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CITIZENS WHO PUBLISH ABROAD: A STUDY IN THE PATHOLOGY OF AMERICAN COPYRIGHT LAW

Irving Younger†¹

*A prophet is not without honour,
save in his own country, and in his own house.²*

It is a familiar complaint among authors,³ publishers,⁴ and scholars⁵ that Title Seventeen of the United States Code stands in urgent need of reform. To that end the leaders of our intellectual community have argued for more than a century. Despite powerful rhetoric and persuasive logic, their success has been only moderate. To be sure, the copyright statute of 1909 was in many ways a proud achievement; yet it left much undone. In the decades that followed it, our society burgeoned beyond the dreams of the most prescient legislator or visionary reformer. Issues which the draftsmen of the 1909 act sensed but chose to skirt took on unexpected importance (*e.g.*, international copyright); problems of which they were necessarily ignorant appeared on the legal horizon (*e.g.*, television). Law has failed to keep step with society, and today some say that it has fallen intolerably far behind. To the authors, American copyright law is a thicket full of hidden snares. To the publishers, it is a quicksand of imprudent business practices. To the scholars, it is a hodgepodge of outmoded tradition and rigid conceptualism.

Each of these views has a considerable degree of truth. American copyright law, on the whole, is in very bad health—a condition we cannot ignore. If copyright law is unable to satisfy the needs of influential copyright-users and articulate copyright-creators, might it not be that the entire legal structure is inadequate to our requirements? The problem is not without interest. Let us focus upon a single, narrowly limited area which touches relatively few of our citizens. It can be defined by means of a simple question:⁶

† See Contributors' Section, Masthead, p. 232, for biographical data.

¹ The author wishes to acknowledge, if not discharge, a debt to Professor Walter J. Derenberg, who suggested this problem to him. This article has been entered in the Nathan Burkan Memorial Competition for 1958.

² Matthew, 13:57.

³ *E.g.*, Hearings before Subcommittee No. 4 of the Committee on the Judiciary on H.R. 2285, 81st Cong., 1st Sess. 30-37, 48-50 (1939) (statements by John Schulman and John W. Vandercook for the Authors League of America).

⁴ *E.g.*, Solberg, Copyright Law Reform, 35 Yale L.J. 48, 69 (1925) (statement by George Haven Putnam); Hearings before Committee on Patents on General Revision of the Copyright Law, 72d Cong., 1st Sess. 114 (1932); Hearings before Committee on Patents on H.R. 6990, 71st Cong., 2d Sess. 98 (1930).

⁵ Briggs, *The Law of International Copyright* 93 (1906); Solberg, *The New Copyright Bill*, 15 Notre Dame Law. 123, 135-40 (1940); Solberg, *Copyright Reform: Legislation and International Copyright*, 14 Notre Dame Law. 343, 357 (1939); Solberg, *Copyright Law Reform*, 35 Yale L.J. 48, 69-71 (1925).

⁶ We shall be concerned in this paper exclusively with the question posed. The manufacturing clause and limits on importation, as such, will be discussed only as they bear on that question.

What protection is available to American citizens who publish abroad?

I

The first Congress was quick to exercise its constitutional power "to promote the Progress of Science and useful Arts, by securing for limited times to Authors . . . the exclusive Right to their . . . Writings."⁷ It passed the nation's earliest copyright law,⁸ providing in section one that "the author and authors of any map, chart, book or books . . . being a citizen or citizens . . . shall have the sole right . . . for the term of fourteen years [to use his or their work]. . . ."⁹ The statute embraced all works in any language published within or outside the United States by American citizens. For instance, should an American citizen residing in Paris have published a novel in French, a treatise in German, or a dissertation in Latin, he might have secured American copyright protection merely by complying with the statute's simple registration requirements. The lack of qualifying or limiting language in section one leads to this conclusion, and section five supports it. That section states:

[N]othing in this act shall be construed to extend to prohibit the importation or vending, reprinting or republishing within the United States, of any map, chart, book or books, written, printed, or published by *any person not a citizen* of the United States, in foreign parts or places without the jurisdiction of the United States.¹⁰

We may infer that to import, vend, etc., a work published abroad by an American citizen but registered under the act was forbidden unless done with his permission, for by registration the citizen had obtained "sole rights." The following table reflects the scope of the protection afforded American citizens by our earliest copyright statute.

	Entitled to full copyright
Book published* by a citizen in America in English	Yes
in America in a language other than English	Yes
abroad in English	Yes
abroad in a language other than English	Yes

* "Published," as used in this paper, connotes "manufactured."

