

## COPYRIGHT IN CANADA.

### A STUDY OF LEGISLATION GOVERNING THE DURATION OF COPYRIGHT.<sup>1</sup>

Prior to determining the duration of the term of Copyright, the existence of Copyright must be ascertained according to—

- (a) the country of origin of the work;
- (b) the date and place of its first performance or publication, or of its simultaneous publication, or of the death of the author;
- (c) the legislation prevailing during the period of protection of the work.

It is, obviously, of prime importance to establish whether any particular work actually is or has ever been protected in Canada, on account of its country of origin, the date and place of first or simultaneous publication or of first performance, the date of death of the author, and the legislation prevailing at the time.

For the purpose of discovering the term of copyright in any particular work which may be or may have been protected in Canada, it is necessary in the first place to ascertain whether such work is entitled to protection in Canada since 1st of January, 1924 (the date of the coming into force of the new Canadian legislation of 1921) or was protected in Canada at that date, and consequently benefitted by the new Canadian legislation which fixes the term of copyright at 50 years following the death of the author; or whether the work had then fallen into the public domain, in Canada, through the operation of the British or Canadian enactments previously in force in Canada and under which the term of copyright was for a shorter period.

For such purpose it is also necessary to consider the following facts:—

- (a) Before 1924, Canadian works were protected, in Canada, under enactments of the Dominion Parliament which have been consolidated into chapter 70 of the Revised Statutes of 1906; in foreign countries, Canadian works were protected under the Imperial

<sup>1</sup> Cf. *Le Droit d'Auteur*, organ of the International Bureau of Berne (Switzerland), No. of 15th October, 1908: "*Législation, traités et durée des délais de protection en matière de propriété littéraire et artistique, dans tous les pays*," No. of 15th February, 1910: "*Commentaire de l'article 7 de la Convention Révisée*," No. of 15th January, 1916: "*Coup d'œil sur l'ensemble de la législation de l'empire britannique en matière de droit d'auteur*," No. of 15th September, 1925, and following issues: "*Les délais de protection dans les diverses législations unionistes*."

Statutes of 1842, 1844 and 1886; in Unionist countries, by the original Convention of Berne. Since 1924, Canadian works are protected, in Canada, under the new legislation of 1921, as put into force on the 1st January, 1924; in Great Britain, by the arrangement entered into, in December, 1923, between Canada and Great Britain<sup>2</sup>; in Unionist countries by the revised Convention of Berne of 1908; in non-Unionist countries, by treaties entered into between Canada and these non-Unionist countries; in the United States of America, more particularly by the Canadian-American Convention of December 1923<sup>3</sup>;

(b) Before 1924, British works were protected, in Canada, under British legislation. Since 1924, they are covered by the special arrangement entered into between the Canadian Government and the British authorities, in December 1923;

(c) Before 1886, foreign works, the authors whereof were subjects or citizens of countries which had entered into copyright agreements with Great Britain, were protected, in Canada, under the British Statutes of 1842 and 1844. From 1886 to 1924, foreign works, the authors whereof were subjects or citizens of countries adhering to the Convention of Berne, were protected in Canada under Imperial Statute of 1886 (chapter 33, 49-50 Victoria) which made the original Convention of Berne operative in every British Dominion and Possession. Since 1924, foreign Unionist works are protected, in Canada, under the revised Convention of Berne of 1908, to which Canada has directly adhered by her new legislation of 1921, put into force on 1st January 1924<sup>4</sup>;

(d) Before 1924, foreign non-Unionist works (and especially works the authors of which were subjects or citizens of the United States) were protected, in Canada, under treaties entered into between Great Britain and such of those non-Unionist countries of which the authors were subjects or citizens. Such works benefitted thus, in Canada, by the protection of the British Statutes. Since 1924, foreign non-Unionist works are protected, in Canada, by virtue of such special regulations as enacted by treaties or conventions entered into between Canada and the non-Unionist countries of which the authors are subjects or citizens. More particularly, works of authors who are subjects or citizens of the United States are, since 1924, pro-

<sup>2</sup> The Canadian-British Arrangement of December, 1923, is referred to hereinafter.

<sup>3</sup> The Canadian-American Convention of December, 1923, is referred to hereinafter.

