# THE STRANGE JOURNEY OF THE MANUFACTURING CLAUSE: FROM ITS ORIGINS TO THE 1976 COPYRIGHT ACT

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*This article provides an overview of the manufacturing clause in copyright law that prohibited the importation of English-language literary works by American authors unless the works were manufactured, printed, and bound in the United States. The clause was first incorporated into U.S. law in 1891 and continued under the 1909 and 1976 Copyright Acts until its eagerly awaited demise in 1986. After examining the clause from a historical standpoint, the discussion turns to its negative effect on U.S. international copyright relations. This article concludes with an analysis of the technical peculiarities of the manufacturing clause in the 1909 and 1976 Acts, and how the manufacturing requirements of yesteryear may affect the status of copyrighted works today.*

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*INTRODUCTION*

The manufacturing clause, a conspicuous feature of both the 1909 and 1976 Copyright Acts, prohibited the importation of English-language literary works by American authors unless the works were manufactured, printed, and bound in the United States.[2] This clause was intended to support the domestic printing industry and prevent the outsourcing of book and magazine production to other countries. Protectionist legislation par excellence, the manufacturing clause benefitted American printers at the expense of American authors and the American reading public. Failure to comply with the manufacturing requirement could result in forfeiting copyright protection for the work in question. This meant that the work would effectively enter the public domain, as the author or publisher would lose the exclusive rights to publish and sell the work.

A unique and much criticized feature of American law since its beginnings in 1891, the manufacturing clause was a trap for unwary authors, a barrier to the United States's participation in the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"),[3] the preeminent copyright convention, and a violation of the General Agreement on Tariffs and Trade (GATT).[4] Fortunately, on its own terms, this odd yet tenacious aspect of U.S. law expired on July 1, 1986.[5]

Even though the manufacturing clause ended long ago, it cannot be totally ignored. It is of continuing, though limited, relevance today because of its effect on noncomplying works under both the 1909 Act and the 1976 Act. Although the manufacturing clause no longer exists in American copyright law, its ghost still hovers in the shadows. Despite its widespread denunciation, this clause persisted and, for eight years, became a part of the 1976 Act until its expiration in 1986.[6] But even then, there were serious attempts to make it permanent notwithstanding its long-awaited expiration date.[7]

Part I places the manufacturing clause in a historical context, tracing its evolution from its earliest days to its last anachronistic presence in the 1976 Act. This historical framework will provide some understanding of how the clause became an extricable part of American law. Part II discusses the manufacturing clause in the international context and the way in which it wreaked havoc with U.S. international copyright relations. Part

[2] 17 U.S.C. § 16 (1909); 17 U.S.C. § 601(a) (1976) (expired 1986 and repealed 2010).
[3] Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (last revised at Paris July 24, 1971) [hereinafter Berne Convention].
[4] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-1155 U.N.T.S. 194 [hereinafter GATT].
[5] Pub. L. No. 97-215, 96 Stat. 178 (1982).
[6] *Id*.
[7] *See, e.g.*, Bill to Make Permanent the Requirements of the Manufacturing Clause of the Copyright Law, H.R. 3465, 99th Cong. (1985).

III examines the technical peculiarities of the manufacturing clause in the 1909 and 1976 Acts and how the manufacturing requirements of yesteryear may affect the status of copyrighted works today.

## *I. THE MANUFACTURING CLAUSE FROM A HISTORICAL PERSPECTIVE: FROM 1891 TO 1976 AND BEYOND*

### *A. The Eighteenth-Century Background*

In the late eighteenth Century, an American printing industry barely existed, and the reading public relied on imported books.[8] Under the first federal Copyright Act of 1790, works of foreign origin were given no copyright protection.[9] The Act specifically allowed the free use of works published abroad by providing the following: "That nothing in this act shall be construed to extend to prohibit the importation or vending, reprinting, or publishing 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] This exclusion allowed American publishers to pirate English and other foreign authors.

Piracy was a two-way street, and American authors found themselves without compensation for their works both at home and abroad. Their works were snubbed at home because publishers make greater profits selling royalty-free foreign works.[11] To make matters worse, American works were pirated abroad because the United States had no reciprocal copyright arrangements.[12]

For years, authors appealed for the reform of U.S. foreign copyright relations. None occurred until Senator Henry Clay in 1837 submitted a petition on behalf of foreign authors for protection of their works in U.S. law.[13] Clay argued that protecting foreign authors was consistent with the Constitutional purpose of the Copyright Clause "to promote the Progress of Science and useful Arts."[14] Strong opposition to the bill accompanying Clay's petition came from the printing trades who would no longer be able to pirate foreign works.[15] To appease the nascent American publishers, deprived of profits from piracy, the bill proposed that copyright protection be based on the work being printed and published in the United States simultaneously with publication abroad.[16]

