Vanderbilt Journal of Transnational Law

Volume 18
Issue 3 *Summer 1985*

Article 4

1985

# The Validity of the Manufacturing Clause of the United States Copyright Code as Challenged by Trade Partners and Copyright Owners

Annette V. Tucker

# THE VALIDITY OF THE MANUFACTURING CLAUSE OF THE UNITED STATES COPYRIGHT CODE AS CHALLENGED BY TRADE PARTNERS AND COPYRIGHT OWNERS

TABLE OF CONTENTS



## I. INTRODUCTION

Federal copyright law currently contains restrictions limiting copyright protection of United States authors to works manufactured in the United States or in Canada.[1] This so-called "manu-

1. Section 601 of title 17 of the United States Code provides:
Prior to July 1, 1986, and except as provided by subsection [17 U.S.C. § 601] (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.
17 U.S.C. § 601(a) (1982). Subsection (b) of § 601 contains a long list of exceptions. Section 603 specifies enforcement provisions.

facturing clause," 17 U.S.C. § 601 (1982), unique in international copyright law,[2] is the only portion of the copyright code carrying an expiration date. That expiration date is now set for July 1, 1986. The clause, originally enacted in 1891, sought to protect the domestic printing industry. Congress recently extended the clause as a result of heavy lobbying by printers and labor unions.[3] Although President Reagan vetoed the extension, Congress successfully overrode the veto. Thus, the extension of the manufacturing clause marked Congress' first defeat of a Reagan veto.[4]

Trade treaty partners recently have determined that the manufacturing clause violates United States obligations under the General Agreement on Tariffs and Trade (GATT).[5] If the clause does violate GATT, sanctions may be imposed unless the clause is eliminated. Even so, two bills have been introduced in the United States Congress to make the clause a permanent feature of the copyright law, and to apply the manufacturing requirement to all printed materials.[6] Meanwhile, a group of United States publishers and authors is challenging the clause in court, claiming it violates both the first and fifth amendments to the United States Constitution.

Protection for United States printers has been written into domestic copyright law since its origin in 1790. While the manufacturing clause recently was referred to as a "legal dinosaur,"[7] it has

---

2. *But see infra* note 146. Canada has had a manufacturing requirement in its copyright law, but apparently has not invoked it.

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

4. N.Y. Times, July 14, 1982, at C19, col. 1.

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. vol. 5, A3, vol. 6, A1365, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. *See infra* notes 119 & 202-06 and accompanying text.

6. Both bills are discussed fully *infra* in section III.B. of this article. H.R. 3465, 99th Cong., 1st Sess., Oct. 1, 1985, would make permanent the requirements of the manufacturing clause. S. 1822, 99th Cong., 1st Sess., Nov. 1, 1985, makes permanent and broadens manufacturing clause requirements. As this article went to press, both bills were being studied by congressional committees.

7. 128 CONG. REC., H4020 (daily ed. July 13, 1982) (statement of Rep. Lungren). Lungren said:

> This legal dinosaur was originally enacted to protect an infant printing industry in 1891. After 91 years proponents of the bill [to extend the clause] would lead us to believe that the infant was slow to mature. This is belied by the facts however. The U.S. printing industry is one of the most modern and efficient in the world today.

*Id.*

been revised many times. The current version, allowing several exemptions, affects mainly books and periodicals, plus other literary and printed commercial materials. Penalty for overseas manufacture in violation of the manufacturing clause is a ban on imports and disallowance of United States copyright remedies.

In light of the approaching expiration date of the manufacturing clause, this Article will examine the clause's international copyright and trade ramifications, as well as its economic and constitutional validity. Upon concluding that the clause should at last be allowed to expire, this Article discusses alternatives for maintaining stability in the domestic book manufacturing market.

## II. LEGISLATIVE HISTORY

### A. Manufacturing Clause Within International Copyright

The United States Constitution grants Congress power to enact laws giving authors and inventors exclusive rights to their creations for a limited time.[8] Generally, such exclusive rights include the right to do or to authorize (a) reproductions, (b) preparation of derivative works based on the copyrighted work, (c) distribution of copies by sale or lending, (d) performance of the copyrighted work and (e) public display of the copyrighted work.[9]

Prior to 1954, Congress codified this monopoly on intellectual property by limiting the copyright protection afforded works of non-United States citizens. The first United States copyright code in 1790 granted copyrights only to United States citizens or residents.[10] As a result, United States printers often pirated foreign works.[11] By limiting the protection of non-United States citi-

---

8. U.S. CONST. art. I, § 8, cl. 8: "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."

9. *See* 17 U.S.C. § 106 (1982).

10. Act of May 31, 1790, ch. xv, sec. 1, 1 Stat. 124 (repealed 1802).

11. Lyons, *Legislative History to* THE MANUFACTURING CLAUSE REPORT, COPYRIGHT OFFICE, LIBRARY OF CONGRESS (1981), *reprinted in* 29 J. COPR. SOC'Y U.S.A. 1, 10-11 (1981) (This is apparently the most recent, comprehensive legislative history of the clause. It was written by Patrice A. Lyons, Senior Attorney-Advisor, U.S. Copyright Office.) [hereinafter cited as Lyons, *Legislative History*]. Among the victims of such piracy was Charles Dickens, whose popular novels were reprinted in the United States without any royalty payments to the British author. *Id.* Ironically, today the United States is worried about copyright piracy in lesser-developed nations that have no copyright laws or decline to en-

zens, the 1790 law encouraged United States authorship and permitted free access to foreign works.[12]

In the late 1800s, European authors initiated the first international copyright convention for the protection of literary and artistic works. The first official text was adopted at Berne, Switzerland, in 1886.[13] The International Copyright Union, usually known as the Berne Convention, still exists in amended form.[14] Most major countries have joined, including Canada, the United Kingdom and the Union of South Africa. Yet the United States, the U.S.S.R., China, and many Latin American countries have never joined.[15] The United States sent a representative to the Berne Convention but declined to sign, expressing reservations that the United States should first adopt domestic legislation defining copyrights available to foreign authors.[16]

In 1891, responding to international pressure for copyrights in foreign authors' works, Congress conditioned such copyrights on the first manufacturing clause.[17] This clause, which required domestic typesetting, was designed to protect the nascent United States printing and publishing industries from stiff overseas competition, especially book manufacturers in Great Britain.[18] United States authors supported the clause to make their own work more attractive to domestic publishers, who had not been required to pay royalties to foreign authors and therefore had been able to market foreign works more cheaply in the United States. Proponents of the law also thought United States authors would be able to enter new international markets,[19] and that some foreign literature "out of the reach of ordinary readers in this country" would

---

force intellectual property rights because of other, more pressing problems. *See, e.g.*, Ringer, *The Role of the United States in International Copyright — Past, Present, and Future*, 56 GEO. L.J. 1050, 1064, 1078 (1968); Terán, *International Copyright Developments—A Third World Perspective*, 30 J. COPR. SOC'Y U.S.A. 129 (1982).

12. Lyons, *Legislative History*, *supra* note 11, at 9.

13. Berne Copyright Union, Sept. 9, 1886, *reprinted in* 3 UNESCO, COPYRIGHT LAWS & TREATIES OF THE WORLD Item A-1 (Supp. 1972) [hereinafter cited as Berne Convention].

14. *Id.*

15. *See* M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 9-10 (1984).

16. Lyons, *Legislative History*, *supra* note 11, at 13.

17. Act of March 3, 1891, ch. 565, § 4956, 26 Stat. 1106, 1107.

18. Lyons, *Legislative History*, *supra* note 11, at 15.

19. *Id.*

be published here.[20] Regarding the alternative of imposing import duties, Congress noted that "[t]he additional cost of manufacturing in this country just about balances the amount of duties [that could be] imposed."[21]

By 1904 the United States by presidential proclamation had established copyright relations with several countries.[22] To encourage even more foreign authors to publish in the United States, Congress initiated an interim copyright system in 1904 to allow market testing of a set number of foreign-manufactured works.[23] Under this system, an interim copyright could be extended to a full-term copyright upon compliance with certain formalities, including manufacture of the book within the United States.[24]

A thorough revision of United States copyright law came in 1909.[25] The 1909 Act included a manufacturing clause with several exemptions.[26] For example, the 1909 Act expanded the scope of technical domestic manufacturing requirements for typesetting by including additional requirements for printing and binding. Also, illustrations had to be manufactured within the United States, unless they represented a subject located in a foreign country and illustrated a scientific work or reproduced a work of art. Other exemptions included works in braille.

To further encourage foreign authors to test the United States market under an interim copyright,[27] Congress in 1949 permitted the importation of up to 1500 copies of books or periodicals writ-

---

20. *Id.* at 16, *quoting* REPORT TO ACCOMPANY S. 554, S. REP. No. 622, 50th Cong., 1st Sess. I (1888).

21. REPORT TO ACCOMPANY S.554, S. REP. No. 622, 50th Cong., 1st Sess. I (1888).

22. Lyons, *Legislative History, supra* note 11, at 17 & n.40; *see, e.g.*, 3 UNESCO, COPYRIGHT LAWS & TREATIES OF THE WORLD, Items 7-48. By 1956, the United States had established copyright relations with 35 countries by presidential proclamation. *Oversight on International Copyrights: Hearing Before the Subcomm. on Patents, Copyrights and Trademarks of the Sen. Comm. on the Judiciary*, 98th Cong., 2d Sess. 30 (1984) (report from the U.S. Copyright Office) [hereinafter cited as *1984 Hearing*].

23. Lyons, *Legislative History, supra* note 11, at 19-20; Ringer, *The Role of the United States in International Copyright — Past, Present, and Future*, 56 GEO. L.J. 1050, 1057 (1968).

24. Act of Jan. 7, 1904, ch. 2, § 6, 33 Stat. 4, 5.

25. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

26. *See id.* § 15.

27. Lyons, *Legislative History, supra* note 11, at 25-26.

ten in English.[28] Five years later, this importation right was formally extended to United States citizens and domiciliaries.[29] The Government under this system applied rigid formalities regarding copyright notice, deposits with the Library of Congress, and affidavits stating that copies satisfied the domestic manufacture requirements.[30]

Since establishment of the Berne Convention, domestic and international pressure had been mounting for the United States to participate in international copyright efforts.[31] However, the United States could not join these efforts unless its domestic copyright law could be brought into compliance with Berne Convention terms as subsequently revised.[32] Those terms provided that the "enjoyment and the exercise" of copyright could "not be subject to the performance of any formality"[33] such as restrictions on manufacture. Thus, the manufacturing clause was the main barrier preventing United States participation in the international copyright union.

Failure to cooperate with international copyright efforts also posed potential trade problems. Domestic trade officials and booksellers feared retaliation by trade partners to the manufacturing clause.[34] United States authors had been taking advantage of Berne Convention protections by publishing simultaneously in

---

28. Act of June 3, 1949, ch. 171, § 1, 63 Stat. 153.

29. Act of Aug. 31, 1954, ch. 1161, § 2, 68 Stat. 1030, 1031.

30. *See* Lyons, *Legislative History, supra* note 11, at 23.

31. *See infra* notes 34-35 and accompanying text. *See generally* Ringer, *The Role of the United States in International Copyright — Past, Present, and Future,* 56 GEO. L.J. 1050 (1968).

32. In 1914 the Berne Convention closed a loophole which United States authors had been using to take advantage of Berne protections despite nonmembership. 3 UNESCO COPYRIGHT LAWS & TREATIES OF THE WORLD, Berne Copyright Union, Berne Additional Protocol, Item D-1. The restriction was clarified in 1928. Rome Act of 1928, 123 L.N.T.S. 233 (entered into force Aug. 1, 1931) [hereinafter cited as Rome Act of 1928].

33. Rome Act of 1928, *supra* note 32, art. 4(2), 123 L.N.T.S. at 249. For a discussion of technical and philosophical reasons why the United States did not join the Berne Convention, see Sherman, *The Universal Copyright Convention: Its Effect on United States Law,* 55 COLUM. L. REV. 1137, 1146-47 (1955) [hereinafter cited as Sherman]; REPORT TO ACCOMPANY S.2559, S. REP. No. 1936, 83d Cong., 2d Sess. 2 (1954).

