"COPYRIGHT CONFUSION" RECONSIDERED

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In the November 1947 issue of the Canadian Bar Review Mr. Samuel Rogers, K.C., has advanced proposals for modification of copyright law[1] upon which I should like to make some observations.

No doubt these proposals were put forward with an eye to the conference of copyright union countries, to be held at Brussels in June of this year. Copyright legislation in all the countries that subscribe to the Berne and Rome Conventions follows a similar pattern. Broadly speaking, it is that in each of the convention countries the creation of an original work, whether it be literary, musical or an example of the graphic or sculptural arts, gives to the creator of the work during his lifetime, and for a period of years (generally fifty) after his death to his heirs, the exclusive right to publish, reproduce, sell copies of, perform or otherwise transmit to the public the works or any substantial reproduction thereof or extract therefrom.

Certain countries, such as the United States, have abstained from adhering to the conventions and provide a less comprehensive right for the originators of literary, musical and artistic works. The United States has special agreements with certain of the copyright union countries, by virtue of which reciprocal rights are granted to composers and authors of each of the contracting countries and their assignees.

Mr. Rogers' proposals are designed to cut down those rights.

The principal Canadian users of performing rights are the radio broadcasting, motion picture, juke box and hotel interests. Leaving out hotel and restaurant businesses, the mere yearly volume of receipts from the business of the principal Canadian industries which depend upon the use of performing rights is not less than $90,000,000. By contrast, it is safe to say that the aggregate of the yearly payments for performing rights made by all those interests does not much, if at all, exceed $380,000, more than three-fourths of which comes from radio broadcasting, and radio broadcasting is responsible for less than one-fifth of the volume of estimated receipts. These figures are approximate only. While the books of performing right societies are open to the world, the most vigilant jealousy has been exhibited whenever any examination into the volume of turnover or profits of the users of copyright has been sought by the performing right owners.

[1] (1947), 25 Can. Bar Rev. 967.

If Mr. Rogers' proposals became law, very substantial profits would be made by the industries just referred to at the expense of performing right owners, by eliminating payments to them which the law now permits them to demand.

It is, therefore, important to consider the basic reasons for copyright and the importance of some of its elements. Most of all, it is desirable to appreciate the significance of performing rights. This paper frankly is written on the assumption that the basic conceptions of the Berne and Rome Conventions are correct and that progress in civilization demands recognition of the unqualified property right of authorship.

The essential thing which must be borne in mind in respect of copyright is that every man owns the things he has created until, by his own act, he has disposed of those things to someone else. That is the basis on which civilized life has proceeded. It is the negation of communism. Because the machinery for the protection of that ownership was defective, the countries that have subscribed to the Berne and Rome Conventions have attempted to prescribe a code of understandings as to what constitutes the property right and how it will be enforced.

It is to be noted that the property in what is covered by the copyright law relates to the form of expression. There cannot be any copyright of an idea. There is no monopoly in forms of expression. There can only be copyright in what the individual has created. There is nothing to prevent independent creation of the same form by any other person. In other words, the rights of copyright are exclusive only in the sense that no person may without permission appropriate what someone else has created. Unlike the exclusive rights that are conferred by patents of invention for mechanical things and processes, the existence of copyright in one author or creator does not prevent the independent creation and enjoyment of a similar thing by someone else. The sole restriction is that that someone else may not be a plagiarist without suffering the consequences. No matter how tawdry a painting may be, nor how dull a musical work, it belongs to the person who made it. His only means of ensuring himself a reward is that his exclusive right to the reproduction, by duplicating or copying, or performing in public, shall be preserved to him and to those who receive a licence from him.

Accordingly, it is quite irrelevant in any discussion of copyright law to distract attention from the central facts by suggesting, either that there is monopoly, or that there is an absence of merit in the thing created and subject to copyright. No doubt a

great deal of what is copyrighted in the world possesses very little merit. It has never, however, been considered respectable to deprive a man of his motor car because it was shabby, or to take away from him his house because it possessed few of the things that make houses attractive to other people. It is equally not a respectable thing to cry down the compositions of some struggling author and demand in the same breath the right to use them without compensating that author, if you like upon his own terms. The fact that he may ask too much for works of little merit is only an incident in the ordinary processes of life in respect of all sorts of goods and services. It may properly be left to take its own course. If too much is asked no one will wish to use the work. If more is paid than the judgment of persons well versed in the arts would justify, our belief in freedom of contract should lead us to conclude that it is only by the franchise of the purchaser's dollars that the economic merit of work can in the long run be assessed properly. It is quite true that fashions change with absurd facility. It is quite untrue to say that any person is hurt by that. The persons who pay exorbitant prices for unimportant and ephemeral works should be left to make their own mistakes and are not entitled to demand the wares of someone else for nothing, merely because they want them. The state only interferes in such processes because pressure groups demand special favours for themselves.