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[8] MARJORIE MCCANNON, U.S. COPYRIGHT OFF., GENERAL REVISION OF THE COPYRIGHT LAW: THE MANUFACTURING CLAUSE OF THE U.S. COPYRIGHT LAW 5 (1963).
[9] *Id.*
[10] Act of May 31, 1790, ch. 15, § 5, 1 Stat. 124.
[11] MCCANNON, *supra* note 8, at 5–7.
[12] *Id.* at 8–9.
[13] 4 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 13:6.50 (Perm. ed. 2026).
[14] U.S. CONST. art. I, § 8, cl. 8.
[15] MCCANNON, *supra* note 8, at 7.
[16] S. REP. NO. 24-134 (1837); Robert Paul, *Reappraisal of the Manufacturing Clause of the Copyright Act in Light of Its History and the Universal Copyright Convention*, 13 U. MIAMI L. REV. 304, 306 (1959).

Clay's proposal failed due to opposition from American publishers who feared that they could not compete against a more advanced British publishing industry.[17]

*B. The Chace Act of 1891: The Manufacturing Clause Enters Copyright Law*

Clay's reform movement continued, but it took another fifty years with the Chace Act of 1891 that U.S. copyright law gave protection to foreign authors based on the principle of reciprocity.[18] As originally introduced, the Clay bill had no manufacturing clause and was vigorously opposed by the typographical unions. As one commentator states:

> The clause was added to relieve labor pressure and as an expedient to ensure passage. It was little more than a political after-thought to help pass a piece of legislation which had as its primary consideration the protection of foreign authors. As Clay had learned some five decades previously, the publishers and printers wanted the whole pie or nothing at all. Half a pie, or simultaneous publication, would not be enough.[19]

Despite strong division between scholars and intellectuals, publishers and book manufacturers prevailed. The former wanted unrestricted duty-free access to printed works, whereas the latter wanted protection from foreign—mainly British—competition.[20]

Under the Chace Act, copyright protection was granted to works of foreign authors, including books, photographs, chromos, and lithographs that were printed from type set within the United States.[21] In addition, importation of foreign printed books was prohibited.[22] The courts, hostile to the Act, construed its terms strictly, excluding from its scope books printed before the Act as well as musical or dramatic compositions in book form.[23] The Act was bitterly denounced from abroad. England and Germany were particularly vehement in their denunciations.[24] Foreign hostility to the Act was more than justified. As Barbara Ringer points out:

> Under section 4956 of the Act, copyright could be secured only by making registration before publication and by depositing two copies of the work on or before the date of publication anywhere. Moreover, in the case of books and certain graphic works, the two copies had to be manufactured in the United States. The requirements of the 1891

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[17] *See generally* Patrice A. Lyons, *The Manufacturing Clause: A Legislative History*, 29 J. COPYRIGHT SOC'Y U.S.A. 8 (1981); Bernard K. Reilly, *The Manufacturing Clause of the U.S. Copyright Law: A Critical Appraisal of Some Recent Studies*, 32 J. COPYRIGHT SOC'Y U.S.A. 109 (1984).

[18] PATRY, *supra* note 13, § 13:6.50.

[19] Lyons, *supra* note 17, at 37.

[20] In 1876, for example, America was importing from England $940,000 worth of books and related items, whereas American exports to England amounted to only $193,000. *See* MCCANNON, *supra* note 8, at 6.

[21] *Id.*

[22] Act of May 31, 1790, ch. 15, 1 Stat. 124.

[23] MCCANNON, *supra* note 8, at 6.

[24] Max Kampelman, *The United States and International Copyright*, 41 AM. J. INT'L L. 417 (1947).

> "manufacturing clause" were so rigid that they made the extension of copyright protection to foreigners illusory.[25]

Criticism also came from domestic advocates of international copyright protection who condemned the clause as a barrier to American participation in international conventions such as U.S. membership in the Berne Convention.[26] The original Berne Convention did not embrace the prohibition against manufacturing requirements and other formalities. By 1908, with the Berlin revision, the Berne Convention provided, for the first time, that "[t]he enjoyment and exercise of these rights shall not be subject to the performance of any formality."[27] U.S. copyright law fell far short of this prohibition imposing registration and notice formalities in addition to the manufacturing requirement as a condition for copyright protection.[28]

*C. The 1909 Act: The Manufacturing Clause Reenacted*

The 1909 Copyright Act reenacted the manufacturing clause with modifications.[29] Unlike previous versions of the clause, the Act exempted works of foreign authors written in a language other than English.[30] This was indeed a minor exception because books of foreign authorship written in a foreign language constituted a relatively small market in the book trade.[31] Moreover, the exemption was all the narrower because it did not apply works of American authors written in a foreign language.[32] The easing of manufacturing requirements in this way was the first of other reductions to the clause that were to occur through the years until its final version in the 1976 Act.[33]

