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A REAPPRAISAL OF THE MANUFACTURING CLAUSE OF THE COPYRIGHT ACT IN LIGHT OF ITS HISTORY AND THE UNIVERSAL COPYRIGHT CONVENTION.*

By ROBERT PAUL**

Section sixteen of the Copyright Act, otherwise known as the "manufacturing clause," has remained an anomaly in the American law of Copyright since 1891. In short, it has required compliance with domestic manufacturing requirements as a condition precedent to the granting of copyright protection in this country. Although the clause has had a controversial history, it is generally agreed that today it is antithetical to the basic purposes of a copyright act, which is the protection of literary property and ideas.

The Copyright Office is currently restudying the present Act with a view to complete congressional revision. The patchwork Act of 1909 has been distorted by continual amendment to a new and grotesque form. Although interim reports on any proposed recommendations with respect to section sixteen have not yet been issued, it is to be hoped that the manufacturing sections will be completely eliminated in the final proposed draft.

This paper traces the history and development of the manufacturing requirement from its inception to the present day. An objective evaluation of present utility can only be had in the light of historical review. Basic questions have to be answered. Why was the clause introduced into the Act in 1891? What problem was it designed to meet? What has happened to the clause since that time? What has happened to the problem?

Only after these questions have been answered can we arrive at a valid determination as to current function.

EARLY UNITED STATES COPYRIGHT LEGISLATION

United States copyright legislation began at the state level.¹ Prior to the passage of the first federal Copyright Act of 1790,² twelve of the

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1. The Connecticut Act of 1783 was the first copyright legislation passed in this country. Stat. of Conn. 133 (1786 ed.). See DRONE, *A TREATISE ON THE LAW OF PROPERTY IN INTELLECTUAL PRODUCTIONS* 87-8 (1879); BOWKER, *COPYRIGHT, ITS HISTORY AND ITS LAW* 35 (1912). It granted statutory protection to Connecticut authors who were citizens of the state. See Solberg, *Copyright Reform*, 14 *NOTRE DAME LAW*, 354 (1939).

2. Act. of May 31, 1790, 1 Stat. 124 (1848).

original thirteen states had passed legislation of their own.³ The Act of 1790 was narrowly drafted to grant copyright protection to United States citizens,⁴ the foreign author was accorded no copyright protection in this country, and literary piracy by American publishers was not only sanctioned, it was encouraged.⁵ The Act contained no manufacturing provision, and none was necessary. English authors were powerless to protect their works. Economically, the American market was lost, and the advantage of a common tongue worked solely in favor of the New York, Boston and Philadelphia publishing houses.

In spite of the obvious injustice the 1790 Act inflicted on foreign authors in general, and English authors in particular, appeals for reform did not gain momentum until 1837. In that year, on behalf of British authors, Henry Clay submitted a petition to the Senate committee on which he sat with Ewing, Preston, Buchanan and Webster.⁶ Within a month, this committee urged Congress to pass copyright legislation⁷ granting protection to English and French literary works.⁸ The Clay Report urged that the constitutional copyright clause⁹ should not be narrowly construed to protect United States citizens alone. Extension of copyright privileges to foreign authors would best advance the purpose of the clause, which was, "to promote the progress of science and useful arts."¹⁰

The Committee realized that the strongest opposition to their bill would come from the printing trades. In an attempt to placate these interests, the report recommended that copyright protection be conditioned upon publication in the United States simultaneously with publication abroad:

3. Connecticut (1783); Georgia (1786); Maryland (1783); Massachusetts (1783); New Hampshire (1783); New Jersey (1783); New York (1786); North Carolina (1785); Pennsylvania (1784); Rhode Island (1783); South Carolina (1784); Virginia (1785); BOWKER, *op. cit. supra* note 1. Today forty-five states and four territories have copyright legislation of some form. See summary in ROTHENBERG, *COPYRIGHT LAW BASIC AND RELATED MATERIALS* 618-89 (1956). For a concise history of English copyright law prior to the American revolution, see Comment, *Copyright: History and Development*, 28 CALIF. L. REV. 620 (1940).

4. ". . . nothing in this Act shall be construed to extend to prohibit the importation or vending, reprinting or publishing within the United States, of any map, chart, book or books, written, printed or published by any person not a citizen of the United States, in foreign parts or places without the jurisdiction of the United States." Act of May 31, 1790, 1 Stat. 124 (1848).

5. BOHN, *THE QUESTION OF UNRECIPROCATED FOREIGN COPYRIGHT IN GREAT BRITAIN* 3 (1851); Note, *The Manufacturing Clause: Copyright Protection to the Foreign Author*, 50 COLUM. L. REV. 687 (1950).

6. DRONE, *op. cit. supra* note 1, at 92.

7. S. REP. NO. 134, 24th Cong., 2d Sess. (1837); BOWKER, *op. cit. supra* note 1, at 341; see text of his bill at 15 *J. Pat. Off. Soc'y* 785 (1933).

8. France was the first country to protect nationals and foreigners equally. Act of July 19, 1793. England extended reciprocal protection to foreign authors in 1844. *International Copyright Act* 7 & 8 Vict., c.12 (1844).

