Magazine Rights A Division of Indivisible Copyright

Harry G. Henn

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One of the most important, but least definite, branches of the law of copyright is that which deals with the contents of magazines and other periodicals. ¹

This lament concerning magazine copyright law, published more than fifty years ago, finds occasional contemporaneous reiteration. The present-day importance of such law is obvious, as indicated by the ever-growing use of the magazine as the medium for the publication of a vast amount of literary and artistic material. However, statutory enactments and judicial decisions during the past half-century have defined and redefined the numerous principles involved to form an integrated and definite body of law. The difficulty today is not that magazine copyright law is indefinite, but that few realize how specific and technical such law is.

To understand modern magazine copyright law, one must first appreciate (1) a concept, which paradoxically is both a historical anachronism and a basic tenet of the present American copyright system, known as the “Indivisible Copyright Theory”, and (2) the wide variety of so-called “Magazine Rights” or “Serial Rights” (from the point of view of substance and form) acquired by various magazine publishers.

HISTORY OF INDIVISIBLE COPYRIGHT THEORY

The earliest control over copying of an intellectual work rested on the possession of the parchment upon which the work had been written,
rather than upon any idea of the ownership of the work as such.\textsuperscript{2} Although the origins of "copyright" are beclouded,\textsuperscript{3} a sound assumption is that the concept underwent its first refinement with the recognition of an incorporeal interest in the work distinct from the more anciently-recognized corporeal interest in the parchment or other physical object embodying the work.\textsuperscript{4} The history of copyright law largely consists of the development of successive refinements in this incorporeal interest during comparatively recent centuries.

In the formative period of copyright, following the invention of moveable-type printing in Europe in the middle of the 15th century,\textsuperscript{5} protection against unauthorized copying of books\textsuperscript{6} was achieved through the recognition of the exclusive right to copy, which, as a practical matter, meant the exclusive right to print.\textsuperscript{7}

This early view of copyright was incorporated in the British Statute of Anne,\textsuperscript{8} enacted in 1710,\textsuperscript{9} the main starting point of the development

\textsuperscript{2} 2 Putnam, G. H., Books and Their Makers During the Middle Ages 431 (1896).
\textsuperscript{3} Birrell, Seven Lectures on the Law and History of Copyright in Books 9 (1899); Lowndes, An Historical Sketch of the Law of Copyright 1 (1840); 1 Putnam, G. H., op. cit. supra note 2, at 46; 2 id. at 465-509.
\textsuperscript{4} Holmes, J., concurring specially in White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1, 19, 28 Sup. Ct. 319, 324 (1908): "The notion of property starts, I suppose, from confirmed possession of a tangible object and consists in the right to exclude others from interference with the more or less free doing with it as one wills. But in copyright property has reached a more abstract expression. The right to exclude is not directed to an object in possession or owned, but is in vacuo, so to speak. . . . It is a prohibition of conduct remote from the persons or tangibles of the party having the right." Maugham, A Treatise on the Laws of Literary Property 1 (1928).
\textsuperscript{5} Oswald, A History of Printing: Its Development Through Five Hundred Years 4-13, 190-192 (1928); Memorandum, 4 Burr. *2418 (1769).
\textsuperscript{6} Copinger, Law of Copyright 1 (7th ed., James, 1936); Shaw, R. R., Literary Property in the United States 24 (1950). Pamphlets were included with books under the licensing act of 1647. Brown, W. F. W., "The Origin and Growth of Copyright", 34 L. Mag. & Rev. 54, 57 (1908).
\textsuperscript{7} The exclusive right probably originated as a form of crown control over unlicensed printing and publishing and vested in printers, rather than authors, either directly or by royal grant or indirectly through the licensing and registration powers conferred on the Stationers' Company by the crown. 6 Holdsworth, History of English Law 360-379 (2d ed. 1937); Pforzheimer, "Copyright and Scholarship", English Institute Annual, 1940, 164, 165-168 (1941). The tradition of patronage sustained authors in the period prior to 1780. Collins, A. S., Authorship in the Days of Johnson 114-210 (1927).
\textsuperscript{8} 8 Ann., c. 19 (1710). Dean Swift is credited with having drafted the original bill which was much cut up in the committee of the whole House. Birrell, op. cit. supra note 3, at 93. The expiration of the licensing acts in 1694 had left the printers without adequate remedies. Brown, W. F. W., supra note 6, at 59-60. Authors showed conspicuous lack of interest in copyright legislation, since they usually sold their works outright. Collins, A. S., "Some Aspects of Copyright from 1700 to 1789", 7 The Library (4th series) 67, 77-79 (1926); Legis, "Revision of the Copyright Law", 51 Harv. L. Rev. 906 (1938).
of the modern law of copyright. Although the preamble of the statute referred to "books and other writings", the effective provisions of the statute referred only to "books" and prohibited their unauthorized printing and reprinting. The term "book", however, was broadly construed to include magazines and related forms of literary works then in the process of emergence.

Over the years following the enactment of the Statute of Anne, the

9 The bill was introduced January 11, 1710, and within three months was amended in both Houses, approved in conference, and signed by the Queen, effective April 10, 1710. The date of the Act is sometimes erroneously given as 1709 because the journals of Parliament recording the legislative history of the Act were dated 1709 until late March, 1710. Ransom, "The Date of the First Copyright Law", Studies in English, 1940, U. of Tex. Pub'n No. 4026, 117-122 (1940).

10 For an analysis of the statute which secured the sole right and liberty of printing books to their authors, see Birrell, op. cit. supra note 3, at 94-96. Books already printed were protected for twenty-one years from April 10, 1710; new books for fourteen years from publication, subject to possible renewal for fourteen years more by the author if he survived the original term. Penalties for infringement were forfeiture of infringing matter and a penalty of one penny per sheet payable one-half to the crown and one-half to the informer. The title of the book had to be entered before publication in the Stationers' Company register-book which was now opened to non-members of the Company.

11 Maughan, op. cit. supra note 4, at 74-75; see Scoville v. Tolland, 21 Fed. Cas. No. 12,533, at 863 (C.C.D. Ohio 1848); Tonson v. Collins, 1 Blackst. R. 301, 96 Eng. Rep. 169 (K.B. 1761) (involving Addison and Steele's The Spectator). Magazines were exposed to growing piracy. Collins, A. S., op. cit. supra note 7, at 56; Bloom, E. A., "Samuel Johnson on Copyright", 47 J. Eng. & Germ. Philology 165, 166 (1948); see Clayton v. Stone, 5 Fed. Cas. No. 2,872, at 999 (C.C.S.D.N.Y. 1829). Specific provisions for reviews and magazines were included in the British Copyright Act of 1842, 5 & 6 Vict., c. 45, which defined "book" to include a sheet of letter-press. Birrell, op. cit. supra note 3, at 152-154; see also Cate v. Devon & Exeter Constitutional Newspaper Co., 40 Ch. D. 500 (1889); Comyns v. Hyde, 72 L.T. 250 (Ch. D. 1895). In the United States, the Act of March 3, 1891, 26 Stat. 1106, first specifically mentioned periodicals in the phrase in Section 11 that "each number of a periodical shall be considered an independent publication", and the Act of March 4, 1909 [17 U.S.C. § 5(b) (1952)] created a separate class for "periodicals, including newspapers". They were previously copyrighted as "books" or "books or periodicals". Solberg, "Newspaper Copyright With Some Practical Suggestions", 112 Publishers' Weekly 267 (July 23, 1927). "Historically, 'books' were the first works to which copyright applied, and extensions of the law of copyright have all consisted in bringing works other than 'books' within the principle of the same law." Copinger, op. cit. supra note 6, at 1. In April, 1709, one year before the effective date of the Statute of Anne, the first issue of Richard Steele's periodical publication entitled The Tatler was published. Two years later, Steele, with Joseph Addison, published another periodical, The Spectator. "As such, The Tatler and The Spectator succeeded in establishing the magazine as a journalistic and literary form of marked social force." Wood, J. P., Magazines in the United States 6 (1949). Although the first magazine in English—The Review, a weekly periodical issued by Daniel Defoe, the famous author of Robinson Crusoe, from Newgate Prison—appeared in February, 1704, it was not until 1731 that the first English-language periodical to describe itself by the name "magazine" appeared in the form of Edward Cave's Gentleman's Magazine. Id. at 3-7. The first American magazine was published in 1741. Id. at 14-26.
rule gradually evolved that post-publication protection could be achieved only under the statute.  

The Statute of Anne, with its judicial gloss, served as the model for the earliest American copyright legislation, first by the states and then

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12 By "publication" is meant a "general publication". See Werckmeister v. American Lithographic Co., 134 Fed. 321, 324 (2d Cir. 1904):

Publication of a subject of copyright is effected by its communication or dedication to the public. Such a publication is what is known as a 'general publication.' There may be also a 'limited publication'. The use of the word 'publication' in these two senses is unfortunate and has led to much confusion.


13 In the period from 1783 to 1786, twelve of the thirteen original states—Connecticut, Massachusetts (cf. Massachusetts Bay Colony, Ordinance of May 15, 1672), Maryland,
Statutory copyright was gradually extended to cover dramatic, musical and artistic works, and to protect them more adequately by recognizing

New Jersey, New Hampshire, Rhode Island, Pennsylvania, South Carolina, Virginia, North Carolina, Georgia, and New York—passed copyright laws. No copyright law seems to have been enacted by Delaware. On May 2, 1783, Congress recommended the several states to secure to authors or publishers of new books the copyright of such books. Copyright Enactments of the United States, 1783-1906, 11-31, 113 (2d ed. 1906). Congress, under the Articles of Confederation, had no power over copyright. Fenning, "Copyright Before the Constitution", 17 J. Pat. Off. Soc'y 379, 380 (1935). Noah Webster, interested in protecting his Blue-Backed Speller, promoted copyright legislation and has been called the father of copyright legislation in America. Warfel, Noah Webster—Schoolmaster to America 54-60 (1936). The views on copyright of Sir William Blackstone, the plaintiff's counsel on reargument in the famous case of Millar v. Taylor, supra note 13, and one of the judges (although he was not able to deliver his opinion personally, being confined to his room with the gout) in the even more far-reaching case of Donaldson v. Becket, supra note 13, were well known in the United States through his famous Commentaries:

When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that identical work as he pleases, and any attempt to vary the disposition he has made of it, appears to be an invasion of that right. Now the identity of a literary composition consists entirely in the sentiment and the language, the same conceptions, clothed in the same words, must necessarily be the same composition; and what ever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing in any number of copies, or at any period of time, it is always the identical work of the author which is so exhibited; and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent . . . in case the author . . . totally grants the copy-right, it hath been supposed . . . that . . . the whole property, with all its exclusive rights, is perpetually transferred to the grantee. [Emphasis supplied.]

Thus, in one of the earliest discussions of copyright under that name, the concept of indivisible copyright finds recognition. 2 Bl. Comm *405-406.

18 U.S. Const., Art. I, § 8, cl. 8. There is very little discussion of the clause in the records of the Constitutional Convention or The Federalist. Fenning, "The Origin of the Patent and Copyright Clause of the Constitution", 17 Geo. L.J. 109-117 (1929). The clause was copied verbatim into the Confederate Constitution. Page, "Copyright Laws in Georgia History" in Second Copyright Law Symposium 151, 156 (1940). The same Constitutional provision also provides the basis for Congressional patent enactments; the courts draw frequent analogies between the two fields. Wolff, "Copyright Law and Patent Law; A Comparison", 27 Iowa L. Rev. 250 (1942). This tendency has been criticized on the grounds that "The dissimilarities are more pronounced than the similarities. One gives a monopoly; the other merely a prohibition against copying—a very different thing." Unbretch, "A Consideration of Copyright", 87 U. of Pa. L. Rev. 932 (1939). The first Federal copyright law, the Act of May 31, 1790 (1 Stat. 124) afforded protection against printing, reprinting, publishing and vending for a map, chart, book or books by an American citizen or resident for fourteen years, subject to possible renewal for fourteen years.

16 In Great Britain, the Act of 1710, supra note 8, applied to "books". Statutory protection was expressly extended to engravings (1734), sculpture (1814), dramatic works (1833), musical works (1842), prints (1852), paintings, drawings, and photographs (1862). Copinger, op. cit. supra note 6, at 11-12. In the United States the Act of May 31, 1790 (1 Stat. 124) applied to a map, chart, book or books. In the Act of April 29, 1802
the exclusive rights of public performance, exhibition, and representation.\textsuperscript{17}

Thus, from a single right applicable to books, copyright grew into an aggregation of several rights covering many types of intellectual creations reduced to concrete form. However, copyright continued to be regarded as an indivisible concept—a historical consequence which has been perpetuated in the American copyright system, where its application and consequences are of major importance.

**The Indivisible Copyright Theory**

The United States Copyright Act does not expressly state that copyright is indivisible. However, the constant references in the Act to “the copyright proprietor”\textsuperscript{18} are consistent only with the assumption of a single proprietorship,\textsuperscript{19} not only of statutory copyright but also of common-law copyright.\textsuperscript{20}

\textsuperscript{17} Great Britain recognized the performing right in 1833 with respect to dramatic works and in 1842 with respect to musical works. Copinger, op. cit. supra note 6, at 11; the United States in 1856 (11 Stat. 138) and 1897 (29 Stat. 481). Recording rights were recognized to a limited extent in the United States in 1909 (35 Stat. 1075) and in Great Britain in 1911 when the classes of works protected were very broadly defined. Copinger, op. cit. supra note 6, at 140, 54-65. See Chafee, “Reflections on the Law of Copyright”, 45 Col. L. Rev. 503, 516 (1945).

\textsuperscript{18} 17 U.S.C. §§ 1, 2, 3, 7, 8, 9, 10, 12, 14, 19, 21, 22, 24, 25, 26, 28, 101, 107, 109, 214, 215 (1952). Synonymous with the word “proprietor” in the Act is the word “owner”. 17 U.S.C. §§ 1, 9, 101 (1952). See also 17 U.S.C. § 27 (1952) (reference to “assignment of the copyright”); § 30 (provision that default in recordation of assignment of copyright void as against any subsequent purchaser or mortgagee, etc.); § 32 (provision that assignee under recorded assignment may substitute his name for that of assignor in copyright notice); § 107 (d) (Fourth) (reference to “proprietor of the American copyright”).

\textsuperscript{19} Co-ownership of the undivided whole of such single proprietorship is, of course, possible. Co-ownership of copyright, or the co-existence of two or more undivided interests therein, may arise in ways other than through co-authorship of a joint work: inheritance by two or more of undivided shares in a work; renewal by spouse and children or by plural next of kin; assignment of undivided portion of the entire copyright. Rosengart, “Principles of Co-Authorship in American, Comparative, and International Copyright Law”, 25 So. Calif. L. Rev. 247 (1952); Redleaf, “Co-ownership of Copyright”, 119 N.Y.L.J. 760, 782, 802, 822 (Mar. 1-4, 1948); Kupferman, “Copyright—Co-owners”, 19 St. John’s L. Rev. 95, 96-99 (1945).

