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Copyright Protection to Aliens and Stateless Persons

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Copyright Protection to Aliens and Stateless Persons

By EDWARD T. BREATHITT, JR.*

These words are contained in the Preamble to the copyright act of Connecticut, passed in 1783:

> "It is perfectly agreeable to the principles of Natural Equity and justice that every Author should be secured in receiving the profits that may arise from the Sale of His works, and such Security may encourage Men of Learning and Genius to publish their Writings; which may do Honor to their Country and Service to Mankind."[1]

Unfortunately, it cannot be said that the security sought by the words of that Preamble has been realized with respect to certain creative individuals living today. These unfortunate authors and composers find the products of their minds in danger of being exploited either because the nation of which they are citizens does not enjoy copyright protection within the United States, or because the conflicting ideologies and wars which are disturbing the world leave them in the position of men without a country.

In order to understand better the rights which foreign authors and composers enjoy, an investigation of past legislation and decisions relative to their rights is advisable. In addition existing copyright protection afforded aliens and stateless persons by an analysis of the statutes, decisions, and treaties applicable at the present time will be necessary.

HISTORICAL BACKGROUND

Under the Constitution of the United States, which conferred upon Congress the power to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, the first federal copyright legislation was passed in 1790.[2]

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[1] Conn. Acts and Laws Jan. Sess. 1783. By this act copyrights were to be granted for 14 years with benefit of a second term of the same length. This act was passed prior to the adoption of the Constitution of the United States.

[2] U.S. CONST. Art. 1, sec. 8.

However, the act of 1790 granted copyright to such author only as may be "a citizen of the United States or resident therein."[3] By this act Congress limited protection to citizens and residents only, and as a result there were many instances of literary piracy of the works of foreign authors.

Recognizing the great need for reform, Henry Clay, in 1837, made a report to the United States Senate signed by a number of leading English authors pointing out the injury to their reputation and property caused by the lack of legal protection afforded them in this country. Furthermore, he submitted a copyright bill providing that the existing copyright legislation "be extended to and the benefits thereof be enjoyed by any subject or resident of the United Kingdom of Great Britain and Ireland, or of France, in the same manner as if they were citizens or residents of the United States."[4] Clay was not successful in getting this legislation passed; however, the movement for reform continued with added impetus.

In 1872 Stevenson Archer, Jr. went much further than Clay by advocating protection to all foreign authors, not just those of England and France. On March 23, in the House of Representatives, he made a stirring and eloquent speech in favor of international copyright. His enthusiasm was evidenced by the following passage:

> "What a melancholy spectacle is presented to the Christian and moralist in this day of boasted enlightenment by the two greatest nations on the globe in their dealings with each other in the matter of mental commodities. Two bands of literary pirates, virtually armed with letters of marque from their Governments, (for their governments would most assuredly protect them if resistance were made to their piratical encroachments) launch themselves boldly forth on the great sea of literature and openly flaunting the black flag in the midday sun, swoop mercilessly down upon property which they know to be another's, and selecting for capture the richest prizes there afloat, hurry them into port,

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[3] 1 STAT. 124, c. 15 (May 31, 1790).

[4] PUTNAM, THE QUESTION OF COPYRIGHT 32-39 (2d ed), Clay reasoned, "it will be but a measure of reciprocal justice for in both those countries, our authors may enjoy that protection of their laws for literary property which is denied to their subjects here."

> where they find thousands of eager purchasers. These purchasers having, as one might think, no honest scruples, propound no awkward queries about right and title, but buy and read and ponder and profit by their ill-gotten merchandise just as coolly and as calmly as if no crime had been committed against the laws of God and of Justice."[5]

Constant pressure was exerted to get a bill through Congress, but without success, until the act of Congress of March 3, 1891. By this act the provisions of the copyright laws of the United States were extended to citizens and subjects of a foreign state or nation only when such state or nation permitted to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens, or when such foreign state or nation was a party to an international agreement which provided for reciprocity in the granting of copyright, by the terms of which agreement the United States of America might, at its pleasure, become a party to such agreement.[6] This was the first important step taken by the United States to extend copyright protection to aliens not residents of this country. Under the provisions of this act the President of the United States issued a proclamation declaring that as citizens of the United States had the benefit of copyright in Great Britain on substantially the same basis as the subjects of that country, those subjects were entitled to the benefits given under the Copyright Act of Congress of 1891.[7]