34. Lyons, *Legislative History, supra* note 11, at 29-30, *citing* REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON COPYRIGHT TO THE COMMITTEE ON FOREIGN RELATIONS, REPORT TO ACCOMPANY EXECUTIVE E, 73D CONG., 2D SESS., *ex. 4,* SEN. EXEC. REP. No. 4, 74th Cong., 1st Sess. 14 (1935).

the United States and in countries governed by the Berne Convention. Meanwhile, the United States had emerged as the leading world exporter of copyrighted works.[35]

Berne Convention members had amended the Convention to provide that if any non-Convention country "fails to protect in an adequate manner the works of authors who are nationals of one of the countries of the Union, the latter country may restrict the protection given to the works of authors who are at the date of the first publication thereof nationals of the other country" and who are not domiciled in a Berne Convention country.[36]

Following World War II, the United Nations Educational, Scientific, and Cultural Organization (UNESCO) helped organize an international copyright agreement that could be adhered to by all countries without extensive revision of existing domestic copyright laws.[37] The Universal Copyright Convention (UCC), completed in 1952 in Geneva, Switzerland, was signed by forty countries, including the United States.[38] Its principle was that national treatment of copyright should be mutually accorded among contracting nations. Article III of the UCC provided for waiver of manufacture as a requisite condition of copyright when other formalities such as copyright notice were met. Thus, when Congress amended the 1909 Copyright Act in 1954 to permit ratification of the UCC,[39] the manufacturing clause was revised to exempt authors who were citizens of UCC nations, or who first published in a UCC country, except for United States authors.

In 1966 the United States eliminated tariffs on most imported books and periodicals by implementing the Multinational Agreement on the Importation of Educational, Scientific, and Cultural Materials (Florence Agreement).[40] Seventy-four other nations

---

35. Ringer, *supra* note 31, at 1060.

36. Rome Act of 1928, *supra* note 32, art. 6(2), 123 L.N.T.S. at 249. Forty-six countries adopted the Act, including the United Kingdom, Canada, Australia, New Zealand and the Union of South Africa. *Id.*, 123 L.N.T.S. at 235-39.

37. Lyons, *Legislative History*, *supra* note 11, at 33.

38. The Universal Copyright Convention, Sept. 16, 1952, 6 U.S.T. 2731, T.I.A.S. No. 3324, 216 U.N.T.S. 133. For a list of the current convention members, see M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 181 (1984).

39. Act of Aug. 31, 1954, ch. 1161, § 1, 68 Stat. 1030 (amending § 104 of tit. 17 U.S.C.) (formerly codified as § 9 of tit. 17 U.S.C.).

40. Agreement on the Importation of Educational, Scientific, and Cultural Materials, *opened for signature* Nov. 22, 1950, 17 U.S.T. 1835, T.I.A.S. No.

have signed the Florence Agreement, including the United Kingdom.[41] In a protocol annexed to the Florence Agreement, however, the United States expressly reserved the right to impose duties or quotas in the event of provable, threatened or actual "serious injury to the domestic industry . . . producing like or directly competitive products."[42]

The current manufacturing clause is a product of a major copyright code revision enacted in 1976 (the 1976 Code) under continued pressure from domestic and international groups to eliminate the clause, as well as pressure from interest groups to preserve the clause.[43] Congress compromised by retaining the clause, subject to additional, new exemptions and an expiration date of July 1, 1982. A chief exemption allowed works to be manufactured in either Canada or the United States. Congress granted this exemption because of the nature of the print industry and trade in both countries, and because the United States hoped Canada would respond by adhering to the Florence Agreement.[44]

Also exempted[45] from the current manufacturing clause are works by United States citizens domiciled abroad continuously for more than one year.[46] Other exemptions exclude from manufacturing clause coverage up to 2000 market-test copies,[47] copies for solely individual use[48] and copies for educational or governmental purposes.[49] Works "made for hire"[50] or in the course of a

---

6129, 131 U.N.T.S. 25 [hereinafter cited as Florence Agreement]. The Preamble explained the Agreement's purpose as facilitation of a free flow of books, publications, and educational, scientific and cultural materials, to promote intellectual progress and international understanding. The Agreement abolished custom duties and special taxes on imports but required a license and foreign exchange for purchase of certain items. *Id.*

41. M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 164-65 (1984).

42. Florence Agreement, *supra* note 40, at 17 U.S.T. 1848.

43. *See infra* sections II. B.2 and B.3.

44. *See infra* notes 86-89 and accompanying text.

45. The exemptions were conceived in the 1960s as a compromise between the interests of book publishers and manufacturers. The exemptions limited the impact of the manufacturing clause. Lyons, *Legislative History, supra* note 11, at 38.

46. 17 U.S.C. § 601(b)(1) (1982).

47. 17 U.S.C. § 601(b)(2) (1982).

48. 17 U.S.C. § 601(b)(4) (1982).

49. 17 U.S.C. §§ 601(b)(3), 601(b)(4)(C) (1982).

50. 17 U.S.C. § 101 (1982) defines a work for hire as one prepared by an employee within the scope of her employment, or specially ordered or commis-

writer's employment are exempted only if prepared for an employer who is neither a national or domiciliary of the United States nor a domestic corporation or enterprise.[51]

In addition to the above exemptions, two other provisions in the 1976 Code provide major loopholes in the manufacturing clause. The so called "troubled author" provision, section 601(b)(7)(B), allows an individual author with United States citizenship and domicile to sell by transfer or license first-time publishing and United States distribution rights to a publisher or licensee who is not a United States national or domicile.[52] This exemption was added to the 1976 Code as an escape clause for United States authors unable to find domestic publishers.[53] However, the exemption does not require that the author even attempt to find a domestic publisher. Additionally, the manufacturing clause does not prohibit the common practice of printing from reproductive proofs, so that publishers may contract their lithographic plant work overseas. Nevertheless, the vast majority of such work is still performed in the United States.[54]

Currently the manufacturing clause applies to nondramatic, preponderantly[55] literary materials in English. The list includes books, periodicals, newspapers, fiction and nonfiction, catalogs,

---

sioned for use as a contribution to a collective work or group endeavor, if the parties expressly agreed in a signed, written instrument that the work was made for hire. This category of works may include translations, compilations, supplementary work, and instructional texts.

51. 17 U.S.C. § 601(b)(1) (1982).

52. *See* 2 M. NIMMER, NIMMER ON COPYRIGHT § 7.22 [A][5] (1985) ("this exemption largely undercuts the impact of the manufacturing clause").

53. *Copyright Law Revision: Hearings on H.R. 2223 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. pt. 3, at 1706-08 (1975) (statement of Irwin Karp, Counsel, Authors League of America, Inc., [national society of professional writers and playwrights with approximately 11,000 members]) [hereinafter cited as *1975 Hearings*]. The exemption is also known as the "Authors League exemption."

54. U.S. INTERNATIONAL TRADE COMMISSION, STUDY OF THE ECONOMIC EFFECTS OF TERMINATING THE MANUFACTURING CLAUSE OF THE COPYRIGHT LAW, 94 (1983) [hereinafter referred to as ITC STUDY].

55. 17 U.S.C. § 601(a) (1982). "Preponderantly" has been interpreted to mean that the text is more "important" than or quantitatively exceeds the illustrations. *See* H.R. REP. No. 1476, 94th Cong., 2d Sess. 166-67 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS 5659, 5782-83 (importance test); Stonehill Communications, Inc. v. Martuge, 512 F. Supp. 349, 351-52 (S.D.N.Y. 1981) (quantitative test); 2 M. NIMMER, NIMMER ON COPYRIGHT § 7.22 [A][2] (1985).

and directories.[56] Also, the clause could be applied to business forms, advertising materials, greeting cards, labels, and other commercial materials,[57] subject to the preponderantly literary distinction.

Because the revised 1976 Code recognizes copyright as soon as a work is fixed in tangible form,[58] manufacture is no longer a condition of copyright.[59] However, such copyright may be hollow because failure to comply with manufacture requirements means the work may not be granted import clearance.[60] Also, the work cannot be channeled through Copyright Office formalities, a prerequisite to filing lawsuits against copyright infringers.[61] Because the infringer has a complete defense upon a copyright owner's failure to meet manufacturing clause requirements,[62] the result is tantamount to a denial of copyright.[63]

---

56. Lyons, *Legislative History, supra* note 11, at 54.

57. Complaint for Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982), *amended complaint reprinted in* 182 PRACTISING LAW INSTITUTE: BOOK PUBLISHING 375, 378 (1984) (Patents, Copyrights, Trademarks and Literary Property Series).

58. 17 U.S.C. §§ 101, 102 (1982). "A work is *fixed* in a tangible *medium* of expression when its embodiment in a copy or phonorecord, by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." 17 U.S.C. § 101 (1982) (emphasis added). "*Copyright protection* subsists in accordance with this title, in original works of authorship fixed in any tangible medium. . . ." 17 U.S.C. § 102 (1982) (emphasis added).

59. "Importation or public distribution of copies in violation of [manufacture requirements] does not invalidate protection for a work under this title." 17 U.S.C. § 601(d) (1982).

60. *See* 17 U.S.C. §§ 601, 603 (1982); Grubb, *The Status of Works Published in Violation of the Manufacturing Requirements of the 1909 Copyright Law After the Effective Date of the 1976 Copyright Law*, 27 BULL. COPR. SOC'Y U.S.A. 264, 277-278 (1979-80). "It is the most effective form of restraint there is. Indeed, the bill is written as an absolute prohibition. It says you can't import them and then it implements it by saying that you lose your copyright." *1975 Hearings, supra* note 53, at 1715 (statement of Irwin Karp). *See also infra* note 215.

61. *See* 17 U.S.C. § 411 (1982).

62. 17 U.S.C. § 601(d) (1982).

63. *See 1975 Hearings, supra* note 53, at 1704-05 (statement of Irwin Karp), 1713 (statement of O.R. Strackbein, Legislative Representative, International Allied Printing Trades Association [combined printing trades unions affiliated with AFL-CIO, approximately 575,000 members]).

## B. From an Economic Perspective

### 1. *Before the UCC*

Since its inception, the manufacturing clause has been an economic law. Its chief aim has always been to protect United States printers and book manufacturers from overseas competitors who have more advanced technology or lower wage costs. Chief proponents of economic data supporting continuation of the clause have been the labor-intensive printing and book manufacturing industries. However, some Government studies have produced conflicting economic data, suggesting far less impact on the industry than claimed by book manufacturers and printers.

The domestic production requirement was originally tagged to foreign authors' copyright in 1891 to keep British publishers from gaining a monopoly in the United States book market. Also, the domestic production requirement was a sort of *quid pro quo*: copyright monopoly in exchange for manufacturing monopoly.[64] Most books imported into the United States were already subject to duties.[65] And, because the United States was a net importer of books and other printed matter, industries opposed any grant of copyright to foreign authors.[66] Also during the late 1800s, a limited market for United States manufactured books existed abroad. It was feared that a new flow of literature from Europe would jeopardize the United States infant printing and publishing industries, thereby hurting United States laborers.[67]

Subsequent studies showed, however, that "a substantial number of printers and publishers believed that the manufacturing clause [had already] outlived its usefulness,"[68] because of modernized technology, sufficient tariffs against foreign book imports and the unfairness of depriving domestic book buyers of foreign works by denying copyright to foreign authors.[69] In designing the first interim copyright, however, Congress was still very conscious of maintaining manufacture restrictions to protect United States

64. Lyons, *Legislative History*, *supra* note 11, at 15.

65. *Id.* at 17, *citing* Tariff Act of 1890, ch. 1244, 26 Stat. 567.

66. In 1891 the United States imported $3,996,085 worth of books, maps, engravings and other printed matter, while exporting $1,943,228 worth of these commodities. The output of books in the United States that year was worth $33,753,000. Sherman, *supra* note 33, at 1166-67.

67. *Id.* at 1161.

68. *Id.* at 1162. The studies were made during 1891-1900.

69. *Id.* at 1162-63.

labor.[70]

By the 1930s, the United States had a healthy export trade in literary and artistic works by United States authors.[71] In 1950, the United States produced $619,370,000 worth of books. It exported $51,639,704 worth of books, maps, engravings and other printed matter compared to $13,958,461 worth of imported printed materials.[72] Following World War II, the U.S. Department of State urged repeal of the manufacturing clause. Congress, however, remained convinced that absent manufacture restrictions on foreign publishers, the United States market would be flooded with inexpensive foreign products and United States publishers would send work abroad to take advantage of lower wage rates.[73] Despite these fears, President Truman substantially lowered duties on imported books in 1947 pursuant to the United States' participation in GATT.[74]

During congressional hearings on legislation to revise the 1909 Act to allow the United States to join the UCC, only representatives of printers' unions and book manufacturers opposed modification of the manufacturing clause. Trade representatives still feared an increase in imports of competitively priced literature because of lower wages and advanced technological potential overseas.[75] The American Book Publishers Council countered that because United States authors would still be subject to manufacture requirements, only one-half of one percent of United States book manufacture business would suffer, or about 200 jobs.[76] Congress decided that the "benefits of UCC participation outweighed any potentially harmful impact on the book manufacture industry."[77] A year later, a study of the effect of UCC modifications

---

70. Lyons, *Legislative History, supra* note 11, at 18.

71. *Id.* at 30, *citing Hearing on S.1928 Before the Senate Comm. on Foreign Relations,* pt. 1, 73d Cong., 2d Sess. 8 (1934) (statement of Wallace McClure, Assistant to Assistant Secretary of State).