To keep or eliminate the manufacturing clause was a hotly debated issue during the twenty-year revision process that formed the 1976 Act. The 1961 Report of the Register of Copyrights recommended elimination, stating the following:

> [There was] no justification for denying copyright protection . . . for failure to manufacture an edition in the United States. The effect on authors is severe. They lose not only the right to reproduce their works in printed form, but also the other rights, often more remunerative, to use their works in motion pictures, broadcasts, plays, etc. Moreover, withholding or cutting off copyright from works printed abroad has proved to be of little or no benefit to the printing industry. If printers need protection against foreign competition, it should be afforded by other means such as an import limitation.[34]

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[25] Barbara Ringer, *The Role of the United States in International Copyright—Past, Present, and Future*, 56 GEO. L.J. 1050, 1057 (1968).
[26] Berne Convention, *supra* note 3.
[27] *Id*. art. 5(2).
[28] *See* 17 U.S.C. §§ 9, 18–19 (1909) (providing notice requirements).
[29] MCCANNON, *supra* note 8, at 9.
[30] 17 U.S.C. § 16 (1909).
[31] *Id.*
[32] *Id.*
[33] See *infra* Part III for a comparison of the technical requirements of the manufacturing clause and the differences between the 1909 and 1976 Acts.
[34] U.S. COPYRIGHT OFF., REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE COPYRIGHT LAW 124 (1961).

*D. The 1976 Act: The Manufacturing Clause Persists*

The book and publishing industry vigorously opposed abrogation of the clause but eventually struck a compromise. The 1976 Act included a substantially watered-down version of the manufacturing clause with a July 1, 1982, expiration date.[35] In the interim, the Senate Judiciary Committee requested the Register of Copyrights "to undertake a study of the economic ramifications and possible dangers to the U.S. printing and book manufacturing industry" if the manufacturing clause were ended.[36] The Copyright Office Report of 1981 concluded that whatever its historical justification, there was no evidence to suggest that Congress extend the manufacturing clause past its 1982 expiration date.[37] Moreover, Congress was motivated to end the clause because of its ostensible violations of the GATT.[38]

Nonetheless, Congress extended the manufacturing clause for another five years until July 1, 1986.[39] In continuing the clause for five years, Congress responded to the printing industry's argument that opening it up to foreign competition would cost 170,000 to 367,000 jobs in the U.S. economy.[40] Obviously, the American publishing industry was no longer in its infancy. It had progressively become one of the largest in the world, and one of the ten largest industries in the U.S. manufacturing sector.[41] Yet politics prevailed; the printing unions were able to convince Congress that competition from countries in the Pacific Basin would quickly compromise the health of the industry.[42]

President Reagan vetoed the extension bill, arguing that it was a barrier to free trade and would provide reprisals and obstacles to American exports, but Congress overrode his veto.[43] The issue arose again in 1986, but times had changed.[44] With low unemployment, a strong economy, and growing concerns about protection for U.S. works abroad and retaliation from trading partners, Congress allowed the manufacturing clause

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[35] 17 U.S.C. § 601(a) (1976), *amended by* 17 U.S.C. § 601(a) (1982) (expired 1986 and repealed 2010). The 1982 amendment changed the manufacturing clause's expiration date from July 1, 1982, to July 1, 1986.

[36] Letter from John C. McClellan & Hugh Scott, U.S. Senators, to Barbara Ringer, U.S. Register of Copyrights (Sept. 30, 1976), *reprinted in* 122 Cong. Rec. 33,815 (1976).

[37] *A Bill to Extend the Manufacturing Clause of the Copyright Code, 1982: Hearing on H.R. 6198 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong. 26 (1982) [hereinafter 1982 Hearing].

[38] *See generally* Annette V. Tucker, *The Validity of the Manufacturing Clause of the United States Copyright Code as Challenged by Trade Partners and Copyright Owners*, 18 VAND. J. TRANSNAT'L L. 577, 595–96 (1985).

[39] Act of July 13, 1982, Pub. L. No. 97-215, 96 Stat. 178 (1982).

[40] H.R. REP. NO. 97-575, at 2 (1982); *id.* at 380 (stating that dissenting members of the Committee on Ways and Means argued that the clause violated the GATT).

[41] STUDY OF THE ECONOMIC EFFECTS OF TERMINATING THE MANUFACTURING CLAUSE, Inv. No. 332-145, USITC Publ. 1402, at xii (July 1983) [hereinafter ITC Report].

[42] *See* 1982 Hearing, *supra* note 37, at 60. *But see* ITC Report, *supra* note 41, at xii (finding no indication that low-cost producers of the Pacific Basin were a threat to the U.S. publishing industry).

