

COPYRIGHT CONFUSION

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The Canadian Copyright Act is greatly in need of revision. The present act, passed in 1921 and amended on several occasions since that date,¹ was enacted in order that Canada might become a member of the Convention of Berne, which provided for automatic reciprocal copyright in all countries of the union. The Revised Berne Convention, subsequently further revised by the Convention of Rome in 1928, will be found in the schedule to the Copyright Amendment Act of 1931. The Convention is a code of general principles providing for international copyright on substantially the same basis throughout the member countries. It specifies what is considered the ideal term of copyright and the nature and extent of the right. It constitutes an undertaking by the member countries to enact domestic legislation carrying its provisions into effect. It is not a part of the municipal law of the member countries. Practically all European countries and their colonies, Great Britain, her colonies and the self-governing Dominions, Japan and Siam in Asia and Brazil in South America are members of the union. The important countries that are not members are Russia, China, the United States of America, Mexico, the Central American republics and most of the South American republics.

The Canadian Act of 1921, in compliance with the terms of the Convention, extended the term of copyright to the life of the author and fifty years, and this was effective in respect of works created before the act came into force on January 1st, 1924, provided that such works had not fallen into the public domain by that date. Prior to 1924, Canada had its own Copyright Act, which protected only works printed in Canada and registered under the act. The period of copyright was twenty-eight years from registration, subject to a limited right of renewal for a further fourteen years. It did not protect the public performing right. A number of Imperial statutes were also in force in Canada, the most important of which was the Copyright Act of 1842,² which gave protection to authors for the life of the author and seven years, or forty-two years from date of publication, whichever was the longer. This act did protect the public performing right. Registration at Stationers Hall, London, under this statute, was optional.

¹ Now R.S.C., 1927, c. 32. Amended by 21-22 Geo. V., c. 8; 25-26 Geo. V., c. 18; 26-27 Geo. V., c. 28; 2 Geo. VI., c. 27.

² 5 and 6 Vic., c. 45 (Imp.).

Great Britain had been a member of the Convention of Berne for many years and this membership applied to the entire British Empire. Foreign authors, as well as British authors, obtained Canadian protection through the Imperial legislation and, as just stated, registration was not necessary.

Great Britain now has in force the Copyright Act of 1911.³ This act does not apply to the self-governing Dominions but is in force throughout the rest of the British Empire. It is similar to, but not identical with, the Canadian Act of 1921 and extends copyright to the life of the author and fifty years in works that were copyright in Great Britain and the Empire, except the self-governing Dominions, on July 1st, 1912, which means that if a work was first published after July 1st, 1870, or if the author was living on July 1st, 1905, it obtains the benefit of the extended term. The Imperial Act of 1911 left earlier Imperial copyright legislation, including the act of 1842, unrepealed in Canada and the other self-governing Dominions and gave each of the self-governing Dominions the right to repeal, within its own jurisdiction, such Imperial statutes.

It is very difficult to ascertain the copyright status in Canada of works of foreign authors published before January 1st, 1924. If protection is claimed in Canada under the Imperial Act of 1842, the work must be one that was published on or after January 1st, 1882, or the author have been alive on January 1st, 1917. There is a decision in the Ontario case of *Harris v. Canadian Music Sales Corporation*, which decides that the only works that enjoy the benefit of the extended term under the Canadian Act of 1921 are those that had been registered under the old Canadian act or that were registered before the new act came into force on January 1st, 1924.⁴ This is a decision of the Ontario Court of Appeal and, therefore, entitled to great respect but, with all deference, the correctness of the decision is open to serious question. It seems to be based on a decision of the Privy Council in *Mansell v. Star Printing and Publishing Co. of Toronto*,⁵ overlooking the fact that the decision in this case was based on the Imperial Fine Arts Copyright Act⁶ which was not an empire-wide statute. This view is strengthened by the fact that the 1921 act not only repealed existing Canadian legislation but also all Imperial copyright legislation in force in Canada, including the act of 1842. The right to repeal this Imperial legislation in Canada was

³ 1 and 2 Geo. V., c. 46 (Imp.).