Efforts to obtain copyright reform were not restricted to legislation, for as early as 1842 England and the United States considered a reciprocal treaty for protection for the books of British and American authors. In 1853 a convention was held in Washington, between the United States and Great Britain, for the establishment of international copyright, and the text was transmitted by the President to the Senate for its ratification. The Senate Committee on Foreign Relations submitted it to the Attorney General of the United States for his opinion, which sus-

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[5] Solberg, *Copyright Law Reform*, 35 YALE L. J. 48, 53 (1925).

[6] 17 U. S. C. A. Sec. 8, note 31 (1927). Prior to 26 STAT. 1110, c. 565 (1891) no foreign author or assignee of a foreign author could avail himself of the copyright law, West Pub. Co. v. Edward Thompson Co., 176 Fed. 833, 836 (C.C.A. 2d 1910).

[7] 17 U. S. C. A. Sec. 8, note 31 (1927).

tained the convention. Unfortunately, the text of the convention was made public. Pressure was brought to bear upon the Senate not to ratify the treaty, and it never became effective. Other attempts were made, but without success, until the passage of the Copyright Act of 1891.

Realizing the inadequacy of existing laws, a "Report on Copyright Legislation" was prepared by Thorvald Solberg after six years administration of the Copyright Office. The following conclusion was reached:

> "That the subject ought to be dealt with as a whole, and not by further merely partial or temperizing amendments. The acts now in force should be replaced by one consistent statute, of simple and direct phraseology, of broad and liberal principles, and framed fully to protect the rights of all literary and artistic producers and to guard the interests of other classes affected by copyright legislation."[8]

It is regrettable that Solberg's conclusion was not followed, for by the Copyright Act of 1909 nothing more than a compromise was reached. Nevertheless two major improvements were embodied in the act. One was an extension of copyright protection from fourteen to twenty-eight years. The other was a release of the alien author from the required remanufacture of his book in the United States, incorporated in the Act of 1891, to the extent of books of foreign origin printed in a language or languages other than English.[9] However, under the pressure of such groups as the Typographical Unions and literary pirates, the far-reaching and inclusive copyright legislation sought for the protection of aliens was not realized, and they were dependent upon reciprocal agreements and Presidential proclamations.[10] It should be pointed out

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[8] Solberg, *Copyright Law Reform*, 35 YALE L. J. 48, 62 (1925).

[9] Solberg, *The Present Copyright Situation*, 40 YALE L. J. 184, 203 (1930).

[10] 35 STAT. 1077, c. 320 (1909), 17 U. S. C. A. Sec. 8 (1927):

"The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title. The copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign State or nation only:

"(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or

"(b) When the foreign State or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement, or law to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection

that other nations in the world recognized the need for protection of the creation of the minds of aliens seeking markets within their borders. Many of the European nations utilized reciprocal treaties; however, they were usually limited to two countries. Eventually the idea for a convention or union with a membership composed of many nations was conceived by the International Literary Association at the annual meeting held in Rome in 1882. A conference was planned to be held at Berne, Switzerland in 1883. From this conference came a plan proposing an international copyright convention with representatives from all of the civilized countries. Several meetings followed and finally, at the convention in 1886, the formal document creating the International Copyright Union was signed without the signature of the United States. The United States was represented at this convention by Mr. Boyd Winchester, who was instructed not to sign the document on behalf of the United States but was authorized to declare that the United States reserved their privilege of future membership under article 18 of the agreement. There was a revision of the Berne Convention at Paris in 1896, the United States delegate taking no active part in the procedings. Again, in 1908, there was a revision of the Convention at Berlin with the United States represented by an observer who manifested the sympathy of the United States toward international copyright protection of aliens but who was not authorized to do more than make notes and submit a report of use to the government.[11] Later revisions took place at Berne, in 1914, and at Rome, in 1928, with the United States remaining out of the Union. It is unfortunate that our government, particularly the legislative branch, did not have the necessary foresight to take advantage of the opportunity presented by the International Copyright Union to pledge reciprocally with the other member nations to protect the rights of authors, composers, artists and dramatists in their literary, musical, artistic and dramatic works.

