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News: Public Right v. Property Right

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INTRODUCTION

SINCE THE EARLIEST DAYS of journalism, the application of copyright protection to news matter has been a chronically unsettled question. The right of the general reading public to the freest flow of information on topics of the day, together with the fact that much of the subject matter of news communications is derived from data already in the public domain, has consistently militated against the extension of journalistic copyright, particularly among the English-speaking peoples. Conversely, the more practical means at hand for protecting news from piracy, in the form of the law on unfair competition, has somewhat reduced the persuasiveness of arguments in favor of extension, particularly in England and the United States in the twentieth century.

Historically, the implication of restraint inherent in the copyright concept was a fundamental consideration in the struggle for freedom of expression. Sixteenth-century authorities were only too eager to apply copyright and registry principles to the news of the day, as an effective means of censorship. From the era of Lilburne and Milton to Queen Anne's Copyright Act of 1709, the advocacy of unlicensed printing keyed the theme of progressively wider liberties of expression; and by the last half of the eighteenth century

it had become virtually an axiom of political democracy that the law of copyright (which by definition is the restricting of the privilege of circulating copies of an original publication) and the freedom of news communications were mutually exclusive if not repellent.

The rise of news agency competition in the nineteenth century, characterized by a marginal group of penurious and piratical services, worked a fundamental change in attitude. It suddenly became apparent to the established agencies that copyright, at least in countries where ideas of official censorship or surveillance had disappeared, could be a basic device for the protection of news property. The systematic international gathering of news, with attendant problems of threatened theft in transmission, developed at approximately the same time that the first movements toward the international protection of literary property got under way. For the most part, however, the journalists met with rebuffs in both the international and domestic areas.

True to the eighteenth-century desire to insulate the periodical press from any possibility of governmental interference, the American Copyright Act of 1790 had omitted any provision for newspapers; and a federal court in 1835 had made it clear that the judiciary would not read into the statute any exception by which journalistic material might be covered.¹ As for the international congresses which were working toward the first multilateral convention on copyright, they consistently turned down any propositions relating to news. The plea was either that this was not a proper subject for protection or that such a provision would amount to a new instrument for control in those nations which lacked any fundamental guarantee of freedom of communications.²

¹ Clayton v. Stone, 5 Fed. Cas. 999 (No. 2872) (C.C.S.D.N.Y. 1829).

² Cf. the historical summary on the question of news copyright in the international congresses in *Le droit de reproduction en matière de journaux et de publications périodiques*, 39 DROIT D'AUTEUR 73 (1930). For a discussion of the factor of government restraint in early English copyright, see Holdsworth, *Press Control and Copyright in the Sixteenth and Seventeenth Centuries*, 29 YALE L. J. 841 (1920).

Two other factors operated against any early successes for the efforts of American news interests in the international sphere. One was the conspicuously isolationist or nationalistic policy of the United States government with respect to the reciprocal protection of literary materials throughout most of the nineteenth century. The other was the fundamental difference in the nature of journalism in Anglo-American society as compared with that of most other Western nations. The Continental and Latin-American correspondent of that period made little effort to distinguish—and, indeed, saw no desirability in distinguishing—between fact and commentary in his news dispatches, while the ideal of British and American journalism, to an increasing degree after the 1870s, was a distinct cleavage between the comprehensive, factual, and largely impersonal news report and the editorial comment upon it.

Moreover, the American newspaper, even more than the British, contrasted sharply with its Continental and Latin American counterparts in that the latter devoted a proportionately higher amount of space to literary and artistic sketches treated as an integral part of the news function. European and Latin-American journalism, in this sense, was cast in a form more familiar to the literary congresses of the mid-nineteenth century which were at work on the proposed international copyright conventions; and to the extent that the later conventions made any concessions to the plea for journalistic copyright, it was in terms of the Continental concept of journalism.³

Meantime, the problem of news piracy continued to grow

³ For examples of the revisions of international conventions in terms of Continental journalistic practices, see notes 60–64, 70–73 *infra*. As for the general nature of journalism in Europe and Latin America as contrasted with that of the United States, little has been written in English. The best and most recent studies are the 5-volume UNESCO postwar inventories on press, film and radio (1947–51). Useful older references, in other languages, are BÖMER, *HANDBUCH DER WELTPRESSE* (1931), and WEILL, *LE JOURNAL* (1934), esp. pt. I, Chs. 4, 5; pt. II, chs. 3, 4; pt. III, chs. 2, 3. A good recent work is GONZALES RUIZ, *EL PERIODISMO* (1955), esp. pt. III.

as the news agencies increased in numbers. In the United States, where no single nationwide news service came into being until 1897, there was half a century of cutthroat competition between bankrupt regional systems. In Europe the prevalence of marauding agencies was even greater, and the cure devised in the case of the major powers was in many respects worse than the disease. There it took the form of government-subsidized monopolies—*e.g.*, Havas in France, Wolff in Germany, Stefani in Italy—which, by the end of the century, had become active instruments of diplomatic propaganda for their respective sponsors and had cartelized virtually all the world outside of North America.⁴

Only in England, where the privately owned Reuters agency flourished, and in the United States, after the Associated Press achieved a semblance of nationwide organization, did any unsubsidized newsgathering services succeed; and these fluctuated in fortune between monopoly and intermittent competition until the Exchange Telegraph in England and the United Press and International News Service in the United States—also private agencies—established a relatively stable and competitive balance.⁵

Whether publicly or privately owned, however, all the news services of the latter nineteenth and early twentieth centuries continued to be plagued with the piracy problem, aggravated by the absence of any practical means of protection. Gradually, by domestic statute and court decision, and to a lesser degree by international and regional agreements, the problems began to be met. To a certain extent, the

⁴The international news cartel is documented in FUCHS, *TELEGRAPHISCHE NACHRICHTENBÜROS* (1919) *passim*. On the propaganda struggle implemented by the European press of this era, see HALE, *PUBLICITY AND DIPLOMACY* (1940), especially chs. 1-4; CARROLL, *FRENCH PUBLIC OPINION AND FOREIGN AFFAIRS* (1931), chs. 1, 12; GRUNING, *DIE RUSSISCHE ÖFFENTLICHE MEINUNG UND IHRE STELLUNG ZU DEN GROSSMÄCHTEN, 1878-1894*, 1-23 (1929).

⁵The development of the American news agencies is described in ROSEWATER, *HISTORY OF COOPERATIVE NEWSGATHERING IN THE UNITED STATES* (1930), esp. chs. 7, 13, 15. In May, 1958, the U.P. and the I.N.S. merged into a single news agency.

consolidating of various small agencies provided for part of the solution by eliminating some of the marginal competitors. A number of international press congresses which met in the period between the two world wars produced certain fresh proposals, notably a plan for a short-term copyright to cover the relatively brief salability period of a news story.⁶

The growth of radio as a news disseminating medium as well as a news transmitting medium illustrated even more dramatically the international aspect of the problem of protecting property rights in news. It also pointed up the problem of preserving to the public, now represented by the various peoples within broadcast range of stations in many lands, the right to the most complete possible output of news. The adaptability of radio to propaganda purposes, and the question of international responsibility of states for hostile propaganda, added to the pressure upon governments to impose, continue, or reinstitute various types of control over information, and among such controls copyright occasionally was mentioned.⁷

Copyright protection for news, it may be seen from these several developments, has both national and international legal aspects, and an adequate understanding of the varied issues involved can only be approached by reviewing some of the major principles which have been evolved within the framework of practical necessity, both in domestic and in international areas of law and legislation. It is not enough to consider, in a vacuum, what obtains within the relatively familiar context of Anglo-American law; contrasting prin-

⁶ Cf. notes 63-65 *infra*, and, generally, Hudson, *International Protection of Property Rights in News*, 22 AM. J. INT'L. L. 385 (1928).