The next statute to which we must turn our attention is the Chace

⁷ U.S. Const. art. I, § 8, cl. 8.

⁸ 1 Stat. 124 (1790).

⁹ *Ibid.*

¹⁰ *Id.* at 125 (emphasis supplied).

Act of 1891.¹¹ Section three of the Act particularly concerns us. It reads:

No person shall be entitled to a copyright unless [he shall deposit copies of the copyrighted work] . . . *Provided*, That in the case of a book . . . the two copies of the same required to be delivered or deposited as above shall be printed from type set within the limits of the United States. . . . During the existence of such copyright the importation into the United States of any book . . . so copyrighted, or any edition or editions thereof, . . . shall be, and it is hereby, prohibited, except in the cases specified [in the Tariff Act of Oct. 1, 1890, 26 Stat. 567, at 604: 1) volumes more than twenty years old; 2) books imported for the Library of Congress; 3) books in languages other than English; 4) two copies of any book imported for the use of an educational society; 5) personal libraries]. *Provided, nevertheless*, That in the case of books in foreign languages, of which only translations in English are copyrighted the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted.¹²

Clearly, the Chace Act is the source of that tradition of opacity in legislative draftsmanship so vexingly upheld by subsequent copyright statutes. We must take care to discover just what it is that is provided. First, no one can copyright a work unless he makes the requisite deposit; second, a condition of deposit in the case of a book is that it be manufactured in the United States; third, once copyright is obtained, copies manufactured outside the United States may be barred from the country, with various exceptions including works in foreign tongues; and fourth, if only an English translation is copyrighted, the original version may be freely imported.

Now, what sense can we make of all this? It is apparent that any person may get American copyright protection if his book is manufactured within the United States, whether he be citizen or alien and whether the work is written in English or some other language. A work in a foreign language, however, does not have the safeguard of the importation provision, for under the third exception stated in the Tariff Act, books in languages other than English are permitted entry without limit. Our analysis might end here were it not for the statute's second proviso. By limiting the prohibition of importation to the translation itself where only the translation has been copyrighted and permitting the importation of the uncopyrighted original version, it implies that were the original version copyrighted it too would be included in the prohibition. There is an inconsistency between the first proviso and the second proviso which no court was ever called upon to resolve.¹³ It would not be rash to con-

¹¹ 26 Stat. 1106 (1891).

¹² *Id.* at 1107-08.

¹³ Research has failed to uncover any cases dealing squarely with the issues discussed in this paper. The following are concerned with peripheral matters: *Oliver Ditson Co. v.*

clude that Congress, intent upon protecting the domestic printing industry, was unaware of the ramifications of the manufacturing clause upon citizens who write in a foreign language or who publish abroad. The scope of the Chace Act can be summarized as follows:

	Entitled to full copyright
Book published by a citizen in America in English	Yes
in America in a language other than English	Yes
abroad in English	No
abroad in a language other than English	No

America's parochialism at the turn of the century and before was as great as it is today.¹⁴ We have observed, for instance, that under the Chace Act a foreign author of works published abroad could get no copyright protection whatsoever in the United States. Congress appears to have been insensible to this unreasonable burden on intellectual commerce until 1904, when the sponsors of the Louisiana Purchase Exhibition encountered difficulty in obtaining foreign works to display at the fair. The 58th Congress met the emergency on January 7, 1904, with Public Law 2, entitled "An Act To afford protection to exhibitors of foreign literary, artistic, or musical works at the Louisiana Purchase Exhibition":¹⁵

[T]he author of any book . . . published abroad prior to November thirtieth, nineteen hundred and four, but not registered for copyright protection in the United States copyright office . . . shall have in the case of any such book . . . intended for exhibition at the Louisiana Purchase Exhibition the sole liberty of printing, reprinting, publishing, copying, and vending the same within the limits of the United States for the term herein provided for upon complying with the provisions of this Act [*viz.*, 1) deposit of one copy in Copyright Office; 2) registration in the "interim copyright record books"; 3) payment of fee of one dollar and fifty cents. The term of protection was two years from the date of deposit, and if an American edition were subsequently printed, the full term ran from that date.]

[E]xcept in so far as this Act authorizes and provides for temporary copyright protection during the period and for the purposes herein pro-

Littleton, 67 Fed. 905 (1st Cir. 1895) (music not a 'book' within purview of the manufacturing clause); Harper & Bros. v. M. A. Donohue & Co., 144 Fed. 491 (N.D. Ill. 1905), *aff'd*, 146 Fed. 1023 (7th Cir. 1906) (importation of book manufactured outside United States); Hills & Co. v. Hoover, 136 Fed. 701 (E.D. Pa. 1905) (certain prints not 'lithos' within purview of manufacturing clause). See also Bentley v. Tibbals, 223 Fed. 247 (2d Cir. 1915); Patterson v. J. S. Ogilvie Pub. Co., 119 Fed. 451 (S.D.N.Y. 1902).

