

THE CANADIAN COPYRIGHT ACT.

Prior to the Imperial Conference of 1926 when Canada achieved a recognition of its right to complete legislative autonomy, it was customary to conform Canadian legislation to the British Statutes. In accordance with this practice the new Canadian Copyright Act was drafted, introduced, passed and assented to (4th of June, 1921) to become Chapter 24, 11-12 George V. The administration of the Copyright Act was then under the Minister of Trade and Commerce. Since December, 1928, it has been transferred to the Secretary of State.

This new Canadian Copyright legislation was submitted to Parliament as having been derived from the British Copyright Act of 1911 and this supposed derivation from the British Statutes constituted a peremptory answer to the protestations of Canadian authors who claimed that the new Act failed to give a fair deal in this Dominion to Unionist and to Canadian authors.

It is true that the main clauses of the Canadian Act of 1921 are derived almost verbatim from the British Copyright Act of 1911; yet a great number of clauses are of Canadian inspiration and drafting, and are, therefore, not to be found in any British legislation. On the other hand, many provisions of the British Copyright Act, 1911, which afford practical protection to authors and composers, failed to be incorporated into the new Canadian Copyright legislation; and, peculiarly enough, there were clauses of Canadian inspiration absolutely detrimental, if not fatal, to the particular interests of those for whose protection one would have naturally thought the Act had been instituted. They are Sections 13, 14 and 15 concerning Licenses, and Sections 28 to 40 (both inclusive) concerning Registration. Among the provisions of the British legislation which were not incorporated into the new Canadian Copyright Act, are those enacted by the *Musical Copyright Act of 1902*¹ and by the *Musical Copyright Act 1906*,² both of which were introduced in Great Britain to make operative the several provisions of the new British Copyright Act, 1911.

Amending legislation was adopted by the Canadian Parliament and assented to, (June 13th, 1923) to relieve Unionist authors from the operation of Sections 13, 14 and 15 concerning Licenses, for

¹ Imperial Statute, 2 Edward VII, Chapter 15.

² Imperial Statute, 6 Edward VII, Chapter 36.

such Sections were obviously too inconsistent with the International Convention of Berne, and could only apply to Canadian and non-Unionist authors—as they now apply only to them under the amending legislation of 1923.³ In spite of the unceasing complaints of Canadian authors, no other amendments were made to the Copyright Act 1921—notwithstanding the almost unanimous report of the Special Committee appointed by the House of Commons (February 1925) to consider and report upon Mr. Chevrier's Bill No. 2 of Session 1925, and which, after three months' inquiry, recommended the adoption of numerous amendments submitted on behalf of Canadian authors.⁴

Among other clauses of Canadian origination and drafting, inserted into the new Canadian Copyright Act of 1921, is Section 39 which, of itself, nullifies mostly all of the advantages that the new Canadian Copyright Act grants to Canadian authors, and more especially to Unionist authors.^{4a} Against the repealing, or even the amending, of that peculiar Section 39, industrial or mercantile interests submitted that it should not be repealed or amended before having been granted a fair trial. The effects of Section 39 were so far-reaching, and therefore so detrimental to the interests of the authors, that an action at law resulted from its operation, which finally reached the Judicial Committee of the Privy Council (in a case instituted in Toronto by *The Canadian Performing Right Society Limited v. The Famous Players Canadian Corporation Limited*) and the Lords of the Privy Council decided (1st February, 1929) that the Canadian Parliament having made registration (upon the production of duplicate originals of each assignment in the whole chain of title) an essential condition to the maintenance of any action in the case of an assignee, "arguments against such enactment ought to be addressed to the legislature and not to the tribunal of construction".

Prior to the passing of the new Canadian Copyright Act 1921,

³Chapter 10, 13-14 George V.

⁴See Parliament Blue Book "Special Committee, Bill No. 2 *re* Copyright Act—Proceedings of the Special Committee appointed to consider and report upon Bill No. 2—February-June Session 1925." This Committee was composed of Messrs. E. R. E. Chevrier (Sponsor of the Bill), A. F. Healy, H. C. Hocken, R. A. Hoey, W. Irvine, L. J. Ladner, A. J. Lewis, M. McKay, J. E. Prévost, W. G. Raymond (Chairman) and Fernand Rinfret. After having held seventeen meetings in the course of which twenty-seven witnesses were examined for evidence, the Special Committee (May 29, 1925) agreed to recommend to the approval of Parliament most of the numerous amendments required by Canadian Authors (Mr. Hocken dissenting).