⁷ On the question of international responsibility for hostile propaganda, cf. CHRISTINGER, *Le développement de la presse et son influence sur la responsabilité internationale de l'état* (1944); ZELLWEGER, *Die völkerrechtliche Verantwortlichkeit des Staates für die Presse* (1949). On the barriers to the flow of news, see INTERNATIONAL PRESS INSTITUTE, *The Flow of News* (1953).

ciples are to be found in civil law jurisdictions, and these in turn have often had a more familiar ring in the ears of conferences drafting conventions intended to provide for copyright protection of international news, in which American agencies have so great an interest.

The present study, accordingly, has undertaken to summarize and compare Anglo-American practices with reference to news copyright, the practices of selected civil law jurisdictions, and the provisions which have been worked out in international law and legislation to date. Only after such a comparative analysis can a summary of the issues involved in news copyright be attempted.

NEWS COPYRIGHT IN ANGLO-AMERICAN LAW

As has already been indicated, journalistic copy has only with difficulty won any degree of recognition from the courts as to its claim to copyright protection. Even before the American case of *Clayton v. Stone*⁸ in 1835, an English court had declared: "All human events are equally open to all who wish to add to or improve the materials already collected by others, making an original work. No man can monopolize such a subject."⁹

Not until 1870 did even slight relaxation appear in this consistent judicial opposition to journalistic copyright. In that year an English court was confronted with a case of verbatim copying of a hunting list from a periodical named *Field*. The defense was that nothing in a newspaper was copyrightable. The court in this instance, however, ruled that a newspaper had a property right in every word and

⁸ See note 1 *supra*; in *Miller v. McElroy*, 17 Fed. Cas. 333 (No. 9581) (C.C.E.D. Pa. 1839) the court noted, without comment and "without prejudice," the question of whether an author who prints his work first in a "public newspaper, not protected by any copyright, can have such a right in the same work by afterwards publishing it in a different form, as in a volume or book." *Id.* at 33. And see *Holmes v. Hurst*, 174 U.S. 82 (1899).

⁹ *Mathewson v. Stockdale*, 12 Ves. Jun. 270, 272, 33 Eng. Rep. 103 at 104 (Ch. 1806) (dictum).

letter of every original article contained in its pages and that no other person had a right to reprint them without permission.¹⁰

This ruling was corroborated in 1881 in the case of *Walter v. Howe*, which held that newspapers were copyrightable under the Copyright Act of 1842.¹¹ Then in 1892 came the famous case of *Walter v. Steinkopff*, involving the question of protection for the exclusive correspondence of the *Times* of London, which had been copied the same day without credit by *St. James' Gazette*. Lord North laid down the fundamental considerations upon which the courts were prepared to enforce a copyright claim for news matter:

It is said that there is no copyright in news; but there is or may be copyright in the particular forms of language or modes of expression by which information is conveyed, and not the less so because the information may be with respect to the current events of the day. The Defendants have copied from the *Times* without knowing, and probably without thinking, whether what they have taken was the subject of copyright or not. So far as the Plaintiffs are not proprietors of the copyright in the matter thus copied they have not any legal ground of complaint. But, with respect to the passages numbered, . . . the Plaintiffs are within the protection of the law.¹²

Such was not the view of the American courts as yet. Eight years after this decision, the London *Times*, the Chicago *Tribune*, and the Associated Press became involved in a dispute over the preservation of copyright on matter transmitted internationally. The *Tribune* contracted with the *Times* for the exclusive American rights to some of its cor-

¹⁰ *Cox v. Land & Water Company, Ltd.*, 21 L.T. 548, 39 L. J. Ch. (n.s.) 152 (1869). Compare with the more recent American case of *Triangle Publications, Inc. v. New England Newspaper Publishing Co.*, 46 F. Supp. 198 (D. Mass. 1942).

¹¹ 17 Ch.D. 708 (1881), construing 5 & 6 Vict., c. 45.

¹² [1892] 3 Ch. 489, at 495-96. The numbered passages had been individually copyrighted prior to their publication in the *Times*. The *Times* as a whole had previously been registered as a periodical under the provisions of 4 & 5 Vict., c. 45. *Id.* at 490.

respondence, which was copyrighted in the London editions of the *Times*. Under the agreement, this copyright was released to the *Tribune* on articles selected by the latter's correspondent, who then cabled them to Chicago. The *Tribune* there undertook to copyright its daily edition containing these stories. However, the London correspondent of the Associated Press simply copied the stories from issues of the *Times* bought on the streets, and these were cabled to A.P. papers in the United States. In a suit to restrain the A.P. from this practice, the *Tribune* cited its American copyright of the stories originally entered under British copyright. The court, however, rejected the argument that an entire edition of a newspaper could be entered for copyright, observing that "there can be no general copyright of a newspaper composed in large part of matter not entitled to protection."¹³

Yet the *Tribune* case contained a hint of relaxing of judicial attitude; the case failed, the court indicated, because no "special matter" was shown to be subject to copyright. Under the existing statute, the opinion that the entire newspaper was not subject to copyright was, of course, well taken. Under the rule of the *Clayton v. Stone* and *Cox* cases¹⁴ it was highly doubtful whether any "special matter" within a newspaper was eligible. But the *Tribune* decision indicated recognition of a need for some type of relief, either equitable or statutory. Both types were soon forthcoming.

The general revision of the American copyright law in 1909 removed a major obstacle to effective copyright protection for journalistic matter by providing for a classification of newspapers and periodicals among the types of works eligible for copyright protection.¹⁵ This new feature of American law did not go as far toward accommodating the news communications industry as had certain domestic laws

¹³ *Tribune Co. of Chicago v. Associated Press*, 116 Fed. 126, at 128 (C.C.N.D. Ill. 1900).

¹⁴ See notes 1 and 10 *supra*.

¹⁵ 17 U.S.C. § 5 (b) (1952).

of the British Empire during the last quarter of the nineteenth century,¹⁶ but it was a major departure from the general rule against journalistic protection which had obtained in American legislative history up to that time.¹⁷ The stage thus was set for the landmark decision which came in 1921 and defined the proper role of copyright in the protection of the literary content in the news of the day.

The case involved a 1917 story, printed in the *New York Tribune*, giving a staff correspondent's eye-witness account of the inauguration of U-boat warfare by the German navy. A Chicago paper reprinted the story, using considerable portions of the original article verbatim. The *New York* paper had copyrighted the correspondence, and it brought suit for infringement. The Chicago paper offered as a defense the contention that what it had reprinted were news facts, part of the public domain, and not subject to copyright. In rejecting the argument, the court pointed out:

It is true that news as such is not the subject of copyright, and so far as concerns the copyright law, whereupon alone this action is based, if the *Herald* publication were only a statement of the news which the copyrighted article disclosed, generally speaking, the action would not lie. But insofar as the Edwards article involves authorship and literary quality and style, apart from the bare recital of the facts or statement of news, it is protected by the copyright law. That the entire copyrighted article involves in its production authorship as generally understood, and manifests literary quality and style in striking degree, is impressively apparent from its perusal. While the appropriated portions comprise in perhaps larger degree the salient facts than do the deductions, descriptions and comments with which the other parts of the copyrighted article more largely deal, they are nevertheless not wholly or strictly confined to recital of mere facts. . . .¹⁸

¹⁶ *Cf.* Hudson, *supra* note 6, at 387.