¹⁴ See Dickens, *American Notes* (1842); Trollope, *Domestic Manners of the Americans* (1832).

¹⁵ 33 Stat. 4 (1904).

vided for, it shall not be construed or held to in any manner affect or repeal any of the provisions of the Revised Statutes relating to copyrights¹⁶

Here is the first *ad interim* provision in American copyright law. Though Congress intended only to grant temporary protection to works by foreign authors, the terms of the statute apply also to the American author of a work published abroad. Despite the "except" clause, then, the act of 1904 extended copyright as follows:

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	Yes

The beneficence engendered by the centennial of the Louisiana Purchase wore off, and the 1904 act was succeeded on March 3, 1905, by Public Law 465 of the 58th Congress:¹⁷

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day of publication in this country . . . shall deposit one complete copy of the same . . . in the Library of Congress . . . within thirty days after the first publication of such book in a foreign country [containing a certain notice] . . . and shall, within twelve months after the first publication of such book in a foreign country . . . deposit two copies of it in the original language or, at his option, of a translation of it in the English language, printed from type set within the limits of the United States, or from plates made therefrom, containing a notice of copyright . . . he and they shall have during the term of twenty-eight years from the date of recording the title of the book or of the English translation of it, as provided for above, the sole liberty of printing, reprinting, publishing, vending, translating, and dramatizing the said book: *Provided*, That this Act shall only apply to a citizen or subject of a foreign State or nation when such foreign State or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as to its own citizens.¹⁸

Here is another fine example of that traditional opacity mentioned earlier. Just what does the Statute mean? It begins clearly enough, stating that the authors of books in a foreign language published abroad can have *ad interim* protection for twelve months, at the end of which time they must publish and register an American edition. Furthermore, it would

¹⁶ *Id.* at 4-5.

¹⁷ 33 Stat. 1000 (1905).

¹⁸ *Ibid.*

seem that both foreign and American authors are eligible for protection, for the statute merely refers to "the author or proprietor of a book in a foreign language." It is the proviso which, like all provisos, gives trouble. Does it mean that *ad interim* copyright is available (1) to American authors and (2) to foreign authors whose States grant reciprocal rights to our citizens, or does it mean that *ad interim* copyright is available *only* to foreign authors when reciprocity exists? The language of the statute supplies no answer, nor are there judicial decisions in point.¹⁹ Trembling, we turn to legislative history.

Public Law 165 entered this world on December 14, 1904,²⁰ reading in pertinent part as follows:

Whenever the author or proprietor of a book in a foreign language, which shall be published in a foreign country before the day of publication in this country . . . shall, within twelve months after the publication of such book in a foreign country, obtain a copyright for a translation of such book in the English language . . . he . . . shall have . . . [sole rights].²¹

In its original form, the statute would have applied both to native and foreign authors. The House Committee on Patents, however, added a proviso:

That this act shall only apply to a citizen or subject of a foreign state or nation, when such foreign state [grants reciprocal rights].²²

Does the proviso limit the statute to alien authors? Although the comma after "nation" suggests that the answer is yes, no such comma appears in the law as printed in the Statutes-at-Large. We must inquire further.

Representative Currier, Chairman of the Committee on Patents and author of the famous Report No. 2222 of 1909, spoke from the floor of the House:

Mr. Speaker, this bill is unanimously reported from the Committee. It has the approval of the registrar of copyrights, the publishers, and the Typographical Union. It gives to a foreign author of a book the same measure of protection when written in a foreign language as is now afforded to American or British authors.²³

Assuming that the Representative meant by "American or British authors" American or British authors writing in English and publishing in their respective countries, how did the bill give foreign authors of works in foreign languages the "same measure of protection"? An American author could acquire full copyright by publishing in the United

¹⁹ See note 13 *supra*.

²⁰ H.R. 6487, 39 Cong. Rec. 286 (1904).

