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Ad Interim Copyright and the Manufacturing Clause: Another View of the Candy Case

Dorothy M. Schrader
AD INTERIM COPYRIGHT AND THE MANUFACTURING CLAUSE: ANOTHER VIEW OF THE CANDY CASE

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I. INTRODUCTION

A REVIEW of the well-publicized litigation concerning the novel Candy, by authors Terry Southern and Mason Hoffenberg, has been published by counsel for the plaintiff, Mr. Charles Rembar.1 He is of the opinion that the court in Hoffenberg v. Kaminstein2 attributed a case of xenophilia to the United States Congress. Aware that this "disease" is exceedingly rare in that body, Mr. Rembar explains that the court misread the legislative history thereby erroneously ruling for the defendant, Register of Copyrights.

Another view, which will be presented by this writer, is that xenophilia in Congress does not adequately explain the ad interim provisions3 and the manufacturing clause4 of the copyright law. It

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3. 17 U.S.C. §§ 22, 23 (1964). These sections, which deal with ad interim copyright protection in the case of works first published abroad, are fully discussed in the immediately succeeding sections of the text. Unless stated otherwise, future references to a section of a statute will refer to Title 17, The Copyright Code, 17 U.S.C. §§ 1-215 (1964).

4. The "manufacturing clause" of section 16 reads:

§ 16. Mechanical work to be done in United States. Of the printed book or periodical specified in section 5, subsections (a) and (b), of this title, except the original text of a book or periodical of foreign origin in a language or languages other than English, the text of all copies accorded protection under this title, except as below provided, shall be printed from type set within the limits of the United States, either by hand or by the aid of any kind of typesetting machine, or from plates made within the limits of the United States from type set therein, or, if the text be produced by lithographic process, or photoengraving process, then by a process wholly performed within the limits of the United States, and the printing of the text and binding of the said book shall be performed

(215)
is submitted that Congress has not demonstrated that rare solicitude for the foreigner at the expense of domestic interests generally. Rather, this is a case of the preferred domestic suitor. Congress has chosen to favor the domestic book printing interests (including business and labor printing interests) at the expense of American authors (and certain foreign authors, whose numbers have diminished over the years).

The novel *Candy* was first published in the English language in France in 1958 on the basis of copies manufactured in France. The publisher and apparent copyright proprietor at the time of first publication was Olympia Press, a French corporation. Each copy published in France contained a copyright notice in the name of Olympia Press. Neither the authors nor Olympia Press took any further steps at that time to comply with the formalities of our copyright law.

In 1964, G. P. Putnam's Sons, a United States publisher, published an authorized edition of *Candy* in the United States on the basis of American-manufactured copies. The Copyright Office registered a claim to copyright in this revised version on the basis of editorial revisions. This registration did not cover the work as a whole.

After unauthorized editions were published in the United States by Lancer Books, Inc., Putnam's and the authors, Messers Hoffenberg and Southern, brought an action for copyright infringement and unfair competition against that publishing concern and its distributors. Plaintiffs were unsuccessful in that action.²

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² Within the limits of the United States; which requirements shall extend also to the illustrations within a book consisting of printed text and illustrations produced by lithographic process, or photoengraving process, and also to separate lithographs or photoengravings, except where in either case the subjects represented are located in a foreign country and illustrate a scientific work or reproduce a work of art: Provided, however, That said requirements shall not apply to works in raised characters for the use of the blind, or to books or periodicals of foreign origin in a language or languages other than English, or to works printed or produced in the United States by any other process than those above specified in this section, or to copies of books or periodicals, first published abroad in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical if said copies shall contain notice of copyright in accordance with sections 10, 19, and 20 of this title and if ad interim copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title: Provided further, That the provisions of this section shall not affect the right of importation under the provisions of section 107 of this title.

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5. Plaintiff's motion for a preliminary injunction was denied. Putnam's Sons v. Lancer Books, Inc., 239 F. Supp. 782 (S.D.N.Y. 1965). The defendants then moved to dismiss for lack of jurisdiction or failure to state a claim on which relief could be granted. This motion was granted without prejudice to the plaintiffs. Putnam's Sons v. Lancer Books, Inc., 251 F. Supp. 210 (S.D.N.Y. 1966). There, the court relied on the case of Vacheron & Constantin-LeCoultre Watches, Inc. v. Benrus Watch Co., 260 F.2d 637 (2d Cir. 1958), and found that, since defendants had reproduced only the foreign edition, plaintiff's suit could not be maintained without obtaining a certificate of registration from the Copyright Office covering the original unrevised text of the 1958 French edition of the novel.
On March 11, 1965, the first attempt to obtain registration for the complete text of the novel was made. Putnam's and Hoffenberg applied for ad interim registration for the foreign edition and, alternatively, for registration of the complete text on the regular domestic application form. The Copyright Office refused registration of both claims because the requirements of neither domestic manufacture nor ad interim registration of sections 16, 22, and 23 of the Copyright Code had been met. The basis of refusal was that the work had been manufactured abroad and the authors had not complied with the ad interim provisions, the only way open to them for obtaining United States Copyright.

Thereafter, Mason Hoffenberg brought an action to compel the Register of Copyrights to issue a certificate of registration covering the complete text of the novel as republished with editorial changes in the United States in 1964. The author argued that he had published his work with notice of copyright and thereby had obtained United States copyright, despite the fact that the copies had been manufactured abroad. He argued that the ad interim provisions were only an alternative route to protection and compliance therewith was not mandatory, at least where the work had been published with notice of copyright.

The Government's case was based upon the explicit language of sections 16, 22, and 23 of the statute and upon the clear confirmatory evidence of the legislative history of the manufacturing clause and the ad interim provisions of these sections. From its point of view Hoffenberg v. Kaminstein presented the central issue of whether sections 22 and 23 of the Copyright Code (17 U.S.C. 22, 23) provide the exclusive method for securing copyright in an English-language book

6. 17 U.S.C. §§ 16, 22, 23 (1964). The specific language of section 16 — the manufacturing clause — is set out in note 4 supra. The language and meaning of sections 22 and 23 — the ad interim provisions — are dealt with in the immediately succeeding section of the text.

7. Hoffenberg v. Kaminstein, 396 F.2d 684 (D.C. Cir. 1968), cert. denied, 393 U.S. 913 (1968). Originally, the plaintiff had sought, in the alternative, to compel ad interim registration for the foreign edition on the ground that the statutory period of six months available for ad interim registration after foreign publication had been tolled because the Bureau of Customs allegedly would not have permitted entry of the deposit copy required by section 22. The plaintiff withdrew this claim on the basis of government representations that a Customs Bureau regulation permits (and by intent requires) the Bureau to forward material addressed to the Copyright Office despite any ban that may exist on general importation. 19 C.F.R. § 9-7(c) (1970).

8. The defendant, Register of Copyrights, Abraham L. Kaminstein, was represented by Copyright Office attorneys and, as required by law, attorneys from the office of the United States Attorney and from the Civil Division of the Department of Justice. The staff of the Solicitor General represented the defendant in connection with the petition for certiorari to the Supreme Court. The term "Government" will be used to refer to the defendant and his counsel.
written by an American author that is first manufactured and published abroad.\(^9\)

Since the case was a matter of first impression, the decisional law could not control. However, important principles of decisional copyright law were relied upon by the Government. Such principles were 1) that general publication here or abroad destroys common law rights; 2) that no statutory copyright can be secured in a work in the public domain,\(^1\)

A work that qualifies for protection in the United States under the U.N.E.S.C.O. Universal Copyright Convention (effective September 16, 1955) [hereinafter cited as Convention] may be exempted from the manufacturing requirement. 17 U.S.C. § 9(c) (1964), amending 17 U.S.C. § 9 (1947), by the Act of August 31, 1954 (68 Stat. 1030), exempts Convention works from the manufacturing requirement if from the time of first publication all copies bear the symbol “®” accompanied by the name of the copyright proprietor and the year of first publication and a reasonable position on the work. Works by United States citizens or domiciliaries and works first published in the United States cannot be classified as “Convention works” in the United States under the specific language of section 9(c), and they are therefore not exempt from the manufacturing requirement. Hereafter, this article will assume that the Convention is not applicable since the authors of “Candy” were American citizens.

In order to secure a decision on the merits with respect to this central issue, the Copyright Office chose not to pursue in any way two other possible issues. One issue related to the copyright notice. The work as first published in France contained a notice in the name of the publisher, Olympia Press; the American edition contained a notice in the name of the authors, and the assignment of copyright from the original publisher to the authors was not recorded in the Copyright Office. Recordation of the assignment before substitution of the assignees’ names may have been required under 17 U.S.C. § 32 (1964) unless the new matter in the American edition were sufficient to justify use of the assignees’ names. See Group Publishers, Inc. v. Winchell, 86 F. Supp. 573 (S.D.N.Y. 1949). Since the court in G.P. Putnam’s Sons v. Lancer Books, Inc., 239 F. Supp. 782, 785 (S.D.N.Y. 1965), implied that the new matter might be “trivial” and therefore uncopyrightable, this issue might have been very significant.

A second unexplored issue, surprisingly, was the circumstances of the authorship of the work: Representations were made to the Copyright Office by the original publisher, Olympia Press, that it was the author as employer in a work made for hire. See 17 U.S.C. § 26 (1964), for the definition of the word “author.” Indeed, after correspondence (and not without intra-office dissent), the Copyright Office registered a claim to copyright in the foreign edition of “Candy” on the basis of the assertion that Olympia Press, a citizen of France, was the author, and copyright claimant. If the author were a citizen of France, the work would qualify under the Universal Copyright Convention, and may thus be exempt from the manufacturing requirement and ad interim provisions. Supra note 9.

Since this registration was made under the “rule of doubt” applied by the Copyright Office, an explanation of that rule is appropriate. It must be understood that when the Copyright Office registers a claim to copyright, it does not necessarily take the position that a valid copyright subsists. The Office will register a claim if some reasonable doubt exists as to the ruling a court would make on validity of the copyright. Frequently, the Office will enter a claim and write a letter to the proprietor advising that serious doubts exist concerning the validity of the registration — in essence that it has been made “for whatever it may be worth.” On the other hand, the Copyright Office does take a position on the merits when it refuses registration. In its judgment, the statute has not been complied with and the copyright is invalid. It takes this position only where no reasonable degree of doubt exists. The opposing view may be advanced, but the Copyright Office has concluded that it is virtually certain that no court, when presented with the bases for the Copyright Office action, would sustain the copyright.

Decisions concerning the concept “employer in a work made for hire” turn very much upon the facts of the case, and it is therefore difficult to generalize. However, in a case similar to the “Candy” situation, the court denied Olympia Press’ motion for preliminary injunction. Olympia Press v. Lancer Books, Inc., 267 F. Supp. 920 (S.D.N.Y. 1967). The work here involved was an English translation of the public domain, The Story of Juliette, by the Marquis de Sade. Registration had been

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domain; and 3) that the right to obtain copyright is lost by general publication here or abroad unless statutory protection is obtained on the basis of the facts at the time of first publication. The Government was also able to demonstrate that the bulk of secondary authorities supported its position.

II. The Statutory Language

Copyright in the United States is a creature of statute. The issue of the Candy case could be simply put in the broad terms of whether the authors or their assigns complied with the statutory requirements for obtaining copyright under the Copyright Code.

The plaintiff argued that statutory copyright had been secured in the complete text as first published abroad with copyright notice in compliance with section 10 of the Copyright Code, notwithstanding that the first published copies were manufactured in France. Under this argument, publication with notice of copyright in France would establish United States copyright. It is accordingly urged that sections 16, 22, and 23 are not mandatory conditions for securing United States copyright. The argument follows that the manufacturing clause of section 16 applies only to copies sold in the United States; and that the ad interim provisions are permissive. They merely provide an alternative method of securing copyright in works first published abroad, and they are mandatory only if the work is first published abroad without notice of copyright.

obtained on the basis of the assertion that Olympia Press was the author. (The translator was an American citizen and ad interim copyright had not been obtained.) On a factual issue such as this, the Copyright Office generally will not refuse registration. (However, in the case of "Candy," some opinion existed in the Office that the very documents submitted by Olympia Press to substantiate its asserted "authorship" proved that Southern and Hoffenberg were the authors.)

11. Recent cases in this court have affirmed the proposition that copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article I, § 8, of the Federal Constitution. . .


At common law, the exclusive right to copy his work exists in the author until he permits a general publication. General publication destroys common law rights. Statutory copyright must be secured at this time or the work enters the public domain. Caliga v. Inter Ocean Newspaper Co., 215 U.S. 182 (1909); Wheaton v. Peters, 33 U.S. 591 (1834). Statutory copyright may, at the election of the author, be secured in certain types of works prior to publication. 17 U.S.C. § 12 (1964).


13. The text of section 10 which deals with publication of work with notice states that:

Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section 22 of this title.

As an alternative argument, the plaintiff contended that the initial publication in France was irrelevant and inoperative with respect to United States copyright protection, and that copyright was secured by publication with notice in the United States in 1964.

The Government never contended that copyright could not be secured by first publication abroad with notice of copyright. Its position was that copyright could be secured by publication with notice either here or abroad provided that the other conditions for securing copyright, in addition to the notice requirement, were fulfilled. These conditions, in this case, were either domestic manufacture as required by section 16, or ad interim registration as required by sections 22 and 23. The Government consistently asserted that the ad interim provisions need be complied with only if copies had been produced in violation of the domestic manufacturing requirement of section 16.14

The Government furthermore agreed that section 10 provides the general method for obtaining copyright in the United States. However, it asserted that section 10 is not the whole copyright law; that it is only one section, albeit a fundamental one. It argued that there are other fundamental sections that obviously affect the ability of a claimant to obtain copyright. For example, if one were to look at section 10 alone, one might conclude that copyright may be secured in any item—a blank form, a piece of machinery, a mere reprint of Romeo and

14. The Government based this argument on 37 C.F.R. 202.4(b) (1970), which reads in pertinent part:

(1) An American edition of an English-language book or periodical identical in substance to that first published abroad will not be registered unless an ad interim registration is first made.

(2) When a book or periodical has been registered under the ad interim provisions, an American edition of the same work, to be registrable, must be manufactured and published in the United States within five years after the date of first publication abroad.

In addition to challenging the validity of this regulation on the ground that it represented an incorrect construction of the statute, the plaintiff argued that the Copyright Office itself conceded the invalidity of the regulation because it stated, in response to a hypothetical posed by plaintiff, that it would make registration for a book manufactured in this country and first published abroad even though ad interim registration had not been secured.

Since copies were manufactured in this country, the Copyright Office did not hesitate to respond that it would make registration without reference to the ad interim provisions even though the work was first published abroad in English. Resort to the ad interim provisions is required only where copies have been manufactured in violation of section 16. The government argued that the regulation was consistent with this position. The misunderstanding apparently arose because of the phrase "American edition" in the regulation. The Copyright Office interprets this phrase as meaning an edition first published in the United States; a work first published abroad is a "foreign edition." The regulation is completely consistent with the government position.

It should be noted that references to a "manufacturing requirement" do not mean that manufacture is required. Section 16 does not actually require manufacture of any copies. It does require that if copies are manufactured by specified processes, such processes must be performed in the United States unless excepted by section 16 or the Universal Copyright Convention. Any reference to the "manufacturing requirement" in this article assumes this understanding.
Juliet by Shakespeare. Section 10, however, is clearly limited by the effect of section 4 which confines copyright to the "writings of an author;" and section 8 which proscribes copyright in works in the public domain and in publications of the United States Government. By the specific language of section 16, it seems clear to this writer that this section also limits the right to obtain copyright in the United States. The question remains as to how section 16 affects the right to obtain copyright.

As seen, counsel for the plaintiff advanced the novel view that the domestic manufacturing requirement of section 16 applies only to copies sold in the United States. This argument represents an unusual variation to the usual argument made by those who suggest that the manufacturing requirements are not a condition of copyright at all, and merely affect the right to bring an infringement action. The Government contended that both the usual argument that the manufacturing requirements affect procedural rights only, and the twist on this argument presented by counsel for the plaintiff that the manufacturing requirements applied only to copies sold in the United States ignored the plain language of section 16, which states that "... the text of all copies accorded protection under this title ... shall be printed ... or ... produced ... within the limits of the United States. ..." by certain specified processes—typesetting, platemaking, lithographic or photoengraving process, presswork, and binding.

It is true, however, that the Government also eschewed a literal reading of the language "all copies accorded protection." No American court would (or should) void the copyright in the innumerable works that have been manufactured and published with notice in the United States and then reprinted in the United Kingdom or elsewhere. However, the Government contended that the maximum liberal interpretation of section 16 would be that its domestic manufacturing requirements for copyright protection must be met at the time of first publication. This seems the obvious interpretation since, as shall later be demonstrated, copyright is secured or lost depending upon compliance with the statute at the time of first publication. The importation

15. Section 4 provides that copyright may be secured in the "writings of an author," 17 U.S.C. § 4 (1964); section 8 prohibits copyright in any work that is "in the public domain," 17 U.S.C. § 8 (1964). These sections assumed importance in the government's argument that the statute must be construed as a whole to give effect to its parts. See Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 346 (1908).

16. The usual argument is based on section 13, which requires deposit and registration before an action for infringement can be brought. The copies deposited must have been "produced in accordance with the manufacturing provisions specified in section 16." 17 U.S.C. § 13 (1964).


18. Id.
provisions\textsuperscript{19} then operate to secure the American market from later reprints manufactured abroad.

Both sides attempted to summon support for their construction of the manufacturing clause from legislative history. Before moving to an examination of this legislative history, the statutory language of the ad interim provisions themselves must be considered.

\textbf{A. The Ad Interim Provisions}

The language of the present ad interim provisions, sections 22 and 23, seems on its face to be unqualified and obligatory. Section 22 establishes the method for securing ad interim copyright:

In the case of a book or periodical first published abroad in the English language, the deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright and a statement of the name and nationality of the author and of the copyright proprietor and the date of publication of the said book or periodical, shall secure to the author or proprietor an ad interim copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad.\textsuperscript{20}

Under this language, ad interim copyright is secured by the act of timely registration with the Copyright Office; this section contains no reference to notice of copyright.\textsuperscript{21} Ad interim copyright once secured endures for five years. The fact that this relatively short term of copyright was established is significant;\textsuperscript{22} Congress wanted to provide an incentive to take action that would lead to full term copyright. The fact of section 23, which provides for extension of the ad interim

\textsuperscript{19} With specified exceptions, section 107 prohibits the importation not only of piratical copies but of foreign-manufactured copies during the existence of an American copyright. 17 U.S.C. § 107 (1964). \textit{Convention} works are exempted from the importation prohibition under section 9(c). 17 U.S.C. § 9(c) (1964). After ad interim copyright has been secured under section 22, section 16 permits the importation of up to 1500 copies.