¹⁷ For an interesting judicial colloquy on the copyrightability of news under the Copyright Act of 1891, in the United States District Court for the Southern District of New York and in the Second Circuit, see *Davies v. Bowes*, 209 Fed. 53 (S.D.N.Y. 1913), *aff'd*, 219 Fed. 178 (2d Cir. 1914).

¹⁸ *Chicago Record-Herald Co. v. Tribune Ass'n*, 275 Fed. 797, at 798-99 (7th Cir. 1921).

From several points of view, the *Record-Herald* case settled some fundamental issues concerning copyright in news matter. In the first place, it reiterated the rule that news facts, *qua* facts, could not be considered subject to copyright but were part of the public domain. On the other hand, by asserting a copyright in the writing style with which such facts might be reported, it did raise a substantial barrier against indiscriminate reprinting. But, in the final analysis, the effect of the *Record-Herald* decision was permanently to relegate copyright to a supplementary or subsidiary role so far as the protection of property rights in news was concerned. Statutory copyright, as revised in 1909, was not to be interpreted so sweepingly, in the process of insulating a private property interest from invasion by competitors, as to infringe upon the public interest in having the most general access to the news of the day.

It remained to develop the equitable remedy, in the effort to apply practical principles of justice and fair dealing to the often unbridled competition of the news agencies. As early as 1902, in fact, an American court had pointed up the practical problem and had suggested the eventual answer. That case involved the appropriation of news briefs, particularly of sports results, from the ticker tape of the Western Union Telegraph Company by the National Telegraphic News Agency. The defense in this instance was that the ticker-tape news, upon publication in the receiving office, was dedicated to the public. But the district court granted an interlocutory decree restraining the news agency, and, in affirming, the appellate court took notice of the basic dilemma represented by the opposing arguments:

It is obvious . . . that if appellants may lawfully appropriate the product thus expensively put upon the appellee's tape, and distribute the same instantaneously to their own patrons, as their own product, thus escaping any expense of collection, but one result could follow—the gathering and distributing of news, as a business enterprise,

would cease altogether. Appellee could not, in the nature of things, procure copyright under the Act of Congress upon its printed tape; and it could not, against such unfair conditions, without some measure of protection, compete with appellants upon prices to be charged their respective patrons. And in the withdrawal of appellee from this business, there would come death to the business of appellants as well; for without the use of appellee's tape, appellants would have nothing to distribute. The parasite that killed, would itself be killed, and the public would be left without any service at any price.¹⁹

Having thus identified both the private and public interest in the protection of news property, the court upheld the restraining order; the gathering of news and information, not merely of sports but of all public activity around the world, should not "be denied appeal to the courts, against the inroads of the parasite, for no other reason than that the law, fashioned hitherto to fit the relations of authors and the public," did not afford adequate relief. At the same time, the court agreed that such material was not appropriate subject matter for copyright, despite the history of successive expansion of the statute to cover new types of copy:

But, obviously, there is a point at which this process of expansion must cease. It would be both inequitable and impracticable to give copyright to every printed article. Much of current publication—in fact the greater portion—is nothing beyond the mere notation of events transpiring, which, if transpiring at all, are accessible by all. It is inconceivable that the copyright grant of the constitution, and the statutes in pursuance thereof, were meant to give a monopoly of narrative to him who, putting the bare recital of facts in print, went through the routine formulae of the copyright statutes.

It would be difficult to define, comprehensively, what character of writing is copyrightable, and what is not. But, for the purposes of this case, we may fix the confines at the point where authorship proper ends, and mere annals begin. Nor is this point easily drawn. Generally speaking, authorship implies that there has been put into the production something meritorious from the author's own mind; that the product embodies the thought of the author, as well as the

¹⁹ *National Tel. News Co. v. W. Union Tel. Co.*, 119 Fed. 294, 296 (7th Cir. 1902).

thought of others; and would not have found existence in the form presented, but for the distinctive individuality of mind from which it sprang. A mere annal, on the contrary, is the reduction to copy of an event that others, in a like situation, would have observed; and its statement in the substantial form that people generally would have adopted. . . . One is the product of originality; the other the product of opportunity.²⁰

While this opinion may in some respects be described as an eloquent argument for the strict construction of the copyright law, whereas the *Record-Herald* opinion (aided, of course, by a significant alteration of the statute) suggested the protection which might be extended to news matter under a liberal interpretation, the chief importance of the *National Telegraphic News* case lies in the foundation it laid for the rule devised in a leading case which was to reach the United States Supreme Court almost two decades later. The 1902 decision in the Seventh Circuit, as a matter of fact, coincided with a series of English cases, extending from 1896 to 1906, which were working out a similar equitable remedy: These "*Exchange Telegraph*" Cases pronounced a similar rule of restraint against unfair competition in the appropriation of noncopyrightable matter gathered and distributed by a rival news service.²¹

The leading case of *International News Service v. Associated Press* came before the Supreme Court of the United States in 1918. The issue arose from an I.N.S. practice of copying A.P. dispatches for distribution and sale to I.N.S. subscribers. The questions, as Mr. Justice Pitney phrased them, were "(1) Whether there is any property in news; (2) whether, if there be property in news collected for the purpose of being published, it survives the instant of its publication" and whether, in redistributing the news to competitors after publication, there was any violation of the laws against unfair competition.

²⁰ *Id.* at 297-98.

²¹ [1896] 1 Q.B. 147 (C.A.); [1897] 2 Ch. 48; [1906] 22 T.L.R. 375 (Ch. 1906).

Conceding at the outset that news, which is "the history of the day," could not be properly found subject to copyright, the Court pointed out that the "peculiar value of news is in the spreading of it while it is fresh; and it is evident that a valuable property interest in the news, as news, cannot be maintained by keeping it secret." Once the newsgatherer has removed the wrapping of secrecy, has he waived any right to realize his valuable property interest—when the only means by which he can realize this interest is by making the news public? That news, "when it thus reaches the light of day . . . becomes the common possession of all," was, of course, the contention of the defense. The Court said:

The fault in the reasoning lies in applying as a test the right of the complainant as against the public, instead of considering the rights of complainant and defendant, competitors in business, as between themselves. The right of a purchaser of a single newspaper to spread knowledge of its contents gratuitously, for any legitimate purpose not unreasonably interfering with complainant's right to make merchandise of it, may be admitted; but to transmit that news for commercial use, in competition with complainant—which is what defendant has done and seeks to justify—is a very different matter. In doing this defendant, by its very act, admits that it is taking material that has been acquired by complainant as the result of organization and the expenditure of labor, skill, and money, and which is salable by complainant for money, and that defendant in appropriating it and selling it as its own is endeavoring to reap where it has not sown, and by disposing of it to newspapers that are competitors of complainant's members is appropriating to itself the harvest of those who have sown. Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news. The transaction speaks for itself, and a court of equity ought not to hesitate long in characterizing it as unfair competition in business.²²

²² *International News Serv. v. The Associated Press*, 248 U.S. 215 at 139-40 (1918) (hereinafter cited as *I.N.S. v. A.P.*). The rule in this case has been

With the rule in the *I.N.S.* case, in juxtaposition with the comparable rule in the "*Exchange Telegraph*" Cases, Anglo-American law had at length arrived at a practical solution to the problem of protecting the private interest in news while preserving the fundamental public interest therein. That this public interest in access to news matter, which was the basic reason for withholding news from the protection of the copyright laws, should also prevent the indefinite exploitation of it as a saleable property under the laws on unfair competition, was generally conceded. For example, upon remand of the *I.N.S.* case to the lower court for a determination of a reasonable period of protection, a twenty-four-hour limit was fixed.²³ Similar practical limits have been set, usually by statute, in various parts of the British Commonwealth, ranging from sixteen to seventy-two hours.²⁴

Aside from such occasional and special provisions in the copyright statutes, the protection of news matter in Anglo-American law is primarily within the purview of equity. Only secondarily is it under the law relating to literary property, although the principles enunciated in the English case of *Walter v. Steinkopff*²⁵ and in the American case of *Chicago Record-Herald v. Tribune Assn.*²⁶ afford an effective complement to the general safeguards against misappropriation which lie in the equitable remedies.