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

States, and so could a British author.²⁴ Nobody, however, could get full copyright without publication in the United States. As to *ad interim* copyright, the bill gave it only to works in foreign languages. It was unavailable to works in English.²⁵ Representative Currier must have nodded: taking the grain of gold in his paragraph of dross, however, we can conclude that the act of 1905 was limited in application to foreign authors writing in foreign languages.²⁶ Our synopsis, then, would stand as follows:

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	No
abroad in a language other than English	No	No

On March 4, 1909, the President signed Public Law 349, "An Act To amend and consolidate the Acts respecting copyright."²⁷ Section fifteen was the manufacturing clause:

That of the printed book or periodical specified in section five . . . except the original text of a book of foreign origin in a language or languages other than English, the text of all copies accorded protection under this Act, except as below provided, shall be [manufactured in the United States] . . . but they [the manufacturing requirements] shall not apply . . . to books of foreign origin in a language or languages other than English, or to books published abroad in the English language seeking *ad interim* protection under this Act.²⁸

Sections twenty-one and twenty-two were the *ad interim* clauses:

Sec. 21. That in the case of a book published abroad in the English language before publication in this country, the deposit in the copyright office, not later than thirty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright . . . shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of thirty days after such deposit in the copyright office.

²⁴ See text following note 12 *supra*.

²⁵ See text at note 33 *infra*.

²⁶ H.R. 6487 was amended by the Senate on Feb. 25, 1905. 39 Cong. Rec. 3389 (1905). These amendments were agreed to by the House on Feb. 28, 1905, 39 Cong. Rec. 3672, and the bill was signed by the President on March 4, 1905. 39 Cong. Rec. 4033.

²⁷ 35 Stat. 1075 (1909).

²⁸ *Id.* at 1078-79.

Sec. 22. That whenever within the period of such ad interim protection an authorized edition of such book shall be published within the United States, in accordance with the manufacturing provisions specified in section 15 of this Act, . . . the copyright shall be extended to endure in such book for the full term elsewhere provided in this Act.²⁹

The burden of these sections is that *all* books seeking American copyright protection, whether by citizens or by aliens, in English or in another language, are subject to the requirements of the manufacturing clause with only two exceptions: first, books "of foreign origin" in a foreign language, and, second, books published abroad in English seeking *ad interim* copyright. Assuming that "of foreign origin" means "by a citizen of another nation,"³⁰ the act gave foreign authors writing in languages other than English a substantial advantage. Full copyright protection was available to them without reference to the manufacturing clause (and, concomitantly, *ad interim* copyright was unnecessary). Authors who published abroad in English, on the other hand, were required to produce American editions in order to qualify for full protection. Thus they badly needed *ad interim* protection. It was essential if they were to test the United States market and determine the feasibility of an American edition. (That the sixty-day *ad interim* period may have been too short is another question.) The section is drafted, we note, in terms of "a book published abroad in the English language." There is no restriction as to citizenship of the author; therefore *ad interim* copyright was available to American as well as to foreign citizens publishing works abroad in English.

It is curious that while the *ad interim* protection of the Act of 1905 was available only to works published abroad in a foreign language,³¹ the 1909 act gave *ad interim* protection only to works published abroad in English³² and altogether exempted works in a foreign language by a foreign author from the requirements of the manufacturing clause. The House Report accompanying the act adverted to this shift:

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

After the passage of the act of 1905 English authors felt that some such rights should be given them. Section 21 was inserted for that purpose.³³

²⁹ Id. at 1080.

³⁰ That this is its meaning is by no means certain. See text at notes 50-59 *infra*.

³¹ See text at note 18 *supra*.

³² See 2 Ladas, *The International Protection of Literary and Artistic Property* 767 (1938).

³³ H.R. Rep. No. 2222, 60th Cong., 2d Sess. 13-14 (1909).

Domestic printing interests were satisfied with the manufacturing clause;³⁴ they felt that works of foreign authorship in foreign languages posed an insignificant commercial threat, and therefore permitted the exclusion of those works from the manufacturing requirements. English authors had the *ad interim* protection they wished. Only the American citizen was forgotten.

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	No

Turning now to the act of 1919,³⁵ which extended the period between foreign publication and *ad interim* deposit from thirty to sixty days, and the term of protection itself from thirty days to four months:

Sec. 21. That in the case of a book first published abroad in the English language on or after the date of the President's proclamation of peace, the deposit in the copyright office, not later than sixty days after its publication abroad, of one complete copy of the foreign edition, with a request for the reservation of the copyright . . . shall secure to the author or proprietor an *ad interim* copyright, which shall have all the force and effect given to copyright by this Act, and shall endure until the expiration of four months after such deposit in the copyright office.³⁶

Omitting the insubstantial modifications of 1926,³⁷ the next major change that concerns us occurred in 1949.³⁸ Congress felt that the stringent requirements of the manufacturing clause were depriving Americans of the benefit of most of the books published in England. As the Senate Report put it:

[The manufacturing clause] is a bar to the manufacture in the United States of books published abroad in the English language except in the case of works by the most famous authors. Last year over 14,000 books were published in England and yet only 139 books written in the English language in England and in all other foreign countries were registered in the United States Copyright Office.³⁹

³⁴ 28 Ops. Att'y Gen. 265, 268 (1910): "[T]he language of that section [the manufacturing clause], as well as the report of the committee which had the bill in charge, clearly shows that it was inserted solely for the purpose of protecting American labor"

³⁵ 41 Stat. 368 (1919).