<sup>4</sup> The list of countries adherent to the revised Convention of Berne is given in the Schedule annexed hereto.

tected in Canada under the Canadian-American Convention of 1923.<sup>5</sup>

#### INTERPRETATION.

"Literary and artistic works" are defined in section 2 of chapter 45 of the British Statute of 1842, in article 4 of the original Convention of Berne (1886), in article 2 of the revised Convention (1908), and further in section 2 of the Canadian Copyright Act 1921;

"First performance," "first publication" and "published works" are defined in section 20 of the aforesaid British Statute, in article 2 of the original Convention, in article 4 of the revised Convention, and further in subsection 2 of section 3 of the Canadian Act 1921;

"Country of origin" is defined in article 2 of the original Convention, and in section 4 of the revised Convention;

"Work published simultaneously" means a work *published* in any one country and then *published* in another country before the expiration of a prescribed delay (par. 3 and 4 of art. 2 of the original Convention; par. 2 of art. 4 of the revised Convention; subsec. 4 of sec. 3 of the Canadian Act 1921. Cf. art. 6 of the revised Convention, and subsec. 1 of sec. 4 of the Canadian Act 1921).

So long as the British Statutes were operative in Canada (i.e. until 1st of January 1924), the *representation* or *performance* of any dramatic or musical work was equivalent to the *publication* of a book (sec. 20 of chap. 45 of the British Statute 1842). Since 1924, the term "publication" does not include the *performance* or *exhibition* in public of a work, nor the *printing*, *editing* or *material manufacturing* of the copies of a work, but solely the issue of copies of the work to the public (par. 4 of art. 4 of the revised Convention; subsec. 2 of sec. 3 of the Canadian Act 1921);

The "delay," or period of limitation within which a work shall be deemed to be published simultaneously in two countries, is determined by subsection 4 of section 3 of the Canadian Act 1921.

The foregoing statutory definitions apply subject to the date and place of first performance or first publication of the work.

#### INTERNATIONAL POSITION PREVIOUS TO THE CONVENTION OF 1886.

##### OPERATION OF THE BRITISH STATUTES.

Prior to the original Convention of Berne (article 2 of which limits the period of protection), the term of copyright in the British

<sup>5</sup> Cf. Pamphlet published by the International Bureau of the Union, at Berne, in 1909, entitled "Convention de Berne révisée en 1908, mise en regard de la Convention de Berne de 1886 et des Actes de Paris de 1896, et suivie de Tableaux résumant la Législation, les Traités et la Durée des délais de protection en matière de Propriété littéraire et artistique dans tous les pays."

Empire was determined by section 3 of chapter 45 of the British Statutes 5-6 Victoria 1842, as follows:—

“3. And be it enacted: That the Copyright in every Book which shall, after the passing of this Act be published in the Lifetime of its Author shall endure for the natural life of such Author, and for the further term of Seven Years, commencing at the Time of his Death, and shall be the Property of such Author and his Assign; Provided always, that if the said Term of Seven Years shall expire before the End of Forty-Two Years from the first Publication of such Book, the Copyright shall in that case endure for such Period of Forty-Two Years; and that the Copyright in every Book which shall be published after the Death of its Author shall endure for the Term of Forty-Two Years from the first Publication thereof, and shall be the property of the Proprietor of the Author's Manuscript from which such Book shall be first published, and his Assign.”

The expressions “book” and “dramatic piece” were defined by section 2 of the above chapter 45, as follows:

“In the construction of this Act, the word “Book” shall be construed to mean and include every Volume, Part or Division of a Volume, Pamphlet, Sheet of Letter-press, Sheet of Music, Map, Chart, or Plan separately published; the words “Dramatic Piece” shall be construed to mean and include every Tragedy, Comedy, Play, Opera, Farce, or other scenic, musical or dramatic Entertainment.”

Section 20 of the same chapter 45 extended the protection of that general British legislation to musical works, and enacted that the “first performance” of a dramatic or musical work was equivalent to the “first publication” of a book, as follows:

“Whereas an Act was passed in the Third Year of The Reign of His late Majesty, to amend the Law relating to Dramatic Literary Property, and it is expedient to extend the Term of the sole Liberty of representing Dramatic Pieces given by that Act to the full Time by this Act provided for the Continuance of Copyright; And Whereas it is expedient to extend to Musical Compositions the Benefits of that Act, and also of this Act; be it therefore enacted, That the Provisions of the said Act of His late Majesty, and of this Act, shall apply to Musical Compositions, and that the sole Liberty of representing or performing, or causing or permitting to be represented or performed, any Dramatic Piece or Musical Composition, shall endure and be the Property of the Author and his Assigns, for the Term in this Act provided for the Duration of Copyright in

Books . . . save and except that the first Representation or Performance of any Dramatic Piece or Musical Composition shall be deemed equivalent, in the Construction of this Act, to the first Publication of any Book.”