9. U. S. CONST. art. 1, § 8, cl. 8.

10. ". . . it cannot be doubted that the stimulus which [the Copyright clause] was intended to give to mind and genius . . . will be increased by the motives which the bill offers to the inhabitants of Great Britain and France." See *Report, supra* note 7.

unless an edition of the work for which it is intended to secure the copyright shall be printed and published in the United States simultaneously with its issue in a foreign country . . . the benefits of the copyright hereby allowed shall not be enjoyed as to such work.¹¹

However, simultaneous publication was not enough. Strong opposition by book publishers and the printing trades prevented favorable congressional action.¹² The American printing industry was still in its infant stage, and it was feared that passage of such an act would cause a loss of the domestic market to an advanced English industry.¹³

It should be noted that the genesis of the troublesome manufacturing clause was in the Clay Report's attempt to secure protection for the foreign author.

Clay's unsuccessful reform movement was carried on by others. A number of bills of a similar nature were introduced in Congress during the next fifty years,¹⁴ but each in turn was lost in committee and the printing opposition continued to dominate Congress. For example, the report of the 1873 Morrill Committee¹⁵ was typical of the prevailing attitudes:

your committee are satisfied that no form of international copyright can fairly be urged upon Congress . . . that the adoption of any plan would be of very doubtful advantage to American authors, as a class, and would be not only an unquestionable and permanent injury to the manufacturing interests concerned in producing books, but a hinderance to the diffusion of knowledge among the people and to the cause of universal education . . .¹⁶

THE CHACE ACT

United States copyright protection was finally afforded the foreign author with the passage of the Chace Act of March 3, 1891.¹⁷ Based

11. See *Report*, *supra* note 7.

12. PUTNAME, *THE QUESTION OF COPYRIGHT* 176 (1891); Solberg, *Copyright Law Reform*, 35 *YALE L.J.* 48 (1925).

13. Between 1837 and 1842, Clay continued his fight for protection of foreign authors, introducing five bills in all providing for extension of copyright protection to English and French nationals. See Solberg, *supra* note 12.

14. For a history of United States copyright acts up to passage of the Chace Act of 1891, see DRONE, *op cit. supra* note 1 at 88-96; BOWKER, *op cit. supra* note 1 at 344-61.

15. The Joint Committee on the Library (1873), consisting of Sens. Morrill (Maine); Sherman (Ohio); Howe (Wisconsin); Representatives Peters (Maine); Wheeler (New York); Campbell (Ohio).

16. S. REP. No. 409, 42d Cong., 3d Sess. (1873).

17. 26 Stat. 1106-10 (1891).

18. ". . . this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens . . ." *supra* note 17, at 1110.

on a theory of reciprocity¹⁸ to be determined by presidential proclamation,¹⁹ the proposed act was three years in passage.²⁰ The typographical unions opposed it throughout.

The bill, as originally introduced, contained no manufacturing clause.²¹ The clause was added to relieve labor pressure and as an expedient to insure passage. It was little more than a political after-thought to help pass a piece of legislation which had as its *primary* consideration the protection of foreign authors. As Clay had learned some five decades previously, the publishers and printers wanted the whole pie or nothing at all. Half a pie, or simultaneous publication, would not be enough.²²

The Act required as a condition precedent to granting copyright protection to foreign authors, that books, photographs, chromos and lithographs be printed from type set "within the limits of the United States."²³ The Act applied equally to all works of foreign origin, whether in English or in a foreign language. To insure effectiveness, importation of foreign-printed books was prohibited.²⁴ Judicial reception was hostile however, and the clause was strictly construed. Thus books printed prior to the passage of the Act,²⁵ as well as musical²⁶ or dramatic²⁷ compositions printed in book form were held to be outside the scope of the clause.

Bitter opposition greeted announcement of the typesetting provision. England and Germany were particularly vehement in their denunciations.²⁸ But criticism was not confined to the other side of the Atlantic. Proponents of international copyright protection immediately recognized the clause as a deterrent to extensive American participation in international conventions. The State Department announced²⁹ that the manufacturing clause prevented United States membership in the Berne Convention of 1886³⁰

19. "The existence of (reciprocity) shall be determined by the President of the United States by proclamation . . ." *Ibid.* The President's determination is conclusive; *Bong v. Campbell*, 214 U.S. 236, 247-8 (1909); 28 OPS. ATT'Y GEN. 222 (1910); *Choppel & Co. v. Fields*, 210 Fed. 864 (2d Cir. 1914). For recent list of Presidential proclamations, see ROTHENBERG, *op. cit. supra* note 3, at 460-9.

20. BOWKER, *op. cit. supra* note 1, at 360-6.

21. H.R. REP. No. 2418, 48th Cong., 1st Sess. (1884); H.R. REP. No. 189, 48th Cong., 1st Sess. (1884).

22. Even with the manufacturing clause, the Senate debated six days before passage of the act in February 1891. BOWKER, *op. cit. supra* note 1, at 365.

23. This has been construed to include Hawaii and Puerto Rico, but not the Philippines. 25 OPS. ATT'Y GEN. 25 (1903).

24. 26 Stat. 1107 (1891).

25. *Patterson v. J. S. Ogilvie Pub. Co.*, 119 Fed. 451 (C.C.S.D.N.Y. 1902). But see 28 OPS. ATT'Y GEN. 90, 94 (1909).

26. *Littleton v. Ditson*, 62 Fed. 597 (C.C.D. Mass 1894).

27. *Hervieu v. J. S. Ogilvie Pub. Co.*, 169 Fed. 978 (C.C.S.D.N.Y. 1909).

28. Kampelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 417 (1947).

29. See *Our Foreign Copyright Relations*, 59 THE NATION 168 (1894).

30. Berne Convention for the Protection of Literary and Artistic Works, signed Sept. 9th, 1886. See Brown, *The Role of the United States in Relation to the International Copyright Union in Recent Years*, 52 J. PAT. OFF. SOC'Y 141 (1952).

which was dedicated to the principle of automatic copyright without formalities. This in spite of the avowed purpose of the Chace Act, which was known as "The International Copyright Act."³¹ *The Nation* made the comparison to the foreigner landing in this country who would not be entitled to protection of the police and judiciary until he had purchased and was wearing a suit of American tailored clothes.³² In any event, it seems clear that the effect of the clause was to "emasculate greatly the intent of the law."³³

COPYRIGHT REVISION OF 1909

Following the work of the Currier Committee,³⁴ Congress undertook a complete revision of the Copyright laws that resulted in the Copyright Act of 1909.³⁵ The manufacturing clause was reenacted with five modifications of varying importance.

The most significant change was the exemption of works of foreign authors written in a language other than English. The statutory exclusion applied to "the original text of a book of foreign origin."³⁶ The phrase of "foreign origin" was drafted by Richard Bowker, and as explained in his subsequent treatise, was intended to apply only to books of foreign authorship.³⁷ It was not meant to be applicable to works of American authors in a foreign language. The class of books excluded was a very narrow one. It was assumed that books of foreign authorship that would subsequently be marketed on a large scale in this country would be translated into English and then become subject to the provisions of the clause.³⁸

Small as this exception was, the process of subtraction had begun. Opponents of the clause had campaigned vigorously for its repeal, and the "foreign origin" exception was made in partial response to these pleas. Chief advocates of repeal were those that favored international copyright cooperation.

31. See Ashford, *The Compulsory Manufacturing Provision*, ASCAP Fourth Copyright Law Symposium (1952) at 53.

32. "An Apologie for Piracie" 38 *THE DIAL* 4 (1905).

33. Kampelman, *supra* note 28.

34. Report of Currier Committee on Bill Enacting Copyright Act of 1909, H.R. REP. No. 2222, 60th Cong., 2d Sess. (1909).

35. Act of March 4, 1909, 35 Stat. 1075 (1909).

36. In addition, the amendment excepted books where, ". . . the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art; . . . works in raised character for the use of the blind . . ." 17 U.S.C.A. § 16 (Supp. 1958).

37. See BOWKER, *op. cit. supra* note 1, at 156. This point was reiterated by Mr. R. Underwood Johnson on presenting this amendment to the committee in charge of the bill in his capacity as secretary of the Authors Copyright League. See HOWELL, *THE COPYRIGHT LAW* 91 (3d ed. 1952). For another problem of construction under the clause as drafted in 1909, see Touhmin, *Printing in the United States Under the Copyright Law*, 10 VA. L. REV. 427 (1924).

38. Howell, *Ibid.*

In 1901, *The Nation* published a series of three articles reevaluating the utility of the clause in light of the restrictive effect that it had on broadened international copyright relations. It concluded that repeal was necessary and cited ten separate reasons:

1. American printers' fear of foreign competition was baseless.
2. Electroplating here was better and cheaper than abroad.
3. Existing import duties made foreign book importation on a large scale impractical.
4. Tariff laws gave ample protection to printers.
5. "Special tastes of American book buyers can be trusted to compel manufacture here to meet requirements."
6. "that it involves a wrong principle to compel the producer to do his manufacturing with one set of printers rather than another."
7. The clause does not have the practical effect of forcing manufacture here, but rather forces foreign books to do without American copyright protection.
8. It was unjust to book buyers to force them to take American editions.
9. The clause resulted in a tax on the public.
10. There was unfair treatment of English authors.³⁹

In addition, a number of printers and publishers realized that the clause was of dubious benefit at best. For example, George Haven Putnam was emphatic in stating that:

The manufacturing condition should be eliminated from the law. It is entirely illogical to couple with the recognition of the right of copyright a condition forcing the producer of the copyrighted property to do his manufacturing with one set of printers or another.⁴⁰

As a general principle, this statement appears to be as applicable today as it was when uttered.

Two other liberalizing tendencies were evidenced in the revision. With minor exceptions relating to lithographing and photoengraving, the clause was made applicable to books and periodicals, rather than books, photographs, chromos and lithographs.⁴¹

Of even greater importance was the continued recognition of *ad interim* protection to books of foreign origin. As incorporated into the act in 1905,⁴² this privilege was granted to books written in a foreign language only. Reenacted in 1909, it included works written in English. Designed

39. See Solberg, *The International Copyright Union*, 36 *YALE L. J.* 103 (1926).

40. Ashford, *supra* note 31, at 55.

41. This is still the format used in § 16 of the Copyright Act which refers to §§ 5 (a) & (b). 17 U.S.C.A. § 16 (1957). For a detailed discussion of the evolution and scope of sections 5 (a) & (b), see Charlow, *Descent into the Market Place—A Survey of the Subject Matter of Copyright*, 8 *HASTINGS L.J.* 146 (1957).