It is necessary to bear these fundamental principles in mind in approaching the proposals made by Mr. Rogers. No compulsion exists upon any person to take anything that belongs to someone else. There is no lack of suitable material in the world of literature, sculpture, painting, musical composition or unmusical composition. Much of it is to be had without reference to any copyright.

On the face of it, if any person wishes to use a work created by someone else, that work possesses a value to him. It may be that the only value of the composition is that, because it has been done, no one else needs to put in the labour of doing it. If it be only an arrangement of some original work in the public domain, labour has been saved for any one else who uses the arrangement. He should never be permitted to make use of someone else's efforts without proper reward. The fact that it may be inconvenient to settle the amount of the reward and that what is claimed may seem to many people to be beyond the merit of the work concerned, should in strict logic never be a matter of interference by other persons or by the state. It may very well be that the state should refrain from making its legal processes

available for the enforcement of claims of an unreasonable amount. That, however, is in the ordinary course of things what every court of law does when it assesses damages. It is concerned to find out what is the commercial value of the loss suffered by the person whose property is taken without authority.

There is, therefore, a very large element of specious argument in protesting against the assertion of property right in an original composition, no matter what may be its intrinsic merit. The word "original" has indeed received a somewhat narrower interpretation in the courts than I have suggested is proper. It has been held to refer to works possessing some independent merit. There is a grave danger in insisting upon independent merit, beyond a very limited degree at the utmost, which might be defined as being that degree where doubt existed as to whether some work had or had not been copied.

Mr. Rogers makes seven somewhat involved and overlapping proposals as to modification in existing copyright law. They fall into three groups, which may be classified as follows:

1. *Recommendations that have to do with the origin of copyright by creation of works, with or without publication.* The substance of these is that publication ought not to be possible without loss of rights, unless further formal requirements are satisfied, and authors in non-union countries should receive no protection by first publication in a union country. Publication should not in any event be the basis of copyright, once it has taken place (Nos. 1, 2, 3 and 4). Some lip service is paid to the possibility of having automatic copyright in unpublished works, but published works should be denied copyright if there is not registration.

2. *Recommendations for stringent registration requirements, the virtue of which will be that non-compliance will destroy the copyright owner's property.* The old system of registering a claim to copyright, which used to be in force in Canada and was abandoned because it was unwieldy, should in effect be re-introduced and a complete chain of title must be open for inspection (No. 1). All assignments must be registered (No. 5).

3. *Recommendations for a drastic cutting down of the extent of copyright.* Its lifetime "should be materially shortened" (No. 1). Existing copyright should be cut down to whatever period is fixed for the new copyright, regardless of vested rights (No. 2). There should be a definite starting point, namely, registration, which must take effect within a short

period after first publication (No. 1). The property right is to be reduced so as to enable public performance without payment wherever, in the elusive and tricky business of litigation, it could be said to be not "for profit" (No. 6). Copyright should be restricted so that mere arrangements will not be protected (No. 7).

It will be noted that not one of the foregoing recommendations is designed to protect the creator of works. They are all calculated to enable persons to make use of the ideas of creators of works for their own profit or advantage.

Certain subsidiary criticisms are made by Mr. Rogers of the Canadian copyright law:

1. It is desired to get rid of "public performing right by means of" records, whatever that ambiguous expression means. The juke box industry is reputed to take in something like $10,000,000 a year in Canada from automatic coin music machines. It has hitherto been able to escape paying any performing right fees.

2. The statutory presumption in favour of the existence of copyright should be abolished. It will not, therefore, be necessary for the defence in an infringement action to prove that a work is not original. The burden will be on the plaintiff who asserts that it is original. This would open up a tremendous field for debatable expert evidence, to say the least.

3. The provisions respecting registration are to be very considerably amplified. Consequently the clerical work, which in the end can only be useful if there is a demonstration of creation of the work, must be greatly magnified.

It will be observed that the further proposals outlined are an oblique attack on the basic conception of copyright. The fundamental principle, that one is not entitled to use what someone else has created without compensation, is ignored under the guise of the complaint that it is unreasonable to recognize rights beyond a limited period of time and without very severe conditions for the establishment of those rights.