³⁶ *Id.* at 369.

³⁷ 44 Stat. 818 (1926). In 1947, Title 17 of the U.S. Code was enacted into positive law. 61 Stat. 652 (1947).

³⁸ 63 Stat. 153 (1949).

³⁹ Sen. Rep. No. 375, 81st Cong., 1st Sess. (1949), in U.S. Code Congressional Service, vol. 2, at 1321. Professor Chafee's eloquence is apposite here: "It is hard on these foreigners

Sensing that revision of the manufacturing clause was a political impossibility, Congress turned its attention to the provisions for *ad interim* copyright. First it rewrote the proviso at the end of the manufacturing clause as follows:

Provided, however, That said requirements shall not apply . . . to books or periodicals of foreign origin in a language or languages other than English . . . or to copies of books or periodicals, of foreign origin, in the English language, imported into the United States within five years after first publication in a foreign state or nation up to the number of fifteen hundred copies of each such book or periodical . . . if *ad interim* copyright in said work shall have been obtained pursuant to section 22 of this title prior to the importation into the United States of any copy except those permitted by the provisions of section 107 of this title . . .⁴⁰

The *ad interim* clause was altered accordingly:

Ad Interim Protection of Book or Periodical Published Abroad.—In the case of a book or periodical first published abroad in the English language, the deposit in the Copyright Office, not later than six months after its publication abroad, of one complete copy of the foreign edition . . . shall secure to the author or proprietor an *ad interim* copyright therein, which shall have all the force and effect given to copyright by this title, and shall endure until the expiration of five years after the date of first publication abroad.⁴¹

Congress extended the interval between publication abroad and *ad interim* deposit from sixty days⁴² to six months, enlarged the term of protection from four months to five years, and permitted the importation into the United States of up to 1500 copies of a work covered by *ad interim* copyright. In this manner, Congress eased the situation for foreign authors publishing abroad in English: the statutory conditions under which they might test the American market now conformed more closely to business realities, and Americans could reasonably expect to enjoy more domestic editions of English books.

But somehow, what Congress gave the English author it took from the American. We have seen that under the prior statutory provision an American author publishing abroad in English was eligible for *ad interim* copyright. Under the 1949 act, this protection was substantially destroyed. The American author publishing abroad in English might still fit section twenty-two, which refers merely to "book or periodical first published abroad in the English language." But having obtained *ad interim* copyright, what could he do with it? The provision permitting

to be denied protection except at a high discriminatory cost, but it is harder on the rank and file of Americans to lose the happiness which is ours almost for the asking." Chafee, *Reflections on the Law of Copyright*: I, 45 *Colum. L. Rev.* 503, 523 (1945).

⁴⁰ 63 Stat. at 153.

⁴¹ *Id.* at 154.

⁴² See text at note 35 *supra*.

importation of up to 1500 copies was carefully drafted to exclude him. The phrase "book or periodicals, of foreign origin, in the English language," for all intents and purposes restricted the *ad interim* provision to foreign authors publishing abroad in the English language. American authors in practice were denied the advantages of *ad interim* copyright and subjected to the requirements of the manufacturing clause. This effect of the 1949 act is plain enough, yet the Senate Report accompany-it states:

Nothing in these amendments can possibly prejudice the right of any of our citizens, whether authors, publishers, printers, members of labor organizations, or the general public.⁴³

The rights of some of our citizens certainly were prejudiced. Their situation stood as follows:

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes*
abroad in a language other than English	No	Yes*

* But of little practical value because of the importation limitations.

Public Law 743,⁴⁴ enacted in 1954 to implement the Universal Copyright Convention domestically, made several changes with regard to copyright protection both for citizens and for aliens. The one which concerns us, however, is the qualification of the section sixteen proviso:

Provided, however, That said requirements shall not apply . . . to books or periodicals of foreign origin in a language or languages other than English . . . or to copies of books or periodicals first published abroad in the English language, imported into the United States [in compliance with the provisions of the act].⁴⁵

The limitation of the 1949 act to books in English "of foreign origin"⁴⁶ disappeared. Effective *ad interim* protection was available again to American authors publishing abroad in English. American authors publishing abroad in a foreign language, however, remained unprotected. Thus, the law presently stands as follows:

⁴³ Op. cit. supra note 39, at 1322.