42. 33 Stat. 1000 (1905).

to permit testing of the American market, the 1905 Act had required the foreign author to deposit a copy of his work within thirty days of first publication abroad. He was then given one year within which he had to comply with all copyright formalities, including manufacture. If this was done, copyright would be granted for the full twenty-eight year period. The 1909 revision, with its inclusion of English language books, limited *ad interim* protection to a maximum term of thirty days after deposit of the work.⁴³

The remaining two changes fell on the other side of the ledger, and were designed to strengthen the clause. The 1904 amendment requiring an affidavit of manufacture⁴⁴ was incorporated in the 1909 Act.⁴⁵ In addition, a provision was added to the type-setting condition requiring that both the printing and the book binding had to be done in the United States.⁴⁶ In recommending this change the Currier Committee reported:

if there was reason . . . for the requirement that the book should be printed from type set in this country, there was as much reason for a requirement that the book should be printed and bound in this country . . . The protection to the men engaged in the work of setting type, making plates, printing and binding books is given by this section . . .⁴⁷

The impression is unavoidable that these latter changes were introduced to appease the printers and thereby assure passage of the amended clause. In any case, the manufacturing clause emerged after the 1909 revision in a slightly diluted state, it had lost ground to the cause of international copyright with the elimination of works written in a foreign language.

THE BERNE CONVENTION

Between 1909 and 1949 the manufacturing clause was amended but twice, each amendment being of minor importance.⁴⁸ On the other hand, during this same period, there was continuous and active agitation for United States subscription to the Berne Convention.⁴⁹ More than fifty items had been introduced in Congress since the First World War, whose

43. Under the 1909 act, deposit was required within thirty days of foreign publication and the domestic printing had to be done within thirty days of that deposit date.

44. H.R. REP. NO. 13355, 58th Cong., 2d Sess. (1904).

45. 35 Stat. 1079 (1909).

46. 35 Stat. 1078 (1909). Appleman, *Compromise in Copyright*, 19 B.U.L. REV. 619, 627-32 (1939).

47. Currier Committee, *supra* note 34. See HOWELL, *op. cit. supra* note 37 at 266.

48. In 1919 the period of *ad interim* protection was extended to six months. 41 Stat. 369 (1919). In 1926 a clause was added to the effect that the manufacturing requirements would not apply to ". . . works printed or produced in the United States by any other process than those specified in this section." 44 Stat. 818 (1926).

49. The Berne Convention has been revised five times: Paris Revision (1896); Berlin Revision (1908); Berlin Revision (1914); Rome Revision (1928); Brussels Revision (1948). See 2 Ladas, *infra* note 53; 1 UNESCO COPYRIGHT BULLETIN, No. 2, Pp. 114-35 (1948).

purpose was adherence to the Berne Convention.⁵⁰ None of these items were ever passed and the United States never became a Berne signatory. The manufacturing clause has generally been recognized as the culprit that delayed effective world-wide copyright cooperation until the Universal Copyright Convention became effective in 1954.⁵¹ It would be appropriate at this time to review the Berne struggle and the part played by the manufacturing clause.

In 1859, the first international group to strive for universal copyright cooperation met at Brussels.⁵² It was an "unofficial" body that continued to meet periodically advocating international copyright. A formal inter-governmental conference was held in Berne in 1884, 1885 and 1886, resulting in the promulgation of the International Copyright Union, *i.e.*, the Berne Convention.⁵³ The convention was open to all nations.⁵⁴

Berne was a self-executing, multilateral treaty. It was predicated on the basic idea of uniform copyright protection throughout the membership area not conditioned on formalities. It granted "automatic" protection to all unpublished works of convention nationals as well as all work first published in a convention state.⁵⁵

The original convention of 1886 met at the request of the Swiss government⁵⁶ with the United States as one of the twelve attending nations.⁵⁷ Most of the civilized nations have since become signatories.⁵⁸ The noticeable exceptions along with the United States were Russia, China and most Latin American nations.⁵⁹

50. *E.g.*, S. REP. NO. 4101, 67th Cong., 4th Sess. (1922); H. R. REP. NO. 11476, 67th Cong., 2d Sess. (1922); H. R. REP. NO. 13676 and H. R. REP. NO. 14035, 67th Cong., 4th Sess. (1923); H. R. REP. NO. 9137, 68th Cong., 1st Sess. (1924); H. R. REP. NO. 11258, 68th Cong., 2d Sess. (1925); Howell, *International Copyright Relations of the United States*, 27 YALE L.J. 348 (1918); Note, *Revision of the Copyright Law*, 51 HARV. L. REV. 906 (1938); Note, *Copyright Reform and the Duffy Bill*, 47 YALE L.J. 433 (1938). For a complete list of fifty items introduced in Congress, see Brown, *The Role of the United States in Relation to the International Copyright Union in Recent Years*, 52 J. PAT. OFF. SOC'Y 203 (1952).

51. BOWKER, *op. cit. supra* note 1 at 372; DEWOLF, AN OUTLINE OF COPYRIGHT LAW ix (1925).

52. Henn, *The Quest for International Copyright Protection*, 39 CORNELL L.Q. 43 (1953).

53. See 1 LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 71-86 (1938).

54. Berne Convention of 1886, Arts. I, XVIII.

55. Dubin, THE UNIVERSAL COPYRIGHT CONVENTION, 42 CALIF. L. REV. 92 (1954); Sherman, THE UNIVERSAL COPYRIGHT CONVENTION: ITS EFFECT ON UNITED STATES LAW, 55 COLUM. L. REV. 1144 (1955).