\textsuperscript{21} Anticipating the review of the legislative history, it may be noted that the prior ad interim provisions as established by the Act of March 3, 1905, ch. 1432, 33 Stat. 1000, required notice of copyright on the copy deposited in the Library of Congress and on copies sold or distributed in the United States.

\textsuperscript{22} As enacted in 1909, Act of March 4, 1909, ch. 320, § 21, 35 Stat. 1075, the applicant was given only 30 days from publication abroad to secure ad interim protection, which then endured for 30 days from the date of deposit in the Copyright Office. Under the 1919 amendment, Act of December 18, 1919, ch. 11, § 21, 41 Stat. 368-69, the time periods were extended to sixty days and four months, respectively. The present time periods were established by the Act of June 3, 1949, ch. 11, § 2, 63 Stat. 153-54.
copyright to full term upon certain conditions, is even more significant. The actual language of section 23 reads as follows:

Whenever within the period of such ad interim protection an authorized edition of such books or periodicals shall be published within the United States, in accordance with the manufacturing provisions specified in section 16 of this title, and whenever the provisions of this title as to deposit of copies, registration, filing of affidavits, and the printing of the copyright notice shall have been duly complied with, the copyright term shall be extended to endure in such book or periodical for the term provided in this title.

The plaintiff in Hoffenberg argued long and strenuously that section 22 was merely an alternative route to protection. But assuming that this were so with respect to section 22, what about section 23? Why provide for extension of ad interim copyright conditioned upon manufacture in the United States? Why not simply condition it upon publication with notice of copyright? Surely, under the plaintiff’s theory, even though one originally published without notice and were forced to elect the section 22 procedure, one could later publish foreign-manufactured copies with notice of copyright and thereby obtain full term protection. Why section 23 at all? There should be no doubt that the reason for section 23 is to compel manufacture of a United States edition within the five year ad interim copyright term, on penalty of loss of copyright thereafter.

Under the plaintiff’s theory of section 16, the copyright would be fully effective even though no authorized edition were ever manufactured in the United States during the first term of copyright; unauthorized editions would be subject to infringement actions at any time during that period. True, in order to bring the infringement action the plaintiff would have to manufacture in the United States. However, the mere threat of such manufacture and establishment of the right to sue would effectively prevent unauthorized editions. Therefore, there would be no need to manufacture in the United States until the close of the original twenty-eight year term, and those in plaintiff’s position could enjoy full copyright protection.

23. 17 U.S.C. § 23 (1964). This language has not been amended since its enactment in the Act of 1909.
24. Although section 13 of the statute, 17 U.S.C. § 13 (1964), specifies deposit of copies accompanied by claim to copyright “promptly” after publication with notice, the Supreme Court ruled in Washingtonian Publishing Co. v. Pearson, 306 U.S. 30 (1939), that the failure to deposit promptly does not invalidate the copyright. In effect, the claimant may apply for registration at any time during the original term, and such registration entitles him to sue for acts of infringement that occurred after publication with notice but before registration. Prompt deposit may be demanded by the Register of Copyrights under 17 U.S.C. § 14 (1964). The Copyright Office
that in order to exploit the book market in this country, it would be necessary to manufacture here. However, the sale of books is only one of many ways to exploit a literary work profitably. Derivative works such as stage plays and motion pictures could be authorized and the manufacturing requirement would have no effect on such versions, under plaintiff's theory.26

The plaintiff's position would result in an anomaly that Congress could hardly have intended: that where a work is first manufactured and published abroad, compliance with section 22 will give the copyright claimant five years in which to have an edition manufactured in the United States; but that his failure to comply with section 22 will allow him to wait 28 years before having an edition manufactured in the United States, and to enjoy full copyright protection meanwhile, though no American edition has been manufactured.

These results are inconsistent with the clear intention of the manufacturing requirements and the ad interim provisions; the sections would be rendered virtually nugatory by such an interpretation. Obviously, it is not possible to compel anyone to manufacture a book in the United States, and it seems clear that the manufacturing requirements have not resulted in as much business for American printing interests as was probably expected. The printing cost has been too high and large numbers of books simply have not secured copyright. The author and publisher always have the choice of simply deciding to do without legal protection and getting by as best they can through extralegal (not to say illegal, of course) means.26 Perhaps Congress

requires registration of the claim to copyright in the original term before it will renew the claim for the second term under 17 U.S.C. § 24 (1964).

25. Essentially, this is the scheme that the pending revision bill contemplates. S. 543, 91st Cong., 1st Sess. (1969). An earlier version with the same manufacturing provisions, H.R. 2512, 90th Cong., 1st Sess. (1967), was reported out of committee. The accompanying House Report No. 83 contains a full discussion of the manufacturing clause problem at pages 131-38, and summarizes the proposed manufacturing clause as follows:

Subsection (d) of section 601 makes clear that compliance with the manufacturing requirements no longer constitutes a condition of copyright protection, and that the effects of noncompliance are limited to rights with respect to reproduction and distribution of copies. The bill does away with the special 'ad interim' time limits and registration requirements of the present law. . . .

H.R. Rep. No. 83, 90th Cong., 1st Sess. 137 (1967). This last sentence is very significant; the ad interim time limits would be abolished since they have no meaning in a manufacturing clause that does not represent a condition of copyright.


26. A so-called "courtesy" copyright frequently obtains among well-established publishers. Even though a legal copyright may not exist, these publishers will secure permission and pay royalties on essentially the same basis as though the legal right existed, where the right has been lost through a technicality. Moreover, moral and business pressures can be brought to bear on those publishers that would not otherwise
and the printing interests chose the wrong weapon, or at least an ineffective one. But that they did choose to make domestic manufacture a condition of copyright for certain works cannot be doubted on the basis of the statutory language that we have just considered, as confirmed by the legislative history of the manufacturing requirements and the ad interim provisions.

II. THE LEGISLATIVE HISTORY

A. Copyright Act of 1891

The first copyright act of the United States, enacted in 1790, extended copyright protection to certain published works of United States citizens and residents. One hundred years were to pass before the Chace International Copyright Act of 1891 extended copyright protection, under certain conditions, to non-resident foreigners.

Although the nineteenth century was a rich period in English literature, and English authors achieved great fame in the United States, they received little financial reward. Literary piracy was the order of the day on both sides of the Atlantic.

recognize the “courtesy” copyright. In very revealing remarks in the specific context of the loss of U.S. copyright because of the manufacturing requirements, one eminent British publisher has described some of the pressures that might be applied:

Piracy. We have seen that, unless printed in the U.S.A. within the specified time, British literary property is at the mercy of anyone who cares to print it in the States; it is true no reputable American publisher would think of doing so, but there are American firms which make a practice of pirating English books. The price of freedom (from such piracy) is eternal vigilance. It is a great mistake to think, as many do, that because there is no legal protection, nothing can be done. In most cases pressure of some kind can be brought to bear.

[He gives a specific illustration in detail.]

They were very soon anxious to come to terms, and agreed to pay royalties on past as well as future sales, because, as one of the then partners of the firm subsequently explained to me, we had made life such a burden to them that it was much simpler to come into line and pay up. He admitted with delicious candour that it got on their nerves when, every time the telephone bell rang, it proved to be an inquiry whether it was a fact that they were taking English literary property without paying for it.

I have purposely given an extreme case. It is seldom any such effort is needed; a little pressure is all that is required, and sooner or later most such firms give one an opening to apply it.


30. The court in Scribner v. Stoddart, 21 F. Cas. 876, 879 (No. 12,561) (C.C.E.D. Pa. 1879), remarked:

To reproduce a foreign publication is not wrong. There may be differences of opinion about the morality of republishing here a work that is copyrighted abroad; but the public policy of this country, as respects the subject, is in favor of such republication. It is supposed to have an influence upon the advance of learning and intelligence.

31. [The American author who was able to win the approval of British readers was as defenseless in Great Britain as the British author was in the United States. For his later novels [James Fenimore] Cooper received little or nothing from
To remedy the situation, Britain proposed, in 1837, that a copyright treaty be concluded between it and the United States. In response to this proposal, a House Committee headed by Henry Clay urged support of an international convention such as that proposed by the British. Strong opposition by book publishers led Congress to ignore the report.

The book publishers were content with a "courtesy copyright" whereby the first publisher of an English work was protected from competition by fellow publishers on the basis of a "gentlemen's agreement." The American book publishers were loath to exchange their "courtesy copyright" for an international copyright under which the English publishing houses might come to dominate them. Thus, the considerable discussion that international copyright engendered in the decades succeeding the Clay report proved fruitless — until "courtesy copyright" disintegrated. "Honourable understandings" became passé. "[T]hey published everybody's books right and left, paying no heed to priority of publication or to the competing editions of their rivals." With this development, most American publishers were on the side of international copyright provided that copyright in a foreign work be conditioned on its manufacture in the United States. For example, during the years 1880-1881 treaty discussions took place between Britain and the United States based upon an anonymous proposal known as the "Publisher's Copyright Convention." This was apparently drafted by William Appleton and the Harper Brothers. The proposal included a provision that "a work manufactured and published in one country to secure copyright in the other country must also have been 'manufactured and published therein by a subject or citizen thereof' within three months after its original publication in the country of the author'." It was in this atmosphere that bills were introduced into Congress that led to the International Copyright Act of 1891.

any British publisher, . . . One publishing house in London has confessed that it was able to establish itself only because of the profit it had made out of [a] single American book [Uncle Tom's Cabin].
Matthews, Twenty Years of International Copyright, 43 AM. REV. OF REV. 721, 722 (1911).
33. Id. A convention between the United States and Great Britain was concluded in 1853 but was not ratified. Solberg, The International Copyright Union, 36 YALE L.J. 68 (1926).
34. Scrutton, English Authors and American Copyright, 4 LAW Q. REV. 345, 346 (1888).
35. Id.
37. Id. at 68-69.
38. Id. at 69 (emphasis added).
One bill, introduced by Senator Hawley, extended copyright protection to the works of foreign authors on a reciprocal basis. However, six weeks later Senator Chace introduced his bill. It included a manufacturing provision and prohibited the importation of foreign editions of works under copyright. The manufacturing requirement was made stronger in the successive versions of this bill.

In the next Congress, Senator Chace introduced another version of his bill, S. 554. In favorably reporting the bill, Senator Chace made these comments:

The committee believe it is time that the United States should cease to be the Barbary coast of literature, and that the people of the United States should cease to be the buccaneers of books. They recognize that this is a peculiar character of property; that it is granted for a limited time; that while we are by this bill granting to foreigners certain rights, privileges, and protection on account of our moral obligations to do so, it is a necessary part of this legislation to see that no interests of our people shall be seriously infringed or injured in return for granting this, what may be termed a kind of monopoly of our market, and the committee have seen to it that no foreigner shall be enabled thereby to withhold from the reading public within our borders the opportunity to avail themselves of the book or other copyrighted article, and for that purpose have required that the books or other copyrighted article shall be produced and manufactured in this country.

These comments in an official report are significant in the following respects: the emphasis upon the peculiar character of copyright as property; the passing reference to a "moral obligation" to foreign authors and the insistence upon protection for American interest; and finally, the direct statement that "the books or other copyrighted articles shall be produced and manufactured in this country."
During Senate debate on this bill Senator Chace also observed:

The foreign author may come here and take out his copyright. By the provisions of this bill in order to take out the copyright his work must be published simultaneously in the two countries. It must be published here from type set in this country.47

In the first session of the Fifty-first Congress, Mr. Simonds introduced a new version of the Chace bill.48 A substitute bill, H. R. 10881,49 was reported favorably by the House Committee on Patents.50

In this Report, Mr. Simonds stated:

A subsidiary but important proposition of the bill is that all books copyrighted under the proposed act shall be printed from type set within the United States, or plates made therefrom.51

This direct statement of the proposed manufacturing requirement contains no reference to books published for sale in the United States; it refers to "all books copyrighted under the proposed act."

As sponsor of the House bill, Mr. Simonds's remarks in the floor debate52 may be accorded some weight.

MR. SPRINGER . . . I now desire to ask the gentleman from Connecticut whether, under the proviso on page 3, beginning at line 23, the works of foreign authors in order to be copyrighted in this country must be printed in this country.

MR. SIMONDS. They must be printed from types set in this country or from plates made from types so set. . . .

MR. SPRINGER. The owner of the manuscript can not be protected in this country unless he prints his book here?

MR. SIMONDS. Unless he prints his book from type set here or from plates made from type set here. . . .

MR. SIMONDS. We are to understand what the bill says, that all books copyrighted under this act shall be printed from type set in this country or from plates made from type so set.53

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46. The bill was considered on April 23, 24, and 30, and May 9, 1888. 19 Cong. Rec. 3231-45, 3269-74, 3506-20, 3878-82 (1888).
51. Id. at 1.
52. 22 Cong. Rec. 32-38, 55-60 (1891).
53. Id. at 55-56.
Although entitled to less weight, remarks by another Representative are equally direct. According to Representative Butterworth:

[I]f [the foreign author] fails to copyright his book in this country we are not cut out from using it, because the moment he issues one volume at home without having copyrighted the book here he loses the right to take an American copyright, and we may import the book as we do now, subject, of course, to the customs laws.\(^{54}\)

This bill passed the House\(^{55}\) and was debated in the Senate during February, 1891.\(^{56}\) Senator Platt, who had succeeded Senator Chace as sponsor of the bill, made the following statement:

This very bill provides, if it passes as it was intended, that before he can copyright in this country he [the foreign author] must set up his book in this country, and he must copyright it on the day or before the day of publication in any foreign country.\(^{57}\)

In response to questions concerning some effects of the bill, Senator Platt stated:

This bill provides that the copyright shall be taken not later than the day of publication in this or a foreign country, so that if the book has been published in a foreign country it cannot be copyrighted in this country.\(^{58}\)

When a question was raised as to whether the manufacturing provisions applied to American authors as well as to foreign authors, Senator Platt answered in the affirmative.

MR. BLAIR. . . . [The question is] whether, under the provisions of this bill, the selection by an American author of a publisher abroad to publish his book, when he cannot find one satisfactorily at home, deprives him of the right of publishing it at home.

. . . .

MR. BLAIR. That no American author can have his book printed abroad?

MR. PLATT. I do understand that.

MR. BLAIR. I am correct in regard to that?

MR. PLATT. I so understand.\(^{59}\)

\(^{54}\) Id. at 58.

\(^{55}\) Id. at 60.


\(^{57}\) Id. at 2605 (emphasis added).

\(^{58}\) Id. at 2791.

\(^{59}\) Id. at 2614. Mr. Rembar in his article, supra note 1, referred to further discussion among Senators Platt, Blair, and Carlisle, which he contended supported
Senator Carlisle made the following comments in opposing passage of the bill:

[Under the present law the American author] can send his work abroad and have it set up in type and can import the plates and print them and procure an American copyright; but if this bill passes in its present form with this prohibition against the procurement of a copyright and the prohibition against the importation when first published and produced abroad, the American author would be denied the privileges which he now has.

He must have his work first set up in type here to procure a copyright here.\textsuperscript{60}

The bill was enacted March 3, 1891.\textsuperscript{61}

his "sale in the American market" theory. He also included comments by James Welsh, representing the Typographical Union, and other comments by Senator Platt, which, plaintiff argued, supported his theory. This argument was made during the litigation and in the article despite the concession in both places that the manufacturing requirement was an absolute condition of copyright protection at the time of first publication under the Act of 1891:

Thus, said the author, for a brief period in the history of our copyright law — a period of eighteen years — the position taken by the government would have been sound: publication having taken place prior to the deposit of American-made copies, the benefit of the American copyright would have been denied to the author. Rembar, supra note 1, at 788.

Having conceded this much, one cannot maintain that the legislative history of this same Act of 1891 supports the view that the manufacturing requirement has always been intended merely to affect copies sold in the American market.

In one sense, of course, the plaintiff is right. The United States Congress can legislate only with respect to the "American market." It cannot, for example, prohibit the circulation of foreign-manufactured copies in England, France, or Germany. These countries obviously would have something to say about what may be circulated in their countries. Congress could have chosen to protect printing interests merely through an importation-procedural right scheme. However, it did not, in fact, choose this device. Beginning with the Act of 1891, Congress chose the device of copyright protection itself being conditioned upon compliance with a manufacturing requirement.

\textsuperscript{60} 22 CONG. REC. 2616 (1891).

\textsuperscript{61} Act of March 3, 1891, ch. 565, 26 Stat. 1106.

The bill had passed the Senate on February 18, 1891. 22 CONG. REC. 2849 (1891). The House had serious objections to some amendments made by the Senate. Id. at 3606-11. The Senate amendments 1) extended the manufacturing clause to chromos, maps, and other printed material; 2) diluted the prohibition against importation during the existence of an American copyright; and 3) provided that the determination of reciprocal conditions should be made by the President rather than by the Attorney General.

The Conference Committee agreed to acceptable language concerning the scope of the manufacturing clause and the determination of reciprocal conditions. The House members, however, would not agree with the importation prohibition proposed by Senator Sherman in the Senate amendment. The points on which the Conference members agreed were accepted by the House and Senate. In a vote taken March 3, 1891, the Senate refused to recede from its amendment on the importation provision. Another conference was arranged that same day. The Senate finally accepted the recommendation of the Conference that substituted limited exemptions from the prohibition against importation for the general exemption proposed by the Sherman amendment for works of foreign authors or proprietors. See 22 CONG. REC. 3709-11, 3788-90, 3847-54, 3882-88, 3894-96, 3900, 3905-08, 3910-11, 3911-12 (1891). The conflict over the importation provision and its resolution demonstrate the congressional intent to fashion a strong importation provision in the same Act that established the manufacturing requirement as a condition of copyright. Congress selected both methods to protect American printing interests. It is also notable that
The language of the statute and the legislative intention are manifestly clear with respect to the Act of 1891. Copyright could be secured only by compliance with the statutory requirements on or before the date of first publication anywhere. In the case of books and certain other works, the two copies required to be deposited had to be printed from type set within the limits of the United States. Since copyright was lost if the work was published before deposit had been made, and since the two copies deposited had to be typeset here, it is clear that domestic manufacture was an absolute condition of copyright for certain works under this Act. The registration and deposit requirements were liberalized later in the general revision of the copyright law. The scope of the manufacturing requirement was broadened in some respects and narrowed in others. However, it can be demonstrated that the original Congressional intent has remained the same: compliance with the "manufacturing requirements" is a mandatory condition of copyright in the first instance.