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secured to such foreign author under this title or by treaty; or when such foreign State or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States may, at its pleasure, become a party thereto.

"The existence of the reciprocal conditions aforesaid shall be determined by the President of the United States, by proclamations made from time to time as the purposes of this title may require."

[11] Solberg, *The International Copyright Union*, 36 YALE L. J. 68 (1926).

PROTECTION UNDER EXISTING LAWS, AGREEMENTS, AND DECISIONS

In order to understand better the protection afforded aliens and stateless individuals in this country at the time of this writing, it is advisable to analyze briefly existing pertinent statutes. One particularly applicable section of the copyright law of 1947 provides:

> "That the copyright secured by this title shall extend to the work of an author or proprietor who is a citizen or subject of a foreign state or nation only:
>
> "(a) When an alien author or proprietor shall be domiciled within the United States at the time of the first publication of his work; or
>
> "(b) When the foreign state or nation of which such author or proprietor is a citizen or subject grants, either by treaty, convention, agreement or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens, or copyright protection, substantially equal to the protection secured to such foreign author under this title or by treaty; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by terms of which agreement the United States may, at its pleasure, become a party thereto.
>
> "The existence of the reciprocal conditions aforesaid shall be determinded by the President of the United States, by proclamation made from time to time as the purposes of this title may require: *Provided,* That whenever the President shall find that the authors, copyright owners, or proprietors of works first produced or published abroad and subject to copyright or to renewal of copyright under the laws of the United States, including works subject to ad interim copyright, are or may have been temporarily unable to comply with the conditions and formalities prescribed with respect to such works by the copyright laws of the United States, because of the disruption or suspension of facilities essential for such compliance, he may by proclamation grant such extension of time as he may deem appropriate for the fulfillment of such conditions or formalities

> by authors, copyright owners, or proprietors who are citizens of the United States or who are nationals of countries which accord substantially equal treatment in this respect to authors, copyright owners, or proprietors who are citizens of the United States.
>
> "The President may at any time terminate any proclamation authorized herein or any part thereof or suspend or extend its operation for such period or periods of time as in his judgment the interests of the United States may require."[12]

Upon comparison of this 1947 statute with the 1909 statute and later amendments it becomes apparent no great changes were made.[13] For example the first subsection, giving copyright protection to an alien or proprietor domiciled in the United States at the time of the first publication of his work, did not change the 1909 statute. This situation is not included in the scope of this article, which covers aliens and stateless persons not domiciled in the United States, for adequate protection is granted those who are domiciled. As for the second subsection in the statute, essentially it remained the same, providing for reciprocal agreements between individual nations and the United States, to be determined by the President of the United States by proclamations made from time to time. A pertinent new provision, however, does allow the President to grant, by proclamation, an extension of time to comply with conditions and formalities required for granting a copyright, where it is found the alien was unable to meet the requirements because of a temporary disruption of facilities necessary for compliance. This provision is an aid to the alien in times of war or national emergency when the normal channels are disrupted and is certainly reasonable and equitable.[14]

It becomes apparent from a study of the statutes that those citizens of foreign countries who are fortunate enough to live in a nation enjoying reciprocal copyright protection with the United States are protected in this country. There is, however, the ever present danger of legislative change in either of the countries which are parties to the agreement with respect to copyright protection to aliens. Since these agreements are for specified

[12] 61 STAT. 652, c. 391 (1947), 17 U. S. C. A. Sec. 9 (Supp. 1948).
[13] 35 STAT. 1077, c. 320 (1909), 17 U. S. C. A. Sec. 8 (1927).
[14] 61 STAT. 652, c. 391 (1947), 17 U. S. C. A. Sec. 9 (Supp. 1948).