56. *Ibid.*

57. Original signatory nations were Belgium, France, Germany, Great Britain, Haiti, Italy, Liberia, Spain, Switzerland and Tunis. UNESCO COPYRIGHT BULLETIN, Vol. 2, No. 1, p. 100 (1949). The United States and Japan were the only two nations not to sign. However, Japan subsequently became a member effective July 15, 1899. COPINGER, LAW OF COPYRIGHT 482 (5th ed. 1915). Conversely, Haiti withdrew from the Union on March 26, 1943. UNESCO COPYRIGHT BULLETIN, Vol. 1, No. 2, p. 114 (1948).

58. See appended chart, Dubin, *supra* note 55.

59. Only Brazil and Haiti joined the Berne Union, and Haiti subsequently withdrew.

There were four principal objections voiced in this country against our participation:

1. The granting of automatic protection upon publication in a Convention nation as well as to unpublished works without formalities, (e.g., manufacturing requirements).
2. Recognition of the doctrine of moral rights of an author in his work.
3. Retroactive application upon accession of a nation to works which under United States law would be considered permanently in the public domain.
4. It protected oral works.⁶⁰

However, most commentators concur that the manufacturing clause of our Act, unique among national copyright laws,⁶¹ proved to be the insuperable barrier. For example, Thorvald Solberg, Register of Copyrights from 1897 to 1930, has continually stated that, "This requirement is the principal obstacle which prevents the entry of the United States into the [Berne Union]."⁶²

A second reason for non-adherence has been our ability to obtain Berne protection through use of the "back-door" provisions of the treaty.⁶³ Where a non-convention national seeking Berne protection were to publish his work "simultaneously," (i.e., within thirty days)⁶⁴ in a convention nation, this latter country would be considered to be the country of origin, and full protection would be granted throughout the convention area. This became usual procedure and "simultaneous" publication was often accomplished in Canada and England.⁶⁵

In any event, every attempt to obtain United States participation in the Berne Convention was effectively blocked, and legislation was continuously lost in committee.⁶⁶ The manufacturing clause was apparently viewed in Congressional circles as an indispensable "formality" of copyright

60. Note, COPYRIGHT—INTERNATIONAL PROTECTION, 30 N.Y.U.L. REV. 478 (1955).

61. Canada has enacted a compulsory licensing system comparable to our manufacturing clause which has traditionally been ignored. CAN. REV. STAT. c. 32 (1927). However, prior to 1912, such provisions were not entirely unheard of, Holland and most of her colonies, Newfoundland and Australia having had similar provisions. See BOWKER, *op. cit. supra* note 1, at 160.

62. See Solberg, *The Present Copyright Situation*, 40 YALE L.J. 203 (1930); *The International Copyright Union*, 36 YALE L.J. 103 (1926); COPYRIGHT LAW REFORM, 35 YALE L.J. 71 (1925).

63. "In the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country shall be considered exclusively as the country of origin"—Brussels Revision, Art. 4.

64. "A work shall be considered as having been published simultaneously in several Countries which has been published in two or more Countries within 30 days of its first publication."—Brussels Revision, Art. IV (3).

65. Farmer, *The Perils of (Publisher) Pauline*, 7 COPYRIGHT PROBLEMS ANALYZED 126 (1951).

66. See Brown, *supra* note 50.

protection. United States international cooperation during this period was confined to participation in Latin American treaties.⁶⁷

Bowker, while urging international cooperation in 1912, correctly prophesized, "The hopes of the friends of copyright will not, however, be fully realized until the manufacturing clause . . . is repealed."⁶⁸ The clause was not repealed and the United States found itself in the ignoble position of rejecting Berne on the one hand, and sneaking in through the "back-door" on the other — a position less than envious.

THE 1949 AMENDMENTS

The 1949 amendments to the manufacturing clause need little discussion. The clause was amended in two respects, and the general purpose for the revision was to partially eliminate the discrimination against works of foreign authors in the English language.⁶⁹

First, the period for *ad interim* registration of books or periodicals in the English language was extended from sixty days to six months after first publication abroad.⁷⁰

Second, permission was given to import fifteen hundred copies of a book in the English language during the five years after first publication abroad.⁷¹

Foreign resentment against the United States' stubborn adherence to the manufacturing requirement had reached an excitable state. Internal efforts to secure entrance into Berne had failed, and Congress feared a wave of retaliatory legislation throughout the world.⁷² Although the State Department urged complete repeal of the manufacturing clause,⁷³ Congress was not willing to go that far. Its intention was mitigation, not repeal.

67. The United States has ratified but two Latin American multi-partite copyright conventions; Conventions for the Protection of Literary and Artistic Copyright, signed in Mexico, Jan. 27, 1902; Convention Concerning Literary and Artistic Copyright, signed in Buenos Aires, Aug. 11, 1910. For other western hemisphere conventions and the role of the United States, see CANYES, COLBORN AND PIAZZA, *COPYRIGHT PROTECTION IN AMERICAS* (1950); Ladas, *Inter-American Copyright*, 7 U. PITT. L. REV. 283 (1941); Note, *The Inter-American Copyright Convention: Its Place in United States Copyright Law*, 60 HARV. L. REV. 1329 (1947).

68. BOWKER, *supra* note 1, at 372.

69. See H. R. REP. NO. 238, 81st Cong., 1st Sess. (1949).

70. In addition to the amendment of § 16, Public Law 84 amended §§ 22, 23 and 215. The amendments to §§ 22 and 23 dealt with the *ad interim* period of protection, and complimented the § 16 changes. § 215 dealt with deposit and fees.