The real answer lies in the basic reasons for the existence of copyright. If Mr. Rogers desires to abolish copyright, he should say so in plain terms, not in obscure ones designed to take the value out of copyright. He should establish that the people who really stand to gain by his proposals are the public, not the special interests who stand to make a profit by denying the value of the basic property they desire to use. It is not evident that the

public would gain. It is clear that the public does not pay more or less for radio broadcasting, because of the use of copyrighted material. By far the greatest part of the charges paid for the right to perform music comes out of the pockets of commercial sponsors. Performing right payments do not amount to more than one-tenth of the amount paid by those sponsors for commissions alone. It is likewise clear that the public has no right to expect its senses to be gratified without paying the authors whose creations gratify those senses.

Turning now to the specific point of Mr. Rogers' objections, as previously classified, we come first to the suggestion that mere publication in a union country ought not to be enough to protect any work, particularly if the author does not happen to be a national of the union country. This is to say in effect that, although the domestic law of union countries has recognized first publication in a union country, that domestic law is wrong in principle. It is wrong in principle, for the reason that people who are not citizens of the country have no right in what they have created because they are foreigners. Such a contention would not be admissible for a moment, if such nationals were to send their chattels into a union country. It would not be permissible if they sought to acquire other kinds of property in a union country. There is no basic reason for the suggestion, except that of national prejudice or the desire of some person in a union country to use the property of a non-national without compensation. It is not sound reasoning in a non-communist society.

With regard to the second class of suggestions, there is no reason for demanding that after publication anything else should be required to establish the rights of the author or his subsequent transferee. Here it is necessary to consider why registration should be required. It is clear that registration has nothing to do with the creation of the work. It has only to do with whether a person who seeks to use an original work should be protected from a claim, the existence of which he could not otherwise know. There is a reason for making copyright rest without further formality after publication. So far as works of graphic art and of literature are concerned, there is usually no difficulty in identifying the work. The artist's name will be upon the picture or sculpture. The author's name will be upon every published book. Mr. Rogers' objections and suggestions are not directed at literary and artistic works. They are aimed at musical works.

Now no musical work ever reaches the public, if there is any copyright attached to it, without the person who wishes to use it

knowing all he requires to know as to the identity of the composer or the publisher through whom it first becomes known. The only question that may arise in respect of a performing right, or a right of reproduction of the work by printing, is how the permission of the owner of the copyright can be obtained conveniently.

The subsidiary question as to whether or not there is originality, and whether or not the person to whom the composition is attributed is in fact the originator of it, is a question that could never be settled by registration. It must necessarily be a matter of fact on which any person who chooses to deny authorship will have to take his chances of establishing the correctness of his denial of authorship. In that respect no registration can be effective. The only possible, proper test is judicial decision. There are very plain and obvious reasons why no preliminary scrutiny of compositions tendered for registration could ever be satisfactory as an adjudication upon whether or not the composer had created an original work. This will always be a question that must be left to the courts to determine, if the parties cannot agree.

The mechanical difficulty of obtaining a licence to perform a work the title to which is not registered is very much exaggerated. Well-known works are easily identified. For the most part they are under administration by one or other of the performing right owners. In Canada the great bulk of the music performed in public on the air, and very much of the music performed in concerts, is the subject of copyright. Recent tests conducted by the Canadian Broadcasting Corporation and Canadian Association of Broadcasters, and analysed by experts on the staff of Composers, Authors and Publishers Association of Canada, Limited, and the Canadian Broadcasting Corporation, indicated that not less than about 60% of all the broadcasting time of certain Canadian Broadcasting Corporation stations was taken up in the performance of music. Of the music performed and analysed at least 75% was covered by performing rights held by Composers, Authors and Publishers Association of Canada, Limited, a maximum of 3⅓% was owned by Broadcast Music Incorporated and other private owners, and not over 21% of the balance of that music might be in the public domain. The precise percentages were not definitely established because the test memoranda were not adequately prepared to enable determination of the question.

The total number of musical works claimed to be in the repertoire of the Composers, Authors and Publishers Association of Canada, Limited, runs into hundreds of thousands. Directly or indirectly it represents some sixty thousand composer con-

stituents. It is obvious that registration would impose an enormous clerical burden upon the copyright office. If the indexing were not done with most elaborate and expensive attention to detail, the index would be so unwieldy as to be quite useless. It would at best be a costly thing to search.

So far as unprinted music existing only in the form of scores is concerned, no real difficulty exists. The name and address of the composer or arranger in whom copyright exists will already be well-known to the person who seeks to use the performing right. It cannot escape being so, if the manuscript is available. It is idle to say that any such person should be entitled to disregard the rights of the owner merely because the owner has not made a registration in a central office.