The period of protection so determined by the Imperial Statute of 1842 constitutes the pivot on which, up to 1924, have turned the various enactments granting to British and foreign authors the full enjoyment of their rights in Canada. In order to simplify as much as possible the study of this complicated question, we shall largely deal with this principal “delay” of the protection granted as regards literary, dramatic or musical works which are more commonly dealt with. It is important, however, to note that the British Statutes fixed divers periods for works of different kinds. Undoubtedly the above-enacted principal delay of seven years after the death of the author, or the minimum of 42 years after first publication, applied to *written works*: (i.e., a book, part or division of a volume, pamphlet, sheet of letter-press, sheet of music, map, chart or plan), and it equally applied to unpublished *dramatic or musical works*. Protection is more uncertain where the dramatic or musical work has been printed or published prior to its first performance. The copyright in *sculpture* subsisted for 14 years from the date of the creation or first publication, with an extension of a further 14 years if the author was still living at the end of that first term and if he had retained his right. Copyright in *paintings, drawings and photographs* subsisted for a period of 7 years after the death of the author. Copyright in *engravings* subsisted for 42 years from the date of first publication.<sup>6</sup>

Chapter 45 of the Imperial Statutes of 1842 applied (section 2) to all British Dominions, Possessions and Colonies.<sup>7</sup> Its operations were extended under the International Statutes adopted by Great Britain in 1844 and 1886, which granted copyright protection to all works published in the British Possessions or in other countries to which Imperial Orders-in-Council granted the benefits of those statutes concerning copyright.

The new British Copyright Act 1911 (chap. 46, 1 & 2 George V), which was substituted for the previous British enactments, contains for the first time provisions concerning mechanical reproductions of musical works by means of *phonographic* records, perforated rolls or

<sup>6</sup> Cf. *Digest of the Law of Copyright*, by Sir James Stephen, Appendix to the Report of the Copyright Commission, 1878, Imperial Blue Books C. 2036.

<sup>7</sup> Cf. *T. E. Scrutton's Law of Copyright*, 4th Edition, London, 1903, Chapter IX: “Rights of foreign authors in British dominions,” pp. 214 & sq. *Copinger's Law of Copyright*, 5th Edition, London, 1915, Chap. 111. “British Works entitled to copyright in Canada,” p. 342.

other contrivances. This British Act did not apply to Canada, and, therefore, its provisions relating to such mechanical reproductions are not in force in this Dominion.

Although *radiographic* performances or reproductions are not specifically covered by the British Copyright Act of 1911, the decisions of the Courts more and more recognize, in England as well as in other countries of Europe and even in the United States, that the fundamental principle of copyright, as defined by law, protects literary and musical works against radiographic utilization.<sup>8</sup>

#### THE CONVENTION OF 1886.

The original Convention of Berne became effective in Canada under chapter 33 of the Imperial Statutes, Victoria 49-50, 1886. It remained in force in Canada until 1st January 1924, when (by application of the new Canadian Copyright Act of 1921) the *revised* Convention of Berne was substituted therefor. Consequently, as far back as 1886, the Convention of Berne afforded protection to Unionist authors in Canada, who were expressly exempted from the obligation, put upon Canadian authors, of fulfilling the registration formalities as prescribed in the Canadian Act. The enjoyment of such Unionist protection was subject only to the fulfillment of the conditions and formalities prescribed by the legislation of the country of origin of the work; such protection could not exceed, in the other countries of the Union, the period of protection granted by the country of origin. The country where the first publication was made was considered as the country of origin of the work, or, if such first publication were *simultaneous* in many countries of the Union, the country which granted the shortest term of copyright was considered as the country of origin. For the *unpublished works*, the country to which the author belonged was considered to be the country of origin. (Article 2 of the Convention of 1886, as modified by the Additional Act of 1896.)

<sup>8</sup>See Jurisprudence in Appendix to Canadian Blue Book "Special Committee Bill No. 2 *re* Copyright Act, February-June Session, 1925." Page 265 and sq. Later on, October 12th, 1925, the United States Supreme Court (Docket 527) has confirmed the jurisprudence recognizing the validity of copyright against performances by radio apparatus: *In re American Automobile Accessories Company* (*Crossley Radio Corporation*), petitioner v. *Jerome H. Remick & Company*, respondent.

*Cf.* *Le Droit d'Auteur*, No. of 15th October 1924: "Droit d'auteur et téléphonie sans fil;" No. of 15th February, 1925: "Droit d'auteur et radiophonie;" No. of 15th February 1926: "Notion juridique de l'émission radiophonique;" No. of 15th April 1926: "Œuvre dramatico-musicale—Radiophonie;" No. of 15th July 1926: "Haut-parleur propageant des œuvres protégées."