⁴⁴ 68 Stat. 1030 (1954).

⁴⁵ Id. at 1032.

⁴⁶ See text at note 40 supra.

	Entitled to full copyright	Entitled to <i>ad interim</i> copyright
Book published by a citizen in America in English	Yes	—
in America in a language other than English	Yes	—
abroad in English	No	Yes
abroad in a language other than English	No	No

II

What does our table mean in human terms? It means that an American citizen residing in the United States can get copyright protection for a work in English or in any other language only by complying with the manufacturing clause. It means that an American citizen who publishes a work in English in a foreign country is entitled to *ad interim* protection on the terms set out in the act, and to full protection only upon satisfaction of the requirement of domestic manufacture. And, astonishingly, it means that an American citizen who publishes a work in a language other than English in a foreign country can get *no* protection at all. He is ineligible for *ad interim* copyright because his work is in a foreign language, and for full copyright because he has not satisfied the manufacturing requirements. It is immaterial whether he resides in the United States or abroad. Consider some examples: (1) An American professor of Greek, residing in Massachusetts, writes a monograph for the Sorbonne which is published in French in Paris. He can get no American copyright whatsoever. (2) A Vermont poet, unable to find an American publisher, submits his work to a London publishing firm which puts out a small English edition. The poet can secure *ad interim* copyright, but without an American edition he cannot secure full copyright. (3) An American novelist living in Switzerland writes a novel in German which is published by a Zurich firm. No American copyright, *ad interim* or full, is available to him. If he publishes an English translation in a foreign country subsequent to publication of the original version, he will be unable to get *ad interim* protection, for section twenty-two refers to "a book or periodical *first* published abroad in the English language."⁴⁷

This is the shocking import of our copyright law. Twenty years ago the Register of Copyrights stated it as follows:

For example, a citizen of the United States living abroad writes a book in a foreign language and has it printed or published abroad with a notice of United States copyright. That this is not a book "of foreign origin"

⁴⁷ 17 U.S.C. § 22 (emphasis supplied).

which justifies the Copyright Office in accepting the deposit and making registration has already been indicated . . .⁴⁸

Plainly, the entire question turns on the meaning of the phrase "of foreign origin." We have assumed⁴⁹ in our exposition that it means "by a citizen of a foreign nation." How sound is that assumption?

III

The phrase "of foreign origin" first appears on the statute-books in section fifteen of the act of 1909,⁵⁰ excepting such works when written in a foreign language. It has two possible meanings: (1) by a citizen of a foreign nation, or (2) published in a foreign nation. R. R. Bowker, by his own admission⁵¹ the author of this section of the statute, has explained its meaning:

This manufacturing provision requires that every "book" except the original text of a work of foreign origin, *i.e.*, not by an American writer in a language or languages other than English . . . [must comply with the manufacturing clause].⁵²

He elaborates as follows:

The effect of these provisions, to cite specific instances, is that an original German text by a non-American author is exempt from the manufacturing provisions, but that a French translation or an English translation is not, and that an original German work by an American author must be manufactured in this country to obtain protection, and that the American author printing his work in English abroad may claim *ad interim* protection but can obtain no substantial benefit from it. In case a German resident of this country, writes a book in the German language and prints it first in Berlin, he can have no American copyright in the German edition; and if copies of such an edition, without copyright notice, should reach the United States previous to manufacture and publication of the work here, any one would have the right to reprint it, and the work would be practically dedicated to the public, while the copyright notice could not be affixed to such foreign printed edition without violation of the law. If, however, the German work were a translation made by or for the author of a work written in English, the general copyright of the English work would cover the German edition, but the German copies could not then be imported.⁵³

⁴⁸ Bouve, Letter to the Librarian of Congress concerning Certain Aspects of the Copyright Act of March 4, 1909, at 30 (1938).

⁴⁹ See text at note 30 *supra*.

⁵⁰ See text at note 28 *supra*.

⁵¹ Bowker, Copyright, Its History and Its Law 156 (1912).

⁵² *Id.* at 154. Supporting Bowker's view, see the statement of R. U. Johnson, secretary of the Authors' Copyright League, Original Hearings, vol. 3, p. 56 (1908): "To express clearly at once the significance of this proviso [referring to works 'of foreign origin'], the American Authors Copyright League moves for the abolition of the manufacturing clause as it relates to books in foreign language of foreign origin, not books in foreign languages of American origin. If the governor of Minnesota, for instance, should print in Norwegian his reminiscences, we should not desire to interfere with the publication of that being required in this country by the American typesetters."

