1966

Duration, the Manufacturing Clause, and the Jukebox Exemption Under the Present Copyright Law and the Proposed 1965 Revision

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INTRODUCTION

The first complete revision of the United States copyright law since 1909 is advocated in a bill prepared under the direction of Abraham L. Kaminstein, Register of Copyrights. This proposal, designated H.R. 4347, was introduced in the United States House of Representatives by Emanuel Celler of New York on February 4, 1965, and is identical to a bill in the Senate, S. 1006.

Some of the highlights and features of this proposed bill, which is currently under congressional consideration, are as follows: extension of the copyright duration from the present fifty-six year maximum term to the life of the author plus fifty years; modification of the existing manufacturing clause which would narrow the scope of this provision; repeal of the exemption of jukebox operators from payment of performance royalties; establishment of a single national system of statutory protection for all works whether published or unpublished, instead of the present dual system of protecting works under the common law before publication and under federal statutes after publication; the addition of sound recordings to the list of protected works with exclusive rights limited to protection against actual duplication and the sale of “dubbed” records; an attempt to clarify the prohibition in the existing law against copyright in “Government publications”; specific recognition of the doctrine of fair use; and modification of the present compulsory license for the recording of music, with an increased statutory royalty ceiling and a broader recovery against infringers.

In this article only three features of the proposed 1965 revision of the United States copyright law will be discussed from among the above incomplete list of topics covered by the bill. Copyright duration, the manufacturing clause, and the jukebox exemption are the subjects of this article because these three sections of the proposed 1965 revision of the copyright law are among the most important features of the bill. They deserve serious consideration, and regard-

*This paper was submitted in the Nathan Burkan Memorial Competition, sponsored by the American Society of Composers, Authors and Publishers.
less of the fate of other sections of the bill, these three aspects of the proposed law are basically sound and should be adopted by the United States. Although this article is primarily concerned with literary works and musical compositions, they are of course not the only works protected by the copyright law. Motion pictures, dramatic works, architectural plans, and sculptural, graphic, and pictorial works are some of the other subjects of copyright protection.

Preliminary to a consideration of the provisions in the proposed bill regarding copyright duration, the manufacturing clause, and the jukebox exemption, it would be helpful to briefly recall the history of copyright in the United States.

**History of the United States Copyright Law**

The need for, and the importance of, a copyright law was recognized very early in our nation's history. In 1783 the Continental Congress recommended that each individual state establish a system of copyright protection. The first copyright statute ever passed in this country was enacted by the Connecticut Legislature in 1783 at the solicitation of Noah Webster, who desired protection for his spelling book. When the Constitutional Convention of 1787 met, twelve of the thirteen original states had enacted copyright laws. Since these state copyright statutes varied greatly it was still difficult for an author to sufficiently protect his work and there was a need for federal legislation in this area.

One of the few points which members of the Constitutional Convention unanimously agreed upon was that protecting the creator's rights to his writings would be one of the basic principles upon which our nation was to be founded. In furtherance of this objective the following provision was inserted into the United States Constitution: "Congress shall have the power... to promote the progress of Science and Useful Arts, by securing for a limited time to authors and inventors the exclusive right to their respective writings and discoveries." Since Congress enacted the first copyright law in 1790,

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1 Hudon, The Copyright Period: Weighing Personal Against Public Interest, 49 A.B.A.J. 759, 762 (1963). The complete text of this resolution is found in Mr. Hudon's article.
5 1 Stat. 124 (1790).
there have been three general copyright law revisions. The first was in 1831, another followed in 1870, and the third was in 1909.

**PURPOSE OF THE COPYRIGHT LAW**

Before proceeding into a discussion of copyright duration, the manufacturing clause, and the jukebox exemption, it might be beneficial to consider the purpose of the United States copyright law. It was decided by the United States Supreme Court in the early case of *Wheaton v. Peters* that an author has no perpetual right in his works once they have been published, but nevertheless, a literary man is as much entitled to the product of his labor as any other member of society. In addition to the public interest in access to works of value, the Court recognized the concept of fair economic return to authors, their families, and publishers. In any discussion of the copyright law a balance must be sought between the two principal interests involved—the public interest in having the works freely available and the individual writer's interest in protecting the works he has created.

While the primary purpose of the copyright law is to foster the creation and dissemination of intellectual works for the public welfare, there is also the important secondary function of securing to authors the rewards due them for their contribution to society. The Supreme Court stated in *Mazer v. Stein*:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and Useful Arts."[

The ultimate purpose of any copyright law should be to promote the growth of learning and culture for the public welfare by granting exclusive rights to authors for a limited time. These objectives can be furthered by extending the copyright duration term to cover the

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6 4 Stat. 436 (1831).
7 16 Stat. 198 (1870).
9 33 U.S. (8 Pet.) 591, 656 (1834).
life of the author plus fifty years, by eliminating the manufacturing clause, and by repealing the jukebox exemption.