\textsuperscript{20} See Palmer v. DeWitt, 47 N.Y. 532 (1872); Fitch v. Young, 230 Fed. 743
It is the copyright proprietor who secures and registers the claim to copyright and deposits the copies;\textsuperscript{21} whose name must appear in the copyright notice;\textsuperscript{22} who renews the copyright in stated situations;\textsuperscript{23} who reserves ad interim copyright;\textsuperscript{24} who is entitled to damages, profits or statutory damages in case of infringement;\textsuperscript{25} whose signature is necessary to the assignment, grant, or mortgage of the copyright;\textsuperscript{26} whose consent is necessary to the production of a copyrightable new version of the copyrighted work;\textsuperscript{27} from whom or under whose authority the first authorized edition of the work must issue;\textsuperscript{28} who has several functions under the compulsory licensing provisions applicable to musical compositions;\textsuperscript{29} who is liable to $100 fine for failure to deposit copies of the copyrighted work on demand;\textsuperscript{30} and who may be required before a permanent injunction is granted to reimburse innocent infringers where the copyright notice has been omitted from a particular copy or copies by accident or mistake.\textsuperscript{31}

The indivisible copyright theory, while never authoritatively defined, can be summarized as follows: With respect to a particular work embodied in concrete form, or separable part of such work,\textsuperscript{32} there is, at

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{21} 17 U.S.C. §§ 9, 10, 11, 12, 13 (1952).
\item \textsuperscript{22} 17 U.S.C. §§ 19, 32 (1952).
\item \textsuperscript{23} 17 U.S.C. §§ 24, 25 (1952).
\item \textsuperscript{24} 17 U.S.C. § 22 (1952).
\item \textsuperscript{25} 17 U.S.C. § 101 (1952).
\item \textsuperscript{26} 17 U.S.C. § 28 (1952).
\item \textsuperscript{27} 17 U.S.C. § 7 (1952).
\item \textsuperscript{28} 17 U.S.C. § 26 (1952).
\item \textsuperscript{29} 17 U.S.C. §§ 1(e), 101(e) (1952).
\item \textsuperscript{30} 17 U.S.C. § 14 (1952).
\item \textsuperscript{31} 17 U.S.C. § 21 (1952).
\item \textsuperscript{32} A new version (compilation, abridgment, adaption, arrangement, dramatization, translation) of copyrightable material prepared with the authority of the copyright proprietor of such material or of material in the public domain may itself be copyrighted to protect the new material. 17 U.S.C. § 7 (1952). See notes 41 and 140 infra. The copyright upon composite works or periodicals gives to the proprietor the same rights as if each copyrightable component part were individually copyrighted. 17 U.S.C. § 3 (1952). The copyright secured in a contribution under the general copyright of the magazine is, by the better view, separable from such general copyright. Dam v. Kirke La Shelle Co., 166 Fed. 589, 590 (S.D.N.Y. 1908), aff'd, 175 Fed. 902 (2d Cir. 1910); Morse v. Fields, 127 F. Supp. 63 (S.D.N.Y. 1954); Kaplan v. Fox Film Corp., 19 F. Supp. 780 (S.D.N.Y. 1937); cf. Witwer v. Harold Lloyd Corp., 46 F.2d 722 (S.D.Cal. 1930), rev'd on other grounds, 65 F.2d 1 (9th Cir. 1933), petition for writ of certiorari dismissed per stipulation of counsel, 296 U.S. 669, 54 Sup. Ct. 94 (1933) (copyright in whole issue assigned to author of contribution). But see Douglas v. Cunningham, 33 U.S.P.Q. 470 (D. Mass. 1933) (holding grantee of less than copyright of whole issue licensee), aff'd, 72 F.2d 536 (1st Cir. 1934) (after magazine publisher was joined by author as co-plaintiff), rev'd on other
\end{itemize}
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any one time, only a single incorporeal legal title or property known as the copyright, which encompasses all of the authorial rights recognized by the law of the particular jurisdiction with respect thereto.

The theory of indivisible copyright is recognized as an established element of the American copyright system. Although the theory has been severely criticized at various times on divergent grounds, attempts to grounds, 294 U.S. 207, 55 Sup. Ct. 365 (1935). The minority view appears to have misapplied the indivisible copyright theory. Although the copyrights of the contributions are separable, the general copyright prohibits unauthorized rearrangements of such contributions by rebinding contributions on various topics and selling such second-hand material in book form. National Geographic Society v. Classified Geographic, Inc., 27 F. Supp. 655 (D. Mass. 1939), noted in 8 Geo. Wash. L. Rev. 979 (1940); cf. Fawcett Publications, Inc. v. Elliot Publishing Co., 46 F. Supp. 717 (S.D.N.Y. 1942) (binding together of two complete issues, except for covers, which were ruled by court to be not copyrightable).


In a particular work, at a particular time, there can, of course, be different copyrights conferred by the laws of different jurisdictions. Technically, there are as many common-law copyrights as there are states recognizing the same. Wheaton v. Peters, 8 Pet. 591, 657-658 (U.S. 1834). These rights are preserved by the United States Copyright Act. 17 U.S.C. § 2 (1952). Separate copyrights are, of course, recognized by different countries. See Henn, "The Quest for International Copyright Protection", 39 Cornell L.Q. 43 (1953).

Divisible, however, into equitable interests and non-proprietary rights. See note 51 infra.


See opinion of Frankfurter, J., dissenting in Commissioner of Internal Revenue v. Wodehouse, 337 U.S. 369, 301, 69 Sup. Ct. 1120, 1135 (1949), reversing 166 F.2d 986 (4th Cir. 1948); Gitlin and Woodward, Tax Aspects of Patents, Copyrights and Trade-
abrogate the theory by express Congressional enactment have to date resulted in failure.  

The Act defines copyright as comprising the exclusive right to use the copyrighted work in several ways—varying to a considerable extent with the type of literary, dramatic, musical, artistic, etc., work involved. With the longest history in copyright law is the exclusive right to print, reprint, publish, copy, and vend, which is applicable to all types of copyrighted works. The exclusive right to translate and to make any other version applies only to certain works. The exclusive right of

Marks 47 (rev. ed. 1954); Fulda, "Copyright Assignments and the Capital Gains Tax", 58 Yale L.J. 245, 253 (1949); Gitlin, "Taxation of Copyright", 27 Taxes 503, 505 (1949); Solberg, "The Present Copyright Situation", 40 Yale L.J. 184, 190-191 (1930); Hearings before Committee on Patents on H.R. 8913, 70th Cong., 1st Sess. (1928); Hearings before Committee on Patents on H.R. 16808, 69th Cong., 2d Sess. (1927).

These bills would have made copyright divisible, would have extended the recordation provisions to licenses, and would have defined the term "copyright proprietor" to include the owner of any rights infringed.

Marks 47 (rev. ed. 1954); Fulda, "Copyright Assignments and the Capital Gains Tax", 58 Yale L.J. 245, 253 (1949); Gitlin, "Taxation of Copyright", 27 Taxes 503, 505 (1949); Solberg, "The Present Copyright Situation", 40 Yale L.J. 184, 190-191 (1930); Hearings before Committee on Patents on H.R. 8913, 70th Cong., 1st Sess. (1928); Hearings before Committee on Patents on H.R. 16808, 69th Cong., 2d Sess. (1927).

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public delivery for profit applies only to a non-dramatic literary work.\textsuperscript{42} To a drama attaches the exclusive right of public performance and of recording;\textsuperscript{43} to a musical composition the exclusive right of public performance for profit and of recording;\textsuperscript{44} etc.

For commercial purposes these rights are divided into various overlapping combinations which, in the case of literary works, are known to the trade as "book rights",\textsuperscript{45} "magazine rights" or "serial rights",\textsuperscript{46} "stage rights",\textsuperscript{47} "motion picture rights",\textsuperscript{48} "radio rights",\textsuperscript{49} "television rights",\textsuperscript{50} etc.


\textsuperscript{43} 17 U.S.C. § 1(e) (1952).

\textsuperscript{44} 17 U.S.C. § 1(d) (1952).

\textsuperscript{45} See Dubin, "Copyright Aspects of Sound Recordings", 26 So. Calif. L. Rev. 139 (1953).

\textsuperscript{46} See pp. 421-426, infra.


\textsuperscript{48} Frohlich and Schwartz, op. cit. supra note 47; Lidney, Motion Picture Agreements (1947); Wittenberg, op. cit. supra note 33, at 243-271. Motion picture rights often include the right to publish a synopsis of the work in magazine form. Clearance of these rights is often sought from magazine publishers. See also Lake v. Universal Picture Co., 95 F. Supp. 768 (S.D. Cal. 1950); see also note 50 infra.

\textsuperscript{49} See Wittenberg, op. cit. supra note 33, at 275-280; MacDonald, "The Law of Broadcasting" in 7 Copyright Problems Analyzed 51-67 (1952); see also note 50 infra.

etc. These several rights are separately marketed and exploited, and are recognized by the courts to involve equitable interests. This recognition of equitable interests in persons other than the technical legal proprietor has alleviated the practical difficulties attendant in many situations upon the strict application of the indivisible copyright theory.51

"MAGAZINE RIGHTS"; "SERIAL RIGHTS"

A very substantial amount of literary and artistic material appears in magazine form, either exclusively or before publication in other forms or media. Occasionally, magazines republish material, but such republication, so far as most magazines are concerned, is minor and incidental.

The contents of a magazine consist of (1) material prepared by the magazine publisher, including the employees thereof, and (2) material written by authors not in the employ of the publisher. As to the material prepared by the publisher (and employees), the publisher is essentially the author and, as such, in the absence of an understanding with the employee to the contrary, owns the material. The rights of the publisher in such material arise directly from authorship and not indirectly through grant from the author.52 In the case of material written by an author not in the employ of the publisher, the publisher must acquire the rights by grant from the author.

Those rights which magazine publishers traditionally acquire in the material which they plan to use are loosely characterized by the term "magazine rights" or "serial rights."53
Such rights with respect to particular material fall into two classes: (1) the rights primarily to be exercised by the magazine, and (2) the rights, incidental to those to be exercised, reserved for purposes of preserving the editorial value of the rights to be exercised. As to the first class of rights, all magazines obviously exercise at least rights of publication in magazine form for those jurisdictions in which their copies are understood to comprehend all publishing rights, including magazine and newspaper publishing rights, and excepting only book, dramatic, and moving picture scenario rights.

All would agree that the exceptions would have to be expanded today. See notes 45-50 supra. It has been stated that the word "serial" refers to a magazine or newspaper as a type of publication that is published serially—weekly, daily, monthly, etc.—and not to serialization or publication in installments. Patterson, Writing and Selling Feature Articles 418 (2d ed. 1949); Thring, The Marketing of Literary Property—Book and Serial Rights 158 (1933). The Canadian Act, § 15(3), defines "serial" to "mean and refer to any book first published in separate articles or as a tale or short story complete in one issue in a newspaper or periodical." But see "When a Serial is Not a Serial", 126 Publishers' Weekly 676 (Sept. 1, 1934); "What Are Serial Rights?" 124 Publishers' Weekly 2012 (Dec. 9, 1933); "Magazines Encroach on Book Rights", 125 Publishers' Weekly 685 (Feb. 10, 1934) (contending that publication in two or more installments is a sine qua non of serial rights). In view of such differences in opinion, use of the term "serial rights" is best avoided, unless accompanied by a definition of the rights intended to be denoted by the term. Use of the terms "first serial rights" and "second serial rights", without amplification, compounds the confusion. So-called "first serial rights" can be construed as combining the right to publish in magazine or newspaper form with the right of first publication or use in any form or media, the word "first" serving the purpose of a twofold limitation: (1) to bar prior or simultaneous publication or use by the author or persons acting under his authority, and (2), to bar subsequent republication or re-use by the magazine publisher or by persons acting under its authority; "Second serial" or "syndicate" rights as permitting publication "in some publication other than the one in which it first appeared" (Patterson, supra, at 418; Thring, supra, at 158); "Syndicate" rights as usually although not necessarily calling for use subsequent to first serial rights, usually connoting substantially simultaneous publication in several periodicals, especially newspapers. But see Wasserstrom, "Magazine, Newspaper and Syndication Problems" in 1953 Copyright Problems Analyzed 159, 165 (1953): "For my own part, I think first serial rights refer merely to magazines and second serial rights to newspapers and so long as one stays within those respective media the work may be published and republished either in installments or not. Of course, these questions arise only when the agreement between the parties is silent on the subject. As such, they are remediable deficiencies that might have been obviated had the parties expressly or by necessary implication spoken on the point. Not infrequently the parties deal so meagerly with this important question of the scope of rights that no more than a short abbreviated legend or notation will be found on the face or back of the publisher's payment check or on the detachable voucher accompanying it. This seems strange indeed, since the parties involved are men whose business it is to deal in words—editors and authors. Yet, I have frequently found them reluctant to formalize or even to say out in reasonable detail just what rights are involved." Quaere, as to the right of the magazine publisher to reprint selections of its material in leaflet form, in an anniversary or other anthology, or otherwise for promotional purposes. See Pratt, Crawford, et al., Magazine Circulation, Sales & Promotion (1952). For discussion of newspaper syndication, see Wasserstrom, supra at 173-175; for an explanation of why so few newspapers are copyrighted, see id. at 171.
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culate—mainly the United States and Canada for American magazines.\(^{54}\)

As to the protective rights, the second class of rights, the practices among
the magazines differ to some extent, depending upon, among other things,
the type of material and magazine involved, the relative bargaining
power of the author of the material and the publisher of the magazine,
and the extent of the parties’ concern with the technical requirements of
copyright law.\(^{55}\)

**Unpublished Material**

Except for the eclectic magazines, of which the most prominent ex-
ample today are the digest magazines,\(^{56}\) and for the news magazines,\(^{57}\)
it is usually important to a magazine that its editorial material be neither
previously nor contemporaneously published or presented in any form
or media.\(^{58}\) For that reason, the common practice has been for Ameri-
can magazines, with respect to new material written by others, to acquire
the rights of first publication and presentation in any form or media and
continuing—at least for a minimum period\(^{59}\)—exclusive rights in any

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\(^{54}\) Circulation of American magazines abroad is constantly increasing. Several maga-
zines now have foreign editions programs. During 1951, more than 8,000,000 copies of
American magazines went to Marshall plan countries through the Economic Co-operation
Administration, N.Y. Times, Apr. 15, 1951, p. 32, col. 1. The Reader’s Digest is printed
in seventeen editions in twelve languages and distributed in every free country of the
world (approximately 17½ million copies per month). The Reader’s Digest, Mar. 1955
(inside front cover). The standard work on Canadian copyright law is Fox, op. cit.
supra note 52.

\(^{55}\) Since magazines are the medium of first publication of such a substantial amount of
literary and artistic material and since publication destroys the common-law copyright
and gives rise to statutory copyright, the magazines especially have had to conform their
policies with respect to their acquisition, holdings, and reconveyances of rights in such
material to the technical requirements of copyright law, including the indivisible copyright
theory.

\(^{56}\) Wood, op. cit. supra note 11, at 199-208.

\(^{57}\) Id. at 184-198.

\(^{58}\) Hearings before Committee on Patents on H.R. 16808, 69th Cong., 2d Sess. 353
(1927): “A large part of the value of the magazine publisher’s right in the literary work
would immediately disappear, and in most cases the material be rendered useless to the
magazine publisher, if the work were to be presented to the public in some other form,
prior to or during the distribution of the magazine under its right of first publication.
Use prior to first publication destroys the value of what the magazine has purchased.”

\(^{59}\) Usually from the publication or newsstand on-sale date of the issue of the magazine
carrying the material. For the purpose of newsstand sales (which term generally includes
all non-subscription sales), most magazines prescribe definite on-sale and off-sale dates for
each issue. Subscription copies are mailed to subscribers in various regions in order to
be received by them on or about the on-sale date, which may not necessarily coincide with
the date printed on the issue. Even after such minimum period, it would not be unlawful
for the magazine publisher to sell back issues containing such material, even if the pub-
lisher at that time no longer held the magazine rights. See 17 U.S.C. § 27 (1952).
form or media and thereafter exclusive rights of publication in magazine and newspaper form for the United States and Canada.

There are, in general, four principal types of grant of rights which the magazine publisher is or may be interested in acquiring in new material of which it is not the author. These types of prepublication grant to the magazine publisher, which can, where appropriate, be limited as to territory, time, and renewal, and which differ widely in phraseology (and verbosity), are as follows:

(1) All right, title, and interest, including all rights of copyright, outright;

(2) All right, title, and interest, including all rights of copyright, subject to a duty to reconvey, at some time after its publication of the material—
   (a) the copyright, including all rights thereof; or
   (b) the copyright, including all rights thereof other than exclusive publication rights in magazine and newspaper form; or
   (c) all rights of copyright other than exclusive publication rights in magazine and newspaper form;

(3) First publication rights and continuing exclusive publication rights in magazine and newspaper form—
   (a) including the right to secure copyright in its own name; or

60 See Field v. True Comics, Inc., 89 F. Supp. 611 (S.D.N.Y. 1950), aff'd, 189 F.2d 950 (2d Cir. 1951) (comic magazine held not “in book form” notwithstanding its classification as “book” under Copyright Act). The Copyright Office defines the term “periodical” as including “newspapers, magazines, reviews, bulletins, proceedings of societies, serial publication, etc., which appear at regular intervals of less than a year; and, generally, periodical publications which would be registered as second-class matter at the Post Office. Serial publications which are not clearly ‘periodicals’ should be registered as ‘books’.”

61 “Newspaper” is defined for certain purposes in the postal service regulations, 39 Code Fed. Regs. § 34.41 (1949), as “a publication regularly issued at stated intervals of not longer than one week and having the characteristics of second-class matter prescribed by law”; “periodical . . . less frequently than weekly . . . ” See notes 136, 249 infra.