Great Britain, which had, for all her Possessions, adhered to the original Convention of Berne, had also adhered to the Additional Act of 4th May 1896 amending several articles of the Convention of 1886 and various numbers of the Closing Protocol; but did not ratify the Declaration of 4th May 1896 for the interpretation of certain provisions of the Convention.<sup>9</sup>

The Interpretative Declaration of 4th May 1896 stipulated that the expression "published works" shall mean the works put into circulation in any country of the Union, and that, consequently, the performance of a dramatic or dramatico-musical work, or the execution of a work of art, does not constitute a *publication* in the sense of the above-cited Acts.

In respect of works, the authors of which were benefitting by the Imperial Statutes of 1842, 1844 and 1911, or were invoking the provisions of the original Convention of Berne to secure the protection of their copyright in Canada, the "first performance" in public of a dramatic or musical work was therefore equivalent to the "first publication" of a book, according to the interpretative proviso of section 20 of Imperial Statute of 1842 which applied to Canada until 1st January 1924.

#### CANADIAN LEGISLATION OF 1875.

From the domestic or national point of view, copyright was established in Canada under the Act respecting Copyright (chap. 70 of Revised Statutes of Canada 1906), which is a consolidation of the original legislation of 1875. Part II of chapter 70 of the Revised Statutes of 1906 was composed of ten sections numbered 45-54, which were to be enforced upon proclamation by the Governor-General. As such proclamation was never issued, Part II of chapter 70 was consequently not put into effect.

Under section 4 of chapter 70 of the Revised Statutes of 1906, the term of copyright ran for 28 years from registering of such copyright with the formalities prescribed in the Canadian Act; and, in special cases provided for by section 18, that period could be extended for a further term of 14 years subject to a second registration. However, section 5 stipulated: "In no case shall the said sole and exclusive right in Canada continue to exist after it has expired elsewhere."

<sup>9</sup> For the text and ratification of the Additional Act and of the Interpretative Declaration of 1896, see *Le Droit d'Auteur* (Berne) Nos. of 15th June 1896 and 15th October 1897.

On 1st January 1924, the Copyright Act 1921 (chap. 24, 11-12 George V) was put into force under the provisions of the Copyright Amendment Act 1923 (chap 10, 13-14 George V).

Under section 5 of the Canadian Act of 1921 "the term for which copyright shall exist shall, except as otherwise expressly provided for by this Act, be the life of the author and a period of 50 years after his death."

We shall, later on, more fully consider the working of the new Canadian legislation of 1921 and of the revised Convention as regards the term of copyright, in Canada, since 1924.

An anomaly has arisen which it is important to notice here in order to explain how a foreign work happens to have been protected in Canada for a longer term than a Canadian work:

The Canadian Act in force until 1924 (chap. 70 of the Revised Statutes of 1906) enacted, under section 4, that copyright in Canada shall subsist for a term of 28 years from the registration of the work and, under section 19, provided for an extension of a further term of 14 years under specific conditions. *At the same time*, Imperial Statutes of 1842, 1844 and 1886 gave the works of foreign authors protection in all the Dominions and Possessions of His British Majesty, for a term of 42 years from the publication of the work, or 7 years after the death of the author, whichever period is the longest. Moreover, under section 4(1) of the Imperial Statute of 1886, foreign authors were generally exempted from fulfilling the registration formalities prescribed by the British or Colonial legislation for their respective citizens. The British Parliament of 1886 seems to have considered as sufficient the provision of article 2 of the Convention of Berne (1886), which was still making the enjoyment of the copyright subject to the fulfillment of the conditions and formalities prescribed by the country of origin of the work.

Consequently, as long as the Imperial Statutes remained in force in Canada (i.e., until 1st January 1924), the term and even the modalities of the protection granted to foreign works were determined, for Canada, not by Canadian legislation, but by Imperial Statutes. The foreign author undoubtedly had the power or privilege of producing, printing and publishing his work in Canada, and registering the same in Canada, and of putting it under the protection of the Canadian Act which granted a term of protection of 28 years; but it was evidently of more advantage to him to disregard altogether the Canadian legislation and claim the protection of the British Statutes which, without his having to leave his own



country, actually assured him of a fuller and more uniform protection throughout the whole British Empire.

It so happened that foreign works, under the provisions of the Imperial Statutes, were protected in Canada for a longer period than Canadian works which were limited to the then restricted term set forth by the Canadian Act.