THE NEED FOR GENERAL REVISION OF THE COPYRIGHT LAW

"Copyright law revision in the United States has had a painful history in the Twentieth Century."12 The last major copyright law revision occurred in 1909 and shortly after the statute was enacted major deficiencies were recognized. Even though it has been a familiar complaint among authors, publishers, and scholars that the United States copyright law needs to be revised, the numerous efforts to secure enactment of a completely revised statute have all failed. Although the Universal Copyright Convention became effective in the United States in 1955, there was no significant change in the application of the United States copyright law because the Universal Copyright Convention incorporated basic features of our nation's copyright statute.

Since the enactment of the 1909 statute the arts, science, and industry have undergone profound changes, and these new developments have rendered sections of the present act obsolete. The copyright law has not kept pace with society's ever increasing needs and complexities. Herbert A. Howell, former assistant register of copyrights, has some observations on the 1909 Copyright Act.

In its final form, however, the Act was very largely a compromise measure, being a composite of several tentative bills and proposals embodying different points of view and interests, and changes appear to have often been made in one place without the necessary corresponding changes in other places, resulting in a lack of clearness and coherence in certain sections which has caused no little perplexity in the practical administration of the Act, not to speak of disturbance in the mind of interested public.13

The trend among other nations has been to revise and replace their old copyright laws. Switzerland revised its copyright law in 1955 and England replaced its 1911 copyright statute with a completely new law in 1956. France enacted a new statute in 1957, Sweden did so in 1960, and Denmark and Norway passed their new copyright laws in 1961. The present state of affairs in the United States can be illustrated by a comment from the present Register of Copyrights. "Copyright law revision in the United States is long overdue, and the failure of the current program would be a real, if

13 Howell, op. cit. supra note 2, at 8.
not major, national tragedy."\textsuperscript{14} The need for a thorough revision of the United States copyright law has been demonstrated, and it is hoped that Congress will meet the challenge by adopting the 1965 proposed revision of our nation's copyright statute.

**COPYRIGHT DURATION**

One of the most controversial and troublesome problems confronting those who have advocated revision of the copyright law has been the inability to agree upon the duration of copyright. The controversy usually centers around the problem of whether the copyright term should be measured from the inception of the copyright, with protection extending for a term of years from that date, as provided in the present act, or whether the term should extend for the life of the author plus a number of years after his death as is the case in most foreign countries.\textsuperscript{15} In the 1965 proposed revision of the copyright law, which is now before Congress, one of the fundamental changes advocated concerns extending the term of copyright protection in the United States from the present fifty-six year maximum period to a period consisting of life of the author plus fifty years.\textsuperscript{16}

In any discussion of copyright duration it should be remembered that a great deal is at stake. The rights involved affect the publisher, the author, and the public. The investment made by the publisher to bring an author's work before the public must be protected, and there must be some prospect of economic reward to the author so that he may more fully devote himself to creative work.\textsuperscript{17} The public "wants the widest dissemination of the greatest range of literary works at reasonable prices."\textsuperscript{18}

To further illustrate how much is at stake, some statistics are offered in regard to books, and they represent only a portion of the copyrightable material involved here. The production and distribution of books in the United States is a large industry. In 1955, 750,000,000 books were sold through 120,000 retail outlets while another 60,000,000 books were distributed by national book clubs.\textsuperscript{19} Approximately 10,000 new titles are published each year and ten to twelve times that number are in print at any given time.\textsuperscript{20}

\textsuperscript{14}Kaminstein, supra note 12, at 154.
\textsuperscript{15}Tannenbaum, The U.S. Copyright Statute—An Analysis of its Major Aspects and Shortcomings, 10 N.Y.L.F. 12, 14, 15 (1964).
\textsuperscript{16}H.R. 4347, 89th Cong., 1st Sess. § 302(a) (1965).
\textsuperscript{17}Hudon supra note 1, at 759.
\textsuperscript{18}G. Goldberg, Copyrights and the Public Interest, 50 A.B.A.J. 56, 57 (Continued on next page)
If the proposed provision regarding duration of copyright is enacted it would be a significant change in the United States copyright law. Our country has always lagged behind in the area of term of copyright protection. It was not until 1909 that the present period of fifty-six years maximum protection was enacted, and even at that date all of the major countries of the world, with the exception of the United States and Holland, protected the author at least for the duration of his life. When the first United States copyright law was enacted in 1790 copyright protection consisted of a term of fourteen years with a renewal provision for an additional term of fourteen years if the author was living at the end of the first term. The maximum twenty-eight year term of protection available under that first act has been extended by two subsequent statutes. In 1831 the original term was extended to twenty-eight years but the renewable term remained at fourteen years. In 1909 the renewal term was extended to twenty-eight years, providing a maximum term of protection of fifty-six years.