[43] Message to the House of Representatives Returning H.R. 6198 Without Approval, 18 WEEKLY COMP. PRES. DOC. 27 (July 8, 1982), *reprinted in* ITC Report, *supra* note 41, at 103.

[44] ITC Report, *supra* note 41, at 54.

to expire on July 1, 1986.[45] From this historical overview, the discussion now turns to the deleterious effect of the manufacturing clause on U.S. international copyright relations.

## *II. THE MANUFACTURING CLAUSE FROM AN INTERNATIONAL PERSPECTIVE*

### *A. The Manufacturing Clause Trumps U.S. Allegiance to Free Trade*

Until its expiration in 1986, the manufacturing clause constituted perhaps the major obstacle to the United States's entry into the Berne Convention. Although the clause had undergone amendments that relaxed its terms, its death-defying existence remained for almost a century an impediment to bringing the United States into the international copyright community.

From a historical standpoint, the United States was unique in having a requirement conditioning copyright protection on the domestic manufacture of books and periodicals. The anomaly of having the equivalent of a tariff provision in a copyright statute is the strangest thing about the manufacturing clause termed by Professor Melville Nimmer a "short-sighted parochial expression of isolationism . . . destructive of the best interests of both copyright creators and users."[46] The Copyright Office has maintained that protection of the domestic printing industry, if deemed necessary, should be in the trade statutes, not copyright law.[47]

The United States, however, was not alone in imposing restrictions on the free flow of printed materials. Other countries restricted importation of books and other printed material by other means. Import barriers, even more onerous than those in U.S. copyright law, existed elsewhere; these barriers included duties, quotas, fees, documentation, and other administrative requirements.[48] Some countries imposed surtaxes, consular fees, and other levies on books in their customs laws, while others had burdensome import licenses.[49] In addition to customs and licensing laws, private agreements between publishers also hindered the free flow of books, whereby publishers of different countries would often acquire exclusive rights of sale in other territories.[50] Such restrictions prevailed during the first part of the twentieth century but began to dissipate with a push toward a multilateral agreement supporting free trade.[51]

Beginning in the 1950s, trade liberalization gained momentum throughout the world, as reflected in bilateral and multilateral trade agreements. The impulse toward free trade resulted in reduced tariff duties on all goods worldwide, including those of the book trade. With the support of the United States, the free trade agenda culminated in the

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[45] *See* Judith Neirman, *Congress Overrode Veto of Manufacturing Clause, but It Expired Four Years Later*, COPYRIGHT NOTICES, June–July 2006, at 8, https://www.copyright.gov/history/lore/pdfs/200606%20CLore_JunJul2006.pdf.

[46] *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 7.22[D] (2024). For further elaboration, see generally Melville B. Nimmer, *Implications of the Prospective Revisions of the Berne Convention and the United States Copyright Law*, 19 STAN. L. REV. 499 (1967).

[47] *See* U.S. COPYRIGHT OFF., *supra* note 34.

[48] *See generally* MCCANNON, *supra* note 8, at 51–55.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 57.

GATT, which came into force on November 15, 1947.[52] Precursor of the World Trade Organization, the GATT, as of March 1960, included thirty-seven contracting countries, representing over four-fifths of the total world trade.[53] In 1984, pursuant to an action brought by the European Communities (now the European Union), a panel of the GATT concluded that the United States, in extending the manufacturing clause beyond July 1, 1982, was inconsistent with the obligations under Article XI of the GATT.[54] Despite this GATT decision, the manufacturing clause remained unchanged until its expiration in 1986. Its abrogation was effectuated in large part so the United States could join the Berne Convention.[55]

The Multinational Agreement on the Importation of Educational, Scientific, and Cultural Materials, known as the Florence Agreement, was another multilateral agreement designed to facilitate the free flow of printed materials between countries.[56] Under the Agreement, member states undertake not to apply customs duties or other charges on, or in connection with, the importation of books, publications, and other documents.[57] The United States implemented the agreement by eliminating tariffs on most imported books and periodicals. In a protocol annexed to the Florence Agreement, however, the United States reserved the right to suspend, in whole or in part, any obligation under the Agreement if there was a threat of serious injury to the domestic industry.[58] Again, as seen in the protocol carveout, printing union politics eclipsed the United States's allegiance to free trade and the unfettered dissemination of information.