Nevertheless, article 2 of the Convention of Berne (1886) applied concurrently. Paragraph 2 of that article 2 enacts that the enjoyment of the rights must not exceed, in the other countries of the Union, the term fixed in the country of origin of the work; and paragraph 3 of that article 2 enacts that, in case of works published simultaneously in several countries of the Union, the country the law of which grants the shortest term of protection shall be considered to be the country of origin of the work. Despite these concurrent stipulations of the Convention of 1886, under which the period of protection for foreign works in Canada was apparently to be determined by the Canadian law in force for the time being (prior to 1924), the jurisprudence is unanimous in confirming that the British Statutes prevail over all. It thus recognizes that a foreign work was protected in Canada for such period as fixed by the Imperial Statute of 1842, and not for the term fixed by the Canadian legislation.

Nothing in the Imperial Statutes (paragraph 4 of section 8 of the Statute of 1886) prevented the passing, in a British Possession, of any Act or ordinance respecting copyright, within the limits of such Possession, of works first produced in that Possession. But the very text of that authorization, which the Statute of 1886 granted to this Dominion, limited the effect of such authority to works *first produced* in Canada, and thereby implicitly reserved for the Imperial Government the power of determining for the whole Empire the modalities and the term of the protection granted for British or foreign works.

The British North America Act conferred upon the Parliament of Canada the power to legislate in matter of copyright (sec. 91). Following upon the Imperial Conference held in London, in November 1926, our Dominion will no doubt exercise henceforward that power in its entirety. In fact, until 1911, International agreements affecting British Possessions and Colonies in matter of copyright were entered into by British authorities.

The British Copyright Act of 1911 confirmed the power so given to Canada to legislate in the matter. Moreover, it recognizes the competency of Canada to repeal British statutes, so far as oper-

ative in Canada, and also to adhere, through legislation of her own, to the Convention of Berne as revised in 1908. But, in order to effectuate her adherence to the revised Convention and to secure for her own nationals the rights conferred by the British Act of 1911, Canada was obliged to observe certain conditions in respect of British and Unionist authors, if not in respect of her own nationals.<sup>10</sup> For instance, the new Canadian Act of 1921 puts the Canadian authors under a system of compulsory licenses from the burden of which British and Unionist authors are exempt. By the intervention of Imperial Statutes, prior to 1924, British and Unionist authors were granted, in Canada, a wider protection than that granted by Canadian legislation to Canadian authors.

Jurisprudence leads us to believe that, inasmuch as the original Convention of Berne (1886) was put into effect in the British Possessions by virtue of an Imperial Statute and not by Colonial laws, it is the Imperial Statute of 1886 which prevailed in applying the International Convention of Berne to the British Possessions, that is to say to such of the Dominions as have not directly acceded for themselves. Canada, however, has directly adhered to the revised Convention of 1908 through her own legislation of 1921 which came into force in 1924. The precedence of the Imperial Statutes of 1842, 1844 and 1886 over Canadian legislation, prior to 1924, is confirmed by the jurisprudence quoted by Scrutton and by Copinger, as well as by the judgments more recently rendered in the lower courts and in appeal in the matters of *Mary v. Hubert* and of *Joubert v. G racimo*.<sup>11</sup>

From the peculiar point of view of the duration of Copyright in foreign works, the Federal representative of the Canadian Manufacturers, Mr. E. Blake Robertson, after a careful examination of the several Acts establishing the rights of Canadian or foreign authors, in Canada, has advised his principals that the term of protection granted to British and Unionist authors against the reproduction of their works in Canada, prior to 1924, has been effected by the Imperial Statute of 1842. He writes:

“A consideration of the terms of the Act of 1842 will show that works published before the 1st day of January 1882, the author of

<sup>10</sup> See sec. 25 and following of the British Act 1911. Cf. Statement of the Canadian Minister of Trade and Commerce (Hon. Mr. Robb, Debates of the House of Commons, 27 April 1923, page 2291).

<sup>11</sup> *Mary v. Hubert*: Superior Court of Montreal, Judge Fortin, Hearing of March 23rd 1906; King's Bench Court, Montreal, Hearing of June 28th 1906.