Even though most nations in the world provide a term of copyright protection consisting of the life of the author plus fifty years, with the United States as the significant exception to this rule, the opposition in this country to such a provision continues to be quite adamant. The view that copyright is a monopoly is often brought forward as a reason why copyright duration should not be extended. According to this line of reasoning it would be against the public interest if the copyright protection term were increased because the duration of the monopoly would be prolonged and new monopolies would be established rather than fostering the creation of intellectual works.

A copyright, however, does not confer a monopoly in the same sense that a patent does, and for this reason patent procedures should not be compared to copyright provisions. A patent grants to the inventor the exclusive right to his creation for only seventeen years, but the invention must be new and useful. The standards applicable to copyright are not the same since novelty and usefulness are harder to measure where literary works are concerned. Another writer is not excluded from the field covered by copyright if he

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(Footnote continued from preceding page)

19 Id. at 56.
20 Ibid.
22 Hudon, supra note 1, at 759.
arrives at the same result independently of the first writer. In Arnstein v. Edward B. Marks Music Corp., Judge Learned Hand stated, "[I]Independent reproduction of a copyrighted musical work is not infringement." In regard to the assertion that copyrights, like patents, are monopolies of the contents of the work, Judge Hand said, "That is contrary to the very foundation of copyright law. . . ."23

In connection with monopoly and copyright the present Register of Copyrights has stated:

Copyright has sometimes been said to be a monopoly. This is true in the sense that the copyright owner is given exclusive control over the market for his work. And if his control were unlimited, it could be an undue restraint on the dissemination of the work.

On the other hand, any one work will ordinarily be competing in the market with many others. And copyright, by preventing mere duplication, tends to encourage the independent creation of competitive works. The real danger of monopoly might arise when many works of the same kind are pooled and controlled together.24

One group which opposes an extension of the present copyright period consists of those who are interested in publishing inexpensive reprints of existing works without restraint.25 Lengthening the copyright duration would delay the entry of works into the public domain, and if an increased term of copyright protection were enacted, these publishers would be required to wait for a longer period of time before the books became available to them. In addition to advancing the monopoly argument, this group of publishers contends that the existing provision of the fifty-six year maximum period of protection is sufficient to assure authors the rewards due them. They further assert that the present statute adequately protects the investments made by publishers and others to bring literary works to the public.26

Since the expenses involved in the national distribution of a book are rather high, such costs are not likely to be incurred by a publisher if the work is also available to his competitor. A publisher must sell a certain number of books to break even, and he cannot undertake the publication of a work unless he can protect his investment by having the exclusive right to publish a book for a sufficient period of time. It has been pointed out that in the case of paperback books about 200,000 copies of the work must be sold just for the publisher to break even.27 Since in many cases the author's market for his

23 82 F.2d 275 (2d Cir. 1936).
25 Hudon, supra note 1, at 759.
26 Ibid.
27 G. Goldberg, supra note 18, at 56.
work is the publisher, the copyright law, by protecting the author, will enable the publisher to realize a fair return from his investment in the author's work. Extension of the term of copyright protection to the life of the author plus fifty years will not only result in a direct benefit to the writer, but the publishers who have undertaken to publish a particular work will receive the increased protection which they deserve and need.

Probably the most important reason for lengthening the term of copyright protection is that the author and his family should be assured a fair share of the revenue the book brings in. The writer should be able to enjoy the benefits and rewards of his work during his lifetime and he should be able to leave his family the right to receive income from the works he has produced. The Register of Copyrights has stated that, "A substantial number of works—though they constitute a small percentage of all copyrighted works—continue to have commercial value beyond the present term of fifty-six years."28

It might be presumed that if copyright protection, through payment of royalties to authors, results in higher prices to the book-buying public, works in the public domain (those not protected by copyright) should be available at lower cost than those works covered by copyright protection. However, this is not true and it has been found that the newer books with royalties often sell better than the older unprotected books, which frequently must be translated, modernized, or recast.29 Royalties to authors do not represent a substantial part of the price of the literary product. It has been said, "The annual royalties paid to all authors probably do not equal the yearly payments for broadcast advertising by a single large advertiser."30

Extension of the copyright term should not be considered a tax on the book-buying public; proportion of book readers among the public at large has decreased due to other forms of entertainment and relaxation, the primary consumers for an author's work in many cases are the motion picture producers, manufacturers of goods advertised on television, and theatre goers.31 Lengthening of the copyright period of protection will encourage and stimulate writers and publishers while the public will receive dividends from the increased volume and higher quality of works produced. An increase in the term of copyright protection will represent a benefit to the public.

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29 G. Goldberg, supra note 18, at 57.
30 Finkelstein, supra note 21, at 1051.
31 Ibid.
from an artistic standpoint, but there will be no increase in cost to the public.

Although there was a time when it was to the benefit of the United States to have a short term of copyright protection, that period has long since passed. The United States now exports a far greater quantity of literary materials than it imports. The primary emphasis should be placed on protecting American works now that the majority of materials written and read in this country are of American origin. In the earlier days of our nation when there were few distinguished American writers, and the country relied primarily on foreign authors, it was beneficial to have a short duration of copyright protection in order that foreign works could be quickly and cheaply published and distributed in the United States. Australia is currently in the position once occupied by the United States.