^{4a}Section 39 of the Canadian Copyright Act 1921, which is analyzed in this study, is now Section 40 of Chapter 32, Revised Statutes of Canada, 1927.

the Bureau of International Convention (Berne), made a thorough study of the Bill then before the Canadian Parliament, and issued the following appreciation of the enactment contained in Clause 39:

If this enactment were applied literally to the assignees of Unionist authors, it would be tantamount in many cases to a real denial of justice, on account of the impossibility to fulfil such a requirement for literary and artistic works.⁵

As foreseen by the International Bureau of Berne, the Privy Council endorsed the decisions of the Canadian courts to the effect that tribunals were compelled to literally apply Section 39 of the Canadian Act to the complaining authors' assignees — and thus materialized the denial of justice also foreseen by the Bureau of the International Union.

Following the first judgment rendered in Toronto (7th March, 1927) in the above mentioned case of the Canadian Performing Right Society Limited, where Justice Rose interpreted Section 39 as debarring an assignee from maintaining any action under the Canadian Act "unless his and each prior grant has been registered," the Assistant-Secretary of State for Dominion Affairs, Lord Lovat, in a communication dated 26th July, 1927, to the Canadian Department of External Affairs, called the attention of the Canadian Government to the inconsistency of Section 39 of the Canadian Copyright Act of 1921.

Lord Lovat referred to Art. 2 of the Primitive Convention of Berne (1886) and quoted the Deliberations of the Conference of Berlin (1908) to point out that the true intent of the Berne Convention as revised at Berlin (1908), and as now in force in Canada, was to protect literary and artistic works without any registration formalities to be required from Unionist authors, *nor from their heirs, legal representatives or assignees*⁶

Subsequently to the above judgment of the Privy Council, Mr. L. J. Ladner put the question to the Government (House of Commons, February 22nd, 1929) whether it was the intention of the Government to correct by legislation the anomalous situation in

⁵ *Le Droit d'Auteur*, Berne, July 15th, 1921, page 75, third column.

⁶ On motion of Mr. Edgar Chevrier, an address was voted to His Excellency the Governor General (28th April, 1930) by the House of Commons, for a return of all papers, letters, despatches, telegrams and other documents exchanged, since March, 1927, to date, between the British authorities and the Canadian Government, relating to the Canadian Copyright Act and the International Convention of Berne for the Protection of Literary and Artistic Works.

At the date of the publication of this study, July, 1930, the return ordered by the House of Commons had not yet been made.

which Canada, a party to the Revised Convention of Berne, was placed by reason of the latest decision of the Privy Council. Honourable Fernand Rinfret (Secretary of State) answered Mr. Ladner that "all these matters are receiving the immediate attention of the Department."⁷

About three months later, the High Commissioner for Great Britain, at Ottawa, made representations to the Canadian Government on behalf of British authors and their legal assignees complaining against those registration formalities prescribed under Section 39 of the Canadian Copyright Act 1921, and asking for measures to release them of the prejudice which they were liable to suffer thereunder.

By Order in Council P.C. 991, passed the 11th of June, 1929, the Copyright Rules and Forms 1927 (concerning registration) made and prescribed by Order in Council P.C. 893, May 11th, 1927, were amended on the recommendation of the Secretary of State. Yet, registration with its formalities (as amended by Order in Council No. 991) remains compulsory for an assignee or a grantee; that assignee or grantee is still, under that Section, denied any right of recourse against the infringers of the work of which he has become the legal owner, unless his own assignment and each prior assignment of the same work has been duly registered "in the manner directed by this Act"—that is to say: by the production to the Copyright Office of duplicate originals of each assignment in the whole chain of title. For a Parliamentary enactment, such as is Section 39 of the Copyright Act of 1921, cannot be amended by an Order in Council.

Section 39 prescribes that, whenever any grant of an interest in a copyright, either by assignment or license, may be registered, such registration is to be made *in duplicate*, "upon production of both duplicates to the Copyright Office and payment of the prescribed fee." Notwithstanding the above mentioned Order in Council P.C. 991 of June 11th, 1929, the obligation still remains upon any assignee (legal representative, heir, publisher or Society representing the author) to register *in duplicate* his own assignment as well as each prior assignment of the same work—which statutory formality, in most cases, remains materially impossible to fulfil.