62 Patterson, op. cit. supra note 53, at 418.

63 In all such grants, or any specific variations thereof, the draftsman must pay particular attention to the technical aspects of copyright law, for the inclusion or omission of certain “words of art” may vitally affect the legal effectiveness of the grant. Two important “words of art” are “copyright” and “renewal”. See notes 107, 238 infra. Such grants often expressly permit the publisher to revise and edit the text [see notes 83, 86 infra], and change the title [see note 163 infra]; authorize reassignment, licensing, or sublicensing by the publisher [see notes 84, 88 infra]; and contain representations and warranties by the author with respect to the work and the rights granted (which would probably be implied in the absence of express provision), and undertakings by the author to hold the publisher harmless and indemnify it with respect to copyright, libel, right-of-privacy, obscenity, and other claims. See Colton, “Contracts in the Entertainment and Literary Fields” in 1953 Copyright Problems Analyzed 139, 142-144 (1953); Klein, “Protective Societies for Authors and Creators” in id. 19-119 (valuable appendix of various forms required or recommended by such societies); Loew's Inc. v. Wolff, 101 F. Supp. 981 (S.D. Cal. 1951), aff'd per curiam, — F.2d — (9th Cir. 1954); Cf. April Productions, Inc. v. G. Schirmer, Inc., 308 N.Y. 366, — N.E.2d — (1955).
(b) including the right to secure copyright in its own name, subject to a duty to reconvey, at some time after its publication of the material—
(i) the copyright, including all rights thereof other than exclusive publication rights in magazine and newspaper form; or
(ii) all rights of copyright other than exclusive publication rights in magazine and newspaper form; or
(c) without the right to secure copyright in its own name;

(4) First publication rights—
(a) including the right to secure copyright in its own name; or
(b) including the right to secure copyright in its own name, subject to a duty to reconvey, at some time after its publication of the material—
(i) the copyright, including all rights thereof; or
(ii) all rights of copyright; or
(c) without the right to secure copyright in its own name.

Previously Published Material

As stated above, magazines occasionally republish copyrighted material. In cases where such republication is minor and incidental, the magazine publisher usually acquires appropriate permission to republish the material in the magazine,\(^{64}\) being more interested in avoiding infringement claims than in preserving the editorial value of the rights exercised. In cases where the use of previously published and copyrighted material is of major importance, however, the publisher may well insist upon acquisition of exclusive republication rights in magazine and newspaper form, at least for a minimum period.

Previously-published material constitutes a large part of the contents of the eclectic magazine, such as the digest magazine.\(^{65}\) Hence the protection of such material is of primary concern to its publisher, which, generally speaking, acquires magazine republication rights known as "reprint rights"\(^{66}\) or "digest rights".\(^{67}\) The condensations are mainly

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\(^{64}\) Since such permission constitutes a strictly-construable license, personal to the licensee [see notes 85-88 infra], care should be taken that it cover all prospective uses by the magazine publisher, its representatives, licensees, and assigns.

\(^{65}\) See note 56 supra.

\(^{66}\) "Reprint rights" denote the right to republish by printing in original form in the absence of express or implied permission to modify. For that reason, "digest rights" (note 67 infra) are more desirable than "reprint rights". Since such rights are part of magazine or serial rights, which may be retained by the magazine of original publication, the latter, as well as the author in certain situations, must agree to the exercise of reprint or digest rights.

\(^{67}\) "Digest rights" are "reprint rights" coupled with the right to abridge or condense. At one time, copyright was deemed not to prevent the making of a "fair abridgment". Story v. Holcombe, 23 Fed. Cas. 171, No. 13, 497 (C.C.D. Ohio 1847); cf. Roberts, H. W., "The Law on Abridgment of Copyrighted Literary Material", 30 Ky. L.J. 297, 304 (1942); "Is an Abridgment an Infringement of the Copyright of the Original Work?"
written by editors in the employ of the magazine publisher.68

The modern news magazine,69 whether mainly text or pictures, largely contains material dealing with news events previously publicized in newspaper form.70 Most of the news magazine's versions of the news and many of the pictures are prepared by staff writers and photographers in the employ of the magazine publisher.71

COMMON-LAW PROTECTION PRIOR TO PUBLICATION

When magazine publishers acquire rights in material not previously published, they are dealing in common-law copyright. Upon common-law principles, as soon as a work assumes concrete form as a visible writing, the exclusive right to publish it or otherwise to use it prior to publication automatically accrues.72 Two of the most important aspects

3 Am. L. Reg. 129 (1855) (answered in negative). Permission to abridge, however, should be secured. Lanigan, "Legal Protection for the Author", 14 Notre Dame Law. 443, 450 (1939). The sound practice is for digest magazines to acquire exclusive digest rights in the material. See also Viking Press, Inc. v. Hearst Magazines, Inc., 88 N.Y.S.2d 375 (Sup. Ct. 1949) (advertisement of condensation as unabridged version).

68 The publisher would be deemed the author. See note 52 supra. Such new versions would be copyrightable as new works. See note 140 infra.

69 See note 57 supra.


71 See note 68 supra. See also Yale University Press v. Row, Peterson & Co., 40 F.2d 290 (S.D.N.Y. 1930).

72 "... The sole, exclusive interest, use, and control. The right to its name, to control, or prevent publication. The right of private exhibition, for criticism or otherwise, reading, representation, and restricted circulation; to copy, and permit others to copy, and to give away a copy; to translate or dramatize the work; to print without publication; to make qualified distribution. The right to make the first publication." Harper & Bros. v. M. A. Donohue & Co., 144 Fed. 491, 492 (N.D. Ill. 1905), aff'd per curiam, 146 Fed. 1023 (7th Cir. 1906); see also Schulman, "Authors' Rights" in 7 Copyright Problems Analyzed
of common-law copyright, so far as magazines are concerned, are the right of first publication and the right to secure statutory copyright. Freely alienable, the common-law copyright can be transferred by any of the methods of transfer—written or oral—recognized by law.\textsuperscript{73} Although abolished by statute in Great Britain,\textsuperscript{74} Canada,\textsuperscript{75} and the other British dominions,\textsuperscript{76} the common-law copyright is still recognized in American jurisdictions.\textsuperscript{77}

19-27 (1952); Pickard, “Common Law Rights Before Publication” in Third Copyright Law Symposium 298-336 (1941); George v. Victor Talking Machine Co., 38 U.S.P.Q. 222 (D.N.J. 1938), rev'd on other grounds, 105 F.2d 697 (3d Cir. 1939), cert. denied, 308 U.S. 611, 60 Sup. Ct. 176 (1939) (recording held violative of common-law rights). Although automatic copyright can hardly be called foreign to American copyright tradition, all of the Congressional statutes have required compliance with formalities with respect to published works. Of course, the Constitutional emphasis on the public interest is not applicable to common-law copyright. Statutory copyright, however, is available also for certain classes of works not reproduced in copies for sale, that is, unpublished at the time registration and deposit are made, and hence generally denominated “unpublished works”. These classes [lectures, dramatic, musical and dramatico-musical works, motion pictures, photographs, works of art, plastic works and drawings, but not books, periodicals, maps, reproductions of a work of art or prints and pictorial illustrations] are limited to works designed primarily for exhibition, performance or oral delivery, and therefore are not of much interest to magazines. Unless the qualifying phrase “common-law” is used, the word “copyright” usually denotes statutory copyright. Both common-law and statutory rights are designated by the term “literary property”. \textsuperscript{73} A Modern Conception of the Common Law Copyright”, 15 Temp. U.L.Q. 531-532 (1941). The common-law copyright is sometimes called the right of first publication. Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949); Palmer v. DeWitt, 47 N.Y. 532 (1872). However, the right includes full control over all uses prior to first publication. There is some authority for the proposition that deposit of copies in the Library of Congress constitutes publication. Jewelers Mercantile Agency v. Jewelers' Weekly Publishing Co., 155 N.Y. 241, 49 N.E. 872 (1896); Cardinal Film Corp. v. Beck, 248 Fed. 368 (S.D.N.Y. 1918); Brown v. Select Theatres Corp., 56 F. Supp. 438 (D. Mass. 1944); S. Rep. No. 1187, 62d Cong., 3d Sess. (1913); H.R. Rep. No. 847, 62d Cong., 3d Sess. (1912). Compare Stern v. Jerome H. Remick & Co., 175 Fed. 282 (C.C.S.D.N.Y. 1910) with Joe Mittenthal, Inc. v. Irving Berlin, Inc., 291 Fed. 714 (S.D.N.Y. 1923); see also Shaw, R. E., op. cit. supra note 6, at 88; Gorham, “Deposit as Publication Under Section 12 of the Copyright Code”, 8 Intra. L. Rev. 202 (1953); cf. Smith, “The Copying of Literary Property in Library Collections”; 46 Law Lib. J. 197 (1953); 47 Law Lib. J. 204 (1954). In any event, the securing of statutory copyright terminates the common-law copyright. See note 33 supra.  


75 Fox, op. cit. supra note 52, at 55; “Canadian Copyright in Unpublished Manuscripts”, 8 Fort. L.J. 72 (1938).  

76 See note 74 supra.  

Upon publication, common-law protection terminates, and thereafter protection is afforded only under the Copyright Act.\textsuperscript{78} Absent compliance with statutory copyright requirements, the work falls irrevocably into the public domain. Upon compliance, the common-law copyright is transformed into statutory copyright. Inasmuch as there are substantial differences between common-law and statutory copyright,\textsuperscript{79} the legal interest acquired from the author by the publisher before publication has different incidents from the legal interest which might be subsequently reconveyed to the author by the publisher after publication.

**Grants: Assignments or Licenses**

All rights of copyright, as has been stated, derive from authorship. If the magazine publisher (or its employee) is not the author of particular material, rights therein may be acquired by grant from the author.

The grant may constitute (1) an assignment, or (2) a license. In American copyright law there is a traditional distinction between an as-

\textsuperscript{78} See note 13 supra. Such publication, of course, must be authorized. See note 171 infra.

\textsuperscript{79} Some of the present differences between common-law and statutory copyright in the United States are: In duration, common-law copyright is, prior to publication, perpetual [Baron v. Leo Feist, Inc., 78 F. Supp. 686 (S.D.N.Y. 1948), aff'd, 173 F.2d 288 (2d Cir. 1949)]; statutory copyright has an original term of twenty-eight years and a renewal term of the same length [see notes 220, 224, infra]. In scope of protection, common-law rights are much broader, short of publication [see note 72 supra], than are the rights enumerated as comprising statutory copyright [see notes 39-44 supra]. All authors are eligible for protection at common law [Palmer v. DeWitt, 47 N.Y. 532 (1872)], but not to secure statutory copyright [see notes 141-145 infra]. Obviously such statutory remedies as statutory damages, importation restrictions, etc. [see notes 246-255 infra], as well as statutory requirements of written assignment [see notes 116-117 infra] do not apply to common-law copyright. The doctrine of fair use applies to statutory copyright [see note 244 infra] but not to common-law copyright [Golding v. R.K.O. Radio Pictures, Inc., 193 P.2d 153 (Cal. App. 1948), aff'd, 208 P.2d 1 (Cal. 1949), 221 P.2d 95 (Cal. 1950)]. Common-law copyright protection is governed by state law which, in the absence of diversity-of-citizenship jurisdiction, is enforced only in the state courts. Palmer v. DeWitt, 47 N.Y. 532 (1872). That statutory copyright infringement is incidentally involved will not prevent the state court from exercising jurisdiction over cases involving breach of contract or license or abuse of fiduciary relation. Underhill v. Schenck, 238 N.Y. 7, 143 N.E. 773 (1924); Benelli v. Hopkins, 197 Misc. 877, 95 N.Y.S.2d 668 (Sup. Ct. 1950). As to jurisdiction where defendant claims statutory copyright in work alleged to infringe plaintiff's common-law rights, compare Ferris v. Frohman, 223 U.S. 424, 32 Sup. Ct. 263 (1912) with Wells v. Universal Pictures Co., 64 F. Supp. 852 (S.D.N.Y. 1945), aff'd, 166 F.2d 690 (2d Cir. 1948); see also Stern v. Carl Laemmle Music Co., 74 Misc. 262, 133 N.Y. Supp. 1082 (Sup. Ct. 1911), aff'd without opinion, 155 App. Div. 895, 139 N.Y. Supp. 1146 (1st Dep't 1913). Federal statutory copyright is enforceable exclusively in the Federal courts. 28 U.S.C. § 1338 (1952). Field v. True Comics, Inc., 89 N.Y.S.2d 35 (Sup. Ct. 1949). See also Bixby, "Hurn v. Oursler After Twenty Years" in Sixth Copyright Law Symposium 140 (1955).
Assignment and a license. This distinction under the indivisible copyright theory, as embodied in the American copyright system, is of fundamental significance, pervading, as will be hereinafter shown, all the important aspects of the securing, maintaining, renewing and enforcing of statutory copyright.

Assignment

Technically, under the indivisible copyright theory, an assignment involves the transfer of the legal property or proprietorship and the assignee becomes the "copyright proprietor." In the absence of a valid restriction to the contrary, the assignee may revise the work, and may

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reassign and freely grant the rights therein.\textsuperscript{84}

\textbf{License}

A license is a strictly-construable, personal, contractual right.\textsuperscript{85} Obviously, a licensee who alters a work in a manner not contemplated by the license would be answerable to the licensor.\textsuperscript{86} Being personal, a


\textsuperscript{86} Manners v. Famous Players-Lasky Corp., 262 Fed. 811 (S.D.N.Y. 1919) (contractual provision against alterations, eliminations or additions in play, when adopting the same for the screen, without author's approval held to prevent licensee of motion picture rights from making substantial deviation from locus of play or order and sequence of development of plot).
license—sometimes known as a limited, special, or partial assignment (the terms used in the instrument to characterize itself are not controlling) cannot, without the consent of the licensor, be transferred or sub-licensed.48

A license may be non-exclusive or exclusive.49 If non-exclusive, the grant operates as a covenant by the licensor not to sue the licensee for exercising rights under the license.50 If exclusive, the licensor also so covenants, and in addition undertakes not to make a similar grant to another, acting as trustee for the benefit of the licensee with respect to the rights exclusively licensed.51

Tests of Differentiation

Important as it is to differentiate an assignment from a license, there is no generally accepted, reasonably precise legal test for such differentiation.

If all right, title and interest in a work, including all rights of copyright, are transferred without territorial or time limitations or other reservations, the transaction obviously constitutes (1) if the work has not been previously published and copyrighted under the statute, an assignment of the existing common-law copyright comprehending as it


An exclusive license which is the equivalent of an assignment carries with it the right to grant sublicenses. In all other cases, a right to grant sublicenses will not pass to a licensee unless the parties to the license make it clear that such a result was intended. Likewise, licenses which are not the equivalent of an assignment are not assignable in the absence of an expression of such intent.


89 Exclusivity is not implied. Hart v. Cort, 83 Misc. 44, 144 N.Y. Supp. 627 (App. Term, 1st Dep't 1913), aff'd, 165 Misc. 44, 151 N.Y. Supp. 4 (1st Dep't 1914). See also 17 U.S.C. § 7 (1952). To bar the licensor from personally exercising the rights exclusively licensed, the cautious procedure is to make the license "sole and exclusive". See also note 115 infra.


does the right of first publication and right to secure statutory copyright, or (2) if statutory copyright has already been secured in the work, an assignment of the statutory copyright.\(^{92}\) If less is transferred the question invariably arises as to whether the transfer constitutes an assignment or a license.

"Partial-reservation-of-rights-by-the-proprietor" test: One test frequently stated is that if the author or successor proprietor reserves in a grant any of the rights of copyright, the grant is partial and as such can operate only as a license.\(^{93}\) The objection to this "partial-reservation-of-rights-by-the-proprietor" test is that in any division of the rights—and such division is necessary if the work is to be marketed profitably—no one person will hold all of the rights, and the technical proprietorship must necessarily be separated from some, and possibly the substantial part, of the rights having commercial value. The application of this test frequently involves the mechanistic tracing of the progress of a metaphysical concept through a chain of transfers. Theoretically, in a chain of partial transfers, the proprietorship would, under this test, always remain with the reserved rights. Only when the final residuum of such reserved rights was transferred would the proprietorship pass, and then to the grantee of such final residuum, no matter how unimportant such residual rights might be.\(^{94}\)

Two variations of the "partial-reservation-of-rights-by-the-proprietor" test have been suggested: (1) if the grant is of at least all of the rights designated in one of the five statutory subdivisions of the enumeration of rights embraced within the copyright, the grant constitutes an assignment; otherwise a license;\(^{95}\) (2) if the grant is of at least all of the


\(^{93}\) M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 470 (E.D.S.C. 1924), aff'd on opinion below, 2 F.2d 1020 (4th Cir. 1924); Wittenberg, op. cit. supra note 33, at 34; Appleman, "Compromise in Copyright", 19 B.U.L. Rev. 619, 623 (1939); Rea, "Some Legal Aspects of the Pan-American Copyright Convention of 1946", 4 Wash. & Lee L. Rev. 10, 17 (1946). Cf. Ellis, "Validity of Doctrine that a Full Exclusive License is in Fact an Assignment", 36 J. Pat. Off. Soc’y 643 (1954). No distinction is usually drawn between the rights of common-law copyright and those of statutory copyright, although the latter appear to be the point of reference.