Australia is primarily an importer of copyright material. Even in the distant future it is difficult to imagine a state of affairs in which Australia would be exporting more copyright material to, say, the United States and the United Kingdom than it imported. It is clear, therefore, that it would be to our economic advantage to make the term of copyright as short as possible. There is also little doubt that throughout the nineteenth and early twentieth centuries the United States benefited economically . . . by a comparatively short term of copyright. . . . It is only in recent years, when the United States has become probably the largest exporter of copyright material in the world that it has liberalized its copyright laws in relation to foreign works. The term of copyright, however, has remained the same.32

There is no valid reason why American authors should be placed at a disadvantage merely because they have had their works published in their native country. As recently as 1965, when sixty nations had copyright laws, thirty-eight of them provided for a term of copyright protection consisting of the life of the author plus fifty years or longer.33 The United States and the Soviet Union were the nations with the shortest terms of protection.34 By adopting the life of the author plus fifty years as the term of copyright protection, the United States would avoid the situation where a work falls in the public domain in this country but still has foreign copyright protection.35 Enactment of the proposed term of copyright protection would not only conform with the term of protection in most other nations but foreign works in the United States would also be bene-

33 Finkelstein, supra note 21, at 1045.
34 Ibid. See 1046-49 of Finkelstein's article for charts with the copyright terms of the various nations in the present period (1956) and the pre-1909 period.
35 Tannenbaum, supra note 15, at 16.
fitted. Such a provision might help to insure that American writers receive the maximum protection from foreign countries.

Opponents of the proposal to extend the term of protection to the life of the author plus fifty years maintain that there is an "evidentiary problem in determining an author's date of death for use in ascertaining the term as opposed to the apparent ease in measuring the term from the date shown on registration records or in published copies of the work." In most cases there should be no problem in ascertaining the date of death of an author. There are many available biographical reference books and other sources in the United States and abroad which contain such information. Furthermore, records maintained by the Register of Copyrights would be a source of information, as would be contacts with publishers and other writers. Since these vital statistics are available to the public the problem of the obscure author in regard to his existence is not as great as is alleged.

Under the 1965 proposed revision of the copyright law the problem of determining the author's date of death is further simplified by the necessity of only determining the year of the author's death. The month and day are not relevant because, under the proposed provision, copyright protection runs to the end of the calendar year in which the relevant anniversary of the author's death occurs. The year-end expiration of term provision is found in most foreign copyright laws and it simplifies the computation of the term.

In the event that an author's date of death cannot be conclusively established, the proposed act contains a provision which determines the rights of the interested parties in a fair and equitable manner.

After a period of 75 years from the year of first publication of a work, or a period of 100 years from the year of its creation, whichever expires first, any person who obtains from the Copyright Office a certified report that the records provided by subsection (d) disclose nothing

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37 Tannenbaum, supra note 15, at 18.
38 H.R. 4347, supra note 16, § 302(d). This section provides that "The Register shall maintain current records of information relating to the death of authors of copyrighted works... and, to the extent he considers practicable, on data contained in any of the records of the Copyright Office or in other reference sources." This section also stipulates, "Any person having an interest in a copyright may at any time record in the Copyright Office a statement of the death of the author of the copyrighted work..."
39 M. D. Goldberg, supra note 36, at 569.
40 H.R. 4347, supra note 16, § 305. This section states, "All terms of copyright... run to the end of the calendar year in which they would otherwise expire." See also 1961 Report of the Register of Copyrights 50, for the Register of Copyrights discussion of the year-end expiration of term provision.
to indicate that the author of the work is living, or died less than 50 years before, is entitled to the benefits of a presumption that the author has been dead for at least 50 years.\textsuperscript{41}

If the copyright user is unable to determine the date of the author's death through the exercise of reasonable diligence he is not left without a remedy. As for the issue of determining an author's death and related problems, the 1965 proposed revision of the United States copyright law adequately and reasonably covers most situations which might arise and with a maximum of fairness to the interested parties.

Another objection advanced by critics of the proposal to extend the term of copyright protection is the lack of uniformity in establishing a general period of life plus a term of years for works by individual authors while at the same time establishing a period formulated on some other basis for works made for hire, or joint, anonymous, and posthumous works.\textsuperscript{42} While it is true that there would be different terms of protection for the various classifications of work, the benefit to authors of increased duration of copyright protection outweighs the disadvantages due to lack of uniformity. Those dealing with copyrighted works would be forced to adjust their practices, but changes are the inevitable result of any major copyright revision.