71. It is interesting to note in this connection, that in 1948, of the 14,000 books published in England, only 139 were subsequently registered in the United States Copyright Office. S. REP. NO. 375, 81st Cong., 1st Sess. 2 (1949). As to the subsequent problems that confronted American publishers caused by the *ad interim* 1500-book provision, see Farmer, *supra* note 65, at 124.

72. H. R. REP. NO. 238, 81st Cong., 1st Sess. 3 (1949). Note, *supra* note 5, at 692.

73. *Hearings before Subcommittee No. 4 of the Committee on the Judiciary* H. R. REP. NO. 2285, 81st Cong., 1st Sess. 21-26 (1949).

74. Note, *supra* note 5, at 694.

Opposition to repeal was based primarily on the argument that to do so would be to open the market gates to a flood of cheap foreign editions.⁷⁴ It is interesting to note that tariff and anti-dumping legislation which has traditionally been used to counteract unwelcome mass importation was never seriously considered by Congress.⁷⁵

The fifteen hundred figure was reached for a variety of reasons:

1. It was generally agreed that American publishers would not be hurt since it is unprofitable to publish books in this country in an edition less than three thousand copies.⁷⁶
2. Therefore, we could take the altruistic position of allowing importation up to fifteen hundred books in order to "test" the American market.
3. Publishers would not be forced to compete with cheaper publication abroad.⁷⁷
4. The American public would benefit by freer flow of ideas from other English speaking nations.⁷⁸

Reaction to the compromise was generally along the same lines, to wit, "be grateful for small gifts."⁷⁹ The 1949 amendments bought the United States temporary insurance against retaliation, but labor was as active as ever, and further amendment would have to wait.

At about this time, advocates of international cooperation, *i.e.*, those favoring manufacturing clause repeal, turned their attention to the work of UNESCO.⁸⁰

THE UNIVERSAL COPYRIGHT CONVENTION

The last phase in the long history of the struggle between international copyright and domestic manufacture begins — the phase that has heralded

75. *E.g.*, 42 Stat. 11 (1921), 19 U.S.C. § 160 (a) (b); 46 Stat. 656, 19 U.S.C. § 1001, par. 1410. The suggestion that higher tariffs would prevent foreign dumping and prevent injury to domestic industry has been continuously urged as the proper approach to the problem, if indeed any such danger does in fact exist. See Note, *Revision of the Copyright Law*, 51 HARV. L. REV. 910 (1938).

76. ". . . the publication of an edition of fewer than 3,000 copies of the work in the United States is impractical inasmuch as the costs of publishing a work in the United States are such that a sale of fewer than 3,000 copies will mean a loss to the publisher"; Hearings, *supra* note 73, at 5.

77. This point will be discussed *infra*, but the question that should be noted at this point is simply that if publication abroad is cheaper, why restrict the American author to domestic publication as the present act does?

78. What better reason for complete abolition of the clause? Chaffee directs his remarks on this point directly to the Unions: ". . . members of all American labor unions suffer a big intellectual loss from their present lack of ready access to English books." Chaffee, *Reflections on the Law of Copyright*, 45 COLUM. L. REV. 525 (1945).

79. Note, *Copyright: Relaxation of the Manufacturing Requirement for Foreign Works*, 35 CORNELL L.Q. 452 (1950); Note, *supra* note 5.

80. Chediak, *The Progressive Development of World Copyright Law*, 42 AM. J. INT. LAW 797 (1948); Note, *The Work of UNESCO on Copyright*, 43 AM. J. INT. LAW 343 (1949); Note, *American Copyright in the International Picture*, 34 B.U.L. REV. 478 (1954).

the death knell to the clause. With United States participation in the Universal Copyright Convention,⁸¹ it is difficult to see how the remaining shell of the once powerful manufacturing clause can survive further revision of the act, as is presently contemplated.

The United States joined thirty-five other nations in signing the UCC at Geneva, Switzerland on September 6, 1952.⁸² Originally under UNESCO sponsorship, the UCC was a successful attempt at harmonizing Berne principles with American objections. Unlike the Berne concept of "automatic copyright," the UCC proceeds along the principle of "national treatment." In short, each member nation affords the same protection to the works of nationals of other member nations as it affords the works of her own nationals.⁸³ There are three exceptions to this basic principle; minimum term of protection, minimum translation rights and a maximum standard of acceptable formalities.⁸⁴

Although the UCC effected no changes in domestic law, it does require that internal law contain no conflicting provisions.⁸⁵ Congress was therefore required to both ratify⁸⁶ the Convention and pass enabling legislation which conformed our Copyright laws to the minimal standards required by the Convention. Public Law 743, passed on August 31, 1954, made the appropriate changes in United States Copyright Law.⁸⁷

Although Public Law 743 amended sections 9, 16 and 19 of the Copyright Act, the section 9 amendment was the only amendment which was made specifically to enable United States adherence to the UCC.⁸⁸ Subsection (c) was added, which provided that when the UCC came into

81. The complete text of the UCC may be found at 5 UNESCO COPYRIGHT BULLETIN, Nos. 3-4, pp. 30-41 (1952).

82. The following English speaking nations were among the thirty-five signatory nations; Australia, Canada, India, and the United Kingdom. The other signatories were: Andorra, Argentina, Austria, Brazil, Chile, Cuba, Denmark, Eire, El Salvador, Finland, France, Germany, Guatemala, Haiti, The Holy See, Honduras, Italy, Liberia, Luxembourg, Mexico, Monaco, Netherlands, Nicaragua, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Uruguay and Yugoslavia. Subsequent additions include Belgium, Israel, Japan and Peru.

