory condition of copyright protection.

(2) Incentives should be offered for the voluntary use of notice, by limiting the remedies available against one who uses the work in reliance on the absence of notice.

(3) The limitations on the remedies available against an innocent infringer should be as follows:

(a) The innocent infringer should be subject to an injunction only upon reimbursement of his reasonable outlay innocently incurred.

(b) The innocent infringer should not be liable for a reasonable license fee for the infringing use.

(c) No other remedy should be available against an innocent infringer.

(d) Actual notice given to the infringer should have the effect of removing his defense of innocence for undertakings begun thereafter.

Under the foregoing, the courts would have to distinguish, in cases where actual notice was given to the infringer during the course of infringement, between the innocent undertaking and undertakings begun after the giving of notice.

(4) (a) The form of the notice should be the symbol © accompanied by the name of the copyright proprietor and the year of first publication.

(b) The notice should be placed in such manner and location as to give reasonable notice of claim of copyright.

(c) The notice should not be required in the case of copies published or republished abroad.

Sincerely yours,

HARRY G. HENN.

Elisha Hanson

(Submitted on his behalf by Emmett E. Tucker, Jr.)

MARCH 31, 1958.

The study entitled, "Notice of Copyright," presents the differing points of view on the issues in this area of copyright law.

In reference to the possible elimination of the mandatory notice requirement, the primary inquiry should be whether or not this can be done consistent with the fair treatment of both the proprietor and the innocent infringer. The proprietor, or creator of a work, should not be met with a forfeiture of all his rights merely because of some technical irregularity. At the same time, the user or disseminator of such works should not be penalized where there is nothing on the face of the material to warn him of the rights of the proprietor. If these two vital

interests can be adequately protected, there should be no objection to the removal of the present requirement of a notice as a condition to protection. However, if the notice requirement is thus eliminated, a specified time limitation for the deposit of copies must be inserted in lieu of the present provisions of the law.

If the notice requirement as a mandatory condition is removed, voluntary use of the notice should be encouraged by limiting the remedies available against those who rely upon the absence of notice. Where the notice may be used on a voluntary basis, the great majority of copyrighted works will continue to carry a notice and disseminators of the material will be informed of the rights existing and will act accordingly. In those cases where no notice appears, the proprietor should retain his basic interest but it should not be at the expense of those who acted in ignorance of the proprietor's rights.

The innocent infringer should be subjected to an injunction as to future publication of the proprietor's work, but with several qualifications. No injunction should be available under any circumstances where it would interfere with or prevent the public distribution of scheduled publications of the various press media. Secondly, the innocent infringer should be reimbursed for his reasonable outlays in appropriate cases.

The innocent infringer should not be required to pay a license fee for his use of a work published without the requisite notice. The very exceptional case might exist where the completion of an undertaking involved serialization in a periodical, for example. However, it would be most difficult to prescribe a statutory standard which would apply equally to all forms of copyrightable work.

The proprietor should not be granted any additional remedies under the stated circumstances.

The existence of actual notice should in the ordinary case remove the defense that the infringement was innocent. Thereafter, the infringer is on notice and should be required to act accordingly.

The form of the copyright notice should be such that any reasonable notice conveying the information that the work is the subject of copyright will satisfy the requirements of law. While the application of the rule of reason is generally desirable, it would be clearly undesirable to unnecessarily multiply the specific forms which will satisfy legal requirements. This would be especially true where the absence of a notice in the proper form will not automatically destroy the copyright.

The position of the notice should be restricted within reason so as to avoid the necessity for closely scrutinizing a lengthy work which may contain a notice in the most unlikely of places. In the liberalizing of the law, it is possible to go from the one extreme of undue technicality to the other extreme where the existence of copyright in a given work cannot be determined with any reasonable degree of certainty. In the case of newspapers, the notice should appear on either the front page or on the title page. Notice of copyright should appear on the title page in the case of magazines. And, these notices should suffice to protect all copyrightable material contained in the newspaper or other periodical. In the case of other copyrightable works, the provisions for notice should meet the demands of both substantial compliance and reasonable certainty. The potential infringer is entitled to a reasonable warning that he is about to violate the copyright of another. While he is entitled to no more, he should not be required to accept less.

Sincerely yours,

EMMETT E. TUCKER, Jr.

By Joseph S. Dubin

APRIL 1, 1958.

RE NOTICE OF COPYRIGHT

In connection with the study covering the above matter, I have the following comments to make:

1. I believe that the copyright notice should be retained as a prerequisite and mandatory condition of copyright protection.

2. The notice should be in the form set forth under the Universal Copyright Convention, and should be so placed as to give reasonable notice of claim of copyright without any requirement for any particular position. I am further of the opinion that the notice requirement should be applied to works published abroad.