While the proposed law advocates extension of the term of copyright protection to life of the author plus fifty years for a work by a single author, it does not fail to take into consideration that the other forms of authorship also must be safeguarded, and a longer period of copyright protection is granted to these works.\textsuperscript{43} Approximately forty per cent of all works registered in the Copyright Office are corporate works, which are those works prepared for corporations or other organized bodies by their employees.\textsuperscript{44} Most foreign nations compute the term of protection for these works from date of first publication and the period runs for a period of years equal to the period subsequent to the death of an identifiable natural author.\textsuperscript{45} The term advocated by the 1965 proposed revision of the copyright law is more definite. Corporate works, in addition to anonymous works and pseudonymous works (those bearing a false name), are given copyright protection for a term of seventy-five years from the

\textsuperscript{41} H.R. 4347, \textit{supra} note 16, § 302(e).
\textsuperscript{42} M. D. Goldberg, \textit{supra} note 36, at 568. Mr. Goldberg does not necessarily oppose extension of copyright duration; he is merely presenting the arguments of those who do.
\textsuperscript{43} See 17 U.S.C. § 24 (1958) for current provisions regarding the various forms of authorship.
\textsuperscript{44} 1961 Report of the Register of Copyrights 48.
\textsuperscript{45} M. D. Goldberg, \textit{supra} note 36, at 568.
year of first publication, or a term of one hundred years from the year of creation, whichever expires first.\textsuperscript{46} In the case of a joint work prepared by two or more authors who did not work for hire, copyright protection is granted for a term consisting of the life of the second of the authors to die and fifty years after his death.\textsuperscript{47} When the 1965 proposed revision is compared to provisions of the present act, it seems obvious that the recommended act, in the duration of protection granted to the various classifications of authorship is more fair and just.

Under the present United States copyright law protection exists for twenty-eight years from the date of publication or registration, and during the last year of the period it may be renewed for another twenty-eight year period. If the life of the author plus fifty years term of copyright protection were adopted, many of the problems arising from the complex and confusing renewal provisions would be avoided. The proposed act eliminates the renewal provision and there seems to be adequate justification for doing so. Less than fifteen per cent of all registered copyrights were being renewed as recently as 1961.\textsuperscript{48}

Renewal provisions are undesirable in a revised United States copyright law because they impose the burden of filing a renewal application on authors and other renewal claimants. Furthermore, these same authors and claimants risk losing their copyrights if they fail to file the renewal application in time.\textsuperscript{49} The renewal copyrights of many valuable works have been lost by the failure to promptly file renewal applications before the initial copyright terms expired.\textsuperscript{50}

\begin{quote}
Notwithstanding that a whole year is given for filing the application, it is surprising how frequently applicants defer mailing it until the eleventh hour, thereby running the risk of losing the renewal term altogether if for any reason the application fails to reach its destination in time.\textsuperscript{51}
\end{quote}

It seems unfair for an author to lose his copyright protection over a revenue-producing work because of a technicality in the law. Only two foreign countries divide the term of copyright protection by a renewal device.\textsuperscript{52}

In connection with the discussion of the renewal aspect of the

\textsuperscript{46} H.R. 4347, \textit{supra} note 16, § 302(c).
\textsuperscript{47} H.R. 4347, \textit{supra} note 16, § 302(b).
\textsuperscript{48} 1961 Report of the Register of Copyrights 51.
\textsuperscript{49} M. D. Goldberg, \textit{supra} note 36, at 573. See also 1961 Report of the Register of Copyrights 51.
\textsuperscript{50} Tannenbaum, \textit{supra} note 15, at 17.
\textsuperscript{51} Howell, \textit{op. cit. supra} note 2, at 111.
\textsuperscript{52} 1961 Report of the Register of Copyrights 52.
copyright law, it should be pointed out that the ownership of the renewal copyright after the first term of twenty-eight years reverts in certain situations to the author or other specified beneficiaries. The reversion feature of the renewal term should be eliminated along with the renewal provision. The Register of Copyrights has stated that the reversionary stipulation of the present renewal system has failed to accomplish its primary purpose. The objective was to protect the author and his family against unprofitable or improvident disposition of the copyright by having the renewal copyright revert to them. The Register of Copyrights further stated that the reversionary feature has been the source of more confusion and litigation than any other provision in the copyright law. While the proposed law eliminates the renewal device with its reversion feature the bill does permit the author or his widow (widower) and children to terminate a grant of his rights after thirty-five years.

Under the present United States copyright law first publication or earlier registration begins the copyright term, and this is also the base point from which the period of copyright protection is computed. This provision has led to problems of definition which the proposed term of life of the author plus fifty years would clear up since copyright protection then would begin with creation of the work. The meaning of the term “first publication” may seem to be clear but this has not been the case in regard to copyright law. Nowhere in the law is there a precise definition of publication, and what constitutes publication has been left to the courts for determination. The United States is the only major country which computes the period of copyright from the date of publication of the work. If the term of copyright protection were the author’s life plus fifty years, there would be no need to determine what constitutes a published work, nor would it be necessary to distinguish between published and unpublished works. Phrases like “first dissemination” and “first performance” would no longer be found in court opinions. Under the proposed law the essential fact would be the year of the creation of the work.