### *B. Universal Copyright Convention and the Hollowing Out of the Manufacturing Clause*

Despite its support for free trade as a GATT member as of March 1960, Congress left the manufacturing clause firmly embedded in the 1909 Act.[59] The presence of formalities in U.S. copyright law, such as the manufacturing clause, prevented the United States from participating in the Berne Convention.[60] Attitudes toward free trade changed in the postwar years with the continued expansion of U.S. exports from the copyright industries to foreign countries.[61] In short, the United States was a major copyright-exporting

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[52] GATT, *supra* note 4.
[53] McCannon, *supr*a note 8, at 5. *See generally The GATT Years: From Havana to Marrakesh*, World Trade Org., https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last visited Aug. 1, 2026).
[54] Panel Report, *The United States Manufacturing Clause*, GATT Doc. L/5609-31S/74 (adopted May 15–16, 1984).
[55] *See generally* Nimmer & Nimmer, *supra* note 46, at 50.
[56] Agreement on the Importation of Educational, Scientific, and Cultural Materials, *opened for signature* Nov. 22, 1950, 17 U.S.T. 1835. The preamble stated that the Agreement aimed to promote free flow of books, publications, and educational, scientific and cultural materials.
[57] *Id*. art. I(1)(a).
[58] *Id*. annexed protocol, art. 2(a).
[59] *See* Lyons, *supra* note 17, at 37.
[60] *See generally* Nimmer & Nimmer, *supra* note 46, at 50.
[61] McCannon, *supra* note 8, at 79 (showing statistics that by 1960, the dominance of the United Kingdom in publishing English-language books had greatly declined vis-à-vis the United States); *see also* S. Rep. No. 83-1936, at 6 (1954) (report to accompany S. 2559) (stating the benefits to be

country, and it was only natural that Congress sought means to facilitate adequate copyright protection for works of U.S. citizens in foreign countries. With the United States excluded from the Berne Convention, a new direction had to be taken to bring the country into a copyright arrangement with other countries. The answer lay in the Universal Copyright Convention ("UCC").[62]

Beginning in September 1947, copyright experts met under the auspices of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) to fashion a new international copyright convention to which the United States and other countries could adhere without having major revisions of their copyright laws.[63] The UCC came to fruition in 1952 and was signed by forty countries including the United States.[64]

Article III of the UCC involving formalities was a key provision of the treaty from a U.S. perspective.[65] Among the formalities specified in Article III were manufacturing restrictions such as those found in U.S. copyright law.[66] Under Article III, however, member states could waive manufacture as a condition of copyright, provided that certain notice requirements were met. Thus, to become party to this new convention, Congress had to revise the 1909 Act to accommodate the notice provisions in Article III.[67]

In 1954, Congress amended the 1909 Act to enable U.S. ratification of the UCC.[68] As for the manufacturing clause, the Act exempted from the manufacturing requirements of U.S. copyright law the author of a work who was a citizen or subject of a state party to the UCC or who first published the work in a UCC member state.[69] This exemption would apply if at the time of first publication, all copies of the work bore the copyright notice required in Article III of the UCC.[70]

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gained from entry into the UCC far outweighed any potentially harmful impact on the book manufacturing industry).

[62] Universal Copyright Convention, Sept. 16, 1952, 6 U.S.T. 2731, 216 U.N.T.S. 133 [hereinafter UCC].

[63] Lyons, *supra* note 17, at 33.

[64] For a history and an overview of the UCC, see *Universal Copyright Convention: Bridging Global Copyright Gaps*, THELAW.INSTITUTE (Dec. 27, 2025), https://thelaw.institute/general-introductions-to-ip-rights/universal-copyright-convention-global-gaps.

[65] UCC, *supra* note 62, art. III.

[66] *Id.*

[67] Article III of the UCC provides: "Any Contracting State which, under its domestic law, requires as a condition of copyright, compliance with formalities such as . . . manufacture or publication in that Contracting State, shall regard these requirements as satisfied with respect to all works protected in accordance with this Convention and first published outside its territory and the author of which is not one of its nationals, if from the time of the first publication all the copies of the work published with the authority of the author or other copyright proprietor bear the symbol accompanied by the name of the copyright proprietor and the year of first publication placed in such manner and location as to give reasonable notice of claim of copyright." UCC, *supra* note 62, art. III.

[68] Act of Aug. 31, 1954, Pub. L. No. 83-743, 68 Stat. 1030, 1031 (codified at 17 U.S.C. § 9(c)) (repealed 1976).

[69] *Id.*

[70] *See generally* John A. Rothschild, *How the United States Stopped Being a Pirate Nation and Learned to Love International Copyright*, 39 PACE L. REV. 361, 444 (2018).

Thus, the amended provisions of the 1909 Act exempted citizens of UCC member states from manufacturing requirements.[71] This aspect of the UCC further undermined the scope of the clause. In 1957, the United Kingdom ratified the UCC, followed by other signatories from English-speaking countries such as Australia and India.[72] Thus, with Canada, already exempted in the 1909 Act, publishers in these countries could freely export English-language books into the United States. As a practical matter, the manufacturing requirement no longer applied for most English-language works of foreign authorship.