terms there is no requirement that they be renewed, particularly where the copyright regulations of the foreign nation have been changed and no longer give essentially the same protection to citizens of the United States as to its own citizens. In addition, it cannot be forgotten that the nationals who publish their works and receive copyrights in countries not enjoying copyright protection within the United States are subject to literary piracy and infringment of their natural and just rights. The argument that the copyright statutes are adequate since they provide protection for most alien writers and composers does not appear sound to the writer. Why not provide protection to the minority whose genius is just as deserving of protection as that of his neighbor in a country enjoying reciprocal protection?

In the last fifty years another problem has arisen which was apparently unforeseen or of no great significance at the time of the passage of the copyright law of 1909.[15] This is the phenomenon of the stateless individual or popularly called "displaced person" who is without citizenship in any state or nation. Every nation has the right to determine the regulations for acquisition and loss of citizenship, although they are limited in this right by international law. This concept has been known for at least a century, although the problem did not become serious until more recent years.[16]

At the end of World War II the situation became acute, and the problem of what to do with the millions of displaced persons in camps all over Europe received the urgent attention of all countries and of the United Nations. Among these unfortunate people, who had lost nearly everything, including their citizenship, as a result of the havoc of war, were many intellectuals, writers, composers and playwrights. As for most of these, the only possession which had not been torn from them was their intellect and talent for creative works. What people are more deserving of having the benefits of their creations protected by copyright?

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[15] 35 STAT. 1077, c. 320 (1909), 17 U. S. C. A. Sec. 8 (1927).

[16] Preuss, *International Law and Deprivation of Nationality*, 23 GEO. L. REV. 250, 254 (1935).

"Formerly, a loss of citizenship was inflicted as a penalty for engaging in the slave trade, or for desertion from the armed forces; now, however, it is imposed for such elastic reasons as 'racial impurity' or any conduct contrary to the duty of fidelity to the Reich and people." Note, 49 YALE L. J. 132, 132-133 (1939).

Since the federal government has not specifically provided for stateless persons in its copyright legislation, what protection, if any, do these people without citizenship in any nation enjoy? If domiciled in the United States at the first publication of their works, then protection is afforded under existing statutes.[17] But what copyright protection, if any, is forthcoming under federal laws to the stateless individual not domiciled in the United States at the first publication of his works? This was one of the principal questions raised in the case of *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*[18] This case was decided on appeal from an order denying a preliminary injunction in an action to restrain infringement of the copyrights claimed by the plaintiff publishing company in Adolf Hitler's autobiographical and political work, MEIN KAMPF. Two rival American editions of the book were being sold in this country. The defendant company published their version without claim of copyright on the theory that the work is in public domain and not protected by copyright, while the plaintiff's version appeared under claim of copyright assignment from the German publishers of the book. The author, Adolf Hitler, was a stateless person at the time his book was published in 1925, having lost his Austrian citizenship during World War I.[19] The defendant claimed that the provisions of the statute, quoted previously above, were exclusive and as a result, an author not living in the United States, or not a citizen of a nation granting reciprocal rights to American citizens, would be unable to have his book copyrighted in the United States. This position is supported by the provision in the statute which operates as a condition precedent to granting copyrights to aliens, requiring a presidential proclamation referring to the specific country, before the copyright law applies. It has been held that the presidential proclamation is a condition precedent and not directory; therefore, there is some basis for the defendant's contention in the present case, for if there is no foreign power, there can be no presi-

[17] 61 STAT. 652, c. 391 (1947), 17 U. S. C. A. Sec. 9 (Supp. 1948).
[18] 104 F. 2d 306 (C. C. A. 2d 1939).
[19] "Defendants by extensive affidavits have produced evidence from German newspapers and other publications to the effect that on both occasions Adolf Hitler was a stateless person, a citizen or subject of no country, since being born a citizen of Austria, he had served in the German army in the World War and had refused to respond to a call for service in the Austrian army." Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F. 2d 306, 307 (C. C. A. 2d 1939).