In view of the distinctly subsidiary role which copyright has assumed in the news communications industry, what is

generally followed in American courts; cf. *Pittsburgh Athletic Co. v. KQV Broadcasting Co.*, 24 F. Supp. 490 (1938).

²³ HOWELL, *THE COPYRIGHT LAW* 127 (3d ed. 1952). The remand was from the Court of Appeals for the Second Circuit to the district court, stayed pending a review by the United States Supreme Court after granting certiorari. Upon affirmation, the remand proceeded. 245 Fed. 244 (2d Cir. 1917), and, for the original trial, 240 Fed. 983 (S.D.N.Y. 1917).

²⁴ Cf. Hudson, *supra* note 6, at 386; League of Nations Conf. of Press Experts, *Report on Laws on Protection of Press Information*, 17, 19-21 (1927). For a recent summary of statutes and case law on the subject in leading countries, see 3 PINNER, *WORLD COPYRIGHT* 581 (1957).

²⁵ See note 12 *supra*.

²⁶ See note 18 *supra*.

its practical usefulness to the modern news medium? A survey of the managing editors of representative American newspapers, conducted by the present writer, indicates two general propositions which may be made. First, copyright is useful primarily for two groups of news copy distributors: syndicates, whose copy is more of a feature or entertainment nature and thus more commonly a product of original literary effort, and those newspapers which have developed a system of exclusive, staff-written correspondence, either abroad or from Washington, D.C. Second, with the waning of local competition between printed media, copyright has become useful as a protective device in the competition between what may be the one remaining morning or evening daily in a community and the so-called "electronic" (*i.e.*, radio and television) media.

The copyright of syndicated matter is natural enough in view of its being less concerned with the news of the day and more with the type of writing which depends for its effectiveness on individual style. As for the exclusive foreign correspondence of certain American newspapers, much of this is also syndicated among noncompeting publications in order to offset part of the considerable cost of gathering it. The *New York Times* and the *Chicago Daily News* have developed extensive syndication facilities, and the objective of copyright in their cases is to extend the protection of their news service beyond the first publication in their own columns through the subsequent publication in the columns of their subscribing newspapers.²⁷

To a somewhat lesser degree, newspapers with extensive Washington correspondence may use copyright. This is usually done in the case of an exclusive story which a staff correspondent has developed. The *Minneapolis Tribune* and

²⁷ For a case involving a dispute between two American newspapers purchasing foreign correspondence for republication in the United States, see *Public Ledger v. New York Times*, 275 Fed. 562 (S.D.N.Y. 1921), *aff'd per curiam*, 279 Fed. 747 (2d Cir.), *cert. denied*, 258 U.S. 627 (1922).

the St. Louis *Post-Dispatch* follow this practice. The Des Moines *Register* some years ago set up a syndicate to market the output of some of the columnists who developed among the members of its Washington staff.

Generally speaking, copyright on a nonsyndicated, staff-originated story in a characteristic American daily newspaper has two pragmatic functions. It serves as a deterrent to misappropriation of news by competitors, and it promotes the prestige of the newspaper carrying the story. The practical effect of both of these considerations was expressed by one publication from the Mississippi Valley region whose editor wrote in answer to the survey:

We copyright stories because other media—particularly television—in our metropolitan area have small staffs and large scissors. We publish a street sale edition of our morning paper about 8 p.m. each night—a most convenient time for the 10 p.m. newscasts on radio and television. These two media are in the habit of lifting from our newspaper as much local news as they can read in twelve minutes. They seem to have a certain respect for a copyright line and they are loath to steal these stories without credit. Whether they are uninformed or not as to the practical aspects of what a copyright means is immaterial. The copyright line also lets our readers know that there are many news stories they get only from a newspaper.

The Denver *Post* echoes this general observation:

A copyright line usually (but not always) persuades radio newscasters to credit the story to us. It can be irritating to have a newscaster read an exclusive story out of the newspaper, without attribution and just as if he had originated it, before that edition is delivered to our subscribers.

The Milwaukee *Journal* states that its use of copyright is chiefly to prevent "misuse of original material." Thus, if a party requests permission to use material which the *Journal* has copyrighted, the newspaper can determine for itself whether it will grant permission.

The prestige value in receiving credit for an exclusive story is rated high by many newspapers. The editor of the

Louisville *Courier-Journal* explains it thus: "If you do develop a good exclusive story, one that you know will be the talk of Kentucky, or maybe of America, next morning, the only way for the general reader to know your paper dug it out" is to have the news agency dispatch include the newspaper's name in the process of giving credit to it for the story. The Cleveland *Plain Dealer* follows the same policy.

It is significant, perhaps, to note from the survey of newspaper practices that copyright is used essentially for its short-term benefits—*i.e.*, for keeping the exclusive story out of the hands of competitors at least long enough to skim off the richest cream for the original publisher. In other words, newspapers are using the copyright notice—in cases other than those of the syndicating of staff correspondence—to achieve the effect which the equitable remedy in the *I.N.S.* case was supposed to provide, an effect which the copyright statute in the United States has never been devised to provide either by legislative enactment or by court interpretation. It is strictly a layman's expedient—a kind of utilitarian trick of the trade to delay competitors in the fast-moving, short-lived process of bringing out successive editions of the day's news.

As laymen, the editors of the newspapers surveyed reiterated two practical points in the use of the copyright notice: (1) the impossibility of securing injunctive relief at the time it was needed, which in the case of a daily newspaper is usually within the hour; (2) the fact that other laymen (*i.e.*, the competitors) are more likely to refrain from using a story if they read a printed copyright notice. It operates as an unmistakable "no trespassing" sign, irrespective of what may actually be known of the historical problems and present status of journalistic copyright in American law.²⁸

²⁸ There is some indication that occasional newspapers—and the practice may be more general—print a copyright notice without the intention of actually completing the application with the Copyright Office. That is, they consider

In one area of news communications, copyright does play a major role. That is in the area of pictorial journalism. Possibly because photographs themselves have been more generally recognized as eligible for copyright, and possibly because of the skill required to obtain a photograph even of some person or event in the public domain, virtually all of the newspapers surveyed advised that they did copyright exclusive local pictures much more frequently than local news matter. From a practical standpoint, one editor points out, there is actually less likelihood that a picture printed in a newspaper will be stolen, since the reproduction of a newspaper half-tone is "a sorry product." Those who seek permission to republish the picture must obtain a print from the original publisher; the copyright here serves its characteristic purpose of preventing those who thus obtain such a print from making copies and selling them in competition with the original publisher.

Generally speaking, working newspapermen do not find that copyright, in those occasional instances where they feel the need for protection of their copy, is effective protection. It delays, but never completely stops, the competition from reaping at least a small part of the benefit of the labors of the originator of the news story. Since speed is the essence of news communications in contemporary American mores, even a temporary deterrent is of some value; at the same time, however, the pressure for rushing into print militates against even the effort to seek a copyright for any but the most lucrative "scoops."