B. "Interim" Acts of 1904 and 1905

The year 1903 marked the centennial of the Louisiana Purchase, and a World's Fair was planned for the occasion in St. Louis. Foreign exhibitors, however, expressed some reluctance to participate, in part because of the restrictions of the United States copyright law. To overcome this reluctance, the Act of January 7, 1904 introduced ad interim protection into the United States copyright law. Under this Act, deposit of a work in the Copyright Office before the closing date of the Fair secured a temporary "interim" copyright. The term of protection was limited to two years unless an American edition were produced in compliance with the manufacturing provision of the existing law and were deposited within the same period in the Copyright Office. Upon such manufacture and deposit, the "interim" copyright was extended to the full term accorded other works.

The Senate Report on Senator McComas' bill concluded as follows:

If foreigners who exhibit desire to obtain this right this bill (see sec. 8) requires them to comply with our copyright laws. The pre-

62. This phrase includes the ad interim privilege that was enacted later to ameliorate the strict requirement of the Act of 1891 that specified domestic manufacture by the date of first publication.
The protection afforded by this bill to exhibitors is for two years only. The protection to American labor given by our copyright law is carefully guarded in this bill.\(^{66}\)

The first instance of "interim" copyright in our law was therefore limited. Those who sought the benefit of interim copyright were required to comply with the provisions of the Act. Full term protection could be secured only within the interim copyright period upon compliance with the manufacturing provision and other conditions.\(^{67}\) Without "interim" copyright protection, books manufactured and published abroad were in the public domain in this country since they had been published without securing statutory copyright.

Ad interim copyright was given permanent status in the Act of 1905.\(^{68}\) The International Copyright Act of 1891 had proved to be a disappointment to those interested in securing copyright protection for foreign authors in the United States. Although English language books by famous authors were manufactured here and copyrighted, copyright registration for foreign language books was virtually nonexistent. The necessary cooperation of the book printing industry was secured and legislation was introduced in December 1903\(^{69}\) to alleviate the manufacturing requirement for foreign language authors. The report that accompanied this bill\(^{70}\) contains significant comments on the then existing law and the need for the amendatory legislation:

*Under the conditions provided for in the law a work to secure copyrights must be printed and published in this country not later than the date of its publication in any other country. The editions published in this country must be manufactured from type set within the limits of the United States.*

On account of this difficulty foreign authors, except English authors, have secured practically no advantage from the international provisions in the present copyright statute.

The obvious remedy would be to allow a reasonable period of time during which the foreign author might arrange to comply with the requirements of American manufacture.\(^{71}\)

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66. Id. at 2 (emphasis added).
71. Id. at 2 (emphasis added). See also the remarks of Senator Platt, who sponsored the Senate bill:

Mr. President, under the present law it is really impossible to procure copyright for the translation of a book in a foreign language because our law requires that
This last paragraph represents a clear statement of the purpose of ad interim copyright: to provide a grace period during which arrangements can be made for manufacture of the book in the United States. The “ad interim” provisions at this time had no other purpose. This legislation proposed no change in the mandatory nature of the manufacturing requirement; it merely “bought time” for foreign language works, a category of works that had not been able to comply with the stringent requirements of the Act of 1891.

The bill passed the House on December 14, 1904. At that point, it provided a one year period during which the foreign author could manufacture and publish his work in the United States. However, the work was subject to piracy during this period. Objections were raised to this feature in the Senate debate on January 30, 1905. The bill was amended to require deposit within thirty days of publication abroad, and the copy deposited had to bear notice of copyright. Under this amended bill, the foreign author was granted copyright protection for one year upon making the required deposit. The amended bill passed the Senate and the House concurred in the changes.

The Act of March 3, 1905, in pertinent part, reads as follows:

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day of publication in this country . . . shall deposit one complete copy of the same . . . in the Library of Congress . . . within thirty days after the first publication of such book in a foreign country, and shall insert in such copy, and in all copies of such book sold or distributed in the United States a notice of the reservation of copyright in the name of the proprietor, together with the true date of first publication . . . and shall, within twelve months after the first publication of such book in a foreign country, file the

before the date of the publication of the book abroad two copies shall be printed from type set up in the United States and deposited with the Librarian of Congress.

72. 39 Cong. Rec. 286 (1904).
73. Id. at 1579-80 (1905).
74. The Act of 1905 was definitely limited to works by foreign authors in a foreign language. English language authors were excluded from its benefits, as were American authors writing in any language. The language of the Act of 1904 had not been clear on these points, and it could have been construed to cover books published in English or a foreign language written by Americans or foreigners. See Younger, supra note 63, at 219. It was certainly the intention of Congress to confine the Act of 1904 to foreign authors (probably writing in either English or a foreign language). S. Rep. No. 142, 58th Cong., 2d Sess. 2 (1903).
75. 39 Cong. Rec. 3389 (1905).
76. Id. at 3672.
77. Importation of the foreign edition during the twelve month period of interim protection was contemplated; however, since the importation provision was not changed, it is questionable whether the Treasury Department would have permitted importation once the interim copyright was established.
title of such book and deposit two copies of it . . . printed from
type set within the limits of the United States, or from plates made
therefrom, containing a notice of copyright . . . he . . . shall
have during the term of twenty-eight years from the date of
recording the title . . . the sole liberty of printing, reprinting,
publishing, vending, translating, and dramatizing the said book.78

Thus, the basic pattern of the manufacturing requirement and
"ad interim" copyright was established by the Acts of 1891, 1904, and
1905. These provisions are reflected now in modified form in sections
16, 22, and 23 of the copyright Code. Under these former Acts, "manu-
ufacture" in the United States was an absolute condition of copyright in
a book at the time of first publication in the United States or abroad.
As an exception to this requirement, and for no other purpose, a definite
time period is set for making a special "interim" registration and
deposit in the Library of Congress. This registration secures a tempo-
rary or "ad interim" period of copyright protection. A second time
period is also specified during which an American edition must be
produced in accordance with the manufacturing requirement in order
to extend the "ad interim" copyright to full term. There must also be
compliance with other formalities, such as the copyright notice.

Nothing in the statutory language of the Acts of 1891, 1904, and
1905, or in the legislative history of the same, supports a view that
the manufacturing requirement was limited to copies published for
sale or distribution in the United States or that the "ad interim" pro-
visions were merely permissive and served some purpose other than a
grace period for compliance with the manufacturing requirement. There
can be no doubt that, from 1891 to 1909, a book manufactured outside
the United States could be copyrighted only in accordance with the
terms of the Acts of 1904 and 1905.79

The proponents of international copyright during the nineteenth
century successfully convinced Congress in 1891 that American national-
ism might be better served through international copyright than through
piracy of foreign works. Under international copyright, national author-
ship could be nurtured since it would not be faced with the competition
of pirated works by unpaid authors — the British authors in particular.
The proponents of international copyright were not, however, able to
surmount the hurdle of American protectionism without compromise.
American authors, faced with the competition of unpaid British authors,
and American publishers, faced with the spectre of unchecked piracy,

79. As noted earlier, supra notes 45 and 59, the plaintiff in the Hoffenberg case
admitted this point.
did not resist long the necessary compromise with the typographical unions and those publishers that felt the need of a protective clause. The manufacturing clause as a condition of international copyright was the *quid pro quo* demanded; the price was paid and, it is submitted, is still being paid today.

**C. The Act of 1909**

1. **Introduction**

The present law is the Act of March 4, 190980 with minor amendments. This represents the latest general revision of the copyright law. The legislative history of this Act contains relatively little significant discussion of the manufacturing requirement and the ad interim provisions. The reason for this seems evident: the basic pattern of these provisions had been established almost contemporaneously by the Act of March 3, 1905.81

The plaintiff in *Hoffenberg* relied heavily on the significant change that the Act of 1909 made in the basic method for securing copyright. He insisted that, under the Act of 1909, publication with notice of copyright would alone suffice to establish copyright and that no other sections effectively limited this method of copyright through section 9 [10].82

The Government agreed that this section provided the general method for securing copyright. However, it did not agree that no other sections limited section 9 [10]. The Act of 1909 did not completely abandon the prior system of making copyright effective upon registration. For example, copyright may be secured under section 12 in works not reproduced in copies for sale, and this copyright is secured by deposit and registration. Also, the second term of copyright is obtained under section 24 by registration with the Copyright Office.

Even though the manufacturing requirement and ad interim provisions were not the subject of extended discussion during the 1906-1909 deliberations, convincing evidence does exist that the congressional purpose, as clearly established in the Acts of 1891, 1904, and 1905, did not change with the Act of 1909.

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81. The first series of copyright conferences were held in 1905 and early 1906 under the general direction of the Librarian of Congress and the Copyright Office. The first bill was introduced in 1906. This was S. 6330 (and companion bill H.R. 19853), 59th Cong., 1st Sess. (1906).

82. Because of renumbering at the time of the 1947 codification of the copyright law (Act of July 30, 1947, ch. 391, 61 Stat. 652), most of the sections discussed in this article have been raised by one number. Thus, section 10 was originally section 9 in the Act of 1909; similarly, section 13 was section 12; section 16 was section 15; section 22 was section 21, etc. The present numbering will hereafter be given parenthetically unless the context is clear.
We have seen that under the Act of 1891 copyright was secured by deposit of copies "typeset" in the United States on or before the date of publication here or abroad. A central feature of the first bill to revise the copyright law in 1906 was that the basic method for securing copyright was changed from deposit of copies to publication with notice of copyright. Registration of the claim to copyright became a condition subsequent that, through court decisions, has been reduced to affecting the procedural right of enforcement. \(^8\)

This first bill was drafted under the direction of the Register of Copyrights, Thorvald Solberg. \(^8\) The Librarian of Congress, Herbert Putnam, opened the 1906 Hearings on the bill \(^8\) with a prepared memorandum that indicated the important provisions of the existing law which were abrogated or modified by the bill. It seems very significant that he made only these statements concerning the manufacturing requirement and the ad interim provisions under a heading:

Provisions of existing law which are omitted from the bill

Section 4952, page 6A. — Ad interim copyright. The requirement for notice (of date of publication and reservation of copyright) on the foreign edition is abolished.

Section 4956, page 8. — Preliminary deposit of title or description abolished. "Photographs" omitted from the "manufacturing clause." ["Chromos" also, in terms, but assumed to be covered by "lithographs." \(^8\)]

Not one word or suggestion appears that the mandatory nature of the manufacturing requirement has been altered intentionally. \(^8\)

Moreover, under a heading of "some leading features" of the bill, the Memorandum contained these statements:

Extends [sec. 13] the "manufacturing clause" to include texts produced by lithographic process, and also in certain cases illustra-

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\(^8\) 59th Cong., 1st Sess. (1906). The Senate and House bills were identical.

\(^8\) Theoretically, copyright may be lost under section 14, 17 U.S.C. § 14 (1964), by failure to deposit after demand by the Registry of Copyrights. See the discussion concerning the registration requirement in note 24 supra.

\(^8\) Important assistance was contributed by Richard Bowker, Vice-President of the American (Authors') Copyright League and Arthur Steuart, Chairman of the American Bar Association Committee on Copyright Matters.

\(^8\) Arguments on S. 6330 and H.R. 19853 Before the Senate and House Comms. on Patents, 59th Cong., 1st Sess. (June 1906).

\(^8\) Id. at 10.

\(^8\) It was altered unintentionally in this first bill by the change in the method of securing copyright, as discussed at p. 238 infra.
tions and separate lithographs, but abrogates it in the case of photographs.

Ad interim term [sec. 16]. — Extends the ad interim term of protection in the case of books first published abroad in foreign languages from one year to two years. Provides for an ad interim term in the case of books first published abroad in English, of thirty days, but with prohibition of importation during the interim. 89

Again, there was no reference to any fundamental change in the manufacturing requirement. The ad interim provisions were extended to English language books, but there is no reference to any option in complying with the ad interim provisions.

The “section 10” of this first bill [actually 9] did not contain a qualifying reference to publication with notice of copyright “in the United States” in the first portion before the semicolon. It was the next bill introduced that contained this qualification. 90 The exact language of the first bill is as follows:

SEC. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor. [Two concluding sentences concerned notice of copyright on works of art and lectures.] 91

Note that this language contained no reference to an exception for books seeking ad interim copyright, as does the present law. This

89. Arguments, supra note 86, at 8 (emphasis added). Foreign language books registered under the ad interim provisions would have been capable of importation under section 30(d) of this bill; as stated in the Memorandum, English language books registered ad interim could not be imported. It is believed by this writer that this dichotomy eventually resulted in some irrelevant language in section 9 [now 10] as enacted.

90. The plaintiff in the Hoffenberg case repeatedly emphasized the deletion of the phrase “in the United States” from this first portion of section 9 [10] as enacted in order to support the point that copyright could be secured by publication abroad with notice of copyright.

The government could never share the sense of importance that the plaintiff felt for this change since the regulations of the Copyright Office expressly contemplate that copyright may be secured by publication abroad with notice of copyright, provided other relevant requirements of the statute are met. 37 C.F.R. 202.2(a)(3) (1970).

The issue of notice of copyright on reprints published abroad did receive discussion at the June 1906 hearings. Arguments, supra note 86, at 50-51, 55. See also the statement by George Haven Putnam at the December 1906 hearings. Arguments on S. 6330 and H.R. 19853 Before the Senate and House Comms. on Patents, 59th Cong., 1st Sess. 50-52 (Dec. 1906). The question of notice of copyright on works first published abroad was not discussed either at the 1906 hearings or at the hearings in 1908.

was an oversight since foreign language works could be imported under section 30 (d) and since the Memorandum also stated that the notice requirement was abolished for ad interim works.

The manufacturing section [13] in this bill did leave a loophole for avoidance of the intended mandatory requirement because it contained the reference of the Act of 1891 to domestic manufacture of the "copies deposited", where, as a general rule, the act of registration would no longer operate to secure the copyright. The opening language of the manufacturing section read:

That of a printed book or periodical the text of the copies deposited under section eleven above shall be printed from type set within the limits of the United States . . .

The general deposit requirement of this first bill (section 11), although not as stringent as the Act of 1891, was more stringent than that enacted later in the Act of 1909. Deposit would have been required within thirty days of publication in the case of books (ten days for periodicals). The right to sue for infringement was lost after the thirty day period, but deposit could nevertheless be made until within one year of publication (section 15). Such registration would establish the right to sue. The drafters apparently contemplated that copyright would be lost through failure to deposit within one year of publication, but no explicit language was included.

This, and other defects, of the bill were discussed at the second series of hearings in December 1906. In response to a general attack on the bill for vagueness and lack of sanctions for violation of certain apparent requirements such as the deposit requirement, Mr. Arthur Steuart made a significant rebuttal which, while perhaps not answering all of the objections to the bill, at least, indicated the assumptions on which the drafters operated:

Now, with reference to section 10 [relating to registration of the claim to copyright, the predecessor of present section 11], it has been said that the act makes no provision for penalties for a failure to comply with the requirements of section 10. It is true that in terms the act does not. In framing the act it was thought that such penalties were wholly unnecessary, for the simple reason that it is

93. A memorandum of the Bar Association of New York City recommended clarification of the point with this language:
[If the requirements for registration are not complied with within the extension of one year permitted by this section [15] the copyright shall be deemed abandoned. Arguments (Dec. 1906), supra note 90, at 406.
94. Arguments (Dec. 1906), supra note 90.
95. See Remarks by Charles Porterfield of the Edward Thompson Law Book Company. Id. at 127–31.
a well-understood proposition of law that copyright after publication can only exist in the United States by virtue of the statute. If publication occurs without compliance with the requirements of the statute, the book is public property, and anybody can print it or use it in any way he pleases. If, however, the owner of the copyright, the owner of the book, the owner of the manuscript, desires to secure to himself the copyright granted by the statute, he must comply with the terms of the statute. That is the only possible way in which he can get copyright — by complying with the terms of the statute. The statute says he shall do so and so. If he desires to secure copyright he may secure it, but if he wants to get it he shall do so and so; he shall put a notice in his book; he shall print his book within the United States; he shall bring his copy within thirty days, or, if for any reason he can not do that, within twelve months. He must put his notice on all his copies.96

Mr. Steuart may have been correct in theory, but the conditions of copyright in the bill were not clearly expressed. The members of the Committees on Patents took note of some of the difficulties with the bill and indicated that suitable corrections would be made. For example, in response to concern by Mr. Sullivan of the Typographical Union over the scope of the manufacturing clause, Representative Currier stated:

I hope, Mr. Sullivan, that if there is any doubt about that you will take up this matter as to whether you will have the law so modified that not only must it be from type set within the United States, but the book must be printed in the United States.97

In another instance, Representative Currier noted the problem concerning deposit of copies:

I might say that I understand that the provision in reference to depositing those copies is not clear; that that is one of the things that the committee certainly would need to take care of.98

3. The second Bill: S. 8190 and H.R. 25133

At the request of the Chairmen of the Committees, the Register of Copyrights, Thorvald Solberg, prepared a confidential redraft of the bill. Based upon this redraft, revised and similar, but not identical, bills

96. Id. at 165-66 (emphasis added). It was remarked earlier that Mr. Steuart was one of the leading drafters of the first bill.
97. Id. at 48. The manufacturing requirement was later broadened to include explicitly printing from plates made in the United States. This passage is also illustrative of the "carte blanche" treatment the Typographical Union interests received.
98. Id. at 131.
were introduced in the Senate by Senator Kittredge and in the House by Mr. Currier in January of 1907.