72. Sherman, *supra* note 33, at 1167.

73. Lyons, *Legislative History, supra* note 11, at 26.

74. *Id.* at 26 n.79.

75. *Id.* at 34-35; Sherman, *supra* note 33, at 1164. *See Hearings on Executive M. 83d Cong., 1st Sess. and S.2559 Before a Subcomm. of the Sen. Comm. on Foreign Relations,* 83d Cong., 2d Sess. (1954) [hereinafter cited as *1954 Hearings*].

76. Lyons, *Legislative History, supra* note 11, at 35; *1954 Hearings, supra* note 75, at 139.

77. Lyons, *Legislative History, supra* note 11, at 35. *See* REPORT TO ACCOMPANY S.2559, S. REP. No. 1936, 83d Cong., 2d Sess. 6-8 (1954).

found no flood of imports and only a slight shift to overseas manufacturers by UCC nationals who had previously published in the United States.[78]

### 2. *The 1976 Act*

In 1961 the long battle began to determine whether a planned overhaul of the copyright code would include a manufacturing clause. The Register of Copyrights recommended elimination of the clause because of its hindrance to United States authors. In the alternative, the Register of Copyrights recommended: "If printers need protection against foreign competition, it should be afforded by other means such as an import limitation."[79]

An economic study commissioned by book publishers[80] found that detrimental effects feared by printers as a result of UCC modifications had not in fact occurred. Predictions of jobs eliminated because of UCC accession proved inaccurate. The study actually found an increase of several thousand job opportunities in book manufacturing between 1958 and 1963.[81] The publishers' economic study also found that a healthy export market existed for works not specifically within the manufacturing clause purview.[82]

---

78. Sherman, *supra* note 33, at 1165.

79. U.S. COPYRIGHT OFFICE, COPYRIGHT LAW REVISION, REPORT OF THE REGISTER OF COPYRIGHTS ON THE GENERAL REVISION OF THE U.S. COPYRIGHT LAW, 87TH CONG., 1ST SESS. 123 (House Comm. Print 1961). The Register also recommended that any import limitation should not be confined to copyrighted works and "should be provided for in legislation other than the copyright statute." *Id.* at 124.

80. *See Copyright Law Revision, Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary*, pt. 3, 89th Cong., 1st Sess. 1579 (1965) (statement of Robert W. Frase, Director of the Joint Washington Office of the American Book Publishers Council and the American Textbook Publishers Institute).

81. *Id.* at 1592. The numbers cited by publishers are similar to numbers cited in 1982. Fears at the time of UCC accession were that 470,000 workers would be adversely affected by the new manufacturing clause. Instead, between 1958 and 1963 employment of production workers in book manufacturing increased by more than 1,000 a year. *Id.* The study also found that 1963 domestic production totalled $13.7 billion, and $175 million of this was exported, compared to imports worth $64 million. *Id.* at 1595. The printed materials included books, newspapers, periodicals, music, commercial printing, and other materials.

82. *See* Lyons, *Legislative History, supra* note 11, at 43; H.R. REP. No. 1476, 94th Cong., 2d Sess. 165-66 (1976) *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5781-82.

This finding seemed to indicate the existence of independent reasons for United States authors' and publishers' choice of domestic printers. The print industry responded, however, that any further erosion of the manufacturing clause would lead to its elimination and could trigger a disastrous reversal in export trade.[83]

When the House Committee on the Judiciary studied the issue in the mid-1960s, it decided not to recommend repeal of the clause. Although the Committee found no justification in principle for a manufacture requirement within the copyright statute, it declined to recommend repeal because "on purely economic grounds the possible dangers to the [United States] printing industry in removing all restrictions on foreign manufacture outweigh the possible benefits"[84] to United States authors and publishers. The Committee noted that the clause should be repealed "as soon as it can be shown convincingly that the effects on the [United States] printing industry as a whole would not be serious."[85]

About the same time, United States business and trade organizations for both printing and publishing, in a rare show of unity, struck a deal with their Canadian counterparts. Representatives from both countries met in Toronto in February 1968 to discuss three issues: (1) removal of trade barriers between the two countries on published materials; (2) Canadian accession to the Florence Agreement; and (3) efforts to keep the United States and Canada from adhering to a controversial copyright treaty protocol.[86] Each group then returned home and wrote legislators concerning their respective laws. The United States businessmen asked that Canada be exempted from the manufacturing clause.

---

83. *See* Lyons, *Legislative History, supra* note 11, at 44-45. Members of the print industry argued that the industry was already operating at low profit margins and that a decline in export trade would aggravate this condition. But in a 1983 government study, the print and publishing industries had significantly higher profit margins than other selected U.S. industries during 1977-82. *See* ITC STUDY, *supra* note 54, at 39-40.

84. REPORT TO ACCOMPANY H.R. 2512, H.R. REP. No. 83, 90th Cong., 1st Sess. 134 (1967).

85. *Id.*

86. *1975 Hearings, supra* note 53, at 1682 (statement of Gerhard Van Arkel, General Counsel, International Typographical Union [AFL-CIO, approximately 114,000 members in U.S.A. and Canada]). The protocol was the 1967 Stockholm Revision, 828 U.N.T.S. 221, to the Berne Convention, which was never substantially entered into force. M. BOWMAN & D. HARRIS, MULTILATERAL TREATIES INDEX AND CURRENT STATUS 10 (1984).

The Canadian industrialists urged that Canada adhere to the Florence Agreement as soon as the manufacturing clause exemption went into effect. Canadian adherence to the Florence Agreement would eliminate an *ad valorem* duty of ten percent on a large United States book export trade to Canada.[87]

Presenting the case for a Canadian exemption, United States book manufacturers said, "Canadian wage rates and costs of equipment and production are comparable to our own and will provide the kind of competition that we can contend with."[88] They argued that the United States and Canada "in reality constitute a single market for literary materials."[89]

United States wages, as a major factor in production costs, appeared to be the principal reason for the domestic industry's vulnerability to foreign competition. A representative of book manufacturers reported: "[P]roduction payroll cost in the book manufacturing industry equals 44.5 percent of total value added by the manufacturer. This is compared to only 29.7 percent for all [United States] manufacturing generally."[90] While one class of print production worker was earning $5.52 to $8.10 per hour in a United States city, a counterpart in Hong Kong was earning 66 cents per hour in 1973.[91] Fair competition would "pull the wages

87. *1975 Hearings, supra* note 53, at 1685-86, *reprinting* letter from Robert W. Frase, American Book Publishers Council, Inc.-American Textbook Publishers Institute, to Rep. Robert W. Kastenmeier (April 1, 1968). Canada has not adhered to the Florence Agreement, although it has reduced to zero the duty imposed on books imported from the United States. U.S. COPYRIGHT OFFICE, THE MANUFACTURING CLAUSE REPORT, LIBRARY OF CONGRESS (1981), *partially reprinted in* 29 J. COPR. SOC'Y U.S.A. 1, 5-7 (1981) (never published or circulated beyond a select mailing list) [hereinafter cited as THE MANUFACTURING CLAUSE REPORT].

88. *1975 Hearings, supra* note 53, at 1686 (excerpts from statement of James H. French, Counsel, Book Manufacturers Institute, Inc., *reprinted from Hearings Before the Sen. Subcomm. on Patents, Trademarks, and Copyrights of the Senate Comm. on the Judiciary,* 90th Cong., 1st Sess., pt. 3, 676-77 (1967)).

89. *Id.* at 1691, *reprinting* letter from James H. French to Sen. Subcomm. on Patents, Trademarks, and Copyrights (Oct. 11, 1967).

British publishers indicated no objection to the exemption, possibly because they owned subsidiaries in Canada. *See id.* at 1694, *reprinting* letters from Ronald E. Barker, Secretary, The Publishers Association Robert W. Frase (Jan. 3, 1968, and May 6, 1975). Great Britain, however, is a member of GATT, and later objected to the Canadian exemption. *See infra* notes 121 & 202 and accompanying text.

90. *1975 Hearings, supra* note 53, at 1696.

91. *Id.* at 1667 (statement of O.R. Strackbein).

of foreign printing trades workers up to our level rather than to give foreign manufacturers a bonus in the form of monopoly of the American market because they have degraded working conditions," a union official said.[92] In summary, "[t]he reason for this [manufacturing] requirement is the maintenance of employment in this country at levels of compensation and under working conditions that are in keeping with the standard of living achieved here and maintained over the years."[93]

During 1975 congressional hearings, copyright owners argued their case mainly on principle. "The rights of these authors are used as hostages to compel publishers to manufacture [United States] editions of books by [United States] authors in this country. . . . Your committee, in 1967, concluded that there is no justification on principle for the manufacturing clause and recommended its ultimate repeal. The Authors League agrees."[94]

The House Committee on the Judiciary reported that economic data supported elimination of the manufacturing clause. Studies had proven that the industry's fears were unfounded: exports far outsold imports, the domestic book manufacturing industry was growing so rapidly it could not keep pace with its orders and the advantages of domestic manufacture were keeping most of the current business within the United States.[95] Because of the controversy surrounding the clause, Congress compromised by leaving the clause relatively intact, with the new exemption for Canada, but with an expiration date of July 1, 1982.

### 3. *1976 - 1982*

Meanwhile, the print industry was instructed to develop methods of dealing with foreign competition without the manufacturing clause.[96] Industry insiders predicted a "major revolution" in the book printing and publishing industry after June 1982, according to one business publication.[97] A print industry analyst at

---

92. *Id.* at 1673 (statement of G. Van Arkel).

93. *Id.* at 1664 (statement of O.R. Strackbein).

94. *Id.* at 1704-05 (statement of Irwin Karp).

95. H.R. REP. No. 1476, 94th Cong., 2d Sess. 165 (1976) *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5781.

96. 128 CONG. REC. H4016 (daily ed. July 13, 1982) (statement of Rep. Kastenmeier).

97. Marcial, *Rash of Acquisitions May Hit Book Publishers With Expiration of Copyright Law Provision*, Wall St. J., Aug. 8, 1979, at 39, col. 4.

the United States Department of Commerce predicted mergers and consolidations to balance higher labor rates with greater productivity. His prediction was based on technological advances that require increased capital investment.[98]

A Government report on the manufacturing clause[99] released in 1981 concluded that the clause could not be supported by economic data. The report found: (1) no proof that absent the manufacturing clause work done in the United States would be contracted for overseas; (2) that only Japan could begin to compete with the United States in producing high quality paper; (3) that the "combination of wealth of raw materials and a strong paper manufacturing industry in this country likely will continue to give the [United States] an advantage over its potential competitors in book manufacturing;"[100] (4) that labor intensity in the United States book manufacturing industry was declining, making the industry less vulnerable to foreign competition; (5) that transportation costs and delays rendered overseas printing less attractive to [United States] publishers; (6) that the "state of the art in the [United States] is equal to that in any country and superior to most;"[101] (7) that the "book manufacturing industry in this country is healthy today and its recent performance matches or exceeds that of [United States] industry in general;"[102] (8) that although the contribution of the manufacturing clause to the industry's health could not be determined, it "appears that [United States] publishers, in choosing manufacturers for works *not* governed by the manufacturing clause, frequently select domestic printers and binders;"[103] and (9) that "[b]ook manufacturers and printers, in part because they overestimate the number of jobs protected by the manufacturing clause, tend to overstate the likely effects of expiration with respect both to market and em-

98. *Id.* (paraphrasing William S. Lofquist, printing analyst at the U.S. Commerce Department, speaking before the International Book Printers Association). This same Commerce specialist also worked with the Copyright Office and the Congressional Research Service to prepare an economic analysis of the effects of elimination of the manufacturing clause. Lyons, *Legislative History, supra* note 11, at 2.

99. THE MANUFACTURING CLAUSE REPORT, *supra* note 87.

100. Lyons, *Legislative History, supra* note 11, at 5.

101. *Id.* at 6.