⁵³ Bowker, *op. cit.* *supra* note 51, at 155.

As a matter of statutory construction, one might argue that this is the meaning of "foreign origin." At the end of section fifteen, it is provided that the manufacturing requirements shall not apply to "books of foreign origin" in foreign languages and to books "published abroad in the English language."⁵⁴ Why should Congress have said "publishing abroad" as to the second exception if it did not mean something else by "foreign origin" in the first exception? And what can the first exception then mean but a work written by an author of foreign citizenship? The argument is answerable. The "published abroad" language may be explained by reference to section twenty-one.⁵⁵ Congress wished to exempt from the manufacturing requirements those works seeking *ad interim* protection, and so, naturally enough, used the language of the *ad interim* section. The argument that Congress meant to distinguish between "foreign origin" and "published abroad" is thus weakened, and we are relegated to Bowker's bare assertion that "foreign citizenship" is what *he* meant when he drafted the provision. The question whether Bowker would have had the last word is permanently open, for no court has ever passed on the matter.⁵⁶ In any event, Bowker's position is not strong. If "of foreign origin" in section fifteen of the 1909 act means "by a citizen of a foreign nation," it follows that a work in German by a citizen of Germany residing in the United States would be exempt from the manufacturing requirements. We have seen that Bowker refused to concede this: "In case a . . . German resident of this country, writes a book in the German language and prints it first in Berlin, he can have no American copyright in the German edition."⁵⁷ The Register of Copyrights in 1938 echoed Bowker:

But if nationality is made the test of "foreign origin" it would seem to follow that a foreign resident here who writes a book creates a work of foreign origin and should be able—if that is all there is to the question—to

⁵⁴ See text at note 28 *supra*.

⁵⁵ See text at note 29 *supra*.

⁵⁶ See note 13 *supra*. Ladas believes that "of foreign origin" means "published in a foreign country." 2 Ladas, *The International Protection of Literary and Artistic Property* 764-65 (1938): "All books in the English language are included in the manufacturing clause of the 1909 act regardless of whether they are made by a citizen or resident of the United States or by an alien resident abroad. There are excluded books in a language other than English by a citizen or resident of the United States or by a citizen of another country. It would appear that the meaning of the term 'of foreign origin' in the section refers to foreign publication rather than to foreign authorship." But see Treasury Decision (1910), Copyright Office Bulletin No. 17, reprinted in Amdur, *Copyright Law and Practice*, at 626-27 (1936): "These books are Swedish copies, the translation of which was duly authorized by the proprietor of the copyright in the United States As it appears that the books in question were translated and manufactured in Sweden by a citizen of Sweden, they are, in the opinion of the department, of foreign origin in a language other than English, and are specifically exempted from the manufacturing provision" It is impossible to tell, however, on which fact the Treasury relied more heavily, that the translator was a Swedish citizen, or that the books were published in Sweden.

⁵⁷ See text at note 53 *supra*.

write his book here and send it abroad to be printed and defeat the interests of American printers, binders and typesetters. On such a limited construction he would be in a preferential position over an American author. It is not believed that such was the intention of Congress.⁵⁸

Accordingly, he suggested the following amendment:

A "book of foreign origin" refers to the work of a foreigner not a resident of the United States.⁵⁹

In short, although students of copyright law and the Copyright Office itself have assumed that "of foreign origin" means "by a citizen of a foreign nation," the answer is by no means clear. One wishes that a court had come to grips with the question.

IV

On June 16, 1955, the twelfth signatory to the Universal Copyright Convention deposited its articles of ratification with the Director-General of UNESCO,⁶⁰ and three months later the UCC became effective.⁶¹ Article III, section 1, of the Convention provides that as to "works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals," a signatory nation's copyright formalities would be met by publication with simplified notice.⁶² No mention was made of the need to comply with any manufacturing provision. Section 2 of article III, however, states:

The provisions of paragraph 1 of this article shall not preclude any Contracting State from requiring formalities or other conditions for the acquisition and enjoyment of copyright in respect of works first published in its territory or works of its nationals wherever published.⁶³

It would seem, then, that the United States can continue to require compliance with the manufacturing clause of all its citizens, wherever their works are published and in whatever language. Congress took care to reserve this privilege in the saving clause of Public Law 743:

The provisions of this subsection [dealing with changes in the copyright statute made necessary by American adherence to the UCC] shall not be extended to works of an author who is a citizen of, or domiciled in the United States of America regardless of place of first publication, or to works first published in the United States.⁶⁴

But is it really so plain that an American citizen residing abroad, for

⁵⁸ *Op. cit. supra* note 48, at 9-10.