Plaintiff's much-heralded "in the United States" did appear in the first clause of section 9 in the Senate bill, and section 10 in the House bill. The beginning of the section read:

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

It can be shown, on the basis of unpublished letters bound in the Copyright Office and available for public inspection, that this insertion of "in the United States" in the first clause was a drafting inadvertence.

Register Solberg wrote a letter to Richard Bowker on April 1, 1907 concerning proposed changes in S. 8190 and H.R. 25133. Concerning the notice requirement he wrote:

There are some amendments that there can be no question about which are necessary to correct obvious slips. The following are some of these:

The elimination of the words "in the United States" in the first sentence of Section 9 and 11 of the Senate bill and of Sections 10 and 12 of the House bill. These words were inserted in these places by inadvertence. Publication in the United States is required by the bill, as in the present law, in the case of articles required to be manufactured in the United States.

Passing from an inadvertent phrase to an intentional change, the second half of this important section contained a new reference to books seeking ad interim protection. The language of the bill, after the semi-colon, read:

and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copy-

100. H.R. 25133, 59th Cong., 2d Sess. (1907).
102. Letter from Thorvald Solberg to Richard Bowker, April 1, 1907, on file in the Copyright Office. This inadvertent slip was corrected in the next version of the revision bill in the Senate and did not re-appear in any Senate bills. However, Representative Currier, when submitting his versions of the bill, left this phrase in, apparently for the purpose of discussion. Thus it appeared in H.R. 243, 60th Cong., 1st Sess. (1907) and H.R. 22183, 60th Cong., 1st Sess. (1908). The phrase also appeared in a bill introduced by Representative Sulzer, H.R. 21984, 60th Cong., 1st Sess. (1908), but three days after this, Mr. Sulzer introduced another bill, H.R. 22071, that omitted the phrase from the first sentence of the copyright-securing section. Since this "villainous" phrase appeared in Representative Currier's bills until the last one, H.R. 28192, 60th Cong., 2d Sess. (1909), it has received more attention than it otherwise would have. It was the last Currier bill, H.R. 28192, of course, that formed the basis of the Act of 1909.
right proprietor, except in the case of books seeking ad interim protection under section sixteen of this Act. . . .

This reference to ad interim protection is the same as that in the present section 10 except for the phrase "section sixteen of this Act." In view of the statement by the Librarian in his Memorandum opening the first hearings, it is clear that this language was not intended to refer to exemption from notice of copyright at the time of first foreign publication. The notice requirement for ad interim books had already been abrogated, according to the Librarian, in the first bill. It is submitted that this was done by omitting any reference to notice in the ad interim provision of section 16 of the first bill.

This writer believes that the new language concerning ad interim protection in this second bill was inserted to cover the situation of foreign language books offered for sale in the United States after foreign manufacture. At this point in the revision process, foreign language books were subject to the ad interim provisions, and they could have been imported into the United States during the period of ad interim protection. This addition was inserted to make clear that ad interim copyright in foreign language books would not be lost by importation and sale in this country without notice of copyright. As we shall see, foreign language books were exempted from the manufacturing requirement shortly before the passage of the Act of 1909. It is submitted that the puzzling language in the present section 10 concerning ad interim books resulted from this last-minute change. The language should have been deleted when foreign language books were exempted from the manufacturing requirement. A review of this convoluted legislative history does emphasize the interdependence of the various sections. The present section 10 is not the whole story of securing copyright.

4. House Report No. 7083 (1907)

The House Committee favorably reported Representative Currier’s bill, H. R. 25133. This report contains language that, on the surface, appears detrimental to the position taken by the Government. Neither side discussed this report during the Hoffenberg litigation. The Government did not do so because the report requires explanation to be

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103. S. 8190, 59th Cong., 2d Sess. § 9 (1907); H.R. 25133, 59th Cong., 2d Sess. § 10 (1907).
104. See notes 86 & 87 supra and accompanying text.
105. See notes 133–36 infra and accompanying text.
106. See the discussion by Professor Nimmer on the apparent conflict between notice on ad interim works as "exempted" by section 10, but as required by section 16. M. NIMMER, NIMMER ON COPYRIGHT 366 (1970).
understood correctly, and the plaintiff apparently felt that the language was not significant since it referred mainly to the Act of 1891.

The Government was troubled by two passages. The first one is reflected in the following statement in the House Report:

There are only two provisions in this bill which in express terms render a copyright void. One has already been mentioned — the failure to comply with the deposit within a certain time upon a written demand; the other is the willful making of a false affidavit regarding what is known as the manufacturing clause.108

There was some concern that this passage might be used to argue that mere failure to comply with the manufacturing requirement did not result in loss of copyright, and that copyright could be lost in this respect only upon willful making of a false affidavit.109 This argument can be rebutted.

First, this passage discusses the two cases in which a copyright already secured may be voided. Failure to comply with the manufacturing requirement means that statutory copyright is not secured at all, with the exception of the protection extended temporarily under the ad interim provisions. Moreover, the reference to “in express terms” is significant. In an ordinary case, copyright would be lost by publication without the statutory notice of copyright. Nowhere in the present statute is there a statement of this result. Copyright is lost in that instance by operation of law because of failure to comply with a fundamental statutory requirement. The same is true of subsequent publications in the United States without notice of copyright.

Secondly, in reference to the penalty of voiding the copyright for false affidavit, it is clear from the legislative history of this provision that the penalty itself was superfluous. It is the affidavit provision which serves the useful function; it provides a means for the printing interests to check up on the manufacture of copies. This affidavit was avidly desired by the printing interests. It seems clear that the printers agreed to the ad interim provisions in 1904 and 1905 in exchange for the publishers' support on the affidavit.110 The clause concerning forfeiture of copyright first appeared in a separate bill that passed the

108. Id. at 8.
110. Following a protest by George Haven Putnam against the affidavit provisions at the 1908 hearings, Representative Currier explained his understanding that publishing interests had agreed to accept the affidavit in exchange for union support for the ad interim proposals in 1904 and 1905. Hearings on Pending Bills to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comms. on Patents, 60th Cong., 1st Sess. 53-54 (1908).
House in 1904.\footnote{H.R. 13355, 58th Cong., 2d Sess. (1904). The language of the affidavit proposal was incorporated in the first general revision bill introduced in 1906. S. 6330 (companion bill, H.R. 19853), 59th Cong., 1st Sess. (1906). The penalty for false affidavit appeared as part of the manufacturing clause, section 13, and read as follows: "Any person who for the purpose of obtaining a copyright shall knowingly be guilty of making a false affidavit as to his having complied with the above conditions shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than one thousand dollars, and all his rights and privileges under said copyright shall thereafter be forfeited." Some changes were made later in the revision process to reflect the altered role of registration in the copyright-securing process. The present section 18 begins: "Any person, who for the purpose of obtaining registration of a claim to copyright . . . " 17 U.S.C. § 18 (1964).} It was obviously not germane at that time since the mandatory nature of the manufacturing requirement was clear under the then existing law, the Act of 1891.

Along this same vein, Mr. Currier also remarked in the report that:

In order to afford protection to American typographers Congress some years ago enacted a law providing that in case of a book, photograph, chromo, or lithograph the two copies of the same required to be delivered to the Librarian of Congress should be printed from type set within the limits of the United States, or from plates made therefrom, . . . \footnote{No penalty whatever was affixed to the failure to comply with this requirement. The applicant for a copyright simply stated that his book was so printed. This statement was not made under oath, nor did he ever indicate where the work was done. [He then referred to the affidavit proposal.]} No penalty whatever was affixed to the failure to comply with this requirement. The applicant for a copyright simply stated that his book was so printed. This statement was not made under oath, nor did he ever indicate where the work was done. [He then referred to the affidavit proposal.]

At the hearings in December it appeared that even the enactment of that provision would not give the protection to American labor engaged in the manufacture of books which it has been the apparent purpose of Congress to give.\footnote{H.R. REP. No. 7083, 59th Cong., 2d Sess. 11-12 (1907) (emphasis added).}

Again, the statement that "no penalty whatsoever was affixed to the failure to comply with . . . [the manufacturing] requirement" initially seemed damaging to the government position during the preparation of the case.\footnote{The plaintiff did not employ this argument in Hoffenberg.} Despite this statement by Mr. Currier, the Act of 1891 clearly did provide a penalty: copyright was not secured unless the two copies deposited were manufactured in accordance with the typesetting clause. Mr. Currier knew this at the time of the report on the ad interim bill in 1904.\footnote{See notes 70 & 71 supra and accompanying text.} Surely, he did not forget it by 1907.

The explanation of this apparent inconsistency is that Mr. Currier in House Report No. 7083 was referring to establishment of an apparent copyright. The act of registration secured the copyright under the Act of 1891, and an applicant merely stated that the book
had been typeset in the United States. *The Act provided no mechanism for checking this fact.* The affidavit was intended to fulfill this function.

The report also discussed the ad interim provisions.115 The general import of the report is that, where a book is published and printed abroad, copyright can be secured in this country only by way of the ad interim sections. Although the statement is not explicit, there is nothing in it to suggest that the ad interim provisions are less than mandatory for certain works. It is extremely significant that the ad interim provisions proposed in these early general revision bills covered *both* foreign language and English language books. There can be no merit to the argument that the ad interim provisions of the Act of 1905 were not originally carried over into the general revision bills. The report merely says that, as to foreign language books, the period of interim protection would be extended to two years. In addition, English language books were to be included, but presumably under the same conditions as prevailed in the Act of 1905 for foreign language works. Only thirty days were given for deposit and registration after first publication abroad.

The subsequent removal of foreign-language works from the ad interim provisions116 — since they were to be exempted from the manufacturing requirement, if of foreign origin — was not accompanied by any statement that the ad interim provisions were rendered permissive. Moreover, the fact that this change was not made until late in the revision effort indicates that the ad interim provisions of the revision bills were in no way affected by the change in the method of securing copyright represented by section 9 [10]. The change in the general method of securing copyright had been made already in the *first* bill introduced, and the *first* bill, as well as the succeeding ones, also retained the full force of the ad interim Act of 1905.

5. *Senate Report No. 6187 (1907)*

The Senate Committee reported S. 8190 on February 5, 1907.117 The report stated that the manufacturing clause was retained and imposed additional conditions upon the copyright claimant.118

Both the House and Senate Bills as reported contained significant new references to compliance with the manufacturing requirement in the deposit section [section 11 of the Senate bill and section 12 of the House bill], in the ad interim section [16 and 17], and in the importa-

116. *See* notes 133-36 *infra* and accompanying text.
118. *Id.* at 5-6.
tion section [26 and 27]. The phrase "in accordance with the manufacturing provisions specified in section [13 or 14] of this Act" was included in the above three sections. This phrase had not appeared in the first bill introduced. The obvious purpose of these amendments was to reinforce the manufacturing requirement and to relate these crucial sections of deposit of copies, ad interim copyright, and importation of copies to the manufacturing clause section.119

However, the most significant amendment in the development of the present manufacturing clause language must still be considered. The bills reported early in 1907 contained this language at the beginning of the manufacturing clause:

That of a printed book or periodical the text of the copies deposited under section eleven of this Act [12 in H.R. 21533] shall be printed from type set within the limits of the United States . . .120

Despite the manifest intention of Congress to continue the obligatory manufacturing requirement of the Act of 1891 and, indeed, to strengthen it, this language strictly construed would have led to a result similar to that contended for by the plaintiff in Hoffenberg. Domestic manufacture of only the two copies deposited with the Copyright Office strictly would have been required. No further action was taken either on S. 8190 or on H.R. 21533.

6. H.R. 243

The next bill121 in the general revision effort was introduced by Representative Currier in December 1907. This bill was the first to use the key phrase of the present manufacturing requirement.

That of the printed book or periodical specified in section five, subsections (a) and (b), of this Act, the text of all copies accorded protection under this Act, except as below provided, shall be printed from type set within the limits of the United States . . .122

This key phrase, "all copies accorded protection," appeared in every subsequent general revision bill. It was clearly inserted to satisfy the demands of the printing interests. It was plainly intended to continue the obligatory nature of the manufacturing requirement in spite

120. S. 8190, 59th Cong., 2d Sess. § 13 (1907); H.R. 25133, 59th Cong., 2d Sess. § 14 (1907) (emphasis added).
122. Id. at § 16 (emphasis added).
of the change in the method of securing copyright. It is submitted that, at the very least, this phrase requires that the first edition published anywhere must not be produced in violation of the manufacturing requirement, "except as below provided," if copyright is to be secured.

This phrase must encompass at least the first edition published for the simple reason that United States copyright is secured or lost depending upon compliance with the statute at the time of first publication. There is nothing arbitrary or whimsical in this construction; it carries out the fundamental principal of our copyright law as established by Wheaton v. Peters.\(^{123}\)

One of the exceptions provided for in this bill was the ad interim provisions. In previous bills, the concluding phrase of the manufacturing section had also referred to ad interim protection in these terms:

But they [the requirements of domestic manufacture] shall not apply to works in raised characters for the use of the blind, and they shall be subject to the provisions of section sixteen [or 17] with reference to books published abroad seeking ad interim protection under this Act.\(^{124}\)

The revised Currier bill, H.R. 243, contained the following language:

[B]ut they shall not apply to works in raised characters for the use of the blind or to books published abroad seeking ad interim protection under this Act.\(^{125}\)

Because of the sweeping nature of the phrase "all copies accorded protection," it was apparently felt insufficient to except ad interim books by mere reference to the ad interim provisions, i.e., "shall be subject" to the ad interim provisions. It was apparently deemed necessary to include an explicit exception in the manufacturing clause without relying upon the construction that might be given to a mere reference to the ad interim provisions.

Therefore, under this bill and under the present law, if the printed book is not manufactured in the United States, and if ad interim copyright is not secured where possible, the work is in the public domain by the act of publication without securing statutory copyright. That is, if no copies of the first edition are "accorded protection" because of non-compliance with the manufacturing clause and failure to obtain ad interim copyright, no statutory copyright has

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123. 33 U.S. 591 (1834). This fundamental principle will be discussed more fully later in this article. See pp. 273-75 infra.
been secured on the basis of the first publication. The work is in the public domain upon the expiration of the period allowed for ad interim registration.\textsuperscript{128}

7. \textit{March 1908 Hearings}

Hearings on copyright revision were held again before the Committees on Patents, on March 26, 27, and 28 of 1908.\textsuperscript{127} Bills under discussion in addition to the Currier bill, H.R. 243, were S. 2499 by Senator Smoot,\textsuperscript{128} S. 2900 by Senator Kittredge,\textsuperscript{129} and H.R. 11794 by Mr. Barchfield.\textsuperscript{130}

The record of these hearings contains several statements by publishers and their representatives that the manufacturing requirement is an obligatory condition of copyright. These statements were not used during the \textit{Hoffenberg} litigation since they clearly represent mere legal opinion. Nevertheless, in the absence of statements taking another position, they do represent the contemporary legal opinion, even though not authoritative. For example, the later author of the \textit{Corpus Juris Secundum} section on copyright, William B. Hale, referred to the proposed manufacturing clause as a "condition of the validity of the copyright."\textsuperscript{131} The highly respected publisher George Haven Putnam, in protesting the affidavit requirement, stated:

If you honorable gentlemen decide to include that affidavit clause, we shall of course accept it, but it will always be under protest. It is ungermane and puts an indignity upon the publishing body. It brings, as Mr. Hale has said, unnecessary new restrictions upon copyright, the penalty now of copyright forfeiture, being quite serious and effective.\textsuperscript{132}

A significant development with regard to the scope of the manufacturing clause occurred at these hearings. Robert Underwood Johnson, Secretary of the American (Authors') Copyright League, proposed

\textsuperscript{126} The work cannot be copied without risk of an infringement action until the period for obtaining ad interim copyright has passed. This "grace period" is the \textit{raison d'etre} of the ad interim provisions and represents an intentional exception by Congress to the fundamental principle that copyright has been lost or secured on the day of first publication.

\textsuperscript{127} \textit{Hearings on Pending Bills to Amend and Consolidate the Acts Respecting Copyright Before the Senate and House Comms. on Patents, 60th Cong., 1st Sess.} (1908).

\textsuperscript{128} S. 2499, 60th Cong., 1st Sess. (1907).

\textsuperscript{129} S. 2900, 60th Cong., 1st Sess. (1907).

\textsuperscript{130} H.R. 11794, 60th Cong., 1st Sess. (1908).

\textsuperscript{131} See \textit{Hearings}, supra note 127, at 52. Mr. Hale, incidentally, was counsel for the plaintiff in United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260 (1908), a case upon which the plaintiff in \textit{Hoffenberg} relied extensively.

\textsuperscript{132} See \textit{Hearings}, supra note 127, at 53 (emphasis added). For further references, within these \textit{Hearings}, to the manufacturing clause as a condition of copyright, see pp. 373, 418, and 422-23.
an amendment excepting books of foreign origin in a foreign language from the operation of the manufacturing clause. He had previously obtained the cooperation of the printing interests. In order to explain that their proposed exception did not apply to American authors writing in a foreign language, Mr. Johnson gave the oft-used example of the governor of Minnesota writing in Norwegian:

"The American Authors' Copyright League moves for the abolition of the manufacturing clause as it relates to books in foreign language of foreign origin, not books in foreign languages of American origin. If the governor of Minnesota, for instance, should print in Norwegian his reminiscences, we should not desire to interfere with the publication of that being required in this country by the American typesetters."

Thus the American authors' group that proposed the foreign language exception made clear that it was not intended to apply to Americans writing in a foreign language. The result has been that such works must be manufactured in the United States in the first instance because the ad interim provisions as enacted were restricted to English language books, and are not available to those in a foreign language.

The first general revision bill containing the foreign language-foreign origin exception was introduced by Mr. Sulzer on January 5, 1909. The first portion of the manufacturing provision [section 16] appeared for the first time in the form in which it was enacted.

The ad interim section [22] was properly amended and appeared substantially as enacted. However, the Sulzer bill contained two errors: the importation provision [section 34(d)] prohibiting importation of foreign language books under ad interim protection was retained intact, and the exception for books published abroad seeking ad interim protection was removed from the concluding phrase of the manufacturing provision. The retention of the importation section reference was an oversight; the elimination of the ad interim reference in the manufacturing clause was deliberate but erroneous. The latter reference should have been retained to cover English language works seeking ad interim protection.