⁴ [1941] 2 D.L.R. 377.

⁵ [1937] A.C. 872.

⁶ 25-26 Vic., c. 68.

conferred on the Canadian Parliament by the Imperial Copyright Act of 1911.

It should also be noted that section 42 of the Canadian Act of 1921, which provides for the extended right in respect of existing copyrights, does not limit the extension to registered works and the first schedule to the act recognizes the extension of the performing right which was not protected under the old Canadian act but only under Imperial legislation. Section 47, which repeals all enactments relating to copyright passed by the Parliament of the United Kingdom so far as they are operative in Canada, provides that such repeal shall not affect prejudicially any legal rights existing at the time of such repeal. The writer has, therefore, in this article dealt with copyright of British and foreign authors in Canada on the assumption that *Harris v. Canadian Music Sales Corporation* is wrongly decided and that authors entitled to copyright in Canada under Imperial legislation are entitled to the extended period apart altogether from registration under the old Canadian act.

Copyright consists of several individual rights, the most important of which are:

- (a) the graphic right, that is, the right to make copies;
- (b) the recording right, that is, the right to make records and other mechanical devices whereby the work may be reproduced;
- (c) the public performing right, that is, the right to perform the work in public;

and these rights may in turn be subdivided. The act provides that copyright may be assigned, in whole or in part, for the whole term or for any part thereof. Thus, in many cases, there may be, and usually are, several owners of the different rights. In these days when use of music is highly commercialized through the medium of radio and motion pictures, the public performing right is usually assigned by the author to one or other of the performing right societies. In the United States there are four or five such organizations, of which the two principal ones are The American Society of Composers, Authors and Publishers and Broadcast Music Incorporated. In Canada, the counterparts of these organizations are Composers, Authors and Publishers Association of Canada Limited and BMI Canada Limited. These societies license music users and the fees payable are regulated by the Copyright Appeal Board. The recording right is usually owned by the publisher and licensed to the record manufacturer, either directly or through an agency representing a group of publishers.

The graphic right is usually owned by the publisher under a royalty agreement with the author.

Any person should be able, by means of some registry, to locate the current owner of the portion of copyright in which he may be interested, in order that he may avoid infringement or obtain a licence from the owner to use the work.

Another point that gives rise to considerable difficulty is the copyright that is conferred on the maker of gramophone records and similar contrivances. This copyright is for a term of fifty years and the first owner is the maker of the first plate. This right is not provided for in the Convention but was adopted in England in the 1911 act and copied into the Canadian Act of 1921. It is, however, a copyright and as such is extended to all countries enjoying the benefit of the Canadian act. There may, therefore, be two copyrights in force, one in the record itself and one in the work recorded. So far as the performing right is concerned, it is difficult to understand how a record, as such, can be performed in public apart from the work itself, but in the English case of *Gramophone Co. Ltd. v. Stephen Cawardine & Co.* it was held that the owner of the record copyright was entitled to restrain public performance by means of the record in question.⁷ There is real justification for protecting the gramophone record manufacturers against pirated copies, but copyright in a record should exclude the public performing right.

In the United States there is no copyright in a record. Most Canadian record manufacturers are subsidiaries of American companies or companies that hold the exclusive right to manufacture and sell in Canada records made by an American manufacturer and the first plate is usually made in the United States. A master record is then sent to the Canadian company and records are made in Canada from the master. The question then arises: Does the American company, as the maker of the first plate, own copyright in the record in Canada? This point has not been dealt with by the courts and it is certainly not free from doubt.

It should be mentioned that the United States, although it is not a union country, has been given the full benefit of the Canadian act by means of a certificate issued in 1923 under the provisions of section 4(2) of the Canadian act and the United States has extended the benefit of its act to Canadian citizens. The result is that American authors have, since the 1921 act came into force on January 1st, 1924, the full benefit of the Canadian act with automatic copyright, while Canadians receive only

⁷ [1934] Ch. 450.

the right to apply for and obtain copyright in the United States by registration at Washington. This would seem to indicate that the American record manufacturer, who makes the first plate, is entitled to record copyright in Canada. There is a provision in the act that where the owner (that is, the maker of the first plate) is a body corporate it shall be deemed, for the purposes of the act, to reside within His Majesty's Dominions if it has established a place of business therein, but it is difficult to understand why this provision is inserted because while a resident within His Majesty's Dominions is entitled to copyright in Canada, American citizens do not have to qualify under that provision.