\(^{94}\) Photo-Drama Motion Picture Co. v. Social Uplift Film Corp., 213 Fed. 374, 377 (S.D.N.Y. 1914) ("The test is whether anything remained in him."); aff'd, 220 Fed. 448 (2d Cir. 1915).

rights necessary to produce a new version copyrightable under the statute as a new work, the grant constitutes an assignment; otherwise a license. The first variation is inconsistent with the indivisible copyright theory in that it recognizes a pentapartite copyright. The second confuses the subsisting rights granted in the existing work with the prospective rights of copyright in the future, new work. Understandably, neither variation has met with any significant acceptance.

"Manifested-intention-to-transfer-the-proprietorship" test: A more realistic and less formal test than the "partial-reservation-of-rights-by-the-proprietor" test, and one which is consistent with general property law, is to examine the intention of the parties in order to determine whether or not the proprietorship was intended to be transferred. Such intention would be clearly manifest if the grant, notwithstanding that some rights were reserved, purported expressly (1) in the case of a work not previously published and otherwise eligible for statutory copyright, to transfer (a) the common-law copyright (which, as has been seen, includes the right of first publication and the right to secure statutory copyright), or (b) the right to secure statutory copyright in the grantee's own name as incidental to the right of first publication and other rights granted, or (2) where statutory copyright has already been secured, to transfer such statutory copyright.

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By this “manifested-intention-to-transfer-the-proprietorship” test, if an intention to make such a transfer is found, the grant should be deemed an assignment; the grantee, the assignee or new proprietor; and the grantor (where the grant is partial), a licensee. Otherwise, the grant, if partial, should be deemed a license with the grantor remaining the proprietor and the grantee becoming a licensee. Obviously, the less comprehensive a grant is, the clearer must be the manifestation required under this test to show an intention to transfer the proprietorship. If statutory copyright has not already been secured in the work, such an intention would be unequivocally manifested by the express grant of “all right, title, and interest, including all rights of copyright”, or of the right to secure copyright in the grantee’s own name; if statutory copyright has been secured, by the express grant of “the copyright”.

Prepublication Grants by Authors to Magazine Publishers

The application of the “partial-reservation-of-rights-by-the-proprietor” and “manifested-intention-to-transfer-the-proprietorship” tests to the principal types of prepublication grants of “magazine rights” previously outlined leads to different conclusions in two cases:


Realistic Approach ... In analyzing a particular transaction, the courts should give effect to the substance rather than the form of the transfer. There are established rules to determine whether what is being transferred has resulted in a license or a sale. Thus, a license is usually considered a personal privilege revocable by the licensor. A licensee may not grant sublicenses unless he is permitted to do so by the licensor. Licenses are limited strictly to their expressed purpose, and are deemed nonexclusive unless they are expressly made so. An assignment has none of these limitations, and is deemed to convey all of the rights of the copyright proprietor in the right transferred, with the right to reassign. If the right is coupled with permission to take out separate copyright, it should be conclusive that the transaction is an assignment.

DeWolf, op. cit. supra note 20, at 42.


100 See pp. 424-425, supra.
Prepublication Grant of "Magazine Rights" from Author to Publisher

| (1) All right, title, and interest, including all rights of copyright,\(^1\) outright | Assignment | Assignment |
| (2) All right, title, and interest, including all right of copyright,\(^1\) subject to a duty to reconvey, at some time after its publication of the material | Assignment | Assignment |
| (3) First publication rights and continuing exclusive publication rights in magazine and newspaper form—<br> (a), (b) including the right to secure copyright in its own name...; or<br> (c) without the right to secure copyright in its own name | License | License |
| (4) First publication rights—<br> (a), (b) including the right to secure copyright in its own name...; or<br> (c) without the right to secure copyright in its own name | License | License |

Where the grant is partial and there is a manifestation of an intention to transfer the proprietorship (as in the case of (3)(a), (b) and of (4)(a), (b), above), the grant is, by the "partial-reservation-of-rights-by-the-proprietor" test, a license; by the "manifested-intention-to-transfer-the-proprietorship" test, an assignment. However, the difference in these two cases is more theoretical than real, since in such a situation where the grantee has been granted the right to secure copyright in its...

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\(^1\) The provision "all right, title, and interest, including all rights of copyright," of course, comprehends not only all rights of common-law copyright, including the right of first publication and the right to secure statutory copyright in the publisher's own name, but also all rights of the ensuing statutory copyright. By either test, such a grant would obviously be an assignment, regardless of the duty of reconveyance. See note 105 infra.

\(^2\) Where the grant is partial and there is no manifestation of an intention to transfer the proprietorship, it is, by either test, obviously a license.
own name and has exercised such right, such a grantee would become the technical copyright proprietor, for proprietorship vests in the person in whose name statutory copyright is secured. Thus, regardless of which of the two tests is applied, the magazine publisher would, upon publication and the securing of statutory copyright in its own name, be the copyright proprietor, subject to the equitable claims of the author with respect to the rights not granted.\(^{103}\)

***Post-publication Reconveyances by Magazine Publishers to Authors***

The problems encountered in construing the publisher's post-publication reconveyance to the author in situations where such a reconveyance is used are even more difficult than the problems encountered in construing the pre-publication grant of rights from the author to the magazine publisher:\(^{104}\)

<table>
<thead>
<tr>
<th>Post-Publication Reconveyance(^{105}) by Publisher to Author</th>
<th>“Partial-Reservation-of-Rights-by-the-Proprietor” Test</th>
<th>“Manifested-Intention-to-Transfer-the-Proprietorship” Test</th>
</tr>
</thead>
<tbody>
<tr>
<td>(2) (a), (4) (b) (i) the copyright including all rights thereof</td>
<td>Assignment</td>
<td>Assignment</td>
</tr>
<tr>
<td>(2) (b), (3) (b) (i) the copyright, including all rights thereof other than exclusive publication rights in magazine and newspaper form(^{106})</td>
<td>LICENSE</td>
<td>ASSIGNMENT</td>
</tr>
<tr>
<td>(2) (c), (3) (b) (ii) all rights of copyright other than exclusive publication rights in magazine and newspaper form(^{107})</td>
<td>License</td>
<td>License</td>
</tr>
<tr>
<td>(4) (b) (ii) all rights of copyright(^{108})</td>
<td>Assignment</td>
<td>Assignment</td>
</tr>
</tbody>
</table>

\(^{103}\) See notes 51 supra and 149 infra. An assignee of the common-law copyright is in a much sounder position than a licensee. See notes 114, 115 infra.

\(^{104}\) Of course, in situations where copyright has not been secured in the name of the magazine publisher, no reconveyance would be appropriate. See note 105 infra.

\(^{105}\) By the better view, copyrights in the various component parts of a periodical secured under the publisher's general copyright may be separately assigned. See note 32 supra. In situations where the magazine publisher as technical copyright proprietor holds certain rights in trust for the benefit of the author [see notes 103, 51 supra], the publisher is under an implied duty to "reconvey" the rights held in trust to the author. Brady v. Reliance Motion Picture Corp., 229 Fed. 137 (2d Cir. 1916). Such implied undertaking can, of course, be negatived or implemented by express agreement. The sound practice is to provide expressly for such a reconveyance and to specify the rights, in-
Although the reconveyance of "the copyright, including all rights thereof other than exclusive publication rights in magazine and newspaper form" is, by the "partial-reservation-of-rights-by-the-proprietor" test, a license, and by the "manifested-intention-to-transfer-the-proprietorship" test, an assignment, no reported case has been found where the court held that a partial grant manifesting an intention to transfer the copyright was a license.

In the oft-cited case of *Eliot v. Geare-Marston, Inc.*, the magazine publisher, after securing statutory copyright, reconveyed to the author "all rights except American serial rights". Since there was no clear manifestation of an intention to transfer the copyright, the court properly held that the reconveyance constituted a license under which the author became the licensee of all rights except American serial rights (which were the rights involved in the alleged infringement), with the magazine publisher remaining the copyright proprietor.

On the other hand, the case of *Witwer v. Harold Lloyd Corporation* involved a clear manifestation of intention to reconvey the copyright. There, the magazine publisher purported to "assign ... the copyright ... together with all rights ... except the right of magazine publication". The court expressly rejected the "partial-reservation-of-rights-by-the-proprietor" test, and held that the reconveyance constituted an assign-
ment, with the author becoming the copyright proprietor and the publisher retaining rights of a mere licensee:111

The language is entirely plain, and is effective to convey the interest in the copyright if the intention of the parties is to be regarded . . . . Had Street & Smith, Inc. [the magazine publisher], conveyed without the reservation, and then had Witwer [the author] assigned to it the right of magazine publication, we would have a situation exactly as the parties intended by this instrument, and entirely free of the objection urged by the defendants. Why, then, should a similar situation not arise when the result is accomplished by the execution of one instrument instead of two?

Apart from the question of the proper legal test to distinguish between an assignment and a license, there is often a factual problem of interpreting a grant to determine what specific rights were intended to be transferred. In the absence of evidence to the contrary, the transfer by an author to a magazine publisher of a manuscript without restriction is deemed to carry with it all right, title, and interest, including all rights of copyright, therein.112

111 46 F.2d 792, at 795 (S.D. Cal. 1930).

112 Dam v. Kirke LaShelle Co., 175 Fed. 902 (2d Cir. 1910) (receipt “in full payment for story” held evidence of sale without reservations); Werckmeister v. Pierce & Bushnell Mfg. Co., 63 Fed. 445 (C.C.D. Mass. 1894), rev’d on other grounds, 72 Fed. 54 (1st Cir. 1896); Pushman v. New York Graphic Society, Inc., 287 N.Y. 302, 39 N.E.2d 249 (1942); Otten v. Curtis Publishing Co., 91 U.S.P.Q. 222 (N.Y. Sup. Ct. 1951). Restrictions on the transfer can be inferred from circumstances, such as where the author regarded the work as unsuitable and never intended it for publication. Chamberlain v. Feldman, 300 N.Y. 135, 89 N.E.2d 863 (1949), noted in 37 Geo. L.J. 448 (1949). The more modern authorities recognize that an author placing a work with a magazine publisher for publication, without further explanation, presumptively intends that the publisher should secure copyright therein in its own name. Mifflin v. R. H. White Co., 190 U.S. 260, 23 Sup. Ct. 769 (1903); Hearings before Committee on Patents on H.R. 16808, 69th Cong., 2d Sess. 15 (1927). See also Curtis, op. cit. supra note 51, at 227; “Copyright of Magazine Articles”, 111 L.T. 395 (Aug. 24, 1901). No intention to transfer the proprietorship was presumed in the older cases. Stephens v. Cady, 14How. 528 (U.S. 1852); Ford v. Charles B. Blaney Amusement Co., 148 Fed. 642 (C.C.S.D.N.Y. 1906); Pulte v. Derby, 20 Fed. Cas. 51, No. 11,465 (C.C.D. Ohio 1852). See also Stodart v. Mutual Film Corp., 249 Fed. 507 (S.D.N.Y. 1917), aff’d per curiam, 249 Fed. 513 (2d Cir. 1918) (entrusting manuscript to broker held not to authorize sale of copyright privilege); Public Ledger v. New York Times, 275 Fed. 552 (S.D.N.Y. 1921), aff’d per curiam, 279 Fed. 747 (2d Cir. 1922), cert. denied, 258 U.S. 627, 42 Sup. Ct. 383 (1922) (agreement to do everything else necessary held not evidence of assignment); Dam v. Kirke LaShelle Co., 175 Fed. 902 (2d Cir. 1910) (suggestion that gratuitous reconveyance of magazine publisher’s copyright in article to author bears out idea that publisher was licensee). The question of the extent of the transfer might be a jury question. Mail & Express Co. v. Life Pub. Co., 192 Fed. 899 (2d Cir. 1912). The sounder practice is clearly to define the grant in writing, either by a formal contract, check endorsement or voucher, or notation on the article. Occasionally symbols are used: “A.A.S.R.”—All American serial rights; “F.A.S.R.”—First American serial rights; “A.S.R.”—All serial rights; “F. & E.”—First and exclusive rights. This is not recommended since the terms so symbolized have no accepted
Importance of Differentiation

Whether a grant is an assignment or a license is important not only because the two types of grants, as has been stated, have different legal incidents and are relevant in determining who is the "copyright proprietor" whose functions, as will be discussed, are so important in the securing, maintaining, renewing, and enforcing of statutory copyright, but also because the Copyright Act subjects assignments (as distinguished from licenses) to certain formal requirements and affords them certain constructive notice advantages.

Oral transfers of common-law rights, by assignment or license, were and are recognized. The prior assignee of the common-law copyright prevails over any subsequent assignee thereof or over any licensee thereunder. Where there are conflicting licenses under the common-law copyright, both prior and subsequent licensees, bona fide and without notice, should be able to exercise the rights licensed without recourse to each other but with recourse to their licensor, who impliedly convenanted to the prior licensee that he would not grant the same rights to another, and who impliedly represented to the subsequent licensee that he had the rights which he purported to grant.

Under the Copyright Act, an assignment of statutory copyright must be by an instrument in writing signed by the copyright proprietor.


113 See note 73 supra.

114 On the theory that the assignor has already divested himself of the property. Kortlander v. Bradford, 116 Misc. 664, 190 N.Y. Supp. 311 (Sup. Ct. 1921); Ball, op. cit. supra note 36, at 542. See note 51 supra.

115 Macloon v. Vitagraph, Inc., 30 F.2d 634 (2d Cir. 1929). But see Gidlin and Woodward, Tax Aspects of Patents, Copyrights and Trade-Marks 12 (rev. ed. 1954); see also Western Electric Co. v. Patent Reproducer Corp., 42 F.2d 116 (2d Cir. 1930), cert. denied, 282 U.S. 873, 51 Sup. Ct. 78 (1930); Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co., 59 F.2d 998 (2d Cir. 1932), cert. denied, 287 U.S. 651, 53 Sup. Ct. 97 (1932) (patent cases) (exclusive, as distinguished from sole, license deemed to imply only that no similar grants will be made in the future).

Furthermore, to be effective as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, whose assignment or mortgage has been duly recorded, an assignment must be promptly recorded in the Copyright Office.\textsuperscript{117} In the absence of recordation, assignments are effective between the parties,\textsuperscript{118} and failure to record is no defense to an infringer.\textsuperscript{119} Oral licenses under statutory copyright are valid.\textsuperscript{120} The Copyright Office will accept for recordation licenses and other papers relative to copyright, even when concerning works in which there is no subsisting statutory copyright.\textsuperscript{121}

A prospective user of a work may rely upon the records of the Copyright Office to determine the name of the copyright proprietor from whom a valid assignment of statutory copyright or effective license thereunder can be secured.\textsuperscript{122} If the claim of copyright has not been registered, such user may presumably deal with the proprietor named in the copyright notice.

An assignee from such proprietor under a duly-recorded assignment of statutory copyright prevails not only over any subsequent assignee of such copyright or licensee thereunder but also, in the absence of notice of any prior assignment thereof not duly recorded or any prior license thereunder, over the assignee under such prior assignment or licensee.


\textsuperscript{120} Ball, op. cit. supra note 36, at 530.

\textsuperscript{121} 37 Code Fed. Regs. § 201.4 (1949):

\section*{§ 201.4 Assignments of copyright and other papers.} Assignments of copyright and other papers relative to copyrights will be recorded in the Copyright Office upon payment of the statutory fee. Examples of such papers include powers of attorney, licenses to use a copyrighted work, and agreements between authors and publishers covering a particular work or works and the rights thereto . . .