The next general revision bill was introduced by Mr. Washburn on January 28, 1909. It corrected both errors. The importation section

133. See Hearings, supra note 127, at 55.
134. Id. at 56.
135. H.R. 25162, 60th Cong., 2d Sess. (1909). The foreign language-foreign origin exception first appeared in a special bill to amend the Act of 1891 on this point alone. H.R. 22098, 60th Cong., 1st Sess. (1908). It was introduced May 22, 1908, by Mr. McCall.
provision concerning foreign language books under ad interim protection was removed. However, an over correction was made in the manufacturing clause [sec. 15]; not only were books published abroad in the English language seeking ad interim protection excepted in the concluding phrase, but also "books of foreign origin in a language or languages other than English." These latter works then had — and still have — a double exemption from the manufacturing clause — in the beginning and at the end. This inconsistency, which has puzzled many people, resulted from the fact that before the Sulzer bill, foreign language and English language works were grouped together in the ad interim provisions. When they were severed, the draftsmen were not careful to distinguish between the two categories.

Finally, on February 17, 1909, Mr. Currier introduced H.R. 28192, the bill that was enacted on March 4, 1909. This bill included the language of the Washburn bill in relation to the manufacturing clause and the ad interim provisions.


The House Committee on Patents favorably reported the Currier bill, H.R. 28192, on February 22, 1909. In discussing the general method of securing copyright the report stated:

Section 9 points out the preliminaries which must be complied with in order to obtain copyright. Under 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. The exception regarding books seeking an ad interim term will be discussed in connection with section 21 of the bill.140

This report contains essentially the same statements concerning the manufacturing clause and the affidavit as the 1907 Report. Indeed, the discussion of the ad interim provisions did not take account of the removal of foreign-language books from the operation of the manufacturing clause. However, the reference to the Act of 1905 demon-

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140. Id. at 10 (emphasis added). However, the report never did discuss the exemption in section 9 [10] for ad interim books. Perhaps, since it was superfluous, the writer of the report could find nothing to say about it.
strates the Congressional intention to maintain ad interim copyright as a limited exception to the mandatory manufacturing requirement, although foreign language works were removed and English language works were inserted.

Section 21 gives to authors of books written in the English language an ad interim term, which can not in any case endure more than sixty days. By the Act approved March 3, 1905, the proprietor of a book published abroad in a foreign language was, under certain conditions, given twelve months after the first publication in such foreign country to deposit copies and comply with the other conditions regarding copyright.

After the passage of the act of 1905 English authors felt that some such rights should be given them. Section 21 was inserted for that purpose. This bill modifies the act of March 3, 1905, which relates to books of foreign origin in a foreign language, so that until such works are translated and published in English here, they may obtain copyright for the full term by the deposit of one copy in such foreign language bearing notice of copyright within thirty days after publication abroad. This change is made for the reason that it is believed that greater benefit might accrue by according general protection to such works, thus promoting projects for translations into English which under the general clause would, later be produced within the United States, in order to gain copyright here as works in English.

Section 22 provides for an extension of the ad interim term so that it will endure for the full term provided in the act upon compliance with all the provisions of this act as to deposit of copies, registration, filing of affidavits, etc.\textsuperscript{142}

Clearly, the confusion exhibited in this passage concerning the effect of the recent amendment of the manufacturing clause affects the authoritative weight of the comments. Nevertheless, the confusion is understandable in view of the last-minute nature of the change. The statement that “under the general clause” works in English “would later be produced within the United States in order to gain copyright” should not be dismissed. This statement clearly does not support the view that United States copyright can be secured without compliance with the manufacturing clause or the ad interim provisions. Since the general effect of the manufacturing clause was not altered by the removal of foreign language books, the comments should be accorded some weight.

Concerning section 22 \textsuperscript{[23]}, the reference to “extension of the ad interim term so that it will endure for the full term” directly opposes

any view that manufacture and publication in the United States after the expiration of the ad interim time limits will serve to establish the copyright and make it retroactive to past infringements.

This legislative history shows a clear intention to retain the basic pattern of the manufacturing clause and the ad interim provisions as they existed under the Acts of 1891 and 1905. As a rule, copyright in a book can be secured only if, on the date of first publication, "all copies accorded protection under this Act" are manufactured in accordance with the statutory requirements and bear the statutory copyright notice. An exception is made in favor of "books seeking ad interim protection;" in that case, the copies at the time of first publication are not required either to be manufactured in the United States or to bear notice of copyright, as long as ad interim copyright is secured within the statutory time limits. If they do bear notice, it is irrelevant since the right must be established by deposit and registration under present section 22. Works subject to ad interim copyright are the only exception to the rule that, unless the manufacturing requirements are met on the date of first publication, the work goes into the public domain.

The bill was passed by Congress on March 3, 1909 at approximately 8:45 p.m., after very limited debate in both houses.148

The manufacturing clause has been amended three times since the Act of 1909. The first amendment seems superfluous. By the Act of July 3, 1926144 it was intended to clarify the fact that a book need not be manufactured at all in order to be copyrighted. That is, to make clear that the manufacturing clause applies only if any of the processes specified therein have been utilized. This was the understanding of the manufacturing clause before the amendment. The amendment inserted the following exception to the manufacturing clause after the exception for ad interim books:

[Nor shall the manufacturing requirement apply] . . . to works printed or produced in the United States by any other process than those above specified in this section.148

This amendment unfortunately introduced more of an ambiguity than it remedied because it was limited in terms to the United States. An implication might be drawn that if, for example, work were mimeo-

145. Id.
graphed it would be registrable only if mimeographed in the United States. The clause has not been construed in this way by the Copyright Office. Unless a process is specified in the manufacturing clause, that process may be performed anywhere without affecting the right to obtain United States copyright.

The other two amendments to the manufacturing clause provided an importation right to works under ad interim copyright. The Act of June 3, 1949\(^{146}\) granted the right to import 1500 copies if “of foreign origin.” This phrase again excluded American authors. The copies imported, moreover, were required to bear notice of copyright. This represented a partial reversal of the view current in 1906-1909 when it was proposed to allow the importation of foreign language works without notice of copyright. (Of course, English language works were not to be imported.) The language in the present section 16 that requires notice on imported copies is directly contradictory to the language in the concluding phrase of section 10 which exempts ad interim books from bearing notice of copyright.\(^{147}\) We will return to this Act in further considering the ad interim provisions.

The third amendment of the manufacturing clause was made in 1954 as part of the implementation of the Universal Copyright Convention in the United States. By the Act of August 31, 1954\(^{148}\) the privilege of importing copies under ad interim copyright was extended to American authors for the first time.

The ad interim provisions have been amended on two occasions since 1909. In each case the amendments have extended the time limits both for securing ad interim registration and for producing an American edition in order to secure full term copyright. The legislative history of these amendments to the ad interim provisions and the above 1954 amendment to the manufacturing clause provides direct and explicit support to the Government’s position that the manufacturing clause and the ad interim provisions are mandatory conditions of copyright for certain works.

To rebut these strong and uncontroverted authorities, the plaintiff in Hoffenberg argued that the statutory provisions governing the case were enacted in 1909 and that their “legislative history” ended at that time and that later legislative history was of no relevance.\(^{149}\) The


\(^{147}\) The present text of section 10 is set forth in note 13 supra.


\(^{149}\) The plaintiff cited Waterman Steamship Corp. v. United States, 381 U.S. 252 (1965); United States v. Philadelphia National Bank, 374 U.S. 321 (1963); and United States v. Wise, 370 U.S. 405 (1962). In the Wise and Philadelphia National Bank cases, the court in fact examined the legislative history of amendatory legislation. In the former it examined the 1955 amendment to the Sherman Antitrust Act:
Government responded that this argument might have some validity if reliance were being placed upon the history of the unsuccessful efforts to obtain general revision of the copyright law from 1924 to 1940. The manufacturing condition was one of the stumbling blocks in the way of achievement of a revision; most bills proposed would have eliminated the manufacturing requirement or would have relegated it to affecting remedy, as does the pending revision bill.

However, the legislative history of the ad interim amendments of 1919 and 1949, and the 1949 and 1954 amendments to section 16 are in a different category, and have clear relevance. The law of the Hoffenberg case represented the Act of 1909 as amended. Each time Congress successfully amended the ad interim provisions it acted on the explicit assumption that such provisions prescribe the sole method of obtaining a copyright for certain works. This interpretation of these provisions was expressly considered by Congress in assessing the need for amendatory legislation and in tailoring the legislation to obtain the desired

"We also agree that there is nothing in the 1955 amendment to the Sherman Act nor in its legislative history to indicate that the Congress intended to restrict the applicability of the increased fine to corporations." 370 U.S. at 415. Moreover, the passage quoted by the plaintiff in Hoffenberg to support his argument specifically referred to the unpersuasiveness of statements by a subsequent group of Congressmen who are promoting legislation "and who are unsuccessful." 370 U.S. at 411. In the Philadelphia National Bank case, the court examined in detail the legislative history of the 1950 amendment to the Clayton Act of 1914 and concluded:

[T]here is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry. . . . 374 U.S. at 348.

The petitioner in the Waterman Steamship case relied upon the history of a purportedly "clarifying amendment" of 1950 to the Merchant Ship Sales Act of 1946, Act of March 8, 1946, ch. 82, 60 Stat. 41. However, the 1950 bill was vetoed by the President on the ground that the amendment did not clarify but rather vitiated the intent of the Congress that passed the original Act. The court agreed with the President concerning the intent of the Congress that passed the original Act, 381 U.S. at 264-69. None of these cases therefore supports the argument that the legislative history of the subsequent amendments to the ad interim provisions and the manufacturing clause is irrelevant or represents "nothing more than what individual Congressmen think to be the meaning of provisions already on the books . . ." Rembar, supra note 1, at 784. The Wise and Philadelphia National Bank cases actually support the authoritative value of the legislative history of successful amendatory legislation. See also United States v. Zacks, 375 U.S. 59 (1963); Flora v. United States, 362 U.S. 145 (1960).

150. See, e.g., the Duffy bill, S. 2465, 74th Cong., 1st Sess. (1935). Senate Report No. 896, which accompanied the bill, contains this statement:

Among the other important provisions of the bill growing out of its relations to the treaty is the elimination of the requirement for the domestic manufacture in the United States of books and similar publications, if in the English language, in order to be eligible to copyright in the United States.

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

151. See note 25 supra. In addition to limiting the effect of violation of the manufacturing clause to remedy, the pending bill, S. 543, 91st Cong., 1st Sess. (1969), would limit the clause in these respects: the clause would apply only to a work consisting preponderantly of nondramatic literary material that is in the English language; even where a work is subject to the clause, the only portions required to be manufactured here are the copyrightable nondramatic literary material in English; finally, a work is exempt from the clause where the author of any substantial part of the English text is neither a U.S. national nor domiciliary, and works by U.S. nationals domiciled abroad for one year or more are also exempted. H.R. REP. No. 83, 90th Cong., 1st Sess. 134-35 (1967), to accompany H.R. 2512, 90th Cong., 1st Sess. (1967).
results. Congress arrived at an accommodation of the interests favoring retention and those favoring abolition of the manufacturing provisions.

D. The Act of December 18, 1919

World War I had caused disruptions in transportation that made it extremely difficult for foreign authors to comply with the time limits of our copyright law. American authors also experienced difficulties in complying with foreign laws.

Senator Kirby introduced a bill, to amend section 8 [9] and section 21 [22] of the Act of 1909 to allow copyright for works that had been produced or published in certain foreign countries during the war, and to extend the ad interim time periods. Hearings were held on the companion bill, H. R. 15853. In reporting the bill favorably, it was stated:

British authors have also experienced much difficulty in registering books for ad interim copyright and in complying with the provisions of the manufacturing clause within the specified time.

Congress adjourned before any action could be taken on this bill. In the first session of the next Congress, Mr. Nolan re-introduced the same proposal in H.R. 3754. Mr. Nolan, Chairman of the Committee on Patents, was in charge of the bill in the House debate. His opening statement included these remarks:

Due to the limited amount of time permitted under the present copyright laws and our reciprocal relations with other countries, it was impossible for foreign authors in friendly and neutral countries to get their works to America in time to be copyrighted.

It is therefore proposed in this bill to amend section 8 [now 9] so as to secure retrospective protection in the United States for such works as have been first produced or published abroad since August 1, 1914, by providing in the case of such works that the conditions and formalities prescribed with respect to such works by the copyright statutes of the United States may be complied with within a period of 15 months after the date of the proclamation of the President’s proclamation of peace.

These conditions, briefly enumerated, are the deposit of copies for registration, the filing of applications . . . and in the case of books in the English language, that the copy shall have been reprinted and rebound within the limits of the United States.

It does not repeal or amend any of the manufacturing sections of the present copyright law.\(^{157}\)

In answer to a question whether the bill contemplated “any new privileges or protection to alien authors not provided by existing law,” Mr. Nolan replied:

No; only that it takes care of a situation that arose during the war. Authors in foreign countries had to get their works in this country within a certain specified time. The book had to be manufactured and printed, and during the war they were unable to do that. This extends that time within which that can be done and gives them the right to copyright the works that were produced during the war, provided they give our authors and publishers similar protection in their own country.\(^{158}\)

The bill passed the House on July 23, 1919.\(^{159}\) The Senate Report\(^{160}\) adopted as its statement of the proposed changes in the law a memorandum of the Register of Copyrights:

The purpose of [the increases in the ad interim time limits] . . . is to facilitate compliance with the requirement of our law that a foreign book in the English language must be type set, printed, bound, and republished in the United States in order to secure copyright protection. The bill does not propose any change whatever in the so-called manufacturing requirements of our copyright laws.

British authors reciprocally can secure copyright in the United States provided their works are re-manufactured and republished here not later than 60 days after publication in Great Britain.\(^{161}\)

The legislation was enacted on December 18, 1919.\(^{162}\) The fact that amendatory legislation of this nature was deemed necessary a mere ten years after the Act of 1909 affords convincing support for the contention that, in the case of books manufactured and first published abroad in English, compliance with the ad interim provisions was essential in order to secure United States copyright.

\(^{157}\) Id. at 2690–91 (emphasis added).
\(^{158}\) Id. (emphasis added). See also the statement by Mr. MacCrate at 3071–72.
\(^{159}\) Id. at 3073.
\(^{161}\) Id. at 3. The debate in the Senate was brief. 59 CONG. REC. 271 (1919).
\(^{162}\) Act of Dec. 18, 1919, ch. 11, 40 Stat. 368.
The same result sought by the plaintiff in *Hoffenberg* was achieved by special legislation in 1919. If compliance with the ad interim provisions were not essential for English-language books first manufactured and published abroad, surely no legislation allowing copyright for works produced and published during the War would have been necessary. Moreover a "saving clause", protecting those who used the work without permission, would have represented a retroactive taking of property.\(^\text{168}\)

One might advance the argument that Congress did not know what it was doing in 1919, notwithstanding the fact that it was merely ten years after the general revision, or that it was being super-careful in order to protect the rights of authors. The legislative history, however, contains no suggestion of doubt on the mandatory nature of the manufacturing clause and the ad interim provisions. The Act of 1919 demonstrates that where Congress sanctions a temporary public domain it does so in express terms, and it provides protection for those who may have used the work while it was part of the public domain.

\textit{E. The Act of June 3, 1949}

During the 1920's and 1930's persistent efforts were made to amend the United States copyright law to permit entry of the United States into the Berne International Union for the Protection of Literary and Artistic Works.\(^\text{164}\) In some instances only the minimum legislation necessary to effect entry into Berne was proposed;\(^\text{165}\) at other

\(^{163}\) The Act of 1919 contained a "saving clause" as follows:

Provided, further, that nothing herein contained shall be construed to deprive any person of any right which he may have acquired by the republication of such foreign work in the United States prior to the approval of this Act.

Similar legislation was enacted at the time of World War II. The ad interim provisions were not amended directly, but the amendment of section 8 [now 9] was intended to affect works subject to the ad interim provisions. The legislation was open-ended since it was enacted at the beginning of the War. Under the Act of Sept. 25, 1941, ch. 421, 55 Stat. 732, the President was authorized, upon a finding of "the disruption or suspension of facilities essential" for compliance with copyright "conditions and formalities," to grant an appropriate "extension of time . . . for the fulfillment of such conditions or formalities. . . ." The Act contained a "saving clause" to protect users of works under acts prior to the effective date of the proclamation.

The House Committee report contained this significant statement:

Care has also been taken adequately to protect rights lawfully exercised by American users or publishers of copyrighted works protection of which has lapsed due to the failure, arising from the disruption of facilities, to comply with statutory conditions essential to the renewal of copyrights or to the acquisition of ad interim copyrights.


\(^{164}\) The Convention may be referred to merely as "Berne," being signed at Berne, Switzerland, on September 9, 1886. The present membership numbers nearly sixty countries. The United States, Russia, and China are not members. The effort began with the Tincher bill in H.R. 11476, 67th Cong., 2d Sess. (1922), during the next twenty years each Congress considered international copyright legislation.

\(^{165}\) \textit{See, e.g.,} the Tincher bill, \textit{Id.;} a Vestal bill, H.R. 8912, 70th Cong., 1st Sess. (1928); and S. 1928, 73d Cong., 1st Sess. (1933).
times, the proposal was part of a general revision bill. All failed for one reason or another. World War II halted these efforts.

As the Berne Union marked its 60th anniversary in 1946, the United States remained outside. However, United States authors had obtained protection in Berne countries by effecting simultaneous publication in the United States and in a Berne Union country. This device is the familiar "back door to Berne." The effectiveness of such protection has not been clear since each Berne member can independently determine the validity of the publication. Moreover, in 1914, the Berne Union adopted a Protocol whereby members could enact legislation denying protection to works by citizens of non-members, if the non-member country did not extend sufficient protection to citizens of member countries.

There were indications in the post-war era that some Berne members were disposed to pass such legislation and to close the "back door." To forestall this threat, a bill was introduced in 1949 to amend the ad interim provisions. The manufacturing clause and the ad interim provisions were the primary irritant to foreigners.