102. *Id.*

103. *Id.* (emphasis in original).

ployment losses."[104]

A United States Department of Labor study[105] reached quite different conclusions. The Labor study estimated that between 80,000 and 170,000 job opportunities in the book manufacturing industry could be lost if the clause were eliminated. The study concluded that of the industry's total 1.3 million employees, between 6.2 percent and 13.9 percent would be hurt. The study also stated that book manufacturers' losses from elimination of the clause could affect related industries for a total estimated loss of 170,000 to 376,000 jobs held by United States citizens.[106]

A Labor Department witness told a congressional committee studying the clause that the above numbers were imprecise estimates because of data problems.[107] One such problem was insufficient data on the proportion of materials actually copyrighted.[108] Also, the numbers were subject to certain qualifications.[109] The report noted that two print industry studies estimated losses of either 21,000 or 40,000 jobs, and that the Congressional Research Service had estimated that up to 9,300 jobs would be lost.[110] The Copyright Office criticized this Labor report, emphasizing that it failed to distinguish between all printed materials and the very limited scope of copyrighted materials actually affected by the manufacturing clause.[111] The Copyright Office also said the Labor report had adopted subjective opinions of industry and labor analysts, without independent study.[112]

Printers' unions, which had engineered the 1982 bill to extend the clause, lobbied for it vigorously.[113] The unions cited the Labor

---

104. *Id.*

105. *A Bill to Extend the Manufacturing Clause of the Copyright Code, 1982: Hearings on H.R. 6198 Before the Subcomm. on Trade of the House Comm. on Ways and Means*, 97th Cong., 2d Sess. 13-20 (statement of Donald J. Rousslang, Acting Director, Office of Foreign Economic Research, U.S. Department of Labor) [hereinafter referred to as *1982 Hearings*].

106. *Id.* at 15 (using 1979 payroll figures).

107. *Id.* at 14.

108. *Id.* at 19.

109. *Id.* at 14, 19-20.

110. *Id.* at 17.

111. *Id.* at 25 (statement of Anthony P. Harrison, Assistant Register of Copyrights).

112. *Id.* at 26.

113. Letter from Benjamin Y. Cooper, Senior Vice-President, Government Affairs, Printing Industries of America, Inc. (PIA) to Annette V. Tucker (Feb. 26, 1985). PIA is a national federation of trade associations representing nearly

study repeatedly at congressional hearings. Trade representatives also contended that the print industry was particularly vulnerable to foreign competition because it was comprised mostly of small businesses.[114]

Pacific Basin countries[115] were perceived by the printing industry as the chief foreign threat because of low labor costs, combined with the presence of large, fully integrated and professionally managed international companies with aggressive research and development policies. Also, a strong partnership existed in these countries between industry and government objectives in export trade.[116] One industry study predicted that but for the manufacturing clause, thirty-seven percent of United States book production would be diverted to Pacific Basin countries.[117]

The United States Department of State had opposed the manufacturing clause for some time, predicting that the exemption of Canada alone would violate multinational GATT obligations as well as many United States bilateral commercial treaties.[118] Spe-

---

10,000 printing companies in the United States. It is allied with the National Association of Printers and Lithographers. Together the organizations represent 350,000 craftsmen and 75 percent of the sales of printed products in the United States. *1982 Hearings, supra* note 105, at 57.

114. *1982 Hearings, supra* note 105, at 57. The printing industry is comprised of more than 42,000 individual units, at least 31,000 consisting of twenty or fewer employees. Also, among the twenty-five leading manufacturing industries in the United States, printing had the most individual units and was seventh in total dollar volume of payroll. *Id.*

A poignant account of the small businessman's problems was filed by the corporate vice president of a family run and held company, which had grown since 1913 to $10 million in sales and 240 employees. He wrote that his business was subject to great fluctuation depending on demand and that it could not possibly convert its equipment to any other manufacturing endeavor. Elimination of the manufacturing clause would threaten his company's very existence. *Id.* at 97 (statement of Douglas B. Rhodes, Corporate Vice-President, Alpine Press, Inc., member of Book Manufacturers Institute, Inc.)

115. The Pacific Basin Countries are Japan, Hong Kong, Republic of Korea, Singapore, Indonesia, Malaysia, Phillipines, Taiwan, and Thailand. ITC STUDY, *supra* note 54, at 84 n.2.

116. *See 1982 Hearings, supra* note 105, at 61-63 (statement of E. Wayne Nordberg, Partner, Prescott, Ball & Turben, on behalf of Book Manufacturers Institute, Inc.).

117. *Id.* at 60.

118. *1975 Hearings, supra* note 53, at 1689, *reprinting* letter from William B. Macomber, Jr., Assistant Secretary for Congressional Relations, Department of State, to Rep. John L. McClellan, Chairman, Subcommittee on Patents, Trademarks, and Copyrights, Committee on the Judiciary, U.S. Senate (Sept.

cifically, the State Department said that an exemption for Canada would conflict with the most favored nation requirement in Article I of GATT and also with the nondiscrimination requirement in Article XIII.[119] In response, printers argued that "if the Congress . . . wishes to clarify a statute adopted in 1909, it violates no international undertaking, the law remains what it has been all along."[120]

The European Community, especially the United Kingdom, and other countries voiced strong opposition to the manufacturing clause at multilateral trade negotiations during the late 1970s.[121] United States representatives assured these countries that the clause would expire.[122] Officials warned Congress that if the clause did not expire as promised, or if its renewal was viewed as inadmissible under the current grandfathering protocol to GATT,[123] trade partners would likely retaliate. The United States faced the prospect of paying compensation for continuation of the clause,[124] or suffering retaliation through adoption of manufacturing clause-like provisions by foreign governments.[125]

Despite this international opposition, Congress passed a bill on June 15, 1982, extending the manufacturing clause to July 1, 1986.[126] President Reagan unsuccessfully vetoed the bill July 8, 1982, telling Congress that the manufacturing clause was no longer economically essential to domestic industry and that expiration of the clause was necessary to uphold promises to international trade partners.[127]

---

19, 1967).

119. *Id.* at 1683 (statement of G. Van Arkel). *See* GATT, *supra* note 5. Article I of GATT requires that any advantage placed by a contracting party on products in trade to or from another country must be granted also to other contracting parties. Article XIII requires that restrictions applied to contracting parties must also be applied to third parties.

120. *1975 Hearings, supra* note 53, at 1681 (statement of G. Van Arkel).

121. *1982 Hearings, supra* note 105, at 3 (statement of C. Michael Hathaway, Deputy General Counsel, Office of the U.S. Trade Representative, referring to the 1979 Geneva Protocol signed by United States on Dec. 12, 1979. 31 U.S.T. 1015, T.I.A.S. No. 9629).

122. *Id.* at 12.

123. GATT, *supra* note 5, at vol. 6, A2051.

124. *1982 Hearings, supra* note 105, at 39, *reprinting* letter from William B. Macomber to Rep. John L. McClellan, *supra* note 118.

125. *Id.* at 23 (statement of A.P. Harrison).

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

127. H.R. Doc. No. 208, 97th Cong., 2d Sess. 1 (1982).

### C. Constitutional Considerations

Congress has explicit constitutional power to control copyrights to promote the progress of scholarship, ideas and the arts.[128] Following the United States' adherence to the Universal Copyright Convention (UCC) in 1954,[129] the manufacturing clause has applied almost exclusively to United States authors. Representatives of United States authors had opposed the revised clause then, saying it discriminated in favor of foreigners.[130] Manufacturing clause restrictions affect only United States authors of nondramatic literary works.[131] No manufacturing requirements exist for musical compositions, dramatic works, sound recordings, motion pictures, or works of art.[132]

While the entire copyright code was being revised in the mid-1960s in preparation for the 1976 Act, the Authors League of America again complained that the manufacturing clause was unfair and discriminatory. Irwin Karp, a spokesperson for the Authors League of America,[133] told a congressional subcommittee that the League opposed the use of copyright grants to control United States authors' publishing options. Karp said a United States author might find that only foreign publishers were willing to print certain types of works.[134] Karp testified that the manufacturing clause drew arbitrary and discriminatory classifica-

---

128. *See supra* note 8.

129. *See* Act of Aug. 31, 1954, ch. 1161 68 Stat. 1031 (amending § 104 of tit. 17 U.S.C.) (formerly codified as § 9 of tit. 17 U.S.C.); *see also supra* text accompanying note 38. UCC modifications applied to Convention nationals who were not domiciled in the United States and who first published their work abroad, extending them the same copyrights afforded United States nationals but exempt from manufacture requirements.

130. *Hearings on Executive E. 73d Cong., 2d Sess., Before a Subcomm. of the Sen. Comm. on Foreign Relations,* 75th Cong., 1st Sess. 35 (1937) (memorandum submitted by the Authors League of America on the Question of the United States Adhering to the International Copyright Union).

131. *1982 Hearings, supra* note 105, at 84.

132. *Id.*

133. *See supra* note 53, and section III.C. of this article.

134. *Copyright Law Revision, Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before Subcomm. No. 3 of the House Comm. on the Judiciary,* pt. 1 89th Cong., 1st Sess. 105-106 (1966) (statement of the Authors League of America, Inc.). The League was especially concerned that scholarly works in science, religion, art, and music would fail to find domestic publishers. Lyons, *Legislative History, supra* note 11, at 39-41.

tions,[135] in violation of the First and Fifth Amendments to the United States Constitution.[136] Karp argued that authors of non-dramatic literary works, who were unable to find domestic publishers or unable to control domestic publication and distribution, were being denied their first amendment right to disseminate their work.[137]

The House Committee on the Judiciary reported in 1976 that the manufacturing clause placed "unjustifiable burdens on the author. . . . It hurts the author most where it benefits the manufacturer least: in cases where the author must publish abroad or not at all. It unfairly discriminates between American authors and other authors, and between authors of books and authors of other works."[138] The House Committee also found that without the manufacturing clause, foreign manufacturing would probably be "confined to small editions and scholarly works, some of which could not be published otherwise."[139]

At congressional hearings in 1982, Karp repeated his charges, arguing, "[a]s the Supreme Court has pointed out repeatedly, the Amendment protects not only the right to publish a book, but the right to distribute it."[140] Karp stated that the first amendment "precludes government from imposing restraints on the importation or public distribution of books and other literary materials, or penalizing those activities."[141] Karp also threatened that if the manufacturing clause was extended again to 1986, "the Authors League would be compelled to challenge its constitutionality . . . in the Supreme Court."[142]

---

135. *1975 Hearings, supra* note 53, at 1706-08.

136. Karp said that forfeiture of copyright protection meant that authors were being "used as hostages" to compel publishers to use United States book manufacturers, because publishing companies most often arrange manufacture of work. *Id.* at 1704-08.

137. *Id.* at 1708.

138. H.R. REP. No. 1476, 94th Cong., 2d Sess. 165 (1976), *reprinted in* 1976 U.S. CODE CONG. & AD. NEWS at 5781.

139. *Id.*

140. *1982 Hearings, supra* note 105, at 84.

141. *Id.* at 87.

142. *Id.* at 84. In his address to the congressional committee, Karp cited three Supreme Court cases to support first amendment protection for a right to disseminate published works. In Smith v. California, 361 U.S. 147 (1959), the Court held that a city ordinance holding a bookstore proprietor strictly liable and subject to criminal penalties for keeping any obscene writing on his commercial premises was an unconstitutional restriction of distribution of constitu-

At the 1982 hearings, a printers' union representative argued, "[t]he present manufacturing clause does not prevent the free flow of cultural information. Books authored by foreign nationals . . . manufactured outside the United States, may be imported into the United States duty free."[143] Also, book printers contended that because copyright is a congressional grant of monopoly, it was reasonable and justifiable to impose conditions such as domestic manufacture.[144]

In the end, all three congressional committees considering the clause reported favorably in 1982 on the 1986 extension.[145] Although the specter of unconstitutional discrimination was raised in both House and Senate debates,[146] congressmen nevertheless voted to extend the clause.

## III. The Current Situation

### A. International Copyright

The United States is currently the only country controlling importation of foreign-manufactured books through copyright provi-

---

tionally protected literature. The Court concluded that free publication and dissemination of printed materials were within first amendment freedoms, even where dissemination was for commercial profit. 361 U.S. at 149-50. In Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963), the Court also affirmed that the first amendment embraces circulation of books as well as their publication. And in Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965), the Court found unconstitutional a federal statute requiring the post office to retain foreign mail that was determined to contain communist political propaganda until the addressee returned a reply card indicating his desire to receive such mail. The Court said its decision turned on the "narrow ground" of finding unconstitutional the requirement of an affirmative act such as returning the post office's file card. 381 U.S. at 307.

143. *1982 Hearings, supra* note 105, at 75 (statement of Stephen Koplan, Legislative Representative, American Federation of Labor and Congress of Industrial Organizations AFL-CIO).

144. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 165 (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News at 5781; *1982 Hearings, supra* note 105, at 51-52 (statement of Arthur C. Prine, Jr., Vice-President, R.R. Donnelley & Sons Co. [largest printer in United States], on behalf of Book Manufacturers Institute, Inc.).

145. The Committee on the Judiciary voted unanimously for the extension. The House Ways and Means Committee and the Senate Committee on the Judiciary also supported extension. 128 Cong. Rec. H4018 (daily ed. July 13, 1982).