dential proclamation.[20] The plaintiff relied on the broad grant of protection which it finds in the first sentence of the section of the statute under consideration, that "The author or proprietor of any work made the subject of copyright by this title, or his executors, administrators, or assigns, shall have copyright for such work under the conditions and for the terms specified in this title."[21] It was alleged that this grant contains no exception of any kind, and as a result it offers the protection of the other provisions of the copyright law to stateless individuals. The court held in favor of the plaintiff apparently basing their decision on public policy rather than a strict interpretation of the statute as advanced by the defendant, which would have meant that the "United States, contrary to its general policy and tradition, is putting another obstacle in the way of the survival of homeless refugees. . . ."[22] This decision, apparently overlooking the regulations and interpretation of the copyright office and the text writers, was justified on its interpretation of the historical course of copyright legislation in the United States.[23] Fortunately, this decision offered protection to the non-resident refugee, previously unprotected, who published a book after termination of his former citizenship and before becoming domiciled in the United States, by affording him a legal right to enjoin infringement of his copyrights. The question arises, are these strained interpretations of the courts based on public policy the best means of supplementing the in-

[20] 61 STAT. 1077, c. 320 (1909), 17 U. S. C. A. Sec. 9 (Supp. 1948). See Bong v. Alfred Cambell Art Co., 214 U.S. 236, 29 Sup. Ct. 628, 53 L. Ed. 979 (1909), where an American copyright was denied to a citizen of Peru because no presidential proclamation had been made even though all other requisites were complied with. Note, 13 So. CALIF. L. REV. 356 (1940).

[21] 61 STAT. 1077, c. 320 (1909), 17 U. S. C. A. Sec. 9 note 31½ (Supp. 1948).

[22] Note, 13 So. CALIF. L. REV. 356, 358 (1940).

[23] 17 U. S. C. A. Sec. 53, *Copyright Rules and Regulations for the Registration of Claims to Copyright*:

"2. The persons entitled by the act to copyright protection by their work are:

(1) The author of the work, if he is:

(a) A citizen of the United States, or

(b) An alien author domiciled in the United States at the time of the first publication of his work, or

(c) A citizen or subject of any country which grants either by treaty, convention, agreement, or law, to citizens of the United States the benefit of copyright on substantially the same basis as to its own citizens. The existence of reciprocal copyright conditions is determined by presidential proclamation."

"Great weight will be given to contemporaneous construction of an act of Congress by department officials, who are called upon to act under and carry out its provisions, particularly if there be uncertainty or ambiguity." Brewster v. Gage, 30 F. 2d 604, 606 (C. C. A. 2d 1929).

adequacies of existing copyright statutes? Would it not be better to amend the statutes to include copyright protection to these stateless individuals instead of leaving the protection of their rights to the mercy of the courts, since it cannot be conclusively presumed that the courts will consistently hold as they did in this case?

As pointed out previously, there is no protection extended to aliens and stateless persons in this country through the International Copyright Union since the United States is not a member. One of the major reasons why the United States did not become a member of the International Copyright Union set up by the Berne Convention is the presence of the so-called "manufacturing provision" of the present copyright law which provides with certain exceptions, that every book in the English language sold in the United States must be manufactured here if it is to secure copyright protection in the United States. In order to become a member of the Union, that clause had to be revised and Congress was not willing to abolish it. Nevertheless, the United States Government has been very active in support of a proposed Inter-American Copyright Union, and that interest was recently shown at the Conference of Experts on Copyright that was held at the Pan American Union in Washington, June 1-22, 1946. This first copyright conference of the Western Hemisphere was the culmination of years of planning for the improvement of copyright relations among the American republics, and the Inter-American Convention on the Rights of the Literary, Scientific, and Artistic Works drafted by the conference, is in effect a clarification and amplification of the Buenos Aires convention of 1910.[24] This convention, which is designed to supersede all earlier inter-American copyright conventions, contains these benefits to aliens. Literary, scientific or artistic work by a national of or an alien domiciled in the United States which is protected in accordance with the law of this country, is entitled to protection without formality of any kind in every other state that is a party to the convention. It follows that such work protected by the copyright law of any other member country of the Convention is entitled to the same protection in the United States and in every other state that is a