*Joubert v. G racimo*: Superior Court of Montreal, Judge Monet, Hearing of November 21st 1914; King's Bench Court, Montreal, Hearing of November 6th, 1916.

which died before the first day of January 1917, are on January 1st 1924 without copyright protection under the Imperial Copyright Act of 1842, and consequently will likewise be without protection under the Canadian Copyright Act 1921. Works published on or after January 1st, 1882, or works the authors of which died on or after January 1st 1917, if such works had copyright by virtue of the Imperial Copyright Act 1842, will have, on January 1st 1924, the copyright protection of the new Act, such protection continuing until 50 years after the death of the author."<sup>12</sup>

The working of the National enactments with the International agreements do not always afford, in practice, the enjoyment of that legal reciprocity which they purport in theory to establish. Such anomalies occur by chance or by design. We have just pointed out one of these anomalies concerning the term of protection which, under the laws in force prior to 1924, was more advantageous, in Canada, for a foreign author than for his Canadian confrère. In passing, we have also indicated the burden of the compulsory licenses which the Canadian legislation of 1921 forces upon its own subjects, while Canada is prevented from enforcing it against British or Unionist authors. We might indicate some other anomalous stipulations of this new Canadian legislation, especially those under which the registration of literary and artistic works is made almost indispensable and exceedingly expensive for the Canadian authors, while the other Unionist authors are absolutely exempt from any registration whatsoever under the revised Convention of Berne. We will see further on that the agreement entered into between Canada and the United States, under the Canadian legislation of 1921, has given ground to another anomaly which consists in guaranteeing to authors, who are subjects or citizens of the United States, for the protection of their works in Canada, more ample protection than that which is offered to Canadian authors for their works in the United States.

ADHESION OF CANADA TO THE REVISED CONVENTION OF BERNE;  
REPEAL OF BRITISH STATUTES IN CANADA.

The Imperial Statutes of 1842, 1844 and 1866 (with many others) were repealed under section 36 of the British Copyright Act of 1911 (chap. 46, 1-2 George V). Said section 36, however, contains the following reservation:

<sup>12</sup> *Copyright Handbook for Record and Roll Makers*, by E. Blake Robertson, Ottawa, 1924, page 7.

"Provided that this repeal shall not take effect in any part of His Majesty's Dominions until this Act comes into operation in that part."

The British Act of 1911 has not been put into operation in Canada, and, accordingly, the repeal enacted by section 36 has no effect in this part of His Majesty's Dominions. Canada had the option (secs. 25, 26 and 37 of the British Act of 1911) either to apply to herself the new British legislation, or to adopt for herself Canadian Copyright legislation. Canada has elected to legislate for herself. The new Canadian Act (sec. 47) has thus repealed, under its own authority, the Copyright Statutes of the United Kingdom so far as they were operative in Canada. However, section 47 of the Canadian Act contains a reservation providing that "this repeal shall not prejudicially affect any legal rights existing at the time of the repeal." On the other hand, section 44 of the Canadian Act had already provided that "no person shall be entitled to copyright or any similar right otherwise than under the Canadian Act, but nothing in this provision shall be construed as abrogating any right or jurisdiction to permit a breach of trust or confidence."

The Imperial Statutes of 1842, 1844 and 1886, therefore, remained in force in Canada until the 1st of January 1924 (the date of the putting into force of the new Canadian legislation of 1921, and of the repeal of British Statutes so far as they were operative in Canada, and of the effective adhesion of Canada to the revised Convention of Berne).

The new Canadian legislation is not retroactive, no more than is the Convention of Berne. That is to say that, prior to the 1st of January 1924, foreign works were protected, in Canada, either by virtue of the original Convention of Berne (article 2 of which enacted that the term of protection would not exceed, in other countries of the Union, the term granted in the country of origin of the work) or by virtue of the British Statute of 1842, section 3 of which granted these works a term of protection of seven years after the death of the author or of 42 years from the first publication of the work, whichever term was the longest.

#### OPERATION OF THE CANADIAN ACT OF 1921 AND OF THE REVISED CONVENTION.

As a consequence of the foregoing, if, on the 1st January 1924, a Canadian, British or foreign-Unionist work had fallen into the public domain, in Canada, by the authority of the above-mentioned

enactments, such work definitely remains in the public domain and cannot take advantage of the new Canadian legislation of 1921 which extends the term of protection. Article 18 of the revised Convention enacts: "If, through the expiration of the term of protection which was previously granted, the work had fallen into the public domain of the country where protection is claimed, that work shall not be protected anew in that country." If, on the contrary, the work was still protected in Canada on the date of 1st January 1924, by virtue of the same above-mentioned enactments, it automatically comes under the regime of the Canadian Act of 1921, section 5 of which enacts: "The term for which copyright shall subsist, shall, except otherwise expressly provided for by this Act, be the life of the author and a period of 50 years after his death." These exceptions, expressly provided for in the Canadian Act, affect the term of protection of copyright in photographs (section 7), in records, perforated rolls and other contrivances for mechanical reproductions (section 8), and in posthumous works (section 9).