Sincerely yours,

JOSEPH S. DUBIN.

By Ellen Jane Lorenz

(Lorenz Publishing Co.)

NOVEMBER 4, 1957.

* * * * *

I am taking advantage of your encouragement to state briefly some of the opinions and suggestions advanced by me at a meeting last spring of the Church and Sunday School Music Publishers, and formally endorsed by them.

First, I should say that the emphasis of our system of publication differs in some respects from that of some (but not all) of the [other music] publishers. Our publications consist of books and magazines containing songs and anthems which are from 25 to 60 percent public domain material; words (hymns, poems) and music (hymn-tunes, sacred themes). There are others of the standard publishers, and also some "popular" publishers, who feature public domain works heavily in their collections of old favorites, who might sympathize with our point of view.

Obviously, in publishing of this sort, which represents a very appreciable segment of the music publishing business, the process of tracking down the names and addresses of the copyright owners of old songs, and the death dates of hundreds of obscure song, lyric, hymn or hymn-tune writers, is one of comparatively enormous complication and great expense. [The] suggestion at the October 30 meeting, that we should abandon the reprinting of questionably public domain material is impossible from two points of view:

(a) Publishers cannot afford to put out collections of all-copyright hymns and anthems and songs.

(b) The public demands a large percentage of familiar material in such collections.

We therefore recommend:

1. A definite copyright term dating from *publication*.

(a) This might be a 20-year term with an optional renewal by the copyright owner (*not* reverting to composer).

2. A compulsory copyright notice on all published music, including date and owner. This notice serves a double purpose, being both *cautionary* and *informative*.

* * * * *

ELLEN JANE LORENZ.

By Ellen Jane Lorenz

(Lorenz Publishing Co.)

AUGUST 25, 1958.

At the June meeting of the Church and Sunday School Music Publishers Association I had the assignment of presenting a paper on "New Developments of the U.S. Copyright Law." Earlier in the spring I had written you, asking for any literature you could send me on your recent studies, and you sent a series of pamphlets which were of great help in preparing my talk.

It was agreed at the meeting that in view of your sympathetic reception of many people's points of view, we would try to formulate an expression of thought along the major lines of these pamphlets and send it to you in the hope that it would be of help in the formulating of your recommendations for the future law. Such a questionnaire has been completed, and the following are the results:

1. *Copyright notice requirements.*

The seven music publishers who responded to the questionnaire were unanimously in favor of retaining a copyright notice. There were six votes favoring wording similar to that of the Universal Copyright Convention. There were two who felt that a more informative notice was not necessary; four believed that more information would help, such as specifying when copyright was claimed on only part of the publication (words, music, or arrangement).

* * * * *

ELLEN JANE LORENZ.

By Herman Finkelstein

MAY 7, 1958.

* * * * *
 It is my feeling that the problem of copyright notice cannot be considered apart from the problem of duration.

As I wrote you on May 15, 1957, in commenting on the study of "The Renewal Problem":

"I do not mean to be unduly critical but I do not see how you can separate the renewal problem from the problem of duration and the problem of formalities. To me they are all interrelated and inseparable. Many of us have been reiterating this point over the past several years."

A copyright notice is not required in any country which is party to the Berne Convention. If we hope to merge that Convention with the Universal Copyright Convention, we might start by eliminating a mandatory notice of copyright.

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

(a) It is not required on phonograph records, tape recordings, etc.

(b) It is not visible in television.

(c) Notice does not aid the user if the work is not registered—and registration is not required. The work may be registered under another title, or as part of a larger work. In these cases a notice is useless.

As Judge Learned Hand reminds us in *National Comics Publications v. Fawcett Publications*,¹ a forfeiture results whenever a work falls into the public domain because of failure to comply with statutory formalities. As he points out, we may conceal the harshness of the results by labeling it "dedication" or "abandonment" of rights, but so long as there is no intent to dedicate or abandon, those terms do not appropriately describe the legal consequences of noncompliance with formalities. Assuming that certain formalities may be desirable, it is fair to question whether the penalty of absolute forfeiture of all property rights in the work is a proper or necessary sanction. The only purpose of a copyright notice or registration is to warn a user that the owner of the work has not authorized its reproduction without special permission.

It is submitted that a notice of copyright is not the only means of placing a user on notice; that registration of a claim of copyright would serve an equal, if not a more effective purpose; and that in any event omission of the notice or failure to register should not be a defense to anyone who is not an "innocent" infringer. Consideration should be given to the suggestion that in order to encourage registration of works, those who fail to do so may be denied certain remedies, such as statutory damages—or possibly the recovery of any damages—for infringements commenced prior to registration. This was the scheme proposed in the Vestal bill which passed the House of Representatives in 1931.² In reporting this bill to the Senate on February 23, 1931, Senator Hébert of Louisiana, chairman of the Committee on Patents, wrote:³

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

¹ 191 F. 2d 594, 598 (2d Cir. 1951), *opinion clarified*, 198 F. 2d 927 (2d Cir. 1952) (where the proprietor of the copyright of the comic strip "Superman" failed to place notice of copyright on certain strips, a forfeiture resulted as to these particular strips but not as to other "Superman" strips). See authorities cited in 104 U. Pa. L. Rev. 1054, n. 89.