Before concluding the discussion on copyright duration it should be pointed out that the proposed act also deals with those works created but not published before the act would go into effect, and

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63 M. D. Goldberg, supra note 36, at 576.
65 H.R. 4347, supra note 16, § 203(a) (1) & (2).
67 Tannenbaum, supra note 15, at 15.
68 Finkelstein, supra note 21, at 1031.
those works with subsisting copyrights when the act would go into effect. These two classifications of works are awarded ample but not full protection. It would be unfair to cut off the expectations of writers and their families concerning future rewards to be earned by existing copyrighted works. Those works created before the proposed act would take effect also deserve extended protection. While they do not receive that degree of protection awarded to works created after the act becomes effective, they too benefit from the increased term of copyright protection.

By increasing the term of copyright protection in the United States to the life of the author plus fifty years, this country would not only be bringing its law in line with that in most other nations but it would be providing that the proceeds from the author’s work would usually go to those who deserve it the most—the authors and their families. Wide dissemination of literature depends upon the sufficiency of copyright protection, and by giving authors a greater opportunity to secure the economic reward their works earn, the copyright law would further stimulate the creation and dissemination of intellectual works. Any cost to the community because of a longer period of copyright protection afforded to authors would be compensated for by the encouragement given these writers. It is desirable to permit the copyright law to continue its contribution to the development of the literary profession by extending copyright protection to a term which covers the author’s life plus fifty years.

THE MANUFACTURING CLAUSE

The manufacturing clause may be approached by means of an example. A book written by an American is printed, bound, and first published in Great Britain. It is not published in the United States within a five-year period. Under the existing United States copyright law the work has entered the public domain and cannot be protected by United States copyright law. Had the writer been a citizen of any other country he would have been able to obtain United States copyright protection when his book was first published in Great Britain.60

The present copyright statute contains a manufacturing clause which requires that certain works must be manufactured in the United States if they are to be covered by copyright law provi-

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60 M. D. Goldberg, supra note 36, at 552. This and other examples of the inadequacy of the existing United States copyright law are revealed in Mr. Goldberg’s fine article.
The manufacturing clause pertains to English-language books and periodicals written by Americans or foreign authors, foreign language books and periodicals authored by Americans, and it also covers many pictorial works. It does not apply to books or periodicals of foreign origin in languages other than English. For example, a book or periodical written by an American citizen in a foreign language must conform to the manufacturing requirements to be protected by United States law even though competitive works in foreign languages written by foreign authors need not comply to be eligible for coverage. In a situation like this the lower cost of printing and binding abroad gives foreign authors a considerable advantage over American writers who must have their works manufactured in this country to be protected by United States copyright law. While the copyright law itself is unclear as to whether failure to comply with the manufacturing clause results in forfeiture of copyright or merely renders unprotectible those copies not manufactured in the prescribed manner, Nimmer suggests that the latter is the result in most cases. Those works not produced in accordance with the regulations may not be imported into the United States.

Following United States ratification of the Uniform Copyright Convention in 1954, our copyright law was amended to abolish those requirements of the manufacturing clause pertaining to foreign works first published abroad and which subsequently seek United States protection under the Uniform Copyright Convention. This international agreement does not permit the United States to require domestic manufacture of certain foreign works protected under that document, but there is no provision at this time which prevents our copyright law from discriminating against American writers. The manufacturing clause continues to have its most direct impact upon English-language books and periodicals written by United States authors or those foreign authors who are not covered by the Universal Copyright Convention. Unless these works are manufactured in the United States they are not entitled to full term copyright protection under the present law.

The existing law provides that if an author first publishes his work abroad in the English language and fails to register his claim

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62 Nimmer, Copyright § 96.2 (1965).
63 Id. § 96.4.
65 M. D. Goldberg, supra note 36, at 621.
to ad interim copyright within six months after the foreign publication, his right to United States copyright protection is lost.\textsuperscript{67} If the writer secures ad interim copyright protection he is protected for a period of five years from the date of the foreign publication.\textsuperscript{68} However, even under ad interim copyright protection an author can import and sell only 1,500 copies of his work during the five year term.\textsuperscript{69} If the writer desires to import more than 1,500 copies during this period he would not be protected by the United States copyright law unless a United States edition were manufactured. If this provision is fulfilled during the five-year period of ad interim protection the writer secures the full twenty-eight year term of copyright protection;\textsuperscript{70} otherwise the term of protection expires at the end of the five-year period.\textsuperscript{71}

The 1965 proposed revision of the copyright law retains the basic provisions of the present manufacturing clause, including the requirement that works in the English language must be manufactured in the United States to be protected. The proposal does advocate several modifications which would narrow the scope of this requirement. One significant change is that it would permit the importation of 3,500 copies manufactured abroad instead of the present 1,500 copies. Furthermore, importation or public distribution of copies in violation of the proposed manufacturing provision does not invalidate protection for the work in absence of proof by the infringer that there was a violation.\textsuperscript{72} While the proposed act somewhat relaxes the rigid manufacturing requirements of the present law, it still discriminates against United States writers who desire to publish English-language books. The 1965 recommended bill has not gone far enough in its attempted solution of the problems posed by the manufacturing clause. The position it has adopted is at best a compromise and not a concrete solution of the problem. The entire manufacturing clause should be eliminated from the United States copyright law. In this aspect of copyright law the reform is not adequate and repeal is the only effective solution.