Copyright of the entire issue of the newspaper has been practiced by a certain number of newspapers. Attorneys for publishers and publishers' associations are split as to the

that the printing of the notice is sufficient to accomplish their purposes. It is not pertinent here to discuss in detail the legal questions arising from any element of *mala fides* of which this practice may be evidence. For a discussion of good faith and intent to complete the copyright registration, see *Washington Publishing Co. v. Pearson*, 306 U.S. 30, 47 (1939) (Mr. Justice Black dissenting), *reversing* 90 F.2d 245 (D.C. Cir. 1938).

practical effect of such copyright. As for the laymen among the editors, they are inclined to feel that a single copyright notice, printed obscurely near the nameplate of the paper on its front page, has a minimal effect in warning others to "keep off."²⁹

British newspapers surveyed as to copyright practice tend to place a somewhat greater value upon it. In part, at least, this appears to be due to the different organization of British journalism: the predominance of the London dailies throughout much of the British Isles, the fact that a higher proportion of them have their own staff correspondents abroad—particularly on the Continent—and the fact that many of them pay substantial sums of money for free-lance material.³⁰

Neither in the United States nor in Great Britain, however, do working journalists find complete satisfaction with existing copyright statutes. As a general principle, the equitable rules against misappropriation of news copy are acceptable, but they do not afford the complete practical relief necessary to insure complete remuneration to the newsgatherer for his efforts. But whether this is either socially necessary or desirable, in view of the public interest in having access to the news at the cost of reasonable compensation to the newsgatherer, is another question.

EDITORIAL PROPERTY UNDER CIVIL LAW

The position of the civil law with respect to journalistic copyright in general has been well summarized by a French writer in the following terms:

²⁹ Most of the material in the foregoing paragraphs has been taken from a survey of selected American newspapers, from coast to coast, conducted by the present writer. A number of these newspapers requested that their specific comments be kept anonymous. It is pertinent to note here, however, that the survey was circulated among leading daily newspapers in Atlanta, Boston, Chicago, Cleveland, Dallas, Denver, Detroit, Kansas City, Los Angeles, Louisville, Miami, Milwaukee, Minneapolis, New York, Philadelphia, Portland (Ore.), St. Louis, Salt Lake City, San Francisco, and Washington, D.C.

³⁰ The survey on which the information in this paragraph was based was conducted among leading daily newspapers of London, as well as American correspondents of British newspaper groups and Reuters news agency.

. . . for many years . . . in the absence of formal legislative rules, there has been a consistent practice . . . to protect, under the same title as other intellectual products, writings published in periodicals. The oldest juriconsults [gave] authority in the matter . . . for rejecting the idea of placing these writings under a separate jurisdiction. And Pouillet, the most reputable of the contemporary writers, affirmed the opinion of his predecessors in maintaining . . . that it was enough, for an article to be protected, that it "may be considered an intellectual product and a manifestation of some effort, some work."³¹

This principle, the same author maintains, was upheld in France by the Court of Cassation as early as 1830; but he admits that for almost as long a time it has been the practice of many periodicals to reproduce articles already published, "and that practice has become international."³² To that extent, then, France appears to be in the same general position as Anglo-American journalism.

Nevertheless, France, as one of the prime journalistic forces of Continental Europe and one of the most ardent supporters of international copyright in general, has sought by statute and court decision to provide a maximum degree of protection for works in the periodical press which meet the definition of intellectual productions in the broadest sense. At the same time, a minimum degree of formality is required; copyright in civil law jurisdictions has never stressed, and seldom made any provision for, any process of registration, while only in recent decades has any printed notice been required. As will be pointed out *infra* the international (Berne) copyright convention and to a large degree the universal (UNESCO) copyright convention have followed civil law practice.

Accordingly, under both of the major international conventions and under the provisions of a national law on copyright which became effective March 14, 1958,³³ French news-

³¹ Weiss, *Journalisme et le droit d'auteur*, 1 CAHIERS DE LA PRESSE 111 (1938).

³² *Id.* at 114.

³³ For this and similar copyright statutes, the most useful reference is UNESCO,

papers are entitled automatically to the protection of copyright in the text of all of their editorial matter, as well as in photographs and drawings which they may publish. In France itself, no notice is required to be printed. To protect editorial property in international circulation—a practical consideration in view of the large foreign circulation of metropolitan French periodicals³⁴—one of the leading contemporary French newspapers regularly uses the symbol © as stipulated by the international conventions. This symbol, when accompanied by the words, “reproduction, even partial, strictly forbidden,”

permits protection as much in countries adhering to the Bern convention as in countries not adhering [thereto]; in particular, it makes possible the obtaining of protection in the U.S.A. without the formality of the deposit of copyright, the simple noting of the symbol © taking its place.³⁵

In the case of features and literary works bought by the newspaper for first publication, the symbol is considered necessary both to protect the author's rights abroad and to advise the “eventual buyers of the rights” to deal directly with the publishers in acquiring them.³⁶

In various European countries, news protection depends upon special short-term provisions in statutes enacted at the height of the news agencies' rivalry in the last quarter of the nineteenth century and the first quarter of the twentieth. In Russia, a statute enacted in 1911 provided for an eighteen-hour limit of protection on news property; this law was continued after the Revolution as well.³⁷ A Finnish law of

COPYRIGHT LAWS AND TREATIES OF THE WORLD (1956) (hereinafter cited as UNESCO COLLECTION), which is kept up to date by looseleaf insertions.

³⁴ See cases discussed at notes 45-48 *infra*.

³⁵ Translated from a memorandum prepared for this writer by the staff of *France-Soir*. The survey of copyright practices among foreign newspapers included leading daily publications in Amsterdam, Bogota, Buenos Aires, Hamburg, Mexico City, Paris, Rio de Janeiro, Rome, and selected foreign news agencies.

³⁶ *France-Soir* memorandum, note 35 *supra*.

³⁷ 37 DROIT D'AUTEUR 63 (1924).

1917 set a limit of twenty-four hours.³⁸ Early in this century, some German courts applied a rule quite similar to the equitable remedy worked out by English and American jurists. A court in Berlin in 1900 convicted several Wolff employees and an employee of a rival agency for conspiring to obtain and publish Wolff dispatches before Wolff could use them; and two years later a court in Hamburg forbade the reproducing of race results gathered and posted by another, basing its ruling upon the prohibition of an act "contrary to morals."³⁹

Most of the recent copyright provisions of Western European states follows the general provisions of the Berne convention as revised at Brussels in 1948, or the UNESCO convention of 1952. In general, these permit the free reproduction of all news matter relating to events of the day, and the reproduction of special news correspondence unless the original publisher prints an accompanying notice that the right of reprint is not granted except on written request and written permission.⁴⁰

Journalistic copyright—or the absence of it—in Latin America was long a favorite example cited by those who advocated the need for more effective protection of property rights in international news. Although the wholesale pirating of news and features from United States and European publications and agencies has considerably declined—in part because the very absence of local news services, which was the excuse for appropriation of copy in the past, has now been offset by the availability of United States and European news services operating in these countries—the general antipathy with regard to news copyright is still a matter of con-

³⁸ League of Nations Conference of Press Experts, note 24 *supra*, at 28.

³⁹ 37 DROIT D'AUTEUR 64 (1924).

⁴⁰ See the summary of contemporary European copyright provisions on this subject in PINNER, *op. cit. supra* note 24, at 599; and see UNESCO COPYRIGHT BULL. Nos. 2-3, 11 (1949), for an exhaustive study of comparative copyright law.

cern to news purveyors. Characteristic of the attitude of Latin-American jurists toward the protection of news property is the 1939 working principle adopted by the Conference of Juriconsults at Montevideo, that any matter may be copied from any periodical or publication without payment to author or publisher, provided that the name of the publication is cited as the source.⁴¹

In principle, at least, contemporary Latin-American legal theory adheres rather closely to the distinctions insisted upon by Anglo-American jurisprudence, between news facts which are not subject to copyright and reporting style which may be subject thereto. The distinction, however, is more subtly phrased in the Latin legal mind as a distinction between "the intrinsic character of news" and "the natural mission of news." Under the former heading a current writer contrasts factual news items (*noticias*), not eligible for protection, with editorial commentary and interpretative articles (*artículos de fondo*), which show "a power of analysis, synthesis, reflection, and opinion which reflects personality and creativity in the writer, as much in the form as in the substance."⁴² The latter may have a claim to copyright, subject to the paramount "destiny" of journalistic publication to inform the public generally.