146. *Id.* at H4017 (statement of Rep. Frenzel), S8104 (statement of Sen. Humphrey).

sions.[147] Other countries impose commercial laws that effect the same result as a manufacturing clause, such as import barriers, currency controls, restrictions on translation rights,[148] duties, quotas, licenses,[149] domestic content quotas, limits on access to exhibition and broadcast outlets, and diversion of earned copyright royalties.[150]

During congressional hearings in 1982, witnesses questioned whether the United States manufacturing clause violated certain international trade treaties,[151] and whether the clause violated the spirit, if not the letter, of United States copyright treaties, including the UCC.[152] Although GATT partners have contested the clause as a violation of specific trade agreements, apparently no treaty partner has challenged the clause for copyright violations. Copyright officials asserted in 1981 that "expiration of the clause will improve the United States position in the international copyright community."[153] The Copyright Office report also concluded that "copyright law is an inappropriate home for barriers to free

147. Lyons, *Legislative History, supra* note 11, at 8; *1975 Hearings, supra* note 53, at 1714 (statement of G. Van Arkel, *supra* note 86). Canada has a manufacturing clause on its books, CAN. REV. STAT. ch. C.30, § 14 (1981), but has apparently not invoked it. The People's Republic of China has considered such a requirement. *See 1982 Hearings, supra* note 105, at 78-79 (statement by Carol A. Risher, Director, Copyright, Association of American Publishers, Inc.).

148. *1975 Hearings, supra* note 53, at 1699 (statement of Jack B. Sandler, Chairman, Government Relations Committee, Book Manufacturers Institute, Inc.), 1681 (statement of G. Van Arkel).

149. Lyons, *Legislative History, supra* note 11, at 8. Nontariff trade barriers include: retail price controls, excessive customs regulations, export inflation insurance, censorship, raw materials subsidies, credit terms, a variety of tax incentives, discriminatory postal rates, advertising restrictions, and other barriers. ITC STUDY, *supra* note 54, at 13-17, app. I.

150. *1984 Hearing, supra* note 22, at 48-49. David Ladd, former U.S. Register of Copyrights, reported to Congress, "[i]t is arguable that by preventing discrimination in terms of copyright law, the UCC and Berne [Convention] may do little more than force states to seek the 'benefits' of discrimination through legal means other than copyright." *Id.* at 49.

151. *E.g.*, GATT, *supra* note 5. *See supra* note 118 and accompanying text.

152. *1982 Hearings, supra* note 105, at 23 (statement of A.P. Harrison), at 82 (statement of C.A. Risher). In congressional debate, Rep. Frenzel stated that the clause probably violated GATT obligations, the Florence Agreement and the Berne and UCC treaties. 128 CONG. REC. H4018 (daily ed. July 13, 1982).

153. THE MANUFACTURING CLAUSE REPORT, *supra* note 87, at 4 (introduction).

trade."[154]

A representative of the Association of United States Publishers testified to a congressional committee in 1982 that while the United States has "sought to become a leader in the international copyright community," failure to eliminate the manufacturing clause has signalled to the rest of the world that this nation's "claims to respect of authors' rights and [the United States] leadership in councils of debate are at best illegitimate and at worst hypocritical."[155] The representative also warned that other countries may decide to imitate the clause.[156]

Shortly before stepping down from office as United States Register of Copyrights, David Ladd reported to Congress that the UCC is the cornerstone of the United States international copyright relations,[157] and the United States must continue to work within multilateral treaty organizations in order to encourage other nations to upgrade their copyright enforcement systems.[158] In a global copyright market, international law is the most effective means of protecting United States commerce in copyrighted works, the Register stated.[159]

### B. Eco-Politics of the Extended Clause

Extension of the manufacturing clause until July 1, 1986, resulted from the first congressional override of a Reagan veto.[160] The President's July 8 veto may have caught Congress off guard[161] since both the Senate and the House had voted overwhelmingly[162] to extend the manufacturing clause. Congressional debate to decide whether to override the veto reveals legislators' concern with the domestic economic situation, particularly rising unemployment and a pervading fear of recession. Legislators were also conscious of international trade ramifications balanced by concern with the domestic jobs issue.

---

154. *Id.* at 7 (conclusion).
155. *1982 Hearings, supra* note 105, at 81 (statement by C.A. Risher).
156. *Id.* at 78. See *supra* notes 125 & 147 and accompanying text.
157. *1984 Hearing, supra* note 22, at 47.
158. *Id.* at 5-6, 25, 165.
159. *Id.* at 10, 36-37, 156.
160. *See supra* note 4.
161. *Id.*
162. The House of Representatives' vote was 339-47; the Senate's vote was unanimous. *Id.*

Introducing the bill to override the veto, Representative Robert Kastenmeier, Chairman of the House Committee on the Judiciary, said the bill was necessary to "protect thousands of United States jobs in the printing industry . . . [and that] 1982 is not the year to put any United States jobs in jeopardy."[163] Another Republican representative, who also favored a veto override, said he did not believe extension of the ninety-one-year-old manufacturing clause would provoke retaliation from foreign trade partners.[164]

During the hour-long debate, only four representatives spoke in favor of the veto. One representative called the manufacturing clause a "discriminating and trade distorting provision" because it denied authors copyright protection "in a free and open market."[165] He said that in 1976 Congress had notified the print industry that the clause was unjustified economically, yet the industry had failed to make necessary adjustments.[166] He also warned that trade treaty partners were sure to file formal GATT complaints against the extended clause.[167] Another representative said the clause amounted to "blatant protectionism" at a time when the United States was pressing other countries to eliminate trade barriers.[168] The same representative said a GATT proceeding would force the United States to pay trade compensation to other countries, especially in areas where those countries seek in-

163. 128 CONG. REC. H4016 (daily ed. July 13, 1982).

164. *Id.* at H4020 (statement of Rep. Sawyer). Sawyer was concerned, however, with the possibility that some of his constituents would lose their jobs at a time when United States unemployment was the highest since the Depression. Sawyer said "[t]his is the status quo we are now talking about changing, and what a time to change the status quo [in a way] that costs American jobs." *Id.* Sawyer's district was suffering setbacks in the auto industry. His district also contained paper industries and small print businesses. *Id.*

165. *Id.* at H4017 (statement of Rep. Frenzel). The Authors League had sent telegrams the day before to every member of Congress, urging support of the veto and advising legislators of the constitutional implications. McDowell, *Legal Test Planned*, N.Y. Times, July 14, 1982, at C19, col. 3.

166. 128 CONG. REC. H4017-18 (daily ed. July 13, 1982) (statement of Rep. Frenzel).

167. *Id.* at H4018. Frenzel said trade tensions "endanger American jobs and undercut the competitive positions of American products and service being sold abroad. . . ." *Id.* at H4018. *See also id.* at H4019 (statement of Rep. Derwinski: "Many of our fellow contracting parties in the GATT are of the view that grandfathered legislation loses its protection once it has been modified.").

168. *Id.* at H4019 (statement of Rep. Derwinski).

creased import opportunities in United States markets.[169] There was also the risk that countries would withdraw concessions benefiting United States exports.[170] Finally, opponents of the clause disputed Labor estimates that 367,000 jobs would be threatened.[171] Proponents of the clause responded by echoing concerns of the print industry, particularly fear of intense competition with the Japanese.[172]

The late Representative John Ashbrook of Ohio, a Republican and former printer, introduced a bill[173] before his death to extend the manufacturing clause indefinitely. Ashbrook's widow, who succeeded him in office, told the House that the manufacturing clause was purely a jobs issue and would not harm United States authors.[174] The House voted 324-86 to override Reagan's veto,[175] and sent the bill to the Senate the same day.

In the Senate, Republican majority leader Howard Baker

---

169. *Id.*

170. *Id.*

171. *Id.* "[The Labor figure] is sheer nonsense and we all know it. . . . [T]he greatest shot in the arm to the economy of our country and, for that matter, the world economy, is the freest possible flow of trade," Derwinski said. *Id.*; *accord id.* at H4022 (statement of Rep. Conable). *See also id.* at H4020 (statement of Rep. Lungren) (deriding manufacturing clause as special interest legislation benefiting print industry at expense of all).

172. *Id.* at H4017 (statement of Rep. Railsback). Railsback said:

> What could be more ridiculous than to let the manufacturing clause expire and simply hand over to Japan a big hunk of our nation's seventh largest industry, while receiving nothing in return from Japan? . . . If we allow the manufacturing clause to expire we will be engaging in unilateral disarmament . . . while at the same time needlessly jeopardizing large numbers of American jobs.

*Id.*

173. H.R. 3940, 97th Cong., 1st Sess. (1981). The Senate counterpart was S.R. 1880. The AFL-CIO supported an indefinite extension of the manufacturing clause. *1982 Hearings, supra* note 105, at 73 (statement of Koplan).

174. 128 CONG. REC. H4017 (daily ed. July 13, 1982). Rep. Ashbrook said:

> The manufacturing clause poses no restrictions on U.S. authors or publishers. No U.S. author can be denied a copyright or denied the right or ability to have his or her works printed as a result of the clause. The clause does not apply to foreign authors who wish to have their works published in the United States.
>
> This is a jobs issue, pure and simple. I urge my colleagues to support overriding the veto, which will assure that the American printing industry will continue to prosper as fair trade.

*Id.*

175. *Id.* at H4022.

opened the hour long debate by declaring he would vote to override the veto.[176] Senator Strom Thurmond rose to say he believed President Reagan had been "poorly advised on this matter" by "midlevel bureaucrats" because the bill was necessary to save as many as 367,000 job opportunities.[177] Again, proponents of the clause argued that "no principle of free trade [was] threatened and no international obligations dishonored by preserving a law that both labor and industry have relied on for nearly a century."[178]

Two senators spoke in favor of the veto. One said it would be unfair to extend protection to "this particular industry" and thereby constrain the copyrights of one class of authors.[179] Senator Robert Dole said the Labor Department's data has been "discredited rather effectively," because the print industry was healthy and the risk of GATT retaliation was real.[180]

The Senate voted 84-9 in favor of overriding Reagan's veto,[181] and the manufacturing clause was officially extended until July 1, 1986, retroactive to July 1, 1982.[182]

At the request of the House Ways and Means Committee, the International Trade Commission (ITC) launched a study in 1983 into the economic effects of terminating the manufacturing clause.[183] The ITC study, completed in July 1983, found that the United States and West Germany were the world's leading exporters of printed materials.[184] In 1981 their exports of printed materials were each worth $1.3 billion, or seventeen percent each of the total market. Only the United States showed a significant gain in world market share between 1977-1981. During those years, the United States was also a leading importer of printed materials, with ten percent of the market totalling $645 million. Also, print production and trade were highly concentrated in developed countries, including Japan, France, Italy, and the United

176. *Id.* at S8099.
177. *Id.* at S8100.
178. *Id.* at S8103 (statement of Sen. Leahy).
179. *Id.* at S8104 (statement of Sen. Humphrey).
180. *Id.* at S8105.
181. *Id.* at S8106.
182. The manufacturing clause had already expired as of midnight before July 1, 1982.
183. ITC STUDY, *supra* note 54.
184. *Id.* at xii.

Kingdom.[185] Although Pacific Basin countries generally had lower labor costs, and Japan and Hong Kong had modern print technology, the Pacific Basin countries had only kept pace with the expanding world trade in printed materials with market shares of four percent or less.[186]

The ITC found that the largest cost factor in United States book production was paper, accounting for thirty to sixty percent of manufacture costs, depending on the number of editions printed.[187] The United States enjoyed a great competitive advantage because of cost, quality and quantity of paper from domestic sources.[188] Also, cost-efficient technology helped reduce overhead and labor costs of domestic production.[189] While United States labor was more expensive than almost every competitor nation,[190] low wage foreign manufacturers lost their competitive advantage through transoceanic transportation and communication costs, and through the quality and speed demands of the United States publishing market.[191]

The ITC report concluded that termination of the manufacturing clause would have a relatively minor impact on United States production and trade in printed matter. The impact would be concentrated in the book-manufacturing sector, where two to ten percent of the United States market would be displaced, or between $50 million and $260 million of business.[192] The ITC found that United States publishers would most likely choose to send abroad only books with higher-than-average labor costs and short-run editions with predictable demand.[193] Total job displacement was estimated at 1400 to 6850 employment opportunities in all related industries.[194]

The ITC reasoned that any interim disadvantage United States producers suffered because of labor costs would be negated eventually by the worldwide trend toward replacing labor with capital-intensive technology. The report also said, the disparity between

185. *Id.*
186. *Id.* at xii-xiii, 84-90.
187. *Id.* at xiii.
188. *Id.* at xiii, 46-48.
189. *Id.* at xiii.
190. *Id.* at xiii, 95.
191. *Id.* at xiv, 96.
192. *Id.* at xiv, 93-102.
193. *Id.* at 93.
194. *Id.* at xvi, 99-100.