The legislative history of the Act of June 3, 1949 gives very strong support to the principle that, from introduction in the Act of 1891 to the present, the manufacturing clause — and the later ad interim provisions — have always represented mandatory conditions for securing United States copyright in certain works. The 1949 Act extended the time periods both for obtaining ad interim copyright, and for converting the ad interim copyright to full term; a six month period for the former and 5 years for the latter. In addition, importation of copies of the foreign edition was allowed for the first time. After ad interim registration had been made, 1500 copies of "foreign origin" could be imported.

166. See, e.g., the Perkins bill, H.R. 11258, 68th Cong., 2d Sess. (1925); a Vestal bill, H.R. 10434, 69th Cong., 1st Sess. (1926); a Sirovich bill, H.R. 10364, 72d Cong., 1st Sess. (1932). As anyone with some knowledge of the copyright law knows only too well, massive efforts have been made to achieve a general revision of the copyright law since 1924. Such efforts have had very little success.

167. "All [efforts to alter the copyright law in the past twenty years] have broken on the rock of uncompromising intransigence of authors' and exploiters' organizations, often having little or no connection with international copyright policy." McClure, Copyright in War and Peace, 36 Am. J. INT. L. 383, 392 (1942).


172. These are the present periods. See 17 U.S.C. §§ 22, 23 (1964).

173. This limitation of the importation privilege to works of "foreign origin," was removed by the Act of August 31, 1954, ch. 1161, 68 Stat. 1030, that implemented the Universal Copyright Convention. American authors therefore first obtained this "testing of the market" privilege in 1954, forty-five years after the last general revision.
The House Committee report on the bill that became the Act of 1949 clearly indicated that the changes in the law were merely ameliorative. The changes did not “effect any radical change in the present copyright law.” The report discussed at length the reasons for rejecting an argument advanced at the hearings by the Author’s League “that ad interim registration should not be made a prerequisite to the importation of 1500 copies of the work.” In so doing, the report contains the most detailed and clearest statements of the effect of failure to comply with the ad interim provisions.

First, the report adverted to the requirement of notice of copyright on imported copies.

If ad interim registration were not required as a prerequisite to the importation of copies of the work, then the foreign publisher could export to the United States up to 1,500 copies of the work bearing copyright notice and then fail to obtain ad interim registration for the work. The result would be that these copies would bear a false copyright notice, and as users of copyrighted material customarily assume that a notice of copyright means that the work is protected by United States copyright, the foreign author and publisher would obtain substantially the benefits of copyright protection without having actually complied with our law.

The second reason given for maintaining ad interim registration as a requirement for importation makes reference to a work, that has fallen into the public domain because of failure to comply with such provisions:

American authors who desire to quote from or otherwise use copyrighted works must obtain the permission of the copyright proprietor. . . . If in fact no ad interim registration had been obtained . . . . [t]he result would be either a great delay in the progress of the American author’s work, or the exaction of a fee where none would be properly claimed, or the denial of the right to use the foreign work where in fact the work was in the public domain and [no] such right of denial existed.

Finally the report stated flatly:

Until ad interim registration is obtained, it is impossible to tell whether the book is in the public domain or will be protected by copyright. Section 2 of the bill gives the foreign author and publisher 6 months in which to apply for ad interim protection. It

175. Id. at 2.
176. Id. at 3-4.
177. Id. at 4 (emphasis added).
178. Id. (emphasis added).
is highly desirable that every incentive be provided to cause the foreign author and publisher to apply for copyright as soon after publication abroad as may be possible so that the period in which the work is neither copyrighted nor is in the public domain may be cut to a minimum. The requirement that ad interim registration be obtained before any copies of the work may be imported, will have the effect of causing prompt registration for ad interim copyright.\textsuperscript{179}

The Senate Report contained equally firm support for the Government's position.\textsuperscript{180} Concerning the changes proposed in existing law, it stated:

\textit{The present United States law requires all foreign authors and publishers of books and periodicals written in the English language to do two things to obtain copyright in the United States: They must (a) register the book or periodical in the United States Copyright Office within 60 days of publication abroad and (b) manufacture the work in the United States within 4 months thereafter. The bill allows 6 months for registration in the United States Copyright Office and 5 years within which to manufacture in the United States.}\textsuperscript{181}

The report went on to state the advantages of the proposed legislation:

The manufacturing clause . . . is a bar to the manufacture in the United States of books published abroad in the English language except in the case of works by the most famous authors. * * * This bill will—

(a) Extend the time for manufacture in the United States \textit{without loss of copyright}. This will allow American and foreign publishers sufficient time to determine whether the book can be profitably published in this country.

(b) Permit an American publisher to test the market by the importation of 1500 copies before investing his money in the publication.

(c) Reduce the likelihood of retaliation against us.\textsuperscript{182}

Most of the statements in these reports refer to the effect of the manufacturing clause and the ad interim provisions on foreign authors. The statements apply equally well to works by American authors. The reports refer to foreign authors because they provided the reason for

\textsuperscript{179} \textit{Id.} (emphasis added).

\textsuperscript{180} \textit{S. REP. No. 375, 81st Cong., 1st Sess. (1949).}

\textsuperscript{181} \textit{Id.} at 1 (emphasis added).

\textsuperscript{182} \textit{Id.} at 2 (emphasis added).
the amendment, which was to forestall retaliatory legislation by foreign countries in the interest of their nationals. The ad interim provisions of the Act of 1909 did not discriminate between works by foreigners and by American citizens. (The manufacturing clause did so discriminate by exempting works of foreign origin in a foreign language.) We have noted that in 1949 the new importation privilege was extended to foreign authors only. Five years later, the legislation implementing the Universal Copyright Convention\(^\text{183}\) effected a significant distinction between American citizens and non-domiciled aliens. One of the cardinal concessions that the United States made to enter an international copyright convention\(^\text{184}\) was to abrogate the manufacturing clause with respect to non-domiciled aliens.\(^\text{185}\)

American author groups supported this "discriminatory"\(^\text{186}\) legislation both because of their "common cause" with foreign authors, and

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\(^{184}\) We have referred to the inability of the United States to enter the Berne Union. The Universal Copyright Convention was created under the direction of UNESCO largely as a means of bringing the United States into the international copyright fold.

\(^{185}\) This change in the law was accomplished by amendment to section 9. 17 U.S.C. § 9 (1964).

\(^{186}\) The plaintiff in \textit{Hoffenberg} argued that the Government's construction of the manufacturing clause and ad interim provisions raised constitutional issues. Principally, he argued that there is a discrimination against American authors in favor of foreign authors amounting to a denial of equal protection of the laws and a violation of due process under the Fifth Amendment. He also argued that the regulation causes an inversion of the constitutional purpose behind the copyright clause of the United States Constitution, U.S. Const. art. I, § 8, resulting in an unconstitutional burden on authors. Finally, he argued that the combination of hardship and complexity amounts to an impairment of free expression and violates the First Amendment.

Neither argument has any merit. Copyright is wholly statutory and Congress is entitled to "attach what conditions to its grant it [sees] fit." United Dictionary Co. v. G. & C. Merriam Co., 208 U.S. 260, 264 (1908). \textit{See also} Wheaton v. Peters, 33 U.S. 591, 663–64 (1834). On the "discrimination" point, it is certainly true that the principal impact of the manufacturing clause and the ad interim provisions now falls upon works by American citizens and domiciliaries, but this represents a deliberate choice by Congress not to liberalize the manufacturing requirements for Americans to the same extent that it has for foreign authors. We have seen that the original manufacturing clause was the \textit{quid pro quo} for international copyright, and American authors at that time labored hard for international copyright because they got something in return: protection for their works in foreign countries. The moral right of copyright protection for all authors also appealed to many as a basis for pressing for international copyright.

As the manufacturing requirement was eased for foreigners, American authors supported the changes. Certainly, they also advocated abolition of the manufacturing clause, but since this was politically unfeasible, the labor interests were assured that American works would remain subject to the manufacturing requirements. Beginning in 1905, Congress has made distinctions between American authors and foreign authors under the manufacturing clause, and this gap has widened each time the law was amended. \textit{See, e.g.,} \textit{Hearings Before a Subcomm. of the Comm. on Foreign Relations and a Subcomm. of the Comm. on the Judiciary on the Executive, 83d Cong., 2d Sess. 26, 51, 180 (1954).}

With respect to the copyright clause of the Constitution, the plaintiff conceded that it was within the power of Congress to impose a manufacturing restriction under copyright legislation. Brief for the Appellant at 43, \textit{Hoffenberg v. Kaminstein}, 396 F.2d 684 (D.C. Cir. 1968). He argued, instead, that the manufacturing clause as construed in the regulation was ineffective and did not protect American printers as
because amelioration of the manufacturing requirement for foreigners forestalled possible retaliation by other countries against American works.\textsuperscript{187} Moreover, American authors received a direct benefit in that the ad interim importation privilege was extended to them by an amendment of section 16.\textsuperscript{188}

### III. Judicial Authority

The case law did not figure prominently in the \textit{Hoffenberg} litigation because the central issue was one of first impression. Moreover, there are very few cases that have involved the ad interim provisions and the manufacturing clause even in a general way. Copyright proprietors, in the past, have managed to avoid litigation concerning the sections at issue here.\textsuperscript{189} However, case law did provide main authority on an important side issue of \textit{Hoffenberg}: the effect of first publication abroad. This issue will be considered later.

Apparently, only four cases, other than \textit{Hoffenberg}, have involved the ad interim provisions directly. The first case, \textit{Encyclopedia Britannica Co. v. Werner Co.}\textsuperscript{190} arose under the first “interim” copyright Act of 1904.

The Encyclopedia Britannica, which had been distributed for several years in the United States, was exhibited at the Louisiana Purchase Exposition. Registration was made under the copyright act well as plaintiff’s construction would. This, however, is an argument about statutory construction rather than about a constitutional problem.

On the first amendment argument, it must be evident that the regulation does not impair an author’s freedom to express himself in writing. An author may write what he pleases. However, if he also wants to obtain copyright protection, he must comply with the relevant statutory provisions. The manufacturing clause is a “burden,” as is the notice requirement for most works, but neither section 16 nor section 10 represents an unconstitutional burden.

\textsuperscript{187} Again, this amelioration of the manufacturing requirement was possible only because a significant element of the printing interests was finally persuaded that economic considerations would lead to reprinting of foreign works in this country even though they were exempted from the manufacturing requirement. The Book Manufacturers’ Institute withdrew its opposition and supported the legislation. \textit{Hearings, supra} note 186, at 179–80.

\textsuperscript{188} \textit{See} S. Rep. No. 1936, 83d Cong., 2d Sess. 6 (1954).

\textsuperscript{189} “Courtesy” copyright and the moral and business pressures that may be applied to gain protection without an enforceable right played a large role in the natural avoidance of litigation. \textit{See} note 26 \textit{supra}. It must also be conceded that the practice of the Copyright Office prior to 1954 may have been a factor. The rules in effect from 1909 to 1954 strongly implied that the manufacturing clause and ad interim provisions were mandatory conditions of copyright. Rules 27, 28 and 38, U.S. Copyright Office, \textit{Compilation of Regulations Concerning Copyright} 1874–1956. However, since the Office was not willing to take a position on the merits until 1954, its practice under the “rule of doubt,” discussed in note 10 \textit{supra}, permitted registration of claims “for whatever they might be worth” after manufacture of the American edition even though the ad interim time limits had not been met. If any of these claims were litigated as is virtually certain, it appears that no defendant challenged the validity of the registration and of the copyright on the ground of non-compliance with mandatory statutory requirements.

\textsuperscript{190} 135 F. 841 (C.C.N.J. 1905), \textit{aff’d, sub nom.}, Encyclopedia Britannica Co. v. American Newspaper Ass’n, 142 F. 966 (3d Cir. 1906).
of 1904. In a suit for copyright infringement, the court held that the Act of 1904 did not provide copyright protection to books of foreign authors that had been published in the United States prior to the Act of 1904 without securing copyright. The Court made this interpretation even though the Act, in its terms, made no distinction between works already published in the United States and works published only abroad.

In reaching this conclusion the lower court expressly construed the manufacturing requirements in the Act of 1891 as mandatory conditions of copyright. Moreover, the court added that, even if the registration were valid, the copyright would end at the expiration of the interim period unless an edition were manufactured in this country before such expiration. Both the lower court and the appellate court utilized a reasonable rule of construction in reference to the Act of 1904; the spirit of the law and the manifest intention of Congress were given precedence over a literal reading that might have accorded copyright protection.

In the copyright infringement action instituted by the publisher and authors of “Candy” that preceded the “mandamus” action against the Register of Copyrights in the instant case, no decision was reached on the merits because the court followed the decision in Vacheron & Constantin-Le Coultre Watches, Inc. v. Benrus Watch Company, Inc. Thus, since the Copyright Office had not issued a certificate of registration covering the entire work, the court ruled that an action for infringement could not be maintained until such a certificate were presented to the court.

The ad interim provisions were discussed in dictum herein however.

It could be said that since compliance with Section 22 results in a “reservation” of copyright, no copyright is obtainable after 5 years if it was not first “reserved” in accordance with the section. This construction is reinforced by Section 23. . . . The specific reference to publication of the book in the United States “within the period of such ad interim protection,” i.e. within the five years, gives rise to a permissible inference that if the book is not published in the United States until after the five-year period has expired, no permanent copyright on it can be secured.

Another case, Grove Press, Inc. v. Greenleaf Publishing Co., involved the novel “Thief’s Journal” by Jean Genet. Copyright had

191. Id. at 846.
193. 260 F.2d 637 (2d Cir. 1958). See note 5 supra.
been secured in the work through publication with notice of a French language edition. Since the author was a citizen of France, the original work was exempted from the manufacturing requirement. Later, an English translation was manufactured and first published abroad without securing ad interim copyright. The court assumed arguendo that the English translation was in the public domain in this country because of failure to comply with the ad interim provisions, but it held that this did not destroy copyright in the original French version. This decision seems correct, although some of the language may be too broad; there are situations in which publication of a derivative work will destroy some copyright protection in the original.\textsuperscript{196} The position taken by the Government in \textit{Hoffenberg} is entirely consistent with the Grove Press decision.

One other case, \textit{Olympia Press v. Lancer Books, Inc.},\textsuperscript{197} also involved an English translation. This case involved a work in the public domain — "The Story of Juliette" by the Marquis de Sade.\textsuperscript{198} Ad interim copyright was not secured even though the copies were first manufactured and published abroad. At issue in this case was the identity of the "author." As explained earlier,\textsuperscript{199} registration had been made on the basis of the assertion that Olympia Press, a citizen of France, was the author as employer in a work made for hire. The translator was an American citizen. The court denied the plaintiff's motion for preliminary injunction restraining the defendants from marketing the work because it concluded that there was a serious question as to whether Olympia Press was the author; if Olympia Press were not the author, the work would be in the public domain because of failure to comply with the manufacturing requirements and the ad interim provisions.

The manufacturing requirements have been involved in a few more decisions. Several of these were decided under the Act of 1891. One of the latter affords apparent support for the plaintiff's position in \textit{Hoffenberg}.

\textsuperscript{196} For example, publication of an edition in the United States without notice of copyright will presumably destroy copyright in any new matter and in any old matter to the extent that it has been republished in the new edition.
\textsuperscript{197} 267 F. Supp. 920 (S.D.N.Y. 1967).
\textsuperscript{198} It might be thought that the lateness of this litigation, concerning ad interim provisions established under the Act of 1909, is related primarily to the controversial subject matter of the books. Our obscenity laws would certainly have hampered their circulation a decade ago. But, the problem presented by the ad interim provisions has been recognized since the early days of the Act of 1909. The real reason that litigation did not arise earlier is, in the view of this writer, because of the past concept of publishing as a profession more than as a business. With the "paperback revolution" and the general proliferation of publishers, publishing has become more of a business and less of a profession. In a business, works not under copyright are likely to be published without paying the author anything. (Of course, most publishers do continue the traditions and would not publish a work by a living author without paying some royalty, where the legal right has been lost on a technicality.)
\textsuperscript{199} See note 10 \textit{supra}.
berg, although he did not use it, either because the case is clearly wrong or because the Act of 1891 was not the applicable law. The holding of Osgood v. Aloe Instrument Co. was that the copyright was invalid because of failure to deposit two copies on or before the day of publication. In so ruling, the court entirely overlooked the amendatory Act of March 3, 1893 that would have saved the copyright on this point. The copies had been deposited on November 20, 1891, after the date of publication, and the Act of 1893 extended blanket “forgiveness” for late deposits between the effective date of the 1891 Act and March 1, 1893. The court also held the copyright void by reason of a defective copyright notice.

However, earlier, the court had ruled that the plaintiff need not allege compliance with the typsetting provision because the Act of 1891 “does not, in terms or by fair implication, make the doing of this work within the limits of the United States a condition precedent to securing a valid copyright.” This was merely a procedural ruling. Indeed, the court went on to state additionally that, even if the plaintiff were required to plead compliance with the typsetting requirement, the defendant had failed to file the correct paper in that he should have demurred to the complaint rather than excepted to it. To the extent that the first ruling represents an interpretation of the Act of 1891 it is clearly wrong in view of the statutory language and the confirming legislative history.

Patterson v. J. S. Ogilvie Publishing Company is sometimes cited in support of the Osgood case as holding that non-compliance with the typsetting clause is a matter of affirmative defense only. However, the book involved in this case was printed and copyrighted in 1890; it was therefore not subject to the typsetting clause of the Act of 1891. The court so stated:

The difficulty with this objection [to no evidence of compliance with the typsetting clause] is that the book was copyrighted and printed in 1890, and the amendatory act which inserted in section 4956 . . . the words above quoted was not passed until March 3, 1891.

202. The Act of 1891 had tightened the deposit requirement; under prior law, ten days had been allowed for deposit after publication.
204. 119 F. 451 (C.C.S.D.N.Y. 1902).
205. The highly respected Stephen Ladas cites these cases thusly in his treatise. S. LADAS, THE INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 766 (1938).
The scope of the typesetting provision in the Act of 1891 quite properly was construed strictly with respect to the kinds of copyrightable works subject to it.207

The only two cases decided under the Act of 1909, rather than involving the manufacturing clause directly, were concerned with the importation provisions. Neither Bentley v. Tibbals,208 nor Meccano, Ltd. v. Wagner,209 concerned the first edition of an English language book. In each case, copyright had been secured by a prior manufacture and publication within the United States. In both copyright infringement actions the defendants argued that wrongful importation of copies foreclosed the plaintiffs' recovery. In rejecting such a contention the courts replied that the defendants were not harmed by such importation, that the importation offenses were committed against the United States Government alone, and that copyright protection is not thereby voided.210

These decisions do lend support to the Government's construction of section 16 — that the manufacturing clause operates primarily with respect to the first edition and subsequent violations, after copyright has been secured, do not divest the copyright. Conversely, if section 16 is applicable only to "copies for sale on the American market" and the Bentley and Meccano cases were followed, there would be no compulsion to manufacture in this country, except to bring an infringement action.