I have mentioned previously that great difficulty arises in ascertaining whether works of foreign authors, published before 1924, are copyright in Canada. There is a provision in the Convention that affords copyright protection in union countries to works of authors of non-union countries if such works are first published in a union country. Publication, as defined by the Convention and by section 3(2) of the Canadian act, does not mean printing but merely issue of copies to the public. There is, however, a decision of the Netherlands Supreme Court in the case of *Ward v. De Combinatie*, which holds that the English translation of this provision of the Convention is incorrect and that the work of an English author, which was first published in an American magazine, copies of which were issued to the public in Canada simultaneously with publication in the United States, was not first publication in a union country.⁸ The case distinguishes between publication and mere distribution. This would not affect the validity of the copyright throughout the British Empire under the Imperial Act of 1911 or in Canada under the Canadian Act of 1921, since publication is defined in these statutes as the issue of copies to the public, but it does affect validity in all other union countries. In this case we have a British author who has secured copyright in the United States, is entitled to copyright throughout the British Empire and, although he is a citizen or subject of a union country, has lost his international copyright by reason of first publication in the United States.

The provision of the Convention that affords protection to authors of non-union countries, if such works were first published in a union country, operates most unfairly. An American author has copyright in the United States for fifty-six years at the longest. Being a non-union country, an American author or composer obtains union protection by first publication in any of the union

⁸ E. J. MacGillivray: *Copyright Cases* (1936), p. 78.

countries. The Convention provides that the term of copyright shall not exceed the term fixed by the laws of the country of origin of the work but, in the case of authors of non-union countries, the country of the union in which the work is first published is the country of origin. Therefore, an American author who first publishes his work, say in England, obtains protection for the life of the author and fifty years throughout those countries of the union that fix this term, and this is the term fixed by nearly all union countries. But the author who is a citizen or subject of a union country obtains no protection in the United States unless he registers his copyright at Washington and, in the case of books, actually prints them in the United States, and then only for the term provided by the United States act.

Russia is another example of the same kind. That country grants copyright for the life of the author and fifteen years but only to its own authors and composers and to works published in Russia, and there is no exchange of rights as between Russia and Canada. Russian authors and composers obtain copyright in union countries by first publication in a union country.

While the terms of the Convention provide for protection of the works of non-union authors in union countries on the basis of first publication in a union country, the terms of the Convention must be carried into the domestic legislation of each union country in order to be effective in that country. The wording of section 4 of the Canadian Act of 1921, which defines works in which copyright subsists, is as follows:

(1) Subject to the provisions of this Act, copyright shall subsist in Canada for the term hereinafter mentioned, in every original literary, dramatic, musical and artistic work, if the author was at the date of the making of the work a British subject, a citizen or subject of a foreign country which has adhered to the Convention and the Additional Protocol thereto set out in the Second Schedule to this Act, or resident within His Majesty's Dominions; and if, in the case of a published work, the work was first published within His Majesty's Dominions or in such foreign country; but in no other works, except so far as the protection conferred by this Act is extended as hereinafter provided to foreign countries to which this Act does not extend.

(2) If the Minister certifies by notice, published in the Canada Gazette, that any country which has not adhered to the Convention and the Additional Protocol thereto, set out in the Second Schedule to this Act, grants or has undertaken to grant, either by treaty, convention, agreement or law, to citizens of Canada the benefit of copyright on substantially the same basis as to its own citizens or copyright protection substantially equal to that conferred by this Act, such country shall, for the purpose of the rights conferred by this Act, be treated as if it were a country to which this Act extends; and it shall be lawful for the

Minister to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, under the law of such country, differ from those in this Act.