*Mechanical reproductions* of musical works by means of phonographic records, perforated rolls or other contrivances, are protected in Canada only since 1st January 1924, owing to the lack of application in Canada of the British Statute of 1911 which, for the first time, recognized this special class of musical reproduction. The British Act authorizes such mechanical reproductions for *musical works* only. Although the Canadian legislation is deemed to be patterned on the British Statute of 1911, it authorizes such mechanical reproduction of musical works and of *literary works* as well.<sup>13</sup>

The new Canadian Act has adopted verbatim the definition of "copyright" as pronounced by the Imperial Parliament; and like the British Act, it contains no provision expressly covering *radiographic performances or reproductions*. But, as in Europe and in America jurisprudence has established that, in the absence of any specific statutory provision, the very definition of "copyright" is sufficient to afford protection for literary or musical works against radiographic utilization, one may assume that the definition of "copyright," the very same in the Canadian Act as in the British Statute of 1911, has also the same far-reaching effect, and that Canadian courts, when the case occurs, would give the same interpretation as already set forth.<sup>14</sup>

In respect to works the authors of which are subject or citizens of one of the countries of the Union, the protection claimed in Canada

<sup>13</sup> Section 18 of the Canadian Act of 1921

<sup>14</sup> Cf. Paragraph 2 of section 1 of the British Copyright Act of 1911, as compared with paragraph 1 of sec. 3 of the Canadian Copyright Act of 1921.

cannot exceed the term fixed by the country of origin (article 7 of the revised Convention); and for all purposes "publication" means, from now on, the issuing of copies for the public and does not include the performance in public of a dramatic or musical work, the exhibition in public of an artistic work, or the construction of an architectural work of art (subsection 2 of section 3 of the Canadian Act of 1921, and paragraph 4 of article 4 of the revised Convention).

#### WORKS OF NON-UNIONIST AUTHORS.

Prior to 1st January 1924, works the authors of which were subjects or citizens of non-Unionist countries were protected, in Canada, by virtue of special agreements entered into between these non-Unionist countries and Great Britain whose copyright Statutes were operative in Canada. On the other hand, protection was again granted, in Canada, to non-Unionist works the authors of which were in cases provided:

(a) under article 3 of the original Convention of 1886;

(b) under article 3 of the Additional Act of 4th May 1896 amending certain articles of the Convention of 1886, and under No. 4 of the Closing Protocol (as Great Britain has ratified, on September 9th, 1897, this Additional Act and this Protocol which were put into force on the 9th December 1897).

The term and scope of the protection granted to the above-mentioned non-Unionist authors were fixed: on the one hand, by the British Statute of 1842 and the subsequent British Statutes of 1844 and 1886; and, on the other hand, by the special agreements aforesaid and the above-mentioned provisions of the original Convention of Berne, of the Additional Act and of the Closing Protocol.

Since the 1st January 1924, authors who are subjects or citizens of non-Unionist countries are protected, in Canada, by virtue of the British Act of 1911, if such non-Unionist authors are nevertheless British subjects and, at the date of the making of the work, resided elsewhere than in Canada; or, if, not being British subjects, they resided in the parts of His Majesty's Dominions to which the British Act in 1911 extends<sup>15</sup>; or if the non-Unionist and non-British authors come within the provisions of article 6 of the revised Convention of Berne.

<sup>15</sup> Notice of the Duke of Devonshire, dated 6th December 1923, published in the *London Gazette* of 14th December 1923).

## AUTHORS BEING SUBJECTS OR CITIZENS OF THE UNITED STATES OF AMERICA.

Non-Unionist authors may be especially protected, in Canada, by virtue of particular agreements entered into between Canada and non-Unionist countries of which such authors are subjects or citizens.

The works of authors who are subjects or citizens of the United States of America (non-Unionist country) were, until 1st January 1924, protected in Canada under the various agreements entered into between Great Britain and the United States for the purpose of granting to works made in the United States (to the extent determined in these agreements) the protection of the British Statutes of 1842, 1844 and 1886. These British Statutes determined (in the whole Empire, and consequently in Canada prior to 1924) the term of copyright in the works originating in the United States.<sup>16</sup>

As the British Statutes were repealed as above mentioned, in so far as they were operative in Canada, a special agreement has been entered into between Canada and the United States (under paragraph 2 of section 4 of the Canadian Act of 1921) by virtue of which the authors, being subjects or citizens of the United States, are afforded the same protection as if the United States were a country to which the new Canadian legislation of 1921 extends.<sup>17</sup>

As a consequence, works originating in the United States, which, on the 1st January 1924, had not fallen into the public domain, in Canada, by the operation of the British Statutes in force until that date, benefitted by the new Canadian Act of 1921 and remained protected in Canada (except as otherwise expressly provided for) for a term of fifty years after the death of the author.