IV. SECONDARY AUTHORITIES

In his article on the central issue in the Hoffenberg case, counsel for plaintiff described the eight treatises and articles supporting the Government's position as "an enormous number considering the fact that the point had never been adjudicated."211

207. Littleton v. Oliver Ditson Co., 62 F. 597 (C.C.D. Mass. 1894), held that musical compositions were not subject to the typesetting clause. Hervieu v. J.S. Ogilvie Pub. Co., 169 F. 978 (C.C.S.D.N.Y. 1909), held that dramatic compositions were not "books" within the meaning of the clause and therefore need not be printed from type set in the United States.


210. 223 F. at 252-53; 234 F. at 923.

211. Rembar, supra note 1, at 771. After citing the treatises and articles in a footnote, he commented further that:

[this] shows one or both of two things: (1) the point itself is intriguing; (2) commentators on the law have an unfortunate tendency to accept what they are told by experts in the field (i.e., each other).

Id. Since, in a later footnote, n.48 at 785, he refers to "the effective if legally dubious point that almost everybody agreed with the government," it seems likely that Mr. Rembar accords more weight to reason number two. This writer would add a third alternative: the interpretation reached by various commentators may be correct under the statutory language and other primary authorities.
A comment of particular importance, both because its source and contemporaneity, is that by Richard R. Bowker, who, as Vice-President of the American (Authors’) Copyright League, was active in the legislative efforts surrounding the Acts of 1891 and 1909. It was he who drafted the foreign origin-foreign language exception to the manufacturing requirement, and thus removed such works from the scope of the manufacturing clause and the ad interim provisions. In discussing the Act of March 4, 1909 he made this clear statement in his treatise:

[T]he failure to deposit the foreign copy within thirty days after publication, or the failure to publish an American-made edition within thirty days after such deposit, will forfeit the right to obtain copyright protection and throw the foreign work into the public domain, despite the ad interim registration.

In an important copyright treatise published within a decade after the Act of 1909, Arthur Weil also took the position that the ad interim provisions are mandatory. However, his position was based in part upon the view that copyright could never be secured by a first publication with notice of copyright outside the United States.

Despite partial reliance on the now discredited principle that first publication abroad with notice cannot invest United States copyright, Weil’s remarks are significant in that he also accepts the principle that United States copyright after publication here or abroad is wholly statutory. The fact that he shared the then prevalent but mistaken view concerning investitive publication does not necessarily mean that he was equally mistaken concerning possible divestitive publication.

The author of a more recent text commented on the existing ad interim provisions in this way:

Before five years have elapsed the proprietor of an ad interim copyright may print the book in the United States and other-

212. R. Bowker, Copyright, Its History and Its Law 156 (1912).
213. Id. at 147-48. As a good advocate, Mr. Rembar had attempted during the litigation to discredit Mr. Bowker as an authority by pointing out that Mr. Bowker was mistaken in believing that the deposit requirement represented a condition of copyright whereas the case of Washingtonian Pub. Co. v. Pearson, 306 U.S. 30 (1939), has established that in practical terms it affects only remedy. Technically, however, Mr. Bowker is correct notwithstanding the Washingtonian case; deposit is mandatory and the Register may demand compliance.
214. A. Weil, American Copyright Law 360 (1917).
215. Id. at 270-77.
216. See the discussion concerning publication abroad, notes 244-80 infra and accompanying text, and note 90 supra. But see, Inselbuch, First Publication Abroad — Investitive, Divestitive, or Inoperative?, A Territorial View of Copyright, 35 Fordham L. Rev. 477 (1967).
wise comply with the . . . [statutory formalities]. Thereupon he obtains a copyright on such work . . . for the full remaining term. Otherwise, after the five years, the work is in the public domain, and all rights are lost in the United States.\textsuperscript{218}

The Government's position also received strong support in law review comment.\textsuperscript{219} Samuel Tannenbaum, in considering the shortcomings of the present law, devoted special attention to the manufacturing clause:

Under Section 16 of the present Act, if he [a U.S. citizen] initially published his work abroad in the English language and fails to register his claim to ad interim copyright within six months after such foreign publication, he loses his United States copyright. . . . To secure the full 28 year copyright, he is required to manufacture and republish a United States edition. Should he fail to do so, the ad interim protection would end at the expiration of the five year period.\textsuperscript{220}

Another article anticipated and propounded the Hoffenberg plaintiff's attack on the constitutionality of the manufacturing clause and ad interim provisions. The author did not, however, deny the basic mandatory effect of the ad interim provisions.\textsuperscript{221}

One article, which was written after the implementation of the Universal Copyright Convention, comments:

To obtain ad interim protection the author or proprietor of the book published abroad must, within six months of such publication, deposit in the Copyright Office a copy of the foreign edition of the book and request a reservation of copyright. Not until after proper deposit and registration is protection granted. . . .

If the book proves successful and the author procures a United States printing, he may obtain an extension of his copyright for the full statutory term upon compliance with the . . . [other statutory provisions]. On the other hand, if no such authorized United States edition is published within five years, all of the author's rights are lost forever.\textsuperscript{222}

\textsuperscript{218} S. Spring, Risks And Rights in Publishing, Radio, Motion Pictures, And The Theater 106 (2d ed. 1956) (emphasis added).
\textsuperscript{219} See note 223 infra.
\textsuperscript{220} Tannenbaum, The U.S. Copyright Statute — An Analysis of Its Major Aspects and Shortcomings, 10 N.Y.L.F. 12, 19 (1964).
\textsuperscript{221} Younger, supra note 63, at 226. He did argue that the mandatory effect should be confined to Americans residing in the United States.
\textsuperscript{222} Note, 30 N.Y.U.L. Rev. 478, 481 (1955). The writer of this note, as well as the writers of several other supporting treatises and articles, deplored the fact of the manufacturing clause as a condition of copyright. Id. at 487.
Further exposition on supporting secondary authorities will be foregone in order to consider those writers that may explicitly or implicitly oppose the government position.

It seems fair to state that no authority has taken the unqualified position that the ad interim provisions are permissive. No one before the plaintiff advanced the view that the manufacturing clause was restricted to "copies sold on the American market."224

The most embarrassing statement to the Government was that made by a former Assistant Register of Copyrights, Herbert A. Howell. In a copyright handbook, he described the application by the Copyright Office of the rule of doubt:

If no ad interim protection has been sought or secured in the first instance through failure of the copy to arrive in due time; or, if the American edition is not gotten out within the prescribed term, the work is open to piracy for the time being and may perhaps fall into the public domain; but not necessarily. There is still a fighting chance. If the author subsequently complies with the manufacturing provisions and publishes his book with the required notice, he has given American labor the benefit sought by the statute and may fairly expect to be protected at least from that time on, subject to any intervening equities that may have arisen in behalf of any person with respect to such book. At any rate, the Copyright Office has always been inclined to give the author the benefit of the doubt, if there be any, and make registration for whatever it may be worth.225

Several points may be noted about this passage. First, Howell does not assert affirmatively that the ad interim provisions are permissive. Second, he believed that the work was "open to piracy" until an American edition was manufactured, unless there was compliance with the ad interim provisions. Third, he believed that a copyright could be obtained after such a period of "piracy" only if the copyright were subject to "intervening equities."226 Finally, his views are in-

223. The following writers provide explicit support for the Government's position: A. Shafter, Musical Copyright (2d ed. 1939), at 465-66; Comment, Manufacturing Clause: Copyright Protection to the Foreign Author, 50 Colum. L. Rev. 686, 689-90 (1950); Comment, International Copyright Protection and the United States, 62 Yale L.J. 1065, 1069 (1953); Note, International Copyright Protection and the United States, 62 Yale L.J. 1065, 1069 (1953); Note, 52 Iowa L. Rev. 1121, 1136 (1967). For implicit support of the government position, see L. Amdur, Copyright Law and Practice 632-33 (1936); H. Ball, Law of Copyright and Literary Property 211-12 (1964); Copinger & Skone, James on Copyright 442 (9th ed. 1958).
224. Rembar, supra note 1, at 785.
226. This phrase has reference to the serious question that would arise under the Howell theory should unauthorized editions be produced before an authorized American edition. The amendatory legislation of 1919 and 1941 that permitted copyright in works published during the world wars without securing copyright contained saving clauses to protect such users. One of the practical objections to the Howell theory is that it would be difficult to handle this problem fairly through the courts.
fluenced by the operation of the “rule of doubt” under which the Copyright Office refuses registration only in the absence of any reasonable doubt of the validity of the copyright. A registration made under the “rule of doubt” is, as Howell stated, made “for whatever it may be worth.” In many cases, it is worthless, and courts should recognize that the fact of registration does not represent an affirmative position by the Copyright Office that copyright subsists.

In the newest treatise on copyright, Mr. Nimmer states that at the very least failure to comply with the ad interim provisions “will render unprotectable those particular copies which have not been manufactured in accordance with the manufacturing clause”. Nevertheless, he indicates that the position of the Copyright Office “may be questionable”. It is difficult to understand the basis for this latter statement. If no copies of the first edition published are “protected” by copyright in the United States, statutory copyright has not been secured at the time of first publication and the work falls into the public domain by operation of law. Surely, Nimmer’s use of “unprotectable” copies has reference to something more than the right to bring an infringement action since in discussing the manufacturing requirement itself, he remarks:

What if a work subject to the manufacturing provisions is first published abroad in copies which have not been manufactured in the prescribed manner? Clearly, no copyright protection is available as to such copies . . . .

It is submitted that if “no copyright protection is available” for copies of an entire edition as first published, the work has been published without obtaining statutory copyright and the right to secure statutory copyright is lost and cannot be regained, except by specific legislation such as the wartime emergency provisions.

Finally, the treatise of Stephen P. Ladas represents perhaps the leading authority against the Government’s position on the manufacturing clause. He apparently takes the position that, under the provisions of section 13 which requires deposit of copies and registration before infringement action, non-compliance with the manu-

227. See notes 10 & 189 supra.
229. Id.
230. Id. at 364.2.
231. S. Ladas, The International Protection of Literary and Artistic Property (1938).
232. Mr. Ladas does not dispute the Government’s position on the ad interim provisions.
233. See note 16 supra and accompanying text.
turing clause does not invalidate the copyright. The cases cited by Ladas do not support this reasoning. We saw earlier that the Patterson case involved a work published in 1890 prior to the Act of 1891. The Osgood case does contain a statement that domestic manufacture is not a condition precedent to a valid copyright. However, it was decided under the Act of 1891 and seems clearly wrong under that Act. In any event, the case did not construe section 13 of the present statute.

Ladas apparently limits the phrase "all copies accorded protection" to procedural effect only. Absence of "protection" is equated with the absence of the right to sue for infringement. The legislative history does not support this limitation since the language of the original bills, referring only to protection accorded the "copies deposited," was discarded in favor of the present all-inclusive phrase. Ladas' interpretation of the word "protection" seems to represent a highly specialized definition. In the usual case of failure to deposit under section 13, the work is nonetheless "accorded protection" under the law, even though suit cannot be maintained until deposit.

The position of Ladas on the ad interim provisions per se is by no means clearly opposed to the Government's position. Writing in general terms, he first indicates that ad interim copyright can be secured and extended only upon compliance with the statutory provisions. This point has not been controverted by any known authority. The point of disagreement is whether the ad interim provisions afford the only means of protection for works in a certain category. In discussing computation of the copyright term in relation to ad interim works, he made these comments:

Evidently, then, the copyright starts from the date of first publication abroad. The result of this is that in case a person in the United States should copy a book first published in the English language abroad before this book is deposited with a claim of ad interim copyright, he cannot plead good faith. Before embarking upon copying such a book, he should have made sure that there has

234. S. LADAS, supra note 231, at 766.
236. See text p. 264 supra.
237. In Washingtonian Pub. Co., Inc. v. Pearson, 306 U.S. 30 (1939), the Court held that the failure to deposit "promptly" after publication did not invalidate the copyright. Under section 13, suit for infringement cannot be maintained until the requisite deposit has been made. However, one can recover damages for acts of infringement before deposit. Such works are therefore "accorded copyright protection" from time of publication.
238. S. LADAS, supra note 231, at 767-68.
239. This point was unclear under the language in effect before the Act of 1949 since the period of ad interim copyright was computed from the date of deposit rather than from the date of publication as under the present law.
been no deposit for ad interim copyright within sixty days from publication abroad.\textsuperscript{240}

The strong implication of the last sentence is that upon expiration of the deadline for securing ad interim copyright, the work is open to copying unless registration has been made with the Copyright Office. There is no suggestion that the "would-be copier" should proceed with caution lest an authorized American edition brought out after the expiration of the ad interim deadline would secure United States copyright and subject the would-be copier to an action for infringement.

This implication is confirmed by his later remarks that English authors publishing abroad prefer to forego obtaining copyright here rather than "incur the cost of the compulsory second printing of the book at the time of its first publication."\textsuperscript{241}

In this phrase, he apparently asserted that the ad interim time limits then in existence — sixty days for deposit and four months to manufacture the American edition — required a second printing roughly at the time of first publication and that the provisions were indeed mandatory for English language works. The Government did not claim Ladas as a supporting commentator, but an analysis of his views suggests that he may be just that in the case of works subject to the ad interim provisions.\textsuperscript{242}

V. THE EFFECT OF FIRST PUBLICATION ABROAD

In addition to the proper construction of the ad interim provisions and the manufacturing clause, another issue which loomed very large in the Hoffenberg case was the effect, if any, of first publication abroad on copyright in the United States. This issue initially assumed almost

\textsuperscript{240} S. LADAS, supra note 231, at 768 (emphasis added).

\textsuperscript{241} Id. at 865.

\textsuperscript{242} One other student article, Copyright — Infringement — Unauthorized Photocopying and Sale of Dedicated Translation Constitutes Infringement of Copyright on Underlying Novel, 79 HARV. L. REV. 1716 (1966), was cited by plaintiff in support of his position. The writer of this casenote on the Grove Press case commented in a footnote on the then pending Hoffenberg case:

Although the copyright office had previously agreed with [plaintiff's] argument, see HOWELL, THE COPYRIGHT LAW 105 (rev. ed. 1962), it now follows the practice of rejecting applications where ad interim protection was not sought. 37 C.F.R. 202.4(b) (1960). A determination that the ad interim provisions were mandatory would in effect require every author in the world writing in the English language to secure ad interim protection and accordingly publish in the United States within five years or suffer the penalty of never achieving copyright protection. Considering the large number of countries where works are regularly published in English, such a result would seem highly debatable.

\textit{Id.} at 1717 n.6.

As has been noted the Copyright Office did not formerly agree with the plaintiff's argument; it merely was not willing to take a position on the merits. The author of the note has, of course, ignored the possibility of protection for works by foreign authors under the Universal Copyright Convention.
as much importance as the statutory construction issue since the plaintiff originally advanced two main alternative grounds for relief. One ground, that of the primacy of section 10 in obtaining copyright by publication with notice, gradually pushed the other argument into the background. This other argument may be referred to as the "extraterritoriality" argument; that is, that events occurring outside of the United States do not affect the status of copyright in the United States. While the effect of first publication abroad was involved in the plaintiff's section 10 argument, in this extraterritoriality argument it became crucial.

The Government's position was that first publication of a work, wherever it takes place, terminates all common law rights in the work and, unless the requirements for securing statutory copyright are met at that time, the work is permanently within the public domain. The position of the plaintiff varied depending upon whether the "extraterritoriality" argument or the "section 10" argument was being advanced. The author relied upon the same case, United Dictionary Co. v. G. & C. Merriam Co., as principal support for both arguments. However the "extraterritoriality" and "section 10" arguments are mutually exclusive.

The United Dictionary case was decided under the Act of 1891. This Act, as we have seen, required compliance with the deposit, registration, and manufacturing requirements "on or before the day of publication in this or any foreign country." The work in the United Dictionary case had been published and copyrighted in this country. The issue was whether a later publication in England without notice of the United States copyright forfeited such protection. The Supreme Court held that it did not. The case did not touch upon the effect of a first publication abroad since the work had been first pub-

244. Rembar, supra note 1, at 795.
246. Both registration and publication with notice were conditions of copyright protection under the pre-1909 law. This is true even though the copyright was actually effective upon registration, because suit for infringement was conditioned upon insertion of the notice "in the several copies of every edition published." Act of July 8, 1870, ch. 230, 16 Stat. 212. The notice requirement was not merely procedural. The notice had to be inserted at the time of publication; any omission from a particular edition published in the United States could not be cured by subsequent publication with notice. It is this latter aspect that distinguishes the registration-publication with notice requirements under the present law. Technically, registration remains a condition of copyright since the Register of Copyrights is authorized to demand compliance and copyright may be forfeited because of failure to register. Practically, however, registration, except ad interim, may be made at any time during the first term. Thus the proprietor may wait until he wants to bring an infringement action. This result probably was not intended by Congress, but it failed to include a definition of "promptly" and the courts have not been willing to forfeit copyright where the obligation has not been clearly delineated.
lished in the United States. The decision is therefore inapposite under either of the author's arguments.

On the other hand, the decisional law afforded substantial support for the Government's position on the effect of first publication abroad. It has been settled law in this country since *Wheaton v. Peters* that copyright after publication is wholly statutory. In order to obtain copyright, an author must maintain intact his common law right until the time of a general publication of his work. Upon general publication he must comply with the statutory requirements. If he fails to do so, the work enters the public domain. The fact that publication in the United States without securing statutory copyright places a work in the public domain has not been controverted in the case law. The Government's position on the effect of first publication abroad has been controverted in a very few cases and in some commentaries. It is submitted, however, that the overwhelming weight of decisional and secondary authority supports the position that first publication abroad either invests or divests copyright in the United States depending upon compliance with the statute.