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

³ S. Rep. No. 1732, 71st Cong., 3d Sess. (1931), reprinted in 34 Register of Copyrights Ann. Rep. 77, 95 (1931).

claim, though it will under the provisions of the bill affect his right to recover damages in case of infringement. In these respects the simple requirements for recordation and notice are not unlike the laws in force in all the States in relation to land titles.”

This principle was adhered to in the Thomas bill.⁴

I would answer the questions posed at page 48 of [Study No. 7] as follows:

1. No.
2. No, although I believe that *registration* might be encouraged by limiting the remedies available against an innocent infringer who relies upon the absence of registration.
3. The limitations of remedies would depend upon the definition of innocent infringer. I do not think anyone should be able to claim he is an innocent infringer if the work has been registered before the infringement occurred or the undertaking began.
4. Although I am in favor of encouraging the date of printing to be affixed to printed works, I do not see how it can be related to a form of copyright notice.

One of the greatest media for the distribution of works today is on television. In general, neither the originals nor kinescopes of those works seem to bear a copyright notice; nor do phonograph records bear a copyright notice.

There is no reason for penalizing those works that are disseminated by means of the printed word rather than other forms of dissemination so far as the copyright notice and limitation of remedies are concerned.

I shall appreciate it greatly if my letter of November 19 and the enclosure—my letter to *The Practical Lawyer*—could be annexed as my comment together with this letter.

* * * * *

HERMAN FINKELSTEIN.

By Herman Finkelstein

NOVEMBER 19, 1957.

I have hastily read the paper prepared by Messrs. Doyle and Cary and the Misses McCannon and Ringer [Study No. 7]. I do not know to what extent the current literature on the subject of copyright notice was examined. In a recent article in the *University of Pennsylvania Law Review*, “The Copyright Law—A Reappraisal,” I pointed out some of the fatal consequences of forfeiting rights because of failure to affix the proper copyright notice (104 *University of Pennsylvania L. Rev.* 1025, 1027-1029, 1032, 1054-1056 (1956)).

* * * * *

Even law reviews are in the habit of omitting a copyright notice on reprints, thus putting the works in the public domain. If law reviews do this, just think of the number of works published by inexperienced firms which fall in the public domain. Enclosed is a copy of a letter which I wrote to *The Practical Lawyer* on this subject and which appeared in the February 1957 issue at pages 95-96.

* * * * *

Sincerely yours,

HERMAN FINKELSTEIN.

By Herman Finkelstein

(Letter appearing in February 1957 issue of *The Practical Lawyer*, pp. 95-96)

Two recent experiences with reprints of articles in law periodicals prompt me to suggest that the editors of such periodicals take steps to protect the copyright in the reprinted articles. The publishers of such journals as *The Practical Lawyer* often furnish the reprints without any sign of a copyright notice. That omission may result in destroying all property rights in the work—a serious blow to the scholar who may plan on ultimate publication in book form of a series of articles which have originally appeared in these periodicals.

The requirements of the Copyright Act concerning the necessity of a notice of copyright are clear (17 U.S.C. 10):

“Sec. 10. *Publication of Work with Notice.*—Any person entitled thereto * * * may secure copyright for his work by publication thereof with the notice of copyright required by this title [sec. 19]; and such notice shall be affixed to each copy

⁴ S. 3043, 76th Cong., 3d Sess. (1940), prepared as a result of a long series of conferences under the chairmanship of Prof. James T. Shotwell.

*thereof published or offered for sale in the United States by authority of the copyright proprietor * * * .* [Italics mine.]

The form of notice in general use for literary works is the symbol ©, plus the word "copyright," the year of first publication, and the name of the copyright owner. Unless an article in *The Practical Lawyer* is copyrighted by the author the copyright notice on reprints of articles published in 1957 should read:

© Copyright 1957

American Law Institute

As I pointed out in "Advice to Authors and Users of Musical Works," in the November 1956 issue of the *Practical Lawyer* at pages 78, 79, "unless statutory copyright is secured, the work falls into the public domain." Many valuable literary works have lost protection because of failure to comply with copyright formalities. In a recent law review article, I pointed to some glaring instances of such forfeitures. Finkelstein, "The Copyright Law—A Reappraisal," 104 *University of Pennsylvania L. Rev.* 1025, 1026-1031 (1956). Yet reprints of that very article omitted the copyright notice. I supplied the defect by affixing a rubber stamp notice to each copy. But what about authors who are not familiar with the formalistic requirements of our Copyright Act, or who fail to notice the omission of the copyright notice?