This exemption, however, was not given to U.S. authors.[73] The Act specified that the exemption did not extend "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."[74] The irony here is that the manufacturing clause was originally adopted in part to advantage American authors against their English counterparts. With the UCC, the opposite occurred. Whereas British publishers could freely export books of British authors, American authors were condemned to publishing their books in the United States. The manufacturing clause was beginning to look like an empty shell, and one that discriminated against American authors.

### *C. The 1976 Act and the Ultimate Demise of the Manufacturing Clause*

The printing unions opposed the United States's entry into the UCC.[75] Congress ignored union objections, having been persuaded that the benefits of entry into the UCC far outweighed any potential harm on the book manufacturing industry.[76] Obviously, the UCC was a stop-gap measure that gave moderate protection of U.S. authors in international copyright. As it turned out, the UCC was hardly a temporary measure, and it took more than three decades before the United States joined the Berne Convention. The elimination of the manufacturing clause in 1986, in addition to the removal of other formalities under the Berne Convention Implementation Act of 1988,[77] unblocked a major obstacle to U.S. adherence to the Berne Convention three years later in 1989.

## *III. THE PECULIARITIES OF THE MANUFACTURING CLAUSE IN PRACTICE*

The two previous Parts have provided a brief historical overview of the manufacturing clause and its ramifications on the United States's international copyright relations. This Part focuses on some of the technical peculiarities of manufacturing clause in actual practice and reflects on the extent to which the clause might become an issue in the future.

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[71] 17 U.S.C. § 9(c) (1909).
[72] UCC, *supra* note 62. A list of the UCC member states is available at https://www.wipo.int/wipolex/en/treaties/parties/208.
[73] 17 U.S.C. § 9(c) (1909).
[74] *Id.*
[75] *See* Lyons, *supra* note 17, at 30–35.
[76] *Id*. at 35.
[77] Pub. L. No. 100-568, 102 Stat. 2853 (1988).

*A. The Manufacturing Clause Under the 1909 Act*

1. The Murky Contours of the Clause

The manufacturing clause enjoyed a long life under the 1909 Act. The discussion below focuses on the final version of the 1909 Act that existed before the effective date of the 1976 Act, January 1, 1978.

Section 16 of the 1909 Act established the major requirements regarding the manufacturing clause.[78] The language of the Act, written in convoluted Victorian language, was a nightmare in construction, and Section 16 was a classic example. As Marjorie McCannon states in her 1963 Study: "The problems involved in the construction of the manufacturing clause could form the basis of a lengthy treatise, for the clause, complicated by involved sentence structure, is replete with undefined words and ambiguous phrases, admitting all sorts of evasions."[79]

Under its terms, any printed book or periodical in the English language, as well as foreign-language books of American authors, had to be manufactured "within the limits of United States,"[80] a phrase used four times in the 1909 Act; the Act did not define whether territorial dependencies were included in its scope. Unlike later versions of the manufacturing clause, Canadian manufacture was prohibited under the original 1909 Act. The manufacturing clause requirements encompassed not just the texts of books and periodicals, but also separate illustrations in books and separate lithographs or photoengravings. On the other hand, not all works published in book form were prohibited. Peculiarly, musical compositions, in sheet or bound form, were deemed not to fall within the designation as books or lithographs.[81] These were only some of the ambiguities found in Section 16. The convoluted *ad interim* formalities and the legal effect for failure to file a proper affidavit of compliance with the manufacturing clause were imponderables inherent in Section 16.[82]

2. *Ad Interim* Protection

Under the 1909 Act manufacturing clause, *ad interim* copyright protection could be obtained for English-language books and periodicals manufactured abroad.[83] To secure *ad interim* protection, the claimant had to deposit and register the *ad interim* claim in the U.S. Copyright Office within six months of first publication abroad. Fifteen hundred copies of the work could then be imported into the United States within six months of foreign publication. *Ad interim* protection endured for five years, measured from the date of publication abroad. If, within the five-year period, an edition of the work was published in compliance with the manufacturing clause, the work could claim a twenty-eight-year copyright term, measured from the date of its first publication. According to some case law, failure to register within the six-month period and failure to

[78] 17 U.S.C. § 16 (1909).
[79] McCannon, *supra* note 8, at 33.
[80] 17 U.S.C. § 16 (1909).
[81] McCannon, *supra* note 8, at 34.
[82] *Id.*
[83] *See generally* Nimmer & Nimmer, *supra* note 46, § 7.23[F].

publish the complying edition within the five-year period resulted in the loss of copyright protection.[84]

3. Forfeiture by False Affidavit and General Noncompliance

Under § 17 of the 1909 Act,[85] anyone depositing a work with the Copyright Office had to submit an affidavit swearing that manufacturing clause requirements had been met. Section 18 provided that knowingly making a false affidavit forfeited copyright.[86] It was unclear, however, whether failure to comply with manufacturing clause requirements without making a knowingly false affidavit would result in forfeiture of copyright.