⁵⁹ *Id.* at 10.

⁶⁰ 2 *Bull. Copyr. Soc'y* 159 (1955). The United States ratified on June 25, 1954. 100 *Cong. Rec.* 8487-95.

⁶¹ For text of the UCC, see 6 *U.S. Treaties and Other International Agreements* 2731.

⁶² *Id.* at 2734.

⁶³ *Id.* at 2735.

⁶⁴ 68 *Stat.* 1030, at 1031 (1954).

example, in Paris, and who there publishes a work in French, could not get full United States copyright protection without an American edition? Suppose that, as permitted by article II, section 3, of the UCC,⁶⁵ France assimilates such an American citizen domiciled in Paris to her own nationals. Could the American citizen, translated now into a French national, claim United States copyright protection by publication in France with the notice required by article III, section 1? The answer is probably no, because section 2 of article III permits the United States to require additional formalities (*e.g.*, compliance with the manufacturing clause) of its own citizens. One might argue in response, however, that this American citizen, according to article II, section 3, is to be treated as a French citizen. Moreover, the permissive clause of article III, section 2, states that "the provisions of paragraph 1 of this article [dealing with simplified notice] shall not preclude" additional formalities, and our hypothetical quasi-French citizen is relying not on paragraph 1 of article III but on paragraph 1 of article II:

Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to work of its nationals first published in its own territory.⁶⁶

Perhaps some day a litigant will rely on the UCC; and though he may not convince a court that it has changed the American law concerning citizens who publish abroad, he may persuade Congress to take on the job.

V

The Universal Copyright Convention is not the only string to a potential litigant's bow. It is also possible that the provisions of the copyright statute we have discussed are unconstitutional.

The customary remark in this area is to the effect that Congress may impose what conditions it likes on a privilege it is free to grant or deny. The remark can be traced at least as far back as Holmes' statement in 1892 that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁶⁷ As applied to copyright law, the argument would be that Congress is free to grant or deny the privilege of copyright; that if it chooses to impose the condition

⁶⁵ 6 U.S. Treaties and Other International Agreements at 2733-34: "For the purpose of this Convention any Contracting State may, by domestic legislation, assimilate to its own nationals any person domiciled in that State."

⁶⁶ *Ibid.* Cf. *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260, 264 (1908) (Holmes, J.): "Of course, Congress could attach what conditions it saw fit to its grant, but it is unlikely that it would make requirements of personal action beyond the sphere of its control."

⁶⁷ *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

of domestic manufacture on books by American citizens wherever published and in whatever language, it may do so; that if it chooses to grant *ad interim* protection to American citizens who publish works abroad in the English language but not to citizens who publish works abroad in foreign languages, there is none to say nay.

The pat rule that Congress knows no bounds in the conditions it may impose on a privilege is no longer impregnable. The doctrine of unconstitutional conditions has breached it. According to that doctrine, the legislature is limited by the requirements of due process in conditioning the grant of a privilege, *i.e.*, the condition must be reasonable. Thus, it is a privilege to work as a teacher at a municipal college; but for the municipality to discharge a teacher without a hearing merely because he pleads the Fifth Amendment before a congressional investigating committee is an unreasonable condition, violative of the due process clause of the Fourteenth Amendment.⁶⁸ Surely Congress is similarly bound by the due process clause of the Fifth Amendment. If works by American citizens published abroad in English are eligible for *ad interim* protection, why should not works in foreign languages also be eligible? If the printing trades can survive the competition of 1500 copies of the first, they can all the more readily survive the competition of 1500 copies of the second. To this extent the limitation of the *ad interim* provision solely to works in the English language may be void for want of due process. It is an interesting speculation.

VI

The best hope of those who are fighting for copyright law reform is the gradual enlightenment of our legislators. In all likelihood the plight of American citizens who publish abroad has not been understood by the committees responsible for supervising the copyright statutes. Once it is called to their attention, we may hope that they will move to relieve it. Meanwhile, these should be our objectives: (1) abolition of the manufacturing clause altogether; if that fails, (2) abolition of the manufacturing requirements as to works by American citizens published abroad in any language; and if that fails, (3) extension of *ad interim* copyright to works by American citizens published abroad in foreign languages. When these goals are attained, we will have done much toward guaranteeing to our artists that integrity of the spirit which is a necessary condition of creation.

⁶⁸ *Slochower v. Board of Higher Educ.*, 350 U.S. 551 (1956).