The Copyright Office records almost any reasonable paper relating to copyright for whatever effect such recording might have. But see Witwer v. Harold Lloyd Corp., 46 F.2d 792 (S.D. Cal. 1930), rev'd on other grounds, 65 F.2d 1 (9th Cir. 1933), petition for writ of certiorari dismissed per stipulation of counsel, 296 U.S. 669, 54 Sup. Ct. 94 (1933) (acceptance by Copyright Office of instrument as "assignment" worthy of mention); see Copyright Office Circular No. 10.

under such prior license.\textsuperscript{123} Recor\'dation of such prior license, unlike valid recordation of a prior assignment of statutory copyright, should not constitute constructive notice.\textsuperscript{124}

A so-called quitclaim grant may operate as an assignment or as a license, depending upon the construction of the extent of the rights purportedly transferred by the grantor. A quitclaim grant, in copyright as well as other branches of property law, is effectual to convey to the grantee whatever rights the grantor has.\textsuperscript{125} The quitclaim grant differs from the ordinary assignment or license in that it contains no express warranty and negatives the implied warranty that the grantor has the rights which are purportedly granted.

In all grants, whether by assignment or license, there is an implied covenant of good faith and fair dealing.\textsuperscript{126} This obligation, imposed by courts of equity, has safeguarded grants of rights against competing rights not within the contemplation of the parties at the time of the grant.\textsuperscript{127}

Whether or not a particular grant constituted an assignment or a license has had serious tax consequences. In the case of a non-resident alien, proceeds from a "sale" were not taxable, whereas proceeds from a "license" were deemed taxable;\textsuperscript{128} in the case of a resident, the sale of a capital asset was subject to lower rates of taxation than was a license or other kind of sale.\textsuperscript{129} In many cases, the tax consequences depended

\begin{footnotes}
\item[123] Photo-Drama Motion Picture Co. v. Social Uplift Film Corp., 213 Fed. 374 (S.D.N.Y. 1914), aff'd, 220 Fed. 448 (2d Cir. 1915); DeWolf, op. cit. supra note 20, at 75. Contra: Ball, op. cit. supra note 36, at 533.
\item[124] Well, op. cit. supra note 36, at 563.
\item[125] See note 105 supra.
\item[126] "Not to use the ungranted portion of the copyrighted estate to the detriment, if not destruction, of the licensee's estate." Harper Bros. v. Klaw, 232 Fed. 609, 613 (S.D.N.Y. 1916); Uproar Co. v. National Broadcasting Co., 91 F.2d 373 (1st Cir. 1936), cert. denied, 298 U.S. 670, 56 Sup. Ct. 835 (1936).
\item[129] "Property held by the taxpayer primarily for sale to customers in the ordinary
\end{footnotes}
entirely upon the application of the indivisible copyright theory.\textsuperscript{130} Under a comparatively recent holding, the tax consequences no longer vary depending upon the application of that theory.\textsuperscript{131}

\textbf{WRITINGS ELIGIBLE FOR STATUTORY COPYRIGHT}

Despite prepublication protection on common-law principles of all classes of intellectual works, the Constitutional grant of power to Congress “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . . “,\textsuperscript{132} and the provision of the Copyright Act that “The works for which copyright may be secured under this title shall include all the writings of an Author”,\textsuperscript{133} the fact remains that only works in course of his trade or business\textsuperscript{9} would not be deemed to be a capital asset. Goldsmith v. Commissioner of Internal Revenue, 143 F.2d 466 (2d Cir. 1944), cert. denied, 323 U.S. 774, 65 Sup. Ct. 135 (1944). See also note 128 supra.

\textsuperscript{130} Compare Rohmer v. Commissioner of Internal Revenue, 153 F.2d 61 (2d Cir. 1946), cert. denied, 328 U.S. 862, 66 Sup. Ct. 1357 (1946), noted in 54 Yale L.J. 879 (1945) (grant of serial rights for lump sum held license) with Goldsmith v. Commissioner of Internal Revenue, 143 F.2d 466 (2d Cir. 1944), cert. denied, 323 U.S. 774, 65 Sup. Ct. 135 (1944) (grant of exclusive motion picture rights deemed “sale”). Cf. Sabatini v. Commissioner of Internal Revenue, 98 F.2d 753 (2d Cir. 1938) (grant of exclusive motion picture rights held license).


For other tax aspects of copyright, see Matter of Frissell v. McGoldrick, 300 N.Y. 370, 91 N.E.2d 305 (1950), holding that the grant of reproduction and publication rights is not a sale of tangible personal property subject to the New York City sales tax [N.Y.C. Adm. Code § N-41-1.0(5)] where transfer of art work was necessary to permit reproduction. Cf. Matter of Hillman Periodicals, Inc. v. Gerosa, 285 App. Div. 441, 137 N.Y.S.2d 863 (1st Dep’t 1955).

\textsuperscript{132} U.S. Const., Art. I, § 8, cl. 8.

\textsuperscript{133} 17 U.S.C. § 4 (1952). “The act must therefore be understood as meaning to cover all those compositions which, under the Constitution, can be copyrighted at all.” Reiss v. National Quotation Bureau, Inc., 276 Fed. 717, 718 (S.D.N.Y. 1921). Pianola rolls and phonograph records are not copyrightable under the Act. Jerome v. Twentieth Century-Fox Film Corp., 67 F. Supp. 736 (S.D.N.Y. 1946), aff’d per curiam, 165 F.2d 784 (2d Cir. 1948) (distinguishing motion picture sound track); see RCA Mfg. Co. v. Whiteman,
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certain specified classes by eligible authors may qualify for statutory copyright.

For purposes of administration, the works for which statutory copyright can be secured are classified by the Copyright Act into thirteen classes.\textsuperscript{134} Included are books (which term has been broadly construed to include any article consisting of words not otherwise classifiable),\textsuperscript{135} periodicals,\textsuperscript{136} photographs, and prints and pictorial illustrations including commercial prints.\textsuperscript{137}

\textsuperscript{134} 17 U.S.C. § 5 (1952), which expressly provides that its specifications are not to limit the subject matter of copyright as defined in section 4, and that no error in classification should invalidate or impair the copyright protection secured. However, the proprietor might be estopped from claiming rights beyond those granted for class in which the work was registered. DeWolf, op. cit. supra note 20, at 227. See also notes 39, 41-44 supra, and note 202 infra. This section has been deemed less broad than section 4, supra note 133. Deutsch v. Arnold, 98 F.2d 686 (2d Cir. 1938). Published works in twelve of the thirteen classes are eligible for statutory copyright. Class C works, upon publication, enter Class A. Until reproduced in copies for sale, the work is eligible for statutory copyright only if it falls within one of the eight classes so specified in the Act. 17 U.S.C. § 12 (1952). Since most of the classes which are important so far as magazines are concerned—books, periodicals, maps, reproductions of works of art, prints, pictorial illustrations, commercial prints—are not so specified, any prepublication of such material must be based upon common-law copyright. See note 72 supra.

\textsuperscript{135} The Copyright Office defines “book” as including not only bound volumes but also pamphlets, leaflets and even single sheets. See 37 Code Fed. Regs. § 202.2 (1949):

\textsuperscript{136} See 37 Code Fed. Regs. § 202.3 (1949):

\textsuperscript{137} “Commercial prints” are defined to include advertisements containing artistic or pictorial features, with or without accompanying text matter, published in a periodical and used in connection with the sale or advertisement of merchandise. Advertisements in periodicals which do not come within the definition of “commercial prints”, either because they are wholly textual without any artistic or pictorial feature or because they are not used in connection with the sale or advertisement of merchandise may be copyrighted as contributions to a periodical. Henn, “Copyright Protection for Advertising in Periodicals”, 220 Printers’ Ink 42 (Aug. 22, 1947); Carter, “Print and Label Registrations”, 6 J. Pat. Off. Soc’y 522 (1924); Derenberg, “Commercial Prints and Labels: A Hybrid in Copyright Law”, 49 Yale L.J. 1212 (1940); “Copyright Protection of Ad-
From the statutory classification it is readily seen that not only may a magazine be protected as a periodical, but in addition the component parts of the magazine or separate contributions may themselves be the subject of copyright protection. The general copyright of the magazine protects the selection and arrangement of the material and, as will be discussed hereafter, can and generally does extend to the component parts or contributions themselves, which, however, may, where desired, be separately copyrighted.

The Copyright Act specifically provides for the copyrighting as new works, or abridgments, translations, or other versions of works in the public domain or of copyrighted works when produced with the consent of the proprietor of the copyright in such works or of works republished with new matter. However, the publication of any such new works does not affect the force or validity of any subsisting copyright upon the matter employed or any part thereof, and is not to be construed to imply an exclusive right to such use of the original works or to secure or extend copyright therein.

138 See note 32 supra.
139 See notes 168-170 infra.
140 17 U.S.C. § 7 (1952). See McCaleb v. Fox Film Corp., 299 Fed. 48 (5th Cir. 1924); American Code Co. v. Bensinger, 282 Fed. 829 (2d Cir. 1922); Stodart v. Mutual Film Corp., 249 Fed. 507 (S.D.N.Y. 1917), aff'd per curiam, 249 Fed. 513 (2d Cir. 1918); Italian Book Co. v. Rossi, 27 F.2d 1014 (S.D.N.Y. 1928). For the abridgment, translation or other version to be copyrightable as a new work, it must involve a modicum of creative effort [Andrews v. Guenther Pub. Co., 60 F.2d 555 (S.D.N.Y. 1932)], although similarities between the original and derivative works are naturally to be expected [Fred Fisher, Inc. v. Dillingham, 298 Fed. 145 (S.D.N.Y. 1924)]. Unfortunately, there are no satisfactory standards for determining whether or not a new version entitled to protection as such has been created. See Edmonds v. Stern, 248 Fed. 897 (2d Cir. 1918). One test suggested: whether ordinary inspection would give the distinct impression that both were the same [Beifeld v. Dodge Publishing Co., 198 Fed. 658 (S.D.N.Y. 1911)]; another test, which seems inconsistent with section 7: whether the derivative work would have infringed the copyright of the original [Du Puy v. Post Telegram Co., 210 Fed. 883, 884 (3d Cir. 1914) (“change of a word or sentence here and there” and “word redress of the substance” held insufficient)]. Additions and variations which a writer with experience and skill might readily make have been held insufficient. Cooper v. James, 213 Fed.
The works of all authors are not eligible for statutory copyright. Although no limitation existed at common law or is required by the Federal Constitution, the Copyright Act\(^{142}\) permits statutory copyright only in works of authors or proprietors\(^{143}\) who are not citizens or subjects of a

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\(^{142}\) Specifically, the Act provides that the "author or proprietor . . . or his executors, administrators, or assigns" may secure statutory copyright. 17 U.S.C. § 9 (1952). Since the rights of the other persons named are derived from the author, although the Act prescribes that in all cases the copyright be secured in the name of the "copyright proprietor" [17 U.S.C. § 19 (1952)], the eligibility of the author is the controlling criterion of whether or not such other person may secure the copyright. Bong v. Alfred S. Campbell Art Co., 214 U.S. 236, 29 Sup. Ct. 628 (1909); Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306 (2d Cir. 1939), cert. denied, 308 U.S. 597, 60 Sup. Ct. 131 (1939); Gross v. Twentieth Century-Fox Film Corp., 38 U.S.P.Q. 399 (S.D.N.Y. 1938); Yuengling v. Schile, 12 Fed. 97 (C.C.S.D.N.Y. 1882). The proprietor by assignment from the author need not
foreign nation other than a “proclaimed country” (that is, a country which has been proclaimed by the President as having established reciprocal copyright relations with the United States),¹⁴³ unless the author is, at the time of first publication¹⁴⁴ of the work, domiciled within the United States. After the Universal Copyright Convention comes into force, works of authors who are citizens or subjects of other adhering nations or works first published in such nations, will be eligible for statutory copyright.¹⁴⁵


¹⁴³ The Presidential Proclamation is controlling. Bong v. Alfred S. Campbell Art Co., 214 U.S. 236, 29 Sup. Ct. 628 (1909); Chappell & Co. v. Fields, 210 Fed. 864 (2d Cir. 1914); 29 Ops. Att’y Gen. 64 (1911); 28 Ops. Att’y Gen. 222 (1910); Proclamations, Conventions and Treaties Establishing Copyright Relations Between the United States of America and Other Countries (Copyright Office, June 1950); 2 UNESCO Copyright Bulletin, No. 4, pp. 136-150 (1949); Stephenson, “Copyright In a World at War”, 32 Ky. L.J. 315 (1944). Prior to the Act of March 3, 1891 (26 Stat. 1106), American copyright was limited to citizens and residents of the United States, and the importation, vending, reprinting and publishing of the works of others was expressly permitted. Under the Act of 1891, the filing of the title and deposit of copies in the United States Copyright Office could be no later than the day of publication in the United States or abroad. Solberg, “Copyright Law Reform”, 35 Yale L.J. 48, 50 (1925); Note, 35 Cornell L.Q. 452 (1950). The Act has been construed to permit “stateless authors” to secure statutory copyright. Houghton Mifflin Co. v. Stackpole Sons, Inc., 104 F.2d 306 (2d Cir. 1939), cert. denied, 308 U.S. 597, 60 Sup. Ct. 131 (1939) (in favor of eligibility of Adolf Hitler). Many refugee authors who had been Hitler’s victims were helped by the decision. See Smith, Sarah, “The Kampf About ‘Mein Kampf’”, 19 B.U.L. Rev. 633 (1939); Breathitt, “Copyright Protection to Aliens and Stateless Persons”, 41 Ky. L.J. 302 (1953).

¹⁴⁴ Leibowitz v. Columbia Graphophone Co., 298 Fed. 342 (S.D.N.Y. 1923) (domiciled alien of non-proclaimed country held not eligible to secure copyright in unpublished work).

¹⁴⁵ Pub. L. No. 743, 83d Cong., 2d Sess. (1954). If from the time of first publication all the copies of such works published with the authority of the author or other copyright proprietor shall bear the symbol © accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright, such work shall be exempt from the following provisions of the Act:
FUNCTION OF COPYRIGHT PROPRIETOR IN SECURING AND MAINTAINING STATUTORY COPYRIGHT

Although the Act provides that the "author or proprietor . . . or his executors, administrators, or assigns" may secure statutory copyright, it further prescribes that the copyright be secured in the name of the "copyright proprietor".

The problem of determining who is the copyright proprietor is not, as has been stated, always easily resolved. Where the person purporting to secure the copyright was found to be the copyright proprietor, there has been no difficulty. Such a finding is more common under the "manifested-intention-to-transfer-the-proprietorship" test than under the "partial-reservation-of-rights-by-the-proprietor" test. In cases where the courts applied the latter test and found that the person in whose name copyright was claimed was only a licensee, they have been faced with the dilemma of holding that such a copyright was void notwithstanding that it may have been so claimed with the express or implied authority of the author.

To ameliorate this difficulty, the courts in such cases have permitted the securing of copyright by such a person as trustee for the author.

(1) The requirement in section 1 (e) that a foreign state or nation must grant to United States citizens mechanical reproduction rights similar to those specified therein; (2) the obligatory deposit requirements of the first sentence of section 13; (3) the provisions of sections 14, 16, 17, and 18; (4) the import prohibitions of section 107, to the extent that they are related to the manufacturing requirements of section 16; and (5) the requirements of sections 19 and 20.


146 17 U.S.C. § 9 (1952); see note 145 supra.

147 17 U.S.C. § 19 (1952). However, the eligibility of the author to secure copyright controls. See note 142 supra. "Proprietor" has been deemed to be equivalent to "legal assigne" or assignee of authority to copyright the work. Mifflin v. R. H. White Co., 190 U.S. 260, 262, 23 Sup. Ct. 769, 770 (1903).