The general hesitancy of most Western countries to find a property right in news publications, and the peculiar nuances of domestic laws addressed to the problem, have presented a certain amount of conflict of law which has further hampered the development of a satisfactory regime of inter-

⁴¹ Cf. article 115 of the Bustamante Code: "Copyrights . . . shall be governed by the provisions of the special international convention at present in force or concluded in the future. In the absence thereof, their acquisition shall remain subject to the local law which grants them." 86 L.N.T.S. 120, 254, 4 HUDSON, INTERNATIONAL LEGISLATION 2283, at 2300 (1931). Compare this with the text at notes 68 and 72 *infra*, noting how this language of a classic Latin-American draft convention has been reflected in other conventions.

⁴² SATANOWSKY, DERECHO INTELECTUAL 201 (Buenos Aires, 1954).

national protection. A general rule, pronounced at the turn of the century by an English court, suggests that when "the right to sue in the country of origin [of copyright] is established, the remedies are regulated by the law of the country in which the infringement takes place."⁴³

Adding to these considerations the fact that an effort to recover in a foreign court for a violation of an alleged property right presents practical difficulties out of proportion to the possible benefits to be gained, it is not surprising that adjudication on the existing issues is rare. As to issues involving news dispatches, only two cases, now more than a quarter of a century old, are worthy of consideration. One is a Swiss case of 1930, in which the court of appeal for the canton of Bâles-Ville was called upon to litigate a contention between the Swiss *National-Zeitung* and the German *Frankfurter Zeitung*. The Swiss paper was accused of reprinting a news agency dispatch which had originally appeared in the German newspaper with a notice of reservation of rights. The court found no negligence in the Swiss newspaper, since it reprinted the dispatch in good faith, but it stressed that the press agency was guilty of illegally transmitting the material.⁴⁴

In 1932 a Canadian court considered a case involving a copyrighted article where the plaintiff was the author of a newspaper item first published in the United Kingdom. The item did not state that reproduction was forbidden and a Canadian publication in time reproduced it. In the suit which followed, the court held that the author was not protected by the International Copyright Convention because he had not given notice that reproduction was prohibited. But the court found that he was entitled to protection under the Dominion

⁴³ *Baschet v. London Illustrated Standard Co.*, [1900] 69 L.J. Ch. (n.s.) 35.

⁴⁴ *Frankfurter Societäts-Druckerei G.m.b.H. v. Verlag der National Zeitung*, Sept. 26, 1930. *Cour d'Appel du Canton de Bâles-Ville* (Switz.), 44 *DRÖIT D'AUTEUR* 81 (1931).

Copyright Act of 1921, which provided that all British subjects may claim an exclusive copyright, without notice, for their articles published anywhere in the British Commonwealth.⁴⁵

Possibly because of the appearance at the time of international radio broadcasting and the first practical wire transmission of photographs, copyright issues on these two types of journalistic communications were litigated on several occasions in the late 1920s and early 1930s. Article 3 of the International Copyright Convention (as revised at Rome) extended copyright protection to "photographic works and to works obtained by any process analogous to photography." A French case relying on this provision arose in 1922; one Gorguet, a painter, had executed a picture under the title "*Le Verger de Pomone*," which was exhibited in 1920 in the salon of the Société des Artistes Français. An English publication, *Eve*, reproduced the picture, but altered the title to "*Le Jardin de Pomone*." Gorguet was awarded nominal damages for the "*préjudice*" which he suffered.⁴⁶

In 1927 the publishers of *Punch* sued the French periodical *Le Rire* for copying their cartoons, relying on article 9 of the International Copyright Convention forbidding reproduction of "novels and all other works, whether . . . literary, scientific or artistic" without the author's consent. The French publication was found guilty of copyright infringement, the

⁴⁵ *Gribble v. Manitoba Free Press Ltd.* [1931] 40 Man. R. 42, [1932] 1 D.L.R. 169 (1931), construing CAN. REV. STAT., c. 32 (1927). See also *Fiel v. Lemaire*, [1939] 4 D.L.R. 561. The Paris correspondent of the Argentine newspaper *La Prensa* was successfully sued by a French author for the copying of his story and the reprinting of it in the Argentine publication. *Foley v. Cazaux*, Trib. Civ. de la Seine, Nov. 24, 1910; Cour d'appel de Paris, Nov. 15, 1912 (Fr.) 26 DROIT D'AUTEUR 100 (1913).

⁴⁶ *Gorguet v. le journal Eve*, April 25, 1932. Trib. Civ. de la Seine, 32 DROIT D'AUTEUR 60 (1923). "Under the Convention (article 6 bis) only alterations prejudicial to the honor or reputation of the author constitute a violation of the moral right. . . ." I LADAS, INTERNATIONAL PROTECTION OF LITERARY AND ARTISTIC PROPERTY 529 (1938). Compare with the case cited note 47 *infra*.

court overruling the plea that the cartoons were comments on current affairs and hence not copyrightable as *information de la presse*.⁴⁷

Whether pictures of current news events are subject to copyright has not been clearly settled in the jurisprudence of various countries. The several French cases on the question are ambivalent.⁴⁸ In the American courts, it has been held that a news photograph taken in a public place does not create any property interest in anyone who appears in the photograph.⁴⁹ The photographer or the publisher may secure a copyright in the picture under the revised act of 1909.⁵⁰

As for the broadcasting of news, the immediacy of publication which gives radio and television reporting its greatest social and commercial value suggests the need of a protective process which is equally expeditious. Such a remedy, as the survey of the newspaper editors has indicated, is not currently available, except as the printed word "copyright" may scare off interlopers. But the manifest difficulty of publishing a copyright notice in the case of radio, if not of television, has made it almost inevitable that an equitable rule such as that in the *I.N.S.* case be applied to radio news property.⁵¹

The nonrequirement of a printed notice in many countries, coupled with the disposition in most of these countries to treat all material disseminated by mass media as part of the public domain, places the purveyor of news squarely upon the horns of a dilemma. Similarly, the lack of an equivalent of the Anglo-American legal concept of "fair use"

⁴⁷ *Bradbury, Agnew & Co. v. Juven*, March 30, 1927. Trib. Civ. de la Seine; June 11, 1930, Cour d'appel de Paris. 44 DROIT D'AUTEUR 32 (1931).

⁴⁸ See *Brigoo v. Le Journal de Roubaix*, Feb. 21, 1927. Trib. Civ. de Lille; *Feitu v. journal l'Echo de Paris*, [1927] *Semaine Juridique* 615, July 18, 1927. Trib. Civ. de la Seine. 44 DROIT D'AUTEUR 32 (1931).

⁴⁹ *Thayer v. Worcester Post Co.*, 284 Mass. 160, 187 N.E. 292 (1933).

⁵⁰ 17 U.S.C. §§ 3, 5, 9 (1952).