United States and foreign wage rates would continue to lessen.[195]

The ITC, however, noted some problems with its data, which mostly came from Department of Commerce files and industry surveys.[196] For example, the amount of printed materials unaffected by the manufacturing clause was not available, nor did the data distinguish materials for which copyright protection was unnecessary to the owners.[197] Although the ITC report meticulously considered separate data for various segments of the industry, it glossed over some categories of commercial printing.[198] In assessing the market potential of competitive nations such as Japan and Hong Kong, the ITC lacked some critical data, such as Japan's paper costs.[199] ITC statistics may also be misleading because of imprecise labor comparisons[200] and currency fluctuations.[201] Yet despite statistical weaknesses, the ITC report cited persuasive evidence that elimination of the manufacturing clause will not irreparably damage the United States print industry.

Contemporaneous with the ITC Study, the European Community filed claims in the spring of 1983 in the GATT council in Geneva, Switzerland, for damages allegedly stemming from the manufacturing clause.[202] A GATT arbitration panel ruled in No-

---

195. *Id.* at xvii, 100.

196. *Id.* at 42 n.1 (U.S. Census Bureau), 51-59 (Association of American Publishers), 61 (industry survey), 77 n.1 (U.S. Department of Commerce).

197. *Id.* at 37, 98. For example, an item may be copyrightable but its owner may deem copyright registration unnecessary if he does not fear infringement, nor intend to prosecute infringers.

198. Reilly, *The Manufacturing Clause of the U.S. Copyright Law: A Critical Appraisal of Some Recent Studies,* 32 J. COPR. SOC'Y U.S.A. 109, 127 (1984) (first prize, 1984 Nathan Burkan Memorial Competition).

199. *Id.* at 128, *citing* ITC STUDY, *supra* note 54, at 86.

200. *Id.* at 130, *citing* ITC STUDY, *supra* note 54, at 95 n.1.

201. *Id.* at 130. An industry analyst altered his estimates 30% because of currency fluctuations. *Id.* at 131, *citing* Book Manufacturers' Institute economist E. Wayne Nordberg's 1978 study, *reproduced in* the 1981 MANUFACTURING CLAUSE REPORT, *supra* note 87, at app. D.

202. Wall St. J., Apr. 21, 1983, at 36, col. 4. In a memorandum prepared for the ITC's March 1983 hearings, the European Community (EC) continued to oppose the manufacturing clause.

> [N]egotiations were not pursued during the Tokyo Round [of GATT] on the understanding that the restriction was to be removed by 1st July 1982. The [EC] Commission considers, therefore, that the Manufacturing Clause, extended by new legislation in July 1982 . . ., is contrary to understandings reached between the U.S. and the EC during the Tokyo Round, and has unbalanced the final equilibrium of concessions reached in the

vember 1983 that the revived manufacturing clause was an impermissible import restriction and that it was inconsistent with GATT obligations of the United States.[203] GATT authorities told the United States to rectify the situation "within a reasonable time."[204] A judgment of GATT compensations would probably focus on industries benefiting from the manufacturing clause, thus pressuring them to seek its repeal.[205] The European Community has estimated it is due $250 million in compensation, while the United States has estimated the figure to be $7 million.[206]

A few months before the manufacturing clause's scheduled expiration, two bills have been introduced to Congress which would in some way perpetuate manufacturing requirements on copyrighted works. Representative Barney Frank, a Democrat from Massachusetts, introduced a bill to make the manufacturing clause a permanent feature of the United States copyright code.[207] Senator Strom Thurmond, the senior Republican from South Carolina, introduced a bill (drafted originally by print union lobbyists)[208]which expands manufacturing requirements in addition to making them permanent.[209] Thurmond's bill affects all printed materials, not just nondramatic literary works. It removes the so called "troubled author"[210] exemption and the exemption for works manufactured in Canada. The United States Trade Representative can exempt printed materials that were manufactured in a country that upholds United States copyrights and that does not impose nontariff trade barriers to United States printed materials. Those exemption requirements would

---

Tokyo Round.

Commission of the European Communities memorandum, (March 2, 1983) (obtained by author from Public Information Officer, referring to 31 U.S.T. 1015, T.I.A.S. 9629 (1979)). *See supra* note 121 and accompanying text.

203. Telephone interview with Alice Zalik, attorney, U.S. International Trade Commission (Feb. 13, 1985).

204. Telephone interview with Alice Zalik, attorney, U.S. International Trade Commission (Feb. 4, 1985). There is little precedent as to "reasonable time." *Id.*

205. *Id.*

206. ITC STUDY, *supra* note 54, at xi n.1.

207. H.R. 3465, 99th Cong., 1st Sess., Oct. 1, 1985.

208. Letter from Benjamin Y. Cooper, *supra* note 113, enclosing draft of 19 U.S.C. § 13560: Manufacture, importation, and public distribution of certain printed material.

209. S.R. 1822, 99th Cong., 1st Sess., Nov. 1, 1985.

210. *See supra* text accompanying notes 52-53.

nullify the manufacturing barrier to many countries while protecting United States printers to some extent against Pacific Basin competitors.[211] Both proposed bills have been referred to congressional committees for study.[212]

### C. A Constitutional Challenge

Only weeks after extension of the clause to 1986, the Authors League of America and Irwin Karp filed suit[213] against the Register of Copyrights, the Secretary of the United States Treasury, and the United States Commissioner of Customs Service[214] to contest the manufacturing clause on first and fifth amendment grounds. This is apparently the first challenge to the manufacturing clause on first amendment grounds.[215] After a district judge

---

211. Telephone interview with Irwin Karp, Nov. 1, 1985. *See supra* text accompanying notes 148-150.

212. H.R. 3465 was in the House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, as of Oct. 4, 1985. S.R. 1822 was in the Senate Judiciary Committee as of Nov. 1, 1985.

213. Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982).

214. All three of these officials are responsible for enforcing the import prohibitions of 17 U.S.C. §§ 601, 603 (1982).

215. *See* Reply Memorandum of Law on Behalf of Plaintiffs and Plaintiff-Intervenor at 3, Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982) [hereinafter cited as Plaintiffs' Reply Memorandum]. The Association of American Publishers has also intervened as plaintiffs. 182 PRACTISING LAW INSTITUTE: BOOK PUBLISHING 1984 375 (1984) (Patents, Copyrights, Trademarks and Literary Property Series) *reprinting* Complaint (filed Mar. 15, 1983). The Association of American Publishers is a national association of about 300 book publishers whose business accounts for 70-75% of the dollar volume of all books published in the United States annually. *Id.* at 373. The Book Manufacturers Institute, Inc., Printing Industries of American, Inc., and Graphic Communications International Union have together filed an amicus curiae brief in the lawsuit.

Plaintiff Karp, a United States citizen and domiciliary, wrote a pamphlet titled "Fundamental Requirements of the Copyright Act" and published it in the United States in 1977. He obtained a copyright in June 1982. After Congress voted in July 1982 to extend the manufacturing clause to July 1986, Karp and the Authors League had 6000 copies of the pamphlet reprinted in England. Karp then applied to the U.S. Copyright Office for an import statement for 3000 copies each for himself and for the Authors League. A Copyright Office employee denied the import permit, explaining in part that because the pamphlet was required to be manufactured in the United States "in order to be lawfully distributed here," she could issue a statement for no more than 2000 copies. If a quantity of pamphlets greater than 2000 had been imported, it would have been

granted summary judgment on the merits to the defendant Government officials in October 1985,[216] the plaintiffs filed notice of appeal to the United States Second Circuit Court of Appeals.[217]

In pleadings to the trial court, plaintiffs argued that the manufacturing clause flatly prohibits United States authors and publishers from exercising their First Amendment right to import and distribute copies of their copyrighted literary works.[218] They also argued that the clause forces a choice between protection of publication rights under copyright law and exercise of the first amendment right to import literary works.[219] Plaintiffs argued that the class of authors subject to the manufacturing clause is so narrow as to be discriminatory and that the clause therefore violates fifth amendment due process rights.[220] Additionally, the complaint claimed that the clause is overly broad in that it affects works that receive only slight first amendment protection, such as mail order catalogs and works that could not be published at all unless printed abroad, because of high domestic costs.[221] Because first amendment rights are involved, the plaintiffs alleged that the Government should have to justify the statute by compelling reasons under a "strict scrutiny test."[222]

In reply, the Government defended the manufacturing clause as presumptively constitutional because of Congress' express copyright authority[223] and because the clause promotes the "public

---

subject to seizure and forfeiture as violative of customs revenue laws. Memorandum of Law on Behalf of Plaintiffs in Opposition to Defendants' Motion to Dismiss and in Support of Plaintiffs' Cross-Motion for Summary Judgment at 7-9, Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982) [hereinafter cited as Plaintiffs' Memorandum]. *See also* 17 U.S.C. § 603(c) (1982).

216. Authors League of America, Inc. v. Ladd, 82-Civ-5731 slip op. (S.D.N.Y. Oct. 8, 1985).

217. Appeal was filed Nov. 20, 1985, Docket No. 85-6346.

218. Plaintiffs' Memorandum, *supra* note 215, at 32-42.

219. *Id.* at 31, 43-45.

220. *Id.* at 31.

221. *Id.* at 37-40.

222. *Id.* at 54.

223. Reply Memorandum of Law in Further Support of the Government's Motion to Dismiss or for Summary Judgment at 3-4, Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982) (referring to U.S. CONST. art. I, § 8, cl. 8, *reprinted supra* note 8) [hereinafter cited as Government's Reply Memorandum].

purpose" of "protection of labor and manufacturing interest."[224] The Government argued that first amendment guarantees do not include a right to import copyrighted literature nor a right to have material printed in a certain location.[225] Additionally, the Government contended that the manufacturing clause does not apply to the content of materials affected;[226] therefore, the Government need only demonstrate reasonable purposes for the manufacturing requirements.[227]

District Court Judge Goettel granted the defendant Government officials' motion for summary judgment. Weighing the first amendment against Congress' authority over copyrights, Judge Goettel determined that the first amendment

> does not preclude the [G]overnment from imposing conditions on authors who seek copyright protection. . . . In enacting copyright

---

224. *Id.* at 10.

225. *Id.* at 11-14, 17.

226. *Id.* at 12-13.

227. *Id.* at 14-16. Amicus curiae briefs filed in the suit also argued that copyright has long been distinguished as a monopoly on the form of expression rather than a right to express an idea protected by the first amendment. Amicus Curiae Brief for Book Manufacturers' Institute, Inc., Printing Industries of America, Inc., and Graphic Communications International Union at 17-21, Authors League of America, Inc. v. Ladd, No. 82-Civ-5731 (GLG) (S.D.N.Y. filed Aug. 30, 1982) [hereinafter referred to as Amicus Curiae Brief]. Even if first amendment rights are involved, government regulation will not be prohibited where it is (1) regulation without reference to content of the regulated expression; (2) regulation serving a significant government interest; and (3) where alternate means of communication are available. *Id.* at 27. *See* Central Hudson Gas & Elec. v. Public Service Comm'n, 447 U.S. 557 (1980). Proponents of the clause argued that it is justified under a rational basis test. Amicus Curiae Brief at 45.

Plaintiffs responded to these arguments by contending that first amendment protections cannot be abrogated by a separate statute that prohibits importation of certain works on the ground that they were manufactured abroad. Plaintiffs' Reply Memorandum, *supra* note 215, at 7. The decision to publish abroad is a form of "editorial control and judgment" constituting content and specific subject matter, plaintiffs argued. *Id.* at 10-11, 13, 25. Additionally, the distribution of certain categories of work is not of itself justification for restraint on expression even though there might be alternative channels for expression. *Id.* at 9-10. Plaintiffs also argued that loss of copyright protection is a severe penalty that amounts to "congressionally permitted piracy;" *id.* at 17, and because protection of the printing industry is not a sufficiently compelling government interest, there is no justification for first amendment restrictions which limit authors' freedom of expression by suppressing the flow of information to the public. *Id.* at 20.

> legislation, Congress may attach to its grant of copyright whatever conditions and restrictions it sees fit. . . . Thus, a copyright holder has no rights except those bestowed on him by Congress.[228]

Conditions on the copyright holder's manner of expression do not violate the first amendment.[229]

Application of the manufacturing clause solely to nondramatic, literary works is a valid legislative restriction.

> Where, as here, a distinction is not content-based and is necessary for the accomplishment of a valid congressional purpose, it is lawful. . . . The distinctions embodied in the manufacturing clause are carefully suited to this legitimate congressional objective and are grounded in an explicit constitutional source of legislative authority.[230]

Finally, Judge Goettel accorded great deference to Congress because it had considered the burdens on United States authors and the economic objectives of the manufacturing clause, and Judge Goettel declined to engage in judicial legislation.[231] "Whether protectionist legislation serves the national interests is a matter for Congress, not the courts."[232] The manufacturing clause does not violate the fifth amendment because "[i]t represents a rational means to protect the domestic printing and publishing industry."[233]

Plaintiff Karp argues that Judge Goettel's opinion barely addressed the substantive first amendment issues, and ignored the plaintiffs' most fundamental issue: can the United States Government flatly prohibit importation of first amendment materials? Any such ban should be exercised by the narrowest means possible, Karp argues. If the plaintiffs lose again in the Second Circuit, they will try to plead their case in the United States Supreme Court.[234]

---

228. Authors League of America, Inc. v. Ladd, 82-Civ-5731 (GLG) slip op. at 13-14 (S.D.N.Y. Oct. 8, 1985).

229. *Id.* at 15.