148 DeWolf, op. cit. supra note 20, at 42.

Of course, by the "manifested-intention-to-transfer-the-proprietorship" test, the person claiming the copyright would have been found to be the proprietor, subject to the equitable interests of the author, and there would have been no need to resort to the trustee theory.\(^{150}\) The trustee theory has been recognized in the case of co-authors where one author has been held entitled to secure statutory copyright for the joint benefit of himself and his colleague.\(^{151}\)

**Copyright Notice Requirements**

Publication with prescribed copyright notice, both as to form and as to location, is the usual method of securing statutory copyright. Publication without such notice constitutes irrevocable dedication to the public.\(^{162}\)

The prescribed form of copyright notice for a printed literary work, such as a magazine or book, is the word "Copyright" or the abbreviation

A Study of Assignments, Other Transfers and General Contractual Relations" in Third Copyright Law Symposium 272 (1941); cf. Dam v. Kirke La Shelle Co., 175 Fed. 902, 905-906 (2d Cir. 1910) (suggestion that publisher's copyright in particular material protects only rights bought by publisher therein); "What a Magazine Copyright Covers", 141 Printers' Ink 198 (Nov. 10, 1947). In the absence of the author's authority to secure copyright, a licensee or agent has no standing. Egner v. E. C. Schirmer Music Co., 139 F.2d 398 (1st Cir. 1943), cert. denied, 322 U.S. 730, 64 Sup. Ct. 947 (1944); Public Ledger v. New York Times, 275 Fed. 562 (S.D.N.Y. 1921), aff'd per curiam, 279 Fed. 747 (2d Cir. 1922), cert. denied, 258 U.S. 627, 42 Sup. Ct. 383 (1922); Societe des Films Menchen v. Vitagraph Co. of America, 251 Fed. 258 (2d Cir. 1918). See National Comics Publications, Inc. v. Fawcett Publications, Inc., 93 F. Supp. 349, 353 (S.D.N.Y. 1950), rev'd on other grounds, 191 F.2d 594 (2d Cir. 1951) (holding advance authorization to exclusive agent to copyright in its own name, and not subsequent ratification, was essential). Quaere, to what extent such authority may be subdelegated. Public Ledger Co. v. Post Printing & Publishing Co., 294 Fed. 430 (8th Cir. 1923).


“Copr.” accompanied by the name of the copyright proprietor and also the year in which the copyright was secured. For a work other


\[\text{184} 17 \text{U.S.C. } \S 19 \text{ (1952). The omission of the year-date from a printed literary, musical or dramatic work is fatal. Wildman v. New York Times Co., 42 F. Supp. 412 (S.D.N.Y. 1941); cf. National Comics Publications, Inc. v. Fawcett Publications, Inc., 93 F. Supp. 349, 354 (S.D.N.Y. 1950), rev’d on other grounds, 191 F.2d 594 (2d Cir. 1951). In case of doubt, the safer course is, of course, to carry the date. No date is required on a cartoon book depicting a series of unconnected poses since such a book is not a printed literary work. Fleischer Studios, Inc. v. Ralph A. Freundlich, Inc., 73 F.2d 276 (2d Cir. 1934), cert. denied, 294 U.S. 717, 55 Sup. Ct. 516 (1934). Nor is a date necessary in cases where the alternative form of notice [see note 155 infra] is properly used. National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594 (2d Cir. 1951). Where the date is not required but is given, it cannot be later than the correct date. Basevi v.}
than a printed literary, musical, or dramatic work, the year-date is not required. An alternative form of copyright notice, the symbol "©", accompanied by the initials, monogram, mark or symbol of the copyright proprietor, so long as his name appears elsewhere on the work, is permissible only for specified classes of works, notably maps, photographs, and prints and pictorial illustrations including commercial prints.\footnote{155}

Edward O'Toole Co., 26 F. Supp. 41 (S.D.N.Y. 1939); cf. Leigh v. Gerber, 86 F. Supp. 320, 322 (S.D.N.Y. 1949). The Copyright Act defines "date of publication" as "the earliest date when copies of the first authorized edition were placed on sale, sold, or publicly distributed by the proprietor or under his authority." 17 U.S.C. § 26 (1952). There has been recent debate as to whether the trade release date of a book or the earliest date when the publisher sells a copy to a retail store or wholesale outlet is the publication date of the book for copyright purposes. "Publishers and Copyright Lawyers Debate Meaning of 'Publication Date'", 154 Publishers' Weekly 1959 (Nov. 6, 1948); see Black v. Henry G. Allen Co., 56 Fed. 764 (C.C.S.D.N.Y. 1893) (holding a work not published when received on consignment with stated release date). Where there is doubt as to which of two year-dates should be used, the doubt should be resolved in favor of the earlier date. Using a later date in the copyright notice is harmful to the public and may well be fatal. Baker v. Taylor, 2 Fed. Cas. 478, No. 782 (C.C.S.D.N.Y. 1848) (under earlier law, in case where publisher knew of error before publication and did not bother to correct it); cf. Heim v. Universal Pictures Co., 154 F.2d 480, 487, n. 7 (2d Cir. 1946): "Were that question here, we should have to consider whether the statement in Baker v. Taylor... , and subsequent cases which cite it apply under the present liberalized Copyright Act." Since the on-sale dates of most January issues of magazines are in December of the preceding year, it is important to insert the date of such preceding year in the copyright notice. A too-early date is in favor of the public and is an immaterial variance except that it cuts down the term of copyright from the end of the year. Callaghan v. Myers, 128 U.S. 617, 9 Sup. Ct. 177 (1888); Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820, 67 Sup. Ct. 1310 (1947); American Code Co. v. Bensinger, 282 Fed. 829 (2d Cir. 1922); Leigh v. Gerber, 86 F. Supp. 320 (S.D.N.Y. 1949); Southern Music Pub. Co. v. Bibo-Lang, Inc., 10 F. Supp. 972 (S.D.N.Y. 1935). It is important at the time of renewal to be governed by the date in the notice. To "correct" the date in the notice after publication under the earlier date would probably be fatal. See note 183 infra. Roman numerals are sufficient. Ted Browne Music Co. v. Fowler, 290 Fed. 751 (2d Cir. 1923); Buck v. Russo, 25 F. Supp. 317 (D. Mass. 1938); M. Witmark & Sons v. Pastime Amusement Co., 298 Fed. 490 (E.D.S.C. 1924), aff'd on opinion below, 2 F.2d 1020 (4th Cir. 1924); Stern v. Jerome H. Remick & Co., 175 Fed. 282 (C.C.S.D.N.Y. 1910). See also Snow v. Mast, 65 Fed. 995 (C.C.S.D. Ohio 1895) ("'94" held substantial compliance).

\footnote{156} 17 U.S.C. § 19 (1952). Cartoon strips have been held to be prints and pictorial illustrations and hence eligible to use the alternative form of notice. National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 602 (2d Cir. 1951), reversing 93 F. Supp. 349 (S.D.N.Y. 1950). See Reeves, "Superman v. Captain Marvel or, Loss of Literary Property in Comic Strips" in Fifth Copyright Law Symposium 3 (1954). Quaere, as to the protection of such works under § 1(c) which applies to non-dramatic literary works. See note 42 supra. See also Block v. Plaut, 87 F. Supp. 49 (N.D. Ill. 1949) upholding following notice:

CLOSET CADDY
Copyright 1948. Pat. Pending
As to the proper position for the copyright notice, the Act provides that "in the case of a book" the notice be applied upon the "title-page or the page immediately following", or "if a periodical either upon the title-page or upon the first page of text of each separate number or under the title heading". In periodicals which do not contain a "title-page" in the ordinary sense, the cover or masthead or table-of-contents page might be regarded as the "title-page" for copyright purposes if the name of the publication is conspicuously displayed there along with the date of issue or volume and issue numbers, which, in the case of issues of periodical publications, are essential elements of the title. The first use of the word "Copyright" instead of the "©" symbol was permitted. Cf. Deward & Rich, Inc. v. Bristol Savings & Loan Corp., 34 F. Supp. 345 (W.D. Va. 1946), aff'd, 120 F.2d 537 (4th Cir. 1941) (use of "©" instead of word "copyright" held fatal), criticized in National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594, 602 (2d Cir. 1951). Article 3 of the Universal Copyright Convention will recognize, with respect to foreign works eligible thereunder, "the symbol © accompanied by the name of the copyright proprietor and the year of first publication" as sufficient copyright notice. See note 145 supra. If it is not clear whether the publication is a book or periodical, the notice should be affixed to the title-page, which is permissible for either class. Affixing the notice to the back cover, last page, or any other place not prescribed by the Copyright Act is not sufficient. Krafft v. Cohen, 117 F.2d 579 (3d Cir. 1941); J. A. Richards, Inc. v. New York Post, Inc., 23 F. Supp. 619 (S.D.N.Y. 1938); W. S. Bessett, Inc. v. Albert J. Germain Co., 18 F. Supp. 249 (D. Mass. 1937); United Thrift Plan, Inc. v. National Thrift Plan, Inc., 34 F.2d 300 (E.D.N.Y. 1929). Compare Booth v. Haggard, 184 F.2d 470 (8th Cir. 1950) (notice on first page of text of annual publication which carried somewhat different title from cover held void) with Powell v. Stransky, 89 U.S.P.Q. 310 (D.S.D. 1951) (notice on reverse side of first page of pamphlet held valid). Article 3 of the Universal Copyright Convention will permit, with respect to foreign works eligible thereunder, placing of the notice in any "manner and location designed to give reasonable notice of reservation of copyright". See note 145 supra.

156 17 U.S.C. § 20 (1952). If it is not clear whether the publication is a book or periodical, the notice should be affixed to the title-page, which is permissible for either class. Affixing the notice to the back cover, last page, or any other place not prescribed by the Copyright Act is not sufficient. Krafft v. Cohen, 117 F.2d 579 (3d Cir. 1941); J. A. Richards, Inc. v. New York Post, Inc., 23 F. Supp. 619 (S.D.N.Y. 1938); W. S. Bessett, Inc. v. Albert J. Germain Co., 18 F. Supp. 249 (D. Mass. 1937); United Thrift Plan, Inc. v. National Thrift Plan, Inc., 34 F.2d 300 (E.D.N.Y. 1929). Compare Booth v. Haggard, 184 F.2d 470 (8th Cir. 1950) (notice on first page of text of annual publication which carried somewhat different title from cover held void) with Powell v. Stransky, 89 U.S.P.Q. 310 (D.S.D. 1951) (notice on reverse side of first page of pamphlet held valid). Article 3 of the Universal Copyright Convention will permit, with respect to foreign works eligible thereunder, placing of the notice in any "manner and location designed to give reasonable notice of reservation of copyright". See note 145 supra.

157 Freeman v. Trade Register, Inc., 173 Fed. 419, 242-425 (W.D. Wash. 1909). It is advisable to establish a single page near the front of an issue of a periodical as the "title-page" by having the name of the periodical and the date of issue or volume and issue numbers appear together there and preferably only there in such issue. See also Siewek Tool Company v. Morton, 128 F. Supp. 71 (E.D. Mich. 1954).

On this "title-page", it is sound practice to carry the name in the form in which it is registered as a trade-mark in the United States Patent Office, and to print by it the Federal statutory trade-mark registration notice: "Registered in U.S. Patent Office" or "Reg. U.S. Pat. Off." or "©". 15 U.S.C. § 29 (1952). There is some advantage in preceding this notice with the word "Trade-mark". For the trademark registration notices required under foreign laws, see Ravenscroft and White, Trademarks Throughout the World (1944).

As part of the copyright notice it is sound practice expressly to reserve all rights under the Pan-American Copyright Conventions and to indicate, if the work is to be published simultaneously in an International Copyright (Berne) Union country, that protection is secured thereunder. There is substantial advantage in stating that the work is published simultaneously in the United States and the Union country involved. A. H. Sarsfield (Sax Rohmer) v. Uitgeversmaatschappij "De Combinatie" of Rotterdam (Rb. Rotterman
page of text is generally regarded as the first printed page of the periodical which is not devoted entirely to advertising.\textsuperscript{168}

The Copyright Act provides that a single copyright notice in each issue\textsuperscript{159} of a periodical is sufficient,\textsuperscript{160} and that the "copyright upon composite works or periodicals shall give to the proprietor thereof all the rights in respect thereto which he would have if each [copyrightable component] part were individually copyrighted".\textsuperscript{161} This provision "does away with the necessity of taking a copyright on the contributions of different persons included in a single publication..."\textsuperscript{162} Thus, a single general copyright notice in the name of the publisher of the magazine in each issue is sufficient for the purpose of securing copyright in all copyrightable material in such issue as to which the publisher is entitled to secure copyright.\textsuperscript{163} As stated above, the publisher is clearly entitled

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\textsuperscript{160} 17 U.S.C. § 20 (1952); see Copyright Office Circular No. 42.

\textsuperscript{161} 17 U.S.C. § 3 (1952). The copyright of a component part thus secured is, by the modern view, assignable apart from the general copyright of the periodical as a whole. Thus several copyrights result, amoeba-like, from a single copyright. See note 32 supra.


to secure copyright in (1) all material prepared by its employees, at least where there is no understanding to the contrary (that is, material of

642 (C.C.S.D.N.Y. 1906); Cormack, "Newspaper Copyright", 18 Va. L. Rev. 523, 524 (1932).


which the publisher is "author"),\textsuperscript{164} and (2) all material as to which the publisher is the author's assignee (that is, material of which the publisher is "proprietor").\textsuperscript{165} As to all other material, in the absence of a manifestation of a contrary intention, the publisher may be said to secure copyright as trustee for the benefit of the authors or other interested persons.\textsuperscript{166} The single general copyright notice, as will be seen hereafter,\textsuperscript{167} also serves to preserve the copyright in previously-copyrighted material.

The Act permits the separate copyrighting of individual contributions to a periodical.\textsuperscript{168} By affixing a valid individual copyright notice to the contribution,\textsuperscript{169} the contribution is in effect taken out from under the operation of the general copyright notice in the name of the publisher of the magazine and copyright in the contribution is secured for the person named in the individual copyright notice.\textsuperscript{170}

\textsuperscript{164} See notes 52, 142 supra.

\textsuperscript{165} Kaplan v. Fox Film Corp., 19 F. Supp. 780 (S.D.N.Y. 1937). See note 142 supra.


\textsuperscript{167} But "without extending the duration or scope of such copyright." 17 U.S.C. § 3 (1952). See note 197 infra.

\textsuperscript{168} 17 U.S.C. § 13 (1952); see Copyright Office Circular No. 43.

\textsuperscript{169} The Act does not specify the location of such a notice although the placing of such a notice on the first page of the contribution upon which the title of the contribution appears is generally regarded as satisfactory. Quaere, as to the effect of an invalid individual notice. See Rigney v. Raphael Tuck & Sons Co., 77 Fed. 173 (C.C.S.D.N.Y. 1896) (Fraudulent notice in improper location held violative of false-notice provisions).

\textsuperscript{170} Separate copyrighting is probably preferable in the event imminent publication in book form is contemplated. Cormack, "Newspaper Copyright", 18 Va. L. Rev. 523, 524 (1932). On the question of the renewal of a copyright in a contribution separately registered, see note 233 infra. If a work eligible to use the alternative form of copyright notice is to be published first in a magazine, and there is a desire to republish later such work alone with the alternative form of notice, such work in the magazine should carry an individual notice in the alternative form and be registered in the proper class in which such alternative form of notice is permissible. See Farmer, "The Perils of (Pub-
There are two principal exceptions to the general rule that the proprietor, at the time of the first authorized publication of his work, must manifest his election to secure statutory copyright therein by affixing a copyright notice strictly conforming to the statutory notice requirements as to form and position of notice. These exceptions are (1) works published outside of the United States prior to the publication of copies in the United States; and (2) works originating in a country adhering to the Pan-American Copyright Convention of 1910.

Whether or not a work published outside of the United States must, prior to the publication of copies in the United States, carry an American statutory copyright notice in order to prevent the work from falling into the public domain in the United States, has been approached primarily as a question of construction of the statutory provision requiring the notice on all copies "published or offered for sale" in the United States. Until recently, the courts required such a notice. A more recent pronouncement, still much debated, appears to hold that so long as the work is protected in the foreign country where it was published,
no notice is necessary. The more cautious procedure, obviously, is to affix the notice.

Works of nationals of a country adhering to the Pan-American Copyright Convention of 1910 are protected in the United States if their copyrights are acknowledged in a Convention country and if they contain a statement reserving the property right.\textsuperscript{176} Thus, such works originating outside of the United States are excluded from the American statutory notice requirements.\textsuperscript{176}

As stated above, statutory copyright may be secured in certain classes of works, of which copies are not reproduced for sale, by means of formal deposit with claim of copyright. Such copyright, however, does not exempt the copyright proprietor from the general provisions dealing with the deposit of copies where the work is later reproduced in copies for sale,\textsuperscript{177} and all such copies must bear the statutory copyright notice.\textsuperscript{178} The proper year-date, where the date is required, is the date of original deposit as a work not reproduced for sale and not the subsequent date of publication, since the term of statutory copyright in such a case commences upon deposit and is not extended by public distribution.\textsuperscript{179}

\textit{Registration and Deposit}

Registration of copyright and deposit of copies in the Copyright Office, while not conditions precedent to the acquisition of statutory copyright\textsuperscript{180}

\textsuperscript{175} Convention Concerning Literary and Artistic Copyright, Signed at Buenos Aires, August 11, 1910 (hereinafter sometimes called the "Buenos Aires Convention").