4. The Continuing Effect of the 1909 Act Manufacturing Provisions

It is a matter of controversy whether the work was injected into the public domain for failure to abide by requirements of domestic manufacture. The answer to this question is critical because works that went into the public domain before January 1, 1978, are not revived by the 1976 Act or by the subsequent Berne Convention Implementation Act amendments.[87] The problem is that the 1909 Act is silent on the effect of noncompliance with the domestic manufacturing requirement.

The issue is whether such noncompliance invalidated copyright or, alternatively, rendered it unenforceable. The case law is not clear on this issue. One might argue that noncompliance did not inject the work into the public domain.[88] The reason is that Section 17 of the 1909 Act specifically provided for forfeiture when a knowingly false affidavit is submitted,[89] whereas forfeiture is not mentioned as the result of general noncompliance with manufacturing requirements. This implies that forfeiture did not occur except where expressly stated. On the other hand, Congress appears to have assumed that noncompliance forfeited copyright.[90] The House Report to the 1976 Act

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[84] *See* H.R. REP. NO. 94-1476, at 164 (1976) (stating that the issue is whether failure to comply with manufacturing clause provisions and *ad interim* requirements places the work in the public domain or invalidates an author's copyright enforcement rights); Hoffenberg v. Kaminstein, 396 F.2d 684 (D.C. Cir. 1968) (noting that failure to comply justified the Copyright Office's refusal to register a work); Bentley v. Tibbals, 223 F. 247 (2d Cir. 1915).

[85] 17 U.S.C. § 17 (1909).

[86] *Id.* § 18.

[87] "This Act does not provide copyright protection for any work that goes into the public domain before January 1, 1978." Copyright Act of 1976, Transitional and Supplementary Provisions § 103, Pub. L. No. 94-533, 90 Stat. 2541.

[88] *See, e.g.*, *Hoffenberg*, 396 F.2d 684. *But see* Meccano, Ltd. v. Wagner, 234 F. 912 (S.D. Ohio 1916). Melville and David Nimmer argue that copyright in a work would not be forfeited if noncompliance was not accompanied by a knowingly false affidavit in connection with a claim for registration. 4 NIMMER & NIMMER, *supra* note 46, § 7.23[E]. In this situation, copyright would have been suspended during the period of the 1909 Act but would have been revived under the 1976 Act. Thus, noncompliance with the *ad interim* provisions under the 1909 Act would be a moot issue today in this situation.

[89] 17 U.S.C. § 17 (1909).

[90] The Copyright Office has also taken the position that works published before January 1, 1978, in violation of the 1909 Act's domestic manufacturing requirement, "are in the public domain in the

states: "Under the present statute, with many exceptions and qualifications, a book or periodical in the English language must be manufactured in the United States in order to receive full copyright protection. Failure to comply with any of the complicated requirements can result in complete loss of protection."[91]

*B. The Manufacturing Clause Under the 1976 Act*

1. Generally

The 1976 Act retained the manufacturing clause but was less restrictive in its provisions than the 1909 Act. Section 601(a) of the Act provided that before July 1, 1986, the subject matter of the manufacturing clause extended to "copies of a work consisting preponderantly of nondramatic literary material that is in the English language."[92] Other varieties of copyrightable subject matter such as pictorial, graphic, and sculptural works were exempted from the provisions of the manufacturing clause. Importation of copies falling into these narrow confines were prohibited if these works were not manufactured[93] in the United States or Canada.

With the 1976 Act, domestic manufacture was no longer a prerequisite for copyright protection. But if a work failed to comply with manufacturing requirements, it would not be granted copyright clearance. Moreover, it could not obtain registration to enforce copyright.[94] Thus, the effect of noncompliance was the same as a denial of copyright registration. The following sections outline the technical requirements that the 1976 Act imposed for compliance with the manufacturing clause.

2. The "Preponderantly" Requirement

Works were subject to the manufacturing requirement only if they consisted of "preponderantly" nondramatic literary material in English; the nondramatic literary material must have exceeded the exempted material in "importance." Thus, a book consisting of graphics, photographs, or illustrations with a short preface, brief captions, and an index in English would not meet the "preponderantly" standard.[95] But even if the

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United States and cannot be registered under the current Act." U.S. COPYRIGHT OFF., COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 1201.01 (2d ed. 1984); *see also* Olympia Press v. Lancer Books, Inc., 267 F. Supp. 920, 926 (S.D.N.Y. 1967).

[91] H.R. REP. NO. 94-1476, at 164 (1976).