May I suggest that law periodicals take steps to adopt a uniform form of notice for reprints—and in a spirit of the brotherhood of men of learning, that they pass the word along to editors and publishers of journals serving other professions, e.g., doctors, dentists, engineers, scientists, educators, and philosophers. Let us not suffer the loss of valuable copyrights through the innocent omission of a copyright notice on reprints.

I think a word from *The Practical Lawyer* along these lines would be most helpful.

HERMAN FINKELSTEIN.

By Vincent T. Wasilewski

JUNE 9, 1958.

* * * * *

As to the notice requirement of the law, I do not believe that we should ever adopt a system requiring no notice whatsoever. The commercial user in the United States assumes much greater importance than in most of the other countries of the world, and he should at least have some means of being put on guard readily. I do not believe that the utility value of notice is necessarily determined by the number of times a user refers to same for informational purposes. A remark recently made by a participant at a meeting I attended quite aptly depicts the posture of the notice requirements. He said: "You do not do away with life preservers aboard a ship merely because they are so infrequently used." On the other hand, I could see the reasonableness of a more liberal and flexible specification of the form and position of the notice. Also, I believe that, should error occur, the copyright should not be invalidated, and provisions should be made for allowing corrective steps to be taken to validate same.

* * * * *

VINCENT T. WASILEWSKI.

By Robert Gibbon

(The Curtis Publishing Co.)

OCTOBER 24, 1958.

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Notice of copyright.—We believe that the benefits which accrue from a requirement of formal notice of copyright far outweigh the arguments against it. The requirement should be (and is, in my opinion) simple to follow and the notice easy to recognize. The notice form indicates the intent to restrict reproduction, it serves to show the inception of the copyright term, and it simplifies communication between the copyright holder and persons who wish to reproduce the work.

Formal requirements should be relaxed to the extent that if the form of the notice clearly indicates an intent to claim copyright and if it is in a location which

conveniently puts the public on notice of this intent, then it should meet statutory requirements.

* * * * *

ROBERT GIBBON.

By George Link, Jr.

APRIL 17, 1959.

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Copyright notice.—I take the position that there should be no change in the form of the copyright notice. I would relax the provision as to the position which the notice of copyright must occupy in the various types of copyrightable material.

It is my opinion that "notice" plays an important function. Those who are opposed to the requirement of notice overlook the fact that the protection of, and rights granted under, the copyright law are grants coupled with a public interest. The public is entitled to be apprised of the claim of a copyright owner.

I would not recommend the relaxation of the rule with respect to the omission of the copyright notice, especially insofar as it relates to the original work. Subsequent copies thereof by the original owner, or by a licensee, which omit the copyright notice, if inadvertent (I would leave it to the court to decide what is, or is not, inadvertent), should not destroy the right of the original copyright owner in and to his copyright.

However, copying from a work on which the notice of copyright has been omitted should be held not to infringe the original work until actual notice to the user that the work is copyrighted.

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GEORGE LINK, Jr.

By Alton P. Juhlin

OCTOBER 26, 1959.

At the last meeting of the Geography and Map Division of Special Libraries Association, particular attention was given to the problems connected with the copyrighting of maps. The following resolution was passed at that time:

Resolved, That the Geography and Map Division of the Special Libraries Association go on record as endorsing a copyright law requiring that map publishers desiring copyright protection for their works include a notice of copyright in the long form, including the copyright claimant's full name and address and the year date of publication."

It was felt by the members of the geography and map division that the copyright notice in the long form would give the owner of the copyright greater protection, and would assist others desiring permission to use the map by indicating the period of copyright protection as well as the name and address of the copyright owner.

As secretary-treasurer of the Geography and Map Division of Special Libraries Association, I have been instructed to forward this resolution to you with the request that you give it your careful consideration.

Very truly yours,

ALTON P. JUHLIN,
*Secretary-Treasurer, Geography and Map Division,
Special Libraries Association.*

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, and I hope to forward other views at a later date. * * *

With respect to notice of copyright, the academic profession does not have a distinctive interest, except as college professors may make greater use than most people of material which may be dedicated to the public without being copyrighted, and hence the profession may have somewhat greater need than others for the aid of published notices of copyright, so as to avoid infringement. The association's counsel, Prof. Ralph F. Fuchs (Law, Indiana University) states, "I have always believed strongly in the notice requirement, and I hope it will not disappear if the statute is revised."

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Sincerely yours,

WILLIAM P. FIDLER.