\textsuperscript{179} Marx v. United States, 96 F.2d 204 (9th Cir. 1938); Howell, op. cit. supra note 36, at 107-108. Cf. Pub. L. No. 743, 83d Cong., 2d Sess. (1954) (§ 9(c) proviso); Universal Copyright Convention, Art. III(1); 17 U.S.C. §§ 19, 10 (1952) (reference to year of first publication).

(except in the case of copyright in works not reproduced for sale and ad interim copyright\textsuperscript{181}), must be complied with in order to perfect the copyright and make it legally enforceable against infringers.\textsuperscript{182} The general copyright in a periodical is registered by the filing of an application,\textsuperscript{183} the deposit of two copies of the periodical, and the payment of the nominal statutory fee.\textsuperscript{184} If a valid individual copyright notice has been affixed to a contribution to a periodical, a separate application\textsuperscript{185} should be filed for such contribution accompanied by one copy of the issue of the periodical containing the contribution and by the statutory fee.\textsuperscript{186}

Although the Act states that registration and deposit should be effected "promptly" after publication,\textsuperscript{187} considerable leeway has been afforded by the courts. It is even possible to delay registration and deposit until


\textsuperscript{185} Presently Form B5. However, contributions may be entered in other classes when appropriate. Previously, most contributions were entered as books in Class A. See note 137 supra.

\textsuperscript{186} 17 U.S.C. § 13 (1952). Page proofs of several contributions bound together in book form have been held registrable for a single fee. Bouve v. Twentieth Century-Fox Film Corp., 122 F.2d 51 (D.C. Cir. 1941).

after the copyright has been infringed, so long as these formalities are completed before suit is commenced.188 However, sound practice dictates compliance with these formalities without unnecessary delay. Registration and deposit should be completed before the application for renewal is filed.189

If copies are not promptly deposited, it is provided that the Register of Copyrights may at any time after publication of the work, upon actual notice, require the copyright proprietor to deposit, in default of which the proprietor is liable to a $100 fine and to pay to the Library of Congress twice the amount of the retail price of the best edition of the work, and the copyright becomes void.190

Requirements for Maintaining Statutory Copyright

Statutory copyright having been secured, all copies of the copyrighted work published or offered for sale in the United States by authority of the copyright proprietor should bear the valid copyright notice.191 Otherwise, the public would not be able to rely upon the presence of a valid copyright notice on copies distributed to it to ascertain whether or not subsisting statutory copyright is claimed in the work.192

188 Washington Publishing Co. v. Pearson, 306 U.S. 30, 59 Sup. Ct. 397 (1939), noted in 8 Geo. Wash. L. Rev. 184 (1939); 52 Harv. L. Rev. 837 (1939); 14 St. John's L. Rev. 169 (1939); 24 Wash. U.L.Q. 420 (1939). Accord, Lumiere v. Pathe Exchange, Inc., 275 Fed. 428 (2d Cir. 1921); Silvers v. Russell, 113 F. Supp. 119 (S.D. Cal. 1953). Presumably, works qualified under the Buenos Aires Convention are exempt from the registration and deposit requirements. See note 176 supra. The Universal Copyright Convention expressly permits adhering nations to provide “that a person seeking judicial relief must . . . comply with procedural requirements, such as . . . that the complainant must deposit with the court or an administrative office, or both, a copy of the work involved in the litigation”. Art. III(3).

189 See Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946), cert. denied, 331 U.S. 820, 67 Sup. Ct. 1310 (1947) (registration after 27 years). See also Copyright Office Form R.

190 17 U.S.C. § 14 (1952). In the period from 1897 through 1930, only one formal demand for deposit was made. Solberg, “Copyright Reform: Legislation and International Copyright”, 14 Notre Dame Law. 343, 350 (1939). At the present time, a “Compliance Unit” of the Copyright Office issues demands with respect to domestic books, periodicals, and significant music. Such demands, with respect to eligible foreign works under the Universal Copyright Convention, would be inconsistent therewith. Art. III(3). See Pub. L. No. 743, 83d Cong., 2d Sess. (1954), supra note 145.


Generally speaking, the copyright notice on all copies distributed to the public, to be valid, should be the same as the original notice affixed to the first-published copies of the work. There are, however, three exceptions to this rule: (1) where the copyright has been assigned by a written instrument recorded in the Copyright Office; (2) where the copyright has been renewed; and (3) where the work is included as part of another copyrighted work or has been revised and is copyrighted as a new version.

In cases where the copyright has been assigned by a written instrument recorded in the Copyright Office, the assignee may substitute his name for that of the original proprietor in the copyright notice.193

Where the copyright has been renewed,194 the Act does not prescribe the form of notice. The apparent choices are the original form of notice, a notice giving the date of effective renewal and the name of the renewal term proprietor, or a combination of the two.195 Any form of notice which combines the proper notice for the original term with a statement as to the date of the renewal and the name of the renewal term proprietor should clearly be satisfactory.196

Where the work is included as part of another work, the copyright notice on the latter, if proper, will preserve the copyright in the former.197

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Where the copyrighted work has been so extensively revised as to constitute a new work entitled to copyright as such, the new year-date of publication and name of the new proprietor, if different from the old, may be used,\textsuperscript{198} although the most cautious course is to include both dates and names,\textsuperscript{199} and, if possible, separately identify the old and new material.\textsuperscript{200} Especially in cases where it is doubtful whether a new version entitled to copyright protection as such has been created, is it desirable that the work carry the original copyright notice.\textsuperscript{201}

Where a work or a part thereof is republished in a class different from transferred the proprietorship of the painting to the magazine publisher, the publication of the reproduction, presumably created by the publisher, without an individual copyright notice in the name of the artist, had possibly destroyed the artist's existing statutory copyright in the painting and in any event had estopped the artist from asserting the copyright against an unauthorized copier. The courts did not decide whether the publisher had secured a statutory copyright in the reproduction since there was no showing of any post-publication assignment of the rights therein by the publisher to the artist. A sounder approach, it is submitted, would have been to hold that if the publisher's reproduction could be deemed a new work, the publisher secured statutory copyright in it as such and preserved the artist's subsisting copyright in the painting under Section 7; that, if not a new work, the general copyright of the magazine preserved the artist's subsisting copyright in the painting under Section 3; and that, in either event, the defendant by copying the reproduction and/or painting had infringed the artist's copyright in the painting. The Leigh cases have been explained as follows: "However, quite a different situation develops when the original of a work of art is copyrighted by registration, as distinguished from publication, under section 12 of the Act, and its first reproduction in a magazine is licensed by the artist. If the magazine is authorized to reproduce the work only once, as happened in the Leigh cases, then unless the magazine reproduction carries the author's own specific copyright notice, the reproduction will probably pass into the public domain, although the copyright on the original work of art will not necessarily be forfeited. The 'new work' provision of section 7 apparently will not aid the artist in this type of case because the reproduction is not a republication, inasmuch as the work of art had not been previously published". Wasserstrom, "Magazine, Newspaper, and Syndication Problems" in 1953 Copyright Problems Analyzed, 167-168 (1953). Quaere, whether such explanation does not overemphasize the literal meaning of the word "republished" in Section 7 of the Act, in view of the occasional construction of the term "publication" in the Act to include the registration of works not reproduced in copies for sale. See notes 72, 179 supra and 220 infra.


\textsuperscript{199} Lawrence v. Dana, 15 Fed. Cas. 26, No. 8,136 (C.C.D. Mass. 1869). In such cases, it is always safer to use a date too early rather than too late, since an error of the former type, unlike an error of the latter type, is not fatal to the copyright. See note 154 supra.


the class in which it was originally published, the notice on the repub-
lished copies should conform to the notice requirements applicable to
such original class and should not rely on the notice requirements ap-
plicable to such second class.202

In the following situations, the complete absence of a valid copy-
right notice on copies distributed to the public is not necessarily indica-
tive of lack of copyright in the work: (1) infringing copies; (2) copies
from which a licensee has improperly omitted notice; (3) copies from
which notice has been omitted by accident or by mistake; (4) copies re-
published abroad; (5) copies published by the United States Govern-
ment; and (6) copies of work originating in a country adhering to the
Pan-American Copyright Convention of 1910.

Infringing copies are published without the authority of the copy-
right proprietor of the infringed work, and hence their lack of notice
does not affect the validity of the copyright of the infringed work.203 It
is possible, therefore, for innocent persons to be mislead by the lack of
notice on the infringing work and thus inadvertently infringe the rights
of the earlier work.204 Of course, if a proprietor knew of a course of in-
fringement and permitted it to continue, he might be estopped from en-
forcing the copyright, at least against innocent infringers.205

Where a licensee has improperly omitted the notice from copies, it
can be contended that they were not published with the authority of the pro-
proprietor.208 The proprietor would presumably be under a duty to act
promptly to have the omission rectified. Certainly, consent by the pro-

202 Advertisers Exchange, Inc. v. Anderson, 144 F.2d 907 (8th Cir. 1944); Deward &
See note 170 supra.

203 See note 171 supra.

204 National Comics Publications, Inc. v. Fawcett Publications, Inc., 191 F.2d 594
(2d Cir. 1951). But see Barry v. Hughes, 103 F.2d 427 (2d Cir. 1939), cert. denied, 308
U.S. 604, 60 Sup. Ct. 141 (1939). (Copying of infringing copy deemed not to be copying
of copyrighted work.) See note 245 infra.

F.2d 398 (1st Cir. 1943), cert. denied, 322 U.S. 730, 64 Sup. Ct. 947 (1944) (acquiescence
20, p. 621 (S.D.N.Y. 1925).

(2d Cir. 1951); American Press Ass'n v. Daily Story Pub. Co., 120 Fed. 766, 768-769
(2d Cir. 1902), appeal dismissed, 193 U.S. 675, 24 Sup. Ct. 852 (1904). See also Amster-
dam Syndicate, Inc. v. Fuller, 154 F.2d 342 (8th Cir. 1946); King v. Edward B. Marks
301 (E.D. Pa. 1939) (licensee not complying with terms of license treated as infringer).
See note 203 supra.
priorty to republication without insistence upon the insertion of the
proper copyright notice would result in loss of copyright. 207

Where the proprietor has sought to comply with the notice require-
ments, the omission by accident or mistake of the notice from a particu-
lar copy or copies does not invalidate the copyright. 208 However, there
are statutory safeguards to protect the public against being damaged by
relying on the omission. 209

Since the notice is required to be affixed only to each copy of the
copyrighted work published or offered for sale in the United States by
authority of the copyright proprietor, 210 copies published abroad need
not contain the notice. 211 Nor need the notice appear on the copy-
righted work when published or republished by the United States Govern-
ment, either separately or in a public document. 212 Similarly, copies of
works originating in a country adhering to the Buenos Aires Copyright
Convention, which are protected in the United States if their copyrights
are acknowledged in any of the countries adhering to the Convention
and if they contain a statement reserving the property right, need not
contain the statutory notice; a mere statement reserving the property
right is sufficient. 213

Manufacturing Clause

A further limitation on copyright protection arises under the so-called
manufacturing clause of the Act, which requires that the text of all
copies of a book or periodical afforded protection be type-set, printed,


213 See notes 175, 176 supra.
and bound in the United States. Exceptions are provided in favor of works in raised characters for the use of the blind, books and periodicals of foreign origin in a language or languages other than English, works printed or produced in the United States by any other process than those specified in the clause, and up to fifteen hundred copies of a book or periodical of foreign origin in the English language protected by ad interim copyright. During the existence of the American copyright


215 17 U.S.C. §§ 16, 22, 23 (1952). The phrase "or periodicals" was added in 1949 (63 Stat. 153) to confirm the practice of the Copyright Office of construing the term "book" in the exception to include a periodical and hence to permit the registration of foreign-language periodicals originating and manufactured abroad. The affidavit requirements for a "book", however, were not applied to periodicals. 17 U.S.C. § 17 (1952).


217 17 U.S.C. §§ 16, 22, 23 (1952); 19 Code Fed. Regs. § 11.21 (Supp. 1954). Ad interim protection for a book or periodical first published abroad in the English language may be secured by depositing one complete copy in the Copyright Office not later than six months after its publication abroad, with a request for the reservation of the copyright and a statement of the name and nationality of the author and the copyright proprietor and the date of publication. Ad interim copyright has all the force and effect given to copyright by the Act and endures until the expiration of five years after the date of first publication abroad. Ad interim copyright may be extended to endure for the full statutory term of twenty-eight years following first publication abroad if within the period of ad interim protection an authorized edition is published within the United States, in accordance with the manufacturing clause, and the provisions as to deposit of copies, registration, filing of affidavits, and printing of the copyright notice are duly complied with. Howell, op. cit. supra note 36, at 96-100.
in any book, the importation into the United States of any copies not produced in accordance with the manufacturing clause is prohibited.\textsuperscript{218} An exception, in addition to those specified in the manufacturing clause itself, is provided in favor of a foreign newspaper or magazine, although containing matter copyrighted in the United States printed or reprinted by authority of the copyright proprietor.\textsuperscript{219}

**FUNCTION OF COPYRIGHT PROPRIETOR IN RENEWING STATUTORY COPYRIGHT**

Statutory copyright endures for an original term of twenty-eight years.\textsuperscript{220} The Act provides for renewal when application for such renewal shall have been made to the Copyright Office and duly registered therein within one year prior to the expiration of the original term of copyright.\textsuperscript{221} Hence, the application for renewal must be received by the Copyright Office within the last year of the original term of twenty-eight years, measured from the exact date on which the original term began.\textsuperscript{222} Otherwise, the work falls into the public domain.\textsuperscript{223}

The renewal is for an additional term of twenty-eight years.\textsuperscript{224} The concept of renewal which results essentially in a new copyright, distinct from the original copyright,\textsuperscript{225} is unique in modern copyright law.\textsuperscript{226}

\textsuperscript{218} 17 U.S.C. § 107 (1952). Copies manufactured abroad may be admitted with the copyright notice obliterated or a notice of abandonment of copyright clearly stated. 19 T.C. 3 (1910).

\textsuperscript{219} 17 U.S.C. § 107 (b) (1952). Copying from illegally-imported copies of foreign edition without copyright notice constitutes infringement. Harper & Bros. v. M. A. Donohue & Co., 144 Fed. 491 (N.D. Ill. 1905), aff'd per curiam, 146 Fed. 1023 (7th Cir. 1906). Also excepted under section 107 are works in raised characters for the use of the blind and the authorized edition of a book in a foreign language of which only an English translation has been copyrighted in the United States (exceptions which are somewhat redundant in view of the express exceptions in the manufacturing clause itself), and non-piratical copies of books imported for individual or institutional use and not for resale. 17 U.S.C. § 107 (a), (b), (d).

\textsuperscript{220} 17 U.S.C. § 24 (1952) ("twenty-eight years from the date of first publication"). In the case of works not reproduced for sale, the twenty-eight year period runs from the date of deposit. Marx v. United States, 96 F.2d 204 (9th Cir. 1938).

\textsuperscript{221} 17 U.S.C. § 24 (1952).

\textsuperscript{222} 17 U.S.C. § 24 (1952).


\textsuperscript{224} 17 U.S.C. § 24 (1952).

although the British Statute of Anne of 1710 had a similar provision.\textsuperscript{227}

So far as magazine material is concerned, the Act specifies the persons who may apply for renewal as follows: (1. First proviso of renewal section) the proprietor of the copyright in any work in which the copyright has originally secured, in the case of a periodical, by the proprietor thereof, or, in the case of a work made for hire, by the employer; and (2. Second proviso) in the case of any other copyrighted work, including a "contribution by an individual author to a periodical,"

the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author’s executors, or in the absence of a will, his next of kin.\textsuperscript{228}

Thus, as to the periodical as a whole and as to all material therein except “a contribution by an individual author to a periodical”, the copyright proprietor at the time of renewal is clearly the person entitled to the renewal.\textsuperscript{229}

\textsuperscript{227} Only the Philippines have a somewhat similar provision. 2 UNESCO copyright Bulletin No. 2-3, p. 70 (1949). See Evans, op. cit. supra note 214, at 16-19 (only approximately 11 per cent of original copyrights are renewed); Chafee, “Reflections on the Law of Copyright”, 45 Col. L. Rev. 503, 719, 722-724 (1945).