On the wording of subsection 1 of the section, it is a moot question whether Canada affords to non-union authors who first publish in a union country full Convention rights or whether the section means, what it seems to say, that both of the following conditions must be complied with in the case of a published work:

- (1) that the author must be a British subject, a resident of His Majesty's Dominions or a citizen or subject of the country to which the act extends; and
- (2) that such work must also be first published in such country.

The Convention provides that the term of copyright shall be for the life of the author and fifty years but gives to countries of the union some leeway in this respect. It provides also that copyright shall not subsist in a country of the union for a longer period than in the country of origin of the work. It is doubtful if Canada has carried this provision into the Canadian act.

The only provision in the Canadian statute is one which was introduced by way of amendment in 1931 and which is now found in subsection 2 of section 8. Section 8(1) fixes the term of copyright for works of joint authorship as the life of the author who dies last and fifty years thereafter. Subsection (2) says:

Authors who are nationals of any country which grants a term of protection shorter than that mentioned in subsection one of this section shall not be entitled to claim a longer term of protection in Canada.

Is this subsection intended to apply only to works of joint authorship or is it intended to extend to all works protected by the act? It would seem as if it applied only to joint works because the wording of the section is copied from Article 7 (bis) of the Rome Convention which deals only with joint works. Article 7 of the Rome Convention says that the term of copyright is regulated by the law of the country where protection is claimed and must not exceed the term fixed by the country of origin of the work. Thus, on the wording of the Convention itself, the country of origin of the work is the test in the case of individual works while, in the case of joint works, the nationality of the author is the test. If these provisions are carried into the domestic law of a union country the result would be that an individual American author by first publication in England would obtain international copyright for the life of the author and fifty years, whereas if

joint American authors first published their work in England the period would be that of the United States.

The Canadian act, apart from the provision just quoted, is silent on this subject and it would, therefore, appear that all authors entitled to copyright under the Canadian act acquire in Canada copyright for the life of the author and fifty years except in the case of joint works. If this conclusion is correct, an author of a union country which gives a shorter term of protection will have protection in Canada after his copyright has expired in his own country. The term of copyright in Sweden and Switzerland, for example, is the life of the author and thirty years.

A great deal of the difficulty that arises under the Canadian act could have been avoided if the Canadian Parliament had adhered more closely to the scheme of the Imperial Act of 1911. Canada attempted to carry out the provisions of the Convention, relating to the copyright in Canada of authors of other countries, by including provisions within the statute. This has resulted in a great deal of inconsistency, anomaly and uncertainty.

The Imperial statute provides for the extension of rights to foreign authors by order in council passed under the authority of the statute. Many orders in council have been passed applying to works originating in other countries. In each case, they were carefully drawn and, in each, specific reservations were made under the authority of the Convention. For this reason the problem of what is or is not copyright under the Imperial act is not nearly so difficult as it is under the Canadian act.

All this of course does not detract from what has been said in this article about the weaknesses of the Convention itself.

Consider the dilemma in which the music publisher, for instance, finds himself if he wishes to publish a volume of music and songs. If the works are copyright (and the act presumes that all works are copyright unless the contrary is proven) he must locate the owner, who may be a publisher in England or Germany or any other country, but how is he going to ascertain that? In order to satisfy himself that the work is not copyright, he must find out when the work was first published, the date of such publication, the nationality of the author, the date of the author's death and the country of first publication, and even with this information he cannot be sure because the law as to what is or is not copyright under the Canadian act is uncertain.

Assume that the same publisher wishes to sell his work in England and the United States. In the United States he has no difficulty. That country is not a member of the Convention and,

in order that works may be protected, they must be registered at Washington. The term is definite, twenty-eight years with the right of renewal for a further twenty-eight years. But England is a different story. It is necessary to ascertain if the work is one that was copyright in England on July 1st, 1912, taking into consideration all the factors referred to and obtaining, if possible, all the information necessary to reach a conclusion. In Canada there are other factors that have to be considered.