83. UNIVERSAL COPYRIGHT CONVENTION Art. 11. See Dubin, *The Universal Copyright Convention*, 42 CALIF. L. REV. 89 (1954). In addition, see Hoffman, *The Position of the United States in Relation to International Copyright Protection of Literary Works*, 22 U. OF CIN. L. REV. 415 (1953); Kaminstein, *The Universal Copyright Convention*, 13 FED. COMMUNICATIONS B.J. 62 (1953); MacCartney, *The Universal Copyright Convention*, 13 LIBRARY OF CONGRESS INF. BUL. 11 (Sept. 7, 1954); Schulman, *Another View of Article III of the Universal Copyright Convention*, 53 WIS. L. REV. 297 (1953); Note, *International Copyright Protection and the United States: The Impact of the UNESCO Universal Copyright Convention on Existing Law*, 62 YALE L.J. 1065 (1953).

84. UCC, Articles IV, V, III (1).

85. UCC, Article X (2).

86. The Senate ratified the UCC on June 25, 1954. 100 CONG. REC. 8495.

87. 68 Stat. 1032 (1954). The President signed the treaty for deposit on November 5, 1954.

88. S. REP. NO. 1936, 83d Cong., 2d Sess., 5 (1954).

effect,⁸⁹ certain enumerated formalities of the Copyright Act would not apply to the works of UCC nationals first published abroad.⁹⁰ Among these exemptions was section 16, the manufacturing section.⁹¹ The momentous effect of this amendment cannot be underestimated. It meant that for the first time in the history of American copyright law, an ever-growing bloc of over forty nations was freed from the clutch of the manufacturing provision. Standing at the top of the list of UCC nations were the United Kingdom, Australia and Canada. Clay's dream of one hundred and seventeen years earlier was at last a reality.

As might be expected, the typographical unions mustered all of the old arguments, as well as a few new ones, to oppose passage of the enabling bill.⁹² The old arguments included the timeless one of fear of foreign competition, first used in 1837. This was answered effectively by Thornsten Kalijavari, Deputy Assistant Secretary of State for Economic Affairs:

In direct contrast to the situation when the manufacturing clause was first placed in the copyright law in the late 1800's, we are now a major exporter with proceeds from books alone totaling more than twenty-four million dollars last year. This figure is well over twice the value of the 1953 book imports. Thus the manufacturing clause has become an anomaly in our law which is out of keeping with our present position in the field.⁹³

Sydney M. Kaye, member of the United States delegation to the UCC added:

The printing unions which fear the removal of the manufacturing clause are, I think, in the posture of a swimmer who has been wearing water wings so long that he does not realize that they are more of an encumbrance than a help . . . The establishment of firm and solid international protection for books printed here may, indeed, increase printing in this country.⁹⁴

The unions then switched their grounds of objection to newer and more novel grounds. First, they argued that passage of the bill would

89. It is to be noted that under UCC, Arts. IX (1) and IX (2), the UCC was not to come into effect in any nation until twelve countries, four of which were non-Berne states, had deposited their instruments of ratification with UNESCO. At that time, the Convention would become effective in each contracting nation three months after the deposit of that nation's ratification documents. The UCC became operative as of September 16, 1955. See Finklestein, *The Copyright Law—A Reappraisal*, 104 U. PA. L. REV. 1040 (1956).

90. 17 U.S.C. §§ 1 (2), 13, 14, 16, 19, 20; for the latest study on remedies presently available to U.S. nationals, see the excellent article of Robert Price, *Monetary Remedies Under The United States Copyright Code*, 27 FORDHAM L. REV. 555 (1958).

91. Arts. II (3) and III (2) of UCC were a concession to the United States enabling us to adhere to UCC while still retaining the manufacturing clause with respect to all works published in the United States as well as to works written by our citizens, or persons domiciled, here, regardless of place of first publication. See Dubin, *supra* note 83, at 102-3.

92. *Hearings before a Subcommittee of the Committee on Foreign Relations and a Subcommittee of the Committee on the Judiciary on Executive M, and S. Rep. No. 2559, 83d Cong., 2d Sess. (1954)*.

93. Statement of Thornsten Kalijavari, Hearings, *supra* note 92.

94. Statement of Sydney Kaye, Hearings, *supra* note 92.

cause discrimination against American authors who would be forced to print in the United States, whereas English nationals could take advantage of cheaper European labor markets. John Schulman, representing the Authors League of America met this objection:

I would be less than candid were I to assert that the American author is eager to retain the manufacturing clause in relation to his own works. American authors have always believed that this manufacturing provision has no place in a copyright statute because his ownership of property which he creates should not be confused with or dependent upon the place where it is manufactured.⁹⁵

Slightly more persuasive was the Union's second new argument. They urged that UCC adherence would open the protection of our copyright laws to Communist nations. As viewed by Dubin,⁹⁶ this would be a calculated risk, and at best, a small price to pay for international cooperation.

Section 16 was amended by Public Law 743 to help harmonize the internal provisions of our manufacturing clause. It was not modified to conform to the UCC.⁹⁷ Of the two changes, only one need concern us here.⁹⁸ The *ad interim* clause granting temporary protection to books or periodicals "of foreign origin," was changed to grant this same five year protection to works "first published abroad." This had the effect of extending *ad interim* protection to both Americans and resident aliens who first published their works in the English language abroad.⁹⁹ This extended to American authors a privilege previously available to foreign authors solely.