230. *Id.*

231. *Id.* at 16.

232. *Id.* at 24 n.16.

233. *Id.* at 17.

234. Telephone interview with Irwin Karp (Nov. 1, 1985).

## IV. ANALYSIS

Pressures from three sources have shaped the current manufacturing clause and contributed to the disharmony surrounding extension or expiration of the clause. These sources are: (1) the movement to create international copyright; (2) trade and economic considerations; and (3) interests of domestic authors.

### A. International Copyright

Perhaps the clearest argument for elimination of the manufacturing clause is the United States position as the world's primary exporter of copyrighted works.[235] Copyright owners wish to retain control over these works and need international copyright protections. The United States has come a long way since the literary piracy practiced in the 19th century.[236] The Berne Convention in 1891 initiated international cooperation on copyright.[237] Although the United States never joined that Convention,[238] the United States has embraced other international copyright efforts, such as the Universal Copyright Convention,[239] bilateral copyright treaties,[240] and the Florence Agreement.[241] The United States manufacturing clause, however, is inconsistent with principles underlying these international agreements, *i.e.*, mutual respect of copyrights and free trade of literary materials.

International law on copyrights as fostered, promulgated, and enforced by international treaty organizations is the most stable and predictable means of protecting United States exports of copyrighted property.[242] Those organizations could also be employed to deal with technological pressures on established copyright principles.[243]

Prior to joining international copyright agreements, the United

---

235. *See, e.g.*, Ringer, *supra* note 31; *see also supra* note 184 and accompanying text.

236. *See supra* note 11 and accompanying text.

237. *See supra* text accompanying notes 13 & 32.

238. The United States may soon attempt to join the Berne Convention. *1984 Hearing*, *supra* note 22, at 169. Any such attempt could be precluded by the manufacturing clause. *See supra* text accompanying notes 32 & 33.

239. *See supra* notes 38 & 129 and accompanying text.

240. *See supra* note 22 and accompanying text.

241. *See supra* note 40 and accompanying text.

242. *1984 Hearing*, *supra* note 22, at 156.

243. *Id.* at 165.

States feared retaliation to its refusal to recognize foreign copyrights. Now, as a member of the international copyright community, the United States should fear that other countries will imitate the manufacturing clause as a condition on copyright.[244] Maintenance of the United States manufacturing clause could cause other nations, particularly lesser-developed countries, to impose manufacturing requirements. China and Canada have already considered the idea.[245] Lesser-developed countries would prefer not to expend their limited resources on protecting foreign copyrights, and would like to encourage domestic publication of scientific, cultural, and creative works.[246] Proliferation of manufacturing clauses would discourage international trade in copyrighted materials, limit access to valuable information and ideas to citizens of those countries with more profitable markets, and disrupt ongoing international efforts to strengthen both copyrights and open trade.[247]

### B. Perpetuation of the Clause by Trade Interests

Studies by both proponents and opponents of the manufacturing clause have produced contrary and questionable results regarding the economic effects of eliminating the clause. The Labor Department estimated displacement of 367,000 jobs while Copyright Office, ITC, and publishers' studies projected the long term loss of only a few thousand jobs.[248] Congress received this conflicting economic data in 1982 in a highly charged political atmosphere and in the midst of a job recession. Congress was aware, however, that the clause had experienced an uneventful ninety-year history. Congress most likely opted in 1982 to extend the clause believing it would save jobs without expending public funds.[249] Congressional consideration of the manufacturing clause in 1986 will be influenced by printers' lobbyists,[250] the Reagan

244. *See supra* note 147 and accompanying text. *See also 1984 Hearing, supra* note 22, at 84.

245. *Id.*

246. *See supra* note 11.

247. *See supra* notes 147, 153-59 & 168 and accompanying text.

248. For discussion of these studies, see *supra* text accompanying notes 107-12, 171, 180 & 196-201.

249. *See, e.g., supra* text accompanying notes 163 & 174.

250. *See supra* note 208 & *infra* note 282 and accompanying text. The printers are reassessing the favorable Labor data in preparation for 1986 lobby efforts. Letter from Benjamin Y. Cooper, *supra* note 113.

Administration's open trade stance,[251] and current political sentiment toward related concerns such as competition with the Japanese[252] and tax credits for domestic industry.[253]

To assess the validity of arguments by printers and trade unions, consideration must be given to whether the domestic printing industry deserves special buffers, and whether the government should intervene to maintain industry wages and lifestyle standards.[254] Those who answer "no" to both questions would find the manufacturing clause to be a blatant example of protectionism and special interest legislation.[255]

Proponents of the clause admit that the printing industry pays higher wages than most United States manufacturers,[256] that only printers' unions favor the clause,[257] and argue that the industry would be penalized, even destroyed, by competition from workers whose governments allow exploitation through lower wages and degraded working conditions. Yet, print industry representatives insist they believe in fair competition with nations whose print workers earn comparable wages.[258] They argue that the manufacturing clause is a reasonable condition to the granting of a copyright monopoly,[259] thus distinguishing the manufacturing clause from a trade barrier. These same print representatives freely admit that the clause is purely an economic measure and that similar provisions with respect to copyrights do not exist in any other nation.[260] They maintain that because of traditional noninvolvement by the print industry in international trade, the industry did little to protest other changes in tariff and trade laws; therefore, the print industry is now unprotected in the open market.[261]

---

251. *See, e.g., supra* text accompanying note 127.

252. *See supra* notes 115 & 172 and accompanying text.

253. *See infra* text accompanying note 280.

254. *See supra* text accompanying note 93.

255. *See, e.g., supra* note 168 and accompanying text.

256. *See supra* text accompanying note 90.

257. *1975 Hearings, supra* note 53, at 1710 (statement of G. Van Arkel).

258. *See, e.g., supra* text accompanying notes 88 & 92.

259. Irwin Karp noted the irony in discussions by printers' unions of conditions on copyright monopoly: labor unions also constitute a form of monopoly. *1975 Hearings, supra* note 53, at 1709.

260. *Id.* at 1714.

261. Letter from Benjamin Y. Cooper, *supra* note 113. This is a strange assertion in light of the long history of printers' lobbying for the manufacturing clause, and in light of a substantial export trade. *See supra* notes 81, 87, 95 & 184 and accompanying text.

Printers argue that because the United States market is so exposed to foreign printers, the manufacturing clause should not be allowed to expire without negotiation by the United States for access to trade with countries that have not opened their markets in return.[262]

Rather than serving as a bargaining chip, however, the manufacturing clause hinders both United States participation in treaties designed to open domestic markets to competitive trade and a foreign relations policy of participation in worldwide markets. The clause raises problems of principle and economic policy. For example, a specific exemption for Canada certainly violates GATT provisions promoting equal treatment of trade partners.[263] Because of European Community complaints, a GATT arbitration panel has ordered that changes in the clause be made within a "reasonable time."[264] While the risk of economic sanctions is incalculable, it is likely that GATT would impose sanctions designed to prod beneficiaries of the clause, *i.e.*, the print industry, to push for repeal.[265]

The GATT controversy illustrates the confusion surrounding the economic importance of the manufacturing clause. Members of the House Subcommittee on Trade were skeptical that the European Community would pursue GATT action against the clause unless those countries could profit by its elimination.[266] Yet, an ITC attorney familiar with GATT believes the European Community has not been hurt financially by the clause.[267] A Copyright Office attorney speculated to the Subcommittee that "part of [the European Community's] motivation is that the United States has brought a number of complaints in the GATT against the [C]ommunity recently."[268] Also, the clause was not part of multilateral trade negotiations in the 1970s because the European Community was told that the clause would expire in 1982.[269] Thus, the European Community's complaint may be merely a matter of principle. Regardless of European Community motives,

---

262. Letter from Benjamin Y. Cooper, *supra* note 113.

263. *See supra* notes 5, 119 & 203 and accompanying text.

264. *See supra* note 204 and accompanying text.

265. *See supra* note 205 and accompanying text.

266. *1982 Hearings, supra* note 105, at 10 (statement of Rep. Bailey).

267. Telephone interview with Alice Zalik, attorney, U.S. International Trade Commission (Feb. 4, 1985).

268. *1982 Hearings, supra* note 105, at 10 (statement of C.M. Hathaway).

269. *Id.* at 12.

the very real threat of reparations to GATT renders further extension of the manufacturing clause much less attractive to United States printers and legislators alike.

Printers' representatives maintain that the manufacturing clause is their only means of effective protection because the Florence Agreement has eliminated duties on scientific, cultural, and technical publications.[270] The United States added a special reservation to its version of the Florence Agreement, however, providing that in the event of provable threatened or actual harm to a domestic industry, the United States could suspend a portion of the Agreement and remedy the harm through the use of tariffs.[271] Afflicted industries must still seek relief through the ITC, where most United States industries seek conventional trade relief.[272] Printers' representatives argue that appeal to the ITC would be so time-consuming and expensive that relief would be unavailable until after extensive harm had already occurred.[273] Also, once a market is successfully penetrated by outside competitors, it becomes virtually impossible to dislodge them.[274] Even a tariff remedy under the Florence Agreement would be difficult to impose exclusively on materials published abroad by United States authors.[275]

Alternatives apart from ITC action have been proposed but have received little discussion. In 1982 President Reagan and the Office of the United States Trade Representative proposed that they be delegated authority to terminate the clause after an economic impact study through normal ITC mechanisms.[276] The study would include private sector input.[277] Printers' unions rejected the proposal, stating, "[w]e know full well that if the Congress delegates such authority to the [A]dministration, the end

---

270. *Id.* at 6 (statement of Rep. Gibbons); *1975 Hearings, supra* note 53, at 1717 (statement of O.R. Strackbein).

271. *See supra* text accompanying note 42.

272. *1982 Hearings, supra* note 105, at 26 (statement of David Ladd, Register of Copyrights).

273. *Id.* at 23 (statement of A.P. Harrison); 128 CONG. REC. H4020 (daily ed. July 13, 1982) (statement of Rep. Goodling: the delay for conventional trade remedy averages one-and-a-half to two years).

274. *1982 Hearings, supra* note 105, at 63 (statement of E.W. Nordberg).

275. Telephone interview with Alice Zalik, attorney, U.S. International Trade Commission (Feb. 4, 1985).

276. *1982 Hearings, supra* note 105, at 2-5 (statement of C.M. Hathaway).

277. *Id.*

result will be termination of the clause, accompanied by devastating numbers of jobs lost to United States workers."[278] Congress rejected the proposal because it deemed copyright laws primarily its responsibility.[279]

The Copyright Office proposed that Congress create tax credits to aid domestic book manufacturers.[280] However, tax credits may be abolished under 1985 tax revision proposals. Congress could devise other incentives for domestic book manufacture and additional supplements to United States printers' current advantages over lower-wage competitors with respect to paper quality, superior bindings or speed in production and delivery of orders. GATT permits subsidies[281] to increase export or decrease import of a product. The United States, however, would have to allege some necessity and would have to negotiate the subsidies if there were prejudice to other treaty parties.

Printing Industries of America, Inc. (PIA) plans to support actively the continuation of the manufacturing clause on a theory of trade reciprocity,[282] as formulated in the recently introduced Senate bill. This action would "change the character of the manufacturing clause from a copyright issue to a trade issue."[283] The EC opposed this theory in a memorandum prepared for the Department of State in 1982.[284] The memorandum states, "[a]ny suggestion that the President should exercise a waiver only to the benefit of countries offering reciprocal arrangements to the United

278. *Id.* at 74 (statement of S. Koplan).

279. 128 CONG. REC. H4017 (daily ed. July 13, 1982) (statement of Rep. Kastenmeier).

280. THE MANUFACTURING CLAUSE REPORT, *supra* note 87, at 7. Domestic motion picture producers currently enjoy tax credits designed to help them contend with overseas producers. *Id.* I.R.C. § 48(k) (1985).

281. GATT, art. XVI, *supra* note 5, at A51.

282. Letter from Benjamin Y. Cooper, *supra* note 113. *See supra* note 208 and accompanying text.

283. *Id.* Perhaps tongue-in-cheek, Authors League representative Irwin Karp proposes that a manufacturing clause on patents would save many more jobs than manufacturing requirements on copyright. Telephone interview with Irwin Karp (Nov. 1, 1985).