The Imperial Act of 1842 with its shorter term of protection remained in force in Canada until it was repealed by the 1921 act, effective January 1st, 1924. Therefore many works fell into the public domain in Canada between July 1st, 1912 (the date when the Imperial Act of 1911 came into force) and January 1st, 1924 (the date when the Canadian Act of 1921 came into force), which are still protected in Great Britain.

An excellent illustration of the confusion that has resulted from this legislative action occurs in the case of the Gilbert and Sullivan operas. These works were all published in England between 1870 and 1892 and are, therefore, protected in England. There was no provision for reciprocal copyright with the United States until 1892; therefore, all these works are in the public domain in the United States. Since both Gilbert and Sullivan died before 1915, only those works first published after January 1st, 1882, are protected in Canada. Therefore, about half of the operas are copyright in Canada and the other half are in the public domain.

The writer recently had occasion to prepare an opinion for an American attorney on the copyright status in Canada and England of a long list of musical works. He had collected a great deal of data dealing with the nationality of the author, date of the author's death and other relevant facts. In the case of many of the works the task was not difficult because the facts were available, but, in the case of a number of works, the author had been dead a considerable time and information as to country of origin, date of publication and date of death could not be determined. The real status of such works can only be ascertained if the original publisher can be located and the necessary data obtained from him. This is surely an intolerable situation, especially when one bears in mind that under the present act copyright is deemed to subsist in every work and the onus is upon a defendant to prove that copyright does not subsist when infringement is alleged.

One of the elements of copyright is the exclusive right to authorize performance of the work by means of radio broadcasting.

Consider the difficulties that arise constantly in that field. Many Canadian broadcasting stations are outlets of American networks. These network companies all maintain extensive copyright departments and are able to determine what works they may or may not broadcast in the United States but, once that program is re-broadcast by a Canadian station, a performance has taken place in Canada and, although the work performed may be in the public domain in the United States, it may be protected in Canada. Its performance over a Canadian station will, therefore, be an infringement. Surely situations such as these should not exist and, if we are going to have reciprocal copyright, works that are copyright in one country should be copyright in all countries and works that are in the public domain in one country should be in the public domain elsewhere; and it should be possible, in any given case, to ascertain readily whether a work is copyright or in the public domain.

The situation, so far as broadcasting stations are concerned, is not perhaps as serious as would at first appear. All stations obtain licences from the performing right societies, which control a very large percentage of the desirable music, but these societies control only what are known as the "small rights", that is, individual songs and musical selections. They do not control the right to broadcast entire symphonies, operas or plays. It is in this latter field that the broadcasting station often finds itself in a dilemma, not knowing whether copyright subsists in the work which it desires to broadcast and not knowing in many cases where to turn to find out from whom permission should be sought.

Another point in respect of which the law would seem to be unsatisfactory is the interpretation of the term "perform in public". The English case of *Jennings v. Stephens* is a leading authority on this subject.⁹ In this case it was held that a performance in a women's institute where the membership was open to any woman resident of the town, but where there was no admission charge, was a performance in public.

In *Ernest Turner Electrical Instruments Ltd. v. Performing Right Society Ltd.* it was held that music furnished by loud speaker to employees in a war factory, from which the public generally was excluded, was also a performance in public.¹⁰

Surely the copyright owner would be adequately protected if the Canadian act followed the American statute, which makes performance in public infringement of copyright only if it is for profit.

⁹ [1936] Ch. 469.

¹⁰ [1943] Ch. 167.

Everyone will agree that an author is entitled to the full fruits of his artistic genius and that the publisher has a definite and important role in the publicizing and sale of the product of the author's genius and should be adequately rewarded, but the term of copyright is far too long. An inventor of a device which may revolutionize industry receives a patent for a period of seventeen years and in many cases it takes several years after the issue of a patent to perfect the device and make it commercially practicable. In the case of popular music the term is of little consequence because its popularity and, therefore, value usually lasts only a few months, but in the case of works of lasting merit the American period of twenty-eight years with a right of renewal for a further twenty-eight years will, in most cases, give the author protection for his entire lifetime with some residue for his dependents. After all, it is the author or composer and not the publisher that the act is intended to protect.