Under section 23 of the Copyright Law of the United States of America, the term of copyright in the United States shall be 28 years from the first publication of the work, and, under certain conditions, may be extended for an additional term of 28 years. The maximum term of copyright in the United States is thus for 56 years after the first publication of the work, whilst the protection granted, in Can-

<sup>16</sup> See Proclamations of the President of the United States of America entering into Copyright agreements with Great Britain, 1st July 1891, 9th April 1910, 1st January 1915, reported as an Appendix to the Copyright Law of the United States of America. Copyright Office Bulletin No. 14, Washington, D.C., 1923.

<sup>17</sup> Notice of the Canadian Minister of Trade and Commerce (Hon. Thomas A. Low), published in the *Canada Gazette*, 29th December 1923; and Proclamation of the President of the United States of America (Calvin Coolidge), No. 1682, dated 27th December 1923, reproduced in the *Report of the Commissioner of Patents for the fiscal year ended March 31st, 1924*, Blue Book published in Ottawa by Order of Parliament in 1924 (page 33).

ada, to authors being subjects or citizens of the United States, is the same as that enjoyed by the Canadian author: 50 years after his death.

Here an anomaly evidently occurs which is condemned under article 7 of the revised Convention. But works originating in the United States escape the provisions of the revised Convention if they are not simultaneously published for the first time in the United States *and* in one of the Unionist countries. Non-Unionist works the authors of which are subjects or citizens of the United States are thus enjoying, in Canada, a longer term of protection than in their country of origin, due to the fact that the Canadian Act of 1921 has no provision corresponding to the stipulation enacted in article 7 of the revised Convention. The Convention cannot apply but in respect of Unionist works.

On the other hand, under article 6 of the revised Convention, works the authors whereof are subjects or citizens of the United States which are for the first time published (or *simultaneously* published, according to article 4 of the revised Convention) in a Unionist country, are afforded *ipso facto*, in the other Unionist countries, the rights which the revised Convention affords to Unionist works. Thenceforth, the protection of such works, in Canada, is subject to article 7 of the revised Convention. That is to say that, by taking advantage of the revised Convention through the formality of a first publication or of a simultaneous publication in a Unionist country, these works, originating in the United States, automatically come under the restrictions of the Convention relative to the duration of copyright and, in such case, cannot be protected in Canada for a longer period than in the United States, which is the country of their origin.

LOUVIGNY DE MONTIGNY.

Ottawa.

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#### APPENDIX.

##### *Countries Adhering to the Union.*

The official list of countries adhering to the International Convention is annually published by the Bureau of the Union in *Le Droit d'Auteur*. On the 15th January 1926, *Le Droit d'Auteur* reported as follows the list of countries then adhering to the Union:

Germany .....	from the origin (5th Dec. 1887)
Austria .....	" " 1st October 1920.
Belgium .....	" " origin.



Brazil, United-States of .....	from the 9th February, 1922.
Bulgaria .....	" " 5th December 1921.
Denmark, with the Féroë Islands.....	" " 1st July 1903.
Dantzic (Free City of).....	" " 24th June, 1922.
Spain, with colonies .....	" " origin.
France, with Algeria and the Colonies, Countries under mandate: Syria and Liban.....	" " origin. 1st August 1924.
Great Britain .....	" " origin.
Colonies, possessions and certain countries under protectorate .....	" " origin and the 1st July 1912.
Countries under mandate: Palestine.....	" " 21st March 1924.
Greece .....	" " 9th November 1920.
Haiti .....	" " origin.
Hungary .....	" " 14th February, 1922.
Italy .....	" " origin.
Japan .....	" " 15th July 1899.
Liberia .....	" " 16th October 1908.
Luxemburg .....	" " 20th June, 1888.
Morocco (except the Spanish zone).....	" " 16th June 1917.
Monaco .....	" " 20th May 1889.
Norway .....	" " 13th April 1896.
Netherlands .....	" " 1st November 1912.
Dutch East Indies, Curaçao & Surinam.....	" " 1st April 1913.
Poland .....	" " 28th January 1920.
Portugal, with colonies .....	" " 29th March 1911.
Sweden .....	" " 1st August 1904.
Switzerland .....	" " origin.
Tchecoslovakia .....	" " 22nd February 1921.
Tunisia .....	" " origin.