[24] Inter-American Conference of Experts on Copyright (Dep't State No. 2827, Conference Series 99, 1947).

party to the Convention. It is interesting to observe that the law of the country where protection is claimed, the *lex fori* doctrine, is to control except in situations when articles of the Convention provide for uniform practice.[25] The specific designation of Article IX that the work must be "by a national of any Contracting State or by an alien domiciled" in the state granting the protection was a proposal by the United States Delegation to prevent aliens who were neither citizens nor domiciled residents of the contracting states from claiming protection under the Convention.[26] Assuming Congress does ratify the Washington Convention it is evident that Article IX would offer no protection to those stateless individuals not domiciled residents of the contracting states. In the event it is not ratified, the copyright protection at the present time will remain limited to statutes and decisions with respect to aliens and stateless persons.

CONCLUSION

Within the scope of this subject, the writer has attempted to show that copyright protection in the United States was limited at first to citizens and residents only, which unfortunately resulted in many instances of literary piracy of the works of foreign authors, composers, artists and dramatists. A continuous movement for copyright reform for nearly a hundred years finally resulted in the Copyright Act of 1891, which extended protection to citizens and subjects of a foreign state or nation only when such state or nation permitted to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens, or when such foreign state or nation was a party to an international agreement which provided for reciprocity in the granting of copyright, by the terms of which agreement the United States of America might at its pleasure become a party to such agreement. Little change was made by the Copyright Acts of 1909 and 1947 with respect to aliens and stateless individuals. Consequently, at the present time the federal statutes offer no protection to those nationals of other countries who publish their works and receive copyrights in countries not enjoying reciprocal copyright protection with the United States. Fortu-

[25] *Id.* at 20.
[26] See Article IV, *op. cit., supra* note 24.

nately, by the decision in *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, protection was extended to stateless persons, previously unprotected, who published works after termination of their citizenship and before becoming domiciled in the United States, by giving them a legal right to enjoin infringement of their copyright. However, this decision was apparently based on public policy, for its interpretation of the statute was strained. Since the United States has not seen fit to join the International Copyright Union, being unwilling to eliminate the manufacturing clause, and Congress has not ratified the Washington Convention of the Inter-American nations, copyright protection to aliens and stateless persons remains limited to statutes and decisions.

Certainly, copyright protection should be extended to include those aliens and stateless individuals not adequately protected at the present time. As has been pointed out, this worthwhile goal may be achieved by any of the following methods: judicial decisions, federal statutes and international agreements. The danger in reliance on judicial decisions, as pointed out in commenting upon the case of *Houghton Mifflin Co.* v. *Stackpole Sons, Inc.*, is that it cannot be conclusively presumed that courts will consistently hold as they did in that case. Such strained interpretations of the courts based on public policy are not the best means of supplementing the inadequacies of existing copyright statutes. Why not go to the source and revise the statutes? The problem should be dealt with as a whole and not by resorting to conflicting amendments and decisions. The statues now in force should be replaced by one consistent statute, written in clear and concise language, based on liberal principles, and framed to protect the copyrights of all authors, composers, playwrights and artists including aliens and stateless individuals. It would be desireable to eliminate the "manufacturing clause" in the present statute in order to facilitate entry into the International Copyright Union. The policy of revising the federal statutes in such a manner would have the advantage of avoiding conflicts between the provisions of the Berne Convention and the copyright statutes of the United States.[27] It may be concluded that such statutory revision coupled

[27] The problem involved in an ill-advised entry into the Berne Convention and the Washington Convention where there would be conflicts with the present federal copyright statute are discussed by Sam B. Warner, Register of Copyright, in *International Copyright and The Washington Convention* (1949).

with entry into the International Copyright Union would be the most desirable method of extending copyright protection in the United States to those aliens and stateless individuals inadequately protected by existing law.

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