These very objections have been recognized repeatedly by British and Australian Parliamentary Committees (Great Britain, 1909, p. 12; Report of Australian Royal Commission, 1933, p. 13; Australian Parliamentary Standing Committee, 1943, p. 13). Indeed an Australian committee unearthed the interesting fact that, although 231,000 index cards were filed in the Copyright Office in Canada, an average of only one music user each year had made a search. The advantage, therefore, of any system of registration is illusory.

Apart from that, it was well observed by the British Committee of 1909 that "there seems to be no reason why owners of copyright should be required to comply with formalities which are not imposed in most other cases of ownership of personal property. Anyone who copies the products of an Author's genius ought to be taken to be doing so at his own risk."

The obvious thing about the proposal is that technical slips in registration would be made use of by the people who sought to use compositions as a means of escape from recognition of the legal right of the true owner. Such a means of escape would be a mere trick or device and unworthy of serious consideration.

It will be seen that, when the smoke screen of technical difficulty is penetrated, the real substance of the recommendation that individual works be recorded under penalty of loss of rights for failure to register is a desire upon the part of people who have no meritorious claim to the property of someone else to use that property for their own advantage without compensation.

As to the several recommendations comprised in the third class of Mr. Rogers' suggestions, it is to be noted, firstly, that cutting down the period for which copyright exists is a matter on which international agreement should be reached. Since copyright

is not in the strictest sense a monopoly and the rights conferred by copyright law are merely rights of property, there is no reason why there should ever be any limitation on the period for which copyright exists, except the reason of convenience. Making a perpetual title to copyright would involve an impossible burden upon persons who desired to obtain the right to reproduce, publish or perform, if the remote heirs of the original creator of the work had to be traced and placated by payment. Granted that fifty years after death is the maximum period in which, practically speaking, returns from reproduction of works should be contemplated, there is no apparent reason why fifty years imposes an undue burden upon the people who desire to publish or perform. It has been uniformly accepted by union countries since 1886. Almost invariably, when it comes to performing rights, the important works are in the repertoire of a performing right society or other corporate owner or in the catalogue of some well-known publisher. There is consequently no difficulty in obtaining a licence on proper terms.

To cut down the period of copyright in existing works must necessarily involve destroying property that has been acquired on the faith of existing law. For the most part copyrights are assigned to publishers on terms that produce quite handsome rewards for creators of works enjoying a substantial public demand. The publishers on their part undertake heavy risks in capital investment. The scandals of the 19th century in respect of the pirating of editions of works of well-known British and American writers by some German publishers are well enough known. The reason for giving the extended lifetime to copyright in the Berne and Rome Conventions (Article 7) was precisely to avoid the continuance of the possibility of those scandals.

Mr. Rogers' proposal looks to a breach of faith with people who have already invested money in existing rights. It is no doubt a convenient proposal for those who desire to use the results of the efforts of creators of copyrighted works. It is not justifiable on grounds of moral or existing legal right.

One of the most insidious ideas in the realm of copyright law is the suggestion that public performances should not be the subject of licence, if the performance is not for profit. Many efforts have been made to amend the Canadian Copyright Act so as to allow important uses of music at exhibitions and fairs without the necessity of a licence. It is so easy to suggest that charities should not have to pay for the effort and skill that has gone into providing the basic material used in their efforts.

There is no visible exertion on the part of the composer or author. Why should not governments be able to use the property of authors for any purpose which seems good to them without compensation?

It is necessary to insist upon the basic conception of copyright as a right of property and to accustom oneself to a clear understanding of the fact that property in a composition is just as much a valid claim upon the pocket-book of anyone who wishes to use it as is the time of the musicians who play the music. The buns and coffee that are distributed at church socials, and the right insisted upon by exhibitions and fairs to demand an entrance fee from people who inspect the exhibits on display (which are the basic reasons of the assembly) are no more property than is the performing right in the music they use. It is quite clear that music makes a contribution to every one of the gatherings where it is used. Resentment at the insistence on rights in the music used is the result of a distorted perspective. If the music is unmeritorious, there is no need to use it. If it is good, it is scarcely consistent with clear thinking to demand that one contributor alone, of all the persons whose efforts make for success in such an enterprise, should be denied payment, when no rational person thinks for a moment of demanding that the merchants who supply the goods used should be required by law to provide those goods without charge, or that the musicians who perform should be compelled to give their services for nothing. Any attempt so to legislate would at once produce indignant protests.