It should also be noted that as of September 16, 1955, all *ad interim* copyrights of works by nationals of countries adhering to the UCC, were automatically extended to the full twenty-eight year term without the necessity of further action by the copyright claimant.¹⁰⁰

PRESENT UTILITY

It is submitted that the UCC has completely eliminated any conceivable argument for retention of the manufacturing clause at the present time. The clause was originally introduced to protect a domestic industry against English and Canadian competition, and as a supplement to tariff

95. Statement of John Schulman, Hearings, *supra* note 92.

96. Dubin, *supra* note 83.

97. S. REP. No. 1936, 83d Cong., 2d Sess., 5 (1954).

98. The second modification was one of form only. The clause pertaining to "the extension of time within which to comply with conditions and formalities granted by Presidential proclamation, No. 2608, of March 14, 1944" was omitted. It was no longer necessary since the proclamation had terminated. See ROTHENBERG, *op. cit. supra* note 3, at 32.

99. See 17 U.S.C.A. § 16, as amended, 68 Stat. 1032 (1954).

100. This extension was "of particular interest" in New Zealand. See NEW ZEALAND L.J. 270 (September 20, 1955).

protection.¹⁰¹ Today, both nations are excused from operation of the clause by virtue of the UCC.

What is left of the clause? It is now applicable to all works published in the English language written by authors who are nationals of foreign states that are not parties to the convention, which upon closer examination means very little. Among others, Australia, Canada, India and the United Kingdom, principal English speaking nations other than our own, are all UCC signatories. Furthermore, assuming that some authors are in fact encompassed within this very restricted class that is still subject to the clause, it is to be remembered that there is still a fifteen hundred volume *ad interim* exception with a five year limitation period. Therefore, it does not seem unfair to say that for all practical purposes, the clause does not affect any significant group of foreign authors.

It is also presently applicable to works of United States citizens or of aliens domiciled here as well as to all works first published in the United States. And this is the most ironic twist of all! The clause forces American authors to publish here, whereas it no longer requires English authors to do the same. The wheel has completely turned. Originally designed to affect the English author, it now only affects the American author. In short then, it forces the American author to publish here, and acts discriminatorily against his best interests.

This point has not been overlooked at the 1952 hearings to amend the act to conform with UCC requirements. It will be remembered that the principal objection voiced by labor against amendment, and rejected by the Congress, was that foreign labor was cheaper than our own, and that to amend the Act would mean discrimination against the American author. But the Act *has* been amended, and by the open admission of labor representatives themselves, the Act now *does* discriminate against the American author.

For example, the following remarks made by Gerhard Van Arkel, representing the International Typographical Union:

The authors have stated that they will try to secure complete repeal of the clause . . . I have no doubt that it will be the inevitable consequence of the adoption of the bill now before you. Senator Wiley: What is left of the manufacturing clause if this bill is passed?

Mr. Van Arkel: I think nothing is left of it, Senator . . . In my view the inevitable consequence of taking the first half step is that you must take the whole step.¹⁰²

101. See Note, *The Inter-American Copyright Convention: Its Place in United States Copyright Law*, 60 HARV. L. REV. 1332 (1947).

102. See statement of Gerhard Van Arkel in Hearings, *supra* note 92.

Others have spoken to the same effect.¹⁰³

The question that may well be asked at this point is, "Why wasn't complete repeal urged in 1952?" The hearings reveal the answer. John Schulman, representing the Authors League of America and the Songwriters Protective Association stated flatly that, "The manufacturing restriction is an anomaly in our law and has no place in a statute dealing with property rights."

Further:

Mr. Schulman: "There is no proposal here to modify the manufacturing clause as far as American works are concerned."

Senator Fulbright: "Would you object to eliminating the manufacturing clause?"

Mr. Schulman: "I would like it."

Senator Fulbright: "Why don't you propose that?"

Mr. Schulman: "Because we do not want, frankly, any more burdens than we have to encounter, and we are perfectly willing to take half a loaf on the manufacturing clause to get the convention . . ."

Senator Fulbright: "You are compromising a principle."

Mr. Schulman: "Senator, if you had been working on this matter of international copyright for seven years, as I have just done on this treaty, you would think that would be a little compromise to make."¹⁰⁴

CONCLUSION

Compromise has been the blood line of the clause. It was compromise that originally injected the clause into the law, and as demonstrated through its long history, it was compromise after compromise that sustained it.

Today, compromise is no longer necessary. The clause is but a shell of its original form. It acts discriminatorily against the American author. Labor has admitted in effect that, "nothing is left of it."¹⁰⁵ The American author does not want it and the English are no longer subjected to it. The UCC has dealt the last blow, there is nothing left to compromise.

The Copyright Office could do no greater service to the Copyright Act than to actively urge complete repeal of the manufacturing clause.

103. See statement of Verner W. Clapp, Acting Librarian of Congress, Hearings: *supra* Note 92.

The representatives of the typographical unions may say that it is discrimination against American authors to require them to manufacture their books in this country but not to require English authors to manufacture here. I grant that it is discriminatory. But the simple answer to this objection is [that] the printing trades unions themselves would never support legislation permitting the American author to go abroad and have his book published; and the authors, book publishers, and book manufacturers are not objecting to the proposed legislation but are in fact wholeheartedly supporting it.

104. See statement of John Schulman, Hearings, *supra* note 92.

105. Statement of Gerhard Van Arkel, Hearings, *supra* note 92.