Another point that ought to be cleared up concerns copyright in arrangements. There is nothing in the statute itself dealing with this matter, but the point arises by reason of certain court decisions. One of the essentials of copyright is that the work shall be "original", but there are decisions that a work written by an author, say for the piano, but subsequently arranged for an orchestra by another person, confers copyright on the arranger in such arrangement although the work itself may have fallen into the public domain. No doubt there are arrangers who really contribute originality by means of an arrangement but, generally speaking, an arrangement is a purely mechanical process readily performed by anyone skilled in the art. The writer knows of the case of one well-known hymn, which has long since fallen into the public domain, where one of the performing right societies lists over thirty arrangements as part of its copyright repertoire. It may well be that these selections would not stand the test of a court action but the claim to copyright in the arrangements is made. It is very rarely that musical genius enters into an arrangement and, therefore, the public interest would seem to be served by stipulating in the statute that no copyright shall subsist in an arrangement of an original work.

It is understood that there will be a meeting of representatives of the Convention countries in the near future to consider a further revision of the International Convention. When the Convention convenes, the points referred to in this article ought to have serious consideration.

The following suggestions are offered:

1. The term of copyright should be materially shortened. It should start at a definite date, preferably fixed by registration, which should be available within a limited time after first publication (which should mean actual printing for sale or distribution or performance) and be for a definite term. The American period of twenty-eight years with a right of renewal for a further twenty-eight years might well be considered. Automatic copyright could subsist in unpublished works, but upon publication or performance registration should be necessary within a limited time. Registrations should be at a central registry and copies of such registrations filed in a branch registry in each country of the union.

2. With respect to existing copyrights, they should only be protected for the same period and then only if the author or publisher records the actual date of first publication and the country of origin in a central registry and the record of such registration is filed with a branch registry in each country of the union.

3. Authors of non-union countries should receive no protection in union countries by first publication in a union country. A non-union country, if it desires to obtain for its nationals copyright in other countries, should join the copyright union or at least adopt substantially the same term of copyright and comply with such rules and conditions as may be adopted by the union, and it should extend to authors of union countries copyright identical as to term and extent of the right.

4. The present definition of publication, which is "issue of copies to the public", should be abolished and copyright should not depend on publication as now defined.

5. There should be a complete record of all assignments of any interest in any copyright work at the central and branch registries.

6. The exclusive right of the copyright owner to authorize the performance of his work in public should be confined to public performance for profit.

7. There should be a specific provision in the Convention that copyright shall not subsist in arrangements of musical works of others.

If changes such as are suggested cannot be effected by action of the copyright union there does not seem to be much point in Canada remaining in it. Most of our authors and composers, and they are few in number, are interested chiefly in copyright in English-speaking countries and provision such as now exists

under section 4(2) of the act can be continued. In other words, Canada will extend the benefit of its act to any country which by statute, treaty or convention gives equivalent protection to Canadian authors. Canada is in an excellent trading position because far more money is paid by way of royalties by Canadian users to foreign authors and publishers than is received in Canada by Canadian authors and publishers from foreign sources.

When amendments to the Canadian statute are under consideration, the following points (which are not Convention matters but purely questions for Canadian legislation) should have consideration:

1. Copyright in records and similar contrivances should not include the public performing right by means of the record.

2. The presumption that copyright subsists in every work and that a *prima facie* case is established by mere production of a copy of the work with the author's name thereon should be abolished. If registration is required a certificate of registration could be *prima facie* evidence of the existence of and title to copyright.

3. The present registration provisions, which are optional but which afford to the person effecting registration *prima facie* evidence of existence of and title to copyright, should be revised. The usual practice is for the publisher to register in his own name the title to copyright which he has acquired from the author. The complete chain of title should be registered, commencing from the author and followed by any and all assignments of the whole or any part of the copyright.

LAYMEN'S LEGAL AXIOMS — No. 1

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble. (Charles Dickens: *Bleak House*)