"The Manufacturing Clause as it was incorporated in the 1909 Act is an anomaly, replete with exceptions and ambiguities."\textsuperscript{73} In essence it requires that setting of the type and making of the plates,

\textsuperscript{68} 17 U.S.C. § 22 (1958).
\textsuperscript{69} 17 U.S.C. § 16 (1958).
\textsuperscript{70} 17 U.S.C. § 23 (1958).
\textsuperscript{71} Tannenbaum, \textit{The U.S. Copyright Statute—An Analysis of its Major Aspects and Shortcomings}, 10 N.Y.L.F. 12, 19 (1964).
\textsuperscript{72} H.R. 4347, 89th Cong., 1st Sess., § 601 (a), (b), (c), (d) (1965).
\textsuperscript{73} Tannenbaum, \textit{supra} note 71, at 18.
and printing and binding the book be done in the United States if the work is to be protected under United States copyright law. This provision was inserted in the United States copyright law in 1891 after the printing industry had alleged that granting copyright protection to works printed abroad would result in substantial damage to the United States printing industry, which at the time was printing piratical copies of foreign works. The piratical printing of foreign works had become such a large part of the United States printing industry that American printers opposed any extension of copyright protection to foreign works unless their own interests were protected. In addition they insisted that works be printed in the United States as a condition of United States copyright, and they wanted this requirement to apply to foreign works as well as the creations of United States authors. The result of these demands was the enactment of a manufacturing clause in the 1891 Copyright Act. This provision was incorporated into the 1909 Copyright Statute and it still exists today.

For many years the manufacturing clause has hindered United States authors who published their works abroad. With the possible exception of the printers themselves, all groups concerned appear to agree that copyright protection should not be conditioned upon manufacture in the United States. Recommendations for the repeal of the manufacturing clause have been supported by book publishers and representatives of authors organizations. No other nation requires domestic manufacture as a condition for copyright protection. There is no justifiable basis for the manufacturing clause today. This country exports far more books than it imports, and even when foreign editions can be imported without limit, as in the case of books in the public domain, American editions are generally preferred by bookbuyers in this country. Elimination of the manufacturing clause now will not represent a serious threat to the United States printing industry. There is no reason to believe that abolition of the manufacturing requirement will result in the importation into the United States of a large number of English-language books.

The manufacturing clause constitutes a burden on writers and it should be repealed. It impairs the constitutional purpose of the

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74 M. D. Goldberg, supra note 36, at 621.
78 1961 Report of the Register of Copyrights 120.
79 Tannenbaum, supra note 71, at 19.
copyright law "to promote the progress of science and useful arts." Manufacturing requirements are too severe on authors because, for failure to manufacture an edition in the United States, they not only lose the right to reproduce their works in printed form but they forfeit all other rights as well, including the rights to use their works in motion pictures, broadcasts, and plays. If it is discovered that book manufacturers need protection, the tariff laws, rather than the copyright law, would be the appropriate instrument to furnish that protection.

THE JUKEBOX EXEMPTION

Under an exemption contained in the present copyright act, "The reproduction or rendition of a musical composition by or upon coin-operated machines shall not be deemed a public performance for profit unless a fee is charged for admission to the place where such reproduction or rendition occurs." Jukeboxes today are a big business, but it was not until the 1930's that this device became an effective method of commercial exploitation. The present exemption was placed in the law in 1909 at the last minute with virtually no discussion because the coin-operated machines of that day were nothing more than a novelty of little economic consequence. As an indication of how far the jukebox industry has progressed since the enactment of the jukebox exemption in the 1909 Copyright Law, 1958 figures show that the jukebox receipts for that year were approximately 500,000,000 dollars. Today in the United States there are 8,000 operators owning jukeboxes in bars, restaurants, and other establishments, in addition to over a half-million coin-operated phonographs.