Apart from that, the ingenuity of the draftsman has not yet succeeded in excluding all claims for performing right fees merely by references to the absence of profit. Very properly, the courts have pointed out that profit does not necessarily mean money in a bank account. It means advantage. There have been a number of law suits in Canada over successive attempts to gain immunity for public use of music, which have had no real merit at all. Those attempts have been almost uniformly unsuccessful.

It is the more remarkable that such attempts should be repeated, when it is borne in mind that, in Canada alone of the English-speaking countries belonging to the Copyright Union, there is a statutory body for the regulation of tariffs for performing right licences, which is charged with the duty of seeing that licences can be obtained at a fair price. Fees for such performances are prescribed by the Copyright Appeal Board only after full public notice and every opportunity to make proper representations as to amount. It is quite too much in the same

breath to demand regulation of prices by asking a respectable tribunal such as the Board to fix proper fees and then to turn around and say that no fee should be paid. That is to ask for protection in two conflicting and inconsistent directions. The very fact that fees are kept within reasonable bounds by legislative action is the best of answers to the demand that no fee should be paid.

Enough has already been said by way of illustrating the propriety of recognizing copyright in mere arrangements of music which is within the public domain. The existence of merit or want of merit in the arrangement is beside the point. So too, on strict theory, is the question of originality. It is enough in ordinary conceptions of property right that one should say: "You must pay me for my pound of butter if you want it. There are millions of similar pounds of butter in the world. This pound is mine. Either pay me or do without." An arrangement is a labour-saving device. It is worth something to the man who uses it, because it relieves him of the necessity of making an arrangement himself. On any conception of business it is proper to ask that payment be made for the arrangement, or that it be left alone.

The sole question that does justify some consideration in this regard, on basic theory, is the question whether the person who has made an arrangement should be able to prevent use of what appears to be the same idea by someone else who desires independently to create it. Admittedly there may be difficult questions of fact in determining whether a parallel arrangement is a plagiarism or an honest independent effort. The real problem is one of convenience. People should not be put unnecessarily to the expense of fighting law suits over debatable facts. It is, however, a matter of common knowledge that there is a wide group of relationships in civilized life in which, ideally speaking, there ought to be no law suit, but in which the mischief-making tendencies of human beings create law suits. Nobody suggests that claims for damages for negligence in the operation of a motor car should be abolished in all cases where there is no independent witness to establish which of two contending parties is correct in his version of the facts, or is or is not telling the truth. Yet, in substance, Mr. Rogers' recommendation is an attempt to get a statutory shortcut, which will prevent the truth from being told and deprive all men who have made arrangements of compensation for their work, because some men may succeed in supporting unmeritorious claims. This is to express want of confidence in the

processes of our civilized law. It is also to take away rights, because some rights may be abused.

In practice, there is very much less to this plausible suggestion than appears from its mere statement. There is a very definite limit to the sums that could be established as properly payable for the use of an arrangement. It may be that in respect of arrangements some specific definition of the damages recoverable for unauthorized use might be desirable, which a tribunal should be invited to consider in fixing the damages, and that the measure of those damages should be conditioned upon the degree of originality in the arrangement. It is submitted that, on basic principle, no more than this restriction should ever be contemplated.

A conference of copyright union countries is to be held this year at Brussels. No doubt we shall see the basic principles of the Berne and Rome Conventions affirmed again. It would be unfortunate if erroneous thinking on the fundamental principles involved undermined Canadian adherence to the Conventions.

TO THE INTERNATIONAL COURT OF JUSTICE — No. I

You are, gentlemen, the highest of all human tribunals. To you has been entrusted, by the consent of the nations, the duty of administering justice between them according to law. It is in order to fulfil this task that you have been chosen from and by all the United Nations, regardless of your nationality. Your court is their principal judicial organ. Your statute is an integral part of their charter, and that charter itself affirms that the United Nations are determined to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, and that one of its purposes is 'to bring about by peaceful means and in conformity with the principles of justice and international law the adjustment and settlement of international disputes'.

A court constituted on such a basis is rightly regarded as the custodian of the hopes and conscience of mankind; its sense of justice and fair play; its deep and almost instinctive belief that to each must be given his due. It is the supreme embodiment of law and justice in international life; it stands for the rule of law in the relations between states, without which civilization cannot endure. (From a statement made by Sir Hartley Shawcross, K.C., at The Hague, on February 26th, 1948, prior to the opening of proceedings in the Corfu Channel case)