Interested authors, publishers, assignees, heirs, legal representatives and Societies representing authors and composers have unceasingly complained to the British authorities against the inconsistency

⁷ House of Commons Debates, Unrevised Edition, February 22nd, 1929, page 374.

of Section 39 of the Canadian Copyright Act of 1921, and urged due remedial measures to release them from the prejudicial effect of such enactment. By letter (6th January, 1930,) to the Secretary of the London Performing Right Society, the Assistant Controller of the Industrial Property Department of the British Board of Trade (through Mr. B. G. Crewe) informed the British interested parties that

A communication has been received from the Canadian Department of External Affairs, in which it is stated that it is the intention of the Secretary of State of Canada to propose to Parliament, at this coming session, an amendment to Section 40 of the Copyright Act, Revised Statutes of Canada, Chapter 32, 1927, so as to bring it into conformity with the terms of the Berne Copyright Convention.

In compliance with the above statement, on behalf of the Canadian Government, the Secretary of State (Honourable Fernand Rinfret) introduced a Bill No. 37 to the House of Commons, March 18th, 1930, "to amend the Copyright Act." Bill No. 37 was merely composed of two clauses, the first one to the effect of preserving the "moral right" of the author, as recognized by the International Convention revised in Rome (1928), and the second one to the effect of bringing the Canadian Copyright Act into conformity with Article 4 of the Revised Convention of Berne under which registration can in no case be made compulsory. That Bill No. 37 was to afford a minimum of satisfaction to authors; but it was not allowed to be taken into consideration before the hasty ending of the session; and the 16th Canadian Parliament was dissolved (May 30th, 1930) without any legislation having been adopted to remedy the situation.

Objection is taken to Section 39 of the Canadian Copyright Act 1921, as it is inconsistent with Article 4 of the Revised Convention of Berne, which enacts:

The enjoyment and the exercise of these rights shall not be subject to the performance of any formality.

In fact, the Revised Convention of Berne provides for the protection of the *work*, whoever its owner may be; and the British Copyright Act of 1911 (Section 6) affords all remedies to the OWNER of the copyright against infringers of his work, without in any way differentiating between an owner by assignment or an owner by authorship, nor without imposing any kind of formality upon an *owner by assignment* or assignee.

A proof, among others, that compulsory registration of an assigned work is inconsistent with the International Convention lies

in the second paragraph of Art. 15 of the Revised Berne Convention, which reads as follows:

For anonymous or pseudonymous works the publisher, whose name is indicated on the work, shall be entitled to protect the rights belonging to the author. He shall be, without other proof, deemed to be the legal representative of the anonymous or pseudonymous author.

It goes without saying (since the International Convention protects anonymous and pseudonymous works, and specifically considers the publisher whose name is indicated on the work, without other proof, the legal representative of the anonymous or pseudonymous author) that a country adherent to the International Convention cannot under law compel the publisher (who is the assignee) of such anonymous or pseudonymous works to register the contract which he has entered into with the author—as such registration would officially disclose the anonymous or pseudonymous author whose works are specifically protected under the Revised Berne Convention without the author being compelled to disclose his name nor to perform any other formality.

Copinger quotes jurisprudence to show that:

An assignment of copyright would no doubt operate (in the absence of contrary intention) to convey to the *assignee* all the rights which go to make up copyright.⁸

French jurisprudence constantly shows that the publishers, the heirs, legal representatives or other assignees of an author have, as well as the author himself, the right to claim against infringement of the work assigned to them, because they legally exercise the rights of the author, and also because infringement of the work assigned to them is a cause of prejudice to them.⁹

In most cases, as well as in general practice, an author or a composer assigns his work to a publisher to market it; and the publisher becomes an assignee falling under the operation of Section 39 of the Canadian Act of 1921. The Canadian Act, as shown above, makes registration an essential condition to the maintenance of any action in the case of such publisher. Moreover, the formalities of registration are as well impracticable (under Section 39 requiring the production *in duplicate* of the plaintiff's own assignment, *and also* the production *in duplicate* of each prior assignment of the same work) as they are repugnant to British and Unionist authors and assignees who are released from any such formalities under

⁸ Copinger's Law of Copyright, 5th edition, London 1915, page 128.

⁹ C. R. P. Le Paulle "*Les droits de l'auteur sur son œuvre*," Paris, 1927, page 344.

their national legislation as under the International Convention. The practical result of Section 39 is thus to deny protection for any literary or musical work as soon as the author has exercised his first statutory right which consists in assigning his work to a publisher organized to make it profitable to the author himself and to all other interested concerns.