\textsuperscript{229} 8 Ann., c. 19 (1710). See notes 8-10 supra.
In the case of a "contribution by an individual author to a periodical" the Act lists, in order of preference, the persons entitled to renew. The meaning of the phrase, "a contribution by an individual author to a periodical", is far from clear. Before 1940, this phrase read: "a contribution by an individual author to a periodical... when such contribution has been separately registered." By the deletion of the last seven words, Congress intended to permit the author of the contribution, the author's widow or widower, children, executor, or next of kin, to renew where the proprietor had not done so, and thus to prevent the contribution from falling into the public domain at the end of the original twenty-eight year term as a result of the proprietor's failure to renew. The method of amendment completely obfuscated the status of renewal rights in magazine material not authored by the magazine publisher (including its employees).

As to the magazine as a whole and as to material prepared by the magazine publisher (or employees), it, of course, would be the statutory author, and might qualify as renewal applicant (in the absence of any assignment) either as proprietor under the first proviso of the renewal section or as author under the second proviso.

With respect to material of which the magazine publisher is not the author, other than a contribution separately registered, two constructions of the 1940 amendment are possible: (1) either the proprietor or the author, etc., or (2) only the author, etc., may renew. Under either construction, it can be contended that any renewal secured by the author, etc., is held in trust for the proprietor.

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231 S. Rep. No. 465, 76th Cong., 1st Sess. 1 (1939). Even before the 1940 amendment, the Copyright Office had accepted renewal applications by authors of material copyrighted in the name of the magazine publisher. See note 228 supra.
233 As to which, the magazine publisher would obviously have no renewal interest. Kupferman, "Renewal of Copyright—Section 23 of the Copyright Act of 1909", 44 Col. L. Rev. 712, 716 (1944).
234 Ibid.
235 Id. at 716; cf. Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941) (suggestion that first proviso overrides second). Renewal by one having a nominal right to renew in trust for those beneficially entitled to interests in the renewal copyright has been recognized by the courts. Shapiro, Bernstein & Co. v. Jerry Vogel Music Co., 161 F.2d 406 (2d Cir. 1946); Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 266, 268 (2d Cir. 1944); Von Tilzer v. Jerry Vogel Music Co., 53 F. Supp. 191 (S.D.N.Y. 1943), aff'd sub. nom. Gumm v. Jerry Vogel Music Co., 158 F.2d 516 (2d Cir. 1946). For accounting between co-owners of renewal, see Shapiro, Bernstein & Co. v.
The right to apply for renewal under the first proviso of the renewal section is assignable, and the proprietor at the time of renewal may apply as such.\textsuperscript{236}

The right to apply for renewal under the second proviso is not assignable. However, the expectancy in the renewal of the person who is the proper applicant for renewal at the time of renewal can be assigned.\textsuperscript{237} Whether or not such an assignment has been made usually presents a difficult question of construction.\textsuperscript{238} It should here be noted that the assignment of the renewal applicant's interest in the renewal is contingent upon the renewal applicant's surviving at least the first twenty-seven years of the original term (and possibly until the renewal application in his name is filed), and that if the latter dies before such time,\textsuperscript{239} the right to renew passes in turn to the others listed in the second

Jerry Vogel Music Co., 73 F. Supp. 165 (S.D.N.Y. 1947); Edward B. Marks Music Corp. v. Wonnell, 61 F. Supp. 722 (S.D.N.Y. 1945). Where the copyright in material of which the magazine publisher is not the author has—as is usually the case—been reconveyed by the publisher to the author, the latter, either as proprietor under the first proviso of the renewal section or as the author under the second proviso, would be clearly entitled to apply for and hold the renewal for his own benefit.

\textsuperscript{236} Shapiro, Bernstein & Co. v. Bryan, 123 F.2d 697 (2d Cir. 1941); Tobani v. Carl Fischer, Inc., 36 U.S.P.Q. 97 (S.D.N.Y. 1937), aff'd, 98 F.2d 57 (2d Cir. 1938), cert. denied, 305 U.S. 650, 59 Sup. Ct. 243 (1938). In other words, under the first proviso, the renewal right accompanies the copyright proprietorship.


proviso of the Act, and any such assignment of the expectancy in the renewal (assuming such others have not joined therein) is ineffective.\textsuperscript{240}

**FUNCTION OF COPYRIGHT PROPRIETOR IN ENFORCING STATUTORY COPYRIGHT**

The violation of any of the exclusive rights comprising statutory copyright\textsuperscript{241} constitutes infringement despite the indivisible copyright theory.\textsuperscript{242} Infringement is not defined in the Act, but includes any substantial unauthorized copying\textsuperscript{243} of the copyrighted work other than fair use,\textsuperscript{244} regardless of intention to infringe.\textsuperscript{245}

240 DeWolf, op. cit. supra note 20, at 66.
241 See notes 39-44, supra.
242 Howell, op. cit. supra note 36, at 154.

244 Whether or not copying is lawful under the doctrine of fair use is a question of degree. As Mr. Justice Story stated in Folsom v. Marsh, 9 Fed. Cas. No. 4,901, at 348 (C.C.D. Mass. 1841):

In short we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of materials used, and the degree to which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work.

An attempt to chart the criteria is found in Shaw, R. R., op. cit. supra note 6, at 68. There is no legal basis for the occasionally-encountered view that a maximum of a certain number of words—usually ranging from 50 to 300—from a copyrighted publication may be used without permission if full credit is given to the author and publisher. Patterson, op. cit. supra note 53, at 423. “The right to quote poetry is more circumscribed than the right to quote prose, although no one can say how many lines exactly may be taken. Depending upon the poem, the limit of fair use may be two lines, twenty lines, or two hundred; the latter instance, however, would demand an epic.” Price, “Quotation of
Where copyright has been infringed the available remedies include

Copyrighted Material and the Doctrine of Fair Use”, 41 Journalism Quarterly 37, 41 (1944). See also Phillips v. Constitution Publishing Co., 72 U.S.P.Q. 69 (N.D. Ga. 1947) (publication of whole poem in newspaper account of police raid of place where poem found held not to constitute fair use); Lillard v. Sun Printing & Publishing Ass’n, 87 Fed. 213 (C.C.S.D.N.Y. 1898) (use of cut and text deemed unlikely to support award for profits or damages). The publication of words of a song without music in a magazine as background or related material for fictional or non-fictional material has been uniformly held to be within the doctrine of fair use. Kriger v. MacFadden Publications, Inc., 43 F. Supp. 170 (S.D.N.Y. 1941) (chorus); Karll v. Curtis Publishing Co., 39 F. Supp. 836 (E.D. Wis. 1941) (eight lines of chorus), noted in 15 So. Calif. L. Rev. 249 (1942); Broadway Music Corp. v. F-R Publishing Corp., 31 F. Supp. 817 (S.D.N.Y. 1940) (whole song—about one-half of magazine article); Shapiro, Bernstein & Co. v. P. F. Collier & Son Co., 26 U.S.P.Q. 40 (S.D.N.Y. 1934) (ten out of eighteen lines of first chorus, in snatches). But see Sayers v. Spaeth, C.O. Bull. No. 20, p. 625 (S.D.N.Y. 1932) (words of entire song and melody of one line of music in history of popular songs held infringement); see also Boosey v. Empire Music Co., 224 Fed. 646 (S.D.N.Y. 1915) (five words and accompanying music of song in later song held infringement); Allen v. Walt Disney Productions, Ltd., 41 F. Supp. 134 (S.D.N.Y. 1941) (music of chorus in other song deemed infringement). The photograph of a person incidentally reading a current magazine in which the copyrighted cover was reproduced as a matter of background is probably fair use. Henry Holt & Co. v. Liggett & Myers Tobacco Co., 23 F. Supp. 302 (E.D. Pa. 1938); New York Tribune, Inc. v. Otsi & Co., 39 F. Supp. 6 (S.D.N.Y. 1941); Price, supra, at 64. A credit line is no defense [Henry Holt & Co. v. Liggett & Myers Tobacco Co., supra], and has been afforded opposite effects by the courts. Compare Warren v. White & Wyckoff Mfg. Co., 39 F.2d 922, 923 (S.D.N.Y. 1930) (where the court in awarding substantial damages emphasized that the “deliberate” copying in calenders of some 300-400 words from a book was “without even the gesture of ‘by your leave’ implied in quotation marks and an acknowledgment of the source”) with Chicago Record-Herald Co. v. Tribune Ass’n 275 Fed. 797, 799 (7th Cir. 1921) (“Far from there being any exculpatory virtue in this credit, it would tend rather to convey to the reading public the false impression that authority to appropriate the extracts from the copyrighted article had been duly secured by the offending publisher”). The doctrine of fair use does not apply to common-law copyright. Golding v. R.K.O. Radio Pictures, Inc., 193 F.2d 153 (Cal. App. 1948), aff’d, 208 P.2d 1 (Cal. 1949); 221 P.2d 95 (Cal. 1950); Ball, op. cit. supra note 36, at 260, n. 5; Shaw, R. R., op. cit. supra note 6, at 27; Well, op. cit. supra note 36, at 115. However, circumstances may imply a license to publish. In the case of letters sent to magazines and newspapers, the publisher has the right to publish the letter in whole or part. Copinger, op. cit. supra note 6, at 30; Fox, op. cit. supra note 52, at 119; Cane, “Who Owns Your Letters? The Paper Belongs to You but Not the Message”, 26 Sat. Rev. of Lit. 12 (Dec. 12, 1943). See, generally, Yankewich, “What is Fair Use?” 22 U. of Chi. L. Rev. 205 (1954); Cohen, “Fair Use in the Law of Copyright” in Sixth Copyright Law Symposium 43 (1955).

injunction,\textsuperscript{246} recovery of actual damage\textsuperscript{247} and profits,\textsuperscript{248} and in lieu of actual damages and profits, statutory damages.\textsuperscript{249} Full costs are

\textsuperscript{246} 17 U.S.C. §§ 101 (a), 112 (1952); see notes 258, 259 infra.


\textsuperscript{248} See note 247 supra. The recovery of profits is limited to those attributable to the infringement. Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 60 Sup. Ct. 681 (1940), affirming 106 F.2d 45 (2d Cir. 1939), noted in 39 Col. L. Rev. 869 (1939); 48 Yale L.J. 1279 (1939); 25 Minn. L. Rev. 375 (1941); 17 N.Y.U.L.Q. Rev. 284 (1940); Harris v. Miller, 57 U.S.P.Q. 103 (S.D.N.Y. 1943). But see Alfred Bell & Co., Ltd. v. Catalda Fine Arts, Inc., 86 F. Supp. 399, 410 (S.D.N.Y. 1949) (limiting apportionment to cases where most profits were attributable to factors other than infringement); Dam v. Kirke La Shele Co., 175 Fed. 902 (2d Cir. 1910) (defendant held liable for all profits since he wrongfully commingled material); Belford v. Scribner, 144 U.S. 488, 12 Sup. Ct. 734 (1892) (defendant held liable for all profits since he so intermingled infringing and non-infringing elements as to prevent equitable apportionment). For a summary of applicable accounting principles, see Sebring Pottery Co. v. Steubenville Pottery Co., 9 F. Supp. 384 (N.D. Ohio 1934). Injunction and profits are independent remedies. Sheldon v. Moredall Realty Corp., 22 F. Supp. 91 (S.D.N.Y. 1937), modified on other grounds, 95 F.2d 48 (2d Cir. 1938).

allowable to the prevailing party and, in the discretion of the court, a reasonable attorney's fee as part of the costs. If the infringement is willful and for profit, it constitutes a misdemeanor punishable by fine and imprisonment. A three-year period of limitations is imposed by the Act on criminal proceedings thereunder. A further deterrent to


253 17 U.S.C. § 115 (1952). The Copyright Act prescribes no limitations for civil actions, suits or proceedings maintained thereunder, although the Act of May 31, 1790 (1 Stat. 124) contained a one-year statute of limitations, and a two-year period was prescribed by Section 4968 of the Revised Statutes of Dec. 1, 1873. In the absence of a Federal statute of limitations, the applicable state statute of the forum controls. Brady v. Daly, 175 U.S. 148, 20 Sup. Ct. 62 (1899). Since state statutes do not provide for copyright litigation, the problem involves the selection of the most appropriate provision, and the periods have ranged from one year in Alabama [Local Trade-Marks, Inc. v. Price, 170 F.2d 715 (5th Cir. 1948) (injury to rights of another, not arising from contract)] and Louisiana [McCaleb v. Fox Film Corp., 299 Fed. 48 (5th Cir. 1924) ("quasi-offense")];
infringement is the impounding of all infringing articles and the delivery for destruction of all infringing copies or devices as well as plates, moulds, matrices, or other means for making such infringing copies.\textsuperscript{264} Infringing copies imported from abroad are seizable by the customs.\textsuperscript{265}

The copyright proprietor, who under the Act is entitled to damages, profits, or statutory damages for infringement,\textsuperscript{266} is clearly entitled to sue therefor.\textsuperscript{267} Although the Act offers preliminary injunctive relief to “any party aggrieved”\textsuperscript{268} that term has been construed to mean the proprietor of the copyright infringed.\textsuperscript{269} A nonexclusive licensee, who under the indivisible copyright theory holds no property right, legal or equitable, has no such standing in court.\textsuperscript{270} But a grantee of an exclusive license to exercise a particular right of copyright has, as has been stated, an equitable interest,\textsuperscript{271} and where this right has been specifically


\textsuperscript{266} See notes 247-249 supra.


\textsuperscript{268} 17 U.S.C. § 112 (1952). Compare term “party aggrieved” with term “the copyright proprietor or any person claiming actual or potential injury” in section 109, supra note 255.


\textsuperscript{267} See note 90 supra.

\textsuperscript{270} See note 51 supra.
violated, such exclusive licensee should join the proprietor as a party either as a voluntary formal plaintiff or as a defendant (if amenable to service) if the proprietor is unwilling to join as a plaintiff, or otherwise as an involuntary formal plaintiff. In such a situation, the copyright proprietor is an indispensable party.262

Any person participating in infringement may be sued or joined as a defendant.263 Aside from the problem as to the proper parties plaintiff or defendant there may also exist questions as to the propriety of awards in favor of or against certain of multiple parties. Where more than one interested party is involved as plaintiff or defendant, any award or liability may be apportioned among them.264

CONCLUSION

So far as the position of magazines under the present American copyright system is concerned, it is significant that most of the material which they publish cannot qualify for statutory protection prior to publication, and that, therefore, when acquiring rights in material, magazines are largely operating under common-law copyright—an automatic system. The principal interests of magazines are (1) in procuring material which does not infringe the rights of others—as to which they must generally rely upon the integrity of the authors (or author’s agents) with whom they deal,265 and (2) in protecting such material during the on-sale peri-
ods of their magazines, and for a reasonable time thereafter, against any use by others.

By securing statutory copyright initially in their own names, the magazines are responsible for protecting a substantial amount of material published in the United States against book, motion-picture, or any other use, during the period in which exclusivity is important to them. They accomplish this by (1) acquiring with respect to material not written by their employees, "all right, title, and interest, including all rights of copyright", and (2) carrying in the masthead of the issue containing the material a copyright notice in the statutory form. After exclusivity ceases to be important—and this should be carefully specified in the contract with the author—the magazine publisher may make a reconveyance of rights to the author, granting him "the copyright, including all rights thereof, other than exclusive publication rights in magazine and newspaper form". This written assignment, after recordation in the Copyright Office, affords to the author the same legal status he would have had if the copyright in the material had been secured originally in his own name.\[^{266}\]

Magazines secure copyright protection not only in the United States but in other parts of the world. By publication on the same day in Canada, protection is secured both in Canada under the Canadian Copyright Act and throughout the International Copyright (Berne) Union under the relevant Internation copyright conventions. By the acknowledgment of the magazine's copyright in the United States and its notice of reservation of rights, protection is also secured throughout much of Latin-America under the relevant Pan-American copyright conventions. Foreign protection should be enhanced by the Universal Copyright Convention.\[^{267}\]

\[^{266}\] A sound approach would be to regard the publisher as holding the rights which are incidental to those to be exercised and reserved for purposes of preserving the editorial value of the rights to be exercised [see page 422 supra] in trust for the author, subject to an implied duty to reconvey [see note 105 supra], undamaged by unauthorized exercise. If the publisher, while copyright proprietor, did grant such rights to a bona fide purchaser without notice, presumably such equitable interests of the author would be cut off [see note 51 supra], but the author would have a cause of action against the publisher (trustee) for breach of trust.

\[^{267}\] See note 145 supra. The question of what constitutes a bona fide first or simultaneous publication in a particular foreign nation is a difficult legal one. See Henn, "The Quest for International Copyright Protection", 39 Cornell L.Q. 43, 66 n.117 (1953).