⁵¹ See *Twentieth Century Sporting Club v. Transradio Press Service, Inc.*, 300 N.Y. Supp. 159 (Sup. Ct. N.Y. County 1937).

with reference to copyrightable matter makes it still more difficult to identify the rights of the owner of news property in civil law jurisdictions and in international transmission. The UNESCO committee of experts found the following in its 1949 study of comparative copyright law:

In the laws of most of the other ⁵² countries, a distinction must be made between those wherein the aim of information is expressly recognized and those wherein it is only implied by provision for a general license to use certain works. Thus, where the laws . . . speak of the free reproduction of photographs of certain eminent persons or persons in the news, it must be considered that this provision applies primarily to use in organs of public information. The general license, however, which in most countries concerns the right to use public speeches, reports of judicial trials, etc., is not limited to the press, though it will find there its most frequent application. In the Anglo-Saxon countries, this restriction on copyright is applied when no notice reserving such right is posted in the place where the meeting reported is held. . . .⁵³

With the continued growth of the major British and American news agencies, particularly since the Second World War, the protection of the news service which they have to sell to foreign publishers has become a matter of increasing concern.⁵⁴ With the generally unsatisfactory state of domestic copyright law in most civil law jurisdictions, where Reuters and the Associated Press have developed markets for their services, the question of the ultimate disposition of the problem under international conventions has become even more acute.

⁵² *I.e.*, other than Austria, Germany, Italy, United States, and Uruguay; see text of reference cited in note 53 *infra*.

⁵³ 2 UNESCO COPYRIGHT BULL. Nos. 2-3, 82 (1949).

⁵⁴ For the postwar growth of the Associated Press's overseas markets, see A.P. Report for 1948 (New York, 1948), p. 95. For comparable data on Reuters, *cf.* Royal Commission on the Press, *Report*, CMD. No. 7700 (London, 1949), p. 52. And see, generally, UNESCO, WORLD COMMUNICATIONS 10-13, 152-65 (rev. ed. 1951).

THE APPROACH OF INTERNATIONAL LAW

The attempts at international regulation of news transmission in order to effect a degree of protection for the property rights of legitimate news agencies have been long continued but, for the most part, indeterminate. To a certain degree this has been due to the hesitancy of courts in various countries to assume jurisdiction over such cases, whether involving news or journalistic copy other than news.⁵⁵ To a larger degree, of course, it is due to the concern at avoiding any unnecessary restraint upon the freeflow of information across national borders.⁵⁶

The original Berne Convention of 1886 skirted the problem by providing that "articles in newspapers and periodicals published in one country of the Union [may] be reproduced, in the original or in translation, in other countries," unless the authors or editors expressly prohibited reproduction.⁵⁷ Upon the immediate complaint of journalistic interests in various lands, the International Literary and Artistic Association took up the cry for revision looking toward a more effective type of protection for certain types of journalistic writing.⁵⁸ The urgent need for action was one of the reasons for the inauguration of the first international press congresses of the early 1890s, which "affirmed their desire to see newspaper articles protected as all other works, without the necessity of any notice of rights reserved."⁵⁹

The first concession was the revision of the Berne Con-

⁵⁵ Cf. "Morocco Bound" *Syndicate Ltd. v. Harris*, [1895] 1 Ch. 534.

⁵⁶ Cf. UNESCO, *TRADE BARRIERS TO KNOWLEDGE* (1951) *passim*. And see the discussion of copyright and freedom of information in TERROU & SOLAL, *LEGISLATION FOR PRESS, FILM AND RADIO* 348 (1951).

⁵⁷ Convention for the Creation of an International Union for the Protection of Literary and Artistic Works, art. 7, Sept. 9, 1886, 77 *BRITISH & FOREIGN STATE PAPERS* 22, 25 (1893); see discussion in 1 LADAS, *op. cit. supra* note 46, at 508.

⁵⁸ *Le Droit de Reproduction en Matière de Journaux et de Publications Périodiques*, 39 *DROIT D'AUTEUR* 73 (1926).

⁵⁹ *Id.* at 74.

vention at Paris in 1896, at which time matter published in newspapers was divided into two classes: (1) literary works, or fiction, which were fully protected; and (2) articles of political discussion, current topics and news of the day, which remained outside the pale.⁶⁰ The next step was in the Berlin Revision of 1908, where a further distinction was made between general news and specialized studies of politics, science, religion, and the like.⁶¹ The principle worked out at that convention has remained virtually unchanged in the ensuing half century, being only slightly reworded at the 1928 Rome convention and the 1948 convention at Brussels. In its present form (article 9), it reads:

1. Serial novels, short stories, and all other works, whether literary, scientific, or artistic, whatever their purpose, and which are published in the newspapers or periodicals of one of the countries of the Union shall not be reproduced in other countries without the consent of the authors.

2. Articles on current economic, political or religious topics may be reproduced by the press unless the reproduction thereof is expressly reserved; nevertheless, the source must always be clearly indicated. The legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.

3. The protection of this Convention shall not apply to news of the day nor to miscellaneous information having the character of mere items of news.⁶²

Unable to make further headway with reference to the Berne Convention, international news organizations sought other means of insuring the protection of their property. At the League of Nations' Conference of Press Experts in 1927, a resolution was passed

that the publication of a piece of news is legitimate subject to the condition that the news in question has reached the person who

⁶⁰ Additional Act Modifying the International Copyright Convention of Sept. 9, 1886, art. I, § 4, 88 BRITISH & FOREIGN STATE PAPERS 36, 38 (1900).

⁶¹ 39 DROIT D'AUTEUR 75, 81 (1930).

⁶² HUDSON, *op. cit. supra* note 41, at 2471. See also Williams, *Newspaper Copyright and the International Copyright Union*, 8 TUL. L. REV. 99 (1933).

publishes it by regular and unobjectionable means, and not by an act of unfair competition,⁶³

while with regard to unpublished news another resolution proposed that

it shall be illegal for any unauthorized person to receive for publication or to use in any way for the purpose of distribution through the Press, through broadcasting or in any similar manner, information destined for publication through the Press or through broadcasting.⁶⁴

Published news was to be left to the protection of the laws of individual countries. While admonishing against legislation which would tend to control the flow of news, the conference concluded that news organizations "are entitled after publication as well as before publication, to the reward of their labor, enterprise, and financial expenditure upon the production of news reports."⁶⁵

These resolutions are illustrative of what at least one body of working journalists considered to be a desirable policy with respect to the protection of news property. Although they resulted in no more concrete expression in the subsequent revisions of the copyright convention, they did find acceptance in the 1932 revision of the International Telecommunications Convention, where article 24 provided for the secrecy of transmitted messages, and article 31 permitted the sending of messages in secret language (code) between countries where such codes were allowed.⁶⁶ Article 2 of the

⁶³ League of Nations, Conference of Press Experts, Final Report 15 (1927) (hereinafter cited as League Report).

⁶⁴ *Ibid.* This suggestion was, at least in part, incorporated into the 1932 revision of the International Telecommunications Convention; cf. notes 66, 67 *infra*.

⁶⁵ League Report *supra* note 63, at 15. The absence of stronger wording is thought to have "signalized the failure, for the time being, of the efforts to secure an international recognition of property in news." Hudson, *supra* note 6, at 389.

⁶⁶ Hudson, *op. cit. supra* note 41, at 125, 127. But an international news agency cannot enjoin use of ciphers in a code on the plea that they are confidential. Reuters Telegram Co. v. Byron, [1874] 43 L.J. Ch. (n.s.) 661. This old English case may have now been overruled by the provisions of the 1932 revised convention.

General Radio Regulations annexed to the convention enjoined all administrations to take necessary steps to prohibit and prevent (a) the unauthorized interception of radio communications not intended for the general use of the public and (b) the publication of radio messages which might be intercepted intentionally or otherwise.⁶⁷ These provisions at least provided some additional machinery for the protecting of news in transmission from piracy by penurious competitors.