As already seen, before the Act of 1891, the non-resident foreign author was not eligible to secure copyright in the United States by publication here or abroad. Only American authors and resident aliens could secure copyright upon compliance with the statutory requirements.

These statutes did not expressly require first publication in the United States. However, the leading nineteenth century authority, Eaton S. Drone expressed the opinion that the courts would, following the English precedent, require first or contemporaneous publication in this country. Mr. Drone, as their contemporary, may have possessed a better insight as to how the courts would rule, but, as a matter of statutory construction, this writer would argue that the place of publication was irrelevant. As a practical matter, however, the technicalities that attended the mandatory registration procedure probably precluded publication abroad.
In any case, whether or not one could secure copyright on the basis of a publication abroad, the courts ruled, without exception, that common law rights were destroyed by first publication abroad. The leading case involved one of the efforts by Gilbert and Sullivan to protect their works in this country; they hired an American citizen to prepare the piano score of "The Mikado". Since printed copies had been published in England, the court denied copyright in the whole work with the exception of the instrumental parts.

A resort to statutory copyright in the United States was indispensable if the authors desired to make publication of their work in print in England, and yet retain the right to control its dramatic presentation in this country. . . . After . . . [publication] the right of multiplying copies, and, in the case of a dramatic work, of representation on the stage, by the rule of the common law is abandoned to the public. It is immaterial whether the publication be made in one country or another.

As previously observed, the Act of 1891 explicitly required compliance "on or before the day of publication in this or any foreign country." In construing the Act, the lower court in Frohman v. Ferris stated:

Even after the taking effect of the act of 1891 an English author could not, after publication of his production in England, secure a copyright in this country, but in order to avail himself of that privilege it became necessary that simultaneously with his publication and securing a copyright in England he also comply with the copyright statutes in this country. A publication of his production without such compliance with our statutes prevented him from afterwards securing the benefits of our copyright statutes and rendered the publication public property in this country.

The basis of such decisions is, that by causing the book to be printed without the protection of the copyright, the author is deemed to have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; of this Act to deposit in the "post-office" and deposit with the "postmaster," it seems likely that the copies should have been deposited in the United States mail system within ten days after publication. Transportation conditions in the nineteenth century would generally have foreclosed compliance with such requirements in the case of publication abroad, unless copies had been shipped to this country in advance of publication abroad. Again, as a practical matter, such copies would have been published in the United States simultaneously with publication abroad.

251. To be sure, the issue was squarely presented only in rare instances. See Daly v. Walrath, 57 N.Y.S. 1125 (App. Div. 1899); Carte v. Duff, 25 F. 183 (C.C.S.D.N.Y. 1885); Yuengling v. Schile, 12 F. 97, 101 (S.D.N.Y. 1882); Wall v. Gordon, 12 Abb. Pr. (n.s.) 349 (N.Y. 1872); Palmer v. DeWitt, 47 N.Y. 532 (1872).
253. 238 Ill. 430, 87 N.E. 327 (1909).
and this applies to books published in foreign countries as well as in this country.254

This decision was affirmed by the Supreme Court.255

The court stated, although in negative terms, the general rule of divestitive publication without reference to place of publication.

The present case is not one in which the owner of a play has printed and published it and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been printed and published.256

The court, by implication, included publication abroad in its remarks since the events in this litigation occurred outside the United States.

Thus, prior to the Act of 1909, it was settled law that first publication abroad without securing United States copyright forfeited both common law protection and the right to obtain statutory copyright at a later time. This result was not based upon statutory language, even though the Act of 1891 was explicit on this point. The result was achieved by application of the fundamental rule of Wheaton that copyright after publication is wholly statutory. Common law rights are destroyed by publication, whether first publication occurs in this country or abroad. United Dictionary Co. v. C. & G. Merriam Co.257 did not depart from this rule. It did not concern the effect of first publication abroad.

However, the United Dictionary case was in progress at the time of the hearings on the bills that led to the Act of 1909. The defendant in the case, George Ogilvie, was very active at these hearings and argued that the revised law should require notice of copyright on reprints published abroad.258

It is submitted that section 10 of the present law represents a legislative codification of the holding of the United Dictionary case. Under the first portion of the section, copyright may generally be secured by publication anywhere with notice, subject to other statutory requirements such as the manufacturing requirement. Under the second portion of section 10, to maintain copyright, notice is required only on copies published in the United States. The concluding reference to books seeking ad interim protection points up the inter-relationship of

254. Id. at 328-29 (emphasis added).
256. Id. at 434.
257. 208 U.S. 260 (1908).
258. See note 90 supra.
the sections, but, as earlier discussed, this writer believes that the language was retained inadvertently.

Although the Act of 1909 thus changed the general method for securing copyright from registration on or before the date of publication to publication with notice, it did not alter the rule that first publication abroad destroys common law rights. Indeed, the shift merely served to emphasize even more the importance of publication in our law. The fundamental principles obtain: copyright after publication is wholly statutory, and whoever seeks the benefits of the statute must comply with its provisions upon first publication here or abroad.

With three "exceptions," the cases since 1909 have been consistent in either holding or stating that first publication anywhere without substantial compliance with the statute dedicates the work to the public in the United States. Typical of the judicial statements reflecting the prevailing view is that in Rolland v. Henry Holt & Co.

In the absence of some right by contract or copyright, whatever right the author may have retained under the French law did not prevent the publication of his work in this country after it had been published in France. Publication unprotected by United States copyright releases a work for copying; it is then dedicated to the public and the author's common law rights no longer protect the work against duplication. In this respect publication abroad has the same effect as publication here. Publication, protected only by foreign copyright statutes, releases the work for general duplication here. The statutory rights of authors do not extend beyond the sovereignty of their origin.

The same point was made in an article which concerned the effect on possible United States protection of a publication by a Russian citizen in Russia.

A preliminary question is suggested by the situation where a Russian national first publishes on his home soil, and is auto-

259. See text at pp. 237–38 supra.
262. Id. at 168.
263. The United States does not have copyright relations with Russia.
An Another View of the Candy Case

The work is automatically covered by Russian copyright protection. Is the work still to be considered a publication without copyright and part of the public domain by United States law? The answer is yes, it is, because copyright must also be understood in its conflicts of laws sense. Basically this is that "it is always the local copyright which is involved and the foreigner brings no rights with him into the forum." Thus, a copyright granted has no extraterritorial effect, while the act of publication may be publication for the entire world.264

The three "exceptional" cases depart in different degrees from the rule that publication abroad without substantial compliance with the U.S. statute operates to dedicate the work to the public domain in this country. In a very puzzling decision, Judge Hough ruled that a publication in Italy in 1913 with an inadequate notice of U.S. copyright did not foreclose registration in this country in 1917.267 The Judge expressed "considerable doubt" about the correctness of his decision.268

The case most contrary to the Government's position on the effect of first publication abroad is Heim v. Universal Pictures Co.269 The statement below concerning publication abroad is dictum; the court did not decide whether or not upon publication abroad the work had been dedicated in the country of publication, and the plaintiff lost the case because of his failure to prove infringement. In dictum, the court stated:

We construe the statute, as to a publication in a foreign country by a foreign author (i.e., as to a publication described in the 1914 amendment), not to require, as a condition of obtaining or maintaining a valid American copyright, that any notice be affixed to any copies whatever published in such foreign country, regardless of whether publication first occurred in that country or here. . . . There is no doubt textual difficulty in reconciling all the sections, as has often been observed; the most practicable and, as we think, the correct interpretation is that publication abroad will be in all cases enough, provided that, under the laws of the

266. The "notice" reserved copyright in Italian terminology.
267. The plaintiff claimed copyright from the 1913 publication in Italy and there was no attempt to justify computation of the term from the United States registration.
269. 154 F.2d 480 (2d Cir. 1946).
country where it takes place, it does not result in putting the work into the public domain.²⁷⁰

Various explanations have been given for Judge Frank's dictum that first publication abroad without notice of United States copyright does not necessarily place a work in the public domain in this country.²⁷¹ Most commentators have explained Judge Frank's dictum as predicated on the language of section 10 alone.²⁷² It seems clear to this writer that the dictum is based upon an erroneous interpretation of the word "published" as added to section 12 [13] by the Act of 1914.²⁷³ Judge Frank makes that explicit reference: "We construe the statute as to a publication in a foreign country by a foreign author (i.e. as to a publication described in the 1914 amendment) . . ."²⁷⁴

However, the 1914 Act merely allowed a foreign author to deposit one copy rather than two copies. Before this Act, section 12 [13] began with a reference to publication with notice of copyright as provided in section 9 [10]; after such publication with notice, two copies had to be deposited with the Copyright Office. The 1914 amendment inserted the following phrase at this point:

[o]r if the work is by an author who is a citizen or subject of a foreign state or nation and has been published in a foreign country, one complete copy of the best edition then published . . .²⁷⁵

The amendment therefore failed to refer either to publication with notice of copyright or to the notice provision of section 9 [10]. Despite the fact that both references did appear at the beginning of this section on the registration requirement, Judge Frank took the opportunity to expound his view that, because of the failure to restate these references to notice requirement in the amendment, no notice of copyright was required on foreign works by foreign authors.²⁷⁶ The legislative history of the amendment entirely refutes such a construction.²⁷⁷

²⁷⁰ Id. at 486.
²⁷¹ The ad interim works are not required to bear notice upon first publication.
²⁷² See M. Nimmer, supra note 228, at 332-34. Nimmer, incidentally, agrees that publication abroad destroys common law copyright. Id. at 332. See also Rembar, supra note 1, at 781-82. Another commentator, who disagreed with the Heim dictum, believed that Judge Frank "may have been motivated, in large measure, by his desire to place American copyright law closer in line with international practices. Perhaps [he] felt that the situation called for 'judicial legislation.'" Katz, Is Notice of Copyright Necessary in Works Published Abroad? — A Query and a Quandary, 1953 Wash. U.L.Q. 55, 75.
²⁷⁴ 154 F.2d 480, 486 (2d Cir. 1946).
²⁷⁵ 154 F.2d at 486.
²⁷⁶ 154 F.2d at 486.
²⁷⁷ Mr. Oldfield introduced the bill, H.R. 9897, on December 5, 1913. Hearings were held on December 10, 1913. Statement of Mr. Thoirvald Solberg Before the
A brief report describes the proposed change as follows:

The bill proposes a single change, namely, that in lieu of "two" copies only "one" copy shall be required to be deposited when the work is by an author who is a citizen or subject of a foreign state . . . and such work has been published in a foreign country. The amendment proposed is in nowise concerned with the remaining provisions of section 12 [13]. These relate to the obligatory manufacture in the United States of books and periodicals. . . . The present bill leaves all the other provisions of the law, including the typesetting clauses, exactly as they are now.278

The report is significant on three grounds. First, it is clear that the only change intended was to allow the foreign author to deposit one copy rather than two. Second, no change has been made in other clauses in the section, including the one on registration after publication with notice. Finally, in this report accompanying amendatory legislation only five years after the Act of 1909, there is a specific statement that manufacture in the United States is obligatory for certain books and periodicals.

Even assuming, arguendo, that the Heim dictum is based upon the language of section 10, it has no applicability to the Hoffenberg case. The remarks by Judge Frank must surely be limited, as he stated, to a "publication in a foreign country by a foreign author." No valid reason exists for extending his remarks to foreign publications by American authors. Further, the case involved a musical composition and therefore did not purport to consider what decision might be reached in the case of works subject to the manufacturing clause. Even in its limited aspect, the Heim case has probably been overruled by the adherence of the United States to the Universal Copyright Convention upon such terms as enable this country to require notice of copyright as a condition of granting protection to Convention works.279

Finally, the third "exceptional" case on the effect of first publication abroad, Mills Music, Inc. v. Cromwell Music, Inc.,280 merely followed the Heim decision. The remarks therein are clearly dicta since the court held that the work had not been published at all.

VI. Conclusion

The "Candy" litigation elicited lengthy, copious briefs from both parties that thoroughly explored all sides of difficult copyright issues. The issues concerning the ad interim provisions and the manufacturing clause had not been fully treated by the courts or commentators, and the question of the effect of first publication abroad had figured prominently in only a few cases. These issues therefore demanded full-dress discussion, and both parties may justly feel that they have now presented their respective positions on the issues in the best tradition of respectful, thorough advocacy.

In summary, the plaintiff argued that he had complied with the copyright statute by publication of the work with notice of copyright. Both the edition published in France and the American edition contained notice. Since section 10, the notice requirement, contains no qualifying language concerning the manufacturing clause, plaintiff asserted that copyright was secured upon publication in France in 1958 or, alternatively, upon publication in the United States in 1964. The manufacturing requirement, it was said, applied only to copies sold in the United States, and the author had complied in this respect. The United Dictionary case\(^\text{281}\) was advanced as authority for the view that the United States copyright law should not be read as applicable to events occurring abroad, at least where the events would result in loss of copyright.

The Government countered with the argument that section 10, although fundamental, did not establish all of the mandatory requirements of our copyright law. It contended that the statutory language of the ad interim sections and the manufacturing requirement section clearly establishes the necessity of compliance with the ad interim provisions for establishment of copyright protection for certain works. Where a work written by American citizens is first published abroad in the English language on the basis of copies manufactured abroad, the only way to obtain United States copyright is to comply with the ad interim provisions, sections 22 and 23 of the Copyright Code. The manufacturing requirement must apply to the first edition published because this view upholds the fundamental principle that copyright is secured or lost depending upon the facts at the time of first publication.

Moreover, the mandatory nature of the manufacturing clause becomes clear upon examination of the legislative history. As the plaintiff admitted, the Act of 1891 that introduced the manufacturing clause established it as a condition of copyright. The ad interim

\(^{281}\) 208 U.S. 260 (1908).
provisions were fashioned later under this same law to provide a grace period for compliance with the mandatory manufacturing clause. The pattern of this legislation was carried over into the present statute, and this again can be confirmed by convincing legislative history of subsequent amendments to the ad interim provisions. These amendments, while reducing the number of foreign authors that are subject to the manufacturing requirements, have retained the mandatory force for Americans.

It is submitted that this situation does not represent xenophilia in Congress. Legislation has been passed to advance the cause of American authorship through improvement of our international copyright posture. Amelioration of the scope of the manufacturing requirement, without altering its mandatory force, has enabled the United States to participate more fully in international copyright developments and has insured protection for American works abroad. At each step Congress has made its purpose evident — to retain the mandatory force of the manufacturing requirements as to works by Americans for the benefit of American printing and labor interests while removing certain foreign authors from the operation of this mandatory clause in order to promote better international copyright relations.

On the issue of the effect of first publication abroad, the Government agreed that copyright could be secured by publication with notice, but it added the proviso that all other mandatory requirements must be satisfied. It argued that copyright was secured or lost depending upon compliance with the statute at the time of first publication, whether this occurred here or abroad. It is submitted that the overwhelming weight of the decisional authority supports this contention and that most secondary authorities concur. The United Dictionary case is inapposite because, under its facts, the work was first published in the United States.

The district and circuit courts agreed with the Government's position on the issues and refused to compel the Register to issue a certificate of registration for the novel "Candy." Both parties in this litigation were disappointed that neither court wrote an opinion exploring the issues thoroughly. The appellate court, in a brief opinion, ruled:

Except when the ad interim provisions of Sections 22 and 23 are met, Section 16 of the Copyright Code allows copyright registra-

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282. The District Court judge wrote no opinion. Hoffenberg v. Kaminstein, Civil No. 1044-65 (D.D.C., June 19, 1967) (McGarraghy, J.). The opinion by the Court of Appeals was per curiam; it recites the facts and renders the decision with little discussion of the issues. 396 F.2d 684 (D.C. Cir. 1968).
tion of English-language books by United States citizens only where the first publication is printed in the United States.\(^2\)

The decision upheld the validity of the Copyright Office's regulation\(^2\) on the ad interim provisions stating that such a regulation is "not only not inconsistent with the pertinent sections of the Copyright Code, but in our judgment it accurately reflects the intention of Congress."\(^2\)

This vindication of its regulation does not mean that the Copyright Office believes that a fundamental principle of copyright law has been upheld (although this is true with respect to the issue of first publication abroad). The Registers of Copyrights have generally opposed inclusion of the manufacturing clause in the copyright law, and the present Register has made clear his opposition to the clause in principle. The Copyright Office looks forward to the day when the supporters of the clause realize that its supposed benefits to them are illusory or, at least, not appropriate in a copyright statute, and that they will agree to its removal from the copyright law. Until that time, the Copyright Office has reluctantly concluded that it must deny registration where mandatory requirements have not been met, however much it may decry the nature of those requirements.

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283. 396 F.2d 684, 685 (D.C. Cir. 1968).
285. 396 F.2d 684, 685 (D.C. Cir. 1968). Reference should be made to one other issue raised by the plaintiff. He argued that the regulation was not entitled to any presumption of validity and that the Register lacked authority to refuse registration for the work. Section 207 clearly authorizes the Register "to make such rules and regulations for the registration of claims to copyright as provided by this title." 17 U.S.C. § 207 (1964). Section 11 provides that a person entitled to claim copyright may obtain registration "by complying with the provisions of this title," and "upon such compliance the Register of Copyrights shall issue to him the certificates provided for in section 209 of this title." 17 U.S.C. § 11 (1964) (emphasis added). The necessary implication from the statute as a whole is that the Register is expressly authorized to set up appropriate guidelines, consistent with the underlying statute, to determine whether an applicant is entitled to registration. He must exercise his judgment in construing and applying the copyright law under which he is required to act. 30 Op. ATTY GEN. 422, 424-25 (1915).

The case law fully supports the authority of the Register to refuse registration for non-compliance with the statute. Bailie v. Fisher, 258 F.2d 425, 426 (D.C. Cir. 1958); Brown Instrument Co. v. Warner, 161 F.2d 910 (D.C. Cir. 1947), cert. denied, 332 U.S. 801 (1947); Bouvé v. Twentieth Century-Fox Film Corp., 122 F.2d 51, 53 (D.C. Cir. 1941). In Hoffenberg, the court remarked that a regulation is presumptively valid. The decision was made on the merits in favor of the government position on ad interim copyright and the manufacturing clause, but the court concluded:

Even if there were some doubt, we would be required to resolve that doubt in favor of the Register's interpretation.

Id.