[92] 17 U.S.C. § 601(a) (1976) (expired 1986 and repealed 2010) ("Prior to January 1, 1981, and except as provided by subsection (b), the importation into or public distribution in the United States of copies of a work consisting preponderantly of nondramatic literary material that is in the English language and is protected under this title is prohibited unless the portions consisting of such material have been manufactured in the United States or Canada.").

[93] What constitutes "manufacture" is a highly technical question. Some of these complexities are reflected in U.S. COPYRIGHT OFF., *supra* note 90, §§ 1210–11, which tries to define the meaning of the term considering 17 U.S.C. § 601(c) (1976) (expired 1986 and repealed 2010).

[94] 17 U.S.C. § 411 (1976).

[95] *See generally* H.R. REP. NO. 94-1476, at 166–67 (1976). However, in *Stonehill Communications, Inc. v. Martuge*, the court found the "importance" test suggested by the House Report too vague for practical application. The court adopted instead an objective or mechanical test such that "a book

English-language portions of the book were extensive enough to meet the "preponderantly" test, only those aspects would be required to be manufactured in the United States. The manufacture of the pictorial portion of the book outside the United States or Canada would not be a violation of the manufacturing clause.

3. Other Exceptions to the Manufacturing Provisions

The manufacturing clause was subject to several exceptions which reduced its scope significantly.[96] It applied only to American authors and domiciliaries on the date of importation or distribution of a work into the United States. Copies imported for personal use, use by federal or state government, educational, scholarly, or religious purposes, and works in Braille were exempt. In addition, two thousand copies of a noncomplying work could be imported pursuant to certain formalities. Finally, another exemption involved the so-called "troubled author" provision, whereby an author of U.S. citizenship could transfer or license first publication rights to a non-U.S. national or domiciliary if the author could not obtain a U.S. publisher.[97]

4. Effect of Noncompliance Under the 1976 Act

Failure to comply with the manufacturing clause under the 1976 Act did not result in forfeiture of copyright. The sanctions imposed were less drastic but nonetheless serious. The noncomplying copies could be seized, forfeited, and destroyed by the Department of the Treasury and the U.S. Postal Service.[98] In addition, violation of the manufacturing clause constituted a complete defense in any civil or criminal action for infringement of the copyright owner's exclusive rights to reproduce and distribute the work.[99] To raise this defense, the infringer had to prove the following: (1) that the copyright owner imported noncomplying copies of the work, (2) that the infringing copies were manufactured in the United States or Canada, and (3) "that the infringement was commenced before the effective date of registration for an authorized edition of the work."[100] The defense extended not only to the nondramatic literary aspects of the work

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'consists of preponderantly nondram[a]tic literary material . . . in the English language' when more than half of its surface area, exclusive of margins, consists of English-language text." 512 F. Supp. 349, 352 (S.D.N.Y. 1981).

[96] *See* 17 U.S.C. § 601(b) (1976) (expired 1986 and repealed 2010).

[97] *Id.* § 601(b)(7)(B); *see Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Just. of the House Comm. on the Judiciary*, 94th Cong. 1706–08 (1975).

[98] *See* 17 U.S.C. § 603(a).

[99] *See* 17 U.S.C. § 601(d) (1976) (expired 1986 and repealed 2010) ("Importation or public distribution of copies in violation of this section does not invalidate protection for a work under this title. However, in any civil action or criminal proceeding for infringement of the exclusive rights to reproduce and distribute copies of the work, the infringer has a complete defense with respect to all of the nondramatic literary material comprised in the work and any other parts of the work in which the exclusive rights to reproduce and distribute copies are owned by the same person who owns such exclusive rights in the nondramatic literary material . . . .").

[100] *Id.*

but also to aspects such as photographs or foreign language materials, if the same copyright owner owned both types of materials.

Although the manufacturing clause has expired, its violation can arguably be used as a defense against a noncomplying work publicly distributed between January 1, 1978, and July 1, 1986, the expiration date of the manufacturing clause. Thus, the possibility of a defense based on the plaintiff's noncompliance remains until the copyright owner registers an American edition in compliance with the law.

*CONCLUSION*

I have entitled this Article *The Strange Journey of the Manufacturing Clause*. Strange indeed. As the 1983 International Trade Commission report points out: "The United States was the only major producer in the world that restricts its book trade through a manufacturing clause embodied its copyright law."[101] This peculiar invention of American law took hold in a moment in American history when the domestic printing industry was in its infancy. Inscribed in U.S. law as a political compromise to protect the nascent printing industry, it persisted as a curiosity in U.S. law for some ninety-five years until it expired in 1986. It did so even though the American printing industry became the most vibrant and competitive industry of its kind in the world. Yet today, the manufacturing clause is more than an anachronic curiosity. Lurking in the background, this oddity of American law may, in the right circumstances, become an issue in future copyright litigation.

[101] ITC Report, *supra* note 41, at xi.