The industrial parties who have caused this Section 39 to be inserted into the Canadian Copyright Act have alleged, to justify such enactment, that concerns interested in the use of literary or musical works ought to be afforded a legal opportunity to ascertain whether such works are actually protected by copyright; and that it is for such alleged purpose of facilitating the inquiries of industrial concerns that the assignees, if not the authors themselves, have been so compelled under the law to register in duplicate the assignments with which they have been vested, as well as every previous assignment (in duplicate) of the works of which they became owners through assignment.

Although the British Copyright Act of 1911, as well as the Revised Berne Convention, have completely removed the obligation of any kind of registration for the owner of a copyright (and that is to say for the *assignees* as well as for the *authors* themselves), Section 39 of the Canadian Copyright Act cannot be justified by such allegation that it was enacted to help Canadian industrial concerns ascertain whether copyright subsists on a work they intended to reproduce or otherwise make use of. For Section 39 *does not* require the assignment of a work to be so registered *prior to any eventual infringement*; but it expressly prescribes that the assignment or grant be so registered just *prior to the taking of an action* and to enable the claimant assignee or grantee to institute and maintain a prosecution against the infringers of the work of which he has become the owner through assignment. The sole practical effect of Section 39 (as it occurred in the above mentioned case of the Canadian Performing Right Society Limited) is then to debar the legal owner of an assigned work from maintaining a prosecution and from obtaining justice against the infringers of his work, in every case where such owner finds himself in the material impossibility of fulfilling each and every formality of registration, as when, for instance, a prior assignee or grantee is deceased and therefore cannot execute the duplicate required under Section 39 for registration by producing duplicate originals of each successive assignment in the whole chain of title.

After having succeeded in inserting, into the Canadian Copyright legislation, enactments carrying with them consequences so contrary to the interests of the authors, the groups responsible for the insertion of such enactments have easily prevented same from being amended or repealed. They merely alleged that these new provisions should be given due trial. . . . This peculiar Section 39 forced Canadian and Unionist authors and their assignees to claim remedial measures from the moment this new Copyright legislation was submitted to the Canadian Parliament, that is to say from 1921; it has caused the International authorities at Berne, as well as the British authorities at London, to call the attention of the Canadian Government to the inconsistency of such enactments; it has caused voluminous correspondence and repeated conferences between interested parties; it has brought about fruitless discussions and inquiries in Parliament; it has caused the Canadian Performing Right Society to institute a test-case on behalf of the authors and their assignees, which went through the whole realm of Canadian courts' jurisdiction, lasted over two years, cost the Canadian plaintiffs \$35,000. and found its way to the Privy Council in London, where it was finally determined that Section 39, as it now stands, practically deprives any victimized copyright owner (by assignment) from his right of recourse in damages, against any Canadian infringer, as (in most cases) the Canadian infringer disposes of high unlimited means to indefinitely postpone the determination of any prosecution brought against him.

In giving evidence before the Commons Special Committee of 1925, the Canadian Authors Association merely requested that Section 39 be amended by adding thereto a declaration that "registration shall in no case be deemed a condition of the existence of any copyright." They were then under the impression that our Section 39 could not be made to apply to the British or Unionist copyright owners protected "without the performance of any formality"—as article 4 of the Revised Berne Convention purports to protect them. Since the Privy Council has confirmed (February, 1929) the interpretation of the Canadian courts that Section 39 prevails over the International Convention and is to apply literally in any case of assignment, the Canadian Authors Association have realized that such enactment, never heretofore found in any Copyright legislation, could be annulled only by the repeal of Section 39. And they now trust that the Parliament of Canada will deem such enactment so exceedingly nefarious to the rights of authors and their

legal assignees, that it has been given a fair trial, and that it has been retained altogether too long in Canadian statutes. They also expect that Parliament will remedy such situation by removing from the Canadian Copyright Act those ambiguous enactments which, in fact, have been inserted, as shown above, for no other purpose than to shelter the infringers against the authors' claims—while the Copyright Act was reasonably intended to do the contrary.

For the above considerations, Canadian authors urge that Section 39 (now Section 40 of Chapter 32, Revised Statutes of Canada, 1927) be repealed, and that the following be substituted therefor, in order to bring the Canadian Copyright Act into conformity with the British Copyright Act and to the International Convention of Berne:

Registration shall not in any case be deemed to be a condition of the existence of any copyright or of the exercise of any rights granted by this Act.

The proposed amendment is taken from the Copyright Act of the Union of South Africa, and highly recommended by the International Bureau of Berne.¹⁰

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Ottawa, July, 1930.

¹⁰ *Le Droit d'Auteur*, July 15th, 1921, page 74-b.