Karp said United States printers buy much of their equipment overseas. *Id.* The United States, however, leads the world in production of printing and bookbinding equipment. It is a net exporter of such equipment. ITC STUDY, *supra* note 54, at 48.

284. Commission of the European Community memorandum dated Apr. 1, 1982, obtained by author from the Public Information Officer.

States is equally unacceptable."[285]

Among the pleadings in *Authors League of America, Inc. v. Ladd*[286] is the statement by amici curiae that the manufacturing clause is already so riddled with exceptions as to be practically nonexistent.[287] This statement overlooks studies predicting economic impact should the clause be repealed, or the efforts by union lobbyists to perpetuate the clause. The manufacturing clause must have some practical impact to elicit such concern from affected parties.

An essential problem, despite several professional studies, is that no one has accurately measured the current economic benefits of the clause, nor the potential impact of its elimination.[288] Unfortunately, the legislative controversy has pitted a few thousand professional writers[289] against well-organized unions lobbying vigorously on behalf of hundreds of thousands of print workers.[290] Thus, the minority has received little attention. A judicial challenge may be the authors' only weapon against the well financed and organized lobbying by national labor unions in support of the manufacturing clause.[291] So far, Congress has extended the clause partly to achieve political compromise and partly in fear of the unknown. That fear, in light of the treaties and principles violated, is insufficient justification to extend the clause.

Ironically, none of the government studies or congressional hearings focused attention on consumer interests. The ITC report noted that manufacturing accounts for twenty to forty percent of a publisher's book costs.[292] Book manufacturers claim that with-

---

285. *Id.*

286. *See supra* note 213.

287. Amicus Curiae Brief, *supra* note 227, at 31 (presumably referring to "troubled author provision." *See supra* text accompanying notes 52-53).

288. *See supra* text accompanying notes 107-12, 171, 180 & 196-201.

289. The writers unions involved in *Authors League of America, Inc. v. Ladd* represent approximately 11,000 writers and 300 book publishers, whose business accounts for nearly 75% of the annual dollar volume of books published in the United States. *See supra* notes 53 & 213.

290. The printers unions represent at least 575,000 AFL-CIO members and nearly 10,000 printing companies, whose business accounts for approximately 75% of the annual sales of printed products in the United States. *See supra* notes 63, 86 & 113.

291. Telephone interview with Irwin Karp (Nov. 1, 1985).

292. ITC STUDY, *supra* note 54, at 50. The remainder of costs is attributable to authors' royalties, editorial expenses, marketing, and administration. *Id.*

out the manufacturing clause money now spent on manufacturing would go overseas and thousands of United States jobs would be lost. Publishers' costs for royalties to authors are justified by copyright law, on the belief that economic incentives for authorship promote the exchange of ideas. All of these policies may produce a better, cheaper, and more easily available product for the reading public, but Congress has yet to address the manufacturing clause's impact on consumers.

### C. Constitutionality

The current manufacturing clause is not prima facie an impermissible restriction on authors' or publishers' first amendment rights. The foremost United States scholar on copyright contends that copyright law does not abridge the first amendment because it does not restrain communication of ideas.[293] Professor Melville B. Nimmer mused in a footnote, however, that the manufacturing clause may be unconstitutional. Nimmer said:

> This prior restraint upon the [import] of written materials may well be invalid under the First Amendment. The right of freedom of speech under the First Amendment clearly includes the right to receive written materials from abroad. It is true that a copyright restraint upon 'expression' (as distinguished from 'ideas') will generally be upheld . . . against a First Amendment challenge. But that assumes a balancing of the interest in encouraging authorship as against the public interest in freedom of speech. In the case of the manufacturing clause, the interests in authorship and in freedom of speech are joined on one side of the balance, as against the protectionist interests of the printers on the other side. It is to be doubted that such a protectionist interest would be held to outweigh the First Amendment interest.[294]

None of the cases cited by plaintiffs, however, in *Authors*

---

293. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 U.C.L.A. L. REV. 1180 (1970); 1 M. NIMMER, NIMMER ON COPYRIGHT § 1.10 (1984).

294. 2 M. NIMMER, NIMMER ON COPYRIGHT § 7.22[C] n.51 (1983) (citations omitted). One case cited by Nimmer, Lamont v. Postmaster General, 381 U.S. 301 (1965), turned on the requirement of the affirmative act of responding to a postmaster's inquiry about detained mail. *See supra* note 142. In comparison, the manufacturing clause clearly requires the affirmative act of publishing within North America and impliedly requires import clearance by the U.S. Copyright Office or other United States officials. 17 U.S.C. §§ 601, 603(a), 603(c) (1984).

*League of America, Inc. v. Ladd* pleadings to the district court established a first amendment right in manner of expression. The manufacturing clause, like copyright law in general, affects expression, and economic choice rather than ideas or content.[295] With all due respect to Professor Nimmer, the first amendment guarantee of freedom of speech does not also protect the right to profit from one's own writing. Plaintiffs argue that by restricting only nondramatic literary works, the manufacturing clause inhibits expression with respect to subject matter and content.[296] The plaintiff's argument is not convincing. Creators have always found ways to express controversial ideas despite narrow-minded or oppressive government regulation. Surely a publisher does not choose to publish a play instead of a novel because of the manufacturing clause. Nor does the clause force creators to alter their form of expression.

Plaintiffs asserted that the decision to publish abroad is an editorial decision and that the "First Amendment prevents Congress from dictating to publishers and authors . . . where the copies must be manufactured."[297] The plaintiffs cited case law presenting economic choices that were intimately related to editorial choices about controversial ideas. In contrast, a publisher's economic choices made under the manufacturing clause correspond to production costs and profit margins, not to the political ramifications of publishing an author's controversial ideas.

A court could find the manufacturing clause to be in violation of the first amendment if it could be shown that the clause effectively prevents publication of some works. Such works might include marketable works that only a foreign publisher would accept or works that could be marketed in the United States in quantities above the import ceiling of 2000.[298] If the clause in practice inhibits publication of works of a scholarly nature,[299]

---

295. *See generally,* Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?* 17 U.C.L.A. L. REV. 1180 (1970).

296. *See supra* note 227.

297. Plaintiffs' Memorandum, *supra* note 215, at 36. In contrast, the Government argued just the opposite premise. *See supra* note 223 and accompanying text. "Clearly *Miami Herald* stands for the proposition that a First Amendment right exists to print *what* the author wishes to print—not *where* the author wishes to have it printed." *Id.* at 13. Amici curiae, however, agreed with plaintiffs on this point. *See supra* note 227.

298. *See supra* text accompanying note 47.

299. *See supra* notes 134 & 139 and accompanying text.

then the free exchange of ideas is suppressed. Although the manufacturing clause as worded in § 601(a)[300] appears to be a flat prohibition, the many exemptions that follow[301] must be read simultaneously as prima facie proof that the clause does not operate as an absolute ban. The Authors League has not argued that the clause has prevented publication of an ascertainable number of works. Instead, the Authors League has argued that United States authors suffer from a loss of publishing opportunities.[302] Printers suggest that the current manufacturing clause exemptions allow such work to be printed abroad in limited quantity,[303] but there is apparently no data with respect to use of the "troubled author" exemption.[304] The argument that the manufacturing clause suppresses the free exchange of ideas seems weak. Thus, the argument that the manufacturing clause violates the first amendment is unlikely to persuade a court to invalidate the clause.

The manufacturing clause affects primarily an economic right, not a fundamental constitutional right, of authors and publishers. Thus, the fifth amendment due process inquiry should follow a rational basis test.[305] Under this test, the manufacturing clause must serve to effect reasonable results through reasonably related means. A court would have to balance the factual and philosophic arguments for protection of the print industry against the possible prejudice to United States authors. Also, the court would have to note that application of the clause to "nondramatic, literary works"[306] may be unrelated to the manufacturing clause's objective.

Judge Goettel's opinion avoids examination of the obvious conflict between the plaintiffs' first amendment right to disseminate

---

300. *See supra* note 1.

301. *See supra* text accompanying notes 46-53.

302. *1982 Hearings, supra* note 105, at 86 (statement of I. Karp. Karp did say in 1975, but without supportive data, that, "Many American authors have been deprived of U.S. copyright protection by the manufacturing clause." *1975 Hearings, supra* note 53, at 1706.

303. *Id.* at 59 (statement of B. Cooper, *supra* note 113). *See also* "troubled author" exemption, *supra* text accompanying notes 52-53.

304. *Id.*

305. *See* Nebbia v. New York, 291 U.S. 502 (1934). *See also supra* note 227 and accompanying text.

306. *See supra* notes 131-32 & 220 and accompanying text.

their writings[307] and the barriers to imports imposed by the manufacturing clause.[308] Judge Goettel's opinion completely ignores that issue, preferring instead to rely on a sweeping view of congressional authority over copyrights. In deferring to Congress on the fifth amendment issue, Judge Goettel's opinion rests on inappropriately weak case law. Despite the amount of United States Supreme Court case precedence on examining legislation under a rational basis test,[309] Judge Goettel cites two copyright cases[310] where the fifth amendment was not even at issue.[311] Perhaps the Second Circuit Court of Appeals will treat the plaintiffs' issues more thoroughly.

While copyright is fundamentally a congressional grant of monopoly for limited policy purposes, Congress certainly has authority to make all necessary trade regulations.[312] Any copyright monopoly is subject to the public need—mainly the need for information. "Need," however, could also include incentives to manufacture books within the United States. Even if there is a direct causal relationship between protection of the print industry and a healthy United States book market, it is difficult to anticipate whether such a purpose would survive a rational basis test.

Legal analysis of the clause therefore turns on factual data such as industrial vulnerability and the extent to which United States authors are hindered in their first amendment and economic pursuits. Unfortunately, some of the important data has not been compiled, while some published data is either incomplete or unre-

---

307. *See supra* note 142 discussing Lamont v. Postmaster General of the United States, 381 U.S. 301 (1965).

308. *See supra* notes 45-54 (the ban on imports is not absolute).

309. *See, e.g.*, U.S. Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (federal foodstamp program giving assistance only to households of related persons was irrational classification and violated fifth amendment due process clause).

310. United Dictionary Co. v. G & C Merriam Co., 208 U.S. 260, 264 (1908) (issue was whether 1892 United States copyright law required copyright notice on a book produced and marketed only in a foreign country); Stonehill Communications, Inc. v. Mortuge, 512 F. Supp. 349, 350-51 (S.D.N.Y. 1981) (Weinfeld, J.) (issue was whether plaintiff's book met the test for preponderantly literary material affected by the manufacturing clause).

311. Stonehill Communications, *see supra* note 310, dismissed a secondary argument by the plaintiff author that the clause should not be enforced, but did so cursorily without explaining the plaintiff's allegations or rationale.

312. *See* U.S. CONST. art. 1, § 8.

liable.[313] For example, it seems essential to know how many United States authors suffer substantial difficulty in finding a domestic publisher because of the manufacturing clause, how many authors qualify for the "troubled author" exemption, and how many other classifications of literary works are being published overseas to the economic detriment of United States printers. Additionally, it seems necessary to determine accurately whether the clause is essential to the financial health of domestic printers.

Nevertheless, protection of an already strong segment of the industrial sector[314] by restricting the publishing opportunities of a discrete, narrow category of authors seems unfair, illogical, and myopic. Recognition of a copyright without protection of it through copyright remedies[315] is a sham. Authors are right to protest that they are victims of a trade tariff that should be aimed at publishers but is instead built incongruously into the copyright law. Challenging the clause through the judicial system is unlikely to result in its elimination, however, and authors and publishers should attempt to present their case well to Congress in 1986.

## V. CONCLUSION

As the 1986 expiration date of the manufacturing clause looms near, the conflict between copyright owners, trade partners and promanufacturing clause lobbyists will intensify.[316] Congress must study reliable data on the economic impact that elimination of the clause would have on the domestic print industry. Additionally, Congress must consider such principles as fairness to authors affected by the clause and the United States' participation in international copyright treaties and open trade treaties. Blatant trade protectionism written into domestic copyright statute directly contradicts this country's stance in the international copyright community. Because economic data so far is dubious and the constitutional challenge to the clause is unlikely to succeed, the principle that the United States should protect its position in the international copyright community may be the most persua-

313. *See supra* text accompanying notes 107-12 & 196-201.

314. *See, e.g., supra* notes 184-195 & 235 and accompanying text.

315. *See supra* text accompanying note 60.

316. *See supra* text accompanying notes 207-210; *see also* Dentzer, *Rumors of Trade War*, NEWSWEEK, Sept. 30, 1985, at 58 (reporting protectionist fervor in United States Congress to be more pervasive and bipartisan since drastic tariffs were imposed in the 1930s).

sive reason for Congress to remove the manufacturing clause from the United States copyright code and find alternatives within trade laws.

*Annette V. Tucker**

* An earlier version of this article was submitted to the 1985 Nathan Burkan Memorial Competition.