The major copyright conventions of the western hemisphere—Mexico City in 1902, Buenos Aires in 1910 (the only one to which the United States was signatory), and Washington in 1946—presumably represented principles of protection which were lacking in the Berne Convention and hence had kept new world nations, for the most part, from joining the International Copyright Union. But in these regional agreements there was nothing more congenial to the idea of news copyright than the provision in the 1908 Berlin revision of the Berne Convention. Article 11 of the Buenos Aires Convention reads:

Literary, scientific, or artistic writings, whatever may be their subjects, published in newspapers or magazines, in any one of the countries of the Union, shall not be reproduced in the other countries without the consent of the author. With the exception of the works mentioned, any article in a newspaper may be reprinted by others, if it has not been expressly prohibited, but in every case, the source from which it is taken must be cited.

News and miscellaneous items published merely for general information, do not enjoy protection under this convention.⁶⁸

⁶⁷ HUDSON, *op. cit. supra* note 41, at 136. For the current comparable articles in the 1947 convention and its accompanying radio regulations, see article 32 on secrecy of transmitted messages, article 37 on secret language, and article 21 of the regulations on interception, respectively, in 63 Stat. 1399, at 1443, 1447, and 1787.

⁶⁸ See the section on Multilateral Conventions in UNESCO COLLECTION, *op. cit. supra* note 33. Article 11 of the Buenos Aires Convention is virtually identical with article 8 of the Mexico City Convention of 1902 and article 6 of the Washington Convention of 1946.

As for the Universal Copyright Convention of 1952, designed *inter alia* to bring together the basic points of agreement to be found in the Berne and Inter-American Conventions, it says nothing at all about news property. Article I engages each signatory state to undertake to provide the fullest protection set forth in its own domestic statute for the types of intellectual property which its statute includes.⁶⁹ There was some discussion, but no action, upon a proposal for an article on news property; but article XI (1) (b), which provides for periodic revisions of the convention upon the recommendations of an intergovernmental committee, leaves open the door for ultimate amendment acceptable both to the private and public interest involved.⁷⁰

Journalistic copyright has become the concern not only of UNESCO, but of the United Nations Economic and Social Council as well, due to the latter's long continued efforts to devise a series of interrelated conventions on freedom of information and international transmission of news. The necessity for preserving to the highest degree the free flow of information prompted the Council in 1954 to call upon the UNESCO committee to make a special study of news copyright and its bearing upon the information conventions. A preliminary report was made to the Intergovernmental Copyright Committee in the fall of 1957, but it refrained from making any recommendations.⁷¹

Interestingly enough, the chief points upon which the intergovernmental committee seems to have settled, with reference to news copyright, have been brought out somewhat obliquely in the course of discussion of a technical question—the legal effect of placing the symbol © at the top of the first page of the newspaper. In addressing itself to this question, the committee made the following observations:

⁶⁹ Printed in UNESCO COLLECTION *op. cit. supra* note 33.

⁷⁰ The Intergovernmental Copyright Committee took up the question of news copyright at its first meeting in 1956. 9 UNESCO COPYRIGHT BULL. 188 (1956).

⁷¹ 10 UNESCO COPYRIGHT BULL. 218 (1957).

A study of Article III, paragraph 1 shows that the author or other copyright proprietor is the person whose name must appear in the notice. The term "author or other copyright proprietor" is not defined by the Convention. Clarification of this term must be sought in the fundamental provision as to national treatment (Article II), one that assimilates works originating in other Contracting States to national works. Assimilation is subject to certain limitations or exceptions contained in the substantive law provisions of Articles III to V of the Convention, but all other formalities as to protection are dependent upon national legislation . . . Thus a study of national legislation will reveal whether a newspaper owner can or cannot, as copyright proprietor, claim the protection to be granted under the terms of the Convention.⁷²

Assuming that the local statutes did in fact permit a newspaper to claim a copyright in its contents by placing a single notice on each number, the committee continued:

A clear distinction must be made between the whole newspaper as a protected work and its component parts; serial fiction, short stories, drawings, photographs, topical articles on economics, political or religious affairs, news items and press information . . .

The Universal Convention contains no definite rule with regard to the system of law applicable to newspapers. It imposes upon the Contracting States the obligation to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works, including writings, etc. (Article I of the Convention). The interpretation to be given to the term "literary works" and in particular to "writings," is a matter for the Contracting States; they are to grant the national treatment to newspapers whenever they regard them as coming under the category of "literary works."⁷³

At the present time international legislation with respect to news copyright is divided between the International Convention as revised in 1908 (to which most of the continental European states are signatory), the Buenos Aires Convention in which most of the western hemisphere nations have joined, and the Universal Copyright Convention of UNESCO. In all of these, it is safe to say, the concept of news copy-

⁷² *Id.* at 251.

⁷³ *Id.* at 252.

right has been one cast in terms of what may be called the "feature" content of the journalistic media, which usually predominates in European and Latin American periodicals, rather than in terms of current factual information which predominates in the Anglo-American press.

SUMMARY

In both the common law and civil law jurisdictions, and in the systems of international legislation which have been drawn from them, the protection of news property has been worked out gradually and tentatively and for the most part in terms of the degree of original creative effort on the part of the individual writer or artist which can be discerned in the published material.⁷⁴ This system of protection has left unanswered a large number of practical questions, so far as the news communications industry itself is concerned, and the industry has expressed its views occasionally in international congresses of its own. To a limited degree, these expressions have effected remedial provisions in the international conventions on telecommunications, but so far as copyright legislation itself is concerned, the situation has been one of parallel but separate and distinct activity.

This may, in fact, be a clue to the failure to date to devise a system of news property protection within the framework of national and international copyright which would be more satisfactory both to journalistic and governmental representatives. It is significant that representatives of national and international news communications agencies have not officially participated—at least on a regular basis—in the deliberations of various international conferences on copyright revision. Other nongovernmental associations have been included. But it was through their own press congresses, and through the meeting of the Conference of Press Experts called

⁷⁴ This is not true of Soviet law in regard to news copyright; see PINNER, *op. cit. supra* note 24, at 596, 657.

by the League of Nations, rather than through the International Copyright Union, that the question of better protection for news property was raised in the period following the First World War. And it was upon the urging of the Economic and Social Council of the United Nations that UNESCO's intergovernmental committee broadened its inquiries into the question of journalistic copyright after the Universal Copyright Convention was opened to signature.

This is not to say that the respective interests of the news proprietor and the copyright administration have never been in contact. It is to suggest that there has not been an effective and continued contact. It is to suggest further that were there such contact—were representatives of groups such as the International Press Institute, the Associated Press, Reuters, and the postwar European news agencies invited officially to submit suggestions and recommendations—much more progress toward a practical settlement of the major problems might be made.

The press representatives of most Western states, it is evidenced by the record of their own conventions, are fully as concerned with avoiding any governmental controls over the flow of news as are the participants in the copyright conferences. They are seeking primarily to protect a short-term investment, amounting to hundreds of thousands of dollars, in the gathering of world news and the transmitting of it to publishing or broadcasting outlets. The occasional prosecutions for misappropriation, coming considerably after the event and requiring complicated legal proceedings in many cases, are ineffectual so far as practical protection of the news property is concerned. What seems to come closest to meeting the news agencies' needs would be a short-term copyright coincident with the short-term expectancy of financial recoupment for the expense of newsgathering.

It is this type of practical protection which the news communications industry seems to require. And this type of short-

term protection seems generally alien to the thinking of the type of government representatives who participate in the international copyright conferences. Until the two groups can meet together consistently, it is evident that the problem of reconciling the private and public interests involved in the distribution and publication of news will remain unsettled.