"The jukebox exemption is a historical anomaly," and because of it operators of jukeboxes are exempted from any obligation to pay royalties for the public performance of music. Jukebox operators are the only commercial users of copyrighted material who are not required to pay royalties to the copyright owner for the performance of his work for profit. With reference to the jukebox

84. Finkelstein, Music and the Copyright Law, 10 N.Y.L.F. 155, 164 (1964).
85. Tannenbaum, supra note 71, at 20.
87. M. D. Goldberg, Promoting the Progress of Science and Useful Arts: A
operators and the exemption which enables them to be enriched at the expense of others, a leading writer has stated:

But the supplier of this entertainment is not a producer. He is not likely to know anything about music, has no dealings with authors or performers, has not shared the labor pains of creating the song or even the recording from which it is produced, has no interest in the work itself, but only in the physical record which he has probably bought for 60 cents and which may be played as many as 2,000 times for which he will receive from $100 to $200 in nickels, dimes, quarters, and half dollars.88

No other nation in the world has a jukebox exemption, although in Canada the playing of music on jukeboxes comes within a general exemption of performance by means of a gramophone.89

The Music Operators of America, Inc., the organization of jukebox operators, contends that the performance of music on jukeboxes is not a public performance because "the individual invariably selects his record, it is his choice, he pays for it, no other person has any choice in that selection, he has to listen to it or close his ears, it is a private performance—ordinarily this is the way the jukebox is played."90 However, there seems to be little doubt that the operation of jukeboxes is for profit and the public pays for the performance. Jukeboxes are usually placed in locations that are easily accessible to large numbers of people. The jukebox industry's income is directly attributable to public performances of copyrighted music for profit, but the industry pays nothing to the copyright owners of such musical works for these performances.91 The records are supplied by the operators and the income is divided between the jukebox operators and the owners of the establishments where the jukeboxes are located.

The 1965 proposed revision of the copyright law repeals the present exemption of jukebox operators from payment of performance royalties. Basically the suggested provision states that the proprietor of an establishment in which copyrighted non-dramatic work is performed publicly by means of a coin operated machine is an infringer if he alone or jointly with others owns the machine

(Footnote continued from preceding page)

88 Finkelstein, supra note 84, at 164.
or has power to exercise primary control over it. Furthermore, the proprietor of such an establishment is considered an infringer if he fails to disclose the identity of the person who owns the jukebox or exercises control over it after he has been requested in writing to do so by the copyright owner. The proposed provision represents a much-needed step forward in the United States copyright law.

There have been numerous efforts to repeal the jukebox exemption but this anachronistic relic still exists in the United States copyright law. Elimination of this exemption has been urged by bar associations, the Copyright Office, the Department of State and many other groups. The Register of Copyrights, along with others, has recognized the problems posed by the jukebox exemption and the need for correcting the present inequitable situation as soon as possible.

The jukebox exemption should be repealed, or at least should be replaced by a provision requiring jukebox operators to pay reasonable license fees for the public performance of music for profit. The consideration of legislation proposed for this purpose should continue without awaiting a general revision of the law. Congress should eliminate the jukebox exemption from the United States copyright law in order to correct the inequitable situation which now exists.

CONCLUSION

"In essence copyright is the right of an author to control the reproduction of his intellectual creation." With this thought in mind it is hoped that Congress will enact that provision of the proposed 1965 Copyright Law which lengthens the period of copyright protection from the present fifty-six year maximum period to a term consisting of the life of the author plus fifty years. Enactment of this provision will not only bring the United States term of copyright protection into accord with that of most other nations but it will further the aims and objectives of United States copyright law as set forth in the Constitution. The term of protection consisting of the author's life plus fifty years is a fair and reasonable provision with the objective of securing to the author the rewards of his labor. The expectation of increased financial earnings to the author should serve as source of encouragement and stimulation to him, resulting in the advancement of the literary profession.

92 H.R. 4347, supra note 72, § 114.
93 Finkelstein, supra note 91, at 1059.
In regard to the present manufacturing requirement one writer has stated:

The legislative purpose of the manufacturing clause was avowedly not protection for authors nor “to promote the Progress of science and useful arts,” but rather protection against foreign competition for American typographers and bookbinders. This short-sighted parochial expression of isolationism is destructive of the best interests of both copyright creators and users. . . .

Congress should remove the manufacturing clause from the United States copyright law and thereby eliminate manufacture in the United States as the basis for copyright protection in this country. The manufacturing clause represents the efforts of the printing industry to obtain legislative protection solely for their interests. It has no place in the copyright law where the primary objectives are protection for the author and the safeguarding of the public’s interest in literary creations.

The jukebox exemption contained in the present copyright law is a discriminatory and anachronistic feature which should be eliminated. A former Register of Copyrights has stated:

I may say that to my knowledge . . . I have not found one single person who has not got a direct economic interest who believes that this exemption is sound. I just submit that to you based on my own experience and observation. All the neutrals, all the third parties believe that an exemption in a statute is unsound which provides that distributors need not pay performance rights for the commodity distributed and performed.

The entire 1965 proposed revision of the copyright law represents a significant advancement in the development of the United States copyright law, and it deserves careful consideration from the Congress. In the event that the entire proposed act is not enacted into law it is hoped that Congress will, nevertheless, repeal the jukebox exemption and the manufacturing clause, in addition to adopting the term of copyright protection consisting of life of the author plus fifty years.

Thomas R. Emerson

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Nimmer, Copyright § 96.5 (1965).